

*Legal Aid Services Act 2020*

# Minimum experience standards for roster members

Public consultation feedback summary

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LEGAL AID ONTARIO  

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AIDE JURIDIQUE ONTARIO

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# Introduction

Legal Aid Ontario (LAO) has completed its consultation about its proposed minimum experience standards (MES) for roster (formerly panel) members to be authorized to provide legal aid certificate services and duty counsel services in specific areas of law. LAO has had minimum experience standards for panel lawyers in place for many years. The standards are being updated and aligned with the *Legal Aid Services Act, 2020* (LASA 2020) and the Legal Aid Services Rules (Rules). Along with several pre-existing standards that LAO is updating, proposed standards were introduced for two new areas of law, youth criminal matters and criminal mental health matters.

The consultation period began December 13, 2021 and ended on January 24, 2022. Three town-hall style consultations were conducted online, on January 12 (General English), January 13 (Aboriginal focus) and January 14 (French). LAO received 15 written submissions.

Consultation feedback reflected two main overarching themes.

The first theme was that the minimum experience standards should not create or increase barriers for lawyers who are new to practice or who want to start doing legal aid work, lawyers who already do legal aid work but want to start taking legal aid cases in one or more new areas of law, and lawyers who take parental or caregiving leaves from their practice.

- Most of the feedback relating to this theme focused on the need for LAO to make it clear that conditional authorization is available to lawyers who do not meet the minimum experience requirements, providing a path to full authorization and enabling these lawyers to work in the area(s) of law applied for while working towards completing the requirements, and ensuring quality client service remains the paramount priority.
- Feedback was also provided that LAO should be able to exercise discretion in individual cases where an individual lawyer does not meet the standards.
- It was noted that barriers to authorization may result in fewer roster lawyers being available to assist clients, including clients who are Indigenous, racialized, Francophone, or living in rural or remote areas of the province.

The second overarching theme reflected in feedback was that roster lawyers need to be able to meet requirements that are consistent with competence and provision of high quality legal aid services in the area(s) of law that they work in.

- While it was made clear in LAO's consultation communications that the MES focus on experiential requirements and are not intended to be the vehicle for LAO's quality

service expectations for providing legal aid services in specific areas of law, the theme of the need for high quality legal aid services was woven through the feedback that LAO received on the standards.

- Numerous suggestions were provided for ways in which LAO might support the bar in providing high quality legal aid services; these included offering or facilitating opportunities for mentorship, making training and coaching available, and making supports and resources, including resources included on the “reading lists” referred to though not included in the standards, easy for lawyers to access in both official languages.

# Feedback on potential barriers

Many participants expressed concern that the minimum experience standards as posted could present a barrier to authorization for new members of the bar as well as lawyers interested in providing legal aid services for the first time, lawyers returning after a leave, and those interested in taking up a new area of practice or nearing retirement. The point was made that roster standards can support quality but can also create barriers to lawyer entry and retention, thus reducing access to justice, including where geographic location, languages spoken or signed, or race and Indigenous status are considerations for the client. Several participants expressed concerns about how the minimum standards might affect lawyers who take leaves from their practice for parental, caregiving or other reasons.

Some participants noted that lawyers seeking authorization in areas of primarily legal aid practice would find it difficult to acquire the minimum experience if that experience had to be gained without the ability to participate in legal aid work. Others submitted that needing to qualify for one roster authorization in order to qualify for a related authorization (e.g. having to qualify for the Family Law authorization to be eligible for the Child Protection (CYFSA) authorization) could deprive legal aid clients of the expertise of those who have restricted their practice areas and/or the number of files they carry.

It was noted that strict application of the standards could cause challenges in small communities, where lawyers may not be able to get the experience required to meet the standards. As a result there may be fewer lawyers authorized to assist clients in these communities, thereby reducing access to justice for individuals who are low-income, vulnerable or facing criminal prosecution. Feedback was provided that it is important to have access to lawyers who reflect the communities they serve, can communicate in a client's preferred language, and can be trusted by the client because of a continuing relationship. There could potentially be a negative impact on clients who are Indigenous, racialized, Francophone, have language barriers, or live in areas with few lawyers and/or low case volume.

Participants suggested two primary avenues for overcoming these potential barriers: conditional authorization and discretion.

Conditional authorization was the most frequently suggested mechanism for addressing the issue of potential barriers. Many participants offered feedback regarding conditional authorization, some noting that it is contemplated under the Rules, but is not mentioned or set out in the MES. There was broad support for the availability of a conditional authorization process. Feedback was provided that clarity is needed on the process for conditional authorization, and that LAO should commit to conditional authorization within the MES themselves, clearly indicating the conditional authorization requirements and path to full authorization "on the same page". It was suggested that, otherwise, many lawyers could be unaware of the possibility of conditional authorization or assume that it is no

longer permitted or supported by LAO, deterring them from applying.

It was suggested that applicants for roster authorizations should be accepted without meeting the minimum standards for a conditional period of up to a three years, during which period they would be expected to meet the MES. One participant noted that allowing lawyers up to three years to achieve the minimum experience requirements is especially important due to the reduction in opportunities for court appearances during the pandemic.

Discretion in applying the standards was also identified by some participants as important. Some were concerned that the standards appear to remove LAO's discretion to authorize lawyers who do not meet the standards, or reflect an intention by LAO to apply such discretion rarely. It was suggested that without the option to exercise discretion on a case-by-case basis, the number of roster lawyers, including senior counsel, could be reduced, potentially increasing the burden on LAO staff lawyer services.

Participants provided feedback that LAO should be clear and transparent about the parameters for discretion. It was suggested that district directors general should have discretion to take local needs and conditions into account, to allow discretionary roster authorization in individual cases where safeguards such as mentorship are in place, and to enable clients to retain experienced roster lawyers who don't meet the MES.

Other suggestions included considering experience gained in a related "equivalent" or "crossover" area of law, and considering experience earned prior to admission to the bar, such as legal assisting or clerking.

# Feedback on competence and quality

Although some participants questioned the need for LAO to continue to have MES, submitting that such standards are unnecessary as the Law Society's rules provide that lawyers not undertake cases they do not feel they can competently handle, it was clear that LAO's ability to establish requirements to ensure competence and quality was considered important by the majority of participants. One participant made the point that it is not enough to leave quality of service up to the Law Society, because clients who are marginalized, have language barriers, or are not familiar with Canada's legal system are unlikely to pursue complaints and may be removed from Canada before a complaint process runs its course. An association submitted that the proposed minimum standards are higher than those currently in place and will allow LAO to objectively assess the experience and skills of a lawyer applying for authorization.

Often, as a corollary or adjunct to their support for the standards, participants referred to the need for LAO to establish and publish a conditional authorization process to enable lawyers to meet the standards. A lawyers' association recommended that LAO monitor and measure the effectiveness of the MES after they are implemented, to make any necessary adjustments to ensure Ontarians have an adequate supply of high-quality legal aid providers and services.

Many participants pointed to the importance of mentorship and training in supporting competence and quality of service as well as in supporting lawyers who are working toward meeting the MES in an initial or subsequent new area of law. Several participants noted that it is difficult for new lawyers to find another lawyer willing to mentor or supervise them. Suggestions that were made included providing or facilitating supports such as training, coaching or mentorship, including electronic mentoring, and compiling a list of volunteer mentors. Another suggestion was that LAO could promote roster membership and diversity on the roster through outreach to graduating lawyers, and making them aware that LAO can provide training and coordinate mentors.

Although outside the scope of this consultation, several participants urged LAO to situate the MES alongside a competence framework that increases preventative front-end measures to support lawyers' practices and help them deliver quality legal aid services to clients. A participant observed that some counsel who meet the minimum standards are nevertheless ineffective and do clients a disservice, yet are difficult to remove from the roster once they have been admitted. Consultation participants stressed the need to have ongoing regard for quality of service, indicating that entry-level minimum standards for authorization are not an adequate substitute for this.

# Feedback on required reading/training/resources

Some feedback was received regarding the required readings and training, and other resources for lawyers. One lawyers' organization submitted that the list of materials is appropriate, adding that LAO needs to have a long-term strategy to develop and support roster members.

Suggestions to improve LAO's reading materials, training and resources included:

- translate readings that are available only in English into French, and include readings on language rights and French language services
- require training on Indigenous issues for family law and child protection law roster members
- roster members authorized to provide family law legal aid services should have training in dealing with domestic violence
- add *Criminal Code* s. 493.2, dealing with overrepresentation of Aboriginal or other vulnerable peoples in custody in the context of bail, to the reading list
- offer specific skills-based training to address potential areas of concern
- refer lawyers to resources that are available from clinics for racialized clients
- require applicants for consent and capacity law authorization to review the Rules of the Consent and Capacity Board and any practice directions or other directions released by the Board
- establish a single area on the LAO portal for all MES materials and resources



# Feedback on proposed standards for specific areas of law

## Criminal law

Some participants expressed concern about the requirement to have completed a minimum of 20 files within the last three years, stating that this could be difficult to achieve for new lawyers and lawyers with lower-volume practices due to a focus on homicide or other complex matters. It was suggested that having an alternative such as a 20% practice concentration in criminal law would be reasonable and helpful. It would also be helpful to permit a lawyer to demonstrate competency through alternative experience aside from the number of files, such as a list of cases and results.

## Criminal extremely serious matters

On the proposed standard that an applicant have solely practiced criminal law for a minimum of five years, one lawyers' association submitted that significant practical experience in criminal law may be gained while a lawyer is also practising in other areas. A participant expressed the view that fulfilling the list of matters under this area of law does not necessarily result in competent representation. It was noted that trials, appeals and extraditions for certain matters are conducted in very different ways. Suggestions included maintaining the existing wording requiring "a minimum of 5 years of 100 per cent criminal practice concentration or the equivalent."

## Gladue matters

A lawyers' organization provided feedback that the current standards should remain in place while LAO undertakes direct consultation with Indigenous communities and stakeholders. One participant submitted that the proposed standards appear reasonable. There was also feedback that LAO should consider requiring all roster members to meet Gladue qualifications; it was pointed out that per diem duty counsel in particular will encounter Indigenous clients and it is not onerous to be at least familiar with the Gladue principles.

## Youth criminal matters

This was the first of two new proposed standards being consulted on. A submission from a lawyers' organization maintained that these standards are too onerous, noting that youth clients are often referred to criminal lawyers who have assisted a friend or family member. It was also stated that criminal lawyers do not require direct or extensive experience in youth

cases, as these cases require the same evidence of rules and burdens of proof. Another lawyers' organization submitted that this area of law is not generally separate from general criminal practice, and the proposed number of completed matters would be difficult to meet for new lawyers. One participant provided feedback that having six completed or ongoing youth matters in the last year is unrealistic.

## Criminal mental health matters

This was the second of two new standards being consulted on. It was submitted by one lawyers' association that this area of law is not generally separate from general criminal practice, as these cases require the same evidence of rules and burdens of proof, and the proposed number of completed matters would be difficult to meet for new lawyers just beginning their practice. Another lawyers' association, however, endorsed additional roster standards for lawyers practicing before the ORB, although it did not support requiring qualification for the general criminal roster as a prerequisite and maintained that the competencies required for representing clients before the ORB are not unique to criminal lawyers.

## Family law and child protection law

Some participants disagreed with the requirement that a lawyer must first qualify for the family law authorization in order to qualify for the child protection authorization. A lawyer participant held the opposite view. There were opposing views on the minimum experience requirement of 10 family law proceedings, with one participant supporting it and another concerned that 10 files is not sufficient experience to deal with complicated matters involving issues such as equalization and tax law.

There was support for the need for alternative dispute resolution experience.

There were concerns that there is no reference to Indigenous issues in this set of standards, with one participant noting that in central Ontario and the near north, there are many cases in which Indigenous persons are involved in child protection and family law proceedings. Feedback was also provided that family law and child protection law roster members should be required to have Indigenous issues training to ensure the judicial process is not itself abusive to Indigenous people.

Feedback was also provided that roster members authorized to provide family law legal aid services should have training in dealing with domestic violence.

## Refugee and immigration law

Ensuring quality of service was the primary focus of feedback on these proposed standards. Some participants provided feedback that minimum experience should include a percentage of the lawyer's practice. Alternatively, if there is no percentage requirement, then the number of matters should be closer to 20 or 25 than 10.

Many participants expressed the view that LAO's standards in this area should include requirements addressing quality of service, which is not necessarily linked to experience. It was noted that the proposed standards do not include some of the quality service requirements that LAO put in place for its refugee panel in 2015. A lawyers' group expressed concern that the standards do not provide for quality checks on lawyers' work such as ongoing auditing, and suggested that there could be a recurrence of the pre-2015 situation where a small number of lawyers incompetently served immigrants and refugees.

## Consent and capacity law

Feedback was provided that education and mentorship should continue to be a component of authorization in this area of law, where lawyers face practical challenges representing clients in unconventional settings, and professionalism issues can arise when representing clients whose capacity is in issue and whose instructions may be contrary to clinical views respecting their best interests. Adherence to LAO's expectations for lawyers should be a requirement, and LAO's document "Helpful Tips for Lawyers Practicing before the CCB" should be updated and reposted to the LAO website.

Feedback was also provided that if LAO intends to have sub-rosters in this area of law, such as those for Form G end-of-life cases and amicus curiae appointments, it should do so transparently and publish attainable pathways to be admitted to any such sub-rosters.

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