

August 11, 2023

Legal Aid Ontario
20 Dundas Street West, Suite 730
Toronto, Ontario
M5G 2H1

via email: consultation@lao.on.ca

RE: LAO Proposed Changes to Minimum Experience Requirements

I am writing to you on behalf of the Toronto Lawyers' Association ("TLA") in response to the consultation by Legal Aid Ontario ("LAO") on proposed changes to minimum experience requirements ("MER" or "MERs") in certain criminal matters.

The TLA represents the interests of more than 3,700 members who practice law in all disciplines across the Greater Toronto Area. Our membership, and our Board of Directors, represents the full diversity of our profession in Ontario. Included among our members are many lawyers who practice criminal law and accept LAO certificates in a variety of matters.

The TLA recognizes that it is important to ensure that LAO clients receive high-quality legal services from any counsel representing them, whether that be private counsel or duty counsel. In criminal matters, LAO primarily achieves this goal through a general MER that requires lawyers providing criminal services to have completed at least 20 criminal law files within the last three years, including at least three contested trials, preliminary hearings, or appeals (or combination). This MER ensures that lawyers have recent criminal law experience and affords some guarantee of competency in that area.

LAO is proposing the following MER changes:

1. Removing the MERs for youth criminal and criminal mental health matters; and
2. Introducing a MER for the Ontario Review Board Roster.

The TLA supports removing the MER for youth criminal and criminal mental health matters and does not support introducing an MER for the Ontario Review Board rosters. In general, the TLA opposes MERs for specific areas of criminal law and procedure.

First, introducing MERs for specific areas of criminal law and procedure is unnecessary. Lawyers in Ontario are ethically obligated to only accept retainers on matters for which they are competent. Lawyers accepting LAO certificates exercise this obligation daily without inquiry by

LAO. For example, many counsel frequently decline to act in appellate matters due to their lack of familiarity with the law and procedure governing criminal appeals, even though there is no MER to bring an indictable appeal to the Court of Appeal for Ontario or to pursue an application for leave to appeal or appeal to the Supreme Court of Canada. In other words, LAO trusts its roster members to exercise their professional obligation to only act on matters for which they are competent.

Second, MERs do not on their own enhance the quality of legal services being provided to a LAO client. Many lawyers provide high-quality legal services to LAO clients without prior experience in a specific area of criminal law or procedure. Senior lawyers often provide high-quality legal services to clients on matters in which they have not acted previously. After all, given the wide expanse of criminal law, it is impossible for any one counsel to have prior experience in all areas. Lack of prior experience in a specific area of criminal law or procedure does not equate with lack of quality. This may be why LAO is proposing to remove the MERs for youth criminal and criminal mental health matters – LAO believes that counsel who may not be able to meet the current MERs for those areas can still provide high-quality services to those clients.

Third, piecemeal MERs and empanelment requirements disincentivize competent lawyers from accepting LAO certificates. Reducing the pool of lawyers available to assist LAO clients restricts access to justice. LAO should be introducing policies that encourage lawyers to accept LAO matters. For example, LAO should be expanding access to second chair funding to allow junior counsel the ability to gain competence.

Fourth, enhanced training in specific areas of criminal law and procedure can accomplish the goals of providing high-quality legal services to LAO clients. Enhanced training ensures that lawyers practicing in certain areas are knowledgeable of the primary legislation and jurisprudence that governs those areas, which in turn ensures a level of competency for counsel. Knowledge has been a Pillar of the TLA since it was created over 130 years ago. We pride ourselves on providing quality continuing professional development to our members and the broader legal community on various areas of criminal law and procedure. The TLA would welcome input from LAO on any areas of specific need for continuing professional development.

For these reasons, the TLA supports removing the MERs for youth criminal and criminal mental health matters and does not support introducing a MER for the Ontario Review Board rosters.

To the extent that LAO intends to proceed with the MER for the Ontario Review Board roster, the TLA recommends that the MER mirror the MER for consent and capacity, which includes matters before the Consent and Capacity Board (“CCB”). Both areas deal with health-related administrative tribunals and involve significant consequences on an individual (at the CCB, the possibility that a person can be force-medicated with serious drugs). The MER for consent and capacity requires only that a roster member have “had carriage” of a least three matters within the last two years. The MER for the Ontario Review Board should be similar (such as having “had

carriage” of at least three matters in the last three years, which is the time frame currently proposed).

Thank you for considering these comments. Our Executive Committee would be pleased to discuss these comments at your convenience, should you find additional consultation beneficial.

Yours very truly,

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a series of loops and a final flourish.

Aitan Lerner
President
Toronto Lawyers' Association