



January 5, 2011

Suzanne Lagacé
Policy and Procedures Directorate
Immigration and Refugee Board of Canada
344 Slater Street
Ottawa, ON
K1A 0K1

Dear Ms. Lagacé,

Re: Response to Working Group's Response to Concerns Raised by the Schizophrenia Society of Ontario and ARCH Disability Law Centre

Thank you for consulting with our organizations, the Schizophrenia Society of Ontario (SSO) and ARCH Disability Law Centre (ARCH), as part of the IRB Working Group's process in examining the Designated Representatives (DR) program. Following our own submissions to the IRB outlining our concerns about the current DR program, we were pleased to have the opportunity to elaborate on the issues we had raised via teleconference on June 29, 2010. Likewise, we appreciate the opportunity to provide a response to your latest communication to our organizations, dated December 13, 2010.

There are several areas in your response to our respective organizations that we address below. First and foremost, however, we would like to clarify the IRB Working Group's use of the words "try" and "could" when discussing ways in which they could respond to the concerns our organizations had made. In some of the responses, the Working Group made a commitment to pursuing a certain course of action; for example, in your response to ARCH you state: "Clear and specific instructions in writing to be provided to DRs upon their designation" [emphasis added]. In other points, the Working Group is not so definitive; for example, in your response to ARCH you state: "The IRB will try to set up a list of persons capable to act as a DR that will be shared by all Divisions" [emphasis added]. Our organizations thereby request that the IRB Working Group clarify the actions that they are committed to taking to improve the DR program, as compared to the actions that they are only considering taking.

Until then, in response to the actions that the IRB Working Group has discussed in their most recent communication to us, we submit the following:

Training Program for Designated Representatives

A national training program for DRs would be a significant step towards improving the experience of individuals before the IRB who are unable to appreciate the nature of the proceedings. SSO and ARCH request clarification regarding the level of commitment the IRB Working Group has towards such a program, and the expected timelines for its implementation.

Regarding the involvement of principal stakeholders in the development of such a program, ARCH and SSO request more information on who would be consulted, and whether NGOs and mental health experts would be included. In response (1) to ARCH, only McCarthy Tetrault and CLASP are referenced; however, both ARCH and SSO feel that experts in mental health and capacity issues should be included in this consultation process to ensure that the concerns we have raised are appropriately addressed.

Training Program for Members and Adjudicative Support Personnel

SSO and ARCH commend the IRB Working Group for committing to a national training/awareness program on mental health issues for IRB Members and adjudicative support personnel, as well as its commitment to refresher training for Members. We are also pleased that NGOs and experts in the mental health field will be included in the development of this training/awareness program. As experts in this area, we would be interested in both participating in this consultation, as well as providing names of additional organizations and experts who may be able to assist the IRB in the development of this program.

In point (10) in their response to ARCH and point (1) to SSO, the Working Group states that the requirement for expert reports to prove vulnerability is not absolute, and that the person appearing before the IRB can present a report from an NGO or other professional body underlying the reasons why the person should be identified as vulnerable and accommodated accordingly. While Section 8.6 of *Guideline 8* does suggest that such evidence is not necessary, anecdotally we have heard that this is not the case, and that the Members do weigh expert evidence very heavily when considering the credibility of a request for a DR. As such, we request that this point be made very clear to the Members as part of their training program, to ensure that those who require DRs are not denied one due to lack of expert evidence, which can in fact be quite difficult to obtain due to financial and other barriers.

Filling the Designated Representative Position

In point (2) in its response to ARCH, the Working Group suggests various ways to address the issue of variance across regions in terms of the appointment of the Designated Representative. However, as noted above, ARCH and SSO request clarification regarding what the IRB is committed to doing to address this issue. The Working Group stated that it would “try” to set up a list of persons capable to act as DRs that would be shared by all Divisions, and that social workers and mental health professionals would be included in this list. As mentioned during our teleconference on June 29th, both our organizations are willing to provide assistance in compiling a list of mental health professionals who are willing to act as a DR in Ontario. In addition, SSO

would be happy to bring the Schizophrenia Societies in other provinces on board to aid the IRB in compiling lists in other regions.

As discussed in our June 29th teleconference, both SSO and ARCH remain very concerned about the use of former Members to act as DRs, and would like to re-iterate that mental health professionals possess a more relevant skill set to act as DRs than lawyers or former Members. Lawyers and/or former Members are not expert at determining the best interests of the person subject to the designated representative.

The Role of the Designated Representative

There is confusion about the role of the Designated Representative. It remains unclear whether the designative representative is a substitute decision maker or is a support for persons to make their own decisions. As described by the Legal Services Branch of the Immigration Division in the Guide to Proceedings, the DR acts “as a sort of litigation guardian in relation to the proceeding concerning the person who is unable to appreciate the nature of those proceedings” (at s. 7.2.12). That is, the designated representative acts in the represented person’s best interests, and does not necessarily represent that persons expressed wishes. In the same document, however, the Legal Services Branch of the Immigration Division also imagined a supportive role, rather than an entirely substitute role:

A designated representative must act in the best interests of the persons he or she is representing by helping the person make decisions concerning the proceedings of which he or she is subject, especially to retain and instruct counsel....(at 7.2.1)

In the Working Group’s response (1) to ARCH, they state that “the IRB sees the DR as a person who may take the place of the claimant/appellant/person concerned in making decisions about the case similar to a litigation guardian in civil litigation with the powers of the DR provided for in the Act and Rules”. SSO and ARCH do not feel that this response addresses the nuances laid out above, and thereby request further clarification regarding when the DR is intended to act as a supportive decision maker, and when they are expected to act as a substitute decision maker.

Guideline 8: Barriers to Requesting Accommodation

In point (3) of its response to ARCH, the Working Group sets out that the IRB does not require a formal application **in all cases**. ARCH and SSO request further clarification about the necessity of a formal application **in the case** where the person concerned may have a capacity issue - it is our submission that a formal application should not be required. In particular, a formal application is a barrier for a person with a potential capacity issue, who does not know that she or he requires accommodation until the hearing begins. The additional step – to prove “vulnerability” before the proceeding even begins – requires extra time, effort and funds. These requirements may pose particular challenges for unrepresented parties.

On behalf of the Schizophrenia Society of Ontario and ARCH Disability Law Centre, we look forward to working with you further on these issues so important to people with mental health issues. If you have any questions or would like further comment, please do not hesitate to contact Tess Sheldon at ARCH Disability Law Centre at 416 482 8255 at t_sheldon@lao.on.ca or Vani Jain at the Schizophrenia Society of Ontario at 416-449-6830 x253 or vjain@schizophrenia.on.ca.

Sincerely,

A handwritten signature in black ink, appearing to read 'Vani Jain', written in a cursive style.

Vani Jain
Director of Policy, Strategy and Community Relations
Schizophrenia Society of Ontario

On behalf of:

Tess Sheldon
Staff Lawyer
ARCH Disability Law Centre

