



## Response to the Law Society of Ontario's Consultation on Lawyer Licensing

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Professional Development and  
Competence Committee

Submitted by: Ontario Bar Association



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## Introduction

The Ontario Bar Association (the “**OBA**”) welcomes the opportunity to provide input on the Law Society of Ontario’s Professional Development and Competence Committee’s (the “**PD&C Committee**”) consultation paper titled “*Options for Lawyer Licensing*” (the “**Consultation Paper**”), which sets out four possible options for pathways to licensure.

## The Ontario Bar Association

Established in 1907, the OBA is the largest legal advocacy organization in Ontario, representing some 15,000 lawyers, judges, law professors and law students. OBA members are on the frontlines of our justice system in no fewer than 40 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA is pleased to assist government, the Law Society, and other decision-makers with dozens of policy initiatives each year – in the interest of the public, the administration of justice and the profession.

To garner input for this submission, the OBA Special Committee on Pathways to Licensing has reviewed the Consultation Paper and sought input from the OBA’s Provincial Council, which represents a critical cross-section of the bar, including senior and junior lawyers, from managing partners to new calls, who practise across Ontario as solicitors and barristers in solo, small, medium and large firms from all eight judicial regions of the province. The Committee has also received input from members of the OBA’s Student Section.

## The Law Society Consultation

The Law Society has reviewed and amended the qualifications to become licensed to practice law in Ontario many times over a number of decades. The OBA has provided input from our members to the Law Society over the years, including recent consultations focusing on the shortage of articling positions and options for ensuring every qualified candidate has a pathway to becoming licensed.<sup>1</sup>

The Law Society now seeks input on its Consultation Paper, which outlines four options intended to provide a long-term appropriate and sustainable system for lawyer licensing in Ontario. In this submission, we have referred to the Law Society option numbers described in the Consultation Paper but not repeated them in their entirety for the sake of brevity.

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<sup>1</sup> See OBA, “OBA Response to the Law Society of Upper Canada Licensing and Accreditation Task Force Consultation Report” [“**OBA 2008 Submission**”]; OBA, “The Future of Articling” [“**OBA 2012 Submission**”]; OBA, “Law Society of Upper Canada Pathways Pilot Project Evaluation and Enhancements to Licensing Report” [“**OBA 2016 Submission**”].



## OBA Recommendations

The OBA's view is that a comprehensive licensing process incorporating (1) barristers and solicitors examinations, (2) a practical legal training course and (3) a practice setting work experience – if available for not materially more than current costs – would provide the best way forward to preserve the effective elements of the current pathways and improve the quality and consistency of transitional training for all candidates. Before turning to such a comprehensive solution, we provide our member feedback on the four options raised in the Consultation Paper.

### *OBA Position on the 4 Law Society Options*

- **The OBA does not support Option 2**, which includes a new Skills Based Examination (“SBE”) and adds a minimum wage requirement, “where possible”.<sup>2</sup> The OBA’s feedback and conclusions regarding the SBE and mandated remuneration are given in the section below titled “*Other Elements of the Law Society Proposals*”.
- **The OBA does not support Option 3**, which eliminates the requirement for a Practice Setting Work Experience (including articling and the LPP/PPD co-op placement) (“PSWE”),<sup>3</sup> and instead adds a new SBE and post-call requirements. Replacing the essential PSWE with post-call requirements provides ineffective public protection, is confusing to the public, and imposes unfair and costly burdens to licensees. The OBA’s feedback and conclusions regarding the PSWE and post-call requirements are presented in the sections below titled “*Ensuring Competency*” and “*Other Elements of the Law Society Proposals*”, respectively.
- **The OBA does not support Option 4**, which eliminates the requirement for a PSWE and instead adds a new SBE. Eliminating the essential PSWE provides ineffective protection of the public. The significant cost estimated for this option, tripling the current licensing fee, is also unacceptable. Option 4 also incorporates a new Practical Legal Training Course (“PLTC”). The OBA’s feedback and conclusions regarding the PLTC are presented in the section below titled “*Providing Consistency*”.
- **The OBA believes Option 1**, which is based on the status quo, is the only Consultation Paper proposal that adequately takes into account all of the evaluative principles and essential elements raised in our consultations, including transitional training that incorporates a critical PSWE. Option 1 is also viewed as an economical model for funding a

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<sup>2</sup> In addition to comments regarding mandated remuneration discussed in the section titled “Other Elements of the Law Society Proposals”, we note that members were uncertain how the Law Society caveat “where possible” would be operationalized or differ materially from the status quo.

<sup>3</sup> Law Practice Program [“LPP”] and Programme de pratique du droit [“PPD”].



transitional training regime. However, this option does not address some key concerns raised through the “Dialogue on Licensing” process – principally increasing the quality and consistency of the experience for all candidates. Accordingly, the OBA proposes the Comprehensive Solution described below, with an alternative recommendation for Option 1 if the Comprehensive Solution cannot be delivered according to the essential cost caveat.

### ***OBA Comprehensive Solution***

The OBA proposes a Comprehensive Solution for transitional training that would include successful completion of the following licensing requirements for all candidates:<sup>4</sup>

1. Examinations (Barristers & Solicitors)  
+
2. Practical Legal Training Course (similar to the current LPP/PPD training courses)  
+
3. Practice Setting Work Experience (similar to articling or the current LPP/PPD co-op placement)

In our view, this solution best preserves the effective elements of current pathways and also takes opportunities to strengthen the process identified in many prior submissions, including increasing the quality and consistency of transitional training experience for all candidates. The OBA's feedback and conclusions supporting this recommendation are presented in the section below titled “*Rationale for OBA Recommendations*”.

However, based on the significant costs concerns described in the section below titled “Cost Implications”, **the OBA proposes the Comprehensive Solution with the caveat that it must be delivered at a cost not materially above the current costs to candidates and the profession.**<sup>5</sup> If the OBA Comprehensive Solution cannot be delivered according to this essential cost caveat, the OBA submits that Consultation Paper Option 1, with better auditing to ensure a valuable candidate experience, is the only acceptable alternative.

The OBA proposes that the entire licensing process continue to take no more than 13 months to complete. However, the success of multiple pathways in the current system suggests that there are multiple ways in which a comprehensive program could be formulated to be effective. The Comprehensive Solution would obviously require important additional details to be determined, for

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<sup>4</sup> As noted in the Consultation Paper, candidates who have completed the Integrated Practice Curriculum through the Bora Laskin Law School at Lakehead are not required to complete the current transitional training process, and accordingly would not be subject to the proposed Comprehensive Solution.

<sup>5</sup> These include the current cost to individual licensing candidates and the annual subsidy by the profession through annual licensing fees.



example, the timing of examinations and the duration and timing of the PLTC and PSWE. In the course of our consultations, feedback indicated that different program parameters have notably different attractiveness and uptake across the broad range of licensing candidates and prospective employers (e.g. length of placements, practice area interests, client base, geographic location).<sup>6</sup> Based on this diversity of view, it is critical that the Law Society take input on any new pathway it recommends, and ideally incorporates flexibility that ensures the selected process is attractive and accessible to the broadest range of participants.

## Rationale for OBA Recommendations

The Consultation Paper sets out the following evaluative principles for all licensing options:

1. ensuring newly-licensed lawyers are competent to practice law;<sup>7</sup>
2. ensuring fairness in the licensing process;
3. providing consistency for candidates in their transitional training experience; and,
4. considering cost implications for candidates and the profession.

The OBA has received significant input from our members over the years regarding the fundamental elements of any licensing system that satisfies the above stated principles. These fundamentals were once again reflected in the most recent input garnered through the OBA's June and September 2018 Council meetings, OBA Licensing Committee and Board discussions, and in comments made during the Law Society's own "Dialogue on Licensing" in the Spring of 2017.

### 1. Ensuring Competency

#### *a) Practice Setting Work Experience ("PSWE")*

A consistent and overarching view of our members is that requiring a practice setting work experience (PSWE) is an essential element of any effective transitional training pathway.<sup>8</sup>

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<sup>6</sup> In prior submissions, the OBA has commented on a "greying of the bar" and an inability to match students with available jobs, particularly in non-urban regions. It remains important for the bar and for the public's access to justice that any licensing pathway(s) going forward not exacerbate this problem but, instead, help to alleviate it.

<sup>7</sup> As noted in the Consultation Paper "Transitional training requirements are based on the premise that the licensing process must include transition-to-practice training in order for the Law Society to fulfil its competence mandate."

<sup>8</sup> The survey included in the OBA 2008 Submission found that 73% of lawyers with ten or fewer years of practice considered articling to be an essential part of their training. The number rose to 80% for lawyers with greater than ten years of practice. At the OBA's June 2018 Council meeting, 83% of OBA Council members ranked a PSWE, like articling or the LPP/PPD co-op placement, as a critical element of any effective lawyer licensing process (it was the highest rated single element).



As stated in prior OBA submissions, a PSWE offers the regulator confidence that licensing candidates have the necessary entry-to-practice competence, which in turn protects the public, by providing opportunities for candidates to employ theoretical knowledge in a supervised practical setting, to learn the “business of law” and client relations, and to allow the sharing of practical advice. The contribution of a PSWE to competency is a matter of expert advice and practical experience from lawyers who overwhelmingly (if not universally) indicate that a PSWE has made them better able to serve their clients. In this regard, the value of a PSWE differs from licensing examinations, which rely on the ability to pass standardized tests to predict whether a candidate can utilize the knowledge necessary to serve clients well.

While there is room for more standardization of the basic competencies that are covered by the PSWE, it is not necessary, feasible or even desirable that the experience be the subject of testing, rudimentary measurement or complete standardization. Different approaches to legal problems make for richer solutions. The real-world practice of law is not a standardized environment and a variety in experiential training is a valuable public good.<sup>9</sup>

Although the bar has consistently advocated for the importance of a PSWE, members have also recognized that there are ways in which the experience can be improved. The principal concern has been promoting the consistency and quality of the learning experience across a wide range of placements. While differing approaches can be beneficial in preparing candidates for practice of law, we support the Law Society’s position that additional auditing will reduce the number of poor quality or marginal positions and ensure a more consistent experience amongst all candidates.<sup>10</sup>

### ***b) Licensing Examinations (Barristers and Solicitors)***

The Consultation Paper indicates that the Law Society does not propose any changes to the current licensing examinations. The OBA does not provide further commentary other than to note that in our recent discussions, a significant number of Council members indicated that exams, properly developed and administered, should serve as an essential element of transitional training.<sup>11</sup>

## **2. Ensuring Fairness**

### ***a) A Pathway to Licensing***

The primary fairness concern giving rise to the LPP/PPD in 2012 was a growing shortage in the number of available articling positions. In the OBA 2016 Submission, the OBA identified an

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<sup>9</sup> OBA 2012 Submission at p. 18.

<sup>10</sup> Consultation Paper at p. 27.

<sup>11</sup> Consultation Paper at p. 16. At the OBA’s June 2018 Council meeting 75% of survey respondents indicated that the examinations formed an essential part of an effective licensing process.



overarching need to provide every qualified candidate with an opportunity to complete the requisite elements of the licensing process and to be called to the bar.

The Law Society has established experiential training competencies that reflect the necessary skills, knowledge and tasks based on the Federation of Law Society's National Entry to Practice Competency Profile and further developed and validation by the profession. These experiential training competencies are the basis of the current articling program and the LPP/PPD programs.

The Law Society has reported that the current transitional training pathways – including articling, LPP and PPD – achieve the goals of transitional training in a manner consistent with the objectives of licensing (fairness, objectivity, transparency and accountability).<sup>12</sup> The Consultation Paper also indicates that throughout the pilot, the LPP/PPD have had smaller annual enrollments than the Law Society initially projected. The Law Society has often noted the paradox that the LPP/PPD serve as effective transitional training pathways yet continue to have a second-tier status in the eyes of some.<sup>13</sup> However, the record of smaller enrollments is less inexplicable given comments from our student members about the lack of confidence licensing candidates naturally have in pursuing any pilot program that may soon be discontinued. Although the LPP/PPD have already created over 900 PSWEs, the continuing lack of certainty also likely deters would-be employers who are unfamiliar with the program. These concerns suggest that even with multiple pathways, the likelihood of stigma would diminish if the Law Society decides to incorporate the LPP/PPD into a more stable, longer-term system.

The potential impact of the LPP/PPD on fairness is also relevant to equity, diversity, and inclusion. Within the historical paradigm of articling, our members have raised concerns that “a significant number of racialized individuals and women are accepting precarious articling positions because they see no other opportunities to enter the profession.”<sup>14</sup> The hypothesis that candidates from historically marginalized groups have been disproportionately at risk of having to accept either poor quality or un/poorly remunerated articling positions is partly borne out by the Law Society's finding that “the composition of candidates in the LPP/PPD is more diverse than the articling population.”<sup>15</sup>

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<sup>12</sup> Consultation Paper at p. 18.

<sup>13</sup> As stated in the PD&C Committee “Pathways Pilot Project Evaluation and Enhancements to Licensing Report” (September 22, 2016) at para. 59 “the Committee's view there is evidence that the alternative pathway of the LPP is *perceived* as second tier. The Committee strongly emphasizes the language of “perception,” because there is no evidence to suggest that the LPP is in fact second-tier or merits the perception.” [emphasis in original]

<sup>14</sup> See e.g. Sandill, R. “End Unpaid Articling” (May 24, 2017) [[www.oba.org/Sections/Women-Lawyers-Forum/Articles/Articles-2017/May-2017/Unpaid-Articling](http://www.oba.org/Sections/Women-Lawyers-Forum/Articles/Articles-2017/May-2017/Unpaid-Articling)]

<sup>15</sup> Consultation Paper p. 21



By providing effective alternative pathways, the LPP/PPD have at least reduced the pool of candidates who would otherwise be compelled to accept any articling position in order to complete the requisite transitional training. Given the strong satisfaction ratings from candidates in LPP/PPD programs, there is reason to believe that the current system provides effective pathways to licensing *and* decreases the incidence of precarious PSWEs. As we have recommended above, additional Law Society PSWE audits will further reduce the number of poor quality or marginal positions and ensure a more consistent experience amongst all candidates.

### 3. Providing Consistency

#### *a) Practical Legal Training Course ("PLTC")*

The LPP/PPD experience suggests that a practical legal training course (PLTC) can provide a useful additional measure of quality and consistency in the transitional training for all participants.

The LPP/PPD PLTCs were designed to further the LSO's transitional training goals, including the application of defined practice and problem-solving skills through contextual or experiential learning; the consideration of practice management issues including the business of law; the application of ethical and professionalism principles; and an introduction to systemic mentoring.<sup>16</sup>

This complements the PSWE requirement in several ways.

First, as a training course designed to impart specific competencies, a PLTC inherently offers a more consistent learning opportunity than can be assured by a PSWE alone.

Second, successfully completing a PLTC gives licensing candidates an ability to "hit the ground running" in order to maximize their potential learning and contribution during the PSWE. This supports the important objective of providing a valuable work experience for candidates, but it also helps encourage the participation of the practising bar in offering PSWEs.<sup>17</sup> The creation of additional placement opportunities as a result of a PLTC supports the greatest choice for candidates to find high quality, remunerated positions that achieve the objectives of transitional training.

Lastly, as noted in the OBA's 2012 Submission, a PLTC can help improve access to justice by exposing students to practice areas and practice structures that do not typically lend themselves to articling positions. Instruction and outplacements could focus on preparing students for the

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<sup>16</sup> Consultation Paper p. 34

<sup>17</sup> At our June 2018 Council meeting, 50% of survey respondents indicated that the prior completion of a PLTC would be a significant factor in encouraging them to offer a PSWE.



practice areas in which there are currently few articling opportunities. In addition, a well-designed PLTC has the potential to improve service in remote or non-urban areas.

## 4. Cost Implications

### *a) Affordability*

A major theme highlighted in the licensing process consultation is the cost and affordability of the licensing process. There are several notable conclusions arising from our discussions.

First, as the Consultation Paper notes, at a time when Ontario law school tuition ranges from \$19,000-\$37,000 per year it is impossible to ignore the pressure this creates on the ability of students to continue transitional training that either costs (e.g. the licensing fee) or is unremunerated (e.g. PLTCs and some PSWEs). To be clear, our members do not suggest that the cost of law school can serve as a justification to either (1) diminish the need for transitional training that ensures graduates are ready for the practice of law, or (2) diminish the need for the Law Society to have a lawyer licensing process delivered at the minimum cost. At our June 2018 meeting, Council members overwhelmingly stated that the cost of licensing must be the minimum necessary to ensure entry-level competence. As discussed in the recommendations portion of this submission, the OBA's view is that the current costs of licensing cannot increase materially over their current level, both for candidates and the profession. However, members also felt strongly that the significant cost of law school needs to be addressed, and that failing to do so inevitably means that students will face financial pressures in even an optimal licensing process.

Second, the significant debt that an increasing number of students carry upon graduation is not only relevant to the magnitude of licensing costs but to their timing, often coming as an unwelcome surprise once financing options have been exhausted. Students attributed this problem to both a persistent uncertainty about the pathways that will be available upon graduation, and to a general lack of awareness of the licensing process and its costs. The OBA supports the Law Society's intention to develop a pathway, or pathways, which will provide a more stable longer-term system. The Law Society should also undertake additional outreach to law school students to communicate the licensing pathway(s) and their costs. Collectively, these will at least help students to plan as effectively as possible from the outset of their law school training.

## Other Elements in the Law Society Proposals

### *1. Skills Based Examination ("SBE")*

The Law Society has suggested the addition of a Skills Based Examination ("SBE") in three of its four licensing proposals. For the reasons below, and in the absence of further information, the OBA does not support the creation of a new SBE as part of any licensing option.



First, it is not clear that there is a gap in the current licensing process (or any of the options that the OBA recommends) that would require a new examination. The Consultation Paper indicates that both existing transitional pathways – articling and the LPP/PPD – effectively ensure licensing candidates possess the required entry-level competencies to provide legal services in the public interest. The absence of a demonstrable need also makes the significant additional costs to the licensing process unsupportable.<sup>18</sup>

Second, the Consultation Paper provides only a general overview of what a new SBE would achieve. Currently, articling and the LPP/PPD pathways impart, evaluate, and improve the critical skills for entry-level competence in an interactive learning environment more suited to the development of practical skills.

## ***2. Post-Call Requirements***

It is difficult to see how eliminating transitional training and shifting the management of regulatory risk to the post-call career path of the new licensee can be reconciled with the Law Society's responsibility to ensure that all newly-licensed lawyers are competent to practice. Providing licenses to practice without the transitional training that assures entry-to-practice competence results in ineffective protection of public. Moreover, the issuance of a license with post-call requirements is confusing for the public, for whom the lawyer's license to practice should serve as a complete communication of competence. In addition to concerns about public protection, the imposition of post-call requirements is viewed as an unfair and costly burden to licensees.

## ***3. Mandated Remuneration***

During our consultations, lawyers of all levels of practice experience expressed a desire to have licensing candidates remunerated for work they perform. However, many members also expressed a concern that adding a new remuneration requirement could jeopardize the availability of practice placements and re-establish the unacceptable gap that previously existed. Members also raised a concern that mandated compensation could prevent candidates from being able to accept unpaid, but otherwise valuable work opportunities in specific practice settings. These concerns were viewed as significant because they undermine fundamental objectives of the licensing process; namely, that all qualified candidates have a pathway to licensing that includes a valuable PSWE.

Furthermore, as noted in the OBA 2012 Submission, some practice settings (e.g. clinics, public interest organizations and sole practitioners) and some practice areas (e.g. criminal firms outside of urban centres) are often less able to absorb the cost of PSWEs, which negatively impacts access to justice in under-serviced geographic and practice areas.

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<sup>18</sup> The Consultation Paper estimates the cost at \$1,600-\$2,000 per candidate at p. 27.



In the absence of confidence that the above concerns would be adequately mitigated, the OBA is not in a position to recommend new requirements for mandated compensation. As previously noted, the OBA supports the Law Society's position that additional PSWE audits will reduce the number of poor quality or marginal positions and ensure a more consistent experience amongst all candidates. Our view remains that a licensing approach that provides all candidates with access to high quality PSWEs would best serve the key objectives of transitional training.

## **Conclusion**

The OBA's view is that the Comprehensive Solution – incorporating barristers and solicitors examinations, practical legal training course and practice setting work experience – provides the best way forward to preserve the effective elements of the current pathways and improve the quality and consistency of transitional training for all candidates.

However, given significant concerns raised by students, licensing candidates and the profession about the importance of providing a licensing process that achieves its objectives while minimizing costs, if the Comprehensive Solution is adopted, it must be delivered at a cost not materially above the current licensing fee and licensee contribution. If the Law Society cannot implement the Comprehensive Solution according to this essential cost caveat, the OBA submits that Consultation Paper Option 1, with better auditing to ensure a valuable candidate experience, is the only acceptable alternative.

We believe that the above two-part recommendation best reflects the feedback our members have consistently given according to the Law Society's evaluative criteria, and provides an opportunity for the Law Society to move forward with a long-term appropriate and sustainable system. The OBA appreciates the opportunity to provide input to the Law Society on this critical issue and looks forward to further assisting the PD&C Committee as it moves forward with recommendations.