A2Justice Coalition Submission to Dialogue on Licensing

October 26, 2018

as endorsed by:

#LawNeedsFeminismBecause (Ottawa Chapter)

The Law Union of Ontario

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[1] Clarification of Professor Wiseman's position is referenced in the conclusion to this submission.

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1. INTRODUCTION

The A2Justice Coalition ("A2J") advocates for better access to justice for Ontarians by fighting for affordable and socially conscious legal education, training and licensing. We recognize that there is an ongoing crisis in accessing legal services for lower income, middle income and marginalized communities. Legal education and licensing plays an important role in addressing this access to justice crisis. Who has access to legal education and licensing, and at what cost, ultimately impacts who can access legal services.

To that end, A2J has maintained an active and ongoing interest in licensing reform and articling. We have made previous submissions to the Law Society of Ontario ("LSO") on the matter.

2. EXECUTIVE SUMMARY

A2J submits that none of the four proposed licensing options outlined by the LSO adequately responds to the evaluative principles that the LSO itself sets out. On the contrary, the three proposed licensing options run contrary to those principles, and only one can adequately meet them with modifications.

Options one and two only offer slight variations on the current model. Both options rely on the barrister and solicitor examinations as a gatekeeper for licensees, and both options rely on the traditional model of the articling format for experiential learning. We submit that written multiple choice examinations generally, and more specifically those constructed by the LSO, are pedagogically unsound, incompatible with the realities of legal practice and constitute ineffective mechanisms of testing for lawyer competency. Similarly, we believe that the current model of experiential learning through articling is *ad hoc*, arbitrary, inconsistent and therefore cannot guarantee a baseline of legal experience. More directed supervision and mentorship in conjunction with law schools is required to structure, standardize and administer experiential learning through legal placements.

Option three primarily relies on the barrister and solicitor examination. As mentioned above, the multiple choice exam constructed by the LSO is flawed, and so this option represents a counterproductive, anachronistic and generally arbitrary approach to ensuring licensee competency. Option three also places an unfair financial burden on those licensees wishing to pursue a small practice serving marginalized and lower income communities when compared to other career options.

Therefore, options one through three should be rejected outright.

A2J's proposal is a modified version of the fourth option that focuses on providing the Law Practice Program/Programme de pratique du droit (LPP/PPD) for all licensees. A2J argues that this would ensure a standardized approach to legal training and relevant lawyer skills development.

In addition to the training approach of the LPP/PPD, which we endorse, we also recommend adding a more structured and actively supervised four to six month placement after the program.

Our amendments to Option 4 as proposed by the LSO are:

1. creating alternative revenue streams to defray the cost impact of this option to the licensee by increased revenue generation from the LSO;

2. allowing for abridgement opportunities based on course completion during law school;

3. a more active role for LSO instructors and mentors in monitoring, supervising and evaluating licensees during the completion of their placement; and

4. eliminating arbitrary and unfair multiple choice examinations from the licensing process.

We believe that A2J's modified fourth option most effectively meets the LSO's evaluative principles, and also permits new licensees to develop skills that are objective and relevant to contemporary legal practice.

Moreover, by implementing both a common and structured modified LPP/ PPD option, the LSO can avoid creating a two-tiered training program and resist market and structural biases against racialized, linguistic and other vulnerable groups.

Finally, as part of the process of reform, it is also vital that the LSO provide more meaningful, current and comprehensive anonymized statistics about performance measures of and barriers faced by licensees. To this end, we continue to advocate for allowing a greater voice and feedback mechanisms for licensees themselves to comment upon and participate in future adaptation and fine tuning of this standard licensing pathway.

3. A2J's ORIGINAL PROPOSAL

During the 2017 consultation process organized by the LSO, A2J submitted a proposal that focused on removing unfair barriers for licensing candidates and addressing the rising cost of licensing. We argued that the law society should take a more active role in ensuring that future generations of lawyers are truly competent practitioners and can pursue their careers without a significant debt burden.

Our previous proposal recommended replacing the current model of licensing with a training program based on a modified version of the current LPP/CPP for all candidates. The details of A2J's initial proposal to the law society were:

1. elimination of the barrister and solicitor licensing examinations in their current format;
2. a single licensing pathway modeled after the existing LPP / PPD program that has two flexible components:
    a. training modules in key areas of competency; and
    b. an experiential paid learning placement of six months;
3. abridgment of different components for candidates that have the requisite experience or academic courses;
4. innovative revenue generating mechanism implemented by the law society that substantially reduces the cost burden on licensing candidates, and the logistical and teaching support from experiential learning partners and Ontario law schools.

Our model proposed the elimination of the solicitor and barrister examinations in their current format because of their ineffectiveness in testing actual required competencies. Neither law school nor practice resembles the multiple-choice format that is used in the examinations. Furthermore, we argued that an exam is not an effective means of testing substantive comprehension nor is it a meaningful evaluative tool for the interpretation and application of information in a real world setting of legal practice.

The A2J proposal also emphasized affordability of licensing. Law students are finishing their education with an unprecedented amount of debt. There is no indication that this trend will change. Therefore, the Law Society has a role to play in reducing the cost of licensing upon licensees by explicitly and proactively subsidizing the cost of an effective, fair and meaningful training process through a membership levy or revenue generation mechanism that does not place the cost of training exclusively upon the licensing candidate.

A2J's original proposal is partially reflected in Option 4 currently being considered by the LSO

4. LSO'S PROPOSED FOUR OPTIONS AND A2J's RESPONSE

The LSO has submitted four options for lawyer licencing that is evaluated against a set of evaluative criteria and principles. A2J agrees that evaluative criteria are vital to assessing any new licensing model, and in general agrees to the criteria set out by the LSO.

A. The Evaluative Principles

The LSO has a duty to maintain and advance the cause of justice and the rule of law, as well as to facilitate access to justice for the people of Ontario. A2J agrees that licensing plays an important role in ensuring that the members of the profession are competent and can serve the people of Ontario in an adequate fashion. Licensing requirements are critical to the public interest and to the reputation of the legal profession.

To assess any proposed changes to the licensing process, the LSO has outlined five guiding principles. Those principles are:

1. the five goals of transition training, which are:
    a. application of defined practice and problem-solving skills through contextual or experiential learning;
    b. consideration of practice management issues, including the business of law;
    c. application of ethical and professionalism principles;
    d. socialization from student to practitioner; and
    e. introduction to systemic mentoring;
2. the law society's statutory responsibility to ensure competence;
3. fairness in the licensing process;
4. consistency for candidates;
5. and cost considerations.

The five goals of transitional training are based on the premise that the licensing process must bring the licensee from being a law student into a practitioner. The Law Society has a role to play not only as an evaluator, but also as an educator.

The LSO has a statutory obligation to ensure its members are competent. Given the wide breadth of professional practices, the LSO should focus on a baseline requirement for competence during the licensing process.

The LSO specifies that fairness, the third evaluative criteria, requires the licensing process to adhere to legislative requirements. It also requires access to the profession by all qualified candidates. A2J would suggest that the requirement for fairness goes beyond formal requirements and also requires actively removing unfair barriers.

Consistency is the fourth evaluative criteria, and it is integral to ensure that the LSO can assure the public that new licensees possess entry-level competencies. Consistency in experience is also an essential element of fairness.

Finally, the LSO has also confirmed that it will take cost considerations into account.

B. The Original Four Proposed Options

The LSO has proposed four options on how to license candidates seeking entry into the bar. The four options are briefly listed below:

1. the current model;
2. the current model with some enhancements, including a requirement that licensing candidates be paid the minimum wage and that the law society practice greater oversight over articling and work placements;
3. examination-based licensing with the management of regulatory risk occurring after licensing takes place and varying depending on career path;
4. a modified LPP / PPD program for all licensing candidates.

The only viable option out of the four is the fourth option, with modifications. The three others are fundamentally flawed and should be rejected for the following reasons.

(i) Option 1: The status quo

Option 1 proposed by the LSO is simply a reiteration of the *status quo*.

The purpose of the licensing dialogue is predicated on some simple facts that make reiteration of the status quo counterproductive. The "articling crisis", as it has been termed, relates to a lack of available positions for licensing candidates, and those who do pursue the articling pathway have raised concerns about consistency, effectiveness and fairness. The lack of availability of the

articling pathway for some has necessitated the creation of LPP/PPD, which is a program in transition, and its performance is partly what is under review in the current dialogue. Additionally, the nature and orientation of licensing examinations is also part of the debate. Some, including A2J, question whether these examinations are effective.

We maintain that the LSO must play an active role in training students in an experiential learning environment. According to the LSO, only 10% of private firms offer articling positions, 59% of articling positions are with firms with 6 or more lawyers, and over 60% of articling placements are in the Toronto area.[2] There remains tremendous scope for the LSO to play a role in recruiting more lawyers to act as principals and mentors and to standardize the expectations of core competencies to be developed through experiential learning.

The nature of the present exercise raises such pressing and significant concerns with the *status quo* relative to equity concerns, consistency, pedagogy and practicalities of developing lawyering competency that there is no compelling argument for simply continuing the current framework for licensing.

This option cannot be selected.

(ii) Option 2: A minor, and unimaginative, modification of the status quo

The second option introduces an additional examination onto the current framework of the barrister and solicitor examinations. A2J rejects the viability of this proposal for several reasons.

Firstly, we believe that substituting another examination or a series of exercises for actual practice is not an effective measure of practice skills. The prospect of having practice-based exercises is helpful in the context of a broader training format such as the LPP, but it does not and cannot represent a replacement for practical or practice-based experience that could be achieved through a placement.

Secondly, the notion that an additional examination is the "answer" to the problems with the current model ignores the basis of the articling crisis, equity considerations in articling, and the concerns about the content of the current barrister and solicitor examinations, some of which we will outline in a section under additional considerations.

By exclusively focusing upon the "enhancements" to the current licensing examination process, this option rubber stamps a fundamentally flawed and counterproductive testing regime by

[2] Law Society of Ontario Dialogue on Licensing, 2018 Consultation Materials, Topic 4: Transitional Training Discussion Group Powerpoint Presentation, slide 12.

adding a further test that is devoid of the meaningful content and context of the LPP/PPD. Such an approach will serve to aggravate existing problems within the current model without addressing the underlying issues that have created the articling crisis and its fallout.

(iii) Option 3: An examination-based licensing system

Option 3 involves a purely examination-based licensing system, and has been costed out as the "least expensive" option in the amount of $4,200 to $6,700. The higher end of the cost range would be borne by licensees seeking to work in a small firm or as a sole practitioner.

In other words, those seeking to embark upon a practice with the most risk and possibly lowest prospect of salary return would pay the highest cost for licensing. By removing the requirement of transitional training, Option 3, is argued as reducing the prospect of power imbalance. However, the LSO discussion paper recognizes that there may be other impacts upon equity seeking groups and candidates who are not able to get exposure to experiential training by obtaining employment.

In our view, Option 3 is laden with the same problems that suffuse the current model of examinations in Options 1 and 2, while adding an additional impediment to equity seeking groups by deferring problems that they may face to the post-licensing phase. Without the prospect of standardized practical training and experience, candidates would have no means of proving their competency to potential employers. In effect, the systemic barriers that already beleaguer the current articling pathway would be replicated and magnified at the post-licensing job application phase.

For these reasons, we believe that Option 3, although attractive from cost perspective for the licensing candidate, carries a series of problems that will impact on basic skills and competency of candidates and negatively impact equity seeking groups.

(iv) Option 4: Structured training and a possible solution to current licensing issues when modified

Option 4 offers the best response to alleviating concerns regarding systemic barriers to equity seeking groups while preserving transitional training that is vital to the development of basic skills. This option can be further improved by adding a structured experiential training requirement.

A2J seeks to preserve an experiential component to ensure a modicum of basic, consistent and meaningful transitional training that will allow candidates to have exposure to legal practice and

for potential employers to meet candidates in a structured environment. In combination with a mandatory LPP/PPD program, candidates would be able to apply some basic skills in practice.

A modified Option 4 best meets the LSO's evaluative criteria. The LPP/PPD program guarantees candidates exposure to the most important facets of transitional training. The program also guarantees consistency as all candidates will participate in substantially the same program. Issues related to fairness in accessing articles and discrepancies between articling placements will be eliminated, thus guaranteeing a certain measure of fairness for all candidates. Lastly, the pedagogical approach taken by the LPP/PPD ensures that candidates will develop the practical skills and knowledge required to meet the LSO's standards for competence. The LPP/PPD has already, through a consultant evaluation, demonstrated its merits and best demonstrates a licensing process that can be relied upon.

We believe that the LPP/PPD offers a framework for imparting essential practice-based legal learning that will assist candidates in becoming practice ready. The program, however, can be improved and we recommend that the LSO be attentive to the needs of licensees by encouraging and maintaining an ongoing dialogue and feedback mechanism for receiving comments from licensing candidates and students.

For example, A2J has received anecdotal information that the LPP/PPD administration must be more alive to the needs of students with disabilities. If students cannot complete and participate in group-based assignments by reason of disability, there must be measures by which licensees can complete the LPP/PPD component of licensing on a modified or part-time basis, with appropriate support mechanisms.

The practical training placement would complement the LPP/PPD. However, we introduce in our approach the possibility of abridgement of the practical placement based on the level of exposure that students may have received through clinical and internship work during law school. In this way, we believe that law schools and the licensing process could develop a complementarity for those candidates interested in practice. It stands to reason that clinical experience in an environment supervised by practising lawyers in a law school environment is both a relevant and meaningful way for candidates to gain practical experience. By allowing for the prospect of an abridgement, students could complete their law degree without the pressure of having to specialize or prematurely deviate from the development of legal analysis and research skills. However, with the possibility of abridgement, students and law schools would be incentivized in building the transitional process of experiential skills development.

Additionally, and not least of all, we advocate that a progressive levy or tax on LSO members should be created to render the cost of a modified LPP option affordable for licensing candidates.

We believe that it is irresponsible for the LSO to advocate a low cost alternative that sacrifices proper transitional training and magnifies problems for equity seeking groups, without first explicitly developing a proposal for subsidizing the LPP through support of the membership and the revenue of the LSO. Because the LSO plays a direct role in monitoring and ensuring the level of competency within the profession, it has a positive obligation to explore and create a mechanism for rolling out training that will be effective and build competency rather than burdening candidates with the cost of an examination process that is quite evidently anachronistic and ineffective.

5. ADDITIONAL CONSIDERATIONS AND CRITIQUES

A variety of social, economic, and cultural considerations have informed our approach to Option 4 and the modifications we have suggested, although such considerations have been largely overlooked by the current regime. The following section provides snapshots of several topics we hope the Law Society will consider as it moves forward through this reformation.

A. The Law Society Should Explore Alternative Revenue Streams for Licensing

The financial impact of licensing on individual licenses, the profession, and the public cannot be overstated. Future licensing regimes must consider alternative revenue streams to relieve the burden on those undergoing the process.

Increases in tuition fees has been a consistent stressor for law students over the past decade. The Law Society has openly acknowledged the high levels of debt facing new licensing candidates. Such statements ring hollow for current law students, licensees and young members of the bar who are struggling under staggering debt. Although the Law Society claimed to have considered costs during this consultation process, every option proposed (including one which claims to mimic the status quo) will be more expensive than the status quo.

By placing the funding burden for the proposed changes upon new cohorts of licensees, the Law Society has further marginalized an already extremely burdened population. Licensing candidates feel the pressure of law school tuition debt, and many need to finish the licensing process to obtain employment and even begin repaying such debt. The Law Society has effectively aggravated an already difficult financial situation for licensees in an already saturated job market.

As discussed below, the Law Society has a professional and moral responsibility to support new licensees, as, quite literally, they are the future of the profession. Therefore, we propose that the

Law Society and members of the profession involved in legal training (such as firms and other employers) subsidize the licensing process on a progressive basis according to their financial means.

The Law Foundation, for example, can contribute the revenue generated through its collection of trust fund interest. Moreover, the Law Society could contribute using the surplus revenue it generates from its education programs, and/or add a percentage to the cost of products it offers to the profession. Additionally, a one time fee levy (e.g. a percentage on the annual LSUC fees) could be collected and used to support innovation in licensing. Whereas the one-time levy on annual fees would not have a significant impact on members, it would have the potential to generate significant revenue. As with similar levies that have been run at post-secondary educational institutions in Ontario to finance Public Interest Research Groups, the levy could be agreed up by LSO members through a referendum.

In order to ensure greater accessibility of the licensing process to all candidates, we also propose that the Law Society reduce licensing fees to at least their 2015 rates (prior to the LPP). In the event that candidates are still not able to pay licensing fees, they should be eligible to apply for an exemption or grant to subsidy their fees.

We also propose that prospective articling principals be entitled to apply to the Law Society for a grant or subsidy to assist with the hiring of a licensing candidate. Such financial relief may also address the problem of the short supply of articling positions overall. Preference may be given to sole practitioners, small firms, legal clinics, etc that may not otherwise be able to accommodate a licensing candidate

B. The Law Society Should Reconsider The Multiple-Choice Barrister and Solicitor Exam

A2J takes the position that any new licensing option should abolish the Barrister and Solicitor Examinations (the "Current Examinations"). A2J disagrees with the LSO's position that lawyer competencies are adequately tested using licensing exams.

In informal discussions with licensing candidates from across the province, including members of our coalition and authors of the present submission, not one participant has endorsed the relevance, appropriateness, or value of the Current Examinations. To the contrary, these former and current licensing candidates indicate that the Current Examinations test one's ability to create (or buy) an effective index and navigate copious materials without ever mastering or fully reading the content. Some candidates forewent studying the materials at all, and instead focused exclusively upon creating an index.

We do not believe that the Current Examinations are adequately designed to test the competencies and legal skills required to practice law. As discussed below, we do not believe the exams expose or evaluate candidates on the complex realities lawyers encounter in practice.

Multiple choice formats are unlikely the most effective way to test critical thinking and the complex application of nuanced law and fact. We argue that multiple choice formats do not allow for effective evaluation of problem solving skills, client service, interpersonal relations, legal drafting and many other key legal practice skills and competencies. The Current Examinations focus on subject-matter knowledge and retention, which is less than relevant to realities of law practice for many lawyers. Firstly, the subject-matter tested is likely to not be in an area practiced by the lawyer. Secondly, as discussed below, the constant evolution of law means subject matter will be outdated almost as quickly as it is published. Therefore, evaluations should focus on developing skills and competencies rather than an ability to retain information.

Further, our members who wrote the Current Examinations, including those who have been practising for several years, note that navigating dense study materials, with an equally dense index, under severe time pressure, is simply not consistent with contemporary law practice in Ontario. Nowadays, legal problems are addressed through online searches, specialized searches, consultative processes, and discussions between colleagues and mentors. Candidates are not learning the problem-solving approach necessary to succeed as a lawyer in Ontario from artificial, individualistic, paper-based Examinations.

The format, timing, and structure of the exams also problematic. For example, the length (both in pages and in hours) is likely to disadvantage individuals with different learning styles and different abilities to handle stress. It is also completely inconsistent with the learning and examination style that students get used to over the three years in law school - i.e. short answer/essay type answers based on fact patterns. Unfortunately, the Law Society does not provide disaggregated data on the pass and failure rates of the exams, and as such it is not known if students from diverse backgrounds or whom have disabilities are more likely to fail these exams. Nevertheless, our members and their colleagues have noted that racialized candidates and candidates living with disabilities perceived the Current Examinations as a barrier to their success. Many had to write the exams multiple times before passing. Based on anecdotal information we have received,A2J believes that this particularly true for racialized francophone candidates.

We are also concerned that the Law Society insists that the Current Examinations are a precondition to beginning work as a lawyer. Using the exams as a gatekeeper function will disproportionately impact candidates of diverse backgrounds and candidates living with

disabilities. Such candidates have historically been underrepresented in the law profession and are sorely needed in the profession.

A2J is also concerned with the costly financial implications caused by demanding the exams be completed before continuing the licensing process. We believe that candidates may continue to not be able to write both exams in a short period of time and thus must wait to continue the process. The longer candidates spend in the licensing process results in increasing debt loads. We are concerned that this impact will disproportionately affect candidates from diverse backgrounds. We put forth that candidates should still be allowed to complete the components of the licensing process concurrently.

The Law Society claims that the Current Examinations are psychometrically defensible and maintain consistency. However, we wish to see the research and results from testing used to substantiate the position. A2J has reviewed the submissions and documentation released by the Law Society. None of the material provides sound and verifiable evidence that that examinations are a valid form of testing that is psychometrically defensible. To defend its position, the Law Society has cited an article simply stating that the Current Examinations are a fair and consistent tool to assess candidates knowledge and skills. This article, written by law professors in the United States, does not provide any research on the psychometric testing done but rather explains how Ontario's exams are better written than lawyer examinations used in the United States. A2J is concerned that the Current Examinations are being justified by an opinion piece. Here, it is also significant to note that the *Canadian Charter of Rights and Freedoms* imposes a higher level of justification on the LSO (than exists in the US) in relation to the defensibility of the exams in light of its systemically adverse impacts.

In fact, the A2J approach seeks to abolish the Barristers and Solicitors examinations also based on the fact that these examinations test for content awareness in ways that can and are already addressed in law school. As we will discuss later, Ontario law schools do not see themselves as bearing the responsibility to produce "practice ready" licensing candidates; however, the process of testing for practice based proficiency is in our view based on developing skills that add to the content specific testing that is done in law schools. Because the Barristers and Solicitors examination do not and cannot test for subject matter proficiency in all areas of legal practice in Ontario, an arbitrary focus on certain areas does not make the licensing candidate practice ready.

What is needed, in our view, is the development of skills that will allow candidates to be able to make practical assessments of problems that raise ethical, financial, procedural and service-based considerations. While the introduction of exercises that allow the candidate to test their ability to produce pleadings or other written documents that are important parts of practices in certain areas (as contemplated by Option 2), such an approach is not appropriate as an addendum or

added component of examination, but must be integrated into a broader framework of training such as the LPP.

C. The Law Society Should Provide Opportunities to Abridge the Licensing Process

In order to create a standardized approach to the experiential learning component of articling, we propose that the Law Society identify key areas of practical competency that a candidate must develop in order to become licensed. These key practical areas include:

1) reporting letters to clients;
2) written advocacy or pleadings to the Court;
3) mediation/ alternative dispute resolution analysis;
4) communications with other counsel, administrative tribunals and/or third parties; and
5) demonstrating skills in practice management, recording dockets and complying with internal filing procedures.

However, it is vital to acknowledge that the experiential learning environment is not limited to the licensing process itself and that students may choose to acquire practical competencies during the course of their three-year JD program by working or volunteering at public interest law clinics or by engaging in special projects that relate to their areas of interest. Many universities such as the University of Ottawa, Queen's University and Windsor University have legal clinics that offer practical experience in a specialized area of law.

In view of the existence of valuable experiential learning available as part of a three-year JD program, we propose that the Law Society permit licensing candidates who have availed of experiential learning to apply for abridgement of the in-class and/or the experiential learning component of licensing. Here, the Law Society must consider the nature of the training and/or activity undertaken by the candidate and, in collaboration with the concerned law school, identify a suitable measure of accreditation that may be afforded to the licensee in order to apply the appropriate abridgement factor.

This kind of a collaborative approach serves to reinforce the connection between the JD and the licensing process, so that experiential learning is not siloed or separated from the legal education environment. In turn, we believe that the collaborative efforts between the Law Society and law schools will create incentives for students, who are interested in becoming licensed, to enhance their experiential learning skills at an earlier stage in their legal education, and so reduce the LSO's administrative burden for the experiential learning component..

D. Recognizing alternative careers and pathways

The licensing process must take into consideration the fact that many students pursue licensing outside of the law firm setting. In fact, 26% of licensees pursue a non-law firm setting for articles, including working in a government or public agency, a Crown's office, a tribunal, in-house in a private firm, or clerking according to materials provided by the LSO for the licensing dialogue process.

These students must be served by the licensing process as well, and consideration to their career paths are also relevant.

Many young lawyers are no longer drawn to big law practice the way they were previously, and licensing and training should reflect that.[3] Especially since there is evidence that the big law model will face significant challenges in the future, from artificial intelligence to outsourcing overseas and private companies insourcing their legal costs. The licensing process must therefore be both future oriented as well as aware of alternative practices.

One large alternative career path that is desirable for many young lawyers is government. However, given government hiring practices, both at the federal and provincial level, many law students wishing to make a career as a public-sector lawyer significantly benefit from beginning their career in these environments through articling. Otherwise, the hiring process to break into government work can be daunting, time-consuming and uncertain.

Government placement options should be coordinated for Ontario students pursuing the LPP/PPD including with Crown Council offices, Department of Justice, independent legal services units within the federal government as well as tribunals. In creating these placement opportunities, there should be some discussion with provincial and federal human resources authorities so that students can be transitioned in from their placement into permanent work, if that is desired by both the licensee and the employer.

E. Access to justice in rural regions

The current proposed changes by the Law Society must take into consideration the particular realities and impacts faced by individuals accessing justice in rural regions. Over 20% of Ontario's population lives in rural or remote communities, and the most common access to justice issues involve effective access to services for aboriginal communities, youth justice, elder

[3] For a quick summary of a study concerning young lawyers' career preferences, please consult: https://www.linkedin.com/pulse/5-key-insights-from-millennial-exodus-law-firms-aly-r-h%C3%A1ji/

law, family law and employment and social assistance law.[4] One of the key barriers to access to justice in rural and remote regions is a shortage of lawyers.[5]

The fact that the licensing process can impact access to justice in rural and remote regions is acknowledged by several specific programs that currently exist. For example, Lakehead University's integrated practice curriculum is a unique licensing path where law students can become members of the bar without completing articling. The program is designed to attract young law students to northern Ontario, prepare them for practice in northern Ontario and offer incentives for candidates from them to stay. Another licensing initiative that addresses access to justice in rural communities are Articling Fellowships offered by the Law Foundation of Ontario that fund and place students in community legal clinics serving linguistic minorities in remote locations. These initiatives are incompatible with some of the proposed licensing options. Without any experiential training component, Articling Fellowships and placements would no longer exist. Furthermore, no option proposed by the LSO addresses what is to be done with Lakehead's JD program.

However, these initiatives could be brought under the fold of a modified Option 4 that includes an experiential component. Maintaining rural and remote legal practice incentives for law students, licensing candidates and young lawyers must be incorporated into any new licensing program, as these initiatives play a key role in ensure that 20% of Ontarians, in remote or rural communities have access to a lawyer.

F. Access to justice for equity seeking groups

Self-identified racialized community members made up about 20% of licensing applicants between 2010 to 2016. Indigenous students made up another 1.5% according to materials provided by the LSO for the licensing dialogue process.These numbers demonstrate the diversity of licencing candidates seeking to enter into the profession.

As a key component of enhancing access to justice for new licensees, the LSO must integrate within all of its licensing options and future pathways the place for candidates of Indigenous background and those seeking to service Indigenous communities. As political self-awareness is growing within Canada of its origins as a settler colonial state, federal and provincial governments are attempting to reframe their relationships with Indigenous peoples. Whatever

[4] Canadian Forum on Civil Justice for the Rural and Remote Access to Justice Boldness Project, *Rural & Remote Access to Justice: A Literature Review* (Toronto, 2015), pg 5. <https://boldnessproject.ruralandremoteaccesstojustice.com/wp-content/uploads/2015/11/Rural-and-Remote-LIt-Revew-Final.pdf>

[5] Ontario Rural Council, *Roundtable Report on "Linguistic and Rural Access to Justice"* (Guelph, 2008) at pg 3.

outcome this may bring, the LSO as the gatekeeper for the largest source of new lawyers in the country must sensitize its newest members to the history and implications of practicing in a country that is still suffering from the effects of cultural genocide against Indigenous peoples. Increasing representation rates of Indigenous lawyers is one method of responding to this reality, but more fundamentally, it is vital that the continuation and growth of the profession train all new lawyers to respect and recognize the sovereignty of and special fiduciary circumstances of Indigenous persons within our legal system.

As part of the evaluative principles for any articling program, the LSO has stressed fairness as a principle. As part of fairness, the LSO has sought to consider human rights and fairness legislation, as well as its own deepening commitment to equity, diversity and inclusion.

Any new licensing program that is designed should take into consideration the fact that almost half of racialized licensees "strongly" or "somewhat" agreed that they struggled to find an articling position. This indicates that significant barriers exist for racialized candidates and candidates from minority communities to equally access and succeed in the licencing process.

The challenge to overcome systemic discrimination also exists for law students and licensees with disabilities. One of the challenges for licensees with disabilities is systemic discrimination in hiring and then accommodation by the employer for the short-term.

It is vital as well that the LSO not compartmentalize efforts to redress sexism within the legal profession as measures focused upon the downstream problem of retention and recruiting of women within the profession. In other words, while important initiatives such as the Justicia Project of the Law Society have sought to address clear systemic discrimination in the career pathways for women in the profession, the prevalence and importance of addressing sexist attitudes must be centred within legal training and the licensing process itself. That public and anecdotal discussions abound in 2018 about harassment, intimidation and sexism towards women lawyers by their male colleagues, judges and others is indicative that there is much work to be done in incorporating feminism into the ethos of the profession.

Moreover, gendered biases intersect and aggravate the discriminatory impact of practices and attitudes faced by a diversity of equity seeking groups within the profession. Developing a strong and proactive approach to building a profession requires the development of licensee training that respects difference and structurally places the needs of equity seeking groups as intrinsic requirements of practice development.

A2J more structured practical component could ensure fairness for all law students and licensees.

G. Transparency

More publicly available information is needed to allow the profession to evaluate the effectiveness of the licensing process, in accordance with the Law Society's duty to act in a timely open and efficient manner. We advocate for maximizing transparency in terms of providing information, statistics and results to the public. Although not exhaustive, we set out below certain areas for which increased transparency will assist licensing candidates, members and students in responding to the current options in the licensing dialogue and which will be necessary as a procedural requirement in building and maintaining a more responsible and responsive licensing regime.

(i) Interim Measure - Publication of results on licensing examination

A2Justice advocates the abolition of licensing examinations; however, on a going forward and immediate basis, we request that all candidates be afforded the results of their examinations and be given a right of review. We believe that the failure of the LSO to allow candidates to understand the nature and context of their errors and/or the result for successful candidates cannot provide a stable of sustainable model for licensing candidates entering the profession. Access to information will allow candidates to know the proportion of unsuccessful responses they have obtained and to take steps to learn from these errors. As an interim measure, this compliance measure is necessary to maintain a modicum of consistency.

As a corollary, however, if the process of appeal and challenge of unsuccessful answers makes the licensing examination process unsustainable based on added cost, the membership is entitled to be made aware of this assessment.

(ii) Access to additional statistics on success rates

Members, licensing candidates and students should also have access to all available statistics on success rates for all groups, including self-identifying equity seeking groups, on initial and subsequent rewrites of examinations. Subject to privacy considerations of individual licensees, access should be permitted for information that can allow for an objective evaluation of performance of candidates and effectiveness of the examinations. Also, subject to privacy considerations of candidates, access should be permitted to the results of all surveys relating to the the evaluation/ performance of metrics within the current model of licensing. The LSO should not be permitted to run surveys without permitting complete transparency of the results to the concerned stakeholders.

(iii) Access to financial statistics

The current discussion paper on the Dialogue on Licensing provides an estimate for the cost roll out for each of the 4 Options proposed. Access should be provided to the data upon which this costing is based. Without access to the underlying costing considerations of the LSO, it is impossible for members to make informed decisions regarding the future of licensing for the profession.

(iv) Deliberative privilege to be removed from Committees

Whereas Convocation proceedings have now become public and are accessible via online webcast, the *in camera* discussions of Committees are maintained as confidential. There is no principled basis for this confidentiality. Members are entitled to know the positions taken by Benchers who are elected by the membership. Benchers should be made to be accountable for their positions through transparency in the deliberative process further to which members may be able to provide input and feedback to members.Currently no formal rule precludes members from sharing information with members or non-members such that information may even be shared with non-members on issues relating to surveys or task forces. Ultimately, committees may make recommendations according to the volition of their respective Bencher members and Benchers can vote at Convocation according to their conscience, but members should be entitled to observe how the deliberative process of the committees unfold.

Such transparency will also serve to educate the membership on the role that cost considerations play on the development of licensing requirements. The input of Benchers on cost issues will be of extreme importance particularly in terms of A2Justice's proposal of a modified Option 4, which is contingent upon the LSO's development of a revenue generating mechanism to subsidize the cost of this option.

(v) Access to other financial information

Members should also be given access to annual statistics on the operating budget of the LSO and the work of its Committees as well as all sources of revenue generation by the LSO. Currently, we understand that the LSO administers continuing education seminars at a profit, but do not understand where these profits are allocated. We also do not know the process that would permit some of the LSO's revenue streams to be directed towards licensing.

H. Engagement with Licensing Candidates

The LSO must meaningfully engage with licensees on an ongoing basis, to ensure that they are

best positioned to achieve the standards set out for them. Law societies across Canada currently approach licensing with a combination of a Policing Model and a Coaching Model—ensuring that licensees meet professional standards by guiding them through practice. Moreover, law societies have begun to emphasize the importance of wellness, tying mental health and addiction related challenges directly to lawyer incompetence.

For the LSO, these approaches have manifested themselves in practice management reviews and disciplinary hearings, which are translated into quantitative statistics about how many people fail to meet practice standards. From a licensing candidate perspective, this approach is problematic for many reasons: it tells candidates, rather than asks them, how to make practice work for them and it postpones any feedback on their wellness and training until, and only if, they become licensed lawyers.

First, the LSO tells, rather than asks, licensing candidates what will make them good lawyers and how to fulfill their licensing requirements. Licensing candidates currently have two opportunities to provide feedback to the Law Society on the licensing process: on anonymous feedback forms completed during the bar exam and on the Record of Experiential Training in Articling Program completed near the end of a candidate's articling term. On the former, Candidates must reflect on the enormous academic and psychological assessment that they have just undergone, within the two minutes allotted for this purpose. On the latter, Candidates explain how they have fulfilled a list of Experiential Training Competencies for Candidates, which is often completed under time and professional constraints. Neither process provides a meaningful and honest outlet for candidates to express whether the licensing process works for them or to suggest how the LSO or their articling principals could improve the experience.

The LSO's own Articling Experience Survey ("Survey") further demonstrates its lack of engagement with candidates. The Survey was conducted in 2017, and its respondents included current candidates and those who had been candidates in 2014, 2015, and 2016. The authors of the Survey caution that a low response rate reduces the reliability of its statistics and conclusions. Nevertheless, one insightful statistic is that 20.2% of past Candidates and 16.5% of current Candidates were not aware of LSO resources like Law Society's Articling Office, Member Assistance Program, Complaints Services Centre, Practice Management Helpline, and Discrimination and Harassment Counsel; 71.6% of past candidates and 69.6% of current candidates did not use these resources, even if they were aware of them. One may argue that such resources are opportunities to engage with the LSO and of which candidates are not taking advantage. Nonetheless, the common theme between these opportunities—the Survey included—is that the LSO often dictates the terms within which candidates can provide feedback. Candidates are rarely treated as if they have anything to bring to the table.

Second, the LSO postpones meaningful engagement with candidates until, and only if, they become licensed lawyers. Through practice management reviews and disciplinary hearings, the

LSO checks-in with licensees about wellness and their ability to practice competently. During practice management reviews, licensees are asked about satisfaction with work, number of hours worked, and vacation taken. By contrast, candidates were asked these questions in the ad-hoc Survey, discussed above. Notable statistics from the Survey on candidate wellness include:

- 69% of past candidates and 73% of current candidates made at least $40 000 while articling; but, 12% of past candidates and 10% of current candidates made less than 20 000 while articling.
- About 60% of both past and current candidates worked between 35-50 hours per week, and the other 40% worked over 50 hours per week.
- 21% of past candidates and 18% of current candidates "received unwelcomed comments/conduct" while articling; similarly, 17% of past Candidates and 16% of current Candidates "perceived unequal/differential treatment" while articling.

It is outside the scope of this comment to address each of these statistics in detail. At a high level, however, candidates are exerting enormous effort into their articling experience and, at best, are not receiving optimal compensation and feedback. At worst, candidates are facing unwelcome comments or conduct and perceived unequal or differential treatment, in addition to issues with compensation and feedback.

A qualitative study by a recent McGill Law graduate confirms that young lawyers compare the articling and summer student experience to "slavery", calling it "soul-killing".[6] As a result, young lawyers are abandoning the partner-track and leaving large law firms for alternative legal work as soon as they pay off their student loans. Candidates should not have to wait until they are lawyers to voice their concerns about these issues, especially if early intervention could impact the Candidate's ability to become a licensee at all.

By telling candidates how to succeed in the licensing process, rather than asking them, and by postponing meaningful engagement until practice, the LSO has effectively turned a blind eye to the inadequacies of its licensing process faced by individuals in the thick of this process. As a result, the licensing process has remained stagnant and outdated, not only affecting the lives of current and future Candidates, but also impacting their future contributions as legal professionals.

I. Development of an Adaptable and Forward-thinking Approach

The LSO's failure to respond to changes in the law and the practice of law in its licensing process directly impacts candidates' ability to practice effectively and the legal profession's ability to operate effectively in a changing society. First, the LSO should structure the licensing

[6] See here: https://www.linkedin.com/pulse/5-key-insights-from-millennial-exodus-law-firms-aly-r-h%C3%A1ji/

process to allow for simple and thorough updates to substantive law studied or tested on. And second, this structure should address developments in the practice of law to account for technology, multi-disciplinary and multi-tiered (alongside paralegals) practices, and diversity.

The letter of the law is constantly changing through law-makers in government and in the courts. Currently, the LSO addresses these updates by providing loose-leaf supplements to the Barrister and Solicitor Examination Materials that add and revise select paragraphs where new legislation and cases have replaced old ones. Anecdotally, the Materials are bogged down by the accumulation of these updates, which are rarely tested on the Examinations themselves and are even more rarely remembered by candidates. Despite these yearly supplements, the Materials and Examinations continue to feature outdated terminology and concepts that do not necessarily prepare candidates to practice in emerging areas of law like intellectual property, in government, or in other alternative legal jobs. In restructuring its licensing process, the LSO should therefore consider the "shelf life" of substantive law and allow for continuous and meaningful updates.

Perhaps more importantly, the practice of law has changed exponentially while the licensing process remains stagnant. The LSO's current model is not likely to prepare candidates to practice—or even adapt to practice—where most legal services require technology and where clients and co-workers come from diverse backgrounds with diverse perspectives on the law.

First, the LSO has done little to educate candidates about technologies being used in practice, even though it purports to equate an understanding of technology to lawyer competence. The Barrister and Solicitor Examination Materials briefly discuss concepts like electronic service, electronic discovery, and cybersecurity and the latter gives an overview of software like Teraview used in Real Estate practice. While detailed modules on every software used in practice is not feasible, the LSO could engage further with the idea technology increases lawyers' capacity to provide more efficient and effective legal services for lower cost. It could also explore more universal examples of technology that candidates will encounter in practice, such as docketing programs, legal research platforms, and conflict-checking systems. By introducing candidates to actual legal technology—explaining how and why they work—the LSO can mitigate the steep learning curve that Candidates encounter when entering technology-dependent practices.

And second, the LSO does little to educate Candidates about working with and for diverse communities, which is likely to perpetuate a lack of diversity in the legal profession. The impact of the current licensing process on minority groups is discussed elsewhere in this submission. However, it is important to highlight that Candidates often enter the profession lacking soft skills and cultural sensitivity, which directly impacts access to justice for marginalized communities who have learned to mistrust and dislike lawyers. In an era of "me-too", it is vital that the

profession catches up with changing social norms and the profession's lack of skills around sexism, as well as other intersecting grounds of discrimination that are faced by lawyers.

Scholars suggest incorporating different cultural contexts into the study of law to ensure that new lawyers appreciate the social, economic, and political aspects of each case—including any cultural biases that the lawyer holds and that may affect their view of the facts or law. Cultural context is essential to perform basic lawyer functions such as eliciting information from clients and communicating the law. Moreover, candidates who possess these soft skills are likely to be adaptable to new and emerging practice environments—from non-traditional legal jobs, to limited scope retainers, to alternative dispute resolution. By attempting to be secular and "culture-neutral", the LSO has tended to ignore the ethnocentricity of the Barrister and Solicitor Materials and Examinations. In other words, the LSO is not preparing candidates to practice in a real society, where their co-workers and clients come from diverse backgrounds and where a competent lawyer will meaningfully engage with the cultural context of each situation.

Overall, the current licensing model does not provide candidates with the tools to practice law in the twenty-first century, let alone contribute to and adapt to constant developments in the letter and practice of law. The LSO should restructure its licensing process to allow continuous and meaningful updates to the substance of what candidates must know before becoming lawyers. Furthermore, the licensing process should ensure that candidates possess technological know-how, soft skills, and cultural sensitivity that will enable them to provide legal services in whatever community that needs them. Such a forward-thinking licensing process will not only improve candidate's abilities in the short-term, but also will help them improve the legal profession in the long-term.

6. CONCLUSION

The LSO has set out a framework of four options for consideration in the move towards building a more fair, efficient and cost effective licensing process. Conceptually these options are important in assisting with an understanding of models of how licensing in Ontario could be developed. As our submission demonstrates, we reject all of the four options as proposed; however, in doing so we have attempted to coherently present the case for a modified version of Option 4. To this end, we have emphasized the importance of practice based training that rejects the tradition of qualifying examinations. The LPP/ PPD, which we endorse, has been the product of considerable pedagogical and practical architecture and offers a responsive mechanism to delivering transitional training, but appears to carry with it the highest price tag. We do not suggest that the LPP is without scope for improvement and note in fact that it is imperative for it to better accommodate the needs of licensees as required under Ontario human rights legislation. However, with the caveat of future improvement for the LPP, A2J submits that the membership

should be informed of a more rigorous breakdown of the anticipated costs that undergird the universal LPP option (Option 4) so as to foster a meaningful discussion around cost of universalizing this option as the licensing pathway for all members.

Once the membership has been provided with a clear and meaningful portrait of the financial costs of a universal roll-out of the universal LPP (under Option 4), we urge that the next step must be to consider a membership funded levy to subsidize this training option along with other funding vehicles available to the LSO as we have outlined above. The discussion of funding options for licensing must not be extricated from the discussion of the licensing options themselves. This is a fundamental tenet of our proposal and is one for which we will continue to advocate. It is also necessary to speak practically about cost consequences for building our proposed modified Option 4 as our model represents a departure from the LSO's proposals and would necessarily entail a different cost.

We have also raised a series of considerations and concerns that face equity seeking groups under the current paradigm of licensing. These considerations are based upon available literature and our anecdotal information from members, licensees and colleagues throughout the province. Our request is that, moving forward, these concerns must be grounded in future training such that the LSO establishes and evaluates skills of licensees in ways that are forward-thinking and which reflect the real concerns of its future membership and the changing landscape of the profession without losing sight of the colonial past and privilege upon which the LSUC/ LSO was founded.

Our proposal also explicitly references the importance of abridgement of experiential learning in view of clinic based training that is available to law students within the three year JD program. This element of our submission has faced resistance from the Law Schools;[7] however, we would maintain our proposal for allowing abridgement options as it is not helpful in our view to approach legal education and legal training as mutually exclusive processes. The reality is that experiential learning is happening in law schools today (which we fully support) and both the LSO and Law Schools must creatively and constructively address the overlap of experiential learning opportunities while bearing in mind the cost burden to the licensee and building a training regime that is both fair and responsive to the real world challenges of legal practice in Ontario.

[7] In this regard, it is important to note that Professor David Wiseman who has generally endorsed our proposal has specifically expressed concern on this one element.