

Dialogue on Licensing  
Law Society of Ontario  
130 Queen Street West  
Toronto, ON M5H 2N6

24 October 2018

**Re: Dialogue on Licensing**

Dear Professional Development and Competence Committee:

The Federation of Asian Canadian Lawyers - Ontario Chapter (“FACL”) is pleased to make submissions to Convocation pursuant to its “Dialogue on Licensing” process established by the Professional Development & Competence Committee in their consultation paper, “Options for Lawyer Licensing: A Consultation Paper” (the “Licensing Paper”).

FACL is a diverse coalition of Asian Canadian legal professionals working to promote equity, justice and opportunity for Asian Canadian legal professionals and the wider community, and to foster advocacy, community involvement, legal scholarship and professional development. FACL addresses the barriers faced by Asian Canadians in the legal profession by, among other things, monitoring and advocating for policy developments impacting the profession, and providing Asian lawyers and law students with mentoring and networking opportunities.

FACL previously provided input to the then-named Law Society of Upper Canada regarding the Pathways Pilot Project Evaluation and Enhancements to Licensing Report (October 19, 2016).<sup>1</sup> This submission concurred with the position taken by the Roundtable of Diversity Associations (RODA) that the elimination of the LPP without proper consultation, and without addressing the fundamental issues that precipitated the LPP, was premature. FACL welcomes the recent efforts by the Law Society of Ontario (the “LSO”) to reach out to stakeholders for consultation.

FACL’s current submissions are based on consultations with our members. After providing the opportunity to comment on the four options generated by the Licensing Paper, FACL received comprehensive feedback that identified common concerns and points of agreement (and contention) which have accordingly influenced our position.

**I. Summary**

FACL recommends the LSO adopt Option 2, with the strong caveat that much more needs to be done to implement the recommendations of the LSO’s Working Group on the Challenges Faced

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<sup>1</sup> <https://on.facl.ca/wp/wp-content/uploads/2016/10/FACL-Pathways-Pilot-Report-Response.pdf>

by Racialized Licensees (the “Working Group”) in its report “Working Together For Change: Strategies to Address Issues of Systemic Racism in the Legal Professions” (the “Racialized Report”).<sup>2</sup> FACL recommends the LSO continue to require that licensing candidates obtain practical legal training to complement law school, but that it also greatly increase its efforts to reduce systemic barriers to racialized candidates, and to ensure the number of placements for racialized candidates grows rather than shrinks as a result of requiring fair compensation.

To address systemic barriers at the licensing stage, FACL recommends that the LSO i) continue developing and investing in innovative solutions, ii) educate potential employers on the significant and material benefits of a racially diverse workforce, and iii) make concrete efforts to reduce barriers to change. By providing tools and resources for employers to make the transition to a more diverse workforce, and by leveraging financial assistance for racialized candidates who want to provide public interest legal services or work for a small firm or a sole practitioner, the LSO would help alleviate barriers to hiring racialized licensing candidates.

In addition, FACL recommends the LSO i) closely regulate the quality and consistency of licensing placements, ii) offer and promote a range of resources and support to candidates who may face ethical, employment or human rights concerns, and iii) ensure that complaints that do arise (given the current high rate of under-reporting) are meaningfully addressed, including with sanctions if necessary. Finally, FACL recommends the bar exams more meaningfully assess the verbal, intellectual and analytical competencies required to be a lawyer.

## **II. Review of Options**

### **Option 1: Maintain the status quo (article for 10 months or complete the Law Practice Program)**

FACL takes the position that maintaining the status quo is untenable and unsustainable. The current model is rife with systemic defects whose consequences have become increasingly apparent, not least of which is the shortage of articling positions of respectable quality relative to demand (‘the articling crisis’). The LPP is designed as a legitimate alternative, but requires the additional significant expense of further classroom training, whose operating costs are also borne by all licensing candidates, and a work placement that like articling, may be unpaid or underpaid.

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<sup>2</sup> “Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions”, page 4, Online: <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf>

As the LSO is also aware, the lack of articling opportunities has a disproportionate impact on racialized candidates.<sup>3</sup> Racialized candidates (especially those whose identities intersect with other prohibited grounds of discrimination - such as gender, physical ability, sexual orientation, age, citizenship, etc.),<sup>4</sup> are more likely to receive unpaid or underpaid articles, or to pay additional licensing fees through participation in the LPP. In our survey alone, 15% of the racialized lawyers who responded were not paid during their articles.<sup>5</sup>

The shortage of licensing opportunities also exacerbates the power imbalance between articling principal and licensing candidate, leading to increased potential for and occurrence of exploitation and abuse, particularly when there is little regulation and oversight over articling principals.<sup>6</sup> And because students are dependent on their articling principals to become licensed and for career advancement, they are more likely to remain silent when faced with abuse.

As well, FACL members expressed concern about the quality of practical training obtained in the current licensing model. The articling experience can vary widely, and does not necessarily provide licensing candidates with the practical training necessary for them to find work after being licensed. If a firm is not paying its licensing candidate, it is not likely to properly train that candidate.

Finally, the bar exam does not meaningfully evaluate licensing candidates on the skills and abilities required to become competent lawyers. Our members also found that more support was needed for preparation for the bar exams, that feedback from failed exams was not helpful, and that exam tutors offered through the LSO were not particularly helpful in passing the exam.

## **Option 2: Require compensation for articling/LPP work placements (at least minimum wage) and add a practical skills exam to the bar exam**

FACL survey respondents widely favoured (52%) the reform option of requiring compensation for articling/LPP work placements consistent with minimum employment standards, and adding a practical skills component to the bar exam. Inadequate compensation is a severe problem for many licensing candidates, particularly low-income and racialized low-income ones, as noted

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<sup>3</sup> This issue was recognized by the LSO in its 2016 report “Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions”.

<sup>4</sup> 84% of our survey respondents identified as racialized, with one other prohibited ground of discrimination.

<sup>5</sup> Additional information and/or data from our survey is available upon request.

<sup>6</sup> One survey respondent said, “Principal did not really take the time to review my work. Fortunately this gave me a lot of room to learn by doing. Principal imposed invasive rules about use of the washroom. Principal occasionally became verbally abusive when upset. Principal would give ethically suspect instructions (e.g. asking me to do minimum necessary work instead of a proper job, lying to client) and become angry when questioned. Principal waited until last moment to file articling documents, most likely as leverage to follow questionable instructions.” In another situation, a principal refused to pay a racialized woman candidate, and the candidate was forced to sue the principal (albeit successfully) for her earnings.

above. Requiring compensation would alleviate at least some of the financial pressures faced by licensing candidates.

A practical skills component would also ensure that candidates are meaningfully tested on legal competencies and have the opportunity to learn important practical skills during their preparation. Although LPP students currently undergo such training in their program, not all articling students will necessarily have this experience.

Many FACL survey respondents felt articling in particular was essential for building not only important practical skills, but also the mentorship relationships and professional connections critical for career advancement. In contrast, some FACL members, particularly students, felt requiring minimum wage would reduce the number of positions available, and ultimately negatively impact the number of opportunities available to racialized candidates. Given these concerns, they preferred the status quo. Most FACL respondents favoured option 2 however, considering not only the quantity, but also the quality of practical training opportunities.

FACL also recommends additional measures that would potentially improve the practical implementation of option 2, and discusses these in the recommendations section below.

### **Option 3: Eliminate the articling/LPP requirement and add a practical skills exam to the bar exam**

Eliminating the articling/LPP requirement and replacing it with a practical skills exam has some support, based on the wide discrepancies in the quality of legal training, the power imbalances and abuse in articling, and criticism of the LPP as essentially extending law school for another year.

Many students respondents favour this model due to the appeal of removing the uncertainty and variability in training offered through the articling and LPP requirement. It also reduces the length of time, complexity and some of the expense involved in the licensing process, which many students find unnecessarily burdensome. Given the difficult job market for licensed lawyers, improving the affordability and timeline of becoming licensed has some appeal.

Some also favour this option as it more closely resembles the American licensing system, such as New York. This approach is also more similar to other common law jurisdictions, such as Hong Kong, in terms of total time required for training, where only two years of law school are required with one year of practical training and a bar exam. FACL has not researched how the American system or other common law jurisdictions are performing with respect to ensuring that racialized lawyers ultimately find employment on par with their non-racialized counterparts.

However, classroom simulations in law school are not training environments equivalent to actual legal practice, and would not effectively function as total substitutes. Although eliminating the articling requirement would eliminate the disparities in legal training, it would also deprive students of the opportunity to receive (potentially) paid practical training.

Eliminating the LPP would also deprive candidates of the opportunity to develop competencies and skills that they may not have received in law school but which would help prepare them for legal practice. And eliminating both would deprive licensing candidates of the opportunity to develop the contacts, mentorship relationships and practical knowledge important for career development.

As discussed above, a practical skills component to the bar would help establish a skills baseline, and could be complementary to the articling/LPP requirement rather than substitutionary.

**Option 4: Eliminate the articling requirement and require completion of the LPP program (without a work requirement), bar exam remains.**

For the reasons discussed above, eliminating the articling/LPP requirement and maintaining the bar exam in its current state is not an option we support.

**III. Respondent Commentary**

Some FACL survey respondents felt strongly that beyond these options, the LSO needs to work more closely with law schools and employers to harmonize the number of students in law schools with the number of available articling positions and the overall conditions of the legal market. In connection with this, one proposal called for eliminating the requirement for an undergraduate degree before entering a JD program. Some respondents also felt that *more* than the minimum wage should be required for licensing candidates, recognizing the substantial amount of academic experience, and in many cases employment experience, many already have.<sup>7</sup>

Respondents voiced concern over the high level of tuition charged by law schools, which forces students to seek higher paid jobs. Similarly, the lack of paid public interest law work in Ontario means that many students entering law school with an interest in this area cannot pursue this direction once they graduate. Some respondents felt strongly that the LSO should look beyond the four licensing options to find creative ways to support more social justice and public interest legal employment opportunities (in areas such as human rights, immigration, refugee, and

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<sup>7</sup> FACL also recommends the use of the term “licencing candidate” replace the use of the term articling “student”, which is outdated and does not capture the substantial education and experience that licensing candidates now bring to legal organizations. Not only have these licensing candidates already graduated from law school, an increasing proportion have already worked substantially in other related capacities.

environmental law) and other ‘underrepresented’ areas of law, many of which candidates are eager to explore.

The articling crisis is also an access to justice crisis for the public because without lawyers who are trained and interested in practicing law that advances the public interest, a significant scope of society’s challenges may not be addressed.

#### **IV. FACL’s Recommendations**

##### *1. Adopt Option 2*

Requiring compensation for articling/LPP work placements consistent with minimum employment standards, and adding a practical skills component to the bar exam, is the most ideal option of the four presented. We emphasize that FACL’s preference for the second option is not mutually exclusive of other reforms to the licensing process reforms that we recommend.

##### *2. Ensure practical legal training that complements law school*

FACL recommends that the LSO ensure licensing candidates receive training in basic legal competencies including drafting (such as simple pleadings, affidavits, and factums), litigation procedure, client assessment, and case management. This skills training is not necessarily reflected in the articling experience (or not fully reflected in the case of the LPP), a skills gap that may need to be remedied through improved standards regulations and stricter enforcement.

##### *3. Support racialized licensees by implementing the recommendations of the Racialized Report*

There continue to be barriers of systemic racism in the licensing process faced by Asian and other racialized licensing candidates, which impede their entry into the profession and undermine their professional development. These challenges are inseparable from any conversation on reforms to the licensing process and must be addressed by the LSO.

Regardless of which option the LSO adopts, FACL recommends that the LSO take concrete and innovative steps to change the status quo and reduce systemic barriers to racialized and equity-seeking candidates in the licensing process, as these problems reflect the systemic problems faced by racialized licensed lawyers throughout their careers. Unconscious bias, for example, can be particularly insidious. As one of our survey respondent explains, “Racial bias was never overt, but given my marks and OCI to second interview ratio, I always suspected my caucasian colleagues had an easier time being a "good fit" for the big firms.”

In its Racialized Report, the LSO’s Working Group identified the same systemic bias and concerns over “culture” and “fit”, as well as a lack of mentors, networks and role models for racialized licensees.<sup>8</sup> At its December 2016 Convocation, the LSO adopted the Racialized Report’s thirteen recommendations, which include requiring licensees to adopt equality, diversity and inclusion principles and practices” (Recommendation 3) and to measure progress through quantitative ... and qualitative analysis (Recommendations 4 and 5).<sup>9</sup>

FACL strongly commends the LSO for adopting these recommendations and for committing to lead the necessary cultural shift in law firms and among licensees – not an easy task. FACL recommends however, that the LSO redouble its efforts to implement the Working Group’s recommendations to address the systemic problems that racialized licensees and licensing candidates face, a toll that will continue as long as the status quo continues.

*a) Innovate and partner to overcome systemic barriers more quickly and effectively*

Although culture is hard to change, some large organizations, such as the Canadian Armed Forces, have worked with “Design Thinking” as a model for changing culture.<sup>10</sup> Another organization, Hire Immigrants Ottawa, which is funded by the Ontario government, offers comprehensive “Cross Cultural Competency Training for Employers” as well as resources to help employers leverage diversity in the workplace.<sup>11</sup> We recommend that the LSO research and pilot innovative approaches and consider partnering with leading organizations to implement the Racialized Report’s recommendations.

*b) Educate potential employers on the benefit of a diverse workforce<sup>12</sup>*

FACL recommends the LSO more effectively communicate the value of a racialized and diverse workforce to firms and potential employers. The demographics of the racialized licensing candidate population is rapidly changing. There are more ‘mature’ racialized candidates, both from other countries, as well as Canadians who have worked and travelled abroad before planning to practice. Licensing candidates of all racial backgrounds are more educated and have more significant employment experience than ever before. In addition, more and more racialized

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<sup>8</sup> “Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions”, page 4, Online: <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf>

<sup>9</sup> “Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions”, page 6-7, Online: <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf>

<sup>10</sup> <https://www.cfc.forces.gc.ca/237/51-eng.html>.

<sup>11</sup> <http://www.hireimmigrantsottawa.ca/events-training/cross-cultural-training/>.

<sup>12</sup> <http://hrcouncil.ca/hr-toolkit/diversity-workforce-matters.cfm>.

candidates are women and men who have non-traditional career paths in order to accommodate family needs. Since the profile of a licensing candidate is changing, so is what they have to offer.

It is critically important that the LSO more effectively educate and communicate with potential employers about the value of a (racially and demographically) diverse workforce to the company's provision of legal services and long-term growth. A diverse, open, and equitable workforce improves client service, business development, as well as overall employee satisfaction and productivity,<sup>13</sup> which significantly benefits the long-term financial health of the firm. By understanding the value of candidates and what they uniquely have to offer, more employers may enter the market and consider hiring racialized as well as 'non-traditional' racialized licensing candidates.

*c) Address barriers to change: Provide employers with tools and resources that save time and effort in making the transition to hiring high quality racialized licensing candidates*

FACL recommends that the LSO conduct research on and provide employers with ideas and resources, techniques and tools that would make it easy and cost-effective to reduce unconscious bias in candidate selection. For example, we recommend that the LSO facilitate engagement between employers and equity-seeking groups and encourage learning and networking opportunities in non-firm settings. If firms better understand how to engage with racialized candidates, they will be able to more easily identify, build relationships with and recruit high-potential members of the racialized legal community.

FACL also recommends that the LSO provide resources on how to simply conduct blind resume screening where the name, gender and any identifying information of candidates are not disclosed until later in the interview process. Experience suggests that blind resume screening would help law firms look more like the people graduating from law school with the skills to contribute and less like the people doing the hiring.<sup>14</sup> We also recommend that the LSO conduct more proactive monitoring, data collection, and statistical analysis on the barriers to hiring, advancement and promotion of racialized candidates, as well as licensees, to inform and improve its efforts.

*d) Address barriers to change: Provide financial assistance to support the recruitment of racialized licensing candidates in public interest law, as well as for small firms and sole practitioners.*

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<sup>13</sup> *Ibid.*

<sup>14</sup> <https://www.nytimes.com/2016/02/28/magazine/is-blind-hiring-the-best-hiring.html>.

FACL recommends the LSO develop a financial assistance program to facilitate articling positions for racialized licensing candidates who work in the public interest, and for small firms or sole practitioners.

The goal of such a program would firstly be to support racialized candidates who wish to advance the public interest but would otherwise be discouraged by their personal financial limitations, and secondly to ensure public interest organizations have the financial capacity to support articling positions. As one survey respondent shared with us, “Doing public interest law, the organization I articulated for used their 'public good' goal to justify not paying me”. This is a common grievance that has been frequently aired in other forums, and is one the LSO can help potentially address through a scholarship, bursary, matching fund, or similar sponsorship mechanism.

FACL recommends that the LSO work with the Law Foundation of Ontario to expand its Public Interest Articling Fellowship Program<sup>15</sup> to support more public interest articling placements. This would build on a variety of existing law school fellowships, such as Osgoode Hall Law School’s Ian Scott Public Interest Internship Program, which provides funding for unpaid or underpaid first or second year students who obtain summer employment at public interest organizations<sup>16</sup>, the University of Toronto’s SLS Public Interest Advocacy Summer Fellowship,<sup>17</sup> and the University of Ottawa’s and Social Justice Fellowship.<sup>18</sup>

By promoting funding for lower paid or unpaid public interest articles, the LSO would not only help address the disproportionate impact of the licensing crisis on racialized licensing candidates, but would also train more licensing candidates for social justice legal careers that improve access to justice in Ontario more broadly.

Further, FACL recommends that the LSO support racialized candidates in obtaining positions with small firm or solo lawyers, who in contrast to larger firms, may not otherwise have the financial capacity to support an articling position. Again, this builds on the University of Ottawa’s Small Firm and Sole Practitioner Fellowship,<sup>19</sup> and could also be conducted in partnership with the Law Foundation of Ontario. Such a program would not only increase the number articling positions available, but help smaller firms and sole practitioners strengthen and develop their own practices.

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<sup>15</sup> <http://www.lawfoundation.on.ca/what-we-do/fellowships/piaf/>

<sup>16</sup> <https://www.osgoode.yorku.ca/programs/juris-doctor/experiential-education/internship-programs/the-ian-scott-public-interest-internship-program/>.

<sup>17</sup> <https://www.law.utoronto.ca/student-life/career-development-office/sls-public-interest-advocacy-summer-fellowship>

<sup>18</sup> <https://commonlaw.uottawa.ca/en/students/career-and-professional-development-office/employers/fellowships>.

<sup>19</sup> <https://commonlaw.uottawa.ca/en/students/career-and-professional-development-office/employers/fellowships>

#### *4. Regulate course of the licensing placement*

FACL recommends the LSO more actively manage the quality of the placement experience for both the candidate and the employer/principal. This will help ensure that both parties are benefitting from the relationship, and that the licensing candidate is receiving the training required to become a productive member of the legal community.

Specifically, FACL recommends that the LSO regulate the conduct of principals to ensure more consistency and quality in practical training. This includes spot-audits, reviewing candidate feedback on general employment and human rights questions (with necessary explanation on how the questionnaire should be completed) and on whether the candidates are required to do anything that they are legitimately concerned is unethical. According to Lai-King Hum, one of the LSO Discrimination and Harassment Counsel (and former FACL President and former RODA Chair), many candidates are loathe to raise a complaint – either informally with their employer or formally with the Law Society due to the fear they would lose their placement as a result. We therefore recommend that the LSO take a critical role in ensuring that no adverse consequence to the licensing candidate results from any possible complaint.

Further, since many candidates who have grounds for making a formal complaint are uncomfortable doing so, we recommend that the LSO make tools and resources available to racialized candidates to personally manage the situation and overcome these circumstances. One option would be to make the Discrimination and Harassment Counsel (DHC) that the LSO offers to be more readily known to licensing candidates so that they may confidentially discuss their problem, weigh their options and feel they have support in their decision. Another option would be to offer limited ‘Helpline’ services available through the Member Assistance Program, which is currently only available to licensees.

We recommend that the LSO take very seriously properly documented reported complaints from licensing candidates, understanding that many more go unreported. We ask that the LSO ensure that principals and employers face real consequences for mistreatment of licensing candidates.

#### *5. Bar exams more effectively evaluate variety of skills required to be a lawyer*

Finally, FACL recommends that the LSO re-design the bar exams to more effectively assess the skills and competencies of lawyers, and to be a more meaningful test for entry into the bar. This includes evaluating a variety of verbal reasoning, intellectual and analytical competencies, beyond merely finding factual information, which the current exams tend to emphasize. Further,

a redesigned bar exam should also evaluate writing skills beyond the exclusive multiple choice format, as is done in other standardized exams, such as the Graduate Record Exams in the U.S.<sup>20</sup>

Candidates should also have access to more relevant support in studying for the exams (including a broader range of tutors and information about University-led bar exam courses). The substantial time and effort spent preparing for the bar exam should result in making candidates better lawyers, not simply better exam writers.

## **V. Conclusion**

Thank you for considering our submissions. Should you have any questions about this matter, we would be happy to discuss this with you further.

Respectfully,

Carissa Wong and Justin P'ng  
On behalf of the FACL Advocacy and Policy Committee

Lai-King Hum  
Former President, FACL and former Chair, RODA

Cc: Emily Lam  
Advocacy and Policy Co-Chair

Gerald Chan  
VP External Public

Michael Doi  
President

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<sup>20</sup> [https://www.ets.org/gre/revised\\_general/prepare/analytical\\_writing/](https://www.ets.org/gre/revised_general/prepare/analytical_writing/)