FEDERATION OF ONTARIO LAW ASSOCIATIONS
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Law Society of Ontario
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Via Email: PolicyConsultation@LSO.ca

To the Benchers:

Re: Submission on Mandatory Minimum Compensation for Experiential Training

The Federation of Ontario Law Associations ["**FOLA**"] represents the associations and members of the 46 county and district law associations across Ontario. Together with our associate member, the Toronto Lawyers Association, we represent approximately 12,000 lawyers. Most of our members are in private practice across Ontario, largely in sole practice and small- to medium-sized firms.

1. Overview

FOLA has reviewed the Experiential Training Enhancements report from the Professional Development and Competence Committee, dated November 26, 2021 ["**Report**"].[1] We write to provide our comments.

In general, we have concerns about the majority recommendations set out in the section of the Report on mandatory minimum compensation. Respectfully, these recommendations are misguided. Overall, we find the recommendation that "the LSO should not move forward with the implementation of mandatory minimum compensation for experiential training" is lacking in economic rationale and is inequitable.

This recommendation is also at odds with a number of commitments the Law Society has made to address diversity in the profession and remove barriers for equity-seeking groups.[2] In our view, it also does not adequately reinforce our regulatory commitment to competency. The Report's majority recommendation should be set aside for these reasons, as elaborated further below.

[1] https://lso.ca/about-lso/initiatives/lawyer-experiential-training-program-enhancements

[2] https://lso.ca/about-lso/initiatives/edi

2. Workers Should be Paid for their Labour

First, FOLA takes the view that workers should be paid for their labour. Articling is work, and like many internships and most apprenticeships,[3] it should be remunerated.

We support the enhancements adopted by Convocation in 2018 which would require a minimum wage for articling students. Most of the experiential training to which the Report refers is labour. This labour is monetized in the form of billable hours, at rates which far exceed the cost of taking on a student. Legal Aid Ontario provides for a $64.74 hourly rate for Students-at-Law;[4] the Public Prosecution Service of Canada allows students to be billed at a $54 hourly rate;[5] and most private retainers bill at even higher rates. Input we have received from legal clinics that do not bill, nonetheless supports minimum compensation.

To require anything less than minimum wage compensation is unacceptable and reflects poorly on the profession. We fear this will give rise to exploitation, abusive workplaces, and problematic industry practices at a time when our profession is grappling with a mental health wellness crisis. Licensees of the Law Society must be held to a higher standard than that, and our policies need to reflect these commitments.

While there is wide variability in the nature of articling positions, especially, the work undertaken is broadly akin to that which attracts employee protections.[6] In fact, the decision not to provide employment protections was an arbitrary one that was lobbied for by various bodies in the profession.[7] It has not aged well. Experiential placements – and articling, in particular – should be recognized as employment by the Law Society by requiring minimum compensation.

3. Removing Required Compensation Undermines Competency and Reduces the Quality of Placements

Second, the suggestion in the Report that removing minimum compensation requirements will eliminate or reduce barriers to securing experiential placements is flawed because it does not account for the quality of the placements it will generate.

Frankly, without a requirement for compensation, it is far more likely that some existing employers will reduce or remove compensation for these positions altogether. By removing the placement as a "cost centre" in the workplace, Convocation will be removing the economic incentive for the principal to provide a meaningful and productive work experience for the candidate and to integrate them into the work of the firm.

In our view, removing the requirement for minimum compensation does nothing to provide assurances of competency or to improve the quality of the placements available. A firm or lawyer principal that has no "skin in the game" is far less likely to provide a quality experience or meaningful opportunities to the candidate in their charge.

We are concerned by the majority's reasoning that the opposite will occur, and we find this to be at odds with economic sense. If the Law Society wants to create more articling opportunities with small firms and sole practitioners, it has other policy levers to do so, such as by offering preferable licensing fees for articling principals who practice in these settings.

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[3] https://www.ontario.ca/page/apprenticeship-ontario; https://thevarsity.ca/2020/01/19/interning-do-you-know-your-rights/

[4] https://www.legalaid.on.ca/lawyers-legal-professionals/accounts-billing/tariff-billing/

[5] https://www.ppsc-sppc.gc.ca/eng/aaf-man/02.html

[6] *Employment Standards Act, 2000* at ss. 1(2) and 3(5).

[7] Tweet thread by Louis Century: https://twitter.com/LouisCentury/status/1501931789501165576.

4. Removing the Requirement for Compensation is Inequitable

Third, FOLA has concerns about the inequities of the recommendation to remove requirements for minimum compensation.

As the Report notes, 10 to 15 percent of experiential training placements are paid below statutory minimum wage levels or are unpaid. This is not a trend that should be encouraged by Law Society policy.

These statistics are even more troubling in light of the Law Society's own acknowledgements in the report prepared by the Challenges Faced by Racialized Licensees Working Group, which observed that racialized licensing candidates were more likely than others to have struggled to find an articling position or training placement.[8] A 2020 study also found that racialized lawyers were more likely to be paid less than their non-racialized peers.[9]

Without mandatory minimum compensation, these problems will be perpetuated. Marginalized and equity-seeking groups will continue to face the greatest barriers to advancement. Without some guarantees of compensation, it is likely that we will continue to see these groups disproportionately represented among the unpaid and lowest paid.

We remind Benchers that the Law Society has adopted commitments to improve diversity and inclusion in the profession, as part of its statutory public interest mandate. Removing basic workplace entitlements and guardrails from the licensing process is not in keeping with those commitments.

5. Removing Compensation Erects Barriers to Joining the Profession

Fourth, we are concerned about the barriers the majority recommendation creates to joining the practice of law.

As Benchers know, the Law Society's lawyer licensing program fees have increased significantly in recent years. These new costs are on top of skyrocketing law school tuition, which is now regularly seeing graduates entering the licensing process with over $100,000 in debt. Requiring these individuals to spend almost a year in unpaid labour, at a time when these debts come due and they have no recourse to further post-secondary loans or financing, is highly inequitable, unfair, and irresponsible. This barrier forces early career licensees away from important work outside major population centres or helping the most vulnerable citizens of Ontario.

The Law Society has a statutory duty to maintain and advance the cause of justice, to facilitate access to justice for the people of Ontario, and to protect the public interest, yet successive Law Society actions have created new costs for lawyers or have not taken responsibility for the mounting costs of legal education.

FOLA shares the concern of other groups that if Convocation adopts the Report's recommendation, the Law Society will, again, be passing on costs to debt-burdened prospective licensees. These costs disproportionately fall on candidates from racialized and equity-seeking groups.

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[8] http://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

[9] https://www.canadianlawyermag.com/practice-areas/corporate-commercial/female-in-house-counsel-earn-an-average-of-19000-less-than-male-counterparts-study-finds/330216

6. There is a Broader Discussion to be had on Licensing Pathways

Finally, we call on Convocation to take a more robust and meaningful approach to its consideration of the lawyer licensing process that addresses the relationship between licensing and legal education.

It remains unclear why alternate pathways have been siloed within certain law schools, given the demonstrated success of the alternate pathways. It is noteworthy that there is a clear distinction between articling students and Law Practice Program candidates (at Ryerson University), who already have a law degree, versus Integrated Practice Curriculum students (at Lakehead University), who must complete placements as part of their degree requirements. The latter have their experiential training integrated into their law school curriculum, similar to a "co-op" placement. FOLA distinguishes this from the other experiential learning paths because it is part of a post-secondary education program (and, likewise, Lakehead prohibits compensation of its placement students).

FOLA suggests that the Law Society consider whether similar models can be implemented in other law school programs – as parallel streams to the traditional "JD plus articling" path or otherwise – in order to facilitate access to the profession. This would better address the serious equity, economic, and fairness issues we have raised in this submission and help to reduce the time needed to become licensed to practice. This, in turn, can reduce the cost to candidate.

Other reforms may be necessary which are less far-reaching. For instance, there may be policy mechanisms or financial incentives that can be introduced by the Law Society to create new experiential learning opportunities with sole practitioners and small firms. These policy choices would be far more equitable and less punitive for candidates.

7. Conclusion

In summary, FOLA calls on Benchers to set aside the Report's recommendation on minimum compensation. This recommendation is unfair and out of touch with Law Society's own goals of improving access to justice and addressing the barriers to joining the profession facing racialized licensees and other equity-seeking groups. If adopted, we fear that this recommendation will further erode competency standards and create new barriers to the profession.

We note that the entirety of the section of the Report on minimum compensation is prefaced on the view that "a mandatory minimum compensation creates a specific risk of losing placements in sole and small firm settings." FOLA *is* the voice of Ontario lawyers who practice in these environments. We take issue with the attribution of this comment in the Report and the inference that our members are unable or unwilling to compensate their employees or articling students fairly. This is not a policy recommendation that our member associations have advanced, and the majority's view should not be adopted on this basis.

We would be pleased to answer any questions you may have on this important subject.

Sincerely,

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