



October 12, 2018

## **TORONTO LAWYERS' ASSOCIATION'S SUBMISSIONS TO THE LAW SOCIETY OF ONTARIO REGARDING OPTIONS FOR ENHANCED GOVERNANCE EFFECTIVENESS**

The Toronto Lawyers' Association ("TLA") is the voice of its 3,700 members who practise law in all disciplines across the Greater Toronto Area. The TLA is pleased to provide comments to the Law Society of Ontario ("LSO" or the "Law Society") regarding options to update the LSO's governance.

As a preliminary note, the TLA commends the LSO for embarking on this review for governance reforms, with the aim of achieving greater effectiveness, efficiency, diversity and inclusiveness in our governing body. As noted in the Governance Task Force's February 2018 report to Convocation, LSO's board structure and its governance process vary from other self-regulated organizations, and there appears to be a trend towards smaller, more streamlined governance. This suggests that the LSO may also be able to fulfil its legislated mandate more effectively, efficiently and inclusively.

What follows are the TLA's comments on the four categories of proposed governance changes:

- A. Board size and composition;
- B. Treasurer's term;
- C. Benchers' terms; and
- D. Terminology.

### **A: Board Structure: Size and Composition**

Currently, Convocation has 90 members made up of 40 elected lawyer Benchers (20 from Toronto, and 20 from outside Toronto), 5 paralegal Benchers, 8 appointed lay Benchers, The Treasurer, the current Attorney General and another 35 *ex officio* Benchers. The ratio of lawyer Benchers to paralegal Benchers is 8:1. The *ex officio* Benchers are made up of life Benchers, former Treasurers and former AGs. The practice of making *ex officio* Benchers ended in 2010 and all such positions would be phased out by 2023, leaving a Convocation of 55 Benchers.

In its August 2018 Call for Comments, the Governance Task Force recommended a smaller board size, which the TLA supports.

The current size of Convocation is unnecessarily large and results in increased costs and inefficiencies. However, in our view, the excess membership largely is as a result of the lay and *ex officio* Benchers. Given the number of lawyers and paralegals in Ontario – which is far greater than in other provinces – a larger Convocation than in other provinces is necessarily required to effectively manage its diverse affairs, otherwise some tasks currently assumed by Benchers would have to be transferred to employed staff, which would defeat the purpose of improving efficiencies, and simply result in greater bureaucracy, which the TLA does not endorse.

In our opinion, a Convocation of 30 Benchers, reflecting the current 8:1 ratio of lawyer to paralegal Benchers, would be appropriate. This would be comprised of:

- 9 lawyer Benchers from outside Toronto (the person achieving the highest votes in each region),
- 9 lawyer Benchers from Toronto,
- 9 additional lawyer Benchers (who are those achieving the next highest number of votes, regardless of where in the Province they are located) and
- 3 paralegal Benchers.

One of the lawyer benchers will assume the role of Treasurer or Chair, as discussed below.

It is the view of the TLA that maintaining regional representation among the lawyer Benchers is essential to the good governance of the profession. The differences in the practice of law inside and outside of large centres, including in particular Toronto, are well-known. Regional voices need to be preserved to ensure that issues relevant to lawyers in each sector of the province are recognized and heard. Indeed, maintaining representation from each part of the province is an important method of encouraging diversity in Convocation, since the issues and concerns of smaller centres and more remote regions are markedly different than those in Toronto. The TLA expresses no view on regional representation of paralegals.

The TLA is of the view that institutional knowledge is highly important for Convocation to run effectively, with seamless transitions between elections. To that end, and as further discussed below in section C, it is our view that term limits for Benchers should not be reduced to fewer than eight years total (with two consecutive four-year terms). This allows sufficient time for new Benchers to become familiar with Law Society operations and issues, and to see most projects and committee work through to completion. With term limits of either three three-year terms or two four-year terms, the maximum time that any Bencher could be in service would be under 10 years, which is sufficient to maintain institutional knowledge, but will also allow opportunities for new Benchers to join Convocation within a reasonable amount of time.

The TLA supports doing away with government appointment of lay Benchers, or else reducing the number and proportion of such Benchers on Convocation. . Government appointments defeat the intent and purpose of a self-governing professional body, as they add individuals who may not understand the complexities of practicing law, and whose own experiences may not be translatable. Government appointment of lawyers or paralegals could result in appointed Benchers who feel themselves to be beholden to advance the priorities and objectives of the government who appointed them. This potential or perceived conflict of interest or lack of independence should be avoided, and is contrary to the objective of maintaining an independent legal body that can steadfastly uphold the rule of law, and maintaining public confidence in the Law Society. That being said, should the practice of government appointment of lay Benchers be continued, it would be appropriate to reduce the number and proportion of government-appointed lay Benchers on Convocation. A Convocation made up of a vast majority of elected lawyer and paralegal Benchers better serves and reflects the professional self-governing nature of the Law Society.

The TLA does not favour LSO-appointed Benchers. There is a risk that such appointments could become political. As compared to elections, appointments are a less transparent process for filling positions on Convocation. Accordingly, in the interest of transparency, appointments should be eliminated, or at least kept to a minimum. Any appointment that is made should be made on the basis of clearly defined selection criteria, by a publicly transparent process, and with appropriate consideration given to the need for relevant knowledge, competence, integrity, and diversity.

As the general makeup of the profession is changing and becoming vastly more diverse than it was 20 or 30 years ago, the TLA is hopeful that Convocation will also begin to reflect the more diverse members of the profession and the community. In the meantime, one means of encouraging more diversity in the governance of the profession would be for the LSO to include non-Benchers in its committee work. These LSO-appointed positions, unlike elected Benchers, would be for specific, time-limited projects, and candidates would be selected from a self-nominating process, with careful vetting. This would provide opportunities to introduce the workings of the Law Society to more and diverse practitioners, and would remove some of the mystery regarding its operations. Committee memberships would also provide opportunities for more licensees to show a demonstrated ability and interest in the Law Society governance, increase their profile, and pave their way to election as a Bencher for those so inclined.

Finally, if the LSO wishes to attract a more diverse membership in Convocation, then one of the best ways that it can do so is by making the position economically tenable. The total time commitment required to fulfil the role of Bencher is enormous, and with a smaller board, the time commitment will necessarily increase. The result is that only well-established lawyers or those at firms that can support a lawyer's absence from remunerative work for a substantial portion of the year will run for the position of Bencher. For everyone else, the commitment is economically untenable. The current stipend is not sufficient to compensate younger lawyers, or those with small or solo practices for

the lost billing revenue and time away from running or developing their practices - not just in respect of the days spent in Convocation - but also for all the preparation time and time spent on committee and task force work, which amounts to hundreds of hours annually. A well-publicized and set annual fee payable to each Bencher would assist in encouraging more diversity in those running for election, and make the position more accessible to a larger number of candidates.

## **B: Board Structure: Treasurer's Term**

### **B.1. Should the Treasurer's term be an elected one year, an elected two years or structured as part of a ladder system to the office of Treasurer?**

The TLA believes that the Treasurer's term should be structured as part of a ladder system. This would allow the Treasurer to benefit from greater education in advance of taking on the role, as well as gaining more support during her or his term. The TLA agrees with the Committee that such a structure would provide the benefits listed under Option 2 of this section, namely:

- Enhanced continuity at the board executive level;
- Enhanced learning opportunities and supports for incoming Treasurers; and
- Greater opportunities to consider delegation of certain Treasurer ceremonial or other responsibilities to others.

The role of Treasurer is a busy one. Having a ladder structure would allow the Treasurer to share the heavy commitment schedule while at the same time familiarizing herself or himself with governance matters – “learning on the fly” so to speak, over a longer period of time. With a ladder system, the Treasurer will have spent a year or two preparing for the role by being engaged in the governance of the LSO at a much deeper level than as a Bencher and without the same level of commitments that the current Treasurer has. It would also allow the Treasurer the opportunity to benefit from the assistance of one or two other executive members, which could add a diversity of views and skills to decision-making.

The TLA believes that such a new structure would serve the LSO, its members and the public well.

### **B.2 If a ladder is favoured, which option is preferred?**

It is our view that the preferred option for a ladder structure is Option Three – two Vice-Chairs and a Chair (to use the nomenclature in the Call for Comment). This structure is similar to legal organizations such as the TLA and the Ontario Bar Association whereby before becoming President, that person spends at least two years in executive level positions. The benefits are as outlined above, particularly much earlier engagement in governance issues and deeper knowledge about the roles and responsibilities of Treasurer/Chair in advance of assuming the role.

The advantage of Option Three over Option Two is that the focus is on the learning process for two years in advance of taking on the role of Treasurer/Chair, and leveraging off of the energy and enthusiasm that comes with advancing towards the role of

Treasurer/Chair. The responsibilities and workload of the Treasurer are significant. It is more likely that Vice-Presidents will be engaged and energized about their roles than a Past-President might be who may instead be ready to disengage from the Society and return to focusing on her practice after many years of service to the LSO and a very busy term as Treasurer. As the Committee points out, this ladder option also avoids the opposite problem that could arise of a Past-President not stepping back to allow the new President to fully take on the role and make it her own.

### **C: Board Structure: Benchers' Terms**

**Should the term limits of 12 years for service as a Bencher remain the same or be reduced to eight years (two four-year terms), nine years (three three-year terms), or some other limit?**

The TLA favours reducing the term limit for Benchers from the current limit of 12 years. A 12-year limit appears to be too long for effective Board renewal, and is longer than the term limits in other provincial law societies as well as the term limits in all of the organizations surveyed by Carol Hansell for the Law Society (the "Hansell Report"), as noted in the Call for Comment.

In our view, paring the term limit for Benchers to either two four-year terms, or three three-year terms is preferable to maintaining the status quo. The main advantage of four-year terms is that they provide elected Benchers more time, during a term of service, to complete any projects they are working on. That being said, the Hansell Report found that three-year terms are more common than four-year terms, which suggests that three-year terms work well for many organizations in ensuring that board members remain dedicated, focused and fresh when they serve.

Notwithstanding our support for reducing Benchers' term limits, the TLA does not support reducing the term limits to two terms of three years' duration. While six years is sufficient to ensure a degree of continuity and institutional memory of Benchers, and in many cases will be as much time as a Bencher will be prepared to commit to LSO duties, those who are strongly committed to serve at Convocation should not be denied the opportunity to serve a third term. Moreover, we anticipate that those who are chosen for the Executive roles of Vice-Chairs and Chairs would be best chosen from those with greater institutional knowledge than three years in Convocation. Additionally, in some of the more remote regions of the Province, there are very few candidates who volunteer for this onerous commitment. Excluding willing and capable representatives from the regions after six years may be counterproductive.

### **D: Terminology**

The Law Society has made great strides recently towards demystifying itself and the profession. In keeping with its mandate to be open and transparent, to protect the public, and to ensure the future of self-regulation the LSO has recently taken a number of positive steps which make it more accessible. Examples include:

- The name change from Law Society of Upper Canada to Law Society of Ontario;

- The establishing of the disciplinary body, the Law Society Tribunal, as a separate entity with its own offices, staff and policies;
- The enhancement of both the LSO and Tribunal websites to make those sites user friendly to non-lawyers, and to allow the public to obtain information about the profession and individual lawyers that would, in the past, have been inaccessible and therefore unknown.

The TLA agrees that it is time to shed the colonial vestiges from the profession. Since the main goal of the Society is protection of the public, then LSO must continue to modernize not only its use of technology and approaches to management, but also its use of language. The language must be clear and unambiguous to the public. Even younger or foreign trained lawyers are often confused by the current use of terms like Benchers and Convocation. We must also remember that in Ontario, and particularly in the GTA, an increasing percentage of our population does not speak English as its first language. These are often the members of the public most taken advantage of by unscrupulous or incompetent licensees, or those holding themselves out as licensees when they are not, and these vulnerable people are the most in need of the LSO's protection. The process of seeking help from LSO should be as easy as possible, including understanding who to contact in the event of a complaint, and for those who are practicing licensees, understanding by whom and how they are regulated.

Those of us old enough to remember can recall that when certain "politically correct" language came into fashion in the 1980's that those who bristled at it or refused to understand it were told that language affects thought, and therefore the use of certain language would ultimately change the way we thought about certain ideas or groups. Many of those words we were trying to change we now universally see as harmful. What was once politically correct is now simply correct. There is no easier and more practical place to follow the LSO name change than with the names we assign to those who govern the profession.

In simple terms, Convocation is analogous to a board of directors. Benchers are directors. We should just say so. This would eliminate any confusion at all.


The term Treasurer is also both outdated and confusing. To the vast majority of people, whether the public, or members of our profession, a treasurer is one who looks after the finances. In corporate law, the treasurer is an officer, below the president and vice president. In the LSO governance structure, however, the LSO Treasurer is the figurehead and leader not only of Convocation but of the LSO. The Treasurer is the public and political face of the LSO. It is time to scrap the term and replace it with what it really is, which is president or chair. The TLA prefers the term Chair, as president sounds too corporate, and implies powers the treasurer does not actually have. Chair sums up what the role actually entails, which is to be the head of the board and public face of the organization.

For the foregoing reasons, the TLA voices its support for the following:

1. "Convocation" to be renamed "Board of Directors";
2. "Benchers" to be renamed "Directors";
3. "Treasurer" to be renamed "Chair".

In closing, the TLA appreciates the opportunity to comment on ways to enhance LSO's governance effectiveness. The TLA looks forward to a continuing discussion with the LSO as it undertakes this important endeavour, and would be pleased to provide further feedback or address any questions that you may have.

Sincerely and on behalf of the Toronto Lawyers Association,

A handwritten signature in blue ink, appearing to read "Dirk Derstine". The signature is stylized with a large loop and a long tail.

Dirk Derstine  
President, Toronto Lawyers Association