



Law Society of Ontario
Governance Task Force Call for Comment:
Options for Enhanced Governance

Date: October 19, 2018

Submitted to: Governance Task Force, Law
Society of Ontario

Submitted by: The Ontario Bar Association



ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien



Contents

Introduction	1
The OBA	1
The Call for Comment.....	1
Size and Composition of Convocation.....	2
<i>Ex Officio</i> Benchers.....	3
Elected Lawyer Benchers	4
Law Society Appointments	7
Other Considerations in Effective Law Society Governance	8
Terms, Term Limits, and Terminology	9
Treasurer's Term	10
Bencher Term.....	10
Bencher Term Limits.....	10
Terminology: Convocation, Treasurer and Bencher.....	10
Conclusion.....	11



Introduction

The Ontario Bar Association (the “**OBA**”) appreciates the opportunity to comment on issues raised by Governance Task Force (the “**Task Force**”) of the Law Society of Ontario (the “**Law Society**”) in the Task Force’s Call for Comment Paper (the “**Call for Comment**”) titled “Options for Enhanced Governance Effectiveness.”¹

The OBA

Established in 1907, the OBA is Ontario’s largest voluntary legal advocacy organization, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA routinely provides expert advice to the Law Society on matters that affect the administration of justice in Ontario in the interest of the public and the profession.

In preparing this submission, the OBA has sought input from our provincial council of members representing a critical cross-section of the bar, including senior and junior lawyers from managing partners to new calls, who practice across Ontario as solicitors and barristers in solo, small, medium and large firms from all eight judicial regions of the province, and in all 40 of the OBA’s practice sections.

The Call for Comment

The Governance Task Force was established in September of 2016 to review and make recommendations respecting the Law Society’s governance structure with a view to achieving the goals of transparency, inclusiveness, effectiveness, efficiency, and cost-effectiveness.² The Task Force report to Convocation in February 2018 outlined planned

¹ Law Society Task Force, Call for comment: Options for Enhanced Governance Effectiveness, August 9, 2018 (<https://lawsocietyontario.azureedge.net/media/lso/media/about/gtf-call-for-comment-paper-en.pdf>).

Please note that for the purposes of this discussion, we will refer to the component parts of the Law Society’s governance structure by their current (status quo) names and/or titles. This is by no means indicative of the OBA’s preferences in this regard, which are outlined later on in this document.

² Treasurer’s Report to Convocation, September 22, 2016 (the “**Treasurer’s Report 2016**”) (<http://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocation-september-2016-treasurer-report.pdf>) at p. 353.



areas of focus following a benchers survey/meeting on governance issues, including the exploration of process and structural issues.³

Through the Call for Comment, the Task Force now seeks input on the following:⁴

- A. A smaller size for the Law Society's board (Convocation) and changes to the composition of the board;
- B. Changes to the Treasurer's term;
- C. Changes to the term and term limits for benchers; and
- D. New terminology that better reflects the Law Society's governance structure.

Our response to the Call for Comment is divided into three parts. In the first part of our response, we address the Task Force's discussions with respect to the size and composition of Convocation. In the second part of our response to the Call for Comment, we address other considerations that must be addressed to achieve the Task Force's stated goals. Finally, in the third part we address the Task Force's consultation with respect to terms for benchers and the Treasurer, term limits for benchers, and new terminology for elements of the Law Society's governance structure.

Size and Composition of Convocation

Although the Task Force has made "no final recommendations", the Call for Comment notes the Task Force's clear view that "a smaller membership for Convocation is necessary."⁵ In reaching this conclusion, the Task Force references the Hansell Report findings that:

- a. Convocation is significantly larger than almost all boards in the comparator group;
- b. Convocation is "unusual" by virtue of the inclusion on a board of *ex officio* and honorary directors;
- c. three year terms for directors are more common than the four year terms currently in place for elected benchers; and,

³ Governance Task Force 2016, Report to Convocation, February 22, 2018 (the "**February Report**") (<http://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/2/2018-feb-convocation-governance-task-force-report.pdf>) pp. 1-2.

⁴ Six items were proposed in the February Report, four of which are reflected in the Call for Comment: (a) Models for an appropriate smaller size for Convocation; (b) The appropriate board structure; (c) Changes to the composition of the board; and (d) The appropriate terms for the Treasurer and benchers. Two items are excluded from this list: (a) Committee structure and membership, and conduct of board and committee meetings; and (b) Governance and conduct policies for board members.

⁵ Call for Comment at p. 2 and p. 4.



- d. a twelve year term limit for elected benchers is longer than the term limits in any organization in the comparator group.⁶

The Task Force states it is focusing on the following with respect to assessing board structure:

- The best process to achieve the level of diversity, professional expertise and governance experience needed for the Law Society's board;
- The appropriate number on the board of the Law Society to meet this goal;
- The operational expertise of the organization;
- The processes developed to engage with and obtain knowledge required for effective governance from all stakeholders;
- Options for the structures that will enable all required perspectives for effective governance to be accessed with the efficiency of a reasonably sized board; and
- Reviewing the need for *ex officio* board positions as a function of effective, efficient governance.⁷

OBA Council members have expressed broad support for the Law Society's objective of enhancing the governance effectiveness of Convocation and they recognized the inherent challenges in meeting the above stated objectives with the current 90-member Convocation. Members generally agreed with the Law Society's view that a smaller Convocation could provide a more streamlined governance structure to achieve greater effectiveness and efficiency, while encouraging diversity and inclusiveness.

The Call for Comment solicits feedback on several specific approaches to reduce the size and composition of Convocation, which are addressed in the following section.

***Ex Officio* Benchers**

The examples presented in the Call for Comment are premised on a structure in which all current *ex officio* and emeritus benchers would be phased out by 2023.

This change reflects the Task Force's view that while *ex officio* benchers collectively provide experience and institutional memory, participation as board members is highly unusual and that the input of those constituencies might be better captured through other means, for example, through membership on restructured policy committees.

⁶ February Report at p. 4.

⁷ Call for Comment at p. 3.



Although the Task Force has not specifically sought input on the elimination of *ex officio* and emeritus benchers, we note that as part of our discussions, OBA Council members did not express any strong support for maintaining *ex officio* positions as part of Convocation.

This change alone is expected to reduce the size of Convocation from 90 to 53 benchers.⁸

Elected Lawyer Benchers

A significant option raised in the Call for Comment is to further reduce the size of Convocation by reducing the number of elected lawyer benchers.

Although our members were broadly supportive of a smaller Convocation, we also heard significant concerns about the potential effects of reducing the number of elected benchers, especially the potential for adverse impacts on diversity and regional representation, as described below.

(i) Diversity

Over the past few years, the Law Society has recognized the pressing need to identify and overcome longstanding barriers facing racialized licensees, including the adoption of specific initiatives designed to accelerate culture shift; measure progress; educate for change; implement supports; and lead by example. The OBA has expressed support for the Law Society's efforts and made a commitment to actively promoting equality, diversity and inclusion ("EDI") within our organization and throughout the legal profession.

In keeping with the Law Society's commitment to EDI, the Task Force has specifically identified the need to improve the Law Society's corporate governance to achieve greater effectiveness and efficiency, while encouraging diversity and inclusiveness.

In contemplating changes to the structure of Convocation, the Call for Comment and earlier Task Force reports unfortunately provide little commentary on the composition of the current and prior Convocations through the lens of equality, diversity and inclusion, or the potential effects of any contemplated reforms on bencher diversity.

⁸ Call for Comment at p. 4. The Call for Comment estimates (at p. 3) that five former Treasurers, two Emeritus Treasurers and 10 life benchers typically attend Convocation. The specific categories that the Law Society proposes to phase out include all relevant categories of life benchers, former treasurers, and former Attorneys-General.



Although in 2016, the Law Society proposed to conduct an internal diversity assessment of the bench composition and publicize the results as part of its strategic plan, at present we understand that work has not yet been undertaken/completed.⁹

We note that at least one academic commentator has conducted a qualitative assessment of the demographic and professional diversity of Convocation following the most recent bench election in 2015. As part of his assessment, Professor Noel Semple found that while Convocation has historically lacked diversity, “non-white members and women were elected in numbers proportionate to their shares of Ontario lawyers in the 2015 election.”¹⁰

Considering these developments, a number of OBA Council members raised concerns about the potential adverse impact on diversity of reducing the number of elected bench positions. In particular, our members expressed an apprehension that reducing the number of elected positions (and thereby increasing competition for the remaining positions) would have a disproportionately negative effect on bench candidates from historically marginalized populations. The Task Force seems to recognize the potential that a smaller component of elected benchers might reduce representative diversity by suggesting that LSO bench appointments could address the greater need to ensure diversity and expertise in a smaller board.¹¹

In voicing this concern, our members recognized that the recency of outcomes from the past few bench elections limits their predictive utility – serving more as an encouraging sign rather than a reliable projection of future outcomes. Members also recognized that the outcomes don’t conclusively identify any number of elected bench positions necessary to either support or impede diversity in future elections.

⁹ Treasurer’s Report 2016 at p. 353. See also *Challenges Faced by Racialized Licensees Report* at p. 4 (<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>).

¹⁰ Noel Semple, *Male, Pale, and Stale? Diversity in Lawyers’ Regulatory Leadership* (Available at SSRN: <https://ssrn.com/abstract=2623743>) (Semple). Professor Semple states that “[t]he 2015 election was either a historical anomaly, or a breakthrough for non-white candidates. The nine candidates who were elected constitute 22.5% of the total, which exceeds their share among Ontario lawyers. This figure remains below the 26.2% share that visible minorities and aboriginals together hold within Ontario’s population according to the 2011 census” (p. 15). Professor Semple also finds that “[t]he diverse employment contexts of the province’s lawyers were also fairly well represented in the 2015 class of Benchers”, although he notes that “one constituency -- early career lawyers -- was completely unrepresented in the Law Society’s elected leadership” (p. 2).

¹¹ Call for Comment at p. 6.



However, even if the limited evidence precludes a conclusion that diversity would unavoidably be diminished by fewer elected positions, our members felt that the recent improvements in bench diversity and the risk of reintroducing barriers to historically marginalized populations counselled strongly against reducing the number of elected lawyer benchers at this time.

(ii) Regional Representation

The Call for Comment offers several examples of potential governance scenarios with fewer elected benchers, which have potential implications for the number of benchers outside Toronto and the process by which they are elected.

The first scenario provides for 53 benchers (i.e., the current composition of Convocation excluding *ex officio* and emeritus benchers), which would include 40 elected lawyers (20 inside and 20 outside of Toronto). The second scenario provides for 40 benchers, which would include reducing the number of elected lawyers to 24 (12 inside and 12 outside of Toronto). The third scenario provides for 30 benchers, which would include reducing the number of elected lawyers to 16 (8 inside and 8 outside of Toronto).

The Task Force states that for the first two scenarios above, “if prescribed geographic diversity is to be preserved, with the eight electoral regions and at least one bencher elected from each region, this would require a larger board than might typically exist for legal or other professional regulators.”¹²

In 2013, the OBA made a submission to the Law Society Bencher Election Working Group supporting the continuance of the regional bencher election scheme. The OBA’s submission was that effective regional representation on Convocation is important in order to properly fulfill the Law Society’s public-protection mandate; to instill confidence in the regulator; and to provide a known and trusted liaison with the Law Society. The regional bencher election scheme facilitates effective regional representation because lawyer voters in a given region are in the best position to understand the particularities and needs of the public they serve, and are in the best position to determine the lawyer amongst them who has the understanding of community needs and realities that is necessary to fulfill the three key regional representation roles.¹³

¹² Call for Comment at p. 5.

¹³ OBA, *Proposed Modifications to the Election of Regional Benchers* (October 3, 2013).



The Task Force presents the three scenarios in the Call for Comment “for illustrative purposes” and notes that “the Task Force continues to consider various potential board structures for recommendation.”¹⁴ Without further information, our view is simply that the Task Force should not recommend changes to Convocation that would diminish regional representation, including eliminating the current regional bench election scheme.¹⁵

Law Society Appointments

The Task Force states that it is exploring the potential for LSO appointed benchers as a way to achieve greater diversity across elements such as age, race, gender, location, area of practice, size of practice, board experience, community association and language. The appointed members would be full voting benchers for the same term as elected or government-appointed benchers. The Task Force also notes that it is considering what would be an appropriate scheme for making any such appointments, including a nomination/application and selection process.

The specific appointment process would be a significant element in evaluating the advisability of any appointment power, especially in terms of the Task Forces’ criteria of transparency and inclusiveness. However, as part of our consultations, OBA Council members did express some overarching concerns about the addition of LSO appointments as a way to enhance governance effectiveness.

Broadly speaking, our members favour a system that democratically elects a Convocation that reflects the diversity of the profession and public it serves. Although appointments might serve as a supplementary approach for board appointments if the existing system continues to fall short of a reflective demographic, our members noted significant drawbacks that militate against their use when compared to elected positions, in light of the recent bench election that was encouraging in respect of the diversity outcomes.

Although by design an appointment power can directly target specific characteristics, expertise or experiences, our members were concerned about pressure upon such appointees to unduly focus their role on representing the characteristics or experiences

¹⁴ Call for Comment at p. 4.

¹⁵ Semple, supra note 10, at p.24 suggests that eliminating the regional bench election [over the past 5 bench elections] “would have elected a more demographically diverse Convocation because female, non-white, and early-career candidates are more likely to run in Toronto than outside of the city... Unfortunately, these benefits would come at the expense of geographic diversity ... leaving non-Toronto lawyers under-represented relative to their numbers in the profession.”



that formed the basis for their appointment. By contrast, the current approach more naturally encourages those elected at-large to bring the whole of their life and professional experiences to bear on their decision-making duties as a benchers. Apart from any expectation for an appointee to limit their scope of participation, some members were concerned about a negative public perception that such benchers were appointed to serve special interests rather than to uphold the Law Society's regulatory mandate.

Given the demographic results of the recent benchers elections, which show improvement in the diversity of elected benchers, our members viewed Law Society benchers appointments as offering little benefit in the face of some significant risks.

Other Considerations in Effective Law Society Governance

OBA members recognize that good governance structures can support effective oversight of an organization but that transparent, inclusive, effective, efficient, and cost-effective decision-making depends on more than an effective board structure, which is the focus of the Call for Comment. Indeed, the Task Force's mandate recognizes that this is but one element of effective governance.¹⁶

In our view, the Task Force must assess the need for structural reforms outlined in the Call for Comment within the broader context of ensuring that when Convocation considers issues, benchers have a thorough understanding of the relevant information, options and advice needed to facilitate effective decision-making. There is a strong sentiment within a number of practice areas, including real estate and family law, that their expertise and advice often fails to be effectively represented in Convocation decision making. Some benchers will be subject matter experts in a particular area of practice, or regulatory issue facing the Law Society, at the time their benchers term commences. However, given the broad and diverse nature of legal practice across Ontario, many benchers will not be experts on the issues under consideration. Accordingly, it is incumbent on the Law Society to facilitate appropriate pathways for benchers to gain the insight and understanding necessary to meet their regulatory mandate.

As the Task Force notes, this may include comprehensive governance policies to articulate expectations for benchers conduct as a board member but it also includes a broader commitment to ensuring that there is a robust and proportionate analysis of issues, driven

¹⁶ See the Task Force's Scope of Work and Terms of Reference, Treasurer's Report 2016 at pp. 353-355.



by strong policy research and effective consultation with the relevant Law Society constituencies.¹⁷ Ensuring fully informed decision-making is especially vital given the breadth of practice types and areas that serve the public in Ontario and the Task Force's overarching desire to reduce the size of Convocation.

With over 40 practice sections and committees, the OBA routinely brings together lawyers with the relevant expertise to thoroughly consider problems and develop effective solutions that support the Law Society's regulatory mandate. The Law Society frequently considers important regulatory issues in areas where the expertise and direct client experience of practicing lawyers is critical to informing Convocation's analysis and decisions. For example, in the past year, the Law Society has addressed numerous topics in which effective decision making necessitates the input of practicing lawyers from the real property, family and insurance bars.¹⁸ It should go without saying that the objective of effective consultation is to achieve better transparency, inclusiveness, effectiveness, efficiency, and cost-effectiveness. A commitment to properly seeking the views of those who have critical practice experience will not ensure specific outcomes, but instead ensure that those entrusted with Convocation's decision-making powers are in a position to exercise that responsibility in a way that fulfills the Law Society's public-protection mandate and instills confidence in the regulator.

Terms, Term Limits, and Terminology

The Call for Comment sets out several questions with respect to changes to the Treasurer's term; changes to the term and term limits for benchers; and new terminology that better reflects the Law Society's governance structure.

In order to assess the potential for a consensus around any of the proposed options, the OBA received input from our Provincial Council members. The input was received according to the categories set out by the Task Force, recognizing that some of the

¹⁷ In its 2017 report, the Task Force notes the need for enhanced bencher training. In the Call for Comment, the Task Force notes an intention to co-ordinate the Law Society Policy Division's work on enhancing policy development processes with the governance review.

¹⁸ There are numerous cost effective opportunities to enhance critical stakeholder input. For instance, in response to longstanding concerns from the real estate bar, the Law Society created a Real Estate Liaison Group (RELG), which is chaired by a Law Society bencher and includes representatives of the OBA, FOLA, and LawPRO. The RELG has met since 2014 to proactively address issues of concern in the interests of the public and the profession. The OBA notes the need to ensure that key stakeholders are consulted through mechanisms like the RELG, as well as the overarching need to ensure stakeholder input is received and considered by Convocation in a timely way.



questions and answers should be considered together to ensure the consistency and practicality of the system as a whole (e.g., the bencher term of service and term limit for service).

Treasurer's Term

Although most of our Council members were receptive to a change in the Treasurer's current term of office, members did not express a clear preference for any of the options referenced in the Call for Comment. Roughly an equal number of members favoured a 2-year term and each of the two Task Force options of a 3-year ladder (i.e., the ladder ending with the term as Treasurer and the ladder ending with the term as Past-Treasurer). Approximately half of those favouring a 2-year term also believe the term should fall entirely within a single bencher term (e.g., years 1&2 or years 3&4 of a four year bencher term).

Bencher Term

Approximately two-thirds of members supported reducing the bencher term of service to 2 or 3 years, with one-third supporting the status quo (4 years). Of those preferring a shortened term, 3 years was preferred over a 2 year term. Members expressed various rationales for this change, including the belief that a shorter bencher term would help encourage and focus bencher engagement and provide greater opportunity for new benchers to be elected, which could increase diversity in Convocation.

We note that the Call for Comment does not canvass the costs of more frequent bencher elections. Given the lack of a clear preference on the options advanced by the Task Force, the Law Society should further consider the impact on decision making ability occasioned by more frequent transitions and the cost effectiveness of any bencher term related changes (e.g., the extent to which shorter terms increase electoral costs for the Law Society).

Bencher Term Limits

Almost all of our Council members favoured a reduction of the current 12 year term limit for benchers. Of the options presented, an 8 year term limit was preferred to a 9 year term limit by an almost 2 to 1 margin, although this likely also reflects members preferences for either a 2 or 4 year term and a 3 year term respectively.

Terminology: Convocation, Treasurer and Bencher

About two thirds of Council members preferred to change both the name of Convocation and the title of "Treasurer" to some other option based on the discussions presented in the



Call for Comment. By contrast, half of respondents preferred maintaining the title of “bencher” for members of Convocation.

On a preliminary basis, the results may be viewed as evincing support for a more descriptive naming of the institutions and roles that are most visible to the public. This captures some of the rationales underscored in the Law Society name change and the anticipated public awareness campaign. By contrast, the need for a new name to describe the individuals that collectively form Convocation is perhaps viewed as a less pressing public interest objective.

Conclusion

The OBA appreciates the opportunity to comment on the important issues presented in the Call for Comment, and looks forward to further engagement on this topic as the Task Force moves forward with its work.