

Articling and Access to Justice

Submission to the Law Society of Upper Canada's Articling Task Force, Responding to the *Consultation Report*, December 2011

Submitted by the Ad Hoc Working Group on Articling and Access to Justice, Faculty of Law, University of Ottawa

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Executive Summary

The Law Society's Articling Task Force was formed as a result of broad concern about a shortage of articling positions in Ontario. The key message of this submission to the Task Force is that the most significant challenge facing the professional licensing system in Ontario is not a general shortage in articling positions. Rather, there is a specific shortage of *access to justice-oriented* articling positions and, in turn, a shortage of pathways to careers in access to justice-oriented lawyering.

This submission supports proposals for reforming the professional licensing system to take account of the general shortage in articling positions and, more broadly, to address concerns over fair access to the legal profession. We submit, however, that priority should be given to those proposals that would ensure that the reformed system makes a significantly greater contribution to improving access to justice in Ontario.

The need to prioritize reforms that improve access to justice arises from the Law Society's own statutory mandate. Specifically, section 4.2.2 of the *Law Society Act*, RSO 1990, c L8 states that "[t]he Society has a duty to act so as to facilitate access to justice for the people of Ontario." In addition, the *Canadian Charter of Rights and Freedoms* applies to the Law Society and the s. 15 guarantee of equality would clearly require the Law Society to eradicate inequality in access to articling positions and also, arguably, requires the legal profession to bear the primary burden of ensuring equality of access to legal services.

It is now generally accepted within and beyond the legal profession that Ontario has a significant problem of lack of access to justice. This has been bolstered by recent empirical studies that quantify unmet legal needs in relation to so-called 'everyday legal problems'. The general problem of lack of access to justice is principally caused by the reliance on private market forces to deliver legal services. Significant numbers of people cannot afford private market rates but, at the same time, do not qualify for legal aid or public legal services because those sectors are underfunded and eligibility criteria are tight. This situation is then exacerbated by the 'greying of the bar', which is expected to lead to a net decrease in lawyers serving everyday legal needs, especially outside the main urban centers.

The current operation of the articling system contributes to the lack of access to justice in that there are only a small proportion of articling positions available in public or private settings serving everyday legal needs. This means not only that the relatively cheap labour of articling students is not being harnessed to improve access to justice but also that law graduates have only a very limited pathway to careers in access to justice-oriented lawyering. The main cause of the shortage of access to justice-oriented articling positions appears to be the economics of sole and small firm practice (who are the main providers of legal services for everyday legal problems) – too few can afford to offer articling positions. At the same time, would-

be articling students are leaving law school with significant debts, which affects their ability to freely choose among articling opportunities and acts as a disincentive or outright barrier to accepting low-wage positions. As well, far too few articling positions are offered in legal clinics and by government departments and agencies, considering the numbers of lawyers practicing in those sectors. In addition, the persistent (and apparently worsening) disproportionate under-placement of equality seeking group members in articling positions raises issues of discrimination, inequality and access to articling which need to be addressed in their own right (and may also contribute to unmet legal needs in corresponding communities).

In our view, in considering reforms to articling, and to the professional licensing system more generally, the Law Society ought to give priority to those reforms that will do the most to improve access to justice. However, in our assessment, some of the Options set-out in the Consultation Report will not make any contribution to improving access to justice to any meaningful extent and other Options will only do so if explicitly designed with that objective in mind. Ultimately, this is because the Options do little, if anything, to avoid or address the economics of legal practice or student debt loads. Specifically:

- **Option 1** (the status quo) and **Option 2** (status quo with improved quality assurance), will not alter the present circumstances of lack of access to justice;
- **Option 3** (post-licensing transition requirements) is noteworthy for proposing a targeting of transition resources towards the small firm and sole practise sector – which serves everyday legal needs – but could not be expected to make more than marginal increases to the size or accessibility of this sector, unless combined with more robust systemic measures;
- **Option 4** (practical legal training course (PLTC) as alternative to articles) would require registrants to pay significant fees, and may reduce concern for existing discriminatory hiring practices, and so runs a grave risk of exacerbating discriminatory barriers to entry to the profession. In addition, a generalist PLTC, involving only simulated practice, would make no contribution to access to justice. However, if PLTC were targeted at everyday legal problems, and involved ‘live-practice’, then it could offer some systemic access to justice improvements. At the same time though, post-PLTC, market forces would still predominate, thus limiting the scope of these improvements to the relatively limited scope of the ‘live-practise’ component of the PLTC.
- **Option 5** (PLTC only) raises similar concerns in terms of barriers to entry as Option 4 and, if generalist and simulated, may worsen access to justice by taking away the articling labour that presently serves everyday legal needs. In contrast though, if targeted at everyday legal problems and involving ‘live-practise’, it may provide even greater access to justice benefits than Option 4.

Given the imperative of prioritizing improving access to justice, and the inadequacies of the proposed Options, our view is that the Task Force and Law Society need to make a more concerted effort to identify and establish initiatives that can increase delivery of legal services for everyday legal problems. This means that the Society needs to identify initiatives that either modify the market constraints or use non-market methods, or both. At the same time, these initiatives need to be systemic and sustainable – Ontario needs a significant increase in access to justice both immediately and over the long term.

Re-design of professional licensing could make a systemic and sustained improvement to access to justice either by providing a means for the skills and labour of new law graduates to be directed to everyday legal problems during articling or by employing newly admitted lawyers in a non-market-based service provider system for everyday legal problems, or by some combination of both. In this submission we outline a number of options along these lines – all of which either modify market constraints or establish non-market methods. Specifically:

- Imposing a levy on lawyers to fully or partially fund the creation of upwards of 200 access to justice articling positions that could be undertaken in small firms, sole practises, clinics, non-governmental organizations and government departments and agencies;
- Establishing a civil law mega-clinic program, providing services for everyday legal needs throughout Ontario;
- Initiating and enhancing debt-relief, hiring incentives, practice supports and regulatory changes to facilitate entry into access to justice positions and careers;

Some of these options would represent a significant improvement in access to justice in their own right, while others would only be effective if part of a package of initiatives.

A final consideration for the Task Force is the inclusiveness, feasibility and timing of articling reform. Any changes to articling and professional licensing can be expected to have significant direct and ripple effects on all aspects of the legal system, including law schools. Indeed, some proposals contemplate specific changes to law school programs. The Law Society needs to ensure that meaningful feasibility studies are undertaken of all proposed changes and that all stakeholders, including law schools, have an opportunity to participate in developing and assessing options. It may be prudent to consider pilot programs as well. Also, curriculum change in Universities is a serious matter subject to a rigorous and time-consuming review process – three years is not unusual. Therefore, while access to justice is an immediate imperative, reform must be pursued systematically, inclusively and on an appropriate time horizon.

Articling and Access to Justice

Introduction

The Law Society's Articling Task Force was formed as a result of broad concern about a shortage of articling positions in Ontario. The Task Force's *Consultation Report* also notes the broader need to ensure fairness, and an absence of anti-competitive business practices, in the professional licensing system. The key message of this submission to the Task Force is that there is another, equally pressing concern: a specific shortage of *access to justice-oriented* articling positions and alternative pathways to careers in access to justice-oriented lawyering. This submission supports proposals for reforming the professional licensing system to take account of the general shortage in articling positions and to ensure compliance with statutory standards for fair entry to professions. We submit, however, that priority should be given to those proposals that would also ensure that the reformed system makes a significantly greater contribution to improving access to justice in Ontario.

Our submission proceeds as follows. First, we review the Law Society's regulatory mandate to promote access to justice and also outline the relevance of the *Charter's* equality guarantee. Second, we provide an overview of the lack of access to justice in Ontario. Third, we identify the 'real' crisis in articling, namely, the shortage of access to justice oriented articling positions and career paths and review the reasons for the shortage as well as barriers to take-up of such opportunities as do exist. Fourth, we address the options outlined in the Task Force's *Consultation Report* from an access to justice perspective; we focus on two aspects – access to articling and articling for access to justice. Finally, we propose a number of potential improvements to the licensing system that would increase the availability of access to justice legal services by both enabling the resource of trainee lawyers to serve access to justice as well as establishing post-training career paths in access to justice.

For the purposes of this submission, our main focus is access to civil justice, rather than criminal justice, but much of what we say and propose could apply to and incorporate access to justice in the area of criminal law.

1. The Law Society's Regulatory Mandate to Promote Access to Justice

We believe that the current regulatory mandate of the Law Society of Upper Canada (the Society) requires consideration of its duty to facilitate access to justice for Ontarians in all that it does, including the present evaluation of the existing articling system in the province and any changes to that system.

We are heartened by the acknowledgement given to access to justice in the Task Force's *Consultation Report*. However, we do not believe that the report has given sufficient weight to access to justice issues. The Mandate of the Task Force (Appendix 2 to the *Consultation Report*) appears to isolate articling and the licensing process from other relevant statutory responsibilities and regulatory priorities of the Society. We believe that the Task Force and the Society must recognize that the regulatory mandate of the Society has changed since articling was established and facilitating access to justice is no longer a voluntary aspiration of the Society but a regulatory imperative.

The Law Society's Statutory Mandate

The *Law Society Act*, RSO 1990, c L8, s. 4.1 provides that "It is the function of the Society to ensure that,

(a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and

(b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario."

This provision is the source of the Society's regulatory power over the licensing of lawyers in Ontario which includes articling and any changes thereto. It is thus the source of the Task Force's mandate to consider changes and alternate approaches to articling.

However, section 4.2 which directly follows the above provision, sets out the principles to be applied by the Society "in carrying out its functions, duties and powers under this Act". These include:

1. The Society has a duty to maintain and advance the cause of justice and the rule of law.

2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
3. The Society has a duty to protect the public interest.
4. The Society has a duty to act in a timely, open and efficient manner.
5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.

It is noteworthy that these principles do not apply to selective functions, duties or powers but rather apply generally and provide a single framework of principles for the Society to apply in everything that it does under the statutory powers in the Act. It is further notable that the language used is mandatory and not discretionary. The Act states quite clearly and unequivocally that “The Society has a duty to act so as to facilitate access to justice for the people of Ontario”. This is preceded by a duty to maintain the cause of justice and the rule of law and a duty to protect the public interest. We believe that these duties are not only relevant but required considerations for the Task Force and for the Society.

We note that these statutory duties are relatively new and did not exist under prior legislation. *The Access to Justice Act, 2006*, SO 2006, c21 amended the *Law Society Act* by adding sections 4.1 and 4.2 to explicitly enumerate these duties.

Access to Justice can therefore no longer be considered simply an aspiration; it is now a statutory duty for the Law Society.

It is for these reasons that we believe that the *Law Society Act* requires the Task Force and the Society to consider its duty to facilitate access to justice for the people of Ontario in evaluating the current articling program and evaluating any proposed changes to that system. We believe that the Society has not given adequate consideration to the impact of its new regulatory duties to its review of articling.

2. The Charter, Equality and Access to Justice

Before turning to an explanation of the access to justice problems affecting Ontario, that the Society has been mandated to address, it should be mentioned that the Society’s duty in this regard may be heightened by the guarantee of equality in section 15 of the *Canadian Charter of Rights and Freedoms*. That the *Charter* applies to the regulatory work of the Society is well-established.¹ Moreover, it is well-established that section 15 guarantees not merely formal but also substantive equality. To the extent that members of historically disadvantaged groups do not

¹ *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143

have equal access to articling positions (and therefore professional licensing), and to the extent that members of those same communities have a disproportionate lack of access to legal services, an argument can be made that they are being denied both formal and substantive equality.

As the (self-)regulatory body of a professional monopoly over a fundamental—if not essential – service, the Society arguably bears a primary constitutional duty to structure the provision of legal services in accordance with the demands of substantive equality. In our view, this constitutional duty puts the presumptive onus on the profession itself to shoulder the burden of ensuring access to justice. This presumptive onus of the profession does not necessarily mean that other governmental entities, such as the Province, are not also duty-bound to play their part in ensuring access to justice. But it would at least seem to mean that the limit of the profession’s obligations is only reached at a point approaching collective (financial) hardship. Or, to put it another way, given the relative wealth of the legal profession as a whole (although acknowledging that there are great disparities among individual lawyers), it is hard to see the reasonableness of the limitation on equality represented by the lack of access to (affordable) justice.

3. Access to Justice: Problems and Priorities

The central place given to access to justice in the mandate of the Law Society reflects the increasing attention given to access to justice issues throughout the Ontario legal community. Numerous leaders, organizations and institutions have identified a ‘crisis’ of access to justice in Ontario and, indeed, Canada as a whole.² For example, in her address to the 2011 annual meeting of the Canadian Bar Association, the Chief Justice of Canada gave special attention to the issue of access to justice and also referenced a recent international appraisal of the Canadian situation:

We have a justice system that really is the envy of the world. The problem is that it is not accessible for far too many Canadians. In my view, access to justice is the greatest challenge facing the Canadian justice system. I am not alone in this regard. In its 2011 Rule of Law Index, the World Justice Project surveys 66 countries to assess the state of the rule of law in each of these jurisdictions. Canada, as you would expect, does rather well. The one area where the *Rule of Law Index* shows that we have significant difficulty is access to civil justice. On access to justice, the index ranks Canada 9th out of 12 wealthy Western European and North American

² For instance: His Excellency the Right Honourable David Johnston, Governor General of Canada, “Address to the Canadian Bar Association, Halifax, August, 2011” available <http://www.gg.ca/document.aspx?id=14195> ; CBA; The Honourable Thomas Cromwell, Justice of the Supreme Court of Canada, “Access to Justice: The Way Forward” (33rd Viscount Bennett Lecture: forthcoming, University of New Brunswick Law Journal); David Scott (co-chairman, Borden Ladner Gervais LLP) addressed access to justice in delivering the William Howard Memorial Lecture, University of Calgary, reported at <http://www.lawtimesnews.com/201202138925/Headline-News/David-Scott-warns-of-professions-global-warming-equal>

countries. The most problematic areas, according to the index, are access to legal counsel and unreasonable delay in civil justice.³

This message has been repeated on numerous occasions by Chief Justice McLachlin, by other Chief Justices, by other judges and by many leading members of the bar. Access to justice is now recognized as a serious concern and a top priority for the justice system.

Quantifying unmet legal needs for ‘everyday legal problems’

Spurred by such concerns, the Law Society was a partner in the recently completed Ontario Civil Legal Needs Project,⁴ which attempted a quantitative analysis of the scope of legal needs, unmet legal needs and problems of access to justice. The Project leaves little doubt about the existence of such problems.

The Project found that 35% of low and middle income Ontarians (with an annual income below \$75,000) had experienced one or more civil legal problems in the preceding 3 years. Women, members of other equality-seeking groups and people in receipt of social assistance were found to be more likely to have experienced problems. The most common types of problems were those relating to family relationships (35%), wills and powers of attorney (13%), housing and land (10%) and real estate (9%). These and the remaining problems on the list of those experienced are referred to as ‘everyday legal problems’.

Two thirds of those who had experienced a problem sought legal assistance and, ultimately, two thirds of those retained a private lawyer, and a further one quarter obtained legal aid, help from duty counsel or the assistance of a legal clinic. However, along the way, 15% had a problem accessing legal assistance, citing either cost or not qualifying for legal aid as the problem in over half of the time. Moreover, some 40% of those who sought legal assistance apparently failed to obtain it. Of the other one third – those who experienced legal problems but who did not seek legal assistance – 50% also cited cost or belief that they would not qualify for legal aid as a reason for not seeking legal assistance. Looking back, 60% believe that the outcome would have been better if they had obtained legal assistance. Significantly, the lower a person’s income, the less was the likelihood that they would seek legal

³ The Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada addressed the Council of the Canadian Bar Association at the Canadian Legal Conference, Saturday 16 Aug. 2011, in Halifax, N.S. See online at <http://www.ipolitics.ca/2011/08/16/beverley-mclachlin-address-to-the-council-of-the-canadian-bar-association/>. The World Justice Project report is available at http://worldjusticeproject.org/sites/default/files/wjproli2011_0.pdf. Chief Justice McLachlin recently reportedly referred to access to justice as a ‘basic right’ in a speech at Thomson Rivers University, see <http://theomega.ca/2012/02/29/access-to-justice-is-a-basic-right-chief-justice-of-canada-speaks-on-how-our-justice-system-has-failed-our-middle-class/>

⁴ Ontario Civil Legal Needs Project, “Report: Listening to Ontarians” (Toronto, May 2010) available online at http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf. See also the earlier pan-Canadian survey conducted by the Justice Statistics Branch of the Department of Justice: Ab Currie, “The Legal Problems of Everyday Life” (Government of Canada, 2009) available at http://www.justice.gc.ca/eng/pi/rs/rep-rap/2007/rr07_la1-rr07_a1/index.html

assistance. Given these findings, of the 35% of Ontarians who had experienced one or more civil legal problems, it appears that approximately 60% did not have legal assistance, either because they could not obtain it or did not even seek it. At the same time, the Project found that a majority of Ontarians would prefer to address their legal problems either with legal advice (but otherwise by themselves) (34%) or through the formal court system (13%). Some 22% would prefer an informal mediation process.

How ‘everyday legal problems’ are addressed

As well as offering a quantification of civil legal needs and unmet demand for legal assistance, the Project reported on the means by which ‘everyday legal problems’ are typically met. Significantly, the report states that “from the perspective of low and middle-income Ontarians, one particular type of lawyer is crucial to ensuring access to civil justice: sole practitioners and lawyers practicing in small firms.”⁵ The report then goes on to quote from the *Final Report of the Sole Practitioner and Small Firm Taskforce*, which noted:

When individual citizens in Ontario require the services of a lawyer to handle a wide range of legal matters such as real estate transactions, will preparation, estates work, representation in matrimonial, other civil disputes or criminal proceedings, advice for small businesses, and appearances before administrative tribunals, overwhelmingly they retain (small firms and sole practitioners). (Small firms and sole practitioners) report that 77% of the clients they represent are individuals.⁶

The services of small firms, sole practitioners and staff lawyers are therefore crucial to addressing everyday legal problems, but the report of the Ontario Civil Legal Needs Project, as well as a number of other reports and studies over the past 5 years,⁷ note that there are a range of supplementary and complementary tools and policy options for meeting access to justice needs and that many such options have already been implemented or are being piloted. For instance: pro bono; mandatory mediation; self-help services; telephone advice and referral; public legal education

⁵ Ibid At 48.

⁶ Law Society of Upper Canada, *Final Report of the Sole Practitioner and Small Firm Task Force*, March 2005, p. 16, available online: <http://www.lsuc.on.ca/media/convmar05solepractitioner.pdf>. As the Project states, this report was the first comprehensive analysis of sole practitioners and small law firms (defined as firms with fewer than five lawyers) in Ontario.

⁷ For example: Ontario, Ministry of the Attorney-General, *Report of the Legal Aid Review 2008* (Toronto: Ministry of the Attorney-General, 2008). [The Trebilcock Report]; University of Toronto, Middle-income Access to Justice Project, *Literature Review and Background Paper*, online at http://www.law.utoronto.ca/documents/conferences2/AccessToJustice_LiteratureReview.pdf; and, Ontario, Ministry of the Attorney General, *Ontario Civil Justice Reform Project Report, 2007*. The activity in Ontario has been mirrored in many jurisdictions across the country, see, for example: British Columbia, Ministry of the Attorney-General, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* (Victoria: Ministry of the Attorney-General, March 2011) [Doust Report]; Alberta, Ministry of Justice, *2009 Alberta Legal Aid Review* (Edmonton: Ministry of Justice, 2009); J. Hughes and E.L. McKinnon, *If There Were Legal Aid in New Brunswick... A Review of Legal Aid Services in New Brunswick*. (Fredericton: Province of New Brunswick, 2007)

and information; paralegals; prepaid legal insurance plans; contingency fees and class actions; and, summary advice and duty counsel. The Project and other reports and studies also note that there are a variety of ways in which these initiatives could be enhanced, such as expanding the use of technology for self-help and information, and also a variety of other options that could be pursued, such as: unbundling of legal services and universal legal expense insurance. It has also been suggested that billing practices could be changed.

The identification of this range of tools for providing legal information and services for addressing everyday legal problems is highly relevant to the Task Force's review of articling. Firstly, it situates the traditional role and services of an individual lawyer in relation to the broader array of legal services that can assist in addressing legal needs. Secondly, it raises the issue of whether the parameters of articling ought to expand to accommodate and at least partially credit work in all of these legal service contexts. This issue will be discussed further below.

It also needs to be noted that there is geographic disparity in the availability of legal services, with significant differences between large and small urban areas and also between different rural areas, large and small. The Ontario Civil Legal Needs Project has undertaken a first step in the quantification of these disparities and it is at least obvious that geography needs to be considered in assessing and delivering access to justice.

In sum then, it is presently well-accepted that there are significant barriers to access to justice for Ontarians with 'everyday legal problems' and that sole practitioners, small firms and staff lawyers (in clinics or other staff-lawyer offices, such as child protection, the children's lawyer, and the family law office) collectively constitute the main providers of 'access to justice'-oriented legal services. At the same time though, it is clear that, as presently structured, there is still significant unmet legal need attributable, at least in part, to either the cost of legal services being too high or the financial eligibility for qualification for legal aid being too low.

4. Articling and Access to Justice

In this section we outline two access to justice aspects of professional licensing in general and articling in particular and discuss their relevance to the options for articling reform and, especially, the idea of establishing a professional legal training course. We begin with the more long-standing concern over access to articles and then turn to the principal focus of this submission, which is a concern over the role of articling in addressing access to justice.

A. Access to Articles (or PLTC)

The Law Society has for some time been concerned to ensure both that members of historically disadvantaged groups have access to articling positions and that

articling does not continue to present a discriminatory barrier to practice. We note that the same placement report that generated the concern over a general shortage of articling positions reported an over-representation of some historically disadvantaged groups among those who were unplaced. Historically, the placement rate has typically been lower for self-identifying equality-seeking group members and in recent years this has been a cause for concern at the Society. Unfortunately, after closing the gap to just under a 2% difference for the 2008 licensing cycle, the gap increased to 3.4% for 2009 and increased further to 4% for 2010.⁸ It is also worth noting that there has been a steady decline in the proportion of self-identifying equality-seeking group members in the total pool of licensing applicants has been in steady decline since 2007 – having dropped from 36.8% (in 2007) to 26.6% in 2010.

Both the worsening lower placement rate and the declining overall proportion of self-identifying equality-seeking group members are facts that may indicate worsening discrimination in articling hiring. Persistent discrimination should be an issue of significant concern in any review of the licensing process, and yet the *Consultation Report* only refers to the statistics for the 2010 cycle, offering no comparison to prior years. In our view, both the placement rate and the overall proportion of equality-seeking group members need to be given priority consideration. Indeed, attention may also need to be paid not merely to any discrimination evident in disproportionate lack of placement, but also to the effects of discrimination on the types of places to which members of historically disadvantaged groups get access.

In relation to the options put forward in the *Consultation Report*, the option of a Practical Legal Training Course (PLTC) may, at first blush, seem like a useful tool for bypassing or alleviating the persistent discriminatory impact of the articling system. According to this option, graduates who might be vulnerable to discrimination in the private market of articling placement would have an alternative option for securing entry to the profession. But, upon closer inspection, we think this ‘solution’ raises a number of concerns.

A first concern is that the availability of a PLTC option will give the profession an excuse to stop proactively addressing discrimination in hiring. Indeed, it may provide cover for increased discrimination. Since this would obviously be unacceptable, it would be important for the Society to continue to actively monitor and address (in)equality in recruitment and retention both for articling and for post-licensing. Related to this concern is the possibility that the availability of a PLTC option may lead to a decrease in the number of articling places offered, in particular, those that are offered through a sense of obligation to sustaining the profession. If the number of articling places dwindles, discrimination in hiring would become an even greater concern.

⁸ See the annual *Placement Reports* of the Law Society of Upper Canada available at <http://www.lsuc.on.ca/FindingArticles/>

A second concern is that the availability of a PLTC option would create a two-tier licensing process and that PLTC registrants would be stigmatized as inferior. Experience in Australia (where practical legal training has reportedly become the pathway to licensing for the majority of graduates) may suggest any such stigma may be confined to the transitional period until PLTC programs are shown to be of good quality, but then it would clearly be beholden on the Society to ensure quality and to address stigma.

A third concern is that any potential benefit a PLTC may offer in terms of alleviating discriminatory hiring must be weighed against the potentially detrimental impact of having to pay fees to undertake a PLTC. The Task Force has rightly observed that, given the generally high levels of debt accumulated by law students at graduation, the fees required for enrolment in PLTC are a potentially significant issue or barrier for any student [p. 26]. This barrier is, it might be expected, heightened for members of historically disadvantaged groups, who are generally over-represented among low-income Canadians. Consequently, from an access to the profession perspective, a PLTC option may hinder as much as it helps – replacing or exacerbating discrimination on the basis of personal characteristics with socio-economic discrimination. This aspect of the PLTC option therefore needs careful analysis and demands attention at the design stage.

In terms of the analysis of the relevance of student debt load to the viability of a PLTC option modeled after the schemes in Australia (which are those referred to by the Task Force), it is also worth noting that there may be some significant differences between the situation of Canadian and Australian law school graduates. In particular, for the most part, legal education in Australia is bachelor-level and so the average graduate has spent 5 years at University, whereas under the graduate model in Canada, the average graduate has spent at least 6, usually 7 and sometimes 8 years at University. Not only does each additional year represent increased debt, but the yearly debt accrued is likely higher in Canada. Canadian University fees at the bachelor level are generally higher than those in Australia and are much higher for the professional graduate degree in law. Furthermore, liability to repay University tuition fees in Australia can be deferred until the graduate reaches an income level equivalent to average weekly earnings (and even then the repayment, through the taxation system, is on a graduated scale). This description may not capture the exact extent of similarity and difference, but suffice to say that much closer comparative analysis is required before the Australian model can serve as a financial guide.

Further, and finally, we would note that the Law Society would need to ensure that a PLTC option is available in both of Canada's official languages and is equally accessible, in both languages, throughout the Province. As discussed in our final section below, this would necessitate pursuing a feasibility study.

B. Articling for Access to Justice

The Treasurer of the Law Society has stated that “[a]rticling must be a bridge, not a barrier, to candidates interested in being legal professionals and in responding to the needs of the public in Ontario.”⁹ Addressing everyday legal problems is a key need of the Ontario public – and a need that is unmet to a significant extent. The main cause of this lack of access to justice for people with everyday legal problems appears to be the cost of legal services, especially the cost of private lawyers. In our view, the Law Society has a significant and crucial responsibility to develop means of improving access to justice for everyday legal problems. Moreover, in our view, it is time for the Law Society to consider initiatives that can systematically direct legal services, including the legal resource represented by new graduates seeking the real-world training of articles, towards this end. At present, however, the articling market directs resources in precisely the opposite direction. Indeed, in our view, this is the real ‘crisis’ in articling.

Distribution of articling positions

As the Task Force notes, the distribution of articling position is heavily skewed towards large and medium sized law firms. The large firms of more than 50 lawyers account for 36% of articling positions. Medium-sized firms (11-50 lawyers) account for 25%. Small firms of 5 to 10 lawyers account for 10%. Very small firms (with less than 5 lawyers) account for 11%. Governments provide another 10% of placements and the remainder are provided by judicial clerkships (6%), in-house legal departments (1%) and legal clinics (1%).

It is the very small firms and the clinics – which together offer only 11% of places – that are generally regarded as undertaking the vast majority of work on everyday legal problems.¹⁰ While we have only anecdotal evidence to rely upon, we firmly believe that far more than 11% of new graduates have a serious interest in articling and then lawyering for the everyday legal problems of low and middle income Ontarians. This specific shortage in what we refer to as ‘access to justice’ articling placements is, in our view, a crisis at least as important as the general shortage in articling placements.

Causes of the Shortage in ‘Access to Justice’ Articling placements

The Task Force has noted the variety of factors that have contributed to fewer articling positions being offered in the access to justice sector. The most significant

⁹ Quoted in Law Society of Upper Canada, “Task force to address articling requirement”, *Ontario Lawyers Gazette*, Summer 2011, p. 13.

¹⁰ The significant role of this sector in meeting access to justice needs is acknowledged by the Task Force at p. 13.

immediate cause of the shortage appears to be the economics of very small firm and sole practice, the disproportionately low numbers of places offered by government employers (as compared to the proportion of practicing lawyers employed), and the limited funding of clinics. We will focus on the first and last of these.

Many very small firms and sole practitioners say that they cannot afford either the time or the money, or both, needed to employ and train an articling student.¹¹ That a significant proportion of people with everyday legal problems cannot afford to retain lawyers working in this sector is one factor that limits the revenue and, in turn, the hiring capacity of this sector.¹² Likewise, the extremely limited scope of civil legal aid offers only a limited additional means of accessing legal services from this sector and, in turn, the revenue of small firms and sole practitioners. It is by no means easy to maintain a viable practice in this sector. As the *Final Report of the Sole Practitioner and Small Firm Task Force* stated:

Difficulty in financing practices is a challenge unique to target group lawyers and is linked to the nature of their client base. Individual clients generally have less ability to pay than do corporate, government or institutional clients. This affects not only the amount of money clients have available for or are willing to commit to lawyer services, but the timing of their payment. The result is that target group lawyers are often left to finance a client's litigation, delay receipt of payment until a matter is completed, or reduce or forgive fees to satisfy client demand. To exacerbate this reality, target group lawyers also report greater difficulty in securing financing and lines of credit from financial institutions. Rising overheads and general market pressures to reduce fees that affect all lawyers have a greater impact on many target group lawyers because of the narrower margins of financial viability they face.¹³

In short, the number of articling placements in this sector of the legal services market is significantly determined by the economics of practice in this sector, which may well be operating at close to maximum capacity, under present economic circumstances.¹⁴

At the same time, the economic reasons for the relatively low levels of articling positions offered in this sector are then exacerbated by the so-called 'greying of the bar' (*Consultation Report*, p. 13). In keeping with changing societal demographics, the legal profession is aging and, particularly outside the major urban centers, the numbers of retiring and later-career lawyers are not being matched by new-entrants. This means even fewer lawyers to service unmet legal needs in these areas, as well as fewer lawyers to provide articling supervision.

¹¹ See *Consultation Report*, p. 13. At the same time, some will admit that they are also wary about training people who could well end up as competitors for legal business.

¹² For present purposes we will not explore the issue of whether the rates charged for legal services in this sector are higher than necessary.

¹³ Law Society of Upper Canada, *Final Report of the Sole Practitioner and Small Firm Task Force*, March 2005, p. 7, available online: <http://www.lsuc.on.ca/media/conymar05solepractitioner.pdf>

¹⁴ The Task Force has acknowledged that the Law Society and the profession certainly cannot depend upon increased hiring in this sector to solve the general placement shortage issue (p. 13)

The claim that there is a shortage of funding for articling placements in clinics is, of course, not novel. For many years there funding has been so insufficient that few clinics are fortunate enough even to afford one articling position per year. The obvious absurdity of that situation has, apparently, not been a sufficient reason to change it. It therefore seems safe to assume that this sector is offering the maximum number of positions under present circumstances as well. Alarming, some clinics have turned to the desperate tactic of offering unpaid articling positions.

Barriers to take-up of access to justice articling positions

At the same time, it must be recognized that there are also barriers to take-up of access to justice articling positions for students. Chief among these is the need to service significant debt loads. We are aware of articling positions being offered at a salary of \$500 per week or \$20,000 gross for the 10-month term of articling. Students inform us that it is not possible to meet living costs and service debt at that salary level. Indeed, we are aware of numerous students who have pursued articling opportunities in completely different sectors of the legal market – especially large firms – principally because they see that as the only pathway to achieving a reasonable rate of debt pay-down.¹⁵

Opting for articling at large firms raises the prospect of young lawyers taking a career path that begins there but then turns in the direction of access to justice lawyering once debt is reduced to a reasonable level. But such statistics as exist on lawyer mobility and change of status suggest that, while many new calls and young lawyers do leave large firms (both voluntarily and involuntarily), only a small proportion move to the access to justice sector.¹⁶

Another factor in take-up, which cannot exactly be characterized as a barrier, is the possible unwillingness of law graduates to relocate to smaller communities to begin their careers.

Implications for the five Options in the *Consultation Report*

The implications of the causes of the shortage of access to justice articling positions for the work of the Task Force are profound. Without wholesale re-design to prioritize improving access to justice, it is unlikely that any of the options presented in the Task Force's *Consultation Report* will produce any significant impact on the access to justice problem.

¹⁵ Other factors are no doubt influential, such as the potentially heightened need for interpersonal compatibility between principal and articling student in such small workplaces ... and the risk of magnified detriment to either party if one or the other is not up to the task of being either a principal or trainee-lawyer.

¹⁶ See LSUC, *Change of Status Quantitative Study Report* (April 30, 2010).

Option 1: Status quo: The status quo is a shortage of access to justice articling positions and an access to justice crisis. To a significant extent, both of these problems are due to the predominant reliance on the private market for delivery of legal services for everyday legal problems. While a variety of other services – legal aid, legal clinics, institutionalized and informal pro bono, administrative agencies, self-help services, paralegals, telephone information and other public legal information and education initiative – do provide important resources for resolving everyday legal problems, they are clearly inadequate. We do not believe that maintaining the status quo is consistent with the Law Society’s duty under s. 4.2(2) of the Act “to facilitate access to justice for the people of Ontario.” From an access to justice perspective, the status quo is not an option.

Option 2: Status quo with quality assurance: The introduction of more meaningful quality assurance may assist in better preparing newly called lawyers to establish small firms or sole practices aimed at serving everyday legal problems, but since they would still operate on the private market model that is unlikely to produce a significant improvement in access to justice. We therefore do not believe that maintaining Option 2 is consistent with the Law Society’s duty under s. 4.2(2) of the Act “to facilitate access to justice for the people of Ontario.”

Option 3: Replacement of Pre-Licensing Transition Requirement with Post-Licensing Transition Requirement: In outlining this option, the Consultation Report puts special emphasis on the possibility that post-licensing requirements may need to be adapted to or targeted at the most challenging and ‘risky’ (in terms of complaints and negligence claims) sector of the profession, namely, small firm or sole practice. Given the role of this sector in serving everyday legal problems, we support the underlying idea that the Society ought to be targeting licensing and other resources at this sector. We also believe it is possible that in supporting transition into this sector this option might lead to more lawyers practicing on everyday legal problems. However, since this option also ultimately relies upon the private market to deliver legal services for everyday legal problems, it is still unlikely to produce a significant improvement in access to justice. Indeed, the shortage of articling positions in this sector may simply translate into a shortage of positions for practicing ‘under supervision’.

Option 4: A Practical Legal Training Course as an alternative to Articling: From the perspective of access to articling, we have already recognized that a PLTC alternative to articles may help to alleviate barriers to entry to the profession associated with discrimination in the articling placement market – although we have also identified various concerns with this ‘solution’ for discrimination, as well as the potential (discriminatory) barrier posed by the cost of PLTC.

From the perspective of articling for access to justice, if a PLTC offers only simulated lawyering, and if that includes or is geared to training for practice in a small firm or sole practice context, then it may assist in encouraging the entry of more new lawyers into that sector. However, again, since the private market for legal services

would still ultimately determine the viability of practice in that sector, we would remain concerned that merely offering a PLTC alternative would not make any significant contribution to improving access to justice. This would be the case whether a PLTC was only available post-law school or whether it could also be partially or fully achieved during law school.

In our view, a PLTC option can only make a significant contribution to improving access to justice if it revolves around a significant 'live-practice' component offering legal services for everyday legal problems. One vehicle for implementing such an approach could be a 'Civil Law Mega-Clinic', an idea which we will elaborate below.

From the perspective of articling for access to justice, we would have grave concerns about even a 'live-practice' oriented PLTC that was more generalist – i.e. a PLTC that was not specifically geared to serving everyday legal problems. Indeed, we believe that there may be an argument for PLTC to be exclusively for this sector. This is because any resources, whether derived from tuition or otherwise, would be scarce and so should be devoted to the priority issue of improving access to justice.

Before leaving this option we also need to mention a different type of access to justice concern about the idea that a PLTC could be undertaken during law school, perhaps as some sort of 'clinical third year' (an idea attributed by the Task Force to the Carnegie Report from the US). Our concern about this idea is that it would likely mean that students wishing to undertake it would have most, if not all, of their academic curriculum taken up with mandatory courses oriented to legal doctrine. This would leave little room, if any, for elective courses offering opportunities to obtain deeper understandings of different perspectives and social contexts, as well as to deepen capacities for critical analysis. In our view, having those opportunities is crucial to the development of the skills necessary for effective lawyering – and all the more so for lawyers serving the access to justice needs of vulnerable and historically-disadvantaged communities.¹⁷

Option 5: Only PLTC: The potential for this option to improve access to justice would also depend upon the PLTC model used. On the one hand, if PLTC were the exclusive path to admission to the profession, and if it revolved around 'live-practice' in relation to everyday legal problems, then it could potentially make a significant contribution to access to justice. This contribution would be represented by the combined practice hours of all students in the course or, in other words, of all new graduates seeking admission to the practice of law in Ontario. This potential would depend upon the length of the PLTC being sufficient to enable new graduates to both develop and apply practice skills to the situations of real clients. This would entail a need not only for effective training sessions but also for continuous supervision. Indeed, so structured, a mandatory PLTC would appear more like a

¹⁷ A further issue would be at what point in their academic program students would be able to, or be expected to, choose a 'clinical third year', particularly if it were an alternative to articles. Significant co-ordination of processes, not to mention curriculum, may be required.

mandatory mega-legal clinic for civil law matters. This is an idea that deserves serious consideration and which will be discussed further below.

On the other hand, if the PLTC only involves simulated practice, or is more generalist, then it would make only a limited direct contribution to improving access to justice. Moreover, ultimately, post-PLTC, the availability of legal services for everyday legal problems would still predominantly rely on market forces and, therefore, access to justice problems would persist.

5. Proposals on Articling for Access to Justice:

If the need to prioritize improving access to justice is accepted, then the upshot of the preceding analysis is that the Society should make a concerted effort to establish initiatives that can increase delivery of legal services for everyday legal problems. Given the limits of the market-based model, this means that the Society needs to identify initiatives that either modify the market constraints or use non-market methods, or both. At the same time, these initiatives need to be systemic and sustainable – Ontario needs a significant increase in access to justice both immediately and over the long term. We are aware of public policy proposals that have been floated to this end, in particular, a public program of mandatory and universal legal expense insurance. But this and other proposals are beyond the reach of the Society. The Society thus needs to concentrate its efforts on systemic and sustainable improvements within its range of activity. Re-design of professional licensing in general, and articling in particular, is one such activity.

Re-design of professional licensing could make a systemic and sustained improvement to access to justice either by providing a means for the skills and labour of new law graduates to be directed to everyday legal problems during articling or by employing newly admitted lawyers in a non-market-based service provider system for everyday legal problems, or by some combination of both. In what follows we outline a number of options along these lines – all of which either modify market constraints or establish non-market methods. Some of the options would represent a complete solution in their own right, while others would only be effective if part of a package of initiatives. The options we outline are:

- A. Fully-funded Access to Justice Articling Positions
- B. Civil law mega-clinic
- C. Debt-relief, hiring incentives, practice supports, and regulatory changes

A. Fully-Funded Access to Justice Articling Positions

The Society and the profession have the capacity to fully or partially fund a significant number of Access to Justice Articling Positions. Such an initiative would modify the economic and funding constraints of private and public legal service

providers engaging everyday legal problems, while leaving intact the broader parameters of professional licensing.

As the Task Force recognizes in the *Consultation Report*, it is beyond the control of the Society to seek third party funders for such positions (p. 15)¹⁸ But the Society has control over its own budget and has the capacity to fund Access to Justice Articling Positions should it elect to do so. One such proposal by a member of the Ad Hoc Working Group on Articling and Access to Justice called on the Law Society to fund 200 articling positions by imposing a \$200 access to justice levy on the approximately 40,000 lawyers in Ontario. This would fund over 200 articling positions which would pay each articling student an annual salary of \$40,000.¹⁹ (A variation, proposed during the 2008 articling review process, would be to at least impose a levy on all lawyers who could act as principals but do not.)

The Task Force addressed this proposal at p. 16 of the *Consultation Report*, noting that this suggestion:

... is an ambitious one and, as described, would require significant planning and organization. To be financially viable it would likely entail a levy on the profession. If it were intended to develop sufficient jobs to substantially address the shortage issue (200 might be estimated) and \$45,000 were used as the annual salary, this could require approximately \$9,000,000 or \$250 per lawyer licensee a year for salaries alone.

We agree that the proposal “is an ambitious one and . . . would require significant planning and organization”. But this comment surely applies to everything related to Options 4 and 5. As discussed in our final section below, we believe that it is critical that the Society devote the resources for “significant planning and organization” should it consider adopting Options 4 or 5.

As for the cost of such a proposal, we note that in 2010 the Society’s Revenue was just under \$60 million.²⁰ By the Task Force’s own estimation, the cost of \$9 million to fund such a program would represent 15% of the Society’s general budget. This is a large percentage of the Society’s budget but given the primacy of the Society’s access to justice regulatory mandate as set out in section 1 of this submission, not to mention the possible *Charter*-duty, spending 15% of Society revenue on access to justice initiatives might be considered modest.

¹⁸ We would note however that there are American models of private philanthropic support, such as the Skadden Fellowship Foundation, that could play a role. Skadden Fellowship Foundation, online: <http://www.skaddenfellowships.org>

¹⁹ Adam Dodek, “Articling and Access to Justice: An Ontario Legal Corps – Why Not?” *Slaw.ca* (October 25, 2011), online: <http://www.slaw.ca/2011/10/25/articling-and-access-to-justice-an-ontario-legal-corps-why-not/>. There could be over 200 positions because articling students are only paid for 10 months of a year.

²⁰ Law Society of Upper Canada, 2010 Annual Report: Financial Statements, p. 8 (General Fund only; does not include any restricted funds).

We would also note that the Law Society received \$744,000 from the Law Foundation of Ontario in 2011 for its “Lawyer Licensing Process”.²¹ Using the Task Force’s estimated salary of \$45,000 per Access to Justice Articling student, this sum alone would fund 16.5 articling positions.

In terms of where these Access to Justice Articling Students might work and where the infrastructure would come from to support and supervise their work, the natural choice would be the 80 community clinics across the province. Other possibilities might include lawyers or some combination of the two. To the extent that these articling positions would be placed in community clinics, a portion of the funds raised would need to be devoted to funding additional articling-supervision capacity – although this might be a resource contribution that could be sought from the Province, or other sources, as funding partners. In addition, in order for the access to justice service delivery objective to be met, it would likely be necessary to alter the terms for eligibility for legal clinic services – in particular, to enable clinics to devote these new resources to meeting the needs of people with incomes above legal aid financial eligibility cut-offs. To the extent that the articling positions would be with private lawyers, there would also be this necessity to ensure that the access to justice service delivery objective is met. This may mean that the private lawyers supervising the articling students would need to undertake to provide a significant proportion of time and labour to provision of free or affordable legal services.²²

B. Civil Law Mega-Clinic

Another proposal is to establish a Civil Law Mega-Clinic (CLMC) program. This initiative would be aimed at the service delivery gap between the very low-income clients of legal clinics and the higher-income clients of small firms and sole practitioners in the private market. The operation of a CLMC would need to be modeled after the existing legal clinics attached to law schools, which have a pyramid staffing structure enabling the provision of multiple entry-level positions (or, for that matter, bigger law firms, which also have a similar pyramid structure). The Law Help program of Pro Bono Law Ontario and the recently established Family Law Office might also serve as models. Services could be provided without fees or on a graduated fee-contribution scale. It might be necessary to establish a maximum income eligibility cut-off.

As with existing legal clinics, a CLMC may seek to provide an array of legal services, ranging from self-help support, public legal education and information, triage and referral, legal advice and document drafting and, where necessary, legal representation. It would also likely be necessary to create something of a virtual or

²¹ Law Commission of Ontario, Annual Report 2010: Book 1: 2010 in Review, p. 29, online: http://www.lawfoundation.on.ca/pdf/annual_reports/LFOAR2010_Book1.pdf

²² A further issue would be whether the funding would attach to the articling student or to the employer.

mobile or network CLMC, providing services in rural and remote areas, as well as online and via telephone and other technologies. A CLMC would provide appropriate and structured training for new graduates in all of these services and enable them to deliver these services for real clients. Work as a graduate in any of these services, or some combination of them, would need to be credited as articling time. Alternatively, it may be more efficient to provide entry-level opportunities to students during their law programs so that they can reach a foundational skill level before graduation and articling (this might even be a pre-requisite to an articling placement). This would enable articling students to provide real-client services more quickly after the commencement of articling.

In order to satisfy the practical competencies requirements established for articling by the Law Society, real-client work may need to be supplemented with regular intensive classroom-type education on practical competencies that would not otherwise be acquired through the particular real-client work undertaken. This supplementary component could be modeled on the Practical Legal Training Course option described in the Consultation Report, but structured as an adjunct to the real-client work of the CLMC.

It may also be worth considering whether the array of services offered by a CLMC, and the articling students working in it, should extend even further. This would be in deeper recognition of the view that legal services, and access to justice, can extend beyond reactive assistance in dispute resolution. There is significant diversity in the types, timing and means of law-related assistance that can be useful not only in managing everyday legal disputes, but also in managing everyday legal issues.

The potential need, and opportunity, to widen the scope of services offered through a CLMC arises from a variety of perspectives on everyday legal problems and issues, access to justice, and legal practice more generally. The Ontario Civil Legal Needs Project, for instance, notes the increasing availability and potential of technological means for legal service provision.

In addition, it is by now well-established that the assistance needed to manage everyday legal problems is multi-faceted and does not necessarily start or end with the traditional visit to a lawyer's office for an individual consultation. Recent debates about unbundling, along with newly established self-help projects, are just a couple of aspects of this broader thinking.

However, beyond that, everyday legal problems are also not necessarily related to dispute resolution – they may involve a lack of knowledge about available rights and entitlements or a lack of understanding as to how to access or claim those rights and entitlements, whether in relation to other private individuals, or employers, or goods and services provided in the private market or by a government service. Everyday problems may also arise from a lack of access to the legal information and advice needed to effectively exercise legal capacity in 'life-management' contexts, for

example, how to make a valid and appropriate will. There is an array of law-related services associated with gathering information, identifying rights and entitlements, spotting issues, completing forms, drafting documents, exploring options, locating means of assistance, and guiding self-help that can and are undertaken by public and private lawyers, both formally and informally, in person, over the telephone or via the internet.

Much of the provision of this array of services – all of which contribute to access to justice – could be performed by articling students in an appropriately supervised and supportive context (there would also be a strong case for a multi-disciplinary approach). Yet the private market model of the articling student as ‘lawyer-apprentice’ – and especially ‘litigator-apprentice’ – does not necessarily reflect this reality of access to justice service provision nor facilitate the leveraging of articling student resources to that end. A review of the regulatory requirements for articling may be needed in order to facilitate a movement to a broader conception of legal service provision during articling. We address this below.

It is worth noting that these two options – fully-funded access to justice articling positions or a CLMC – do not need to be alternatives or mutually exclusive. It could be that the best option would be a combination of both. Also, it may be that there are many more options for access to justice articling positions than with the clinics or private practice. There are numerous access to justice-oriented public agencies (such as the Office of the Public Guardian and Trustee, or the Children’s Lawyer) and non-governmental organizations (such as the Canadian Civil Liberties Association or Amnesty International) that already hire articling students, or could place them if it were more affordable. Moreover, the availability of subsidized articling students may trigger the establishment of new access to justice initiatives or networks to meet unmet needs – to provide, for instance, pro bono or affordable legal services to a greater number of people involved in consent and capacity hearings or tax hearings.

Obviously enough, new funding would be needed for establishing and maintaining a CLMC program in any form. A levy on the profession, as proposed above, would be one option for at least partial funding of a CLMC program. The Society might also consider a levy on medium and big law firms based on annual articling salaries paid by them in the private market. Other parties, such as the provincial government, the Law Foundation and charitable foundations, may also need to be approached.

If in-program entry-level opportunities or pre-requisites are established for law students, then some contribution may also be available from tuition fees paid to Faculties of Law or their Universities. We have already raised concerns about the extra debt that might be associated with enrolment in a post-graduation PLTC option and we see different, institutional, difficulties – educational and financial – with the idea of a ‘clinical third year’ of law school. But it may be that there is the possibility to create a part-time third year that is undertaken over two years, in conjunction with work in a CLMC, and leads to satisfaction of both academic and

articling requirements by the end of the fourth year. If that is possible, then some Faculty or University resources might be available or, at least, leveraged, to the end of articling for access to justice.

C. Debt-relief, hiring incentives, practice supports and regulatory changes

There are a variety of options for modifying the economic constraints felt by both would-be principals and would-be articling students in the access to justice sector.

On the articling student side, new and better, systemic, debt-relief needs serious consideration. There are a number of options that ought to be explored:

- **Delayed commencement of repayment:** The terms of public and private loans could be modified so that commencement of debt-repayment is deferred at least until the completion of access to justice designated articling.
- **Repayment-geared-to-income:** The terms of public and private loans could be modified so as to have repayment obligations geared-to-income for graduates working in access to justice designated positions.
- **Loan forgiveness:** Public and private lenders could establish complete or partial loan forgiveness for graduates working in access to justice designated positions. This might be modeled after similar incentives offered to medical graduates willing to work in geographic areas with high unmet need.

On the side of would-be principals in small firms and sole practice, the partial or complete subsidizing of salaries of articling students, as proposed above, could be expected to offer a strong incentive to offer articling placements. Another possibility could include full or partial licence-fee waivers for lawyers who act as principals

More concerted development of **practice supports** should also be considered. We understand that the Law Society has been working with the Ontario Bar Association and the County and District Law President's Association on a joint strategy to develop resources and other practice supports for small firms and sole practitioners. This work is informed by the report of the Linguistic and Rural Access to Justice Project.²³ In our view, the mandate of a CLMC could include the co-ordination, development and maintenance of these sorts of resources – similarly to the resources maintained within the Ontario legal aid program for clinic and legal aid lawyers. And working on those resources could be another task for the articling students within a CLMC.

The Law Society also needs to undertake an examination of whether the problem of access to justice is exacerbated by any of the **regulations** applicable to articling or the supervision of articling and, more specifically, the type of work that allows for

²³ Karen Cohl and George Thomson, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services* (Toronto: Law Foundation of Ontario, 2008) as cited in the University of Toronto, Faculty of Law, Middle Income Access to Justice Initiative, *Background Paper*, available online at

eligibility to serve as a principal and for the development of practical competencies for admission to the profession. We note, for instance, that the Law Society of British Columbia Law Society has recently altered some of the restrictions on the work that can be performed by articling students. We also note that the Society also relieves principals practicing in certain contexts from ensuring training in aspects of practice that do not arise in that context (for example, government lawyers and trust accounting). However, in recognition of the diversity of types, timing and means of law-related assistance that can be useful in managing everyday legal problems and issues – as discussed in relation to the Civil Law Mega-Clinic, above – there may be a need to go further.

For instance, some re-assessment may be needed of such issues as: what practical competencies are required; whether it is necessary to acquire the full gamut of practical competencies for licensing and admission to the profession; and, whether differential categories of admission might be created, together with post-licensing programs for transition into other categories.

Conclusion: Vision and Feasibility (and Timing)

There is a clear consensus that Ontario has continuing, significant, access to justice crisis. There is also a clear duty on the Society to facilitate access to justice. Indeed, the Society has played a key role in supporting access to justice initiatives and expanding our access to justice knowledge base over the past few years and has given priority to pursuing its duty on access to justice over the coming years. The establishment of the Task Force on Articling therefore comes at an important and opportune time for considering the role of the Society, and articling, in improving access to justice. In our view, the Law Society cannot afford to tinker at the edges of the access to justice problem. At the same time, in a period of governmental fiscal restraint, undertaking reforms and establishing initiatives that could direct articling resources towards everyday legal problems is a potentially cost-effective means of making a systemic improvement in access to justice. Consequently, we submit that the Task Force needs to put improving access to justice at the center of its vision for re-assessing articling and professional licensing. Delivering services for the anticipation, prevention and resolution of everyday legal problems needs to be the lens through which reform options are developed and analyzed.

In our view, and as described above, the present options in the *Consultation Report* do not give sufficient priority to improving access to justice – any improvements they facilitate would be at the margins, at best. We submit that there are other options that deserve serious attention. We also argue that the question of funding – and the need to generate new funding or re-allocate existing funding – cannot be avoided. The Society needs to spearhead fundraising and the legal profession needs to reach further into its own pocket – both in terms of time and money. But other stakeholders, such as Legal Aid Ontario, the Law Foundation of Ontario, Ontario Faculties of Law and their Universities, must contribute as well. Perhaps the only

parties who should not suffer more burdens are new graduates seeking training in access to justice lawyering, as many are already burdened by significant debt.

Having said that, we believe it is appropriate to end with a note of caution on feasibility and timing. All of the options, whether in the *Consultation Report* or this or other submissions, require much further examination of objectives and feasibility. Time and resources are needed just for that. We would suggest that the Society consider establishing and funding multiple feasibility studies (perhaps directed by the Law Commission of Ontario and/or the Law Foundation of Ontario), exploring a variety of options, and also considering a stage of pilot-programs, before making wholesale changes. Although we would note that some options, particularly establishing access to justice articling positions through a levy on the profession, could be implemented relatively quickly (at least to some extent and even if only on a temporary basis), as this largely fits into the existing framework of professional licensing.

Also, we know firsthand the timeline of University decision-making and reform. Faculties of Law appear keen to be partners in exploring options and establishing initiatives, but curriculum revision or reform may be required and this also takes time – three years is not unusual.

Some of the options under consideration by the Task Force would represent the most significant changes to the licensing system of lawyers in Ontario in over 50 years. It is incumbent upon the Society as the regulator of the legal profession in the public interest to proceed in a prudent and considered fashion. Forging systemic improvements to access to justice in Ontario is a job worth doing – but it needs to be done properly and inclusively.

Appendix A: Endorsements