Toward a New Legal Profession Act

Policy Paper

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Executive Summary

This Policy Paper has been written with the intention of providing guidance to the Yukon Government regarding the preparation of new legislation designed to regulate the provision of legal services in Yukon.

For the reasons set out below, the need for revisions to the current Legal Profession Act, RSY 2002, c. 134, as amended (the "LPA") was identified by the Executive of the Law Society of Yukon. In 2010, the Executive appointed a Legislative Review Committee to review the current LPA, to review comparable legislation in other jurisdictions, and to make recommendations for future legislation.

Over the course of several months, while fulfilling their mandate, the Legislative Review Committee and the Executive of the Society prepared a detailed Discussion Paper which was circulated for feedback to members and other relevant stakeholders. Feedback was directly sought from the membership at a Town Hall meeting held in late May, 2011, and additional feedback sought from regulators of the legal profession throughout Canada and from a variety of other individuals and organizations.

Based on the feedback received, a draft of this Policy Paper was prepared and circulated to the membership and other stakeholders for feedback in November, 2011. Information from this latest consultation process was then incorporated into this final version of the Policy Paper which is now submitted to government for review, in anticipation of government drafting new legislation to regulate the provision of legal services in Yukon.

A detailed list of those consulted throughout this process is included in Appendix 1.

This Policy Paper has been prepared by the Executive of the Law Society of Yukon, assisted by the Legislative Review Committee and external counsel. A list of those involved in the preparation of this Policy Paper is attached as Appendix 2.

Why is New Legislation Needed?

There are three primary drivers establishing the need for new legislation:

1. Changes in the Legal Profession

There has been tremendous change in the legal profession during the last several years. The mobility of lawyers has increased; many legal services are now being outsourced; alternate legal service providers such as paralegals are engaging in aspects of the practice of law in other jurisdictions; the number of internationally trained lawyers is on the rise; the use of technology has changed many of the methods by which law is practiced; there are increasing concerns about access to justice and the availability and affordability of legal services; and there has
been a movement toward national harmonization of key regulatory functions among the Law Societies in Canada.

It is imperative that new legislation reflect and address such changes in a manner that best upholds the public interest.

2. **Changes in Regulation of Professions in Other Jurisdictions**

The concept of self-regulation has come under increasing scrutiny in other jurisdictions. In England, for example, self-regulation of certain aspects of the legal profession has been replaced with a government oversight body. While this has not occurred in Canada, there have been indications of increasing government involvement in the regulation of professions. *Fair Registration Practices* legislation has been implemented in Ontario, Manitoba and Nova Scotia. In those jurisdictions, government officials now monitor registration processes for all professions. In addition, throughout Canada, the Federal/Provincial/Territorial Agreement on Internal Trade mandates the admission of lawyers who are admitted to practice in one jurisdiction to be authorized to practice in other jurisdictions regardless of differing admission requirements.

It is imperative that new legislation recognize that governments are prepared to step in if the regulation of legal services is not being properly conducted in the public interest.

3. **Practical Difficulties with Current LPA**

Three practical difficulties exist. Firstly, the current LPA is written in a very prescriptive style, allowing little flexibility to be responsive to changes in the profession and in the field of self-regulation. The legislation in a number of other jurisdictions in Canada is less prescriptive and more enabling, authorizing detailed procedures and operational matters to be spelled out in the Rules, rather than in the statute itself. Secondly, in some instances the content of the LPA is simply outdated or unclear, and thirdly, in other instances the required procedures may not be consistent with best practices or developments in the common law.

In order to maintain public and member confidence in the ability of the profession to regulate itself, it is imperative that new legislation is clear, understandable, and reflective of standards of natural justice and procedural fairness upheld by the courts.

**General Themes Evident Throughout New Legislation**

In reviewing various issues for inclusion in new legislation, certain themes and approaches to regulation emerged. Some of these themes and approaches that permeate the suggestions for new legislation are as follows:

1. The public interest must be paramount in all aspects of the legislation;

2. The independence of the legal profession must be maintained, as a foundational element to the Rule of Law;
3. There must be recognition of the need to evolve the legal profession to allow greater access to legal services;

4. The legislation must be flexible enough to allow for such evolution. The Act should be structured in such a way that it will enable matters to be developed through Rules, rather than prescribing detailed operational matters in the statute itself. At the same time, key regulatory roles must be established in the Act so that the public interest is properly protected;

5. The policy setting and oversight roles of the Executive as the governing entity of the Society should be emphasized. Decisions about specific operational matters should be appropriately delegated to Committees and individuals authorized in the Act;

6. The need for fair and transparent regulatory processes must be seen throughout the legislation, where fairness exists for the Society, the member subject to the processes, and the public;

7. The statute must provide a practical form of regulation, recognizing limitations of resources.

**Key areas For Change in New Legislation**

**Framework of the Statute**

The present *LPA* contains many details about the processes and operations of the Law Society.

In most statutes involving the regulation of the legal profession throughout Canada, the Act contains the general framework and the key principles of regulation, but the detailed operational aspects of the regulatory processes of the Society are set out in the Rules. This allows opportunities for evolution and flexibility. It is proposed that the framework for new legislation governing the legal profession in Yukon follow this approach.

With respect to the approval of the Rules, the present *LPA* requires membership approval of the Rules, and further allows Cabinet to annul any Rule it believes is not consistent with the authority under the Act. Bearing in mind that the public interest must be the paramount guiding feature of any self-regulatory legislation, the requirement for membership approval can be problematic. Members’ personal interests can differ from the public interest. In keeping with the framework of the majority of other jurisdictions in Canada, it is proposed that the new legislation should provide for membership consultation but not membership approval, with respect to any proposed new Rules or amendments.

With respect to the ability of Cabinet to annul Rules, the Society is conscious of the importance of the concept of the independence of the legal profession. It is the view of the Society that government’s role is properly exercised through the statute approval process, but outside of this, Rule making authority of a self-regulating independent legal profession should be placed in the hands of the Executive.
In short, the proposed legislation is expected to include key regulatory concepts and processes, with the detailed operational aspects left to Rules to be approved by the Executive following consultation with members, with no right of annulment by Cabinet.

**Objects of the Society**

The objects clause in the current *LPA* is very broad, requiring the Society to do a variety of things including preserving and protecting the rights and freedoms of all persons. While such an objective is aspirational, it is not achievable. Rather, the mandate of the Law Society should be appropriately reflective of the need to protect the public interest and to enhance the administration of justice, while at the same time recognizing it should not be so excessively broad as to exceed the Society’s resources and capabilities. With this balance in mind, the Law Society of Yukon proposes the following to reflect its purpose:

The purpose of the Society is to uphold and protect the public interest in the delivery of legal services by:

- a) establishing standards for the education, professional responsibility and competence of its members and applicants for membership;
- b) regulating the delivery of legal services in Yukon;
- c) upholding the independence of the legal profession;
- d) promoting the Rule of Law, and
- e) engaging in such activities that are incidental to the above.

**What is to be Regulated under the New Legislation?**

Under the current *LPA*, the practice of law is defined in an inclusive way by providing a list of activities that are said to constitute the practice of law. Examples include “appearing as counsel or advocate”, “preparing, revising or settling documents for use in proceedings” etc. Certain activities are then considered exempt from the definition of the practice of law, such as activities that are not performed for a fee or any expectation of a fee, gain or reward.

The current *LPA* then goes on to indicate that only members of the Law Society may engage in the practice of law. While some limited exceptions apply, the current *LPA* in essence creates a monopoly for lawyers to engage in the practice of law.

Increasingly, both members of the public and consumer advocates are questioning the need for such tight control on who can engage in the provision of all aspects of legal services, recognizing the breadth of activity encompassed within the definition of the practice of law. In Ontario for example, certain aspects of the practice of law have been carved out for the role of paralegals who are regulated under the same legislation as that which regulates lawyers.

In other jurisdictions such as England, public demand for greater availability of legal services has driven such results as the availability of alternate service providers where legal services are offered alongside other consumer services in entities such as grocery store chains.
Given the increasing concerns about access to justice, the movement toward “unbundling” of legal services in other jurisdictions, and the changing nature of the practice of law, it is recommended that new legislation should enable the regulation of the provision of legal services by lawyers and others, and not be limited to the regulation of the practice of law by lawyers. The Law Society agrees with feedback received from the President of the Law Society of British Columbia, who stated “determining what course of regulation will be necessary in the coming years is impossible to determine at this time. We believe legislation that enables the regulation of groups other than lawyers (but does not require it) is preferable given that at this point in time the underlying issues of who and what to regulate have not yet been settled”.

**Who is to be Regulated under the New Legislation?**

In recognition of the increasing mobility of lawyers, the global nature of many legal issues, and the movement toward regulating legal services, it is proposed that the new legislation should provide for the regulation of:

- lawyers,
- law firms,
- inter-jurisdictional lawyers and inter-jurisdictional law firms,
- students-at-law and law students engaged in aspects of the practice of law,
- professional corporations and Limited Liability Partnerships,
- Canadian Legal Advisors (members of the Barreau du Quebec and Chambre des Notaires authorized to give legal advice on the law of Quebec or matters of federal jurisdiction outside of Quebec),
- Foreign Legal Consultants (lawyers licensed to practice in a jurisdiction outside of Canada who apply for and are granted permission to practice the law of their home jurisdiction in Yukon), and
- such other providers of legal services as may be authorized under the Rules.

The exemptions found in the current legislation allowing self-represented litigants and aboriginal court workers to engage in aspects of the practice of law without being members of the Society, should continue. It is also proposed that there should be a consequential amendment to the *Legal Services Society Act* to clarify which employees of the Legal Services Society are authorized to provide legal services.

It is believed that the current exemption in the legislation that allows employees of members or employees of law firms or government to fully engage in the practice of law while under the supervision of a member, is too broad and should be deleted from the new legislation. It is not consistent with the Law Society’s mandate to protect the public interest in the practice of law if virtually any employee can fully engage in the practice of law without having the credentials or training of other members of the Law Society.
Finally, with respect to titles that should be protected against use by non-members of the Society, and authorized for use by members of the Society, it is proposed that there be a broad provision in the new legislation to prohibit persons who are not members of the Society from using any title, name or description with the intent of representing that they are qualified to deliver legal services. The term “lawyer” should be authorized for use by those who qualify for membership as lawyers; the term “members” should be used in a broader sense to generally describe all categories of persons who are regulated under the new legislation; and the term “practising members” should be used to distinguish categories such as lawyers and professional corporations from categories such as non-practising and retired members. Each category of membership will then be granted explicit privileges under the Rules to set out the scope of legal services, if any, which may be provided.

Governance

In keeping with the principle that the new legislation should be flexible and allow for evolution to keep pace with the changing nature of the legal profession, it is proposed that the new legislation will set out the minimum composition of the Executive, with room to add as set out in the Rules. The minimum number in the Act will be eight persons, with at least twenty-five percent of the total composition of the Executive to be public representatives. It is proposed that public representatives should be appointed by government, following consultation and recommendations from the Law Society.

All other aspects of governance including the details of election processes, the terms of office for officers, the need for staggering of terms, and such other matters should be set out in the Rules that will enabled by the new legislation.

Credentials and Admissions Processes

Under the current LPA, the authority to make decisions concerning admissions and credentials matters is vested in the Executive. Neither staff nor committees have been given any decision-making authority. As one of the foundational principles for the new legislation is that the Executive will perform a policy-making function more so than an operational role, it is proposed that a Credentials Committee be created to become the decision-making body for admission matters. The Credentials Committee should be comprised of members of the Society and public representatives, and it would be optional for some members of the Executive to serve on this committee. The Executive Director should be an ex officio member of the Credentials Committee who could deal with the various administrative aspects of the admissions and credentials process on behalf of the committee. In addition, there should be some delegation authority authorizing the Credentials Committee to delegate certain aspects of the processes to the Executive Director to achieve administrative efficiencies.

In the event the Credentials Committee denies an application for admission, or an application to change a category of membership, there should be an appeal to a separately established Credentials Appeal Committee, comprised of members of the Society (other than the Executive) and public representatives who did not concurrently serve on the Credentials Committee that
made the initial decision. The use of a Credentials Appeal Committee retains the concept of peer review, reduces additional resources needed for a court appellate process and keeps the members of the Executive within a policy-setting function rather than an individual decision-making function.

**Quality Assurance**

Under the current LPA there is no requirement for members to participate in continuing professional development (CPD), although a Taskforce of the Law Society has recently recommended that mandatory CPD be required for all members of the Law Society.

The majority of jurisdictions across Canada have now either implemented or are about to implement mandatory CPD. Given the recent decision of the Law Society’s Taskforce on CPD, the new legislation should enable the details of a CPD program and other potential quality assurance programs to be established in the future. The specific nature of the programs need not be spelled out in the Act, as long as there are enabling provisions in the legislation authorizing details of such programs to be set out in the Rules or otherwise established by the Executive. Such programs, in addition to mandatory CPD, may include the ability to establish practice standards in particular areas of law; the ability to have a program of random practice inspections and the potential for more formalized trust account auditing practices.

**Sanctions for Unauthorized Practice**

The current LPA creates an offence punishable on summary conviction for individuals who engage in the practice of law while not being active members of the Society. Upon conviction, the person is liable to a fine of not more than $5,000 and/or to imprisonment of not more than six months. In the event the Society wishes to seek an injunction to stop a non-member from practising law, injunctive relief can only be obtained after a summary conviction offence has been entered.

In the new legislation it is proposed that the process used to obtain summary convictions should be more streamlined, providing, for example that the Executive Director or a person authorized by the Executive may lay the information alleging the offence.

In addition to streamlining the process, it is imperative that the new legislation allow injunctive relief to be obtained without the necessity of a summary conviction, so that the Law Society can act quickly to stop someone engaged in the unauthorized practice of law.

Finally, the amount of fines that can be imposed should be increased to provide an appropriate deterrent to those individuals who choose to participate in the unauthorized practice of law. The Society suggests a minimum of $5,000 as a fine for a first offence and further suggests that each day of unauthorized practice amounts to a separate offence, with a maximum fine payable under one summary conviction process to not exceed $250,000.
The Complaints and Hearing Processes

The Complaints and Hearing Processes are the most public aspects of the work of the Law Society. As a result, it is imperative that the processes used, and the communications involving members of the public be transparent, fair and conducted in accordance with the common law and best practices. In order to achieve this, it is proposed that a clear distinction be made between the Complaints Process and Hearing Process (the investigative and adjudicative phases of a complaint process), where the individuals assigned to the investigation of a complaint are different individuals than those who may be involved in determining the outcome of the matter. Accordingly, the new legislation should provide for the establishment of separate Complaints Committees and Hearing Committees, the membership of each of which should include lawyers and public representatives.

At present, the LPA provides jurisdiction over “conduct deserving of censure”. The use of this terminology presupposes a penal aspect of the complaint, and does not appropriately take into account the reality that many matters that end up in the complaints process are rooted in mental health or addiction issues, or issues of lack of knowledge, skill and judgment rather than a wilful intent to act unethically. It is recommended that the new legislation provide that the Law Society has jurisdiction over professional misconduct, conduct unbecoming, incompetence and incapacity. Flexible options should then be made available to the committees of the Society dealing with such complaints, so that the disposition of a matter appropriately reflects the issue to be addressed.

Indeed, flexibility is key in Complaints Committee and Hearing Committee Processes, as each complaint brings with it its own individual considerations. As a result, it is proposed that many of the processes and resolution options for complaints will be set out in the Rules, rather than the Act itself. Some of the key provisions that will need to be included in The Act are:

1. establishing the key committees such as the Complaints Committee and Hearing Committee, and the minimum composition of each;
2. providing broad investigative authority, including authority under the Public Inquiries Act for investigators and committee members;
3. providing for a mechanism for dismissal at an early stage of a matter if a complaint meets certain threshold requirements;
4. providing for a mechanism to have an interim suspension, conditions or restrictions placed on a member pending full disposition of the matter, where it is necessary in the public interest to do so;
5. allowing for materials subject to solicitor client privilege to be disclosed during the course of Complaints Committee and Hearing Processes;
6. establishing a statutory privilege that would prohibit the disclosure of information gathered through the Society’s regulatory processes are using external civil or administrative proceedings;
7. setting out a right of appeal for either the member or the Society following a formal hearing. In view of the deference shown by courts to self-regulatory adjudicators, the
appeal should be limited to questions of law. The appeal should be to the Yukon Supreme Court rather than to an appellate court, as this provides for a more accessible and cost-effective process.

Practice by Professional Corporations/LLPs/Multi-disciplinary Practices

The provisions of the current statute allow for the practice of law by professional corporations that meet the criteria enumerated by the Law Society. This practice works well and it is proposed that it be continued. In addition, given the different types of business associations that now exist across the country, the legislation should provide for other types of corporate practice, such as limited liability partnerships (LLPs).

Only two jurisdictions have Rules respecting multi-disciplinary practices, as they are a relatively new model for legal practice in Canada. However, global developments would suggest that it may be prudent to have enabling language in the new statute that will allow future Rules regarding multi-disciplinary practices to be passed in the future.

The Special Fund

The current LPA requires the Society to establish, maintain and operate a “Special Fund” for the purpose of reimbursing pecuniary losses sustained as a result of the misappropriation of a person’s property by a member entrusted with the same.

Presently, all members are required to pay into the Special Fund with two key exceptions:

1. where no property that belongs to another person was entrusted to or received by them in the private practice of law;
2. where the lawyers is a member of the Public Service of Yukon or Canada

The Society proposes that the Special Fund be renamed the “Compensation Fund”, to be more descriptive of the function of the Fund. In addition, the Society proposes the elimination of the two exemptions that exist under the current LPA. This is in keeping with the principle that there is an obligation of the profession as a whole to reimburse those who have suffered at the hands of identified individual unethical lawyers. All lawyers have an equal stake in ensuring that members of the public have confidence in the legal profession, and the existence of a Compensation Fund to compensate clients in cases of misappropriation is a key method by which public confidence is reinforced. As a result, the Act should provide only for limited exemptions for certain categories of members respecting payments into the Compensation Fund, and it is anticipated that such exemptions would be set out in the Rules and would exempt students-at-law, non-practising members, retired members and honorary members.
**Law Foundation**

The current *LPA* sets out the purposes for which funds from the Law Foundation may be used as including research and reform of the law, the administration of justice, legal aid programs and the establishment of law libraries. These types of purposes for funds of a Law Foundation are common across the country. In addition to these fairly traditional purposes, the language of the current legislation also indicates that funds from the Law Foundation may be used for contributions to the Special Fund, and contributions toward the costs incurred by the Society in relation to disciplinary matters.

It is the view of the Society that the focus of the Yukon Law Foundation should be on public interest issues such as law reform, the administration of justice, law libraries and legal education for members and the public. Accordingly, it is recommended that the new legislation delete reference to the ability to use funds from the Law Foundation for contributions to the Special Fund and contributions toward the cost of disciplinary proceedings.

**Trust Accounts**

The current provisions of the *LPA* that deal with trust accounts are detailed and prescriptive, setting out, for example, specific requirements for maintaining books, records, and accounts in ink or a duplication thereof, or “by machine”. Given the rapid changes in banking, technology, and law practice, it is proposed that the operational requirements for trust accounts be moved to the Rules, and that the new legislation provide the broad obligations for members to maintain trust accounts in accordance with the provisions of the Rules.

It is further proposed that in order to promote good practice and to prevent poor practice, a system of random trust account audits should be enabled in the new legislation with the details of the process to be set out in the Rules. Finally, the Society recommends that unclaimed trust funds should be made payable to the Law Foundation to be put to the various public interest uses authorized by the Foundation. Under the present *LPA*, unclaimed trust funds are payable to the Minister. The Society believes this money more properly belongs to the Law Foundation for its various law-related public interest uses, rather than becoming part of general government funds.

**Conclusion and Next Steps**

New legislation presents an opportunity for both the Law Society of Yukon and the Government of Yukon to establish structures and processes that will better govern and regulate the provision of legal services in Yukon for the foreseeable future. The suggestions advanced in this Policy Paper, summarized in Appendix 4, have been made after careful study, wide consultation, and consideration. The changing nature of the practice of law, combined with challenges to self-regulation of professions throughout the world allow for a timely review of matters involving the regulation of legal services. The prospect of new legislation opens the
door to provide the processes that both the public and members will find to be fair, transparent and open, in order that confidence in the regulation of the legal profession can be maintained.

The Law Society of Yukon looks forward to working with government to develop new legislation that will provide effective and enhanced regulation of legal services for the citizens of Yukon.
Introduction

This Policy Paper presents the results of a process designed to review Yukon’s current Legal Profession Act with the objective of developing new legislation that will enhance the regulation of legal services in Yukon.

In preparing this Policy Paper, the Law Society of Yukon has consulted extensively, both internally with its members and externally with others to bring varying perspectives to the preparation of this document. Attached as Appendix 1 to this Policy Paper is a listing of individuals and organizations consulted throughout the preparation of this document.

This Policy Paper has been prepared by the Executive of the Law Society of Yukon, assisted by a Legislative Review Committee and external counsel. A list of those involved in the preparation of this Policy Paper is attached as Appendix 2.

Throughout the preparation of the Policy Paper, comparisons have been made with legislation from other Canadian jurisdictions, as well as with legislation from selected countries around the world. The list of legislation considered in the course of preparing this Policy Paper is found in Appendix 3.

Why is new legislation needed?

The Law Society, as the governing body of the legal profession in the Yukon was originally incorporated by statute in 1985 through the Legal Profession Act, R.S.Y. 1986, c. 100, repealed and replaced by the Legal Profession Act, R.S.Y. 2002, c. 134 as amended by An Act to Amend the Legal Profession Act, S.Y. 2004, c.14, and as amended by the Labour Mobility Amendments Act, S.Y. 2010, c.4, s. 8 (the “LPA”). While there have been some amendments to the LPA since 1985, no comprehensive review has been undertaken to ensure the statute currently addresses appropriate and effective governance and regulation of the legal profession.

Since 1985 there have been significant changes not only in the legal profession itself, but in the manner in which the provision of legal services has been regulated throughout the world. While the scope of these changes is beyond the parameters of this Policy Paper, it is worthwhile to note some of these developments as follows:

Changes in the legal profession:

- Increasing mobility of lawyers (e.g., National Agreement on Mobility);
- Outsourcing and a call for "unbundling" of legal services;
- Expanded scope of practice for paralegals and other alternate legal service providers;
• Increase in number of internationally trained lawyers;
• Increased use of technology in the practice of law;
• Increased concern regarding access to, availability and affordability of legal services; and
• Movement toward national harmonization of key regulatory functions.

Changes happening in other jurisdictions:

• Influence of marketplace competition and consumerism in the erosion of legal services monopolies (e.g., UK and Australia);
• Diminished public confidence in the ability of the legal profession to regulate itself in the public interest (largely arising from poorly handled or secretive disciplinary processes and failures to fairly administer admissions processes);
• Increased government involvement in regulation of professions:
  o *Fair Registration Practices* legislation has been implemented in Ontario, Manitoba and Nova Scotia appointing a government official to monitor registration processes;
  o The Federal/Provincial/Territorial Agreement on Internal Trade mandates admission of lawyers admitted to practice in one jurisdiction to be authorized to practice in all other jurisdictions, regardless of individual requirements of province or territory; and
  o Legislation has been introduced in Ontario, Alberta and British Columbia allowing for government oversight of health professions when government is dissatisfied with role of regulator.
• Replacement of some traditional regulators of legal professions with government oversight regulators in England, Australia and elsewhere.

While some of the changes in the regulation of the legal profession in other jurisdictions reflect increased government involvement in regulatory processes, the need for the independence of the legal profession and its critical role in upholding the Rule of Law has never been more prominent. One need only look at the situations in any number of countries throughout the world to see where the loss of independence of the legal profession has led to significant infringements on human rights and democracy. To the extent that legislation can reinforce the concept of independence of the legal profession, it must do so.

In addition to these high level changes in the legal profession and throughout the world, there are local and practical difficulties with the current *LPA* that present some limitations to those
implementing its provisions. Some sections are outdated, some lack clarity, and some fail to recognize best regulatory practices or developments in the law. These issues are referenced with respect to a number of the separate subject matters covered within this Policy Paper.

As a result of all the above, it is the view of the Law Society that the regulation of the legal profession needs to evolve to meet changes in the legal profession, changes in regulatory matters, and changes in practices and procedures at the Law Society of Yukon. The traditional roles of Law Societies in admitting individuals who are authorized to practice law, setting standards for their practice, and disciplining them when they run afoul of such standards, may no longer be good enough. The public has higher expectations of regulation in order to be satisfied that lawyers are practising competently, ethically and in a manner that permits access to legal services and upholds the Rule of Law.

It is within the context of such shifts in thinking and such changes in practice that the time has come to revisit the LPA.

**Guide for Reviewing Policy Paper**

This Policy Paper is intended to give general guidance to the Yukon Government in the drafting of a new *Legal Profession Act*. Since this Paper presents issues in the form of policy guidance and not specific legislative drafting, the Paper will largely present concepts rather than suggested wording. In some instances where the specific wording may have particular importance, draft language is suggested.

In the event more specific guidance or direction is sought with respect to proposed specific sections of a new *Legal Profession Act*, the Law Society of Yukon would be pleased to provide it. It is hoped however that the general comments contained within this Policy Paper will at least provide the opportunity to assess and understand the merit of the proposed changes.

The general format used throughout this Policy Paper to provide policy direction to the Yukon Government is as follows:

1. A specific topic is identified.
2. The manner in which the topic is dealt with under the present Yukon LPA is set out.
3. The manner in which the topic is dealt with in other jurisdictions is reviewed.
4. The topic is discussed and the position of the Law Society of Yukon is then articulated.
5. The rationale for the position taken by the Law Society is set out, unless the rationale is evident in the discussion portion of the topic.

A summary of the suggested direction for the specific topics discussed in this Policy Paper is attached as Appendix 4.
1. GENERAL FRAMEWORK OF THE STATUTE

Yukon

The current LPA is a comprehensive statute vesting the management of the affairs of the Society in an Executive. The Executive is given certain authority, including Rule making authority to deal with issues of admission, reinstatement, trust accounts, member records, discipline and other matters.

Under this authority, a set of Rules has been developed that provides detailed information respecting the Executive of the Society, membership and enrolment issues, discipline matters, issues related to the Special Fund, professional liability insurance, advertising, professional corporations, ethics and professional conduct and accounting records and requirements.

The framework used in the LPA presents some difficulties. The LPA refers, for example to dealing with trust accounts only in print and ink, and does not take into account electronic data. The current LPA provides very prescriptive authority with respect to the disciplinary functions of the Society, and does not take into account some of the more flexible options that have been implemented in other jurisdictions. These are but a few of the examples where the existing LPA is constrained by the degree of detail found in the statute itself.

Other Jurisdictions

The framework for legislation in most other provinces and territories in Canada is similar to that of Yukon, in that in each there is a governing statute setting out key regulatory functions, and then a set of Rules (sometimes called Regulations in certain jurisdictions) providing details about these processes.

The statutes vary however, with respect to the amount of detail included in the Act compared with what is included in the Rules or Regulations. For example, in Yukon's LPA, the powers of a Committee of Inquiry are explicitly set out in Section 37. These varied powers are very detailed and prescriptive. In most other jurisdictions, the Act simply indicates that the relevant committee may order such dispositions as set out in the Rules, and the details are then articulated in the Rules, which can be more easily amended as new forms of disposition are desired.

Discussion and Proposed Direction

Matters prescribed in Rules can be much more easily changed than matters set out in a statute. Statutory changes require government involvement, while changes to Rules require either the approval of the governing body only in some jurisdictions, or by the membership in others. It is generally considered desirable to achieve the benefits of flexibility of moving matters to Rules
where the issues are ones which do not rise to the level of requiring statutory authority. Governments generally recognize that the detailed workings of a Law Society are best left to those appointed to govern the profession, while government's role is to ensure that a sufficient structure is established in the legislation to ensure the public interest is protected.

The trend in other jurisdictions is toward inclusion of key public interest concepts in the governing statute, with the details and the operational aspects of those topics to be covered in the Rules. The Law Society of Yukon agrees with this approach and proposes that the new LPA should be less prescriptive than the present statute, containing the general framework for each of the key statutory issues, but leaving the details with respect to each of these issues to the Rules. Such a structure provides much greater flexibility to allow the profession and its regulatory processes to evolve.

**Rationale for Recommended Policy Direction**

By including key public interest matters in the statute and leaving the detailed operational implementation of the workings of the Law Society to the Rules, the appropriate balancing of interests is struck. Through direction over matters contained within the Act, government ensures that the public interest is addressed. Through provisions in the new LPA that enable the Society to develop its own Rules, the principle of self-regulation is maintained and those aspects of regulation that are either more operational in nature or more likely to need flexibility, are left in the hands of the Society. This approach is consistent with the trend across the country.

**2. AUTHORITY FOR APPROVAL OF RULES**

**Yukon**

Section 6(1) of the LPA provides that the Executive may make Rules not inconsistent with the LPA respecting a variety of matters including admission of members, the bar admissions courses, membership fees, reinstatement, trust accounts, other books of accounts, records and a variety of other matters.

Section 6(4) goes on to provide that "no Rule made by the Executive respecting the admission, conduct or discipline of members or of students-at-law or respecting admission fees or membership fees shall have effect until it is confirmed by resolution supported by at least 2/3 of the active members present at a general meeting".

Other than the Rules outlined in Section 6(4), all other Rules require membership approval by active members either at a general meeting or at the annual general meeting.
In short, membership approval is required before any Rule goes into effect.

Also of note is Section 7(3) that provides the Commissioner in Executive Council (“Cabinet”) may annul any Rule considered contrary to the public interest. In essence this provides Cabinet with a veto over Rules enacted by the Society in the event the Rule is considered contrary to the public interest.

### Other Jurisdictions

**Membership Involvement in Approval of Rules:**

There appear to be three different models for membership involvement in the approval of Rules (sometimes called Regulations in other jurisdictions) across the country:

1. **No approval required by members** - Newfoundland, Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba, and Saskatchewan.

2. **Rules requiring general approval of members** – Prince Edward Island, Yukon, Northwest Territories and Nunavut.

3. **Province – specific variations:**
   
   (a) In Alberta, Benchers approve the Rules, although members may make a resolution at an AGM respecting Rules, but these votes are non-binding on Benchers.

   (b) In British Columbia, Benchers have the authority to approve Rules with the exception of specified Rules requiring an affirmative vote of 2/3 of members voting in a referendum (on issues such as the practising fee, term of office of Benchers, removal of officers, electoral districts and eligibility to serve as Benchers).

**Cabinet Approval:**

The involvement of Cabinet in the rules or regulations of each Law Society varies across the country. In summary:

- **Newfoundland:** No cabinet approval required;
- **Nova Scotia:** Cabinet approval required for limited matters such as taxation of fees;
- **New Brunswick:** Cabinet approval required only for matters relating to taxation of fees;
- **Prince Edward Island:** Cabinet involvement limited to approval of notaries public;
Ontario: Limited Cabinet approval required for specific regulations concerning establishment and dissolution of county and district law associations, appointing of a Complaints Resolution Commissioner, the assignment of members of hearing panels to hearings, matters related to a class proceedings fund, gaming tribunals that have a judicial or quasi-judicial function, and designating financial institutions in which joint accounts must be established for certain purposes;

Manitoba: Limited Cabinet approval required for regulations regarding paralegal involvement in highway traffic offences;

Saskatchewan: Rules must first be filed with the Legislative Assembly to determine whether they are within the authority delegated to Benchers by the Act, but apart from this, Benchers vote on approving Rules;

Alberta: Limited Cabinet approval required for regulations respecting LLPs;

British Columbia: No Cabinet approval required;

Northwest Territories: No Cabinet approval required;

Nunavut: No Cabinet approval required.

Discussion and Proposed Direction

It can be seen that most Canadian jurisdictions do not require members of the Law Society to approve all Rules or Regulations. This function is largely left to the governing entity of the Society. When it is recognized that it is the public interest, rather than member interest that is paramount in the regulation of the legal profession, it must be questioned why the members have the ability to vote on matters that could be adversely impacted by the members' self interest. Membership fees are one clear example of this. If the governing body determines that a certain fee needs to be set in order to fulfil a public interest mandate, it does not seem consistent with the public interest that members could vote down a fee increase based on their self interest. This likely explains the trend across the country to leave the Rule making approvals in the hands of those elected and appointed to serve the Society in the public interest.

Throughout the consultation process leading to the preparation of this Policy Paper, it has been observed that members have been somewhat disengaged from voting in elections for the Executive of the Society because the Executive has no ability to make decisions that impact members. The processes that are followed in most other jurisdictions, whereby authority is given to the Executive to make various decisions in the public interest on behalf of the
members, arguably assist in engaging members to vote for those who will be charged with the governance of the legal profession.

It is always a fine line to walk when looking at the authority of the Executive compared with the authority of members to make the Rules that govern the provision of legal services in a Territory. It is important that members always have the opportunity to provide input to those who are elected, so that those in the decision-making role have full knowledge of the implications of any particular matter. The approach taken in Alberta that leaves the authority to approve the Rules with the Bencher, while at the same time allowing members to vote in a non-binding way with respect to resolutions, allows for input to be given, while at the same time streamlines the decision-making authority in the hands of those who are elected to govern in the public interest.

With respect to Cabinet approval of Rules, Yukon seems to be anomalous with respect to the ability of Cabinet to annul Rules respecting certain issues relating to broad regulatory functions. While this is an annulment authority rather than an approving authority, it could be argued that such authority runs contrary to requirements for the independence of the legal profession, and contrary to a foundational principle of self regulation that provides that the members themselves best know the standards to which members should be held accountable.

Generally, with respect to the requirement for Cabinet approval of regulations, it is important that the principle of independence of the legal profession be borne in mind. Unlike any other profession, the independence of the legal profession is fundamental to upholding the Rule of Law. It has often been said that the legal profession stands between the power of the state and the vulnerability of individuals, thus leading to the importance of the principle of independence. Given the importance of this principle, while governments are involved in approving the statutes for legal professions, Cabinet is generally not involved in the approval or annulment of the Rules under which Law Societies operate, except in limited circumstances.

In the jurisdictions where more authority has been given to the Executive with respect to decision-making, there is a greater responsibility on the Executive to communicate with members through a variety of means. In many jurisdictions, for example, the agendas for meetings are posted in advance; minutes are posted showing what was discussed; and opportunities are created for members to provide formalized feedback before decisions are made.

It is the position of the Law Society of Yukon that approval for Rules should be dealt with as follows under a new LPA:

1. All Rules involving the eligibility of members to serve on the Executive, the election process, the term of office of members of the Executive, and the removal of members of the Executive shall require a majority vote of members eligible to vote.

2. Apart from the specific matters set out above, all other Rules should require consultation with members before an Executive vote, but should not require
membership approval. For example, the Act could require the giving of notice of a proposed new Rule or a proposed Rule change at least 30 days prior to the Executive vote on the matter. This would allow the input of the members to be considered prior to the vote.

3. Cabinet approval should not be required for the Rules.

### Rationale for Recommended Policy Direction

The rationale for the above position is perhaps best expressed in comments received during the consultation process from Gavin Hume, the 2011 President of the Law Society of British Columbia, who stated as follows:

"Independence for lawyers is a crucial element of ensuring the protection and continuance of the Rule of Law. The Law Society of British Columbia does not consider that a requirement for cabinet approval for law society rules is consistent with the notion of an independent regulator. It is therefore inconsistent with an independent legal profession which is fundamental to upholding the Rule of Law."

The Law Society of British Columbia also believes in general that requiring member approval of rules (particularly in connection with fees) raises difficult issues of conflicts of interest and may make it difficult for the Law Society to demonstrate that it is a regulator in the public interest rather than the members' interest...".

### 3. OBJECTS OF THE SOCIETY

#### Yukon

The current "objects" clause of the Act states in Section 3 that it is the object and duty of the Society:

(a) To uphold and protect the public interest in the administration of justice by:

(i) Preserving and protecting the rights and freedoms of all persons;

(ii) Ensuring the independence, integrity and honour of its members; and

(iii) Establishing standards for the education, professional responsibility and competence of its members and applicants for membership,
(b) Subject to paragraph (a),

(i) To regulate the practice of law; and

(ii) To uphold and protect the interests of its members.

This is a very broadly stated objects clause that gives the Society not only a role but a duty to preserve and protect the rights and freedoms of all persons in addition to some of the more traditional regulatory functions for a Law Society. In the last clause, it is also noted that the Society has a duty to uphold and protect the interests of its members. While this clause is subject to the requirements to uphold and protect the public interest in the administration of justice, it creates the dual and potentially conflicting obligations to protect public interest and member protection.

Other Jurisdictions

While not every statute across Canada governing the legal profession includes an objects clause, those that do vary considerably. This is not surprising when the wide variety of activities undertaken by Law Societies across the country is borne in mind. The “pure regulatory” activities are undertaken in virtually every jurisdiction in Canada, but some of the more wide ranging duties such as those involving a duty to preserve and protect the rights and freedoms of all persons, and the duty to protect member interests, are not as common.

Set out below is a chart that attempts to show the variation among the ranges of purpose that can exist in Law Societies.

Figure 1: Range of Purpose

Within the above ranges of purpose, jurisdictions such as Manitoba, Nova Scotia, Ontario, and Saskatchewan fall somewhere between the "regulation plus" model and the "regulation plus plus" model. PEI, New Brunswick and British Columbia fall to the right hand side of the ranges of purpose in line with Yukon's present wording.
Compare for example, the Manitoba objects clause with Yukon's objects clause:

Manitoba Legal Profession Act,

Section 3(1) The purpose of the Society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.

(2) In pursuing its purpose, the Society must:

(a) establish standards for the education, professional responsibility and competence of persons practising or seeking the right to practice law in Manitoba;

(b) regulate the practice of law in Manitoba.

It must also be noted that jurisdictions such as the United Kingdom have adopted some variations on the purposes of a Law Society. For example, the Legal Services Act 2007 (UK), 2007 c.29 refers in Section 1 to the "regulatory objectives" as:

(a) Protecting and promoting the public interest;

(b) Supporting the constitutional principle of the rule of law;

(c) Improving access to justice;

(d) Protecting and promoting the interest of consumers;

(e) Promoting competition in the provision of services...;

(f) Encouraging an independent, strong, diverse and effective legal profession;

(g) Increasing public understanding of the citizen's legal rights and duties;

(h) Promoting and maintaining adherence to the professional principles.[emphasis added]

"Professional principles" are defined to include activities such as acting with independence and integrity; maintaining proper standards of work; acting in the best interest of the clients; acting in accordance with duties to the court, independence and the interest of justice and ensuring confidentiality for the affairs of clients.

Accordingly, there is wide variation of purposes set out in the statute of Law Societies within Canada and in jurisdictions such as England.
Discussion and Proposed Direction

The objects clause is arguably the most important provision of legislation for self governing professions. All clauses in a statute are analyzed in the context of the purpose of the Law Society as set out in the objects clause. The clause sets out the core functions and mandate of the Law Society.

In determining the scope of the purpose of the Law Society of Yukon, a number of factors need to be borne in mind including:

- The purpose of self regulation;
- The need to focus on the public interest rather than member interest;
- Recognition of the role a Law Society plays as the one entity in each jurisdiction where all lawyers are required to be members, thereby setting the parameters for lawyers' roles in the administration of justice and in upholding the Rule of Law;
- The size of the legal profession in Yukon;
- The resources and capacity of the Law Society.

As a general principle, the mandate of the Law Society should be appropriately reflective of the need to protect the public interest and appropriately reflective of the role required to be played in the administration of justice, but should not be excessively broad so as to exceed the Society's resources and capabilities. With this balance in mind, the Law Society of Yukon suggests the following as a proposed objects clause:

The purpose of the Society is to uphold and protect the public interest in the delivery of legal services by:

a. Establishing standards for the education, professional responsibility and competence of its members and applicants for membership;

b. Regulating the delivery of legal services in Yukon;

c. Upholding the independence of the legal profession;

d. Promoting the Rule of Law; and

e. Engaging in such other activities that are incidental to the above.
**Rationale for Recommended Policy Direction**

When examining the present objects clause of the current LPA, the Law Society of Yukon does not believe it is possible for it to "preserve and protect the rights and freedoms of all persons". As previously noted, the objects clause must appropriately reflect the balancing of the need for public protection in the context of the delivery of legal services with the practical realities of a small membership and resources. At the same time, the objects clause must have appropriate flexibility to enable the Law Society to engage in activities that are relevant in an ongoing national and global context to ensure the independence of the bar and the upholding of the Rule of Law. The Society believes that the above recommendation achieves these objectives.

4. **PROTECTED TITLES**

**Yukon**

Section 99 of the LPA designates that all members are known as barristers and solicitors. It does not reference the term "lawyer" and instead uses the term "members". Section 103 prohibits any person from representing themselves as an active member unless they are an active member. Thus, no person may represent themselves as being a barrister or solicitor unless they are an active member.

**Other Jurisdictions**

Most jurisdictions provide title protection either directly in the definitions or indirectly in provisions restricting what representations persons can make regarding membership, titles, or authority to practice.

Nova Scotia and Manitoba define the term "lawyer" as including the terms barrister, solicitor, and attorney-at-law. Nova Scotia also includes the terms "avocat" or "notaire" and a few additional variations of barrister or solicitor such as "barrister-at-law". Both Nova Scotia and Manitoba also define a "practicing lawyer" as meaning a lawyer who holds a valid practicing certificate. Both Acts prohibit persons from making false representations related to title and authority to practice law.

New Brunswick has taken a broad approach to title protection by prohibiting persons from using "any title, name or description" with the intent of representing that they are qualified to practice law. The Act defines "members" of the Society as including barristers or solicitors; however, title protection is cast more broadly to include any representation or title which would imply entitlement to practice law.
PEI and Ontario protect titles in an indirect manner. The PEI Act provides that no person shall practice as a barrister, solicitor or attorney unless they are a member, and then goes on to prohibit individuals from representing themselves to be members unless they are in good standing. The Ontario Act refers to "licensees" as persons licensed to practice law in Ontario or persons licensed to provide legal services in Ontario. The latter reference includes paralegals.

Quebec does not include title protection in the Act, but in the Professional Code enacted under the Act, the term advocate/avocat is defined and means any person entered on the Roll and authorized to practice in Canada.

Saskatchewan and Alberta expressly prohibit any person who is not a member in good standing of the Society from representing themselves by the designations "barrister" or "solicitor". In Saskatchewan, the Act also protects the titles: "barrister and solicitor", "lawyer", or "attorney".

BC defines the terms "lawyer" and "practicing lawyer" as members of the Society authorized to practice law. The BC Act prohibits persons from falsely representing themselves to be a lawyer.

The Northwest Territories and Nunavut Acts are similar to PEI and Ontario where they prohibit any person from representing themselves to be a member of the Society or authorized to practice law.

Table 1: The following table provides a summary and comparison of the various titles protected by jurisdiction.

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<thead>
<tr>
<th>Title Protection</th>
<th>YU</th>
<th>NL</th>
<th>NS</th>
<th>PE</th>
<th>NB*</th>
<th>PQ</th>
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<th>MB</th>
<th>SK</th>
<th>AB</th>
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* The NB Legislation does not protect these titles expressly; however, the legislation protects the use of any title which would represent to the public that they are entitled to practice law. This would include all of these titles.
† While the Ontario Act does not expressly protect the title "paralegal" it does prohibit persons from representing that they are authorized to provide legal services and in the Licensing Regulations for the P class licenses, reference is made to the fact that persons who provide legal services are commonly known as paralegals.

**Discussion and Proposed Direction**

It can be seen that there are a variety of titles that are used throughout Canadian jurisdictions. Since the term "lawyer" is commonly understood by both the public and the profession, the Law Society of Yukon proposes that the term "lawyer" be used throughout the LPA when referring to those individuals who have the appropriate level of education and training.
equivalent to a LLB/JD. The use of such a term will assist in distinguishing among different categories of members that would include lawyers as one category, with other categories including groups such as students-at-law.

Because a variety of terms are used by both members and the public to describe lawyers, as evidenced through the above chart, New Brunswick's approach to title protection is appealing. Accordingly, the Law Society of Yukon suggests that a broad approach to title protection be taken that would see a provision in the new LPA to prohibit persons who are not members of the Society from using any title, name or description with the intent of representing that they are qualified to deliver legal services. It is proposed that the term "lawyers" be used to describe those who qualify for membership as lawyers, and the term "members" be used to generically describe all categories of persons who are regulated under the new LPA, including students-at-law.

**Rationale for Recommended Policy Direction**

Because the term "lawyer" is a commonly understood and commonly used word, it follows it should be referenced and defined in the new statute. Lawyers would not be restricted to the use of this word to describe their activities and could continue to use terms such as barrister, solicitor, legal counsel, attorney, etc. In the registration provisions of the Act and in the Rules, it can then be clarified that lawyers are one category of members within the Society, leaving room for the development of other categories of members such as students-at-law, and perhaps at a time in the future, other categories such as paralegals.

With respect to title protection, because so many titles are used by varying individuals, a general prohibition against non-members of the Society using any titles, names or descriptions with the intent of representing that the individual is qualified to provide legal services seems most appropriate, as is done in New Brunswick.

### 5. WHAT IS TO BE REGULATED UNDER THE STATUTE?

**Yukon**

The present LPA deals with the regulation of the "practice of law". In section 1(1) the practice of law is defined in an inclusive style whereby a variety of activities are set out that are included in the meaning of "the practice of law". These include activities such as appearing as counsel, preparing, revising or settling corporate documents or documents used in a proceeding, preparing a will or trust document, and more. The definition also expressly excludes any of these acts which would otherwise be the practice of law, if they are not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed. The definition also excludes the preparation of documents in the course of a public
officer's duties, the lawful practice of a notary public, the usual business carried on by a licensed insurance adjuster, and acts of the legislative assembly or municipal government.

**Other Jurisdictions**

The BC, Alberta, Saskatchewan, PEI, Newfoundland, Nunavut and the Northwest Territories statutes all contain provisions very similar to those found in the Yukon LPA respecting the definition of the practice of law. There is some variation among the Acts regarding what additional specific acts are included in the practice of law, but generally the provisions are similar to Yukon's approach.

Nova Scotia and Ontario take slightly different approaches in their definitions. Unlike the majority of provinces which itemize more specific lists of activities, Nova Scotia defines the practice of law very broadly and does not go into the specificity of activities prescribed in other legislation. The definition in the *Legal Profession Act*, S.N.S. 2004, c. 28 reads as follows:

16 (1) The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of a person that requires the knowledge and skill of a person trained in the law, and includes any of the following conduct on behalf of another:

(a) giving advice or counsel to persons about the person's legal rights or responsibilities or to the legal rights or responsibilities of others;

(b) selecting, drafting or completing legal documents or agreements that affect the legal rights or responsibilities of a person;

(c) representing a person before an adjudicative body including, but not limited to, preparing or filing documents or conducting discovery;

(d) negotiating legal rights or responsibilities on behalf of a person.

In Ontario, there is no specific definition of the "practice of law". Instead, the "provision of legal services" is defined as follows:

1(5) For the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.

(6) Without limiting the generality of subsection (5), a person provides legal services if the person does any of the following:
1. gives a person advice with respect to the legal interests, rights or responsibilities of the person or of another person.

2. selects, drafts, completes or revises, on behalf of a person,

   (i) a document that affects a person's interest in or rights to or in real or personal property,

   (ii) a testamentary document, trust document, power of attorney or other document that relates to the estate of a person or the guardianship of a person,

   (iii) a document that relates to the structure of a sole proprietorship, corporation, partnership or other entity, such as a document that relates to the formation, organization, re-organization, registration, dissolution or winding-up of the entity,

   (iv) a document that relates to a matter under the Bankruptcy and Insolvency Act (Canada),

   (v) a document that relates to the custody of or access to children,

   (vi) a document that affects the legal interest, rights or responsibilities of a person, other than the legal interest, rights or responsibilities referred to in subparagraph (i) to (v), or

   (vii) a document for use in a proceeding before an adjudicative body.

3. Represents a person in a proceeding before an adjudicative body.

4. Negotiates the legal interest, rights or responsibilities of a person.
Without limiting the generality of paragraph 3 of subsection (6), doing any of the following shall be considered to be representing a person in a proceeding:

1. Determining what documents to serve or file in relation to the proceeding, determining on or with whom to serve or file a document, or determining when, where or how to serve or file a document.

2. Conducting an examination for discovery.

3. Engaging in any other conduct necessary to the conduct of the proceeding.

The statute then goes on to provide a list of exemptions for persons who shall be deemed not to be practising law or providing legal services.

The legislation in Ontario further allows for the licensing of barristers and solicitors to provide all aspects of legal services, and indicates that other categories of members, such as paralegals, can engage in only specified aspects of the provision of legal services as set out in their bylaws.

The only other jurisdiction that speaks to the ability to regulate legal services is Manitoba. However, while the objects clause of the Manitoba Legal Profession Act indicates the purpose of the Society is to uphold and protect the public interest "in the delivery of legal services", the legislation goes on to say that in pursuing its purpose, the Society must regulate the practice of law in Manitoba, and does not contain provisions regulating other activities, apart from the ability to regulate Highway Traffic Representatives. Section 20(3) of the Manitoba Act then goes on to list a variety of activities that are deemed to be the carrying on of the practice of law, which are similar to those enumerated in the other jurisdictions.

Discussion and Proposed Direction

The trend in most Canadian jurisdictions is to define the "practice of law" in an inclusive way listing a variety of functions. The statutes generally then go on to provide a list of exceptions to clarify functions that may be conducted without infringing the right to practice granted to lawyers.

With the exceptions of Ontario where the Law Society regulates legal services including the services of lawyers and paralegals, and Manitoba where the services of Highway Traffic Representatives are regulated, the remaining Canadian statutes regulate the practice of law by lawyers either individually or through corporate entities authorized by the statute.

The concept of regulating the provision of legal services is a flexible and broader one that leaves room for individuals other than lawyers to engage in the provision of legal services. There has been much talk in the media of late regarding the need to "unbundle" legal services
so that certain functions traditionally considered to be within the practice of law can be performed by individuals who are not lawyers.

Issues of access to justice are being increasingly aired by members of the public. In the context of one of the purposes of the Law Society with respect to upholding the administration of justice, it is appropriate for the Law Society of Yukon to leave the door open to the possibility that individuals other than lawyers may in the future perform certain aspects of legal services. This issue is under discussion by other jurisdictions in Canada, as evidenced by the feedback from the President of the Law Society of British Columbia set out below:

"Whether the Law Society should regulate lawyers or legal services providers through regulating the practice of law or the provision of legal services are interesting questions for discussion. Indeed, the Benchers in British Columbia recently addressed those very issues at their 2011 retreat. It is well known that the Law Society of Upper Canada now regulates the provision of legal services, through the regulation of both lawyers and paralegals. Determining what course of regulation will be necessary in the coming years is impossible to determine at this time. We believe legislation that enables the regulation of groups other than lawyers (but does not require it) is preferable given that at this point in time the underlying issues of who and what to regulate have not yet been settled."

Given the increasing concerns about access to justice, the movement toward "unbundling" of legal services in other jurisdictions, and the changing nature of the practice of law, it is the view of the Law Society of Yukon that a new LPA should adopt the approach recommended by British Columbia, where the statute would enable the regulation of the provision of legal services by lawyers and others, and not be limited to the regulation of the practice of law by lawyers. As a result, the new legislation should include a broad encompassing definition of the provision of legal services, mirrored on the definition included in the Ontario legislation, and should then set out which categories of members may engage in the full provision of legal services, and which categories may engage in a limited provision of legal services. Lawyers, law firms, law corporations and designated others would be included in the former group, with provision to be made in the Rules to include potential other groups over time. Students-at-law and aboriginal court workers would be included in the latter group, with provision to be made in the Rules to include potential other groups over time. Under this type of framework the door is left open to regulate groups such as paralegals and other alternate service providers to provide designated types of legal services, once the need has been fully identified and reviewed. The details of the types of services to be provided by such groups should not be included in the new Act, as they will likely evolve over time. Rather, the statute should simply enable this to unfold through the development of Rules in the future.

In addition to defining the provision of legal services as set out above, and enabling the provision of legal services by lawyers and others, the statute will need to exempt the activities that are not considered to fall within the definition of “legal services”. In that regard, the
exemptions listed in Section 1(1)(h), (i), (j), (k), (l) and (m) of the current LPA should be maintained. Similarly, the provisions of Section 1(4) must be maintained to ensure that members or former members who have been suspended or disbarred cannot engage in the provision of legal services even when they do so without expectation of a fee, gain or reward.

**Rationale for Recommended Policy Direction**

The ability to regulate the provision of legal services by lawyers and others, rather than regulating the practice of law by lawyers, is a responsive approach to concerns about access to justice. The definition of “legal services” must be accompanied by a provision indicating that only those individuals authorized under the Act and the Rules to engage in the provision of legal services are authorized to do so. Lawyers would be included in a category of practising members and will be permitted to participate in the provision of the full scope of legal services. Other categories of members, such as students-at-law, would be constrained through the Rules to engage only in designated aspects of the provision of legal services as set out in the Rules.

This proposed structure, where lawyers engage in the full scope of practice, and other categories are permitted under the Rules to engage in a prescribed scope of practice, creates the potential for unbundling of legal services in the future and takes into account the changing nature of the practice of law. While the need for the creation of other categories of members may not exist at present, it will be important to have the flexibility in the statute to allow for the development of Rules creating other categories of members in the future, such as paralegals, who can engage in designated aspects of the provision of legal services. This is more fully explored in the next section.

While the provision of legal services will be broadly defined in the legislation, specific exemptions for activities that fall outside the definition must be referenced. These exemptions should largely mirror the exemptions found in the current LPA, so that, for example, those individuals who engage in an activity that falls within the meaning of the provision of legal services, will not be violating the Act if they have done so without expectation of a fee, gain or reward, unless they are lawyers from Yukon or other jurisdictions.

This approach appears to appropriately balance the need for clarity around the meaning of “legal services” while at the same recognizing that certain acts performed sometimes routinely by non-members of the Law Society must continue without risk of infringing the legislation.
6. **WHO IS TO BE REGULATED AND WHO IS EXEMPT UNDER THE LPA?**

### Yukon

Authority exists under the current *LPA* to regulate members, students-at-law and professional corporations. In addition, the *LPA* authorizes permission to be given to members of the legal profession from outside Yukon to engage in occasional appearances or to have limited authority to practice law. Authority also exists to impose conditions or limitations on the permission granted, and to make Rules regarding the regulation of such applicants.

The current *LPA* also exempts certain groups from the requirement to be members before they are authorized to practice law. For example, self represented litigants may engage in the practice of law without being members of the Law Society. Similarly, aboriginal court workers can engage in aspects of the practice of law. Also exempt from the current *LPA* are the Legal Services Society, lawyers from other jurisdictions who are authorized to practice in Yukon and employees of members or law firms or governments who act under the supervision of a member. In essence, this latter exemption allows any employee of a lawyer to actively engage in the full practice of law as long as they are acting under the supervision of a member. In theory, any person with no formal legal training or education could conduct a full trial in court, whether a judge-alone trial or a jury trial, as long as the person was acting under the supervision of a member.

### Other Jurisdictions

All jurisdictions regulate persons who fit within the respective definition of "members", or in the case of Ontario, "licensees". The definition becomes important as it is the members or licensees who are subject to the disciplinary and other authority outlined in the governing statute. The term "members" generally includes: lawyers, barristers, solicitors, counsel or advocates. In a number of jurisdictions, authority is given to regulate other categories of members including:

(a) inter-jurisdictional lawyers (lawyers with authority to practice in one province or territory in Canada who have gained authority to practice in another province or territory);

(b) inter-jurisdictional law firms (law firms that are authorized to practice in more than one province or territory);

(c) Canadian Legal Advisors (*members of the Barreau du Quebec or Chambre des Notaires* authorized to give legal advice on the law of Quebec or matters of *federal jurisdiction in jurisdictions outside of Quebec*); and
(d) Foreign Legal Consultants (lawyers licensed to practice in a jurisdiction outside of Canada who apply for and are granted permission to practice the law of their home jurisdiction in a Canadian jurisdiction).

In addition, all provinces and territories also regulate articed clerks or students-at-law, although they are not always included in the meaning of the term "members".

Most provinces and territories also regulate professional corporations, and some regulate limited liability partnerships and multi-disciplinary practices. (Refer to Section 12 of this Policy Paper for more detail regarding these structures).

Nova Scotia is the only jurisdiction that provides authority to regulate law firms.

The individual variations among jurisdictions with respect to who is regulated, is reflected in the table below:

Table 2: The following summary provides a comparison of who is regulated under the provincial legislation.

<table>
<thead>
<tr>
<th></th>
<th>YU</th>
<th>NL</th>
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<tr>
<td>Articled Clerk/Student-at-Law</td>
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<td>LLP</td>
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<tr>
<td>Law Firms</td>
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<td>Professional Corporation</td>
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<td>Inter-jurisdictional Lawyers</td>
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<td>Foreign Legal Consultants</td>
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<td>Canadian Legal Advisor</td>
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<td>Highway Traffic Representatives</td>
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<td>Paralegals</td>
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</table>
The regulation of inter-jurisdictional lawyers under the national mobility agreement and foreign legal consultants is set out in the Rules, not the Act. The regulation of inter-jurisdictional practice and foreign legal consultants is set out in the Regulations, not the Act. The Act grants regulation making authority related to the inter-jurisdictional practice of law but does not include any express provisions regulating the same. Inferred from license classes and/or addressed in the Bylaws but not the Act. The Act does not define foreign legal consultant but regulates the practice of law by any lawyer authorized to practice law in a foreign jurisdiction which is defined broadly as any jurisdiction outside Manitoba. The Rules address foreign legal consultants. The regulation of inter-jurisdictional practice, foreign legal consultants, and Canadian Legal Advisors is set out in the Rules, not the Act. Regulation set out in the Rules, not the Act. The Northwest Territories regulate LLPs, Professional Corporations and Canadian Legal Advisors in their Rules where the Act does not. Nunavut does not provide for regulation of them.

The legislation in each jurisdiction goes on to expressly exclude certain professions from the requirement to be a member of the Law Society prior to engaging in particular activities that fall within the definition of the practice of law. Examples include insurance adjusters, notaries public, prepaid legal services programs and real estate professions.

Discussion and Proposed Direction

In recognition of the increasing mobility of lawyers, the global nature of many legal issues, and the previous discussion respecting whether the new LPA should regulate the practice of law or the delivery of legal services, it is the position of the Law Society of Yukon that the new LPA should provide for the regulation of:

- Lawyers;
- Inter-jurisdictional lawyers;
- Inter-jurisdictional law firms;
- Canadian legal advisors;
- Foreign legal consultants;
- Law students engaged in aspects of the delivery of legal services; (eg, summer students);
- Students-at-law;
- LLPs;
- Law firms;
- Professional corporations; and
- Such other providers of legal services as may be authorized under the Rules (this will allow, for example, for future regulation of paralegals).

The extent of the scope of practice authorized for each of these categories will be spelled out in the Rules. For example, the type of activities that can be performed by law students gaining experience during the summer may be articulated in the Rules. Similarly, lawyers from other jurisdictions who are authorized to practice in Yukon may be limited under the Rules with respect to their authorized scope of practice.
With respect to specific exemptions, the Executive believes that self-represented litigants should be exempt from the legislation and should be able to fully engage in the provision of legal services to themselves. With respect to aboriginal court workers, it is anticipated that they should have a defined scope of practice that will be more particularly set out in the Rules.

It should also be noted that the current LPA provides an exemption for the Legal Services Society. It is requested that at the time government is reviewing the potential for new legislation for the Law Society of Yukon, it should similarly review the Legal Services Society Act to determine whether individuals acting under the auspices of the Legal Services Society should be granted the ability to engage in either the full or limited scope of practice authorized under the Law Society’s new legislation. Consistency should then be achieved between the two statutes.

Finally, it is proposed that the current exemption for employees of members, law firms or governments who act under the supervision of a member, be deleted. Such a provision in essence allows the unregulated practice of law by any person, regardless of their education or training, which is not consistent with the public interest. It undermines the entire purpose of regulation by allowing unregulated individuals to fully engage in the practice of law. There is also no clarity around the meaning of “supervision”, which could allow an employee of a law firm or government to engage in virtually any aspect of the practice of law while acting under only the most indirect supervision by a member. It is inconsistent with the Law Society’s mandate to protect the public interest in the practice of law to allow such practice to continue.

**Rationale for Recommended Policy Direction**

The above listing of categories of members for regulation under the legislation is consistent with the proposed objects clause as well as present and anticipated structures of legal practices. The Society is proposing that the statute allow for the regulation of law firms, as it is anticipated that there will be occasions where it is the firm, rather than an individual, who may bear the responsibility for a particular action. The Society is proposing the regulation of other categories such as inter-jurisdictional lawyers, Foreign Legal Consultants and Canadian Legal Advisors as there is movement nationally toward recognition of these individuals. By listing these specific individuals and entities and allowing for the creation of newly regulated providers of legal services, an appropriate balance of certainty and flexibility is achieved. The Society will maintain the ability to place conditions or restrictions around the scope of practice of these individuals through the Rules.

With respect to the recommended exemptions as outlined above, the suggested list continues to recognize that there are certain instances where it is appropriate for individuals other than those regulated under the statute to engage in specified aspects of practice. Individuals such as aboriginal court workers act within presently understood and accepted parameters and guidance, which can, if needed be articulated in the Rules. Given the purpose of the Law Society it is not considered appropriate to continue to allow the exemption for employees of
members or law firms or governments, as the breadth of this exemption has significant potential for abuse.

7. GOVERNANCE

Yukon

The governing body of the Law Society is known as the Executive. Section 4 of the LPA provides that the Executive shall be composed of at least six persons. Of those six, at least four shall be elected from the active members who are resident in the Yukon, and two shall be non-members appointed by the Commissioner in Executive Council who serve as public representatives. The Rules establish that there are eight members in total: five elected lawyers, two public representatives plus the past president. The elected members sit for a term of one year but may be re-elected. There are no requirements that the elected members represent any regional affiliation or organization. However, section 8 of the LPA provides that to be eligible for election, the candidate must be an active member resident in the Yukon.

Yukon’s LPA goes on to provide considerable detail with respect to governance matters, including the ability to appoint Deputy Executive Officers, noting who chairs meetings, and setting out voting requirements.

Other Jurisdictions

The titles given to those who govern Law Societies across the country differ. Six jurisdictions use the term "Benchers", while four use the term "Council". The territories each use the title "Executive".

Not surprisingly, the size of Council varies across the country, with the larger jurisdictions generally having the larger size of Council.

Public representatives are used as members of the governing body in all jurisdictions, although they are referred to differently across the jurisdictions as "lay member", "lay bencher", "lay person", "person who is not a member", "appointed benchers", "appointed members" and "public representative".

In some jurisdictions, the public representatives are appointed by government or a committee external to the Law Society, while in one jurisdiction (Nova Scotia), they are appointed by the Law Society itself.

In some jurisdictions, there are Benchers appointed by reason of position – e.g., representatives of the Minister of Justice, law schools, etc.
In Ontario, the Benchers include representatives of the categories of those who are licensed to provide legal services. As a result, the Benchers include two paralegal representatives.

In some jurisdictions, details respecting the elections of Council members and other governance issues are found in the governing legislation, while in others, such details are found within the Rules and Regulations. The majority take the latter approach.

The following table shows a comparison by province and territory of the different titles used in the governance structure, and different compositions of the governing body.

**Table 3: Governance Breakdown**

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<tr>
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<tr>
<td>Executive</td>
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<td></td>
<td>✓</td>
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<tr>
<td>Council</td>
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<td>✓</td>
<td>✓</td>
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<td>✓</td>
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<tr>
<td>Members elected according to geographic representation</td>
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<td>✓</td>
<td>✓</td>
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<td>✓</td>
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<tr>
<td>Certain Positions Mandated (eg. Minister)</td>
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<td>Paralegal representation</td>
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<tr>
<td>Public representatives appointed by Government or Committee (not Law Society)</td>
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</tr>
<tr>
<td>Public representatives appointed by Benchers/Executive/Council</td>
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</tr>
<tr>
<td>Total Number of Benchers/Council/Executive</td>
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<td>22</td>
<td>21</td>
<td>10</td>
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<td>37</td>
<td>50*</td>
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<td>21-23</td>
<td>32</td>
<td>5</td>
</tr>
<tr>
<td>Number of public representatives, Benchers/Council/Executive</td>
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<td>3</td>
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<td>8</td>
<td>4</td>
<td>4</td>
<td>4</td>
<td>6</td>
<td>1</td>
</tr>
</tbody>
</table>

* This number reflects the total number of elected benchers, lay benchers and paralegal benchers. In addition, to this number there are several ex-officio benchers including former Attorneys-General of Ontario and former Treasurers of the Law Society.
Discussion and Proposed Direction

There are a number of issues that arise with respect to the broad issue of governance. One of the structural issues to be considered is the extent of governance issues to be included in the Act, compared with the details to be included in the Rules. Recognizing the need for flexibility and evolution, the Law Society of Yukon proposes the following:

1. The name of the governing entity will continue to be the “Executive”;
2. The minimum size of the Executive (8 members) should be specified in the Act, and a provision made to add to the Executive as set out in the Rules;
3. Because the new Act is not expected to initially provide for the regulation of groups such as paralegals (although provisions enabling this in the future will be included), the Executive at present should consist only of lawyers and public representatives. In the event groups others than lawyers will be regulated in the future, the Act should authorize the inclusion of representation from such groups, through the Rules;
4. A minimum of 25% of the composition of the Executive should be public representatives;
5. Public representatives on the Executive should be appointed by government, but the appointment process should allow for recommendations to come forward from the Law Society;
6. Apart from these key elements outlined above, remaining issues of governance such as term of office for officers, staggering of terms, eligibility for service on the Executive, details of the election process, and other such matters should be set out in the Rules enabled by the new LPA.

Rationale for Recommended Policy Direction

With the principal goal of protecting the public interest in the provision of legal services, it is important that key elements of governance be set out in the statute approved by government. These key elements such as the minimum size of the governing entity; the need for public representatives and the manner of appointment of public representatives are appropriate to be included in the Act itself. All remaining issues however should be given the flexibility of inclusion in the Rules so that they can be amended more readily as principles of governance continue to evolve.
8. CREDENTIALS / ADMISSION PROCESS

Issue A: Legislative Framework for Admission Criteria/Decision-Making Authority

Yukon

The criteria for admission are set out in both the LPA and the Rules. Section 20 of the LPA sets out certain specific requirements for admission and includes a final requirement/condition that the person has met all requirements for admission prescribed by the Rules. For example, the LPA provides that a person (not previously admitted to the bar in another Canadian jurisdiction) is qualified to apply for admission if they have completed 12 months of articles, taken a bar admission course, passed the bar admission exam, graduated from an approved law school, and "met all the requirements for admission prescribed by the Rules".

The authority to make decisions concerning admissions and credentials matters is vested in the Executive. Neither staff nor committees have any decision making authority.

Other Jurisdictions

In most jurisdictions across the country, particularly those with more recently amended statutes, the legislation itself contains few of the specific requirements for admission. These details and the specific processes for admission are left to the Rules. This provides flexibility for evolution and leaves the more operational aspects of the workings of the Society to the Rules.

With respect to the issue of who makes the decisions regarding admission processes and other credentials matters, the processes vary across the country.

In some jurisdictions, the Executive Director is given decision making authority on specified matters. In other jurisdictions, committees variously referred to as Credentials Committees, Credentials and Education Committees or Registration Committees are given the authority to make decisions; and in others Benchers are given authority to make decisions. Some examples follow.

In Newfoundland, a person is admitted to the Bar when a memorandum of their enrolment is entered on the Roll. The process includes a review by the Education Committee and subsequent notice from the committee's Chairperson to the Vice-President that the person has been approved for enrolment under the Law Society Rules.

In Nova Scotia, the criteria for admission are set out in the Regulations (Rules) as opposed to the Act. The Executive Director is given certain authority to make decisions on credentials matters, and in the event any issues arise with respect to discretionary issues such as character or fitness to practice, the matter is referred to a Credentials Committee for a decision. Review mechanisms are then available from the decisions both of the Executive Director and the
Credentials Committee. The governing entity of the Council is not involved in the decision making process. Similarly in Alberta, authority is given to the Executive Director to make various decisions respecting admission of individuals. Certain specified functions are reserved for the Benchers, such as admission of faculty or Society employees.

In British Columbia, the Benchers may grant admission but do not have authority to deny admission. Upon receiving an application, the Benchers may grant admission, grant admission subject to certain conditions, or order a hearing. To grant admission, the Benchers must be satisfied that the applicant is of good character and repute, and is fit to become a barrister and solicitor. The Benchers may establish a Credentials Committee and this Committee may conduct a credentials hearing by panel. Upon hearing an application for admission, the panel must grant admission, grant admission on conditions or deny the application. If denied, the applicant must be provided written reasons.

In Nunavut and the Northwest Territories, the Executive determines whether an applicant for admission will be approved or denied. The Executive must evaluate the academic qualifications of every applicant for admission as a member of the Society and has the discretion to administer a special examination to any applicant. The Executive also has the discretion to waive or vary certain admission requirements.

**Discussion and Proposed Direction**

To achieve consistency with the principle that operational matters should be set out in the Rules rather than the Act, it is proposed that the Act itself only contain the basic framework for the credentials and admission process, with the detailed requirements for admission, changes of categories, and the administrative processes for such applications being set out in the Rules.

The Act should specify who has the decision-making authority on matters involving credentials and admission issues. While the Executive is the sole decision-maker under the current LPA, the Law Society of Yukon proposes that under new legislation a Credentials Committee should be created that is given the decision-making authority for credentials and admissions matters. The Credentials Committee should be comprised of members of the Society and public representatives. It should be open for members of the Executive to serve on the Credentials Committee, but not required. It is proposed that the Executive Director would be an *ex officio* member of the Credentials Committee who could deal with the various administrative aspects of the credentials and admissions process. A general provision should also be included authorizing the Credentials Committee to delegate aspects of the credentials and admissions process to the Executive Director.

**Rationale for Recommended Policy Direction**

By leaving the details of the admission criteria and the admission process to the Rules rather than the Act, the opportunity exists to more readily refine and revise these processes as circumstances may dictate over time. The Act should contain only the key elements of the
admission process, and in particular, should outline that the criteria for admission and changes of category are contained in the Rules, and that the Credentials Committee has the authority to make decisions. The Act should also provide that the Committee may delegate certain aspects of the admissions and other credentials processes to the Executive Director, but cannot delegate the ability to deny applications.

The use of a Credentials Committee rather than the Executive as the decision-making body for admission matters is consistent with governance principles that view the role of the Executive as a policy maker rather than a participant in operational decisions.

**Issue B: What type of review or appeal process is available when an application is denied?**

**Yukon**

Under the current LPA, an appeal from the denial of a request for admission is to the Yukon Supreme Court. There is no internal right of review or appeal to any committee.

**Other Jurisdictions**

Most jurisdictions provide some recourse to an internal appeal of a decision denying admission. In Newfoundland, Saskatchewan, and Alberta, any person refused admission may request a review of the decision by the Benchers. The benchers may confirm, vary or reverse the decision. New Brunswick similarly permits a person refused admission by the admissions committee to request a review by Council. Council may confirm the decision or refer the application back to the committee with directions.

Nova Scotia has a dual review process, depending on who makes the initial credentials decision. Authority is granted to the Executive Director to deny applications, where objective criteria, such as the passing of a bar examination exam, have not been met. Decisions by the Executive Director to deny admission are then appealed through an internal review process conducted by an internal review subcommittee. In the case of other admission decisions where subjective criteria such as good character are involved, those decisions are initially made by a Credentials Committee. Where admission is denied, there is an appellant process available to a Credentials Appeal panel.

In Ontario, a licence application may be refused only by the hearing panel after conducting a hearing. The hearing panel is the same body responsible for hearings in the complaints and discipline process. A decision of the hearing panel may be appealed to the Appeal Panel.

In Manitoba, admissions decisions are made by the chief executive officer and may be appealed to the admissions and education committee. A three member panel is convened out of the committee to hear the appeal. The hearing may be public and any decision of the panel refusing to issue a practicing certificate with or without conditions, may be appealed to the Court of Appeal.
In BC, a credentials hearing by a panel may be ordered or requested in relation to an application for admission. Following the hearing, the panel may approve the application or reject it. The Act provides for a review of this decision by the benchers upon application. The benchers may confirm, vary or reverse the decision of the credentials panel.

In Nunavut and the Northwest Territories, a person refused admission may appeal the decision directly to the Court.

**Discussion and Proposed Direction**

In keeping with the previous discussion, it is proposed that admissions decisions will be made by a Credentials Committee. This leaves open the options of having an appeal from a decision of the Credentials Committee heard by the Executive, a separately established Appeal Committee, or the Court.

Because current decisions relating to the credentials and admission process in Yukon are made by the Executive itself, there is presently no other internal body to which an appeal may be brought. In most other jurisdictions, decisions made with respect to the credentials and admissions processes are made either by staff or by some type of a registration or credentials committee, as discussed above under Issue A. As a result, these other jurisdictions then include an internal appeal process that in some instances brings the matter before the Benchers, and in others before an internal appellate committee.

In those jurisdictions where *Fair Registration Practices* legislation has been enacted, the availability of an internal review or appeal process is considered a fundamental feature of the fairness of the admission process. While such legislation does not exist in Yukon, the principle of allowing an easily accessible appeal mechanism to an individual who has been denied admission seems appropriate. Depending on who the initial decision maker may be for questions of admission, it would be relatively straightforward to set up an internal appeal committee to which appeals from denials of admission could be brought.

**Rationale for Recommended Policy Direction**

It is the view of the Law Society that an appeal to a separately established Credentials Appeal Committee is most appropriate. The new Act should constitute such a committee and set out the function of the committee. Matters such as the specific composition of the Credentials Appeal Committee and its detailed processes should be left to the Rules.

The use of a Credentials Appeal Committee retains the concept of peer review; it reduces the additional resources needed for a court appellate process; and it keeps the members of the Executive within their policy setting function rather than an individual decision making function.
9. **QUALITY ASSURANCE**

**Yukon**

The *LPA* and Rules focus on admission requirements and say little about requirements for maintaining membership. The only requirement for ongoing membership that is set out in the Rules is the requirement for payment of fees and insurance.

Aside from these annual licensing requirements, there is the ability for the Society to conduct random trust account audits, and authority also exists under the insurance section of the Rules to order a risk management audit.

In addition, the Continuing Professional Development Taskforce of the Law Society has recently recommended that mandatory continuing professional development (CPD) should be required for all members of the Law Society of Yukon. The details of the program are yet to be developed.

**Other Jurisdictions**

In recent years, there has been a movement toward introducing mandatory CPD programs across the country. New Brunswick, PEI, Quebec, Ontario, Saskatchewan, British Columbia and the Northwest Territories have all enacted Regulations/Rules imposing mandatory CPD on members. The requirements and programs vary across the provinces.

In addition to those provinces/territories that have currently implemented CPD requirements, Manitoba has passed a resolution requiring mandatory CPD commencing in January 2012, and Nova Scotia has done the same commencing in June, 2012.

While there are some provincial/territorial variations (Quebec, for example requires 30 hours over two years) most require 12 hours of "formalized" professional development outside of usual reading expectations. In some jurisdictions there are more formal accreditation requirements before the programs will "count" toward the mandatory requirements; in others there are variations about the types of programs that will "count".

In Alberta a different approach has been taken. Members are required to have Professional Development Plans to address their competence needs which must be filed with the Law Society annually. However, there is no mandatory minimum requirement and compliance with these plans is left to the members themselves.
While mandatory continuing professional development requirements are one type of quality assurance mechanism that can be put in place by Law Societies, others also exist. These include, for example:

(a) the establishment of practice standards in particular areas of law (e.g., Nova Scotia has formalized Real Property Law and Family Law Standards of Practice);

(b) random practice inspections (e.g., Ontario);

(c) certification of specialists (e.g., Ontario);

(d) more formalized trust account auditing practices (e.g., Saskatchewan where the Society may employ an "audit inspector" to conduct spot audits -- see Section 17 of Policy Paper for details).

**Discussion and Proposed Direction**

In keeping with the principle that the Act should contain the framework for the work of the Society, and the detailed operational aspects should be included in the Rules, the Law Society of Yukon proposes that the new Act enable the creation of Rules that will require members to participate in a mandatory CPD program. The details of the program would then be left to the Rules.

With respect to other quality assurance mechanisms, the Society again proposes that flexibility be created in this regard by including a provision in the Act that enables the creation of Rules that will permit the Society, but not require the Society to engage in other quality assurance functions such as practice inspections, establishment of practice standards, and formalized trust account audits.

Another aspect of quality assurance that should be enabled in the Act and set out in the Rules, is the Society's role in the provision of continuing legal education. It is anticipated that the role of the Society in the provision of continuing legal education will evolve over time in response to any requirements that may exist for mandatory continuing professional development. The delivery of continuing legal education is resource intensive, and the Society should retain flexibility with respect to the extent of its role in this regard. It may, for example, wish to deliver certain aspects of continuing education that are not readily available to members of Yukon, but which may be required through a mandatory continuing professional development program. Accordingly, it is the position of the Society that the Act should be permissive in authorizing the Society to provide continuing legal education, but should be clear that the Society is not required to engage in this activity.

**Rationale for Recommended Policy Direction**

As self-regulation comes under closer scrutiny, expectations have increased on Law Societies to demonstrate they are taking an active role in regulation that protects the public interest in
ways other than merely reacting through disciplinary measures following complaints. Quality assurance mechanisms that are enabled by the new *LPA*, but not necessarily required to be in existence at time of proclamation provides the appropriate flexibility to be responsive to changing public and governmental expectations and enables the Society to adapt its processes to the realities of its resources.

10. **SANCTIONS FOR UNAUTHORIZED PRACTICE**

**Yukon**

The current *LPA* prohibits persons from representing themselves to be active members unless they are active members (s. 103). Every person who contravenes this prohibition commits an offence punishable on summary conviction (s. 104(1)). Unless the *LPA* states otherwise, everyone who is convicted of an offence punishable on summary conviction is liable to pay a fine of not more than five thousand dollars and/or to imprisonment of not more than six months. Subsection 104(2) of the *LPA* provides a remedy to the Society to seek an injunction against anyone convicted of an offence of unauthorized practice upon application by the Society to the Supreme Court.

**Other Jurisdictions**

Most jurisdictions in Canada provide for a mechanism to obtain a summary conviction against an individual who is practising law without being a member of the relevant Law Society. In addition, most jurisdictions provide a mechanism to obtain an injunction. The principal differences are with respect to the following:

(a) fines arising from summary convictions - fines range anywhere from $2,000 to $25,000 for a first offence across the country. In addition, several jurisdictions provide for increasing fines for second and subsequent offences. In some jurisdictions, where the conduct which gives rise to the offence occurs on more than one day, each day is a separate offence, thereby increasing the amount of fines payable. In some jurisdictions there are different amounts payable depending on whether the conviction is entered against a member of the Society, a non-member of a Society, or a corporation, with larger amounts generally due in the event of a conviction against a corporation;

(b) the procedure for obtaining summary conviction - in some provinces, the governing legislation sets out that the Executive Director or a person authorized by the Benchers may lay the information alleging the offence (see, for example, British Columbia). Outside the parameters of the governing statute, Alberta has entered an agreement with the provincial Attorney General whereby two
lawyers are appointed to be agents of the AG for the purpose of prosecuting offences under Alberta's statute. The Law Society is responsible for investigating the matters and having the information sworn, and the Law Society pays all the costs of investigation and prosecution;

(c) timing of injunctive relief - in the majority of jurisdictions, injunctive relief can be obtained without the need for an initial conviction.

**Discussion and Proposed Direction**

The process to obtain a summary conviction can be an onerous one and an expensive one. To the extent these processes can be streamlined, as they are for example in British Columbia and Alberta, procedural changes should be incorporated in the new legislation.

It is most important, however, that injunctive relief be available at the earliest opportunity when the Law Society has reasonable grounds to believe that a person is engaging in the practice of law without approval of the Society to do so. To this end, it should not be necessary to obtain a summary conviction before an injunction may be pursued.

Finally, with respect to the amount of fines and the ability to impose fines for each day of an offence, it is proposed that the fines should be increased for second and subsequent offences. The Society suggests a minimum of $5,000 as a fine for a first offence; and further suggests that the statute note that each day amounts to a separate offence. The maximum amount payable under one summary conviction proceeding would be $250,000.

**Rationale for Recommended Policy Direction**

With public protection as its key purpose, it is imperative that the Law Society have the ability to stop individuals at the earliest possible time from engaging in the unauthorized practice of law. Accordingly, a provision for injunctive relief without the necessity for a summary conviction is essential.

The fine should be of such an amount to serve as an appropriate deterrent to individuals from engaging in unauthorized practice.

### 11. THE COMPLAINTS AND HEARING PROCESSES

**Background**

Members of the public are most likely to interact with the Society during the complaints and hearing aspects of the Society's work. This part of the Society's work becomes the public face of the regulation of the practice of law. It can be seen in jurisdictions such as England that
where the complaints and hearing processes have been perceived by the public to be deficient, the entire concept of self-regulation has been challenged. It is critical that the Society have complaints and hearing process that are open, transparent, impartial and procedurally fair to both the complainant and the member who is on the receiving end of a complaint.

Under the current provisions of the LPA, there is a separate Part entitled "Discipline" that sets out the various steps taken from the time the complaint is received until its final disposition.

Every complaint must be referred to the Chair of the Discipline Committee, who reviews the complaint and either dismisses it (if of the opinion that the member's conduct is not capable of being found to be conduct worthy of censure) or arranges for a preliminary investigation into the matter. Upon completion of the investigation the matter is referred back to the Chair of the Discipline Committee who has authority to dismiss, seek additional investigation, refer to two members of the Discipline Committee for review and disposition on a consensual basis, or refer to a Committee of Inquiry for a hearing.

If the complaint is dismissed by the Chair, the complainant has a right of appeal to the Executive.

Decisions from a Committee of Inquiry can be appealed to the Supreme Court.

A number of items for discussion arise from this review. For purposes of reviewing these items, all matters that occur prior to referral to a formal hearing will be referenced as "the complaints process", and all matters that occur after referral to a formal hearing will be referenced as "the hearing process".

When the legislation in other jurisdictions is reviewed, it will be seen that there are common features of both the complaints process and the hearing process that bear analysis in the context of new legislation for Yukon. Some of these features include:

- the movement of all detailed and operational aspects of the complaints and hearing processes to the Rules rather than the statute;
- the authority to deal with a variety of matters, including professional misconduct, conduct unbecoming, incompetence and incapacity, all of which are generally described under the inclusive title of "Professional Responsibility" processes;
- the availability of streams other than the traditional "disciplinary" approach to deal with issues of incapacity or incompetence;
- authority for early dismissal of complaints that fall clearly outside the Society's jurisdiction or are frivolous or vexatious;
- where early dismissal authority exists, a fair review process for complainants;
• a wide range of dispositions available to resolve the matter during the complaints process, including consensual dispositions;

• broad settlement authority once a matter has been referred to a hearing process to resolve the matter without the cost and resources of a formal hearing;

• the authority of the Society to access material subject to solicitor-client privilege throughout the discipline process.

With this background in mind, various issues relevant to the complaints and hearing processes are discussed in the pages that follow.

**Issue A: Jurisdiction over professional misconduct, conduct unbecoming, incompetence and incapacity**

**Yukon**

Section 24 of the LPA provides authority to the Executive and a Committee of Inquiry to deal with "conduct deserving of censure". This is defined to include "any act or conduct of a member or student-at-law that is contrary to the public interest or that harms the standing of the legal professional generally or that is contrary to the code of professional conduct and ethics...whether or not that act or conduct is disgraceful or dishonourable and whether or not that act or conduct relates to the practice of law." Subsection 24(3) notes that without restricting the generality of that definition, "conduct deserving of censure includes incompetently carrying out duties or obligations undertaken by a member or student-at-law in their capacity as a member or student-at-law".

**Other Jurisdictions**

Several jurisdictions make the distinction between issues of conduct and issues of competence, and then provide for different "streams" for dealing with each matter.

In New Brunswick there is authority to refer complaints to either the Competence Committee or the Complaints Committees depending on the nature of the complaints. Each Committee may investigate the complaint under separate processes.

In Manitoba the Complaints Investigation Committee investigates and responds to complaints related to the conduct and competence of members.

In Saskatchewan, a person designated by the Benchers must review the conduct of a member whenever the Society receives a complaint. The legislation provides for two distinct streams for dealing with complaints of conduct versus competence. A matter of competence may be referred to the chairperson of the professional standards committee. A matter relating to conduct may be referred to the conduct investigation committee. The professional standards
committee is comprised of Benchers and members appointed by the President of the Society. The conduct investigation committee is comprised of six persons appointed by the President of the Society who may be Benchers, members or former Benchers.

In British Columbia any person may make a complaint to the Society regarding the competence or conduct of a lawyer. The Executive Director at the instruction of a member of the Discipline committee may investigate the complaint to determine its validity. If valid, it may be referred to the Practice Standards Committee, the Discipline Committee, or the Chair of the Discipline Committee depending upon the nature of the complaint.

Ontario has a separate stream available to deal with issues of incompetence. It also defines "incapacitated" in the Act and provides that a hearing panel may determine whether a licensee is incapacitated. With the authorization of the Proceedings Authorization Committee, the Society may apply to the Hearing Panel for a determination on incapacity. The Panel may make an order requiring the licensee to be examined by a physician or psychologist specified by the Panel to determine incapacity. If the Panel determines the licensee is incapacitated, the Panel may make an order suspending the license, directing the licensee to obtain treatment, restrict their practice or legal services (in case of paralegals), order ongoing progress reports and any other order the Panel considers appropriate.

In Nova Scotia where a complaint specifically concerns a member's capacity (issues involving addictions, mental health issues or other health issues that impact the member's ability to practice ethically and competently), the Executive Director may refer the matter to the Fitness to Practice Committee to address the issue. The Fitness to Practice Committee is comprised of lawyers, health professionals and public representatives. Under the statute, the Committee is given authority to deal with issues of incapacity in an alternative way to the disciplinary approach, where the matter is not publicized and the member is not found to have a disciplinary record.

The following table summarizes the different types of conduct and processes available in each jurisdiction.

Table 4: This table provides a comparison of the nature of complaints considered in each jurisdiction, and whether separate processes are available based on the nature of the complaint.

<table>
<thead>
<tr>
<th>Conduct deserving of censure</th>
<th>YU</th>
<th>NL</th>
<th>NS</th>
<th>PE</th>
<th>NB</th>
<th>PQ</th>
<th>ON</th>
<th>MB</th>
<th>SK</th>
<th>AB</th>
<th>BC</th>
<th>NWT / Nu</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conduct deserving of sanction</td>
<td>✓</td>
<td></td>
<td>✓</td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
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<tr>
<td>Professional misconduct</td>
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<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Conduct unbecoming</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>(eg., any Act that harms the standing of the legal profession)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Incompetence</td>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
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<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>
Discussion and Proposed Direction

The term "conduct deserving of censure" presupposes that "censure" is the only mechanism available to deal with a matter. It arguably has a "penal" overtone to it that may not be consistent with the desire to impose censure when needed but also to encourage remediation where appropriate.

Issues of misconduct and conduct unbecoming have elements of moral turpitude or wilful wrongdoing. Different considerations often, but not always apply when dealing with issues of incompetence and incapacity. Many Law Societies are noting increases in the number of complaints that are rooted in matters of incapacity. The heavy hand of discipline may not always be the most effective way of addressing the issue. Similar considerations apply to certain incidents of incompetence.

As long as the public interest can be safeguarded through the imposition of appropriate conditions and restrictions, the availability of approaches that are both remedial for the member and protective of the public interest may be worthy of consideration for issues of incompetence and incapacity.

It is generally in the public interest to ensure that lawyers who have received the appropriate remediation for either incapacity or incompetence issues can return to practice, assuming the appropriate safeguards are in place for the public.

When dealing with the issue of the Society’s jurisdiction over complaints, it is also important to ensure the new Act allows jurisdiction to be asserted over individuals who are no longer members of the Society, but who were members at the time of the subject matter of the complaint. Members should not be able to simply leave the jurisdiction to avoid disciplinary consequences.
Accordingly, the Law Society of Yukon recommends:

1. The statute provide the ability to deal with professional misconduct, conduct unbecoming the profession, incompetence and incapacity. Each of these terms should be defined, borrowing definitions from other jurisdictions that make it clear professional misconduct involves unprofessional conduct in the practice of law; that conduct unbecoming the profession involves conduct occurring outside the practice of law but which bring the reputation of the profession into disrepute; that incompetence includes lack of knowledge, skill or judgment; and that incapacity involves physical or mental health issues or addictions that impact the members’ ability to practice ethically and competently.

2. The statute should preserve jurisdiction over former members, such that those who were members at the time of the substance of the complaint remain subject to the Act for disciplinary purposes.

3. The new Act should make it clear that issues of professional responsibility are not matters of litigation between the complainant and a member. The professional responsibility process deals with the Society’s role to determine whether a member has fallen below expected standards of behaviour in practice. As a result, the complainant is not a party to the proceeding. In dealing with complainants, the Society must ensure appropriate communication and cooperation as a witness in a proceeding, but the complainant will have different procedural rights than the lawyer throughout the process.

4. Given the limited resources of the Law Society of Yukon, it is not practical at present to have separate committees and separate streams to deal with issues of incompetence and incapacity. It is recommended that the statute provide alternative forms of resolution of all types of matters including the ability to informally resolve matters in a way that would focus on remediation of certain issues rather than a "one size fits all" disciplinary approach. Details of such alternate resolution mechanisms should be contained in the Rules. These could include resolution through mediation; consensual reprimands or conditions or restrictions; voluntary resignations; counsels or cautions; and others.

5. Findings of incapacity should not be considered to be “disciplinary findings”. Rather, they should be reportable to other jurisdictions and discloseable on applications for judicial appointment or such other purposes as a hearing committee may determine. There should be authority to order health assessments, but because of the personal nature of such information, there should be limited ability to make such information public, beyond what is needed to protect the public interest.
**Rationale for Recommended Policy Direction**

Issues of misconduct, conduct unbecoming, incapacity and incompetence arise for very different reasons, and need to be dealt with in different ways. While public protection will be at the core of how to deal with all of these issues, the element of remediation will be more applicable to issues of incapacity and incompetence. It is important that the legislation be sufficiently flexible to allow for the use of informal resolution processes focused on remediation in these latter types of cases. It is also important that the legislation provide a sufficiently varied menu of dispositions to meet the variety of circumstances that constitute complaints. Because the type of available dispositions may change over time, the Act should simply enable and authorize the dispositions that are set out in the Rules.

**Issue B: Decision making authority for the complaints process**

**Yukon**

The current LPA does not provide any role for the Executive Director throughout the complaints and hearing processes. All complaints must be referred to the Chair of the Discipline Committee who acts alone in determining whether the complaint should be dismissed or referred to investigation. Upon receipt of the investigation it is the Chair who has the authority to dismiss or take any of the actions authorized by Section 29(2)(c). The Discipline Committee itself has no role unless the Chair refers a matter to two members of the Committee under Section 29(2)(c) to review and to work toward a consensual disposition. This provision is frequently referred to as the "fireside chat", and allows for resolution where the two members of the Discipline Committee and the member can agree on any disposition that could otherwise be ordered by a Committee of Inquiry.

**Other Jurisdictions**

While some provinces and the other two territories provide no direct authority to the Executive Director to deal with complaints, several provinces do provide such authority. Some examples follow.

In Nova Scotia, the Executive Director has authority to commence an investigation, to informally resolve, or to dismiss. These preliminary actions are taken without receipt of the member's response to the complaint. If an investigation is commenced, the member's response is obtained, following which the Executive Director has the power to dismiss the complaint (with or without a letter of advice), attempt to resolve the complaint informally, investigate the matter further, or refer the matter to a Complaints Investigation Committee.

In Manitoba the Chief Executive Officer is given the authority to dismiss, attempt to resolve, investigate or refer a matter to the Complaints Investigation Committee.
In Alberta, any complaint related to the conduct of a member must first be reviewed by the Executive Director. During the review, the Executive Director may require the complainant or the member to answer any inquiries and produce any relevant records. If the conduct relates to a dispute between the member and another person, the Executive Director may attempt to resolve the dispute between the parties and if resolved, dismiss the complaint. At the end of the review, the Executive Director must either dismiss the complaint or refer the matter to the Conduct Committee.

In British Columbia the Executive Director must consider every complaint and, at the instruction of a member of the Discipline Committee, investigate the complaint to determine its validity. The Executive Director may dismiss the complaint or provide it to the member and seek their response. At any time, the Executive Director may attempt to resolve the complaint. After investigating the complaint, the Executive Director must determine whether to take no action or refer the matter to the Practice Standards Committee, the Discipline Committee, or the Chair of the Discipline Committee.

Where matters are not resolved by the Executive Director, a committee is usually appointed to deal with the complaints process. The committees are known by a variety of names including the Complaints Authorization Committee, the Complaints Investigation Committee, the Conduct Committee, or the Conduct Investigation Committee.

The number of members on such committees range from three to as many as a minimum of twelve, with a quorum usually comprising three.

In most jurisdictions there is a requirement to have at least one public representative on any type of investigative committee. Composition often includes some mixture of members of the Benchers/Council and other volunteers, in addition to the public representative(s).

**Discussion and Proposed Direction**

Because all complaints under the current LPA are now dealt with by the Chair of the Discipline Committee (who may change annually), issues arise of consistency and continuity of decision making. Several jurisdictions grant the authority to initially dismiss a complaint to the Executive Director. While this may improve efficiency for those cases where it is apparent at an early stage that a complaint should be dismissed, it removes the element of peer review by a committee which is often considered foundational to self-regulation. In a jurisdiction such as Yukon where the Executive Director may not be a lawyer, this concern is heightened.

Accordingly, the Law Society of Yukon proposes that a Complaints Committee be created under the Act as a separate entity from a discipline committee or hearing committee. The detailed powers of the Complaints Committee would be set out in the Rules. It is anticipated that the authority of the Complaints Committee would include the ability to dismiss a complaint without an investigation on prescribed grounds, to investigate a complaint and to resolve the complaint using a variety of mechanisms. The committee would also have the authority set out in the Rules to refer a matter to a hearing.
The Society recommends that the Complaints Committee consist of a combination of lawyers and public representatives. The Act should specify the minimum number of members of the committee (3) including the requirement for at least one public representative. The specific number outside the minimum could then be referenced in the Rules.

The Act should also enable the appointment of an investigator, with the detailed powers of the investigator and the committee to be set out in the Rules. The new Act should set the basic structure for receipt of complaints; the role of the Executive Director; the ability to appoint investigators; the process to refer a matter to the Complaints Committee; the appointment of a Complaints Committee; and the ability of the Complaints Committee to exercise the powers and authority as set in the Rules. The Act should also reference that the Complaints Committee and investigators appointed by the committee will have the powers, privileges and immunities of commissioners appointed under the Public Inquiries Act. Accordingly, the key recommendations for this issue are as follows:

1. The Executive will appoint a Complaints Committee, consisting of a quorum of three, two of whom shall be lawyers and one of whom shall be a public representative appointed by the Executive. The Executive will appoint the Chair of the Complaints Committee;

2. The Executive Director, or such other persons as designated in the Rules, will be given authority to receive complaints and to refer them to the Chair of the Complaints Committee;

3. Upon receipt of the complaint, the Complaints Committee Chair will convene the Committee and may dismiss the complaint without investigation if the matter is outside the Society’s jurisdiction; does not allege facts which if proven would amount to misconduct, conduct unbecoming, incompetence or incapacity; or where the matter is frivolous, vexatious or constitutes an abuse of process;

4. Where a complaint is not dismissed under the thresholds set out in the previous paragraph, the Complaints Committee may appoint a member of the committee as the investigative lead for the complaint, or may retain the services of a person outside the Complaints Committee to act as investigator;

5. The detailed authority of the person acting as investigator should be set out in the Rules, although the minimum broad authority under the Public Inquiries Act should be set out in the Act itself (see Issue C for more detail);

6. The investigative lead of the Complaints Committee or the external investigator will provide the results of the investigation to the Complaints Committee. The Complaints Committee may then dismiss the matter without providing an opportunity to the complainant or the lawyer to meet with the committee, if the committee determines the matter is outside the Society’s jurisdiction; does not allege facts which if proven would amount to misconduct, conduct unbecoming, incompetence or incapacity; where
the matter cannot be substantiated, or where the matter is frivolous, vexatious or constitutes an abuse of process;

7. If the Complaints Committee does not dismiss as set out in the previous paragraph, the Complaints Committee is then required to give the complainant and the member the opportunity to provide any additional explanations or background information they wish to provide, following which the Complaints Committee may then dispose of the matter through the variety of mechanisms set out in the Rules;

8. The Executive Director should be authorized to assist with the administrative and procedural aspects of complaints, but not participate as a direct decision maker regarding the substance of any complaint;

9. Throughout the process, the Law Society and the member are the parties to the complaint. The complainant is not a party, but will be given the opportunity to provide information to the Complaints Committee in addition to the complaint itself, unless the matter is dismissed on the basis of meeting the earlier threshold for dismissal outlined above.

**Rationale for Recommended Policy Direction**

Because the Executive Director of the Society may not be a lawyer, it is not deemed appropriate to delegate substantive decision making functions on complaints to the Executive Director. It is appropriate, however, for the Executive Director to play a key administrative role in referring complaints to a committee that is independent from the hearing committee.

Under this approach, the Executive Director could play a direct, albeit behind the scenes role in the administration of the complaint, without any designated investigative or decision making functions. The authority given to the Committee to appoint investigators as deemed necessary would allow for flexibility to appoint an investigator who may have familiarity with the particular practice area which may be the subject of the complaint.

The detailed powers of investigators and the Committee should be set out in the Rules to allow for evolution and flexibility. The *LPA* would simply set the basic structure for receipt of complaints by the Executive Director; permit the Executive Director to refer the matter to the Complaints Committee and then authorize the Committee to be the entity that can deal with the substance of the complaint. Based on the results of the investigation, the Committee would then have a range of dispositions it could impose, as set out in the Rules and as discussed more fully in Section E.
Issue C: Investigator's authority

Yukon

Under the existing LPA, the Discipline Committee may direct a preliminary investigation into the matter. Section 28 of the LPA authorizes the investigator to require the member concerned and any other member to produce any relevant documents in the member's control. In aid of this, the Society may apply to the Court for an ex parte order directing the member or any other member to produce documents to the investigator. The investigator may also require the member to attend "at the investigation", although it is unclear what is meant by this.

The Society may also apply to the court under subsection 28(3) for an order directing any person, including financial or other institutions in which a member has trust money on deposit, to produce books, records and material related to the subject matter of the complaint.

There are no general subpoena or production powers provided for either the investigator or the Discipline Committee, such as those found in the Public Inquiries Act, R.S.Y. 2002, c. 177. Section 106 of the Rules does provide specific authority for an investigator to enter the premises of the member under investigation and to conduct a practice audit and to seize records related to the audit or the complaint. It is not clear who orders the audit in these circumstances.

Section 28(5) explicitly provides that nothing in the section compels disclosure of anything or information that is protected by solicitor-client privilege.

Other Jurisdictions

Investigators in most other Canadian jurisdictions have the basic power to compel disclosure of relevant documents and to compel witnesses to be interviewed. The statutes in Alberta and Ontario contain provisions which allow the investigators to seek assistance from the Court in the form of an Order directing compliance with obligations under the investigation or a search and seizure order.

In addition to the above, in Newfoundland a person conducting an investigation may require the respondent to undergo an assessment or evaluation and to make available for review their records. The information must be provided within 7 days of the request. The Complaints Authorization Committee also has the power to summon the respondent or any other person and compel them to give evidence under oath and/or produce documents relevant for a full investigation of an allegation. The Committee has all the privileges, powers and immunities as conferred under the Public Inquiries Act.

In Nova Scotia the Complaints Investigation Committee has all the powers of a commissioner under the Public Inquiries Act, and may require a member to attend before it for purpose of the investigation. If a member fails to comply, the Complaints Investigation Committee may suspend the member until they comply.
In Quebec, the syndic has the power to require any related information or documents be provided.

In Ontario, the person appointed for the purpose of investigating a complaint, if they have reasonable suspicion to believe the licensee may have engaged in professional misconduct or is incapacitated, has the power to: enter the licensee’s business, require production of documents, examine documents, and require certain information be provided by the licensee, their employees or other persons who may have relevant information.

When dealing with professional competence, the Society may direct a practice review be conducted when there are reasonable grounds to believe the licensee may have failed to meet standards of professional competence. The person conducting a review has the power to: enter the business, require production of documents, examine documents, and require disclosure from the licensee, employees and/or other persons.

When conducting an investigation or a practice review, the Society may apply to the Court for a search and seizure order. Such order may be granted if the Court is satisfied that the investigation/review is authorized, there are documents that relate to the matter located at the identified premises and the order is a necessary means of accessing due to the urgent nature and necessity of the Order.

In Manitoba the Complaints Investigation Committee for the purpose of conducting an investigation, is entitled to obtain any file or record required to further the investigation.

In Saskatchewan, the Professional Standards Committee may conduct an investigation into the member’s competence and for the purpose of investigating the matter, the committee has the power to require the member to answer any inquiries or provide any documents necessary to determine the matter. The Conduct Investigation Committee may investigate a complaint related to conduct. For the purpose of their investigation, they may invite the member to appear before the committee for a formal investigation and counsel.

In Alberta, an officer or employee of the Society engaged to investigate has the power to direct the member or any other member to answer any inquiries, produce any relevant documents or property, give up possession of any records, or to attend before the investigator. The Society may apply to the Court of Queen’s Bench for an Order directing the member to comply with these requirements. If the matter is referred to the Practice Review Committee, in the course of its investigation the Committee may require the member concerned to answer any inquiries and produce any records or property.

In Nunavut and the Northwest Territories, the chairperson of the respective Discipline Committees has the power to require the member or the complainant to answer any questions and/or disclose any records considered relevant to the investigation.
Discussion and Proposed Direction

The powers given to an investigator under the LPA are limited to obtaining documents from members and from financial institutions. There is no general subpoena authority as found in the legislation of several jurisdictions. When a matter requires referral to two members of a Discipline Committee for a consensual resolution, there are no subpoena powers available to the Committee and no authority to compel individuals to attend to be interviewed.

In order for effective resolution to be achieved, it is imperative that those involved during the complaints stage of a matter have appropriate authority to obtain relevant information and material. By virtue of the fact that many complaints arise out of specific solicitor-client relationships, the prohibition against use of privileged material really ties the hands of those conducting the investigation. (This issue is explored as a separate matter in Section I.)

Accordingly, the Law Society proposes that both investigators and members of the Complaints Committee be given authority under the new Act to obtain information and documentation relevant to the investigation. It is recommended that the new legislation authorize the following:

1. Investigators and members of the Complaints Committee and Hearing Committee be given the powers, privileges and immunities granted to Boards under the Public Inquiries Act; and

2. Where the Complaints Committee is satisfied there are reasonable and probable grounds to believe that evidence relevant to an investigation is available, an application can be brought to a Territorial Court Judge to authorize a search warrant permitting search and seizure of premises.

Rationale for Recommended Policy Direction

The added time and cost for attendance in Court to obtain appropriate subpoena power to thoroughly investigate a matter is inefficient and unnecessary. It is imperative that those who perform the investigative function have the appropriate and timely tools and authority to conduct a thorough investigation. By specifying in the legislation the authority to require production of information and to require the attendance of the member and witnesses, the investigator and the Complaints Committee will be appropriately cloaked with the necessary authority to do their jobs.

Because search and seizure authority is more invasive than traditional subpoena authority under the Public Inquiries Act, the separate step of satisfying a Territorial Court Judge of the reasonable and probable grounds for obtaining the search warrant is appropriate.
**Issue D: Interim suspensions, restrictions or conditions**

**Yukon**

The *LPA* does not provide any authority for the issuing of an interim suspension, conditions or restrictions during the complaints stage of a matter. Section 33 does provide such authority to a committee of inquiry after a matter has been referred to it, but not before.

**Other Jurisdictions**

Most jurisdictions provide authority to impose suspensions, restrictions or conditions on an interim basis during the complaints process. In some jurisdictions this power of suspension can be exercised by the Society, while in others it requires an application to the Court.

In Newfoundland, the test for the exercise of such interim authority is whether there are reasonable grounds to believe the respondent engaged in conduct deserving of sanction. In New Brunswick, the test is whether the committee considers it probable that the continued practice would be harmful to the public or the member’s clients.

In Nova Scotia, the Complaints Investigation Committee may suspend the member until they comply with any order or direction related to the investigation process. During or following an investigation, the Complaints Investigation Committee may suspend a practicing certificate or impose restrictions or conditions on a practice certificate where it is in the public interest to do so. The lawyer may appeal an interim suspension to the Court of Appeal on a question of law.

In Manitoba, after a charge is laid, if it is believed to be necessary for public protection, the complaints committee may impose a suspension or restrictions on a member’s practice and direct the publication of the same.

In Saskatchewan, the Conduct Investigation Committee has the power to impose an interim suspension pending the outcome of their investigation or decision of a hearing committee. The member may request a review of the suspension by notice to the chairperson of the Discipline Committee.

In Alberta, the benchers may, at any time and without notice or hearing, order the suspension of a member who is subject of proceedings respecting conduct deserving of sanction.

British Columbia provides for interim suspensions following an investigation if the Discipline Committee or the chair of the Committee directs the Executive Director to issue a citation. However, before any action can be taken to suspend the lawyer, there must be a proceeding before three or more Benchers and discipline counsel to consider whether a suspension is warranted. The threshold is whether the continued practice will be dangerous or harmful to the public or the lawyer’s clients. Notice to the lawyer is not required if the majority of Benchers are satisfied that notice would not be in the public interest.
Discussion and Proposed Direction

Where protection of the public is the principal purpose of the discipline process, it is appropriate to have the ability to remove a member from practice, or to impose conditions or restrictions in those circumstances where the public may be at risk by allowing the member to continue to practice unencumbered. It must be recognized that such action can have a very detrimental effect on the member, whose livelihood and reputation may be significantly impacted by such action. Accordingly, such action should not be taken lightly. A threshold test needs to be set to avoid arbitrariness, which could state for example, that interim conditions, restrictions or an interim suspension could be ordered, "where there are reasonable and probable grounds to believe that a member is incapacitated, or has engaged in professional misconduct, conduct unbecoming, or incompetence, and where it is in the public interest to do so”.

Such a step should be able to be taken immediately, without the necessity of a hearing. However, if an interim suspension or restrictions or conditions are ordered, the member should have the ability to appear before the Committee at an early opportunity to fully address the matter. As a further protection to the member, there should be an appeal process available from any interim order which should be readily accessible to the member. This appeal should be to an internal appeal committee, as it is a more accessible forum than the courts for efficient review. The internal appeal committee may include members of the Executive.

Rationale for Recommended Policy Direction

There may be instances where it is clear at an early stage of an investigation that a member either needs to be removed from practice, or needs to have conditions or restrictions on his or her practising certificate in order to ensure the protection of the public. The ability to impose interim suspensions, restrictions or conditions serves this purpose, while at the same time allows the member to be heard by the decision maker to challenge the need for the imposition of such interim sanctions.

Issue E: Range of dispositions during the complaints process

Yukon

The chair of the discipline committee can dismiss the complaint outright or direct a preliminary investigation. Subsection 29(2) of the LPA provides that, upon considering a report by the preliminary investigator, the chair of the Discipline Committee may dismiss the complaint, direct a full investigation be conducted, refer the matter to two members of the Discipline Committee for review with consent of the member (the "fireside chat"), or refer the matter to the Committee of Inquiry which is the adjudicative body.
When a fireside chat is conducted, the two members of the Discipline Committee may dismiss the matter, or with the consent of the member agree to any other type of disposition ranging from remediation to disbarment. This authority to resolve a matter by agreement is done in private, without a hearing process.

**Other Jurisdictions**

A number of other Canadian jurisdictions provide a broader array of dispositions to the committee that is initially dealing with the complaint. Some of the options include referral for alternate dispute resolution; counselling or giving advice to a member; cautioning the member; agreeing to reprimand or conditions with the consent of the member; seeking the appointment of a receiver or a custodian, or including a "catch all" disposition where the committee is authorized to take any action as is necessary to protect the public interest.

Some jurisdictions also allow a voluntary resignation during the investigative stage (see, for example, Alberta) while other jurisdictions only permit voluntary resignations at a hearing stage after a member has been found guilty (see, for example, Nova Scotia, Newfoundland, Saskatchewan, Ontario and Manitoba). It should be noted that in Yukon, section 23(2) does allow for voluntary resignations, although it is stated to be in circumstances to avoid suspension or disbarment. It remains unclear whether a voluntary resignation is acceptable during the investigative stage of a matter.

In some jurisdictions, specific authority is given to order a member to participate in practice reviews, audits, or to submit to examinations or to take other remedial measures.

In most jurisdictions, the detailed range of dispositions available to the Committee empowered with the investigation of the matter are left to the Rules, and are generally not laid out in any detail in the Act.

**Discussion and Proposed Direction**

The wide array of options available in many other jurisdictions assists in resolving a matter without the necessity of a formal hearing. As long as the public interest can be protected, it makes sense to have some dispositions open at an early stage that will allow a resolution of the matter that will either result in no disciplinary finding against the member, or may result in a disciplinary finding with the consent of the member.

The availability of these options allows those involved with the complaints process to only refer matters to formal disciplinary hearings in the most serious of cases. These types of options allow for flexibility in resolution, similar to what can be achieved now through the fireside chats. The distinctions from the fireside chats are that more significant matters that are resolved by consensual reprimands, conditions or restrictions are given the same effect as similar sanctions imposed after a hearing. They require disclosure to the complainants, and are "on the record".
In keeping with the principle that the key elements for the operation of the Society should be set out in the Act with the details to be found in the Rules, the Law Society proposes that the Act simply state that the Complaints Committee shall dispose of a complaint in the manner as set out in the Rules. The detailed dispositive powers of the Complaints Committee would not be included in the Act itself.

**Rationale for Recommended Policy Direction**

It is important that a Complaints Committee have the widest possible variety of options open to it to ensure that the disposition is appropriate for the specific facts that are at issue. In some instances, an informal approach may be appropriate, while in others, a referral for a formal hearing may be the only logical response. The extent of these powers should be set out in the Rules rather than the Act to allow for the potential to change the variety of options open to the Complaints Committee at any time.

**Issue F: Right of appeal for dismissed complaints**

**Yukon**

Section 30 of the LPA provides the complainant with a right to appeal a decision of the chair of the discipline committee dismissing their complaint. The appeal may be made to the Executive of the Society within 30 days of the decision. The complainant has the right to make representations at this appeal and the Chair is not entitled to participate.

**Other Jurisdictions**

In Newfoundland a complainant whose allegation is dismissed by the Complaints Authorization Committee may appeal the dismissal to the Trial Division of the Supreme Court within 30 days.

In Nova Scotia, rights of appeal or review for a complainant differ depending on whether the decision to dismiss the complaint is made by the Executive Director or the Complaints Investigation Committee. If the dismissal is by the Executive Director, the complainant has the right to request a review before a panel of three members of the Complaints Investigation Committee. A decision by the review panel is final. If the initial decision to dismiss the complaint was made by the Complaints Investigation Committee rather than by the Executive Director, that decision is considered final and is not subject to review.

In New Brunswick if the complaint is dismissed by the Registrar, the complainant may request a review by the Complaints Committee. The Complaints Committee may review the complaint and dismiss it or make any determination or disposition available to the committee in the normal course of an investigation. If the Committee dismisses the complaint, the complainant may request the Committee review its decision, following which the Committee must review and provide written reasons for its decision. In addition to the rights of the complainant, any
member affected by a decision of the Competence Committee may appeal to the Court of
Appeal on a question of law or fact.

In Quebec, if the syndic dismisses the complaint without a referral to the disciplinary counsel,
the complainant has a right to request the decision be reconsidered by a review committee
within 30 days. A Review Committee is appointed by the Board of Directors and comprised of
three or more persons. The Review Committee may receive submissions from the complainant
at any time before they render a decision. The Review Committee must examine the records
and documents of the Syndic. The Committee also has the discretion to hear from the Syndic
and the complainant. Within 90 days of the request for review, the committee must render a
decision, which decision is final. The Committee may affirm the original decision, suggest
further investigation by the syndic, or suggest a referral to the disciplinary council.

In Ontario, if a complaint is dismissed by the Society without referral to the Proceedings
Authorization Committee, hearing panel or appeal panel (i.e., in the initial phase), the
complainant may request the complaint be referred to the Complaints Resolution
Commissioner for review within 60 days. The Complaints Resolution Commissioner is a person
appointed by Convocation and may not be a Bencher or a person who has been a bencher in
the previous two years. The Commissioner is appointed for 3 years and cannot engage in the
practice of law during their tenure. The Commissioner has the power to investigate a complaint
with the same powers of investigation as conferred on a person conducting an investigation on
behalf of the Society. The Commissioner may not review a complaint it previously reviewed, or
complaints about fees, disbursements and potential negligence of a licensee. Upon review of
the complaint, the Commissioner may affirm the Society’s decision to dismiss the complaint, or
refer the complaint back to the Society with recommendations to take further action. A
decision of the Commissioner is final and not subject to appeal.

The appeal process in Manitoba is very similar to that in Ontario. If a complaint is dismissed by
the Chief Executive Officer without referral to the Complaints Investigation Committee, the
complainant may request a review by the Complaints Review Commissioner. The
Commissioner is appointed by the Benchers and must be a person who is not a member of the
Society, a lawyer or a Bencher. The Commissioner is not conferred powers to investigate but
may review all records collected by the CEO. The Commissioner must confirm the decision,
direct the CEO to investigate, or direct the CEO to refer the matter to the Complaints
Investigation Committee.

In Saskatchewan, a complainant may apply to a Complainants' Review Committee consisting of
one or more persons appointed by the President and may include any Bencher or outside
complaints counsel. One or more members of the committee must review the records
obtained and collected in the investigation and may make inquiries of the persons involved and
may hear oral submissions from the complainant and/or member. The committee must then
affirm the original decision or refer the complaint to one of the investigative committees.
In Alberta, if the complaint is dismissed in the initial stage, the complainant may appeal the decision to an Appeal Committee. The Appeal Committee must hear the matter and may dismiss the complaint or refer it to the Conduct Committee for review and investigation.

In British Columbia if the Executive Director dismisses a complaint in the initial investigation phase the complainant may apply to the Complainants' Review Committee for a review of the decision within 30 days. The Complainants' Review Committee is appointed each year by the President from the Benchers and must include at least one non-lawyer. The Complainants' Review Committee must review the documents and records of the Executive Director and affirm the original decision to dismiss the complaint or refer the matter to the Practice Standards Committee or the Discipline Committee. A complainant may also contact the Office of the Ombudsperson if the complainant believes the Law Society's process was unfair.

In Nunavut and the Northwest Territories the legislation does not provide for an appeal by a complainant whose complaint is dismissed.

Table 5: This table summarizes a Complainant's availability of appeal or review of a decision to dismiss their complaint by jurisdiction.

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* Indicates jurisdictions in which the legislation expressly provides that a decision of the review/appeal process is final.
† PEI, Nunavut and the Northwest Territories do not provide for a complainant to appeal or request a review of a decision to dismiss their complaint.

**Discussion and Proposed Direction**

In Yukon where the present appeal of a dismissal of a complaint by the Chair of the Discipline Committee is to the Executive who appointed the Chair, there may be a perception of bias. It can be seen that a number of jurisdictions have moved to much more of an arm's length review process, particularly in Manitoba, Ontario and British Columbia. These types of external review processes often give complainants more confidence in the independence and integrity of the review process. It must be noted however that these types of external review processes only
arise when the complaint was dismissed at an initial stage by the person holding the equivalent office of the Executive Director of the Society. The arm’s length review process is not open to decisions to dismiss a complaint that has been made by a full committee of the Society, which includes public representatives.

It is also important to note that a complainant is generally not a party to the process, but acts in the capacity of a witness. The parties to the complaints and hearing processes are the member who is the subject of the complaint and the Society itself. Some would argue that it is not appropriate to give rights of review or appeal to complainants who are not parties to the process, and who may have different agendas than those designed to be served by the disciplinary process. Indeed, various Court decisions support this principle that complainants have different procedural rights than members during investigative and hearing processes, as the consequences to each are significantly different.

Under the process established in Issue B above, it is proposed that the Complaints Committee will have the ability to dismiss a complaint without hearing the complainant, if certain threshold grounds are met. This can happen before or after an investigation on different threshold grounds, and the decision to dismiss is made without the Committee hearing from the complainant.

Under the proposed legislation the Complaints Committee will be comprised of members of the Society as well as public representatives. The presence of public representatives on the Committee provides a check and balance against arbitrary dismissals of complaints. Unlike several of the other jurisdictions where the Executive Director is given authority to dismiss a complaint, there is no similar proposal in the proposed new Yukon legislation.

As a result, since the proposed legislation does not contemplate a process of early dismissal by the Executive Director; where the complaint will receive the consideration of a full Complaints Committee including public representatives; where the threshold grounds for dismissal are clearly identified; and where the procedural rights of a complainant differ from the procedural rights of a member, there is no proposal for a statutory appeal process for dismissals of complaints by the proposed newly constituted Complaints Committee. In keeping with common law requirements, however, judicial review will be available where there are allegations of procedural unfairness by the Complaints Committee.

Rationale for Recommended Policy Direction

In the jurisdictions across Canada that presently provide for review of a dismissal by a complaint, the initial decision is made the Executive Director, and not by a Complaints Committee. Under the system proposed in this Policy Paper, no initial decisions would be made by the Executive Director to dismiss, and accordingly different considerations apply.

The appropriate balancing of administrative efficiency and the need for complainants to have confidence in the integrity of the complaint process appears to be struck by requiring all complaints to be vetted through the full Complaints Committee, with no ability to dismiss at an
earlier stage by the Executive Director. The composition of the Complaints Committee, which includes public representatives, provides reassurance to complainants that the lens of public scrutiny is being brought to bear on each complaint to determine whether it warrants dismissal or a referral to the next stage of the process. In instances of alleged procedural unfairness, it will be open to a complainant to seek judicial review.

**Issue G: Settlement mechanisms**

**Yukon**

The Yukon legislation does not expressly provide for settlements of disciplinary matters, although subsection 23(2) of the LPA does allow for a member to resign with the permission of the Executive, rather than be suspended or disbarred.

**Other Jurisdictions**

A number of jurisdictions allow for a matter to be resolved by way of a settlement process that requires approval by an adjudicative committee without the necessity of a hearing before such committee.

Approaches such as Joint Statements of Fact, Joint Submissions on Disposition, Consent Resignations and Settlement Agreements are utilized.

Settlement Agreements sometimes require specified elements to be in place such as an agreed statement of facts, specific admissions respecting some of the charges, and an agreed upon disposition.

In some jurisdictions, a Settlement Agreement requires the approval of the committee that referred the matter to a hearing, as well as approval by the hearing or adjudicative committee. Generally, the approval of the Settlement Agreement is done in the context of an open hearing, where the public may attend.

In some jurisdictions, authority is granted to allow a member to resign in advance of a hearing (see, eg. Newfoundland). As earlier noted, a member in Alberta who is the subject of a proceeding may at any time apply to the benchers for approval of resignation instead of having the proceeding continue.

Generally, the details of settlement mechanisms are found in the Rules rather than the statute.

**Discussion and Proposed Direction**

It can save considerable time and cost, and achieve the same result by having options for settlement that will avoid the necessity of a formal hearing. Generally the parties to the settlement are the Society and the member. This raises the concern that the complainant is
denied his or her "day in court" and also raises the suspicion of a "deal". These concerns can be alleviated by having open and direct communication between the Society and the complainant throughout the process.

There are many instances where complainants themselves do not wish to be part of a formal hearing process requiring them to give evidence and to be subject to cross examination. A Settlement Agreement often comes as a welcome relief.

Cost saving should never be the principal driver of settlements. In every circumstance where a Settlement Agreement is being considered, the public interest must be paramount. As long as this is borne in mind, where a member is prepared to make appropriate admissions and the agreed disposition is proportionate to the admissions and protects the public, Settlement Agreements can be very useful tools.

While the LPA itself does not have to specify the details of the settlement mechanisms that may be available, the Law Society recommends that the new statute enable the resolution of a matter through a variety of settlement mechanisms, the details of which can be outlined in the Rules.

### Rationale for Recommended Policy Direction

If the public interest can be protected through a settlement, rather than through a formal hearing, this is generally desirable. It saves the parties both time and money and removes the emotional and other costs of a protracted hearing process. The interests of the complainant can be adequately addressed through establishing proper and frequent lines of communication between the Society and the complainant.

### Issue H: Composition of hearing committee

#### Yukon

The Chair of the Discipline Committee must convene a Committee of Inquiry to preside over and hear a complaint where the preliminary investigation concluded reasonable and probable grounds exists to believe a member’s conduct might be deserving of censure. The members of the Committee of Inquiry are members of the discipline committee, with the exception that the Chair of the Discipline Committee is not permitted to serve on the Committee of Inquiry.

#### Other Jurisdictions

In several jurisdictions, a large pool of people, including lawyers and non-lawyers, is appointed, from which a hearing or disciplinary panel is selected to deal with individual cases. In other provinces, hearings are conducted by a Hearing Committee comprised of anywhere from three to five members. In most instances, some public representation is required on such
committees. In some jurisdictions, Benchers may serve on the Hearing Committee, unless they are disqualified for a particular reason such as bias.

**Discussion and Proposed Direction**

While names vary from jurisdiction to jurisdiction, the majority of jurisdictions have a pool of both lawyers and public representatives from which a panel of three to five persons is selected to conduct the actual hearing. There is a clear separation of function and composition of committees between the complaints and the hearing processes.

While not clearly set out in every statute, some jurisdictions do not permit members of the Society's governing entity (Benchers, Council/Executive) to sit on the Hearing Panel. The parties before a Hearing Panel are the Society and the member who is the subject of the complaint. Where the members of the Hearing Panel are also members of the governing Executive, an argument can be made that a perception of bias arises in favour of the Society as a party during the hearing.

In Yukon's statute, the Committee of Inquiry consists of members of the very committee that had responsibility for the initial investigation of the matter. There is a blurring of the investigative and adjudicative functions that can create the basis for an argument of perception of bias.

The Law Society proposes that in its new Act:

1). A pool of members and public representatives be appointed to a Hearing Committee, from which a panel is selected to hear a particular matter.

2). The quorum for the Committee will be established in the statute as 3, with a minimum of one public representative who will be appointed by the Executive. (It must be remembered that the Executive itself has public representation on it, and accordingly objectivity will be brought to bear on the Executive’s appointment of an additional public representative for the Hearing Committee. It is not contemplated that Cabinet will become involved in the selection of public representatives for the Society’s Committees – only in the selection of public representatives for the Executive).

3) Members of the Executive will not be eligible to serve on the Hearing Committee.

**Rationale for Recommended Policy Direction**

The concept of peer review suggests that the majority of members of the adjudicative body should be members of the profession itself. Given the public interest mandate of the Society however, it is also important to ensure there is public representation on the decision making body.
Because of the potential for a perception of bias if members of the adjudicative body are also members of the policy setting body of the Society, it is preferable to not include any members of the Executive on the Hearing Committee.

**Issue I: Solicitor-client privilege**

**Yukon**

Section 28(5) expressly provides that nothing in the powers granted to investigators compels disclosure of any thing or information that is protected by solicitor-client privilege.

Section 31(8) provides a similar prohibition regarding material protected by solicitor-client privilege during a hearing process before a committee of inquiry.

**Other Jurisdictions**

Several statutes contain explicit provisions allowing material protected by solicitor-client privilege to be accessed by the Law Society as part of the investigative and adjudicative processes of the Society.

In Nova Scotia and Manitoba, materials over which solicitor-client privilege is claimed must be disclosed to the Society in the course of its investigation or hearing. However, use of the information is limited to the purposes authorized under the Act under which it was obtained. A duty is imposed on the Society to maintain the solicitor-client privilege with respect to any other disclosure of the materials. Both jurisdictions also provide for exclusion of the public from hearings when necessary to preserve privilege related to the materials or information disclosed.

Nova Scotia and British Columbia also provide that a member who discloses solicitor-client privileged information to the Society in the course of a proceeding (investigation or hearing) is deemed not to have breached their duty or obligation to the client respecting that disclosure.

In Ontario, a person required to disclose information to the Society must do so even if the information is privileged or confidential. This information is admissible in a proceeding under the Act despite it being privileged.

In Alberta, a member cannot refuse to disclose materials which are subject to solicitor-client privilege in the course of an investigation or hearing process under the Act. However, the member may require that all or part of the proceeding which deals with the privileged evidence be held in private and the public be refused access to the records. This protection is also extended to the Court of Queen's Bench and Court of Appeal hearing any appeal of a proceeding under the Act.
In British Columbia, any confidential or privileged information obtained by the Society must be used for the limited purpose under the Act for which it was obtained. It must not be disclosed to any other person except in relation to that purpose. A member may object to disclosure of documents required to be produced on the basis of confidentiality. If an objection is made the Act provides a process for the document to be sealed and for the Society to obtain a waiver from the client or to make an application to the Court for a determination.

In Nunavut and the Northwest Territories, the Act expressly prohibits any member or student subject to a disciplinary hearing from refusing production of evidence on the basis of solicitor-client privilege.

Discussion and Proposed Direction

In order to conduct a thorough and complete investigation, and to allow for full and fair adjudication of a matter, it is often necessary to access information that is subject to solicitor client privilege. Without access to information that is subject to solicitor-client privilege, it is possible for a member to hide behind the privilege to avoid providing information that is relevant to the Society's investigation and adjudication of a matter. It is in the public interest to allow broad access to information and evidence during the investigative and adjudicative phases of a proceeding, while at the same time taking appropriate steps to protect information that is subject to solicitor-client privilege from disclosure or utilization in other processes. In that regard, a number of jurisdictions have created a statutory privilege so that any information gathered during the investigative and adjudicative processes can only be used for those purposes, and are statutorily protected against use in civil or administrative proceedings. This issue is more fully explored in Section J.

It is therefore recommended that the new Act should explicitly authorize disclosure of information and material that is subject to solicitor-client privilege where necessary to assist in the complaints and hearing processes of the Society.

Rationale for Recommended Policy Direction

Complainants, in particular, and the public in general expect that Law Society investigations are thorough. Frequently, information relevant to a complaint is subject to solicitor-client privilege. If this information is relevant it should be accessed, and the statute then should provide the appropriate means of protecting the privileged nature of this material from use in any other proceedings.

Issue J: Statutory Privilege

Yukon

Under the LPA, no statutory privilege exists with respect to information obtained in the course of the Society fulfilling its statutory mandate. Arguably, a plaintiff in a civil lawsuit could
subpoena information that the Law Society obtained in the course of investigating or adjudicating a complaint, or in the course of a variety of other processes of the Law Society.

Other Jurisdictions

In Nova Scotia, the Society and its employees or agents cannot be compelled to testify in a legal proceeding, disclose reports or produce any other information acquired under the Act as part of the investigation and hearing process. Reports created by the Society in the course of the proceeding are not admissible in any civil proceeding, discovery, inquiry, or administrative process outside the scope of the Act. Notwithstanding these restrictions, the original complaint and the respondent's response may both be admissible with the consent of the respective parties.

In New Brunswick, any information gathered in the course of an investigation is privileged and may only be disclosed at the discretion of the Registrar when necessary for prosecution of complaints. It is not admissible in any civil proceedings. Any evidence given before the discipline committee for the purpose of prosecuting a complaint is not admissible in any civil proceeding.

In Ontario, the requirements to disclose privileged materials to the Society for the purpose of an investigation or hearing does not negate or constitute a waiver of privilege in relation to any other purpose other than a proceeding under the Act. The Society is expressly prohibited from disclosing any information obtained as a result of an audit investigation, review, search, seizure or proceeding under the investigation and discipline provisions of the Act. There are some exceptions enumerated, including disclosure with the written consent of all persons whose interests might be affected by the disclosure or in cases where there is a risk of harm identified. An employee or agent of the Society involved in the proceeding cannot be compelled to testify.

In Manitoba, a person in possession of solicitor-client privileged records that were obtained or provided to the person in the course of an investigation or proceeding under this Act cannot be compelled to produce those records or to answer any question about them in any other legal proceeding.

Alberta provides that certain persons cannot be compelled or required to testify, produce records or give evidence relating to any matter which arose in a proceeding under the Act, in any other proceeding. This statutory privilege is extended to any person who was involved in the investigation or hearing of a proceeding, any officer, employee or agent of the Society, any director, officer or employee of a subsidiary corporation of the Society, any person who is appointed as a custodian, and any person who acted under the instruction and supervision of any of the above.

In BC a complaint under the Act is not admissible in any other proceeding without the written consent of the complainant, and neither the Society nor the complainant can be required to disclose or produce the complaint. The same provision applies to a member's response to the complaint. Statutory privilege is also extended to any report, investigation, audit, or hearing by
a person, committee or panel acting under the authority of the Act, such that they are not admissible in any proceeding outside of the Act, except with written consent of the Executive Director. The Society and any persons involved in the complaints process may not be compelled to testify or disclose information in any other proceeding.

**Discussion and Proposed Direction**

The creation of a statutory privilege serves a number of purposes. It encourages witnesses to come forward and to cooperate with the Society during the investigation of a matter, without fear that information provided by them may be used in subsequent civil or administrative proceedings. Secondly, statutory privilege provides an added layer of protection to information subject to solicitor client privilege that has been accessed by the Society in the course of its investigation. Thirdly, there are matters in addition to information obtained during the complaints process that can also benefit from the statutory privilege. For example, there may be private matters that are discussed when considering an application for admission to the profession that should not be available in subsequent civil or administrative proceedings. Similarly, information disclosed to the Society under a Lawyers' Assistance Program may also include very private and personal matters, sometimes of a health information nature. Disclosure of such information to the Society should not enable the disclosure of similar information through a subpoena process in subsequent civil or administrative proceedings. The creation of a statutory privilege can, where sufficiently worded, provide protection to all types of information received by the Society in the course of performing its functions under the Act.

It is possible to enumerate exemptions to the statutory privilege which would allow for the appropriate disclosure of Society information in the right circumstances. As noted above, when referencing the Ontario legislation for example, disclosure with the written consent of all persons whose interests might be affected by the disclosure is permitted.

Given the discussion in Issue I regarding the need for accessing information subject to solicitor-client privilege, it is imperative that a statutory protection be created in the new legislation to ensure such privileged information cannot be utilized outside of the Law Society’s disciplinary processes. The protection should be created through the establishment of a statutory privilege over all materials that come into the possession of the Society as part of its regulatory processes, unless the material is otherwise available in the public realm, or unless there is appropriate written consent. Legislation in Ontario or Nova Scotia can be referenced for suggested wording.

**Rationale for Recommended Policy Direction**

The creation of a statutory privilege prohibiting use of Society information outside of Society processes is an appropriate corollary to the power to access information that is subject to solicitor-client privilege as part of the Society’s regulatory processes.
**Issue K: Range of dispositions during the hearing process**

### Yukon

Section 36 of the *LPA* provides that the committee of inquiry may dismiss the complaint if it determines that the member has not engaged in conduct deserving of censure. However, if a decision is made that the conduct is deserving of censure, the possible sanctions include: an order reprimanding the member, suspending the member with or without conditions, and striking the name of the member from the Roll resulting in disbarment (s. 37). Conduct deserving of censure is defined in section 24 of the *LPA*. Alternatively, if the member is found to be incompetent, additional sanctions include: suspensions with various conditions including remedial conditions or restrictions; requirements to complete a course of study or requirements for the member to appear before a board examiners to satisfy the board that competence is not adversely affected by a physical or mental disability or addiction. The committee of inquiry may also order costs of the proceeding.

### Other Jurisdictions

All jurisdictions provide authority for dismissing complaints. In addition all jurisdictions provide for the basic sanctions of: reprimand, suspension of practice, disbarment, imposing restrictions and/or conditions on practice. Most jurisdictions have a "catch all" provision allowing the adjudicative body to order any other penalty or sanction as may be appropriate.

Some jurisdictions allow for resignation as an alternate sanction. In jurisdictions where there is authority to deal with questions of incapacity, there is authority to order treatment or assessments.

Other dispositions available in certain jurisdictions include the appointment of a receiver or custodian, restitution, fines, and successful completion of examinations.

In most jurisdictions, the details of all possible dispositions open to the adjudicative committee are set out in the Rules and not in the statute itself.

### Discussion and Proposed Direction

Following a formal hearing it is generally helpful to have a wide array of options available to tailor the disposition of a matter to its particular circumstances. The possible dispositions may include dismissals, reprimands, conditions, restrictions, suspensions, education, fines, disbarment, or some combination of these and other sanctions.

Because the type of dispositions that can be ordered may evolve over time and are so context specific, it is recommended that the breadth of such dispositions be set out in the Rules rather than the statute. Ideally, the new legislation would simply state that the Hearing Committee may impose such disposition as set out in the Rules. The Rules would then set out in detail the
variety of dispositions that are available, and would also include a “catch-all” provision allowing for “such other disposition as the Committee may deem appropriate”.

**Rationale for Recommended Policy Direction**

The inclusion of the range of dispositions in the Rules rather than the statute is consistent with the general approach suggested for all aspect of a new LPA whereby the statute contains the general framework, but the Rules contain the detailed operational aspects of the matter. The combination of specifically enumerated dispositions together with a “catch-all” provision can be particularly helpful in tailoring the disposition to the particular findings and circumstances.

**Issue L: Rights of appeal**

**Yukon**

Section 42 of the LPA provides that a member who receives a negative decision and is subject to censure may appeal any finding or order of the committee of inquiry to the Supreme Court. The Supreme Court may make any finding it thought ought to have been made, quash or confirm the finding, make any order in its opinion the committee of inquiry ought to have made; and refer the matter back to the committee of inquiry for further consideration.

**Other Jurisdictions**

In Newfoundland the parties may appeal a decision or order of the tribunal to the Trial Division of the Supreme Court. An appeal does not stay the decision or order being appealed.

Newfoundland also allows a respondent who is found guilty to apply to the Complaints Authorization Committee for a supplementary hearing if there is new evidence or a material change. The committee may refer such an application to the tribunal for a supplementary hearing and the tribunal shall have the power to confirm, vary, or discharge the decision or order.

In Nova Scotia, every order or decision of a Complaints Investigation Committee or a hearing panel is final subject only to the right of appeal in the Act. A party may appeal a decision of the hearing panel on a question of law only and the appeal is to the Court of Appeal.

In New Brunswick any respondent affected by a decision may appeal to the Court of Appeal on a question of law or fact.

In Ontario, the Act provides for a first line of appeal to an Appeal Panel consisting of five persons appointed by Convocation one of which must be a lay person. The Society can only appeal questions of law or mixed law and fact while the respondent can appeal on any grounds. A decision of the Appeal Panel may be appealed to the Divisional Court with the same qualifications on what grounds the parties may appeal.
In Manitoba, a member may appeal to the Court of Appeal. A decision or order against an inter-jurisdictional law firm may also be appealed to the Court of Appeal.

In Alberta, the member may appeal a decision to disbar or suspend to the Benchers within 30 days. The Benchers shall hold a hearing to consider the hearing report and record, and hear representations of the member. A panel of Benchers holding an appeal hearing may, on application for leave to receive fresh evidence, consider and direct whether all or part of the evidence will be received, direct the matter back to the Hearing Committee to consider the fresh evidence, or quash any finding of guilt and direct a new hearing. After the conclusion of the appeal, the Benchers may make an order confirming the Hearing Committee's findings, quash the finding of guilt, modify the penalty imposed, or refer the matter to a new hearing by a different Hearing Committee.

In British Columbia, an applicant, respondent, or lawyer who is suspended or disbarred may appeal a decision of the panel or Benchers to the Court of Appeal.

In Nunavut and the Northwest Territories, a member or student-at-law who is subject of an adverse decision may appeal to the Court of Appeal on a question of law.

Table 6: The following table provides an overview of which Courts an appeal may be made to from a decision of the adjudicative body, including instances where the legislation specifies or limits the ground of appeal.

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(1) Only a respondent can appeal issues of fact; the Society is restricted to appeals on questions of law or mixed law and fact.

Discussion and Proposed Direction

The jurisdictions vary as to whether a right of appeal should be made internally within the Society or externally to a Court. There are variations as to whether the appeals to a court are to the Supreme Court or directly to the Court of Appeal. Variations also exist as to whether the appeals are to be on questions of law alone, or mixed fact and law, or some other avenues of appeal.
It is the view of the Executive that appeals from findings of the Hearing Committee should reflect the following:

1. Appeals can be initiated by either the member or the Society;
2. Because appeals can be initiated by the Society, it is not appropriate to have the appeals heard internally within the Society;
3. The appeal should be to the Yukon Supreme Court;
4. The appeal should be limited to questions of law.

**Rationale for Recommended Policy Direction**

The Hearing Committee is an arms-length Committee from the Law Society. It should not be considered “part” of the Society itself. As a result, the Society should have a right of appeal in the same manner as a lawyer has a right of appeal if it disagrees with the decision of the Hearing Committee.

The appeal should be limited to questions of law, as the courts have repeatedly held that members of the professions themselves (assisted by public representatives) are best able to judge their peers. A high degree of deference is given to committees in rendering their decisions.

An appeal to the Yukon Supreme Court is the appropriate forum for an appeal, as it is removed from the Society itself and is more readily accessible than the appellate court.

**Issue M: Names for committees and disciplinary process**

**Yukon**

Under the LPA, the body that adjudicates matters arising from complaints is called a Committee of Inquiry. The part of the legislation that deals with complaints and hearing processes is referred to as "Discipline".

**Other Jurisdictions**

There are a variety of terms used to name the adjudicative body that conducts hearings arising from complaints. They include Discipline Committee, Disciplinary Panel, Disciplinary Council, Adjudication Tribunal, Hearing Committee, Hearing Panel, Sole Inquirer or Committee of Inquiry.

In some jurisdictions, the term that is used to describe the overall complaints and hearing processes has been changed from a "discipline" process to a "professional responsibility" process.
Discussion and Proposed Direction

The term "discipline" can connote a process with only a penal purpose, as compared to purposes that could include remedial measures and a focus on rehabilitation. In naming the Society's process that deals with complaints and hearings, and in naming committees, consideration should be given to the various purposes served by the entirety of the complaints and hearing processes.

The Law Society recommends the following:

1. The committee dealing with the initial review of complaints should be called the Complaints Committee as that name is most descriptive of the issues it will be dealing with.

2. The committee dealing with the adjudication of complaints that have been referred by the Complaints Committee should be called the Hearing Committee, as that name clearly describes its function.

3. The entire process dealing with complaints and hearings should be called the Professional Responsibility process, to more accurately describe the variety of issues that are encompassed within it, and to remove any penal connotation.

Issue N: Division of matters to be included in new statute, compared with Rules

Yukon

Under the LPA, the statute itself contains many of the details of the complaints and hearing processes.

Other Jurisdictions

As has been referenced throughout this Paper, the approach generally taken in most jurisdictions is to reference the key public interest issues in the legislation itself and then include the more operational aspects of the complaints and hearing processes in the Rules.

Discussion and Proposed Direction

It is proposed that consistent with the general framework of the new statute, the provisions dealing with complaints and hearings should largely be set out in the Rules with only the most critical aspects of the processes found in the Act itself. In particular, the following breakdown of items between the Act and Rules is recommended:

1. The types of matters over which the Law Society has jurisdiction (e.g., professional misconduct, conduct unbecoming, incompetence and incapacity should be in the Act);
2. Each of the above terms should be defined in the Act;

3. The Act should set out that jurisdiction is maintained over former members whose conduct giving rise to the complaint occurred while they were a member of the Society;

4. The process by which complaints are received and forwarded to the Chair of the Complaints Committee should be noted in the Act;

5. The Act should specify the authority of the Complaints Committee to issue interim restrictions, conditions or suspensions. The process by which these are issued can be spelled out in the Rules;

6. The detailed powers of the investigator and the detailed powers and procedures for the Complaints Committee should be included in the Rules, and not in the legislation itself. There are two exceptions to this: the Act should explicitly give the powers, privileges and immunities of Boards under the Public Inquiries Act to investigators and members of the Complaints and Hearing Committees; and the Act should spell out the search and seizure authority granted to investigators;

7. The statute should create the opportunity for settlement mechanisms, but the details of the settlement mechanisms should be spelled out in the Rules;

8. The minimum composition of the Complaints Committee and the Hearing Committee should be delineated in the Act, with the ability to add additional members as set out in the Rules;

9. The statute should specifically provide for the authority to access material subject to solicitor/client privilege;

10. The statute should create a statutory privilege such that any material acquired during any of the Society's regulatory processes cannot be used externally in administrative or civil proceedings;

11. The range of dispositions available during the hearing process should be set out in the Rules, and the Act should simply enable this to occur; and

12. A right of appeal should be granted to both the Law Society and the member from findings of the Hearing Committee.
12. LEGAL CORPORATIONS/LIMITED LIABILITY PARTNERSHIPS/MULTI-DISCIPLINARY PRACTICES

**Yukon**

The current LPA allows "Professional Corporations" that hold a valid permit to engage in the practice of law (s. 88(1)). The legislation is silent on Limited Liability Partnerships and Multi-Disciplinary Practices (MDPs).

For Professional Corporations, the Executive must issue a permit to a corporation that meets all of the conditions set out in subsection 88(3) of the LPA. Three notable conditions include: legal and beneficial ownership of all voting shares of the corporation must be vested in one or more active members, all directors must be active members, and the persons carrying on the practice of law on behalf of the corporation are active members. Once issued a permit, a professional corporation may practice law in its own name, but cannot be enrolled as a member of the Society (s. 88(2)). Sections 92 and 95 provide that a Professional Corporation is subject to the same fiduciary, confidential and ethical relationships with its clients as an individual and all provisions of the LPA and Rules apply. This includes the potential to have its permit revoked or suspended and be subject to investigation or an adjudicative process for conduct and competence of its member.

It should be noted that recent amendments to the Partnership and Business Names Act have opened the legislative door in Yukon to the use of limited liability partnerships as a business structure. Accordingly, if the new LPA specifically authorizes practice through a limited liability partnership, no additional consequential amendments of other Yukon statutes will be required.

**Other Jurisdictions**

Most provinces and territories in Canada allow for a Professional Corporation or a Law Corporation to engage in the practice of law.

Generally, most provinces will issue a permit to a professional law corporation that satisfies all conditions required by the respective Acts for a permit to be issued. Common notable conditions required for a permit to be issued include: legal and beneficial ownership of all voting shares of the corporation being vested in one or more active members, all directors must be active members, and the persons carrying on the practice of law on behalf of the corporation are active members. Voting and proxy agreements are prohibited.

Holding a valid permit allows the corporation to engage in and represent that it is authorized to practice law as defined in relation to individual members. The corporation may engage in the practice of law in its own name but may not become a member or be added to the register or roll. The legislation also typically preserves the nature or the solicitor-client relationship and protection of privilege. All provisions of the governing legislation apply to the corporate entity. This includes the potential to be subject to discipline or other sanctions including having its
permit revoked or suspended. Furthermore, shareholders and others who may be related to the corporation may be liable for any misconduct or contravention of the Act by the corporation, to the same extent as if they were a partner or practicing as an individual.

In Ontario, one or more persons licensed to practice law (lawyers) and/or one or more persons licensed to provide legal services (paralegals) may establish a professional corporation for the purpose of practicing law or providing legal services. The corporations are issued certificates of authorization as opposed to permits. Ontario also permits Limited Liability Partnerships to practice law.

With respect to LLPs, the following jurisdictions allow for the practice of law to be performed by LLPs:

- Nova Scotia
- New Brunswick
- Ontario
- Manitoba
- Saskatchewan
- Alberta
- British Columbia
- Northwest Territories
- Nunavut

In several of these jurisdictions, consequential amendments were required to other statutes governing partnerships in the jurisdiction, before LLPs could be authorized in each jurisdiction.

With respect to multi-disciplinary practices, most jurisdictions are silent on the matter with the following exceptions:

1. Nova Scotia – the Legal Profession Act allows Council to make regulations permitting practice arrangements between lawyers and non-lawyers;
2. New Brunswick – the Law Society Act allows Council to make rules regulating multi-disciplinary practices;
3. Ontario – Bylaw 7 allows for the formation of multi-disciplinary practices;

Only Ontario and British Columbia have developed detailed Rules respecting multi-disciplinary practices.
Discussion and Proposed Direction

Most jurisdictions have similar requirements for the practice of law by a professional corporation. The requirements currently in practice in Yukon seem to be working well, and accordingly it is recommended that the status quo be maintained with respect to the ability of professional corporations to engage in practice.

Variations exist with respect to whether or not practice can be conducted through a Limited Liability Partnership. There is an increasing trend in Canada toward the use of LLPs as a structure for engaging in legal practice, and it is recommended that this should be recognized in the new statute.

While multi-disciplinary practices are a relatively new model of legal practice in Canada, global developments would suggest that it may be prudent to have language in the new statute that will enable multi-disciplinary practices to operate in the Yukon in the future. Rules need not be developed at the moment with respect to MDPs, but with the appropriate enabling provisions in place in the statute, rules could be developed at a future date should the need arise.

Rationale for Recommended Policy Direction

Current provisions regarding professional corporations are working well and accordingly should be retained. The prevalence of LLPs in other jurisdictions suggests that the new statute should allow for the practice of law by LLPs in Yukon. With respect to multi-disciplinary practices, it is recommended that the new statute enable their development and use through the Rules, but it is not immediately necessary to develop such Rules. Having the statutory framework in place to allow their development may be of assistance in the future if MDPs become more common and beneficial.

13. TAXATION OF FEES

Yukon

The LPA provides for the review and taxation of a lawyer’s bill though the clerk or an officer of the Supreme Court. Once a review is initiated, the other party must be given notice of the review and has the right to attend.

A reviewing officer has the power to determine what constitutes reasonable fees and disbursements for the services rendered and whether the person charged is liable to pay the bill. The officer must take into consideration: any agreement between the parties, extent and character of the services, labour and time exerted, importance of the matter, amount of money or value involved, skill and experience of the member, the reason the disbursement was
incurred and the results achieved. On completion of the review, the officer shall certify their
decision which shall bind the parties. This decision may be appealed to a judge of the Supreme
Court. An order for costs of the taxation proceeding may be made against the unsuccessful
party.

Other Jurisdictions

While the statutes of several jurisdictions are silent on the issue of taxation, those jurisdictions
that do address the issue provide for some variations as to who can tax the account. In some
jurisdictions (e.g., Nova Scotia, Manitoba), an application for taxation can be made directly
either to a small claims court adjudicator or the Supreme Court. In certain instances, there are
time limits for clients to apply for taxation (e.g., six months in Manitoba).

In British Columbia, a taxation proceeds by appointment with the Registrar who has authority
and discretion to determine the remedy, if any, and may also order costs of the review process.
A decision of the Registrar may be appealed to the Court. A similar process is in effect in
Saskatchewan.

Discussion and Proposed Direction

The Yukon system of taxation appears similar to that available in the other jurisdictions which
cover this issue in their legislation. Throughout the consultation process no issues were raised
respecting the current system. Accordingly, it is recommended that this portion of the new LPA
simply incorporate the provisions from the present LPA. No changes are suggested.

14. INSURANCE

Yukon

Under sections 50 through 56 of the current LPA, the Executive of the Law Society is responsible
for the insurance programs for members, whether by direct administration of the fund or by
contract with an insurance provider. Alternatively, section 54 imposes a requirement on
individual members to obtain their own policy of insurance in the event no fund or insurance
contract is established by the Executive.

Claims are administered by the Alberta Lawyers’ Insurance Association (“ALIA”).
Indemnification for professional liability claims may be paid directly from the fund, or the
Executive may enter into a group insurance contract for the provision of professional liability
insurance. Subsection 53(3) of the LPA allows for the contract to be entered into alone or
jointly with another Law Society. Under this provision, Yukon has joined with other jurisdictions
to obtain coverage through CLIA – The Canadian Lawyers Insurance Association.
The current legislation also imposes an obligation on individual members to take out and maintain a policy of liability insurance to a limit of at least $1,000,000 if the Society has not established or maintained a professional liability fund (s. 54(1)). This applies only to members who are engaged in private practice (s. 54(2)). A member who must maintain an insurance policy under this provision must satisfy the Executive they are in compliance with the requirement on an annual basis.

### Other Jurisdictions

While not expressly provided in the legislation, Nova Scotia, PEI, New Brunswick, Manitoba, Saskatchewan, Alberta, Yukon, Nunavut, Newfoundland and Labrador, and the Northwest Territories are all subscribers to the Canadian Legal Insurance Association ("CLIA") reciprocal insurance exchange program for the provision of insurance to members.

In some jurisdictions, separate legal entities have been created apart from the Law Societies to run the insurance programs in each jurisdiction.

In Nova Scotia, the Lawyers Insurance Association of Nova Scotia ("LIANS") is authorized to conduct and administer the mandatory professional liability claims program. LIANS is delegated all the powers necessary to do so and may enter into contracts with service providers to support programs of assistance. With the approval of Council, LIANS may also participate in a reciprocal exchange of indemnity contracts. While LIANS has authority for the administration, Council maintains authority to make regulations prescribing the limits of liability insurance, exclusions and exceptions, assistance programs and more.

In Ontario, the Society may own shares of and hold an interest in an insurance corporation incorporated for the purpose of providing professional liability insurance to licensees and other qualified persons. According to Bylaw 6, the Lawyer's Professional Indemnity Company is the insurer of lawyer licensees.

The Alberta Benchers may authorize the Society to enter into any contract or arrangement to establish an indemnity program. The Rules go on to establish the Insurance Committee which is responsible for supervising all aspects of professional liability insurance with the Society or ALIA. The Rules state that the indemnity program fund of the Society is transferred to ALIA.

In some jurisdictions, a lawyer's assistance program is run under the auspices of the insurance program. This allows for a separation of information obtained through a lawyers' assistance program from the day-to-day workings of the Society, including its disciplinary functions. It is helpful to have a clear provision in the legislation stipulating that information disclosed to the insurance program through a lawyers' assistance program is done in a confidential manner and in a way that cannot be utilized by the Society during its disciplinary functions. The creation of a statutory privilege for this purpose can be helpful.
Discussion and Proposed Direction

The key distinction between Yukon and a number of other Canadian jurisdictions is the creation of an entity separate from the Law Society to operate the insurance program. The principle behind the separation is to encourage members to report potential claims at the earliest possible opportunity, without fear that the reported information will result in a disciplinary complaint. While this advantage is an important one, the creation of a separate legal entity involves additional administration and cost, both of which are relevant in a small jurisdiction like Yukon. Arguably, where claims in Yukon are administered through ALIA, there is an appropriate degree of separation between insurance claims and the Society's disciplinary functions.

It is the view of the Executive that the present system is working effectively and that the size and resources of the Yukon do not easily lend themselves to the creation of a separate insurance entity. Accordingly, no changes to the status quo are proposed.

15. SPECIAL FUND

Sections 45 through 48 of the current LPA require the Society to establish, maintain and operate a "Special Fund" for the purpose of reimbursing pecuniary losses sustained as a result of the misappropriation of a person's property by a member entrusted with the same. The Executive may make Rules for the administration of the Special Fund, levying of annual assessments, provision of payment out of the Special Fund, conditions for reimbursement, and transfer of admission and membership fees to the Fund. The Fund must be invested by the Society in a prudent manner as would be expected of a Trustee.

Under section 49, a person who believes he or she qualifies for reimbursement may apply to the Executive. To qualify, the misappropriation or conversion of property must have occurred in relation to property entrusted to the member in their capacity as a barrister or solicitor. If the claimant qualifies, the Executive may pay out the loss from the Fund or any other amount determined. The Society maintains its rights of subrogation if a claim is paid out from this Fund.

Two categories of exemption arise with respect to payments into the Special Fund. Firstly, if during the time in respect of which the assessment was levied no property that belongs to another person was entrusted to or received by them in a capacity as a barrister or solicitor, they are not required to contribute to the Special Fund; secondly, members of the Public Service of the Yukon or Canada are exempt from paying the annual assessment or special assessments required for the Special Fund.
The Act also provides that the administrative costs of the Fund will be paid out of the Fund itself.

The experience of the Executive is that the administration of the Special Fund creates a cumbersome and time consuming process which could be streamlined in Rules to be created under new legislation.

**Other Jurisdictions**

All provinces and territories, except Quebec, provide for the establishment and maintenance of a fund to be used for compensating clients who suffer a pecuniary loss as a result of the misappropriation of funds or property held in trust by a lawyer or law corporation. All impose the basic conditions that the misappropriation occurred after the fund was established, and when the member was acting in their capacity as barrister, solicitor, lawyer or attorney. Most also retain a right of subrogation to recover monies from the lawyer for amounts paid out from the fund. In all jurisdictions, the governing body of the Society is responsible for the administration of the fund and is required to keep the funds separate from the main funds of the Society.

The fund is known by different names in various jurisdictions, including the "Special Fund", "Reimbursement Fund", "Compensation Fund", "Client Compensation Fund", "Special Compensation Fund", and "Assurance Fund". The limitation period for filing a claim against the Special Fund varies across the jurisdictions from six months to two years.

With respect to who is required to contribute to the fund, all members in Newfoundland, PEI and Saskatchewan are required to contribute. In Alberta, the Northwest Territories and Nunavut, all active members are required to contribute to the fund. In the remaining jurisdictions, all practising members are required to contribute to the fund.

In New Brunswick, in addition to the requirement to contribute by all practising members, non-practising members are also required to contribute to the fund. Newfoundland also requires students and professional law corporations to contribute.

In Ontario, all licensees, including lawyers and paralegals, are required to contribute to the fund. However, the compensation fund levy is incorporated into the annual fee and the By-laws provide for a reduction in annual fees for licensees who do not practice law or provide legal services. Thus, they are contributing to the fund but at a reduced amount.

It is important to note that no jurisdiction provides for the two exceptions presently set out in Yukon's LPA that exempt members of the public service of the Yukon or Canada from paying into the assessment required for the Special Fund, and also exempt individuals who did not hold trust funds during the period of the assessment. In other jurisdictions, the belief is that the Special Fund is there to serve all members of the public, and it is a joint responsibility of all lawyers to contribute to this Fund, regardless of the particular area of practice in which the lawyers are involved.
With respect to whom claims may be paid, there is a provision in the British Columbia statute that provides that a claim will not qualify for compensation from the special compensation fund if the misappropriation was made by a person acting in the capacity of a member of the governing body of the legal profession in another province or a foreign jurisdiction.

**Discussion and Proposed Direction**

Aside from the various names for "the Fund", the only area of real discussion focuses on the extent to which members should be exempt from contributing toward the Special Fund. It really becomes a question of whether lawyers whose conduct does not place their clients at risk for making claims from the Special Fund should be required to contribute to the fund in order to share the cost among all members. The rationale used by other jurisdictions that require all practising or active members to pay into the fund arises from the obligation of the profession as a whole to reimburse those who have suffered at the hands of unethical lawyers. All lawyers have an equal stake in ensuring that members of the public have confidence in the legal profession, and the existence of a fund to compensate clients in cases of misappropriation is a key method by which this public confidence is reinforced.

The Executive is in agreement with this rationale and recommends that the current exemptions should be removed from the new statute. It is recommended that the Rules under the new legislation outline which categories of members are required to contribute and which are exempt. At present, it is anticipated that the Rules would only exempt students-at-law, non-practicing members, retired members and honorary members.

With respect to the name of the “Fund”, the Society proposes the “Compensation Fund”, as it is descriptive of the function of the Fund.

The new statute should establish the creation of the Compensation Fund, establish the composition of a Compensation Fund Committee, and provide that decisions with respect to payments out of the Compensation Fund shall be made by the Compensation Fund Committee in accordance with the procedures set out in the Rules. The new Act should make it clear that the cost of administering the Fund shall be paid out of the Fund itself. To the extent that a claim may be denied by the Compensation Fund Committee, the new Act should provide that there will be right of review to the Executive of the Society. All remaining matters should be included in the Rules.

**Rationale for Recommended Policy Direction**

In keeping with the goal of placing operational matters in the Rules rather than in the new Act, all matters associated with the administration of the Compensation Fund should be set out in the Rules. Key jurisdictional issues such as the creation of the Fund, the establishment of the committee to administer the Fund, the right of review for the denial of claim, the obligations to pay into the Fund, and the ability to claim the costs of the administration of the Fund from the Compensation Fund itself, should be included in the Act. This approach allows for flexibility in
the development of the process used to administer and determine claims, and always leaves an option for review for a dissatisfied claimant. It is believed this approach appropriately protects the public interest while at the same time creates a more efficient process for the operation of the Fund.

16. LAW FOUNDATION

The Yukon Law Foundation is established under Section 78 of the LPA. Section 79 sets out the objects of the Foundation, and in addition to including more "traditional" purposes for the use of Law Foundation funds such as conducting research into and recommending reform of law and the administration of justice, other authorized purposes also include:

...  
(b) establishing, maintaining and operating law libraries for public use;...  
(d) legal aid programs ...  
(e) contributing to the Special Fund;  
(f) contributing to the cost incurred by the Society in relation to proceedings under Part III ("Discipline") ...

Section 80 of the LPA provides for the affairs of the Foundation to be administered by a Board including three individuals appointed by the Minister.

Section 83(1) requires the Foundation to prepare an annual report to the Minister summarizing the work of the Foundation, remitting an audited balance sheet and providing any other information the Minister may require. The report from the Law Foundation is then tabled in the Legislature.

Some members have raised the concern that there is a practical issue with the banks remitting trust account interest to the Law Foundation in a timely way. The question has been raised in the Society’s consultation process as to whether it should be the responsibility of the bank rather than the lawyer to ensure such funds are remitted.
**Other Jurisdictions**

Most jurisdictions provide for the creation of an entity similar to the Yukon Law Foundation. The emphasis with respect to the objects for each of the Foundations is on areas of legal education, legal research, law libraries and law reform. In Nova Scotia, for example, the objects of the Law Foundation are to "establish and maintain a fund to be used for the examination, research, revision and reform of and public access to the law, legal education, the administration of justice in the province and any other purposes incidental or conductive to or consequential upon the attainment of any such objects" (s. 73).

In Saskatchewan, Section 76(1) of the **Legal Profession Act** states that the purpose of the Foundation is "to establish and maintain a fund to be used for the purposes of legal education, legal research, legal aid, law libraries and law reform".

Apart from NWT and Nunavut, no other jurisdiction authorizes money from the Law Foundation to be used as a funding source for the Special Fund.

References to use of funds for legal aid programs vary from jurisdiction to jurisdiction, depending on which specific legislation may be in place to establish Legal Aid Programs.

In most jurisdictions, the Board administering the Law Foundation is comprised of members of the Society and some representatives appointed either by the Minister or Cabinet.

It is common among all jurisdictions to require some form of reporting to the Minister of Justice/Attorney General.

**Discussion and Proposed Direction**

A literal reading of the objects of the Yukon Law Foundation would suggest that it could be a core funder for the establishment of law libraries and the operation of legal aid programs.

It is important to note that aside from the Territories, none of the other jurisdictions in Canada authorize use of monies from the Foundation to be contributed to the Special Fund, or its equivalent.

It is the view of the Society that the focus of the Yukon Law Foundation should be on the following matters:

1) Conducting research into and recommending law reform;

2) Conducting research into issues involving the improvement of the administration of justice;

3) Contributing toward the establishment and operation of a law library for public and member use;
4) Contributing to the legal education and knowledge of members of the people of the Yukon and providing programs and facilities therefor;

5) Contributing toward legal aid projects that are in keeping with the above objects, while at the same time not implying that the Law Foundation is the core funder of legal aid programs.

It is accordingly recommended that the objects of the Law Foundation as set out in Section 79 (a), (b) (c) and (d) be maintained with some modification in wording to reflect the above, while those set out in Section 79 (e) and (f) be removed. These latter types of initiatives do not fit within the overarching objectives of using Law Foundation funds for educational, legal research and law reform initiatives, which form the core of the purposes of the Law Foundation.

With respect to the composition of the Board, since the funds from the Law Foundation will be used for purposes that impact both lawyers and the members of the public, the current composition of the Board whereby three individuals are appointed by the Minister and three appointed by the Executive from among the members, provides an appropriate balancing of background and perspective on the Board. No changes are recommended from the status quo.

With respect to the sources of funding for the Law Foundation, in addition to the interest on trust accounts and other sources of funding as presently set out in Section 85(1), it will be seen in the next Section of this Policy Paper that it is being proposed that unclaimed trust funds should also be paid to the Law Foundation, rather to the Minister. This approach is consistent with that in other jurisdictions and provides for a direct utilization of such funds for the publicly focused purposes of the Law Foundation.

Finally, with respect to the practical issues of remitting trust account interest, it is the view of the Executive that it would not be appropriate to create a statutory duty for banks to remit the interest to the Foundation, as the proposed statute is focused on the obligations of lawyers and not on financial institutions. If such a statutory duty were created, it would suggest some penalty and enforcement mechanism for non-compliance, and this is not an area into which the Executive wishes to tread. It is recommended however that the new statute explicitly provide that the Foundation has a subrogated claim to the interest on trust accounts that are required to be remitted by financial institutions to the Foundation, which can be enforced by way of civil action. By including such a provision, it will allow the Foundation to step into the shoes of a member and to obligate the banks through court proceedings to turn over monies that under the statute are to become the property of the Foundation.
17. **TRUST ACCOUNTS**

**Yukon**

The provisions dealing with trust accounts are primarily contained in the *LPA* with only a few references in the Rules.

Section 62 of the *LPA* provides that a member who has held money in a trust account for seven years and is unable to locate the person, for whom the money is being held in trust, shall deliver the money to the Minister. The *LPA* requires members who receive money in trust to maintain a trust account and to maintain records of these accounts. Within six months of the financial year end declared by the member, every member in private practice must file with the Executive a statutory declaration and a certified accountant's report related to their practice (not limited to trust accounts). If the chair of the Discipline Committee considers it necessary or advisable, an audit by an accountant may be ordered. In addition, authority exists under the current *LPA* to create rules providing for the inspection of books and records by auditors or agents of the Society. Rule 179.1 has been enacted pursuant to this authority.

**Other Jurisdictions**

In other jurisdictions, the regulation of accounting standards and audits of trust accounts are primarily dealt with in the Rules or Regulations. In most jurisdictions, the respective Regulations/Rules set out detailed requirements for record keeping by the member including monthly reconciliations and annual reporting. They also prescribe the time period for maintaining records.

In Nova Scotia, New Brunswick, Ontario, Saskatchewan, Nunavut and the Northwest Territories, audits may be conducted of a member’s accounts outside of the annual filing requirements as spot or random audits. The spot or random audit can be conducted without receipt of any complaint and are performed as a preventive measure rather than as a disciplinary measure. In Saskatchewan, an "audit inspector" employed by the Law Society may attend the offices of any member to perform a spot audit.

In Alberta the Rules establish a Trust Safety Committee to consider all matters under Part 5 of the Rules which govern trust accounts and include provisions for a separate hearing process by the committee. The Rules also require law firms to file an Accountant’s report with the Society annually. The Benchers have authority to direct an audit subsequent to the filing.

In BC a member who is more than 60 days late in filing their annual report is suspended and the Executive Director has authority to order an audit by an accountant or examination of the records. BC and Saskatchewan both provide for the assessment of late filing fees to accrue for each day an annual report is late.
Discussion and Proposed Direction

In keeping with the paramount object of protecting the public, it is imperative that Law Societies have stringent procedures regarding trust accounts. Given the importance of provisions regarding trust accounts, the Act itself must contain the requirements for maintaining trust accounts. It is proposed however that the detailed aspects of administering and operating trust accounts should be moved to the Rules, to allow for flexibility and evolution as banking processes change. For example, the provisions of Section 61 (1) to (3) should be maintained in the new statute, rather than in the Rules under such statute. Details with respect to how cheques shall be drawn, and the types of books, records and accounts required to be maintained, should be spelled out in the Rules and not the Act itself.

In addition to providing for a more appropriate breakdown of the content to be included in the Rules rather than the statute itself, it is proposed that the new legislation should include a requirement for random trust account audits to be conducted independently of any authority arising from the complaints process. Such mechanisms are seen as a way of catching issues before they turn into problems for members of the public, and for members of the profession.

As earlier outlined in the previous Section, in most jurisdictions across the country, unclaimed trust funds are not payable to the Minister. Rather, such funds are payable to the Law Foundation for use as part of its funding, once an appropriate process has been completed to ensure the owner of the funds cannot be located. This allows monies specifically collected as part of the practice of law to be used for the public interest objects established by the Law Foundation, rather than for general purposes of the government. As a result, it is recommended that the new legislation include a provision authorizing the payment of unclaimed trust funds to the Law Foundation.

The Executive also recommends that the new LPA contain an explicit provision authorizing the conduct of random trust account audits outside of the disciplinary process. Random audits of trust accounts provide a useful quality assurance mechanism that acts in a preventive way to address potential disciplinary matters. The authority to conduct such audits should be included in the statute, with the details of how the audits are to be conducted to be included in the Rules.

Rationale for Recommended Policy Direction

The breakdown outlined above between the content of the Act and Rules places those aspects of the administration of trust accounts in the Act that deal with matters of public protection. The remaining aspects of the administration and operation of trust accounts can appropriately be included in the Rules that can be more easily amended to take into account issues such as the rapidly changing technology in the administration of bank accounts. It is interesting to note that Section 63 (2b) refers to the books, records and accounts required to be maintained by the statute, to be entered and posted in ink or duplication thereof. This serves as a good
The preceding pages have attempted to outline some of the key policy directions anticipated for a replacement of the Legal Profession Act. Since this Policy Paper does not contain a proposed draft statute, it is anticipated that there will be further issues where the input of the Law Society will need to be provided to government in the preparation of any statute.

The concepts expressed in this Policy Paper will hopefully provide some high level direction to the legislative drafters. Members of the Law Society remain available for consultation at any time with respect to further issues that require additional explanation or expansion.

As set out in the Introduction to this Policy Paper, a review of the Legal Profession Act is needed to reflect changes in the profession, changes happening in other jurisdictions, practical issues with the current statute, and most importantly, the need to create a statute that will instil confidence in the public and in the members of the Law Society that the regulation of legal services in Yukon is being conducted in a progressive, fair, and open manner with the public interest as the paramount consideration.

The Law Society of Yukon looks forward to working with the Yukon Government in determining and implementing the next steps needed to develop a new statute to govern and regulate the provision of legal services in Yukon for the foreseeable future.
APPENDIX 1 - LISTING OF INDIVIDUALS AND ORGANIZATIONS CONSULTED THROUGHOUT THIS PROCESS

All members, Law Society of Yukon

Chief Mark Wedge, Carcross/Tagish First Nation
Chief James Allen, Champagne Aishihik First Nations
Grand Chief Ruth Massie, Council of Yukon First Nations
Chief Math’ieya Alatini, Kluane First Nation
Chief Rick O’Brien, Kwanlin Dun First Nation
Chief Liard McMillan, Liard First Nation
Chief Eddie Skookum, Little Salmon Carmacks First Nation
Chief Simon Mervyn Sr., First Nation of Nacho Nyak Dun
Chief Jack Caesar, Ross River Dena First Nations
Chief Kevin McGinty, Selkirk First Nation
Chief Brenda Sam, Ta’an Kwach’an Council
Chief Peter Johnston, Teslin Tlingit Council
Chief Ed Taylor, Tr’ondek Hwech’in
Chief Norma Kassi, Vuntut Gwitchin First Nation
Chief David Johnny, White River First Nation

James Ewert, Chair, Yukon Public Legal Education Association

Mr. Ronald J. MacDonald, QC, President, Federation of Law Societies of Canada

Executive Directors of all Law Societies in each Canadian Jurisdiction

Kathy Kinchen, Chair, Yukon Legal Services Society

Ms. Norah Mooney, President, Canadian Bar Association, Yukon Branch

Whitehorse Chamber of Commerce, President, Rick Karp, Chair: Gerrard Fleming

Yukon Chamber of Commerce, President, Sandy Babcock, Chair: Andy Stouffer
APPENDIX 2 - LIST OF INDIVIDUALS INVOLVED WITH PREPARATION OF POLICY PAPER

This Policy Paper has been prepared with the assistance of the following:

(1) The 2010-2011 and 2011-2012 Executives of the Law Society of Yukon:
    - John Phelps: President, 2011-2012; Secretary 2010-2011
    - Susan Dennehy: Past President, 2011-2012; President 2010-2011
    - Mark Radke
    - Laura Cabott
    - Jim Tucker
    - Leslie McRae
    - André Roothman
    - Kim Sova
    - Linda Doll: Public Representative
    - John Wright: Public Representative

(2) Members of the Legislative Review Committee:
    - Susan Dennehy
    - André Roothman
    - Suzanne Duncan
    - Ian Yap
    - John Wright

(3) The Executive Director of the Law Society of Yukon:
    - Lynn Daffe

(4) External consultants:
    - Marjorie A. Hickey, Q.C.: marjorie.hickey@mcinnescooper.com
    - Kiersten Amos: kiersten.amos@mcinnescooper.com
APPENDIX 3 - LIST SHOWING THE NAMES/CITATIONS OF THE GOVERNING LEGISLATION USED THROUGHOUT THE JURISDICTIONS IN CANADA, ENGLAND, AUSTRALIA AND NEW ZEALAND

Canada

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Canada - Citations

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United Kingdom

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Australia

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Australian Capital Territory
Legal Profession Act 2006 (A.C.T.)

Northern Territory
Legal Profession Act 2006 (N.T.)

Queensland
Legal Profession Act 2007 (Qld.)

Victoria
Legal Profession Act 2004 (Vic.)

Western Australia
Legal Profession Act 2008 (W.A.)

Tasmania
Legal Profession Act 2007 (Tas.)

Southern Australia
Legal Practitioners Act 1981 (S.A.)

New Zealand

Lawyers and Conveyancers Act 2006 (N.Z.) 2006/1
APPENDIX 4 - SUMMARY OF SUGGESTED DIRECTION FOR SPECIFIC TOPICS DISCUSSED IN POLICY PAPER

1. GENERAL FRAMEWORK OF THE STATUTE

RECOMMENDATION: The new LPA should be less prescriptive than the present statute, containing the general framework for each of the key regulatory issues, but leaving the details with respect to their operation to the Rules.

2. AUTHORITY FOR APPROVAL OF THE RULES

RECOMMENDATION: Members should be given the ability to vote on issues involving the election of members of the Executive, and matters respecting the term of office and removal from office for members of the Executive. Apart from this, membership approval of Rules should not be required. The Executive must consult with members before the executive votes on amendments to the Rules, but the Executive does not require the approval of membership to make a rule change effective. In addition, Cabinet approval should not be required for the Rules, and no ability should exist for Cabinet to annul Rules appropriately passed by the Executive.

3. OBJECTS OF THE SOCIETY

RECOMMENDATION: The new Objects clause should read:

The purpose of the Society is to uphold and protect the public interest in the delivery of legal services by:

(a) establishing standards for the education, professional responsibility and competence of its members and applicants for membership;
(b) regulating the delivery of legal services in Yukon;
(c) upholding the independence of the legal profession;
(d) promoting the Rule of Law; and
(e) engaging in such other activities that are incidental to the above.

4. PROTECTED TITLES

RECOMMENDATION: Because the term “lawyer” is a commonly understood and used word, there should be a category of members called “Lawyers”. It is recognized however that lawyers sometimes use other names, such as barrister or solicitor to describe themselves, and accordingly there should be a broad approach to title protection in the legislation. It is proposed that the new LPA should prohibit persons who are not members of the Society from using any title, name or description with the intent of representing that they are qualified to deliver legal services.
5. **WHAT IS TO BE REGULATED UNDER THE STATUTE**

**RECOMMENDATION:** New legislation should adopt the approach recommended by British Columbia, where the Statute would enable the regulation of the provision of legal services by lawyers and others, and not be limited to the regulation of the practice of law by lawyers. As a result, the new legislation should include a broad encompassing definition of the provision of legal services, mirrored on the definition included in the Ontario legislation. The Act should then set out which categories of members may engage in the full provision of legal services, and which categories may engage in a limited provision of legal services. Lawyers, law firms, law corporations and other categories designated in the Rules would be included in the former group, and students-at-law, aboriginal court workers and others as designated in the Rules would be included in the latter group. Under this type of framework the door is left open to regulate groups such as paralegals and other alternate service providers to provide designated types of legal services in the future.

6. **WHO IS TO BE REGULATED AND WHO IS EXEMPT UNDER THE NEW LEGISLATION?**

**RECOMMENDATION:** In recognition of the increasing mobility of lawyers and the global nature of many legal issues, it is recommended that the new legislation provide for the regulation of lawyers, inter-jurisdictional lawyers, inter-jurisdictional law firms, Canadian legal advisors, foreign legal consultants, students-at-law, law students engaging in aspects of the practice of law, LLPs, law firms, professional corporations and such other providers of legal services as authorized under the Rules.

Self-represented litigants and aboriginal court workers should be exempt, with flexibility to include other exemptions in the Rules.

7. **GOVERNANCE**

**RECOMMENDATION:** The name of the governing entity will continue to be the Executive. The minimum size of the Executive should be specified in the Act, enabling additions, but not requiring them, as set out in the Rules. The minimum size of the Executive should consist of eight, including at least 25% as public representatives. In the event additional categories of members are created in the Rules, the potential remains for a seat for such category of member to be added to the Executive. With respect to the appointment of public representatives to the Executive, the appointment should be made by government but should follow a process of recommendation from and consultation with the Law Society.
8. CREDENTIALS/ADMISSION PROCESS

RECOMMENDATION: The operational aspects of credentials and admission matters should be set out in the Rules rather than the Act. The Act should provide that decisions respecting credentials and admission matters will be made by a Credentials Committee, comprised of members of the Society and public representatives. The Executive Director will be an ex officio member of the Credentials Committee who can deal with various administrative aspects of the credentials and admissions process.

There should be an appeal of a denial of an application to a separately constituted Credentials Appeal Committee.

9. QUALITY ASSURANCE

RECOMMENDATION: The Act should reflect the recent decision to require mandatory continuing professional development and should include a flexible provision enabling the creation of Rules that will permit the Society, but not require the Society, to engage in quality assurance functions such as practice inspections, establishment of practice standards, and formalized trust account audits.

10. SANCTIONS FOR UNAUTHORIZED PRACTICE

RECOMMENDATION: The new Statute should provide for a streamlining of the summary conviction process, allowing any Information to be laid by the Executive of the Society. In addition, injunctive relief should be available without the necessity of obtaining a summary conviction prior to injunctive relief being pursued. In addition, the amount of fines should be increased to provide a sufficient deterrent, and it is proposed that the minimum fine be $5,000 for a first offence, with a separate offence being created for each day the offence is committed. The maximum fine payable under one summary conviction proceeding would be $250,000.

11. THE COMPLAINTS AND HEARING PROCESS

RECOMMENDATIONS: There must be a clear delineation between the complaints process and the hearing process, with separately constituted committees authorized to deal with each to be known as the Complaints Committee and the Hearing Committee. Clear investigative authority should be provided to all individuals involved in these processes, including the authority of a Board under the Public Inquiries Act.

The statute should provide jurisdiction over matters of professional misconduct, conduct unbecoming, incompetence and incapacity, and each of these terms should be defined in the legislation.
The Complaints Committee should be granted authority to issue interim suspensions, restrictions or conditions, when the appropriate threshold for ordering such matters has been reached.

The extent of dispositions available during both the complaints process and the hearing process should be set out in the Rules rather than the Statute, allowing for maximum flexibility and evolution.

The ability to settle a matter without the necessity of a formal hearing should be available at all stages of the complaints process.

Individuals involved in the complaints and hearing processes should be able to access material that is subject to solicitor-client privilege. Such material, and indeed all material obtained through any of the Society’s regulatory processes, should be subject to a statutory privilege that would prohibit the use of such information in civil or administrative proceedings.

When a Hearing Committee finalizes a matter, a right of appeal on questions of law should be provided to both the member and the Society directly to the Yukon Supreme Court.

12. LEGAL CORPORATIONS/LIMITED LIABILITY PARTNERSHIPS/MULTI-DISCIPLINARY PRACTICES

*RECOMMENDATION*: As there is an increasing trend across Canada toward the use of LLPs as a structure for engaging in legal practice, it is recommended that this option be available in new legislation. The existing provisions for the practice of law by professional corporations are working, and should be maintained. With respect to multi-disciplinary practices, while they are a relatively new model of legal practice in Canada, global developments would suggest that it will be prudent to have language in the new legislation that will enable multi-disciplinary practices to operate in the Yukon in the future. Rules need not be developed at present with respect to multi-disciplinary practices, but could be developed at a future date should the need arise.

13. TAXATION OF FEES

*RECOMMENDATION*: The status quo should be maintained.

14. INSURANCE

*RECOMMENDATION*: The status quo should be maintained.
15. **SPECIAL FUND**

*RECOMMENDATION*: It is proposed that the special fund be known under the new legislation as the Compensation Fund to more accurately reflect the purpose of the fund. It is recommended that all practicing members should pay into the Compensation Fund. Accordingly, the current exemptions for members who do not hold property in trust, and lawyers who work for the federal or Yukon governments should be deleted. The only categories of exemption that should be maintained are students-at-law, non-practicing members, retired members and honorary members.

16. **LAW FOUNDATION**

*RECOMMENDATION*: The Objects of the Law Foundation should be revised to focus on its research, educational and law reform initiatives. The presently stated Objects which authorize contributions to the Special Fund and contributions toward disciplinary proceedings at the Society should be removed.

17. **TRUST ACCOUNTS**

*RECOMMENDATION*: The details with respect to the maintenance of books, records and accounts should be moved from the Statute to the Rules. In order to promote good practice and prevent poor practice, there should be an explicit provision authorizing the conduct of random trust account audits outside of the disciplinary process.

Finally, unclaimed trust funds should be payable to the Law Foundation, rather than to the Minister, and available for the various uses authorized by the Law Foundation.