

Legal Professions Regulatory Modernization

Ministry of Attorney General Intentions Paper

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Introduction

In March 2022, the Ministry of Attorney General (Ministry) announced a project to modernize the regulatory framework for legal service providers in British Columbia to help make it easier for the public to access legal services and advice. Specifically, the Ministry announced it would develop a legislative proposal for further consideration by government that involves:

- regulating all legal service providers under a single statute and by a single regulator;
- establishing a mandate for the regulator that clarifies its duty to protect the public, including the public's interest in accessing legal services and advice;
- establishing a modernized regulatory framework that is consistent with best practices in professional regulatory governance; and
- establishing clearly defined scopes of practice for each regulated profession with procedures to allow for expanded scopes as needed.

Between March and June 2022, the Ministry held several meetings with staff representatives of the Law Society of British Columbia (Law Society), the Society of Notaries Public of British Columbia (Notaries Society) and a representative of the BC Paralegal Association. The information provided in these meetings assisted the Ministry in refining several potential reforms.¹ The purpose of this paper is to set out a summary of the Ministry's intentions so that input can be obtained from the public and key partners, including the Law Society, the Notaries Society, the BC Paralegal Association, and Indigenous partners, before a legislative proposal is finalized for government and the Legislature's consideration.

B.C.'s Legal Services Landscape

In B.C., the legal services landscape currently involves at least three types of legal service providers, two main statutes, and two separate regulators.

Lawyers

- Lawyers are regulated by the Law Society pursuant to the *Legal Profession Act* (LPA). Many of the functions of the Law Society are performed through its governors, known as the benchers. There are 32 benchers in total, including the Attorney

¹ The Ministry is grateful to the individuals who participated and provided information about current structures and practices. However, the draft proposals set out in this paper are the Ministry's alone and may not reflect the views of those individuals or their affiliated organizations. The Ministry looks forward to receiving submissions from these organizations following their review of this paper.

General, six members of the public appointed by the Lieutenant Governor in Council, and 25 lawyers elected by the Law Society's membership (i.e., lawyers) in nine regions.

- Under the LPA, subject to certain exemptions, only a practising lawyer may engage in the practice of law as defined in the LPA. The Law Society has the authority to take action against persons suspected of providing unregulated legal services.²

Notaries Public (Notaries)

- B.C.'s notaries are unique in Canada in that they must complete a master's degree program and have a broader practice authority than notaries in other jurisdictions.³
- Although their current scope of practice includes matters that are otherwise typically limited to lawyers (including drafting of some wills and real estate conveyancing), notaries are regulated under a separate statute from lawyers (the *Notaries Act*) and by a separate regulator (the Notaries Society).
- Some notaries have been seeking an expanded scope of practice for many years.
- The Notaries Society currently has a board of 12, two of whom are not notaries.

Paralegals

- Paralegals are not directly regulated in B.C.
- Under the Law Society's rules, a paralegal may provide some legal services but they must work under the supervision of a lawyer who is responsible for their conduct. The Law Society also allows a lawyer to supervise up to two "designated paralegals" who can perform additional duties, but who remain subject to the oversight of the supervising lawyer.
- In 2018, the Legislature amended the LPA, at the request of the Law Society, to create a new category of legal service provider called licensed paralegals. Once in force, the amendments would give the Law Society the authority to make rules establishing the scope of practice (within the practice of law) of licensed paralegals or a class of licensed paralegals. However, for reasons discussed below, these amendments are not yet in force.
- The BC Paralegal Association has created a category of "voting membership" which is only open to paralegals who have graduated from certain recognized education programs or who have worked as a paralegal for a minimum period of time. Voting members are allowed by the BC Paralegal Association to use the title "BCPA

² Pursuant to a policy adopted by the Law Society in 2020, it will only take action against persons providing unregulated legal services contrary to the LPA if the executive director determines there is significant risk of harm to a person or the public.

³ With the exception of Québec, where notaries (notaries) must complete a law school education and have a more comprehensive scope of legal practice.

Registered Paralegal” which is registered under the *Trademarks Act* but is not otherwise a legally protected designation.

Previous Reform Efforts

Over the last decade, many efforts have been made to implement changes aimed at improving legal regulation and increasing access to legal services for British Columbians. These efforts include attempts to amalgamate the two current regulators and other initiatives.

Efforts to Establish a Single Regulator

In 2012, the then-Attorney General asked the Law Society and the Notaries Society to work together to develop a proposal for government’s consideration regarding “direction for regulatory reform of legal and notary services in the province” that would:

- ensure, and preferably enhance, the protection of the public interest in the provision of legal services;
- increase both affordability and access to legal services and/or access to justice; and
- create efficiencies in the regulation of legal services.

In response, the two regulators advised they were jointly of the view that a single, unified regulatory body that oversees the regulation of all legal service providers was the optimum model. However, despite that consensus, no final agreement was achieved.

Efforts to Improve Access to Legal Services

Over the past several years, the Law Society has pursued several initiatives aimed at increasing access to legal services and responding to unmet need. Those initiatives include rule amendments to allow for the provision of limited scope retainer or “unbundled” legal services in 2008, expanding the scope of services provided by articulated students in 2011, and the establishment of “designated paralegals” in 2012.

As noted above, the LPA was amended in 2018 to allow the Law Society to regulate a new category of legal service provider called licensed paralegals, and to give the benchers the authority to make rules establishing their scope of practice. Before those amendments were brought into force, at the Law Society’s 2018 AGM, a member’s resolution was passed by those members in attendance which directed the benchers to request that the government not bring the amendments into force until more consultation was completed, and which directed the benchers to not authorize licensed paralegals to practice in the area of family law. Following that AGM, the Law Society elected to advance the licensed paralegal initiative by creating a limited, controlled environment within the scope of its

regulatory authority to permit several experimental service delivery models in an “innovation sandbox”.

The innovation sandbox is intended to facilitate innovation in the delivery of legal services by allowing individuals and organizations to propose a new technology, structure or legal service that they want to provide to the public. If a proposal is accepted, the proponent is issued a “no action” letter which means that the Law Society will not prosecute the proponent or seek an injunction against them for the unauthorized practice of law. As of August 2022, 27 proponents have been approved, all generally falling within one of the following categories:

- regulated paralegals from Ontario;
- individuals with legal training and/or experience in B.C. proposing to provide a limited range of legal services independently;
- joint proposals from law firms and paralegals and others (e.g. a Human Resources Specialist) to expand services provided by paralegals without direct supervision by a lawyer; or
- legal technology innovations.

The Law Society hopes that as proposals continue to be evaluated on an individual basis, criteria will begin to coalesce, allowing the Law Society to establish clear guidelines and expectations for required training and experience in providing legal services.

Rationale for Reforms

The rationale for change is simple. Far too many people in B.C. cannot afford the cost of a lawyer. A survey conducted for the Law Society by Ipsos in 2020 found that as many as 60% of those in B.C. with a legal problem get no legal advice about their situation, and of those that do get advice, more than half get it from someone other than a lawyer.⁴ Although government has made significant investments in legal aid over the last number of years, adding approximately \$40 million to the annual budget of the Legal Services Society and funding eight new legal clinics in the province, we cannot rely solely on legal aid and pro bono work done by lawyers as the complete solution to the gap in access to legal services.

Access to legal services is at least in part a regulatory issue because rules around who is allowed to provide what services have an impact on the availability (and cost) of those services to the public. Access to legal services is also at least in part a governance issue

⁴ Ipsos, “Legal Services in BC: 2020 Survey” (1 May 2020), online: <<https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/Alternate/IPSOSReid2020-LegalServicesSurvey.pdf>>.

because it requires a governance framework that prioritizes the public interest over the interests of the professionals it regulates.

Unfortunately, previous reform efforts have either been unsuccessful or have been approached on a smaller-scale or piecemeal basis. Although the innovation sandbox has had some limited uptake, there are limits to a “no action” regulatory model for both proponents and the public. From a proponent’s perspective, licensing can help establish credibility with the public, and from the public’s perspective, licensing helps assure them that the services are provided by competent and insured providers. It also provides a regulator with a more extensive set of regulatory tools when the services provided are unsatisfactory.

That no past initiative has been as impactful as might be hoped signals an opportunity for a broader, more holistic approach to reform. The Ministry has identified several potential areas for reform, each informed by one or more of the following guiding principles:

- improving access to legal services;
- enhanced focus on public interest protection; and
- improving efficiency, effectiveness and flexibility of the regulatory framework.

Taken together, the intentions outlined below are aimed at two key complementary objectives. The first is facilitating better access to legal services for the public. The second is modernizing the governance framework for all legal service providers, ensuring they can continue to regulate themselves both independently from government and in a manner that ensures the public interest is paramount.

The Importance of Independence

The importance of an independent bar to the functioning of a free and democratic society cannot be overstated. The Ministry is not proposing, and has no intention of implementing, changes that would interfere with the ability of a lawyer (or other legal service provider) to fearlessly advocate for their client and provide independent legal advice to their client, even, and especially, when their client is at odds with government.

The Ministry has no intention of implementing changes that would see a shift away from what is commonly referred to as “self-regulation”. Self-regulation does not mean *no* oversight or involvement by government. It means that the Legislature has made a policy decision to assign a professional regulator the primary responsibility for the development of structures, processes, and policies for regulation.

As set out in greater detail below, the reforms contemplated by the Ministry would:

- establish a board of directors on which the government-appointed members constitute a minority;
- give the regulator the power to make rules for the regulation of legal service providers that would not need to be approved by, or filed with, government;
- maintain the regulator’s jurisdiction to adjudicate discipline matters involving lawyers and other regulated legal service providers;
- establish a regulator that continues to be self-funded; and
- remove the Attorney General as a member of the board.

Many other common law jurisdictions have moved away from self-regulation in favour of alternative regulatory models featuring enhanced government oversight (often referred to as “co-regulation”). For example, in 2007, England and Wales created a state-appointed Legal Services Board to oversee the regulators of the legal professions in that jurisdiction. Similar models are also in place in most Australian states. However, the Ministry is not proposing this kind of change. The reforms contemplated in this paper would ensure that legal professions in B.C. remain (or become, in the case of licensed paralegals) self-regulating.

Reconciliation

Pursuant to the *Declaration on the Rights of Indigenous Peoples Act*, the government must take all measures necessary to ensure that B.C.’s laws are consistent with the United Nations Declaration on the Rights of Indigenous Peoples (Declaration). The Ministry acknowledges the particular importance of this obligation with respect to laws impacting the justice system, given the system’s colonial history and the harm it has caused, and continues to cause, to Indigenous peoples. All the proposals set out in this report must be interpreted and implemented in a manner that is consistent with the Declaration and that seeks to dismantle institutional and systemic racism.

As a starting point and as discussed further in this paper, the Ministry contemplates that:

- the future legal regulator’s statutory mandate would include an express obligation to support reconciliation with Indigenous peoples;
- consideration should be given to a statutory minimum requirement for Indigenous participation on the regulator’s board; and
- consistent with the Truth and Reconciliation Commission of Canada’s Calls to Action, and building on the work of the Law Society in this respect, an obligation for cultural competency training for all regulated legal service providers would be embedded in statute.

In a preliminary, high-level review of an earlier draft of this paper, the BC First Nations Justice Council noted that this legislative project, as with all justice system reform efforts,

must be undertaken in a manner consistent with, and guided by, the BC First Nations Justice Strategy.⁵ This will require a distinct stream of consultation and co-operation. Noting that this paper is intended as a vehicle for engagement and discussion, the Ministry is committed to ensuring that the outcome of this project reflects a marked shift towards reconciliation and in how Indigenous peoples engage with legal services.

⁵ BC First Nations Justice Strategy (February 2020), online (pdf): <https://bcfnjc.com/wp-content/uploads/2022/04/BCFNJC_Justice-Strategy_February-2020.pdf>.

Proposed Reforms

1. Single Statute, Single Regulator

In recent years, the professional regulation landscape in B.C. and elsewhere has evolved and modernized across other many other sectors including health, finance, and the built and natural environment. Many of these shifts have involved the consolidation of multiple professions under a single statute and/or oversight body.

The Law Society and the Notaries Society have in the past agreed that a harmonized, single regulator is the optimum model to protect the public, increase access to legal services, and create efficiencies in regulation. They have also in the past agreed that reform should be viewed not only from the broad perspective of the provision of all legal services (i.e., not just lawyers and notaries), but also other potential future providers of legal services.

Legal regulators across Canada and elsewhere are broadening their oversight to include the regulation of paralegals and/or other legal service providers. B.C. already has the benefit of two well-established categories of legal service providers in lawyers and notaries; consolidating their regulation will ensure a centralized and efficient approach to meaningfully working towards enhanced and affordable legal services for people in B.C.

Benefits of a single statute and single regulator model include:

- A single statute will ensure there is a consistent expectation of professional accountability regardless of the specific professional. Consistent standards are important, particularly when different kinds of providers offer similar (or overlapping) services.
- A single regulator for lawyers, notaries, and licensed paralegals, particularly if that regulator has a clear mandate to facilitate access to legal services, will be well positioned to identify gaps in underserved areas and to regulate in a manner that addresses those gaps.
- It will avoid the need for coordination between regulators, which at best can be administratively challenging and at worst can lead to competition or turf wars.
- It will make it easier for the public to know what kind of legal help is available when faced with a problem and who to contact with their concerns about services they received.
- A single regulator for all legal professions may be better positioned to maintain the public's confidence that it is regulating in the public's interest and not in the interest of any one particular profession.

Finally, on a separate but related note, a shift towards a single regulator and a single statute raises a question as to whether the Law Foundation of British Columbia (Law Foundation) and the Notary Foundation of British Columbia (Notary Foundation) should also combine their operations.⁶ Subject to further engagement with the two foundations and other stakeholders, it is anticipated that the optimal future model may also involve an amalgamation of those two entities.

Ministry Intentions

- 1.1 A single statute should regulate all current and future regulated legal service providers.
- 1.2 The statute should establish a single regulator, responsible for the regulation of all current and future regulated legal service providers.
- 1.3 The Law Foundation, the Notary Foundation and the Ministry should explore the possibility of a single foundation model for all legal service providers.

2. Clear Mandate

A regulator's mandate provisions reflect the powers and responsibilities delegated to it by the Legislature. They must clearly communicate the regulator's purpose to the regulator, its licensees, and the public. The optimal mandate for the new regulator would include several components.

First, it would assign the regulator the broad authority to regulate the competence and integrity of legal service providers in B.C. and to promote the rule of law.

Second, it would outline the regulator's core responsibilities, including:

- establishing conditions or requirements of licensee registration, reinstatement and renewal;
- establishing, monitoring and enforcing standards of practice and professional responsibility of licensees;
- establishing, monitoring and enforcing continuing competency requirements for licensees including Indigenous cultural competence; and

⁶ The Law Foundation is established by the LPA and the Notary Foundation is established by the *Notaries Act*. The Law Foundation's primary source of revenue is the interest earned on lawyers' pooled trust accounts, and the Notary Foundation earns its revenues through the interest earned on notaries' client trust accounts. The Law Foundation is statutorily required to distribute its funds in the following areas: legal education, legal research, legal aid, law reform, and law libraries. The Notary Foundation is required to distribute its funds to legal aid, legal education, legal research, and law libraries, and to pay for administrative costs and continuing education for notaries and applicants.

- maintaining a register of licensees that shares key information with the public about each licensee.

Finally, the regulator’s mandate would also include guidance to the regulator on *how* it should carry out its duties. Both England and Wales and Ontario’s relevant statutes include key principles to guide how their legal regulators must discharge their mandate. This initiative presents an opportunity to adopt a similar approach in B.C. A modernized statute could advance principles such as:

- promoting and protecting the public interest;
- facilitating access to legal services;
- supporting reconciliation with Indigenous peoples;
- protecting the ability of all legal professionals to provide committed representation to all clients;
- encouraging diverse and effective legal professions; and
- regulating proportionately to risk.

Ministry Intentions

- 2.1 The statute should assign the regulator the broad authority to regulate the competence and integrity of legal service providers in B.C. and to promote the rule of law.
- 2.2 The statute should set out the regulator’s core responsibilities.
- 2.3 The statute should set out guiding principles to assist the regulator in its decision making.

3. Modernized Governance Framework

The current (separate) governance frameworks for notaries and lawyers are both in need of revitalization.

The *Notaries Act* has not been substantively revised in over 40 years, and the regulatory framework under which notaries operate requires modernization. For example, the current statute does not include a mandate provision for the Notaries Society and reflects an era when professional associations were responsible for disciplining members for professional misconduct as opposed to professional regulators. The *Notaries Act* also designates the Notaries Society as a society under the *Societies Act*, which has a member focus and is ill-suited to the task of professional regulation. Further, the only committee named in the *Notaries Act* is the discipline committee, and the statute does not clearly grant the authority to establish other committees consistent with those often established by professional regulatory bodies.

Regarding the governance framework for lawyers, in the summer of 2021, the Law Society, to its credit, commissioned independent governance expert Harry Cayton to undertake a governance review of the Law Society. Cayton's report to the Law Society (Cayton Report) was presented to the benchers in December 2021.⁷ The Cayton Report made numerous recommendations, many of which were accepted and adopted by the benchers at their meeting of March 4, 2022.

Cayton's core recommendations included proposals for the reduction of elected benchers, an increase in the proportion of publicly appointed benchers and reform of the Electoral College model in a manner that would facilitate not only geographic diversity but also an optimum level of skill sets on the regulator's board. He also observed that some of the reforms he thought necessary would require amendments to, or replacement of, the LPA.

In considering how best to structure the new regulator's governing body, the Ministry's intention is to assure a competent, nimble, and skills-based board, composed of a diverse group of legal service providers and others who individually and collectively have a deep understanding of the regulator's public interest mandate. Diversity has a variety of meanings in this context; it includes diversity of skills, regions, backgrounds, professional designations, and genders. Both the Notaries Society and Law Society have in recent years achieved gender parity among governors, and in 2021, five Indigenous benchers were elected to the Law Society's bencher table, a result described by the Law Society as "unprecedented".⁸

A modernized governance framework would build on these recent improvements by establishing a structure and election/appointment processes that will ensure the regulator's board is reflective of all British Columbians because of, and not in spite of, the framework in place.

The Ministry believes that the public would be best served by a board composed of:

- "licensee" directors who are elected by licensees;

⁷ Harry Cayton, "Report of a Governance Review of the Law Society of British Columbia" (2021, November), online (pdf): <https://www.lawsociety.bc.ca/Website/media/Shared/docs/about/GovernanceReview-2021.pdf>.

⁸ According to one media report, until the 2021 election results, only two Indigenous lawyers had been elected as benchers since the Law Society was formally incorporated in 1884. See Jason Proctor, "'Unprecedented': 5 Indigenous lawyers elected to B.C. Law Society leadership in major victory" *CBC* (17 November 2021), online: <https://www.cbc.ca/news/canada/british-columbia/indigenous-benchers-bc-law-society-1.6251486#:~:text=From%20left%20to%20right%2C%20Indigenous%20lawyers%20Brian%20Dybwad%2C,to%20get%20greater%20representation.%20%28Canadian%20Bar%20Association%20B.C.%29>.

- directors who are appointed by the other members of the board in accordance with a fair, transparent, accountable and independent nomination process; and
- directors who are appointed by the government in accordance with a fair, transparent, accountable and independent nomination process.

The directors appointed by government should constitute a minority on the board. In addition, although it is important that communication channels be maintained between government and the regulator, that relationship need not and should not be based on the Attorney General's membership on the regulator's board.

One of the benefits of at least some director appointments, responsive to identified, or anticipated, skill gaps, is that it enables a more intentional approach to the overall board composition. Boards often establish a composition matrix that identifies the skills, experience, and backgrounds that the board as a whole should reflect. Appointments can then be made with a view to filling any identified gaps. Ensuring that a number of seats on the regulator's board are filled by appointments will help ensure the board has the right mix of skills and diversity needed to fulfil its mandate. However, given the particular importance of Indigenous representation in legal professions regulation, and the gains that have recently been made in this respect at the Law Society, consideration should also be given to embedding an explicit requirement in the statute regarding Indigenous representation on the regulator's board. A guaranteed Indigenous appointee (or appointees) would not and could not account for all the diverse perspectives of Indigenous peoples in the province, and any statutory minimum requirement would need to be supplemented by purposeful, merit-based election and appointment processes that promote additional Indigenous voices at the board table.

The size of the board would be balanced to address the dual objectives of diversity and functionality. On the one hand, the board would be large enough to ensure that all regulated legal service providers and the public are reflected in its composition, and to ensure a diversity of skills, perspectives, regions, and backgrounds are represented in its deliberations. On the other hand, the board would be small enough to be nimble and cohesive. As observed by Cayton and others, the current size of the bench table at the Law Society is too large for effective discussion, deliberation or decision-making. In its submissions to Cayton as part of his Law Society governance review, the Canadian Bar Association, BC Branch recommended that the number of benchers be reduced to 15.⁹

⁹ Canadian Bar Association, BC Branch, "*CBABC Submission on Self-Regulation and LSBC*" (2021), online (pdf): https://www.cbabc.org/CBAMediaLibrary/cba_bc/pdf/Elections/Bencher/2021/CBABC_Submission_to_LSBC_Governance_Review.pdf. These submissions were made in the context of possible improvements to the Law Society's governance framework, before the Ministry announced its

Finally, the Ministry notes that the Cayton Report contains several recommendations aimed at ensuring the benchers can focus their attention on their key responsibilities and better avoid potential conflicts of interest. Both the Law Society and the Notaries Society have implemented measures to separate adjudicative and investigative functions; the Ministry would like to see the new regulator build on these initiatives in accordance with professional regulation best practices. This would include ensuring that as a principle, directors focus on strategic oversight as opposed to regulatory or operational matters. This would allow additional participation in those processes by other licensees (and members of the public).

Ministry Intentions

- 3.1 The regulator should be governed by a board composed of a statutory maximum number of directors, some of whom are elected by licensees, some of whom are appointed by the other members of the board, and some of whom are appointed by government.
- 3.2 The directors appointed by government should constitute a minority of the board, and the Attorney General should not sit as a member of the board.
- 3.3 Consideration should be given to a statutory requirement for Indigenous representation on the board.
- 3.4 The board and government should be required to follow nomination procedures that are fair, transparent, accountable and independent.
- 3.5 Director elections and appointments should be staggered, so that gaps on the board (with respect to, for example, diversity, skills, type of legal service provider) can be identified and filled.
- 3.6 The board's role should be focused on strategic oversight.

4. Flexible Licensing Framework

A flexible licensing framework is one that ensures the public has the ability to find the kind of legal services that meets their needs, whether through a lawyer, notary, licensed paralegal, or otherwise. It is also one that is adaptable, giving the regulator the tools and discretion it needs to be responsive to the changing legal landscape and marketplace.

Lawyers

The LPA defines the “practice of law” which constitutes a practising lawyer’s scope of practice. The Ministry envisions a revised statute that maintains a statutory definition of

intention to explore the creation of a new single regulator for lawyers, notaries, and licensed paralegals.

the practice of law (which may be clarified but not changed in substance), and which will continue to constitute the scope of practice for practising lawyers.

Notaries

The *Notaries Act* sets out notaries' scope of practice. The Ministry intends to maintain this core scope of practice for notaries in statute, but also build in mechanisms to enable that scope to be expanded without the need for legislative change. This change would allow, for example, scope to be expanded by both rule and regulation.

Licensed Paralegals

An ideal future state will likely enable one or more classes of licensed paralegals with a common scope or scopes of practice in specific areas, such as family and/or corporate law, and/or certain litigation matters. The Ministry is exploring establishing a minimum scope (or scopes) of practice for licensed paralegals in a revised statute, along with granting the regulator the authority to expand those scopes and create new ones. Another potential option is to require the regulator to establish a minimum scope (or scopes) of practice for licensed paralegals within a specified period of time.

Individualized Licensing

In addition to the potential of a minimum defined scope(s) for licensed paralegals, the Ministry is also exploring whether the statute should enable the regulator to license licensed paralegals and notaries on a case-by-case basis. This would allow the regulator to customize an individual licensee's license based on their specific training and expertise, who could then provide those customized legal services directly to the public. As it relates to licensed paralegals specifically, granting individual licenses in discrete areas could help establish a common scope or scopes. Enabling a case-by-case approach to licensing would build on the sandbox initiative and would allow for the prospect of licensure for many of its participants immediately and outside of a defined scope of practice. It is also consistent with the approach taken in Saskatchewan, where a case-by-case limited licensing pilot is underway.

Other Future Categories

The statute should also enable the creation (and regulation) of additional future categories of legal service providers, to capture, for example, the potential future regulation of Commissioners for Taking Affidavits and/or technological legal services. With respect to the latter, several of the proponents in the Law Society's innovation sandbox fall within this category, and other jurisdictions in Canada (specifically, Alberta and Ontario) are exploring how access to legal services can be enhanced by developments in technology.

A Caution Against Over-Regulation

As noted above, it is contemplated that the statute would include some guidance to the regulator on how its mandate should be discharged, including a reference to regulating proportionately to risk. This will require a commitment to avoiding over-regulation. If the provision of legal information and law-related assistance by certain individuals does not require regulation to protect the public, those individuals should not be regulated, or if some level of oversight is required, only regulated in a manner that is proportionate to the risk. Current examples falling within the category of no regulation include Native Courtworkers, non-lawyer mediators, and community advocates; it is possible that this list could be expanded in the future and the regulator should have the flexibility to do so.

Future Review

Finally, the Ministry is optimistic that a unified legal regulator, with a revitalized governance framework and clarified mandate, will ensure meaningful progress towards more access to, and more choice among, different kinds of legal service providers. However, in light of both the status of the 2018 amendments and the initiatives in progress across many other jurisdictions with respect to alternative legal service providers, the statute should require an independent progress review of B.C.'s regulation of legal service providers (and specifically, its impact on access to legal services) after a set period of time.

Ministry Intentions

- 4.1 The statute should continue to include a definition of the practice of law, which will also constitute the scope of practice for lawyer licensees.
- 4.2 Notaries should have a core scope of practice set out in statute. Mechanisms should be established to allow that scope to be expanded without the need for legislative change.
- 4.3 The statute should authorize the delivery of legal services through licensed paralegals by setting a minimum scope or scopes of practice or requiring the regulator to do so within a prescribed period of time.
- 4.4 The statute should enable the regulator to grant licensed paralegals and notaries a license on a case-by-case basis.
- 4.5 The statute should enable the creation of additional future categories of legal service providers that can be authorized to deliver specific legal services.
- 4.6 The statute should include a requirement for a future independent review of legal service provider regulation and its impact on access to legal services.

5. Efficient Discipline Framework

A key function of any regulator is to ensure that those it regulates are competent and to have processes in place to address concerns about a professional's practice or conduct. Over the past several years, a body of best practices has emerged with respect to the manner in which concerns are addressed and resolved. Those best practices include, among other things:

- ensuring the public understands the types of complaints a regulator can address, and can easily access complaint processes;
- ensuring complaints processes are culturally safe;
- utilizing multiple pathways to resolve concerns fairly and in a timely manner (recognizing that not every concern should require a discipline hearing);
- ensuring that there is no conflict or overlap between a regulator's adjudicative and investigative functions;
- ensuring investigation and discipline outcomes are transparent to the public;
- ensuring that appropriate information can be shared with other organizations or bodies, in the public interest;
- ensuring a regulator in one jurisdiction can rely on findings of discipline processes conducted in another jurisdiction;
- ensuring the regulator can take extraordinary action to suspend a professional's license pending the outcome of an investigation if it is in the public's interest to do so; and
- ensuring there is a clear "duty to report" on licensees to report other licensees when the public may be at risk.

Many of these practices are already in place at the Notaries Society and Law Society through statute, rule, bylaw or policy. The intention is to establish a framework that maintains these practices while expanding and adapting them to keep pace with best practices as they continue to evolve. This approach will likely require some matters to be spelled out in statute, with the regulator being granted the authority to address others by rule.

Finally, the Ministry notes that the Law Society is presently undergoing a review of its regulatory processes to ensure that these processes accommodate the full participation of Indigenous complainants and witnesses who may be experiencing marginalization and vulnerability. The future regulator's complaints and discipline processes should incorporate the recommendations that flow from this review, to ensure and support participation in these processes by historically underrepresented groups and vulnerable individuals.

Ministry's Intention

5.1 The regulator's discipline framework should reflect modern regulatory best practices, and should be flexible enough to accommodate changes in process as regulatory trends evolve.

6. Enhanced Focus on Public Interest

One of the key shifts in the professional regulatory environment has been an increased expectation of a separation between regulation and advocacy. For example, the BC Notaries Association was formed in recent years as the advocacy body for notaries, to ensure the Notaries Society could properly focus exclusively on regulation. As another example, the LPA was amended in 2012 to remove a reference in the Law Society's mandate to "uphold and protect the interests of its members". Although it is important that all legal service providers have an unconstrained ability to advocate, it is important that regulatory bodies only act in an advocacy role in accordance with the public interest and their overarching legislation.

One of the observations of the Cayton report is that although the Law Society is a regulatory authority, it remains fundamentally a membership-run association. This dynamic manifests through nomenclature (i.e., society vs. regulator, member vs. licensee or registrant) and through the powers granted to members, including the authority to bring forward resolutions at AGMs and to require the Law Society to hold referendums. Although these observations were directed at the Law Society, the Notaries Society shares many of these traits. These discrepancies can cause confusion for the public (and for those regulated) as to whose interests are being pursued (i.e., members' interests or the public's).

Ministry Intentions

6.1 The statute should refer to regulated individuals as licensees and not members.

6.2 The statute should include public accountability mechanisms suitable to that of a regulator that regulates in the public interest and not that of a membership-driven association.

6.3 Licensees should not have the authority to bring forward resolutions that purport to direct the actions of the regulator's board.

6.4 Licensees should not have the authority to approve or reject the regulator's rules as determined by the board mandate to address the public interest.

Next Steps

The Ministry welcomes feedback on the proposals contained in this paper:

- An online survey is available at <https://engage.gov.bc.ca/govtogetherbc/consultation/legal-professions-reform/> until November 18, 2022.
- Written submissions may also be emailed to PLD@gov.bc.ca until November 18, 2022.

Please note that submissions may be subject to disclosure under freedom of information legislation.

The Ministry will take all responses into consideration before finalizing a legislative proposal for government's further consideration.