



DISCUSSION PAPER: A REVIEW OF THE LEGAL PROFESSION ACT OF THE NORTHWEST TERRITORIES

*Prepared for the Executive of the Law Society of the Northwest Territories by the
Legal Profession Act Revision Committee*

Yellowknife, Northwest Territories

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1. Executive Summary

This Discussion Paper is a review by the Legal Profession Act Revision Committee of the underlying policy contained within the current *Legal Profession Act* for the Northwest Territories.¹ Generally the Paper considers the current Act following its divisions. Consultation comments are considered in the context of those divisions. The Committee concludes the discussion of each division with a series of recommendations for each division. These recommendations include: expanding who is regulated by the Law Society to include other legal service providers; revising provisions concerning complaints against lawyers and approaches used in resolving complaints; and clarifying what is the practice of law. A summary of the recommendations to modernize the Act is made by the Committee and presented in Schedule A to this Discussion Paper.

2. Introduction

Background

The Law Society of the Northwest Territories is unique in Canada. Its predecessor, the Law Society of the North-West Territories, was established in 1898 as a full-fledged regulator of the legal profession, self-governing and independent from government.² In 1905 the North-West Territories was partitioned into the provinces of Alberta and Saskatchewan. That Law Society appears to have morphed into the Law Societies of Alberta and Saskatchewan. The historical record of what happened between 1905 and 1938 is not clear, but in 1938 the Law Society of the North-West Territories ceased to exist and the regulation of the legal profession in the Northwest Territories came under the direct control of the Commissioner.³ The profession in the Northwest Territories lost its self-regulating status. Only in 1976 was the profession allowed to regain its self-regulating status - possibly due to the advent of greater responsible government and the Legislative Assembly at this time.

In August, 2018, the Executive of the Law Society of the Northwest Territories established the Revision Committee to conduct consultations on the *Legal Profession Act* and to provide a report to the Executive with recommendations to amend the Act. The Executive approved of the Committee's Terms of Reference on August 1, 2018. The Terms of Reference are at Schedule B to this Discussion Paper.

The Executive appointed the following members to the Committee:

¹ [Legal Profession Act](#), RSNWT 1988, c. L-2.

² In the 1898 Legal Profession Ordinance, CONT 1898. s. 2, there is the first mention of the establishment of the Law Society of the North-West Territories. It is the Committee's belief that this entity eventually morphed into the Law Societies of Alberta and Saskatchewan with the evolution of the provinces of Alberta and Saskatchewan in 1905. Recall that prior to 1905, the capital of the North-West Territories was Regina. From 1905 to 1938 it is not clear if there was any ordinance governing the legal profession in what remained of the Northwest Territories.

³ The 1898 Ordinance and its amending ordinances of 1899, 1903 and 1904 were repealed by *An Ordinance Respecting the Legal Profession*, assented to March 21, 1938 at section 5. From 1938 to 1978 the legal profession was regulated directly by the Commissioner of the Northwest Territories. One can only speculate as to why this happened. The Committee thinks it may have been the small population of the Northwest Territories at the time but also the lack of responsible government and its vice-regal nature.

Tracy Bock – Chair
Margo Nightingale
Michael Hansen

Craig Boyer
Ian Rennie

Sarah Kay
Magnolia Unka-Wool

Glenn Tait the Law Society Executive Director also participated in Committee meetings. Two of the appointees resigned in the course of the Committee's work due to other commitments.

Methodology

The Committee met first in August to determine who should be part of the initial consultation. The Committee determined that it would solicit comments from

- members of the Law Society of the Northwest Territories;
- standing committees of the Law Society;
- other Law Societies in Canada;
- Federation of Law Societies of Canada;
- Canadian Bar Association - Northwest Territories Branch;
- Canadian Lawyers' Insurance Association;
- Government of the Northwest Territories;
- Northwest Territories Law Foundation; and
- Law Society of Alberta Practice Advisor.

The Committee received comments from

- members of the Law Society;
- Law Society of Alberta;
- Law Society of Alberta Practice Advisor; and
- Canadian Bar Association - Northwest Territories Branch.

After receiving the consultation responses, the Committee embarked on a detailed review of the responses, the current Act, new material arising from the consultation, and independent research of Committee members. The Committee met from November 2018 until September 2019. The Committee prepared this Discussion Report based upon the materials collected and reviewed during its meetings.

If accepted by the Executive, the recommendations in this Discussion Paper may help to inform the drafters of the Final Report on the underlying policy behind what will be the new Act. The Committee has identified a several issues that are better left to the Rules of the Law Society or its policies. The Committee believes this approach will allow for a more flexible response as the legal and social landscape affecting the legal profession evolves.

The Committee recognizes that drafting of a new Act is a matter for legislative drafters. To this end the Committee generally has not tried to frame recommendations as new legislative provisions but has, as much as possible, focused on matters of underlying policy with respect to the current Act and a proposed new Act.

Discussion Paper

This Discussion Paper is generally arranged along the thematic organizational structure of the current Act with additions where the Committee considered the Act to be deficient. Committee members reviewed the consultation responses and the provisions of the existing Act. They engaged in research concerning the issues and presented their findings to the Committee. A summary of that analysis is generally provided before each recommendation. Each recommendation represents the conclusion of the Committee concerning the relevant issue discussed.

This Discussion Paper has been prepared to share with lawyers and other interested people to inform ongoing discussions about changes the Committee proposes be made to the Act and to get more feedback on the specific changes being suggested. Any feedback received will be reviewed by the Committee, and if accepted, will be incorporated into a Final Report. The Final Report will identify the changes being requested to update the Act, and will include the reasons that support the changes being requested.

3. Detailed Review of the *Legal Profession Act*

Society

Self-Regulation

The legal profession in Canada is self-regulating. The primary function of the *Legal Profession Act* is to determine who the regulator is, and how that regulatory function is exercised and performed.

Self-regulation has been described as follows:⁴

Self-regulation recognizes the maturity of a profession. It honours the special skills, knowledge and experience that a profession possesses.

Self-regulation means that the government has delegated its regulatory functions to those who have the specialized knowledge necessary to do the job. The granting of self-regulation acknowledges a profession's members are capable of governing themselves.

The ability of lawyers to regulate themselves is delegated to a regulator by the Legislative Assembly through legislation passed by the Legislative Assembly in a province or territory. In the Northwest Territories, the regulator is the Law Society of the Northwest Territories and the governing statute is the *Legal Profession Act*.

Maintaining public confidence is especially critical in the legal profession because of the special role that lawyers have in Canadian society:⁵

⁴ Ontario College of Teachers at <https://www.oct.ca/about-the-college/what-we-do/professional-self-regulation> <date accessed: 18 May 2019>.

⁵ *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)* (1993), 85 BCLR (2d) 85 at paragraph 53.

One of the great and often unrecognized strengths of Canadian society is the existence of an independent bar [legal profession]. Because of that independence, lawyers are available to represent popular and unpopular interests, and to stand fearlessly between the state and its citizens.

Ensuring the independence of lawyers is an important component of being a self-regulating profession:⁶

The independence of the Bar [i.e. lawyers] from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. The uniqueness of the position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative control over the supply of legal services throughout the community.

If a regulator (i.e. a law society) has failed in its duty to regulate its members, the government can take back those powers and regulate the profession directly.⁷ Maintaining public confidence in the autonomy of the legal profession is critical to ensure an ongoing delegation of the power to self-regulate.

As the regulator of lawyers, the Law Society's responsibility is to protect the public interest in getting legal representation from competent and trustworthy professionals and to respond appropriately when a lawyer acts incompetently or in an untrustworthy manner. This is done by setting standards of professional and ethical competence for admission to the Law Society and enforcing those standards. The Law Society also has a duty to enforce the restriction on the practice of law to qualified individuals and to take action against unregulated and unauthorized practice by non-qualified individuals. Enforcement measures include assessment of qualifications, continuing professional development, corrective measures and, in extreme cases, suspension or removing the ability to practise law completely.

⁶ *Canada (AG) v. Law Society (BC)*, [1982] 2 SCR 307 at 335-336.

⁷ This happened with the medical profession (doctors) in the United Kingdom when the government stripped the General Medical Council of its powers to discipline doctors and prevent doctors from practising. This occurred in the aftermath of the loss of confidence in the self-regulation of that profession following the Harold Shipman scandal and Shipman Inquiry. Harold Shipman killed 215 patients over 23 years and the General Medical Council failed to act. The Inquiry concluded that "...was an organization designed to look after the interests of doctors, not patients...". See: http://news.bbc.co.uk/2/hi/programmes/politics_show/4211693.stm <date accessed May 18, 2019> which includes a link to the final report of the Inquiry. The aftermath of the Shipman case is at the root of continuing legal professional development requirements, adopted by Law Societies across Canada - not to mention continuing professional development requirements for most professions including the medical professions.

Mission and Mandate Statement

A mission statement provides a helpful way to clarify the purpose and functions of the Law Society's mandate as the regulator of the profession. The Law Society has operated with a Strategic Plan since at least 2012. That Strategic Plan identifies a Mandate and a Mission.

The Mandate is

To ensure the public is well served by a legal profession that is independent, responsible and responsive.

The Mission of the Law Society is as follows:

It is our responsibility

- (a) to ensure that the people of the Northwest Territories are served by lawyers who meet high standards of competence, learning and professional conduct; and
- (b) to uphold the independence, integrity and honour of the legal profession.

The current Strategic Plan also outlines Law Society Values which are recognized in order to achieve the Mandate and Mission, namely

- *Competency* – the Law Society requires Northwest Territories lawyers to meet high competency standards;
- *Professional Conduct* – the Law Society values honest, respectful and ethical behaviour;⁸
- *Transparency* – the Law Society must have the confidence of the public and of its members;
- *Diversity* – the Law Society values a profession that reflects the population it services;⁹ and
- *Consensus* – the Law Society values consensus decision making.

⁸ Some members of the Law Society queried whether there should be provision in the Act for dealings with self-governing aboriginal groups. The Committee is of the view this is best dealt with by the Law Society value of professional conduct.

⁹ Some members of the Law Society queried whether there should be mention of the "Calls to Action" in Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015) at www.trc.ca. The Committee believes that these matters are best addressed in the Law Society's value of diversity. There is no need to mention this in the Act.

Recommendation #1. The following wording is proposed as a Mandate and Mission statement for the Society in the new Act:

- X. (1) The purpose of the Law Society of the Northwest Territories is to
- (a) ensure that the people of the Northwest Territories are served by lawyers who meet high standards of competence, learning and professional and ethical conduct; and
 - (b) uphold the independence, integrity and honour of the legal profession.
- (2) In pursuing its purpose, the Society shall
- (a) establish standards for the education, professional responsibility, ethical conduct and competence of persons practising or seeking the right to practise law in the Northwest Territories; and
 - (b) regulate the practice of law in the Northwest Territories.

Society Name

The current Act establishes the Law Society with its name as the "Law Society of the Northwest Territories". There is some thought that the term "Law Society" is not reflective of what the Law Society does. The Committee considered various alternative names such as the "Legal Professions Regulatory Authority", but in the end elected to maintain the name of the "Law Society", for a number of reasons, including

- in Canada, all but two legal profession regulators are called "Law Society".¹⁰ If the Law Society was to change its name, that would be inconsistent with the majority of other Canadian jurisdictions;
- currently the Law Society of the Northwest Territories has achieved "brand recognition" as the regulator and there does not appear to be public confusion about the role of the Law Society. If there was to be a change of name, there is a concern that public recognition would be lost; and
- the Law Society recently went through a rebranding exercise in 2017. A further name change would involve considerable expense without measurable benefit.

The Committee also considered amending the title of the new Act. No shorter, simpler or clearer name was identified. Most Canadian Law Society's derive their authority from a *Legal Profession Act*. Maintaining consistency across the country has some value.

Recommendation #2. There should be no change to the name of the Law Society or the title of the Act.

Powers of Society

The Committee considered whether the Law Society should be given the powers of a natural person. Currently the *Legal Profession Act* is silent on the matter. A number of other jurisdictions have given

¹⁰ The exceptions being the Nova Scotia Barrister's Society and the *Barreau du Québec*.

their law societies the powers of a natural person.¹¹ This can be useful for investigations and enforcement which have an extra-territorial component.

The Law Society is a body corporate. The Committee notes it is well established at law that a body corporate has "*prima facie* all the capacities of a natural person" in its jurisdiction.¹² The problem arises in that these capacities are restricted only to the jurisdiction that recognizes the body corporate.¹³ To resolve this, the establishing statute can give the body corporate all of the capacities of a natural person. The effect is that the body corporate has standing before the courts of other jurisdictions.¹⁴ This was the case that the Law Society of British Columbia found itself in *Penty*, seeking and obtaining legal standing before the United States District Court for the Western District of Oklahoma.¹⁵

The Committee is of the view that having all the capacities of a natural person is essential for the Law Society so that it can have standing in extra-territorial jurisdictions and abroad.

Recommendation #3. The new Act should provide that the Law Society has all of the powers of a natural person.

Executive

Laypersons on Executive

Subsection 3(2) of the current Act provides that there is one layperson on the Executive. The layperson is appointed by the Commissioner of the Northwest Territories. In practice the Executive tends to recommend to the Commissioner the layperson to be appointed. The presence of lay representation provides the Society a critical on-going connection to the public and ensuring that the public is well served by the legal profession and responsive to the needs of the public it serves.

The Committee recognizes the importance of adequate and diverse representation on committees, including the Executive. The Committee was keenly aware that it has proved difficult to find enough community members who have the capacity and interest to undertake this volunteer work and who are willing to commit the considerable time and effort that is required without compensation. Stopping short of requiring additional laypersons or specific Indigenous participation, the Committee is of the view that the Executive should make diversity a key criterion when recommending or selecting

¹¹ BC - s. 2(2) *Legal Profession Act* – "(2) For the purposes of this Act, the society has all the powers and capacity of a natural person." NL – s. 5 *Law Society Act* – "5. For the purpose of this Act, the society has all the powers and capacity of a natural person." MB – s. 2(2) *Legal Profession Act* – "(2) In pursuing its purpose and carrying out its duties, the society has all the powers and capacity of a natural person." PE – s. 5(1) *Legal Profession Act* – "(1) The society has all the powers and capacity of a natural person." NS – s. 3(2) *Legal Profession Act* – "(2) In pursuing its purpose and carrying out its duties, the Society has all the powers and capacity of a natural person."

¹² *The Canadian Bank of Commerce v. The Cudworth Rural Telephone Co.*, [1923] SCR 618, 1923 CanLII 32 (SCC); *Honsberger v. Weyburn Townsite Co.*, 59 SCR 281, 1919 CanLII 6 (SCC); and *Bonanza Creek Gold Mining Co. v. The King*, 1916 CanLII 423 (UK JCPC), [1916] 1 A.C. 566, 26 D.L.R. 273.

¹³ *Ewachniuk v. Law Society of British Columbia*, 1998 CanLII 6469 (BC CA).

¹⁴ *Penty v. Law Society of British Columbia*, 1999 BCCA 630 (CanLII).

¹⁵ *Ibid.*

laypersons. A helpful model exists in the *Territorial Court Act*.¹⁶ A provision along the following lines is suggested:

The Law Society shall recognize the importance of reflecting, in the recommendation of laypersons, the diversity of the population and the gender balance of the Northwest Territories.

The Committee came to a similar conclusion with respect to addressing diversity amongst the legal members of the Executive. The Committee noted that achieving a balance between gender and private and public practitioners on the Executive was an important goal.

Recommendation #4. The Committee recommends that the new Act should

- provide that there be at least one layperson on the Executive and that the Executive would have the power to recommend the appointment of additional laypersons to the Executive as it sees fit; and
- provide that in selecting a candidate layperson, the Executive consider the diversity of the population and the gender balance of the Northwest Territories.

Seats on Executive for Specified Groups

Since the Law Society is the regulator of the legal profession in the Northwest Territories, it should reflect the population that it serves. It is a Law Society value to respect diversity. To maintain the credibility of the Law Society, this should be reflected in its leadership.

The Committee reviewed a consultation suggestion that seats on the Executive should be set aside for Indigenous representation. The Committee concluded that the Executive should be representative of the membership of the Society. The Committee recognized that cannot always be achieved. The Committee is concerned that if there were dedicated seats, the Law Society might not be able to constitute an Executive, because of a lack of representatives from the specific groups who are prepared to sit on the Executive.¹⁷

The Society needs to show leadership in addressing barriers that discourage historically disadvantaged classes of members from participating in the Executive. While a desirable goal, the Committee thinks it can be met by means of Law Society policy rather than through the setting up of a structure in the Act that may not be capable of being implemented in practice. For these reasons the Committee does not believe that the Act should require seats on the Executive for specific groups.

Recommendation #5. Diversity in the leadership of the Law Society should be encouraged through policy.

¹⁶ For example, consider subsections 5.3(3) and 31(4.1) of the [Territorial Court Act](#), RSNWT 1988, c. T-2.

¹⁷ This is not unlike the issue of diversity in the selection of laypersons on the Executive: see Laypersons on Executive.

Residency Requirement of Executive Members

The Committee notes an inconsistency between paragraph 3(2)(b) and subsection 4(1) of the current Act. Paragraph 3(2)(b) states that the Executive must be composed of not less than four other persons who are elected from among the members of the Society and who are resident in the jurisdiction. Subsection 4(1) states that only active members are eligible for nomination and election to the Executive. In practice, this has been interpreted as a requirement that all members of the Executive (with the exception of the layperson) are active and resident members. The Committee considered whether the residency requirement should be maintained.

The Committee recognizes that a significant number of members of the Law Society reside outside of the Northwest Territories.¹⁸ Resident members have the distinct advantage of living and working with the residents of the Northwest Territories and better understanding the issues of the peoples of the Northwest Territories and its communities. The Committee believes that this type of connection to the jurisdiction is equally important for the members of the Executive.

Recommendation #6. In order to be elected to the Executive of the Law Society, a lawyer needs to be a resident of the Northwest Territories. The current requirement should be maintained in the new Act.

Inactive lawyers and Lawyers with Restricted Appearance Certificates on Executive

The current Act does not speak to inactive members, Canadian Legal Advisors, or those holding a Restricted Appearance Certificate, sitting on the Executive. The same arguments in favour of residency of Executive members apply to these classes of members. The current restriction is present in other jurisdictions.¹⁹

Recommendation #7. Inactive members, Canadian Legal Advisors and members holding Restricted Appearance Certificates should be ineligible to be elected to the Executive of the Law Society.

Inactive Lawyers and Lawyers with Restricted Appearance Certificates – Voting Rights for the Executive

The Committee considered whether inactive lawyers, suspended lawyers or lawyers with Restricted Appearance Certificates, should be entitled to vote in elections of Executive. Section 5 of the Act restricts entitlement to vote at an election of the Executive to active members only.

¹⁸ The Admissions Committee reported 251 active non-resident members out of 415 active members in its report at the 2018 Annual General Meeting of the Society (page 46 of the Materials) - about 60% of the active membership are non-resident members. For inactive members, 76 of 90 inactive members are non-resident - about 84% of the inactive membership are non-resident members. This does not include Open Restricted Appearance Certificates (the Committee suspects that 100% of RACs are non-resident members) or members that were suspended.

¹⁹ For example consider subsection 13(1) of the Alberta *Legal Profession Act*, RSA 2000, Chapter L-8. An interesting question arises in respect of whether other classes of member should be on the Executive. For example if paralegals are captured by the new Act as a class of member, should they not have some form of representation on the Executive? The answer is probably no. The Law Society is the regulator of the legal profession. It is not a body that is representative of its various classes of members. There is some degree of representation of its members individually through the elections process.

The limited nature of the legal services provided by a Canadian Legal Advisor, and those who hold Restricted Appearance Certificates, makes those persons distinguishable from other active members. An inactive member is no longer practising law; therefore his or her voting privileges should be curtailed. For the suspended member, suspension of voting privileges is reasonable, at least until the terms of the suspension have been fulfilled.

Recommendation #8. Inactive members, Canadian Legal Advisors, those members who hold Restricted Appearance Certificates and suspended members, should continue to be ineligible to vote for members of the Executive.

Meetings of Law Society – Proxy Voting

The Committee discussed Annual General Meetings and Special Meetings of the Law Society. Sections 10-13 of the current Act refer to these meetings. The current Act is silent on proxy voting as are the Rules of the Law Society. There is the ability for lawyers to attend by telephone, though that opportunity is rarely exercised. The Committee discussed the possibility for proxy voting at meetings of the Law Society, recognizing that many lawyers are non-resident, and may not be able to attend a meeting, but may want to have a vote on the matters being discussed.

Recommendation #9. The new Act should allow for proxy voting at Annual General Meeting and Special Meetings of the Law Society.

Powers of Executive

The Committee considered the powers of the Executive generally, and the powers of the Executive to make rules. It noted that some of the powers are no longer relevant, redundant or repetitive.

For example:

- the ability of the Society to acquire, hold and use real or personal property etc. is contained in subparagraph 15(a)(iv) of the *Interpretation Act*, so surely paragraph 7(a) of the *Legal Profession Act* covers that; and
- if section 7 of the *Legal Profession Act* was intended to empower the Executive, that empowerment is present already in subsection 3(1) of the Act.

In addition, paragraphs (h), (i), (j), (o) and (r) are not matters that the Law Society engages in or has ever engaged in:

- reporting of legal decisions (or specifically judicial decisions) is carried out by the GNWT Department of Justice (paragraph (h));²⁰

²⁰ From 1983 to 1998, the Law Society did engage in the publication of the *Northwest Territories Reports* (NWTR) with Carswell Legal Publications. This was a resurrection of the *North-West Territories Law Reports* published from 1885-1907. Current law reporting may be found at <https://decisia.lexum.com/nwtcourts-courstno/en/nav.do>. This site appears to be run in part by DECISIA by Lexum and therefore there is a degree of affiliation with CanLII. It is

- establishment and maintenance of libraries for use of the members of the Society is carried out by the GNWT Department of Justice (paragraph (i));²¹
- there is no fund maintained for relief of members or former members who are aged, infirm or disabled (paragraph (j));
- the Law Society does not set guidelines for fees charged to clients (paragraph (o)); and
- the Law Society does not grant pensions or allowances to its staff or dependants (paragraph (r)).²²

These paragraphs should be removed.

It is possible that other powers could be added to section 7 of the Act. The promotion and supporting of access to justice should be reflected in the new Act so as to be consistent with current practice. This would include access to legal information.

A statutory power should be added allowing the Executive to make rules concerning mandatory continuing legal education. Such continuing legal education is important for ensuring that members remain qualified and competent. Requirements already exist in the Rules of the Law Society, but entrenching this power in the Act would help to anchor what is currently in practice.

The Committee is also of the view that the Act should be clear that when a member fails to comply with the Rules of the Law Society, that member may be suspended or face correction or discipline by the Society.

our understanding the database of decisions is routinely uploaded to CanLII by Court Services Division of the GNWT. The Law Society also supports CanLII, making access to the common law publicly accessible. This is a major access to justice (A2J) initiative.

²¹ The Law Society and the Law Foundation usually contribute to what is now the M.M. de Weerd Public Legal Resource Centre.

²² These provisions are traceable to section 5 of the 1976 Ordinance. It is likely that these provisions are now defunct and outmoded in 2019 - another argument in favour of their repeal. For example paragraph 7(r) of the current Act speaks to the Executive granting pensions. This is not a function of the Executive in practice. Benefits are available to Law Society staff but through the Northern Employee Benefits Services (NEBS). See [Northern Employee Benefits Services Pension Plan Act](#), SNWT 2015, c.6. Section 4 of that Act is indicative of predecessor legislation and suggests the origins of NEBS to have been around 1979. When the Law Society signed onto it is not known, but as soon as it did (around 1979), the provisions of s. 7(r) of the *Legal Profession Ordinance* became obsolete. This scheme would be better captured by a general power of the Law Society to enter into agreements respecting the granting of benefits to employees and former employees of the Society and to their dependants.

Recommendation #10. The Committee recommends that

- the Executive be given broad rule making power to manage the affairs of the Law Society, pursue its purposes and carry out its duties;
- certain of the rule making powers delegated to the Executive be removed - those dealing with paragraphs 7(h), (i), (j), (o) and (r) of the current Act;
- rather than providing that the Executive may make rules to establish and maintain libraries, that the Executive be given rule making power to support access to legal information;
- the Executive rule making power include the right to make rules supporting access to justice;
- the Executive be given robust powers to make rules concerning mandatory continuing legal education, and that those powers be defined very broadly; and
- the new Act clearly provide that lawyers may be suspended or face correction or discipline for failing to comply with the rules enacted by the Law Society.

Rules of the Law Society

Section 8 of the current Act governs the Rules of the Law Society. In its review, the Committee noted that most other jurisdictions had a list specifying the rule-making powers of a law society. The Executive should continue to have broad rule making powers but that the qualifications on those powers under subsection 8(1) should be removed (i.e. in that part of the provision before paragraph (a)). The non-restricting of generality provision should remain. The listing in the current paragraphs should remain, although it should be reviewed carefully. The list should have a catch-all provision at the end.

Under the current Act and the *Statutory Instruments Act*,²³ the Rules of the Law Society are statutory instruments. This means that proposed amendments to the Rules must to be registered with the GNWT Department of Justice and be examined by the Registrar of Regulations.²⁴ Rather than Rule amendments being subject to the statutory examination process by the Registrar of Regulations, the Committee recommends this examination process be carried out by the Executive itself. This would streamline the process and reinforce the self-governing nature of the Law Society.

In 2017 Nunavut amended its *Legal Profession Act* so that its version of the *Statutory Instruments Act* would not apply to the Law Society Rules.²⁵ The Society is still required to make the Rules readily accessible to the public.²⁶ The Committee thinks a similar approach to Nunavut might be adopted in the new *Legal Profession Act*.

²³ [Statutory Instruments Act](#), RSNWT 1988,c.S-13.

²⁴ The Registrar of Regulations is a statutory appointment under the *Statutory Instruments Act* that is held by the Director of Legislation, GNWT Department of Justice.

²⁵ Bill 47, [An Act to Amend the Legal Profession Act](#).

²⁶ For the Northwest Territories, there should be a provision similar to Nunavut's, which would also deactivate any requirement to publish flowing from the *Public Printing Act*. A publication requirement in the new Act would need to be included. The *Rules of the Law Society of the Northwest Territories Exemption Regulations*, R-082-92 exempt the Rules of the Law Society from the publication requirements of subsection 9(1) of the *Statutory Instruments Act* - so the Rules need not be published in the *Northwest Territories Gazette*. If the new Act outlines how publication is to be achieved, then these regulations could be repealed.

Recommendation #11. The new Act should provide that Rules made under that Act are not statutory instruments for the purposes of the *Statutory Instruments Act* so that

- registration and the statutory examination of proposed Rules by the Registrar of Regulations should still continue, but on a voluntary basis rather than being mandated under the *Statutory Instruments Act* as is now the case; and
- the process of statutory examination and publication be modified along the lines that Nunavut took in its amendments to its *Legal Profession Act* in 2017.

Confirmation of Rules by Membership

Subsections 8(2), (4) and (5) of the current Act require that rules made by the Executive are confirmed by the membership at an Annual General Meeting and that rules may be confirmed, amended, added to or altered to by the membership at any meeting called for that purpose. Historically this check on the power of the Executive to make Rules can be traced to the section 6 of the 1976 *Legal Profession Ordinance*.²⁷

The overarching responsibility of the Executive is to act in the public interest. There may be times when that interest conflicts with the interests of the Society's members. When such a conflict arises, the duty of the Law Society is clear - the public interest takes priority. The Committee notes that the obligation to regulate in the public interest requires the Executive have the ability to create binding rules, even when the majority of the membership may disagree.

The Committee acknowledges the need for the Executive to maintain its accountability to the membership, but takes the view that other processes are in place to ensure rules are always capable of being subjected to scrutiny and are made within the Executive's legal authority. The Executive will always be accountable to the membership through the process of elections and through the requirement to conduct Annual General Meetings and ultimately through judicial review.

Recommendation #12. The new Act should

- remove what is currently subsections 8(2) to (6) of the current Act;
- remove the requirement that rules created by the Executive need to be confirmed by the Law Society membership at an Annual General Meeting;
- still allow Rules to be made, amended or added to by the Executive at an Annual General Meeting or any other meeting called for that purpose; and
- require the Executive to notify the Law Society membership in advance of any proposed new rules, or changes to rules, in a manner determined appropriate by the Executive (this could be a rule making power).

²⁷ There were no rule-making provisions in the various Ordinances prior to 1974. Curiously there were rule-making powers on the part of the Benchers set out in section 32 of the *Legal Profession Ordinance*, CONWT 1898, Chapter 51. The check on rule making may have been a prudent move in 1974 for the nascent Law Society that had yet to prove itself.

Deputy Secretary-Treasurer/Executive Secretary

Subsection 6(2) of the current Act provides for the Executive to appoint a Deputy Secretary or a Deputy Secretary-Treasurer. In practice, this role has fallen to the Society's Executive Director. Over the years, the role and functions of the Executive Director have evolved from that of a volunteer position to a part-time administrator to, most recently, a full-time lawyer. To formalize the changed nature of the position, the Committee recommends that the position be identified as that of the Executive Director, who shall be identified as an employee of the Society, reporting to the Executive, and that there should be some mechanism for the Executive to set out the powers of that position.²⁸

Recommendation #13. The new Act should

- change the term "Deputy Secretary/Deputy Secretary-Treasurer" to "Executive Director";
- specify that the Executive Director is an employee of the Law Society;
- specify powers and duties of that office;
- provide rule-making powers for additional powers and duties to be specified; and
- allow the Executive to delegate certain of its powers to the Executive Director.

Membership and Enrolment

The Roll and Record

Section 14 of the current Act requires the Law Society to keep a Roll and a record of members and students-at-law that contains information that will be available to anyone on request. The information is currently identified and collected according to the Rules of the Law Society. The Committee agrees the Law Society should continue to make relevant information available to the public on request, but digitization of this information makes the concepts of "record" and "roll" obsolete.

The Committee recognizes the interplay between maintaining appropriate privacy for members, and the public's interest in access to relevant information about members. While the Committee recommends public disclosure of general identifying information should continue, the Committee suggests that there should be some discretion granted to the Executive to withhold information at a members' request if there are compelling circumstances.

The Committee suggests that there should be some degree of discretion accorded to the Executive as to what information is made available to the public. At the very least the following information about members should be made public:

- name of lawyer;
- contact information (allowing the member to identify the extent of the information disclosed - whether it be mailing address, email or phone numbers);²⁹

²⁸ Manitoba and Nova Scotia are good examples. Section 12 of the [Legal Profession Act](#), CCSM, c.L107 speaks of a chief executive officer. Section 9 of the [Legal Profession Act](#), SNS 2004, Chapter 28 speaks of an executive director.

²⁹ Additional contact information would be held by the Law Society in each member's file and could be published on a member's request.

- date of call of lawyer;
- lawyer’s status in the Law Society (whether active, inactive, a holder of a Restricted Appearance Certificate, a Canadian Legal Advisor, resigned, suspended or disbarred); and
- lawyer’s disciplinary history (identifying any disciplinary and administrative sanctions and the date of those events).³⁰

Recommendation #14.

- All references to "the Roll" and "record" should be removed from the new Act.
- The Law Society would still be required to maintain relevant information about the member through a public listing, as determined by the Executive.
- The Executive should have the discretion to withhold a member's personal information in certain circumstances.

Concept of "member"

The Act currently defines a "member" of the Society. The defined term is used throughout the Act to identify any lawyer who is regulated by the Law Society. One consultation respondent suggested that using the term "member" did not well reflect the distinction between the regulator and the regulated. The Committee considered whether the use of "member" might create a public perception that a member would receive preferential treatment when his or her conduct came under question. Some other jurisdictions have adopted the term "licensee" to replace "member".³¹ The Committee recognizes that the privilege to practise law in the Northwest Territories is directly tied to various legal and ethical obligations set by the Society. The Committee prefers the use of "member" over "licensee" as it is more reflective of a professional than is simply a "licensee".



Figure 1 - Schema of Entities Mentioned in New Act - "Members" and their Subclasses

³⁰ Currently, the website will disclose events in the past 2 years. The Committee suggests that the Executive identify the relevant timeframe bearing in mind 6 year limitation on bringing an action against a lawyer.

³¹ See section 27 of the [Law Society Act](#), RSO 1990, c.L.8.

Figure 1 above outlines the Committee's understanding of who might be members under the new Act.³² Through discussion, the Committee considered how to address and name members if other legal service providers were to be regulated in the Act. The Committee saw the continued use of "member" as the broadest term for those regulated by the Law Society. In an effort to use more plain language in the new Act, the Committee came to the conclusion that a "member" is clearer than a "licensee" and that each sub-class of member could be specified. Where an obligation under the Act applied to all, "member" would be used. Where any obligation was restricted to a specific sub-class, that sub-class would be identified, for example lawyers, students, court workers or other legal service providers).

The definition of "member" has not kept pace with the changing face of the practice. There are now at least four categories of lawyers that are regulated under the Act or the Law Society Rules, including

- **Canadian Legal Advisors** - lawyers with a civil law degree whose practice in the NWT is limited to matters under Quebec and federal authority;³³
- **Restricted Appearance Certificate (RAC) holders** - lawyers in good standing of another law society who only intend to represent a defined client and get a renewable certificate that entitles the lawyer to represent that client in the Northwest Territories for up to a year;
- **active lawyers** – (a defined term in the Act) who have met the qualifications for membership and represent clients in the Northwest Territories whether they live in the Northwest Territories, or elsewhere; and
- **inactive lawyers** – (a defined term in the Act) who are members of the Law Society but are not entitled to practise law in the Northwest Territories.

Other categories of individuals who are regulated by the Law Society include

- **students-at-law** - they are addressed in the Act but are considered a member under the current definition of "member" in the Act. They work in a legal environment under the supervision of an active NWT member; and
- **law students** - they are not addressed in the Act, but are regulated within the Rules.³⁴ A law student, distinct from a "student-at-law", also works in a legal environment under the supervision of an active NWT member but a law student does not have a law degree.³⁵

The Committee is of the view that the term "member" in the current Act needs to be overhauled and transformed into a general category that includes all of these different classes of members.

³² The categories within this Figure are discussed later on in this Report.

³³ [Rules of the Law Society of the Northwest Territories](#), R-044-2012. The concept of a Canadian Legal Advisor is also part of this. See rule 52.

³⁴ See sections 33,37, 53 and 85 of the [Rules of the Law Society of the Northwest Territories](#), R-044-2012 as amended.

³⁵ There was some interest in making a law student's employment should count towards time articling. The Committee is of the view that is a matter for the Rules to address rather than the Act.

Recommendation #15. The new Act should re-define the meaning of "member" and include students-at-law, law students, Canadian Legal Advisors, Restricted Appearance Certificate Holders and others that may be identified within the Rules of the Society.

Lawyers

In practice, applications are referred to the Admissions Committee and reviewed by three members of that Committee. Those members assess each applicant on the basis of the Society's Rules and policies. The recommendation of that Committee is reviewed by the Chair of the Admissions Committee who refers the recommendation to the Executive. The Executive, as a whole, decides whether to accept or reject the Admission Committee's recommendation.

The Revision Committee notes that under the existing process set out in the Rules and Policies, all admissions decisions are made by the Executive. Currently the only participation by a layperson in the admission process is the layperson member of the Executive. None of the consultation respondents suggested this change. The Revision Committee is of the view that the current involvement by a layperson in the admission process is adequate.

The vast majority of applications for admission to the Society are from lawyers that practise in other provinces or territories. When the *Legal Profession Ordinance* was passed in 1976 (before national mobility agreements were conceived of) all applicants were required to write an admission exam to demonstrate sufficient knowledge of Northwest Territories statutes and Rules of Court. Because of the role that national mobility agreements now play, the examination is no longer required, although an undertaking to read the statutes and Rules of Court is still required. It is understood that if a lawyer was admitted to another Law Society, his or her educational credentials would likely meet the standards for the Northwest Territories. As a result, the process for review and assessment of qualifications has become a more routine administrative exercise. As one consultation respondent pointed out, there is little sense to a three-person panel reviewing these types of applications. The Committee thinks that, in the case of routine applications for admission, the evaluation and admission should be delegated to the Executive Director.

There have been some situations where applications are complicated or present special circumstances. These applications would continue to benefit from review by a three-person panel. When deciding whether to accept or reject the recommendation that follows the review, subsection 16(1) of the Act gives the Executive discretion to require a special examination from an applicant. This provision has been relied upon when unique or special circumstances warrant, but this does not always allow for an appropriate response to the issues raised in an application.

Responding appropriately to more complex applications would be improved if the Act were to set out a broad and clear authority for the Executive to set any conditions on the member that the Executive determines are necessary to protect the public. This could include practice restrictions or requirements for supervision or the writing of an examination.

The Committee is of the view the Act should, however, include the power of the Law Society to enter into agreements concerning mutual recognition of mobility rights for lawyers from other jurisdictions within Canada.³⁶ Foremost among such agreements would be the Territorial Mobility Agreement.³⁷ The Society also relies upon the Federation Canadian Law Societies' National Committee on Accreditation,³⁸ to evaluate the legal education and professional experience of applicants who have obtained their credentials outside of Canada or in a Canadian civil law program. The power of the Law Society to enter into agreements of these types should be set out in the new Act.

Section 18 also requires modernizing to delete:

- the reference to lawyers who were qualified for admission in 1978 in paragraph 18(1)(a) of the Act (none of whom remain active); and
- the reference to those classes of person described in paragraph 18(1)(b) of the Act, because this class is now subject to the mobility agreements.

Recommendation #16.

- Section 16(1) should be amended to allow the Executive to delegate the review of applications for admission to the Executive Director.
- The Executive should be given express power to approve exceptions to applications for admission on a case by case basis and attach any practice conditions deemed necessary to protect the public.
- Paragraph 18(1)(a) is no longer necessary and should be repealed.
- Paragraph 18(1)(b) of the Act is no longer necessary and should be repealed.
- The Executive be granted authority to enter agreements with the Federation of Law Societies with respect to any matter required to facilitate the assessment of an applicant's international credentials (and mobility of Society members).

Student-at-Law

Sections 16 and 18 of the current Act govern students-at-law (commonly known as "articling students"). When assessing a student-at-law's qualifications for admissions, the Executive currently has, under subsection 16(2) of the Act, discretion to waive or vary the requirements for admission under subparagraph 18(1)(c)(i) of the Act.

One consultation respondent suggested that it may no longer be necessary to require that articles be completed exclusively in the Northwest Territories. Given the expanded rights of mobility throughout Canada, this suggestion was accepted so long as a substantial part of the articling experience was in the Northwest Territories.

³⁶ While this would amount to a new provision in the new Act, it merely reflects current practice.

³⁷ See: <https://flsc.ca/national-initiatives/national-mobility-of-the-legal-profession/>.

³⁸ See: <https://flsc.ca/national-committee-on-accreditation-nca/about-the-nca/>.

The Committee considered the requirement that articles must currently be completed within 12 consecutive months. Circumstances can arise when a student-at-law clerk with a court or circumstances require personal leave during the articling period so the articles extend beyond 12 months.

The Committee took the position that greater flexibility was called for. An applicant should not face additional hurdles if required to extend his or her articles for personal reasons (like having a child during articles or illness of a family member). Overall, so long as a delay in completion does not undermine an applicant's ability to gain the required experience and skills to practise competently, a delay should not disqualify an articling student from membership.

Articling with a court (sometimes referred to as a "clerkship") is a valuable and prestigious opportunity that should be encouraged in the Act. Despite the different kind of skills obtained while working for a court, it remains reasonable to expect articles should be longer than 12 months where some part is worked at a court.

Subsection 17(2) of the current Act provides that a student-at-law can serve part of his or her period under articles with either a judge of the Supreme Court or Territorial Court of the Northwest Territories. There could be opportunities for students-at-law to article with other courts in other jurisdictions (including the Supreme Court of Canada or the Federal Court of Canada or in various provinces) and those periods should be given some credit as part of a student-at-law's articling period. The current Act does not allow for this. The Committee recommends removal of the restriction that only experience in specific Northwest Territories courts would be deemed valid.

The Act would benefit by an express power granted to the Executive to approve applications that do not strictly comply with the articling eligibility criteria.

Recommendation #17. That the Act be amended to provide for the following:

- students-at-law must complete 12 months of articles within a 24 month period;
- students-at-law may clerk with any court within Canada;
- the Executive should retain the power to determine how much credit a student-at-law will receive for a period of clerkship as part of an articling experience;
- a substantial part of a student's articles must occur within the Northwest Territories; and
- an express power for the Executive to assess applicants for admission and attach any conditions necessary to ensure that the applicants are competent and qualified to an acceptable standard for the practise of law.

Retired Members

One consultation respondent queried whether there was a need to recognize retired members, or those who end their membership with the Law Society. The Law Society is responsible to regulate its members. The Committee looked at the jurisdictions who do have "retired members" as a class of

membership. Retired members cannot practice law and as a consequence, the Committee concluded that there was no obvious public interest to regulate that person. If a former member of the Society wanted to provide legal assistance for a fee, that person would need to make a new application or face sanctions for “unauthorized practice”. The Committee also noted that at the present time, many members who have retired from practice do not remain in the NWT. In all of the circumstances, the Committee saw no reason to create a new category of retired lawyers.

Notaries Public

Section 79 of the *Evidence Act*, RSNWT 1988,c.E-8 governs the appointments of notaries public. The Committee received comments that lawyers who are members of the Law Society should automatically become notaries public. This is the case in several other jurisdictions. All notaries public must be appointed by the Minister. Only certain classes of person are eligible to be appointed and these are set out in the list at subsection 79(1) of the *Evidence Act* - a person entitled to practise as a barrister and solicitor in the Territories is one such class at paragraph 79(1)(c).

The Committee consulted with the Government of the Northwest Territories Department of Justice, which administers the notaries program under the *Evidence Act*. The Department indicated that Canadian provinces and territories are considering the Federal Government's recommendation that Canada accede to the *Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents* (the "Apostille Convention"), which deals with the authentication of documents to be used outside of the country of origin.³⁹ Once this Convention is implemented, it will be necessary for all notaries to have their signatures registered in a central registry, as is currently the practice in Legal Registries.

The GNWT Department of Justice notes that if all lawyer members of the Law Society automatically become notaries, the burden of registration may be significant for current and future members. It may also increase the workload for Law Society staff if they are required to establish and maintain a Register. It is not clear if this would result in more or less of an administrative burden than currently required for appointment or if any change is necessary to improve the public access to notaries.

Recommendation #18.

- There is no need to change the process by which lawyers can become a notary public.
- To reduce confusion for new members, membership applications could include a notice advising of the separation application process under the *Evidence Act*.

Paralegals and other Legal Service Providers

The Committee had extensive discussions about whether the Law Society should regulate other legal service providers including paralegals and court workers. These issues have been discussed in other provinces.

³⁹ See: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=41>.

There were several consultation responses, but no consensus as to whether the Law Society should assume this greater responsibility. Some respondents noted that access to regulated legal service providers would enhance the public's access to justice and could provide various legal services at a more affordable cost and with no risk to the public, particularly where services must be supervised by a lawyer. Others noted there are very few legal service providers who would be affected by new provisions and it would cause a disproportionate administrative burden on the Law Society to regulate this small new class of member.

At the present time, aside from court workers employed by the Legal Aid Commission, there is only a handful of individuals offering or hoping to offer paralegal services in the Northwest Territories. As time progresses, one can expect this number to increase to meet the unmet needs of the public. Little statistical information is known about how many people are unable to find a lawyer to help them resolve an issue, and how many cannot afford those services. In the North, there is ample circumstantial and anecdotal evidence to suggest the problem is significant; people outside Yellowknife and Hay River are likely most affected as there are few, if any, lawyers who live in other communities of the Northwest Territories. As a result, it is impossible to deny that there is need for additional affordable legal resources. The Law Society must be concerned that filling this void does not increase any risk to the public.

Across the country the interest and ability to regulate paralegals or other legal services providers has been mixed. The Law Society of British Columbia does not regulate "designated paralegals" but regulates the lawyers who are obligated to supervise them. A designated paralegal may give legal advice or appear in some tribunals at in family mediations. Further regulations are being discussed, but are controversial and do not have full support of the membership of the Law Society of British Columbia.⁴⁰ The Law Society of Manitoba does not regulate paralegals yet non-lawyers are authorized by statute to act as agents or provide advice in highway traffic matters.⁴¹

⁴⁰ Consider the third resolution of the Law Society of British Columbia at its Annual General Meeting of December 5, 2018: <https://www.lawsociety.bc.ca/about-us/news-and-publications/news/2018/annual-general-meeting-concludes/>. The resolution was passed and authorized a request to the provincial government to delay regulations regarding the licensing of paralegals and also refused to authorize the licensing of paralegals to practise family law under the authority provided in the *Legal Profession Act*. This last refusal was controversial amongst the membership. For details on the amendments to the Act see: <https://cbabc.org/News-Media/News/2018/Bill-57>. See also Law Society of British Columbia, "Family Law Legal Service Providers: Consultation Paper" (September 2018) at: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/2018AltLegalServiceProviders-Consultation.pdf>. For the BC Bill 57 see: <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/3rd-session/bills/first-reading/gov57-1> at section 26. Bill C-57 was assented to - its official citation is *Attorney General Statutes Amendment Act, 2018*, SBC 2018, Chapter 49.

⁴¹ See Part 5 (sections 40-42) of the *Legal Profession Act*, CCSM 2002, c.L107

In August 2018, Saskatchewan published the results of an extensive study conducted by the Law Society of Saskatchewan and the Saskatchewan Minister of Justice.⁴² The primary recommendation was that, while it was not the time to embark on the creation of a separate group of legal service providers, Saskatchewan should:⁴³

...move towards greater flexibility in the regulation and delivery of legal services [and that] the legislative structure be revised to make space for a different regulatory approach and greater flexibility in its application.

On May 15, 2019 Saskatchewan passed legislation that empowers the Law Society to allow a person to become a limited licensee.⁴⁴ The Law Society benchers are authorized to make rules respecting

- who would be eligible to apply and become a member of the Law Society;
- the criteria for granting membership;
- training, competency and education requirements;
- fees;
- insurance requirements;
- the terms of membership; and
- creating disciplinary provisions applicable to these new members.

The Committee endorses this approach as it allows flexibility to pursue this matter further without an immediate obligation to regulate a broader scope of members in the Law Society.

Recommendation #19. The new Act should adopt provisions similar to those provided in the Saskatchewan *Legal Profession Act*, to allow the Law Society to license, on a case by case basis, those who wish to provide limited legal services to the public in the Northwest Territories.

[Law Firms, Professional Corporations and Alternative Business Structures](#)

[Law Firms](#)

Section 42 of the current Act states that "member" includes a "firm of barristers and solicitors." This is a Part-specific definition relating to Part VI - Accounts, Audits and Financial Inspections. The new Act should make it clear that all obligations on "members" (redefined as a broad term encompassing all legal professionals), equally apply to law firms.

⁴² "Final Report of the Legal Services Task Team" (August 2018) at <http://publications.gov.sk.ca/documents/9/107840-FINAL%20REPORT%20OF%20THE%20LEGAL%20SERVICES%20TASK%20TEAM.pdf> .

⁴³ *Ibid.* at page iii.

⁴⁴ *The Legal Profession Amendment Act, 2018*, SS 2019, No. 163. See: <http://www.legassembly.sk.ca/legislative-business/bills/progress-of-bills-current> .

A law firm should be a class of member in the new Act. The responsibility of individual members of a law firm needs to be emphasized - they cannot hide behind a corporate veil to evade professional responsibility. They cannot contract out of professional responsibility requirements.

Law firms with a physical presence in the Northwest Territories should be required to

- register with the Law Society prior to the commencement of operations;
- identify the number of lawyers in the law firm;
- identify when lawyers or students join or leave the law firm;
- identify the trust accounts of the law firm;
- appoint a 'responsible lawyer' similar to that imposed in other jurisdictions; and
- make provisions for the replacement of the 'responsible lawyer', so that at all times the firm has a 'responsible lawyer' in place.

This level of detail might be more suitable for the Rules rather than the Act. The new Act should adequately provide for rule-making authority.

The Committee considered the concept of a "responsible lawyer" - a lawyer in a law firm who is the point of contact with the Law Society. The residency of the responsible lawyer was also considered - should he or she be a resident member? The Committee thinks in this case the responsible lawyer need not be a resident member but he or she must be a member of the Bar and be insured. The Committee notes requirements for resident lawyers in Alberta are relegated to the Law Society Rules of Alberta.⁴⁵

The Committee noted that when a law firm is suspended from the practice of law, that would mean all members of the firm are suspended from the practice of law.

The new Act might contain language similar to this provision from the Nova Scotia legislation on regulating law firms:⁴⁶

24. The Law Society may make regulations

- (a) requiring law firms to register with the Society;
- (b) requiring law firms to designate a member of the firm who is to receive official communication from the Society to the firm;
- (c) specifying what information law firms must provide and keep current with the Society.

⁴⁵ Some of these have already been adopted in the amendments to the Law Society Rules adopted by the Executive on 27 July 2019 (AL-3). These amendments concerned trust accounting rules and are largely based on those found in the Law Society of Alberta, [Rules of the Law Society of Alberta](#) (December 1, 2016). These amendments come into force on 2 January 2020.

⁴⁶ [Legal Profession Act](#), SNS 2004, c.28 at section 24. Keep in mind that Nova Scotia calls the equivalent of the Law Society Rules, regulations.

Recommendation #20.

- The new Act should address law firms as a class of member and that all of the obligations on a member under the Act equally apply to a law firm.
- There should be sufficient rule-making authority for details of regulation of law firms (such as the "responsible lawyer").

Professional Corporations

Section 2 of the [Professional Corporations Act](#), SNWT 2009,c.6 allows one or more members of a "designated profession" to incorporate under the [Business Corporations Act](#), SNWT 1996, c.19, which includes barristers and solicitors. Such incorporation has various tax and other business benefits. Individual lawyers can incorporate professional corporations and still be part of a law firm.

Professional corporations came into existence after the passage of the current *Legal Profession Act*. The current *Legal Profession Act* has no provisions regulating professional corporations. During the consultation, questions arose respecting the obligation of a member to register an extra-territorial professional corporation. Such questions require prudence when being addressed because one is at the intersection of the regimes governing three different statutes (i.e. the *Professional Corporations Act*, *Business Corporations Act* and *Legal Profession Act*). The *Legal Profession Act* should not intrude on any of those other statutes.

The Committee reviewed the Alberta *Legal Profession Act* noted that section 137 of that Act provides an obligation to obtain a permit for a professional corporation:⁴⁷

137 (1) No person shall engage in practice as a barrister and solicitor under any name containing "Professional Corporation" or the abbreviation "P.C." unless that person is incorporated or continued as a corporation under the *Business Corporations Act* and the corporation is the holder of a permit not under suspension.

(2) A person who contravenes subsection (1) is guilty of an offence and liable to a fine not exceeding \$1000 for every day on which the prohibited name or abbreviation is used.

This provision is not unlike provisions protecting the use of the titles such as "lawyer" or "barrister and solicitor". Such provisions are aimed at making sure that corporate names do not mislead the public. The Committee agrees that a provision like section 137 should be added to the new Act.

Recommendation #21. The new Act should contain a provision preventing a lawyer from practising through a professional corporation unless that professional corporation is registered under the *Professional Corporations Act* and under the new *Legal Profession Act*.

⁴⁷ [Legal Profession Act](#), RSA 2000, Chapter L-8, section 137.

Alternative Business Structures

The Committee received a comment about alternative business structures (ABSs). ABSs arose in England and Wales as a result of concerns that the legal services market did not enjoy sufficient competition and was subject to restrictive practices. In 2007 the British Parliament passed the *Legal Services Act*, in part to provide a new route for consumer complaints and to promote competition.⁴⁸ ABSs were generally viewed in England and Wales as a means of liberalizing commercial competitiveness in the provision of legal services.⁴⁹ While some ABSs have been introduced in England and Wales, the legal profession in England and Wales has been extremely cautious about them.

The reception of ABSs in Canada has been lukewarm. The Law Society of Ontario, for example, formed an ABS Working Group in 2012 and ceased to continue to consider structures involving majority ownership, or control, of traditional law firms by non-licensees (i.e. lawyers).⁵⁰ Interestingly, that Working Group does see a role for lawyers and paralegals to provide legal services through civil society organizations, such as charities and not-for-profit organizations.⁵¹ This is a far cry from the liberalization of the legal services market envisioned for England and Wales.

While ABSs exist in the UK, there appears to be little appetite in Canada for such structures. Given the small size of the Northwest Territories and its Bar, the Committee is of the view that such structures would not be feasible.

Recommendation #22. The new Act should not make provision for alternative business structures.

Public Participation in Admissions Process

The Committee discussed whether there should be layperson participation in the admission process. It was noted that there is no public participation in the admission process in the current Act. The Committee notes that in cases where there is a question about admission, the Admissions Committee is required to forward the issue to the Executive for decision. This is governed not by the Act but rather by the Rules of the Law Society and the Policies of the Law Society.⁵² On the Executive is a layperson. The Committee is of the view that this is sufficient layperson participation in the admission process.

⁴⁸ The Committee is of the view this need not be discussed in any detail in the report. The Committee is aware of the UK *Legal Services Act 2007*, 2007, c. 29 and the *Clementi Report*. See also Suzanne Rab, *Regulation of the Legal Profession in the UK (England and Wales)* (March 2018) at: [https://uk.practicallaw.thomsonreuters.com/7-633-7078?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-633-7078?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (this is an online book).

⁴⁹ For a discussion see: <http://www.lawsocietygazette.ca/news/alternative-business-structures-united-kingdom/> .

⁵⁰ See: <https://lso.ca/about-lso/initiatives/alternative-business-structures> . See Alice Woolley at: <https://www.cba-alberta.org/Publications-Resources/Resources/Law-Matters/Law-Matters-Fall-2015-Issue/Alternative-Business-Structures-and-the-Modern-Reg> . This article dates from May 2015 (it is dated) but it does outline the debate ongoing amongst regulators and ABSs. Nevertheless four years later, there are still no known ABSs in Canada.

⁵¹ *Ibid.* As approved in principle by the Convocation in September 2017.

⁵² See: Law Society of the Northwest Territories, *Policy Manual* (November 1980), updated to April 10, 2019 at Article 17, item 4.

Practice of Law

Definition – Practice of Law

The Committee pondered what is meant by the "practice of law". At section 1 of the current *Legal Profession Act*, there is a fairly complex definition:

"practice of law" includes but is not restricted to

- (a) appearing as counsel or advocate,
- (b) drawing, revising or settling
 - (i) any petition, memorandum of association, articles of association, application, statement, affidavit, minute, resolution, bylaw or other document relating to the incorporation, registration, organization, dissolution or winding-up of a corporate body,
 - (ii) any pleading for use in any judicial proceeding,
 - (iii) any will, deed of settlement, trust deed, power of attorney or document relating to any probate or letters of administration or the estate of a deceased person,
 - (iv) any document relating to proceedings under an Act of the Northwest Territories or an Act of Canada, and
 - (v) any instrument relating to property that is intended, permitted or required to be registered, recorded or filed in any registry or other public office,
- (c) drawing any act or deed or negotiating in any way for the settlement of, or settling, any claim or demand for damages founded in tort,
- (d) agreeing to place at the disposal of any other person the services of a barrister and solicitor, and
- (e) giving legal advice,

but does not include

- (f) any act referred to in paragraphs (a) to (e) if it is not done for or in expectation of a fee, gain or reward direct or indirect, from any other person,
- (g) any act referred to in paragraphs (a) to (e) done by a public officer or a member of the Legislative Assembly or a council of a municipality in the course of his or her duty, or
- (h) the lawful practice of a notary public;

The Committee concluded that the definition in the current Act is not broad enough to capture all activities that are part of the practice of law today. For example, a lawyer who may be retained to be fact-finding investigator is not captured by the current definition.

The Committee notes that there is no mention of solicitor-client privilege in the definition of "practice of law" in the current Act. The Committee is of the view that where such a privilege is asserted, then this is evidence of the practice of law. Such a privilege could be extended from the lawyer to other members (such as limited service providers including paralegals or court workers) but those other members must be under the supervision and direction of a lawyer.

The Committee is of the view that a provision similar to that set out in Nova Scotia legislation might be more appropriate for dealing with the "practice of law" and address some of the deficiencies noted above.⁵³ The Committee suggests a modified substantive provision (not a definition) as follows:

- X. (1) The practice of law is the application of legal principles and judgement 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 persons 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;
 - (e) asserting any type of solicitor-client privilege.
- (2) No person shall carry on the practice of law in the Northwest Territories, unless the person is
- (a) an active member of the Society;
 - (b) entitled to practise law by the governing body for lawyers in a foreign jurisdiction approved by the Executive and has met the requirements established by regulation to engage in the practice of law in the Province;
 - (c) a student-at-law and is practising in accordance with the Rules;
 - (d) a law student who is practicing in accordance with the Rules; or
 - (e) otherwise entitled pursuant to this Act or the regulations to carry on the practice of law in the Northwest Territories.
- (3) Only a lawyer, a law firm or a professional corporation licensed under this Act may advertise or hold out that the services of a lawyer are available to the public.
- (4) Notwithstanding subsections (1), (2) or (3), this Act does not prohibit
- (a) any public officer from fulfilling the public officer's duty;
 - (b) any incorporated loan or trust company carrying on business within the Northwest Territories from doing anything that its act of incorporation empowers it to do;
 - (c) an accountant from preparing for the person by whom the accountant is employed any document or portion thereof dealing with the accounting affairs of that person;
 - (d) any person from representing himself or herself in a matter or proceeding to which that person is party;
 - (e) any corporation from being represented by an agent if such representation is authorized by statute;
 - (f) a professional corporation from carrying on the practice of law in accordance with the provisions of this Act and the regulations;

⁵³ [Legal Profession Act](#), SNS 2004, Chapter 28, section 16

- (g) an insurance agent or adjuster from adjusting, negotiating and settling claims, including consenting to judgments in uncontested matters;
- (h) a mediator or arbitrator from mediating or arbitrating disputes;
- (i) a member of any of the following from acting as an advocate or representative of a person in the member's capacity as an elected representative:
 - (i) the House of Commons of Canada,
 - (ii) the Legislative Assembly, or
 - (iii) a council of a municipality;
- (j) a member of the Senate of Canada from acting as an advocate or representative of a person in that member's capacity as a Senator;
- (k) any other person or class of persons permitted by the regulations made by the Executive and approved by the Commissioner to carry on one or more of the activities referred to in subsection (1); or
- (l) any other person or class of persons permitted by regulation made by the Commissioner to carry on one or more of the activities referred to in subsection (1) if the Commissioner considers the carrying on of the activities to be necessary or advisable for the purposes of the government of the Northwest Territories.

The Committee also noted that there are currently some exceptions which are set out in policy rather than within the Act. Given that the practice of law is fundamental to the Act, the Committee is of the view that any exceptions should be supported by an explicit statutory provision. One example where an exception may continue to be required is for land claims negotiators.

The Committee also is of the view that such a provision in the new Act would need to state something like⁵⁴

For greater certainty, any person who has been disbarred or suspended is not eligible to practise in the Northwest Territories.

Recommendation #23.

- The definition "practice of law" in the current Act should be transformed into a substantive provision in the new Act, similar to that set out above.
- Where there is an assertion of solicitor-client privilege, then this too amounts to the practice of law.
- There should be a prohibition on the practising of law by a member who is disbarred or suspended.
- There should be an exception for any person who provides the public with general legal information, as opposed to legal advice.

Oath

Section 21 of the current Act governs oaths. Although not raised in the consultation, some members have found the current form of oath to be objectionable for various reasons. In some jurisdictions there is mention of an oath being taken but the words in the oath are not specified in governing statutes.⁵⁵

The Committee recognizes that the current form of the oath needs to be modernized and updated. The Committee believes that the form of the oath does not need to be in the Act, but that an oath should be required of all members on admission. In practice an alternative oath exists without references to the Sovereign. That alternative oath was agreed upon by the Executive and the Supreme Court.

The Committee believes that taking an oath remains an important way for all members of the Law Society to acknowledge their professional and ethical obligations and their distinct responsibilities as the legal representative of their clients, and as officers of the Court. As the classes of membership expand to include students and other legal service providers, the oath itself may need to be modified accordingly. For that reason, the Committee recommends the obligation to take an oath remain but the text of the oath should be deleted from the Act and the Executive have the power to vary the oath, as is now the practice.⁵⁶ The Committee further recommends that references to the Sovereign be removed along with the final statement: "So help me God."⁵⁷

In addition to removing the text of the oath from the Act, a respondent wondered if the oath could be taken before the Supreme Court *via* teleconference. The Committee is not making any recommendations about this issue, because it raises issues of jurisdiction. This is a question of practice and procedure of the Supreme Court and is beyond the scope of this Committee and really a matter for that Court.

Recommendation #24.

- The new Act should not prescribe the oath to be taken before a Supreme Court judge on admission to the Society but it should still require it to be taken.
- The wording of the oath should be set by the Executive.
- The wording could be put in the Rules.

⁵⁵ See *Legal Profession Act, 1990, SS*, Chapter L-10.1 and *Legal Profession Act (SBC 1998)*, Chapter 9. Also the *Legal Profession Ordinance, CONWT 1898*, Chapter 51 did not make reference to the Sovereign. Those references were only added in 1938. The Committee has no information as to why this occurred.

⁵⁶ This has been done in Saskatchewan (*Legal Profession Act, 1990, SS*, Chapter L-10.1) and in British Columbia (*Legal Profession Act, SBC [1998]*, Chapter 9).

⁵⁷ The much more concise form of oath at section 6 of the *Legal Profession Ordinance, CONWT 1898*, Chapter 51 is worth considering (with modification):

I, A.B., do solemnly swear (or affirm) that I will well and truly and honestly demean myself as an advocate in the North-West Territories according to the best of my knowledge, skill and ability. [So help me God.]

Discipline

Introduction

As a self-regulating profession, discipline is a key element of the Law Society's Mandate and Mission. The primary responsibility of the Law Society is to serve and protect the public interest. Part of its role in protecting the public interest is to make public all instances of lawyer discipline. Professional discipline also includes a focus not only on deterrence, but also on rehabilitation when appropriate.

The Committee discussed whether "discipline" continues to be the appropriate name for describing these provisions. The term may be in tension with modern concepts of corrective measures and a proportional system of progressive correction. A lawyer's conduct may be inappropriate, and may not be as a result of intentional acts, but instead arise because of external factors, such as mental or physical health issues. Rehabilitation, rather than disciplinary sanction, may be a more appropriate response. Such rehabilitation would be desirable for the public, the Law Society and the member.

The Committee recognizes that inappropriate lawyer conduct can be addressed in a number of ways, not just through disciplinary sanctions. In some cases, the issues raised by a complaint can be addressed without a full investigation.

Recommendation #25. The title of Part 3 of the current Act, "Discipline" and the content of that Part should be reconsidered in the new Act so as to modernize and expand the tools available to address inappropriate conduct, including alternative dispute resolution and diversion.

Definitions in Part 3 - "Conduct Deserving of Sanction"

The Committee is concerned about the confusion over the various defined terms used in section 22 of the current Act. "Conduct unbecoming", "unprofessional conduct", "professional misconduct" and "conduct unbecoming a barrister or solicitor or student-at-law" are all used.⁵⁸ These suggest different forms of wrongdoing.

Recommendation #26. The term "conduct deserving of sanction" should be used in all instances and in place of all other references to unprofessional conduct or professional misconduct in the new Act.

Disciplinary Processes - Review of Conduct

Starting at section 24 of the current Act, a procedure is laid out for the making of a complaint to the Society in respect of the conduct of a member or student-at-law. This procedure should be expanded to apply to all classes of members of the Society.

Recommendation #27. The disciplinary process in the new Act should apply to all classes of members of the Law Society.

⁵⁸ The proposed definition of member in the new Act will ensure that the disciplinary process applies to all classes of members.

Discipline for Students-at-Law and Law Students

The current Act has separate provisions dealing with discipline for lawyers and students-at-law. Disciplinary provisions should apply generally to all classes of member including lawyers, students-at-law, Canadian Legal Advisors, law students and any others who might be licensed under the Act. The Committee is of the view that there should be no difference in the form of disciplinary proceedings for students-at-law etc. Consequences for students-at-law and lawyers should be the same, other than the additional consequences for disciplining a student-at-law would be the suspension or termination of the student's articles and the potential for discipline of the student-at-law's principal. For a law student, consequences could also include termination of the law student's registration and the potential for discipline of the law student's principal.

Recommendation #28. The new Act should ensure that disciplinary consequences for all members be the same, except that one additional disciplinary consequence for a student-at-law would be the suspension or termination of the student's articles. The student-at-law's principal may also be subject to discipline. For law students, termination of registration and discipline of the principal may also be available.

The Complaints Process

Role of Complainant

The Law Society, as regulator of lawyers, has a duty to the public to ensure that lawyers in the Northwest Territories follow the provisions of the Act and adhere to the standard of behaviour set by the Law Society. In cases where there is a problem, the public, other lawyers or the Law Society itself may make a complaint against a lawyer, which may result in disciplinary action being taken against that lawyer.

This process does not provide any individual remedy to members of the public who believe they may have suffered a loss as a result of a lawyer's actions or inactions. Those claims must be made against the lawyer directly and through other legal processes.

Because it is the Law Society that is advancing a complaint, any member of the public who may have made a complaint is not a party to the complaint resolution process,⁵⁹ although he or she may be informed of that process if the Law Society so chooses.

Recommendation #29. The new Act should include a provision that states that the complainant does not have party status in the disciplinary proceedings.

Public Participation

Currently, the Law Society has three laypersons, who are part of the Discipline Committee. As a matter of practice, input is sought from one of the laypersons before the Discipline Committee Chair decides to dismiss a complaint after an investigation. Under the current Act, a layperson must also be one of three

⁵⁹ *Del Valle v Law Society*, 2017 NWTSC 29 (CanLII), <<http://canlii.ca/t/h3pmz>>, retrieved on 2019-05-20.

people appointed to form a Committee of Inquiry. A Committee of Inquiry is established to hold a hearing on a serious matter that could result in a member losing their right to practise law.⁶⁰

The Committee considered the role of public participation in the complaints process. It also considered the relationship between public involvement to carrying out the Society's self-regulation function and ensuring the public interest is well served when decisions about members are made. The Committee noted that other jurisdictions involve laypersons in stages of the disciplinary process. The Committee concluded that the new Act should ensure that participation, through the layperson, should be included in all stages of the disciplinary process, and especially in

- the dismissal of complaints, either on receipt or after investigation; and
- the adjudication of complaints.

Recommendation #30. The new Act should authorize participation by laypersons of the Discipline Committee at all stages of the disciplinary process.

Initial Screening of Complaint

The circumstances for dismissing a complaint, before an investigation, are currently too narrow in the Act. The Committee would like to see additional authority to dismiss a complaint if it is frivolous or vexatious, is being brought in the wrong forum (for example a fees dispute) or lacks sufficient evidence to be substantiated. The chairperson of the Discipline Committee should have the power to delegate this authority.

If a complaint is to be dismissed without an investigation there should be an internal review process. The Committee thinks this could be a new area of involvement for laypersons. Such a review process will establish greater transparency and help to set the standard of review as reasonableness should the decision to dismiss a complaint be challenged.

Recommendation #31.

- The new Act should provide that the chairperson of the Disciplinary Committee have the ability to dismiss a complaint prior to investigation, if the complaint is found to be frivolous and vexatious, is beyond the jurisdiction of the Law Society or lacks sufficient evidence to be substantiated.
- The chairperson of the Discipline Committee should have the power to delegate this authority.
- Where complaints are dismissed, there should be an internal review mechanism of the dismissal.⁶¹

⁶⁰ See subsection 24.4(6) of the current Act.

⁶¹ The layperson would be involved.

More Options

Once the complaint is accepted, there should be more options available to address a complaint instead of immediately requiring that the complaint be investigated. These options might include early intervention, a practice or conduct review, referral to a wellness program, alternative dispute resolution or advice and direction. A failure of these options would bring the complaint back to the more traditional investigation stream.

These options should also be available following the investigation of a complaint, where circumstances merit it. If such an option is pursued, then the complaint would be paused in the disciplinary process. Should the option be unsuccessful, then the matter should be able to be returned back to the formal disciplinary process. In all cases, the determination of the particular option would rest with the Chairperson of the Disciplinary Committee in consultation with the layperson.

Recommendation #32.

- The new Act should provide for more options for addressing a complaint instead of having the complaint investigated.
 - These options should include early intervention, alternative dispute resolution, practice or conduct review, referral to a wellness program or advice and direction.
 - These options would also be available before the investigation of a complaint.
- The chairperson of the Discipline Committee would determine the option to be pursued in each case.
 - Where any of these options is being pursued, the complaint will be paused while that option is being pursued.
- If the diversion approach fails, the matter can return to the formal investigative stream.

"Mediated Resolution Process" and Alternate Dispute Resolution

The Committee thinks that the phrase "mediation resolution process", used in the current Act, does not properly describe what that process should be.⁶² A more generic and flexible term should be used - perhaps "alternative dispute resolution" (ADR). The complainant, the Law Society and the respondent would be participants in any ADR process.

Recommendation #33. "Mediation resolution process" should be removed from the new Act and in its place a more generic and flexible term should be used - possibly "alternative dispute resolution."

Separate Discipline and Adjudication Committees

The Committee thinks that the Discipline Committee should be separated into two committees - a Discipline Committee and an Adjudication Committee. It believes the separation is necessary to reinforce the ADR diversionary approach where certain types of complaints can be diverted from formal discipline to other options that would be more suitable - for example where matters of wellness or competency are at issue. An Adjudication Committee, with a separate chairperson, could be established that deals with more formal discipline matters - more quasi-judicial.

⁶² For example, see subsection 24(3) of the current Act.

The role of the Discipline Committee would be to receive complaints, determine if those complaints should be investigated, consider alternative measures, determine whether there are other issues (such as competency or wellness) are at play and need to be addressed, receive investigation reports and determine if a complaint should proceed to hearing or adjudication. If adjudication is necessary, the complaint would be passed on to the Adjudication Committee.

The Adjudication Committee would determine the make-up of adjudication panels, conduct adjudications, and render decisions.

The Committee recommends that the Rules could set out roles and duties of each of the Discipline Committee and Adjudication Committee.

Recommendation #34. The new Act should authorize the establishment of a separate Discipline Committee and an Adjudication Committee with separate chairpersons.

Sole Inquirer and Committee of Inquiry

The Committee considered the concepts of the Sole Inquirer and the Committee of Inquiry set out in section 24.4 of the current Act. Presently, less serious matters are referred to a Sole Inquirer. Where a matter could result in suspension or disbarment, the matter is referred to a Committee of Inquiry.

The Revision Committee considered whether the new Act should continue or replace this dual model of decision making. In its view, every hearing should include a layperson and a lawyer. This would require a new structure. The Committee recommends creating an adjudication panel, where at least one member and one layperson would sit on the panel. The Committee concludes that the new Act should give the chairperson of this new Adjudication Committee the discretion to decide how many persons will be part of each adjudication panel. This flexibility is intended to simplify the new Act and facilitate the participation of laypersons, whenever a hearing into a member's conduct must be held.

Recommendation #35.

- The concepts of Sole Inquirer and Committee of Inquiry should be dropped in the new Act and replaced by adjudication panels.
- Each adjudication panel would have layperson and member representation.

Interim Suspensions

Section 27 of current Act allows the chairperson of the Discipline Committee to issue a suspension for a maximum of 90 days, pending the inquiry of a matter concerning the conduct of a member or student-at-law. This is an interim suspension although the term "interim" is not used in the Act.

The Committee thinks that this power is not broad enough, and the period of interim suspension is inadequate. Section 27 of the current Act should be modified to accommodate greater flexibility on the part of the chairperson of the Discipline Committee. The chairperson should be able to suspend a member before an investigation commences, where it may be necessary to protect the public. In considering whether an interim suspension is appropriate, the chairperson should be required to

consider the least restrictive condition necessary to protect the public interest. Each suspension would be reviewed periodically by the chairperson every 120 days.⁶³ Prior to renewing any interim suspension after the initial period, the chairperson of the Disciplinary Committee shall consult with layperson members of the Disciplinary Committee.

In addition to interim suspensions, the chairperson should also have the power to impose conditions on practice.⁶⁴ These conditions would also impose the least restriction appropriate for the circumstances.

Recommendation #36.

- The chairperson of Discipline Committee, or designate, should have the ability to issue interim suspensions that must be reviewed every 120 days by the chairperson.
- Prior to renewing an interim suspension, the chairperson of the Discipline Committee must consult with layperson members of the Disciplinary Committee.
- The chairperson of the Discipline Committee, or designate, should have the ability to issue conditions on practice.

Fine Amounts

The Committee noted that the amount of fines in the current Act have not increased since 1988. The Committee agreed that the maximum amount of fines should increase. The Committee considered the Bank of Canada inflation rate and noted an increase by 92.63% from 1988 to 2019.⁶⁵ The fine amounts in the current Act are

- \$1,000 (at subparagraphs 24.5(5)(a)(iii) and(6)(a)(iii));
- \$2,000 (at subparagraphs 24.4(5)(a)(iii) and (6)(a)(iii) and paragraphs 29.1(2)(c) and 31(3)(a) and 30.1(2)(c));
- \$5,000 (at subsection 71(1)); and
- \$10,000 (at paragraph 30(3)(a)).

The Committee considered fines provided in other legislation. The Committee considered whether there should be language in the new Act to facilitate the recovery of fines. Other jurisdictions have wording which provides that fines are debts, recoverable by legal proceedings. The Committee recommends the inclusion of such wording.

⁶³ See item 7 of Federation of Law Societies of Canada, [National Discipline Standards](#) (Approved June 11, 2018).

⁶⁴ Alberta has these - see section 63 of Law Society of Alberta, [Rules of the Law Society of Alberta](#) (December 1, 2016). Also consider [Kumar v. College of Physicians and Surgeons of Alberta](#), [2019] A.J. No. 910; 2019 ABQB 514 (CanLII).

⁶⁵ See <https://www.bankofcanada.ca/rates/related/inflation-calculator/>.

Recommendation #37.

- The maximum amount of a fine that can be imposed as part of a disciplinary sanction under the new Act should be \$25,000 for each disciplinary finding, in addition to costs that a person would be required to pay.
- The new Act should also provide that fines imposed under the new Act are debts, and are recoverable as such.

Collection of Fines and Variation of Repayment

Language from other jurisdictions provides that any disciplinary fines have to be paid prior to a renewal or reinstatement of membership. The current Act is silent on this issue.

The Committee recognizes that while this language should be incorporated into the new Act, it must be flexible so that if a member has been paying-off any fine, in accordance with a payment schedule, that would be acceptable and not constitute a barrier to the member renewing.

The Committee also considered whether there should be a procedure for the member to apply to the chairperson of the Adjudication Committee to vary the terms of repayment, for example, an extension of time or change in periodic amount to be paid. This would be a discretionary power on the part of the decision-maker, taking into account the case at hand. This variation would be an administrative function rather than an adjudicative function. The Committee is of the view that all of this could be relegated to the Rules and it does not need to be included in the Act.

Recommendation #38.

- There should be rule making powers in the new Act that allow for payment schedules and applications to vary payment schedules in certain cases.
- The new Act should provide that a member may not renew his or her membership if there are outstanding fines owing to the Law Society, unless the member has entered into a payment arrangement, and is honouring the terms of that arrangement. In that case the member should not be prevented from renewing membership on that basis alone.

Application of Fines

The current Act does not specify to whom the fines specified are paid. The new Act should specify that the Law Society receives any revenue collected by fines imposed through the disciplinary process. This approach is present in other legislation.⁶⁶

Recommendation #39. The new Act should specify that any fines payable under the Act are payable to the Law Society.

Appeals

There should continue to be a statutory right of appeal from the decision of the adjudicator. This is important for judicial review and deference by a court to the decision of the adjudicator. Without a

⁶⁶ For example see section 22.6 of the [Safety Act](#), RSNWT 1988, c.S-1.

statutory right of appeal, an aggrieved member could apply for judicial review of decisions made before an adjudication panel reached a final decision.⁶⁷

By having a statutory right of appeal to the Court of Appeal, there would be an adequate alternative remedy to judicial review and the Supreme Court could dismiss the judicial review application on that basis.

Recommendation #40. The new Act should enshrine the statutory right of appeal from a decision of the trier of fact (Committee of Inquiry).

Publication of Alternative Dispute Resolution Process

The Committee considered whether any resolutions coming out of an ADR process should be made public. The Committee received a submission on this issue. The Committee's conclusion is that there is a difference between an ADR which may occur at the time a complaint is filed, before an investigation, and an ADR which may take place after investigation. Typically after an investigation, if there has been a determination by the investigator that there is a reasonable prospect of conviction and therefore the complaint should move to adjudication. In these cases, the Committee believes that there is a public interest in having resolution of the complaint made public. This is keeping with the Law Society's role to protect the public and as a self-governing institution. It is also a display of transparency.

The Committee thinks that ADRs following an investigation should be public, while those that may occur before an investigation would not be made public. The Committee concluded that this was not a matter for the new Act but rather could be put in the Rules as it concerns practice and procedure.

Recommendation #41. The Committee recommends that any resolution of a complaint that comes about through an ADR process, following the investigation of the complaint, should be made public.

Assurance Fund

Name of Assurance Fund

Part IV (sections 34-36) of the current Act deals with the Assurance Fund. The Assurance Fund is established to compensate members of the public who may have lost money or other property which they entrusted to a lawyer in the lawyer's capacity as a barrister and solicitor, because the lawyer misappropriated or wrongfully converted that money or other property.

Both lawyers and members of the public struggle to understand the difference between what is currently the Assurance Fund (Part IV of the current Act) and what is professional liability insurance (Part VIII of the current Act or sections 59-62). The Committee thinks the complexity of the language in the Act contributes to a lack of understanding. Because the Assurance Fund is available solely for the public, it is essential that the Assurance Fund be described in plain language.

⁶⁷ In this context the adjudication panel is performing the function of what is the Committee of Sole Inquiry under the current Act.

Recommendation #42. Part IV be revised using plain language and includes

- a new, descriptive name for the Assurance Fund;
- a clear purpose statement;
- a clear description of the Executive’s role in deciding how to respond to claims under the Assurance Fund; and
- a plain language description of the right of subrogation (recovery of compensation).

Expenses under Assurance Fund

The Committee notes that in other jurisdictions, expenses under funds similar to the Assurance Fund (as it is now) can be charged against the Fund. A similar provision exists under paragraph 60(3)(e) of the current Act for the Liability Fund.

The Committee believes that the Law Society should be able to charge against the Assurance Fund any of its expenses related to the Fund, including costs of audit for the Fund, and any investigation and hearing costs related to claims under the Fund.

Recommendation #43. The Committee recommends that the new Act provide that the Law Society can charge against the Assurance Fund any Fund-related expenses.

Limitation of Claims against Assurance Fund

The current Act does not provide any limitations for claims against the Assurance Fund. In the absence of such provisions limitations period, and the exceptions set out in the *Limitations of Actions Act*, RSNWT 1988, c.L-8, would apply. The Committee considered whether there should be limits on any claims advanced against the Fund.

Clients must bring a claim against a lawyer within 6 years after the cause of action arose.⁶⁸ If misuse is hidden, a client might not become aware for some time and the Committee was of the view that a person should have the right to bring an action within 6 years of becoming aware of the cause of action.⁶⁹

Recommendation #44. The new Act include a provision respecting a limitation period allowing an aggrieved member of the public to claim compensation under the Assurance Fund within 6 years of becoming aware of the cause of action.

Subrogation (Recovery of Compensation)

Section 36 of current Act is a subrogation of rights provision. If the Law Society makes a payment under the Assurance Fund, the Law Society would then have the ability to bring an action against the lawyer whose misconduct resulted in the necessity of a payment under the Fund. Such a provision is necessary in order to preserve the rights of the Law Society and the Assurance Fund itself.

⁶⁸ *Limitations of Actions Act*, RSNWT 1988, c.L-8 at paragraphs 2(1)(e) and (f).

⁶⁹ Similar to the right within the *Limitations of Actions Act*, s. 2(1)(f) and (g)

The Committee thinks this provision should be rewritten in the new Act to make the language easier for the public to understand. The Committee notes subsection 47(3) of the Manitoba *Legal Profession Act* might be a good model.⁷⁰

Recommendation #45. The subrogation provision in the new Act should be modified so as to make it more understandable.

Claims against Bankrupt Lawyers

The Committee noted that other jurisdictions provide that the Law Society can pursue a bankrupt lawyer in a case where there are payments made from the Assurance Fund because of that lawyer's dishonest actions. For example in Ontario the legislation states:⁷¹

Reimbursement from bankrupt's estate

- (9) If a grant is made under this section and the dishonest person is or becomes bankrupt, the Society is entitled,
- (a) to assert and prove a claim in the bankruptcy for the amount of the grant; and
 - (b) to receive all dividends on the Society's claim until the Society has been reimbursed the full amount of the grant.

Recommendation #46. The new Act should contain a provision allowing the Law Society to pursue a bankrupt lawyer where claims have been made against the Assurance Fund because of the dishonest actions of that lawyer.

Custodianships

Appointment of Interim Custodian

The Committee notes that it can take some time to have a Custodian appointed under the current Act. Sections 39 to 41 of the current Act outline the process.

Where a member of the Law Society becomes unable to practise and no plan exists for another lawyer to take over that lawyer's practice, the Law Society has an obligation to appoint a Custodian to protect the rights and interests of the lawyer's clients. This can arise when a sole practitioner becomes unexpectedly ill, is disciplined and not allowed to practise, or dies. Effective January 1, 2020, the Law Society Rules will require that every resident member in private practice have a "succession" plan in place - a measure aimed at mitigating the effects on clients of a law firm in the event of an unexpected death of the lawyer. The appointment of a Custodian should only be necessary if a member violates this new rule or his or her succession plan is not viable.

Custodianships are few in the Northwest Territories. If a Custodian is required, this is done by obtaining a court order which can take time and the costs are at the member's expense. Because the impact on

⁷⁰ The *Legal Profession Act*, CCSM c.L.107.

⁷¹ See *Law Society Act*, RSO 1990, c.L-8 at subsection 51(9).

affected clients can be immediate and severe, the new Act should provide for the power of the Law Society to appoint an interim Custodian as a means of mitigating these negative effects. Such an appointment would be for a specified short-term until a permanent Custodian is appointed by the court or the member is able to resume his or her practice.

Recommendation #47.

- The new Act should provide that the Law Society have the ability to appoint an interim Custodian of the property and practice of a member, where the Law Society has determined that there are circumstances which warrant such an appointment.
- Such an appointment would be of very limited duration, and would expire at the end of that period if the court did not appoint a Custodian over the property and practice of that member.

Accounts, Audits and Financial Inspections

Trust Accounts

Part VI (or sections 42-46) of the current Act set out requirements for the keeping and managing of trust accounts. With respect to trust accounts (s. 46.1), many other jurisdictions require a lawyer or law firm to notify the Law Society of its intention to open a trust account and get the Law Society's approval in advance of the account being opened. This is another mechanism for the Law Society to protect the public interest in allowing only those who have demonstrated compliance and good financial management to open trust accounts. The Committee supports this addition to the Rules as it reflects practice and procedure rather than a new authority for the Society.⁷²

Section 47 of the current Act needs to be updated to use the new term "chartered professional accountant" as required by the *Chartered Professional Accountants Act*, SNWT 2018, c.13.

Current section 47 of the *Legal Profession Act* authorizes the chairperson of the Discipline Committee to order an audit of a lawyer. Something less onerous than a full audit is often sufficient to ensure a member's compliance with the trust accounting rules. The Committee is of the view that the chairperson should have discretion to require an audit, a review, or an inspection. This should ensure ongoing compliance and client protection without the significant costs associated with an audit, which may only be required where financial mismanagement is apparent from a review or inspection.

⁷² Some of these have already been adopted in the amendments to the Law Society Rules adopted by the Executive on 27 July 2019 (AL-3). These amendments concerned trust accounting rules and are largely based on those found in the Law Society of Alberta, [Rules of the Law Society of Alberta](#) (December 1, 2016). The amendments come into force on 2 January 2020.

Recommendation #48. The new Act should

- set out that a lawyer or firm intending to open a trust account must get the Law Society's approval in advance of opening the account;
- refer to "chartered professional accountants" in a manner that reflects the new *Chartered Professional Accountants Act*; and
- give the chairperson of the Discipline Committee greater discretion to order financial inspections, reviews and audits of lawyers.

General

Members

Section 63 of the current Act allows lawyers to be designated as "barristers and solicitors." Section 18 of the current Act uses the terms: "attorney", "advocate" and "barrister or solicitor".⁷³ The Committee carried out a word search of GNWT legislation in an effort to understand how each of the following terms are used in the legislation: "solicitor", "barrister", "lawyer", "attorney", "counsel", "member of the Law Society" and "advocate". The search results revealed 113 statutes of interest and that there is inconsistency throughout the roll of statutes. This inconsistency may seed confusion as to whom is being mentioned and therefore detract from clarity across all of these statutes.

Consistency of terminology should greatly enhance readability. If the definition of "member" changes to mean more than just lawyers, other statutes may need to be corrected in the new Act by means of consequential amendments. The Committee recommends this terminology be adopted in the new Act.

Recommendation #49. Consequential amendments should be made to amend other GNWT statutes to make references to "lawyer" consistent with the new *Legal Profession Act* and all GNWT statutes.

Use of Protected Professional Titles

In the *Legal Profession Act* and elsewhere, there are multiple titles used to refer to a lawyer as discussed above. To ensure that the public is not confused as to the status of a person using any of these professional titles, only those persons who are members of the Law Society and lawyers should be able to call themselves "lawyers" or any of these other related professional titles.⁷⁴ Sections 68 to 70 set out that a person who uses any of these titles when they are not a member of the Law Society can be charged with the offence of unauthorized practice.

The Committee reiterates that the definition of "member" in the new Act should be transformed into an umbrella term and include lawyers, students-at-law, Canadian Legal Advisors, Restricted Appearance

⁷³ The term "advocate" is likely an artifact. Prior to 1938, all lawyers in the Northwest Territories were called "advocates". See *Legal Profession Ordinance*, CONT 1898, c. 51.

⁷⁴ This includes "barrister", "solicitor", "counsel" or "attorney".

Certificate holders, disbarred and suspended members, law students and possibly other classes of person regulated by the Act.⁷⁵

Recommendation #50. The Committee recommends that only qualified and authorized lawyers with the Law Society be able to refer to themselves using any of the following protected titles:

- lawyer;
- barrister or solicitor;
- Canadian Legal Advisor;
- student-at-law;
- law student;
- member of Law Society of the Northwest Territories;
- other classes of persons that are included in the Act or Rules.

Offences, Punishment and Return of Fees

Section 71 the current Act deals with offences under Part IX of the current Act. The section is a bit disjointed but it is focussed on persons engaging in the unauthorized practice of law (sections 68 and 69), a statutory offence. Such an offence is punishable by a fine, and if there is a default of payment, the offence may also be punishable by a term of imprisonment. The Committee decided that this is adequate but the wording could be improved.

Section 80 of the Saskatchewan *Legal Profession Act* is notable in that it sets out an initial fine for the first offence and then a higher fine for second or subsequent offences.⁷⁶ This might be suitable for inclusion in the new Act. A fine without a term of imprisonment may be an insufficient disincentive as the fine may be simply regarded as "the cost of doing business".

The forfeiture of any fees or profits obtained by the unauthorized practitioner may be a more sufficient disincentive. This approach is not uncommon in the securities sector.⁷⁷ Revenue collected through this process should be payable to the client or, if the client cannot be located, the Assurance Fund (or whatever that Fund is to be called in the new Act).

There should be a liability for payment of costs too.

Recommendation #51. The new Act should include provisions respecting

- fines and terms of imprisonment for violations of the Act, including an increasing scale of fines for repeat offences;
- repayment of any fees collected through unauthorized practice; and
- liability for payment of costs to the Law Society.

⁷⁵ This is the approach in Nova Scotia: [Legal Profession Act](#), SNS 2004, Chapter 28 at section 5 in particular.

⁷⁶ *Legal Profession Act, 1990* SS 1990-91, Chapter L-10.1. The approach is often referred to as "disgorgement".

⁷⁷ Consider [Securities Act](#), SNWT 2008, c.10 at subsection 166(4) and 168(2). A CanLII search of the term reveals that the concept is not restricted to securities in other national legislation.

Protection from Liability

The current Act protects certain individuals from liability for anything done in good faith under the Act (section 73) and against a claim of defamation (section 74) when matters relating to the conduct of a member are published by the Society. These types of provisions should be retained in the new Act.

Given how much the Law Society relies on volunteers to carry out its work, the Committee recommends expanding the liability protection. Volunteers acting in good faith for the Law Society should be protected.

Section 126 of the Alberta *Health Profession Act* provides a helpful model.⁷⁸ That Act extends protection from liability to include anyone acting on behalf of, or for the Society, under the Act. That Act also protects acts or omissions done in good faith that are authorized under the Act. The authorization must be derived from the Act or the Rules. The protections in the *Legal Profession Act* for the Northwest Territories should be expanded in a similar manner. The successor provisions to sections 73 and 74 of the current Act should include reference to acts and omissions made in good faith.

Recommendation #52. The new Act should expand the protections in sections 73 and 74 of the current Act to include

- liability protections for anyone who provides services to the Society under the Act or rules, including volunteers; and
- references to good faith acts or omissions.

Disclosure and Solicitor-Client Privilege

Section 79 of the current Act deals with disclosure under the Act of information, which is subject to solicitor-client privilege. A person to whom that information is disclosed has the same duty with respect to the disclosure as the member or student-at-law from which the information was disclosed. It also empowers a court to take measures to restrict access to that information in court by, for example, excluding the public from court proceedings. The aim of this section is to balance the need for disclosure under the current Act with the protection of solicitor-client privilege. The new Act should contain a provision similar to current section 79.

Recommendation #53. The new Act should include provisions about disclosure and the safe-guarding of solicitor-client privilege as does the current Act at section 79.

No Contracting Out of Obligations under the Act

The Committee considered the possibility that a lawyer might attempt to contract out of his or her obligations under the Act. For example, a lawyer might attempt to contract with a client to have the client's funds held in the lawyer's general account, to avoid the lawyer having to have a trust account. The new Act should specifically prohibit any attempt to engage in such activity.

⁷⁸ [Health Professions Act](#), RSA 2000, Chapter H-7.

Recommendation #54. The new Act should provide that a lawyer cannot by contract or otherwise attempt to avoid the lawyer’s obligations under the Act.

4. Next Steps

The Executive of the Law Society commissioned this Discussion Paper to study possible amendments to the *Legal Profession Act*, taking into account the views of members and others. While the current Act and its amendments to date have served the Society well, the Act is in need of modernization to meet the needs of the profession today and into the future.

The Committee carried out research into the issues raised by members and by the Committee members. Many of the issues are not unique and are faced by other law societies across the country and in England and Wales. Unlike many of those other law societies, the Law Society of the Northwest Territories serves a much smaller jurisdiction (in terms of population) and it is very small and dependent on the services of volunteers (such as the members of the its various committees). There are capacity issues.

This Discussion Paper has focussed on the 1988 Act as it is now and how it can be improved upon to aid in achieving the Mandate and Mission of the Law Society, with observance of its core values. Many of the recommendations would also extinguish artefacts from when the Law Society was under direct control of the Commissioner (1938 to 1976).

The Discussion Paper hopefully has shed some light on some of the key issues that should be addressed in a new *Legal Profession Act*. Hopefully this paper will generate further discussion amongst the Executive and the membership and others. These discussions can then be considered when the Final Report is generated. The Final Report will then inform the drafters of the new Act.

5. Schedule A - Summary of Recommendations

<p>Recommendation #1. The following wording is proposed as a Mandate and Mission statement for the Society in the new Act:</p> <p>X. (1) The purpose of the Law Society of the Northwest Territories is to</p> <ul style="list-style-type: none">(a) ensure that the people of the Northwest Territories are served by lawyers who meet high standards of competence, learning and professional and ethical conduct; and(b) uphold the independence, integrity and honour of the legal profession. <p>(2) In pursuing its purpose, the Society shall</p> <ul style="list-style-type: none">(a) establish standards for the education, professional responsibility, ethical conduct and competence of persons practising or seeking the right to practise law in the Northwest Territories; and(b) regulate the practice of law in the Northwest Territories.
<p>Recommendation #2. There should be no change to the name of the Law Society or the title of the Act.</p>
<p>Recommendation #3. The new Act should provide that the Law Society has all of the powers of a natural person.</p>
<p>Recommendation #4. The Committee recommends that the new Act should</p> <ul style="list-style-type: none">• provide that there be at least one layperson on the Executive and that the Executive would have the power to recommend the appointment of additional laypersons to the Executive as it sees fit; and• provide that in selecting a candidate layperson, the Executive consider the diversity of the population and the gender balance of the Northwest Territories.
<p>Recommendation #5. Diversity in the leadership of the Law Society should be encouraged through policy.</p>
<p>Recommendation #6. In order to be elected to the Executive of the Law Society, a lawyer needs to be a resident of the Northwest Territories. The current requirement should be maintained in the new Act.</p>
<p>Recommendation #7. Inactive members, Canadian Legal Advisors and members holding Restricted Appearance Certificates should be ineligible to be elected to the Executive of the Law Society.</p>
<p>Recommendation #8. Inactive members, Canadian Legal Advisors, those members who hold Restricted Appearance Certificates and suspended members, should continue to be ineligible to vote for members of the Executive.</p>
<p>Recommendation #9. The new Act should allow for proxy voting at Annual General Meeting and Special Meetings of the Law Society.</p>
<p>Recommendation #10. The Committee recommends that</p> <ul style="list-style-type: none">• the Executive be given broad rule making power to manage the affairs of the Law Society, pursue its purposes and carry out its duties;• certain of the rule making powers delegated to the Executive be removed - those dealing with paragraphs 7(h), (i), (j), (o) and (r) of the current Act;• rather than providing that the Executive may make rules to establish and maintain libraries, that the Executive be given rule making power to support access to legal information;• the Executive rule making power include the right to make rules supporting access to justice;• the Executive be given robust powers to make rules concerning mandatory continuing legal education, and that those powers be defined very broadly; and• the new Act clearly provide that lawyers may be suspended for failing to comply with the rules enacted by the Law Society.

Recommendation #11. The new Act should provide that Rules made under that Act are not statutory instruments for the purposes of the *Statutory Instruments Act* so that

- registration and the statutory examination of proposed Rules by the Registrar of Regulations should still continue, but on a voluntary basis rather than being mandated under the *Statutory Instruments Act* as is now the case; and
- the process of statutory examination and publication be modified along the lines that Nunavut took in its amendments to its *Legal Profession Act* in 2017.

Recommendation #12. The new Act should

- remove what is currently subsections 8(2) to (6);
- remove the requirement that rules created by the Executive need to be confirmed by the Law Society membership at an Annual General Meeting;
- still allow Rules to be made, amended or added to by the Executive at an Annual General Meeting or any other meeting called for that purpose; and
- require the Executive to notify the Law Society membership in advance of any proposed new rules, or changes to rules, in a manner determined appropriate by the Executive (this could be a rule making power).

Recommendation #13. The new Act should

- change the term "Deputy Secretary/Deputy Secretary-Treasurer" to "Executive Director";
- specify that the Executive Director is an employee of the Law Society;
- specify powers and duties of that office;
- provide rule-making powers for additional powers and duties to be specified; and
- allow the Executive to delegate certain of its powers to the Executive Director.

Recommendation #14.

- All references to "the Roll" and "record" should be removed from the new Act.
- The Law Society would still be required to maintain relevant information about the member through a public listing, as determined by the Executive.
- The Executive should have the discretion to withhold a member's personal information in certain circumstances.

Recommendation #15. The new Act should re-define the meaning of "member" and include students-at-law, law students, Canadian Legal Advisors, Restricted Appearance Certificate Holders and others that may be identified within the Rules of the Society.

Recommendation #16.

- Section 16(1) should be amended to allow the Executive to delegate the review of applications for admission to the Executive Director.
- The Executive should be given express power to approve exceptions to applications for admission on a case by case basis and attach any practice conditions deemed necessary to protect the public.
- Paragraph 18(1)(a) is no longer necessary and should be repealed.
- Paragraph 18(1)(b) of the Act is no longer necessary and should be repealed.
- The Executive be granted authority to enter agreements with the Federation of Law Societies with respect to any matter required to facilitate the assessment of an applicant's international credentials (and mobility of Society members).

<p>Recommendation #17. That the Act be amended to provide for the following:</p> <ul style="list-style-type: none"> • students-at-law must complete 12 months of articles within a 24 month period; • students-at-law may clerk with any court within Canada; • the Executive should retain the power to determine how much credit a student-at-law will receive for a period of clerkship as part of an articling experience; • a substantial part of a student’s articles must occur within the Northwest Territories; and • an express power for the Executive to assess applicants for admission and attach any conditions necessary to ensure that the applicants are competent and qualified to an acceptable standard for the practise of law.
<p>Recommendation #18.</p> <ul style="list-style-type: none"> • There is no need to change the process by which lawyers can become a notary public. • To reduce confusion for new members, membership applications could include a notice advising of the separation application process under the <i>Evidence Act</i>.
<p>Recommendation #19. The new Act should adopt provisions similar to those provided in the Saskatchewan <i>Legal Profession Act</i>, to allow the Law Society to license, on a case by case basis, those who wish to provide limited legal services to the public in the Northwest Territories.</p>
<p>Recommendation #20.</p> <ul style="list-style-type: none"> • The new Act should address law firms as a class of member and that all of the obligations on a member under the Act equally apply to a law firm. • There should be sufficient rule-making authority for details of regulation of law firms (such as the "responsible lawyer").
<p>Recommendation #21. The new Act should contain a provision preventing a lawyer from practicing through a professional corporation unless that professional corporation is registered under the <i>Professional Corporations Act</i> and under the new <i>Legal Profession Act</i>.</p>
<p>Recommendation #22. The new Act should not make provision for alternative business structures.</p>
<p>Recommendation #23.</p> <ul style="list-style-type: none"> • The definition "practice of law" in the current Act should be transformed into a substantive provision in the new Act, similar to that set out above. • Where there is an assertion of solicitor-client privilege, then this too amounts to the practice of law. • There should be a prohibition on the practising of law by a member who is disbarred or suspended. • There should be an exception for any person who provides the public with general legal information, as opposed to legal advice.
<p>Recommendation #24.</p> <ul style="list-style-type: none"> • The new Act should not prescribe the oath to be taken before a Supreme Court judge on admission to the Society but it should still require it to be taken. • The wording of the oath should be set by the Executive. • The wording could be put in the Rules.
<p>Recommendation #25. The title of Part 3 of the current Act, "Discipline" and the content of that Part should be reconsidered in the new Act so as to modernize and expand the tools available to address inappropriate conduct, including alternative dispute resolution and diversion.</p>
<p>Recommendation #26. The term "conduct deserving of sanction" should be used in all instances and in place of all other references to unprofessional conduct or professional misconduct in the new Act.</p>

<p>Recommendation #27. The disciplinary process in the new Act should apply to all classes of members of the Law Society.</p>
<p>Recommendation #28. The new Act should ensure that disciplinary consequences for all members be the same, except that one additional disciplinary consequence for a student-at-law would be the suspension or termination of the student's articles. The student-at-law's principal may also be subject to discipline. For law students, termination of registration and discipline of the principal may also be available.</p>
<p>Recommendation #29. The new Act should include a provision that states that the complainant does not have party status in the disciplinary proceedings.</p>
<p>Recommendation #30. The new Act should mandate participation by layperson members of the Discipline Committee at all stages of the disciplinary process.</p>
<p>Recommendation #31.</p> <ul style="list-style-type: none"> • The new Act should provide that the chairperson of the Disciplinary Committee have the ability to dismiss a complaint prior to investigation, if the complaint is found to be frivolous and vexatious, if it is beyond the jurisdiction of the Law Society or if it lacks sufficient evidence to be substantiated. • The chairperson of the Discipline Committee should have the power to delegate this authority. • Where complaints are dismissed, there should be an internal review mechanism.
<p>Recommendation #32.</p> <ul style="list-style-type: none"> • The new Act should provide for more options for addressing a complaint instead to having the complaint investigated. <ul style="list-style-type: none"> ○ These options should include early intervention, alternative dispute resolution, practice or conduct review, referral to a wellness program or advice and direction. ○ These options would also be available before the investigation of a complaint. • The chairperson of the Discipline Committee would determine the option to be pursued in each case. <ul style="list-style-type: none"> ○ Where any of these options is being pursued, the complaint will be paused while that option is being pursued. • If the diversion approach fails, the matter can return to the formal investigative stream.
<p>Recommendation #33. "Mediation resolution process" should be removed from the new Act and in its place a more generic and flexible term should be used - possibly "alternative dispute resolution."</p>
<p>Recommendation #34. The new Act should authorize the establishment of a separate Discipline Committee and an Adjudication Committee with separate chairpersons.</p>
<p>Recommendation #35.</p> <ul style="list-style-type: none"> • The concepts of Sole Inquirer and Committee of Inquiry should be dropped in the new Act and replaced by adjudication panels. • Each adjudication panel would have layperson and member representation.
<p>Recommendation #36.</p> <ul style="list-style-type: none"> • The chairperson of Discipline Committee, or designate, should have the ability to issue interim suspensions that must be reviewed every 120 days by the chairperson. • Prior to renewing an interim suspension, the chairperson of the Discipline Committee must consult with layperson members of the Disciplinary Committee. • The chairperson of the Discipline Committee, or designate, should have the ability to issue conditions on practice.

<p>Recommendation #37.</p> <ul style="list-style-type: none"> • The maximum amount of a fine that can be imposed as part of a disciplinary sanction under the new Act should be \$25,000 for each disciplinary finding, in addition to costs that a person would be required to pay. • The new Act should also provide that fines imposed under the new Act are debts, and are recoverable as such.
<p>Recommendation #38.</p> <ul style="list-style-type: none"> • There should be rule making powers in the new Act that allow for payment schedules and applications to vary payment schedules in certain cases. • The new Act should provide that a member may not renew his or her membership if there are outstanding fines owing to the Law Society, unless the member has entered into a payment arrangement, and is honouring the terms of that arrangement. In that case the member should not be prevented from renewing membership on that basis alone.
<p>Recommendation #39. The new Act should specify that any fines payable under the Act are payable to the Law Society.</p>
<p>Recommendation #40. The new Act should enshrine the statutory right of appeal from a decision of the trier of fact (Committee of Inquiry).</p>
<p>Recommendation #41. The Committee recommends that any resolution of a complaint that comes about through an ADR process, following the investigation of the complaint, should be made public.</p>
<p>Recommendation #42. Part IV be revised using plain language and includes</p> <ul style="list-style-type: none"> • a new, descriptive name for the Assurance Fund; • a clear purpose statement; • a clear description of the Executive’s role in deciding how to respond to claims under the Assurance Fund; and • a plain language description of the right of subrogation (recovery of compensation).
<p>Recommendation #43. The Committee recommends that the new Act provide that the Law Society can charge against the Assurance Fund any Fund-related expenses.</p>
<p>Recommendation #44. The new Act include a provision respecting a limitation period allowing an aggrieved member of the public to claim compensation under the Assurance Fund within 6 years of becoming aware of the cause of action.</p>
<p>Recommendation #45. The subrogation provision in the new Act should be modified so as to make it more understandable.</p>
<p>Recommendation #46. The new Act should contain a provision allowing the Law Society to pursue a bankrupt lawyer where claims have been made against the Assurance Fund because of the dishonest actions of that lawyer.</p>
<p>Recommendation #47.</p> <ul style="list-style-type: none"> • The new Act should provide that the Law Society have the ability to appoint an interim Custodian of the property and practice of a member, where the Law Society has determined that there are circumstances which warrant such an appointment. • Such an appointment would be of very limited duration, and would expire at the end of that period if the court did not appoint a Custodian over the property and practice of that member.

<p>Recommendation #48. The new Act should</p> <ul style="list-style-type: none"> • set out that a lawyer or firm intending to open a trust account must get the Law Society's approval in advance of opening the account; • refer to “chartered professional accountants” in a manner that reflects the new <i>Chartered Professional Accountants Act</i>; and • give the chairperson of the Discipline Committee greater discretion to order financial inspections, reviews and audits of lawyers.
<p>Recommendation #49. Consequential amendments should be made to amend other GNWT statutes to make references to "lawyer" consistent with the new <i>Legal Profession Act</i> and all GNWT statutes.</p>
<p>Recommendation #50. The Committee recommends that only qualified and authorized lawyers with the Law Society be able to refer to themselves using any of the following protected titles:</p> <ul style="list-style-type: none"> • lawyer; • barrister or solicitor; • Canadian Legal Advisor; • student-at-law; • law student; • member of Law Society of the Northwest Territories; • other classes of persons that are included in the Act or Rules.
<p>Recommendation #51. The new Act should include provisions respecting</p> <ul style="list-style-type: none"> • fines and terms of imprisonment for violations of the Act, including an increasing scale of fines for repeat offences; • repayment of any fees collected through unauthorized practice; and • liability for payment of costs to the Law Society.
<p>Recommendation #52. The new Act should expand the protections in sections 73 and 74 of the current Act to include</p> <ul style="list-style-type: none"> • liability protections for anyone who provides services to the Society under the Act or rules, including volunteers; and • references to good faith acts or omissions.
<p>Recommendation #53. The new Act should include provisions about disclosure and the safe-guarding of solicitor-client privilege as does the current Act at section 79.</p>
<p>Recommendation #54. The new Act should provide that a lawyer cannot by contract or otherwise attempt to avoid the lawyer’s obligations under the Act.</p>

6. Schedule B - Terms of Reference

TERMS OF REFERENCE

LEGAL PROFESSION ACT REVISION COMMITTEE

(Approved by Executive August 1, 2018)

Membership

The *Legal Profession Act* Revision Committee shall be made up of seven members. Two of the members shall be members of the Executive of the Law Society. The other five members shall be members of the Law Society. Wherever possible, the membership should reflect the diversity of the areas of practice in the NWT and the membership of the Law Society.

All members shall be appointed by the Executive. The Executive Director of the Law Society shall be an ad hoc member of the Committee.

Responsibilities

The Committee shall:

- Consult with the Law Society membership concerning changes to the *Legal Profession Act* and solicit input from the membership;
- Consult with other law societies, the Federation of Law Societies of Canada, and such other legal organizations as the Committee determines appropriate concerning changes to the Legal Profession Act and solicit input;
- Consolidate that input into a written Discussion Paper to be presented to the Law Society Executive;
- Following approval of the Discussion Paper by the Law Society Executive, circulate the Discussion Paper broadly and seek comments on the Discussion Paper;
- Convene a meeting of the Law Society membership to discuss the Discussion Paper and receive comments;
- Provide a Final Report in writing to the Law Society Executive on changes to the *Legal Profession Act*.

Timing

The Committee shall provide its Discussion Paper to the Law Society Executive by January 15, 2019. The Committee shall provide its Final Report to the Law Society Executive not later than 120 days after the approval of the Discussion Paper by the Law Society Executive.

Reporting

The Committee shall report to the Law Society Executive, through the Executive Director, at least once a month, in advance of the monthly Law Society Executive meeting.