



The Law Society of
Upper Canada

Barreau
du Haut-Canada

Tab 5

Report to Convocation June 25, 2015

Treasurer's Report

Purpose of Report: Decision

**Prepared by the Policy Secretariat
(Jim Varro – Director, Policy)**

FOR DECISION

PART 1

PROPOSED TASK FORCE TO CREATE A STRATEGY TO PROMOTE WELLNESS AND ADDRESS MENTAL HEALTH AND ADDICTIONS ISSUES

Motion

1. That Convocation establish a Task Force to create a Law Society strategy to promote wellness and address mental health and addictions issues, with terms of reference and membership of the task force as set out in this Report.

Statement of Principle and Vision for the Task Force

2. Based on the principle that mental health and wellness are central to supporting the professional responsibility of lawyers and paralegals in the effective delivery of legal services, the Law Society seeks to create a wellness and mental health strategy to enhance its effectiveness as a regulator, with a vision to:
 - a. Become informed of and educate on issues related to wellness and mental health in the legal professions and the public they serve;
 - b. Promote wellness and positive mental health;
 - c. Effectively respond to mental health and addictions issues within the professions respectfully, compassionately and with purpose; and
 - d. Encourage and offer appropriate support,as a function of the Law Society's regulation of the professions in the public interest.

Issue for Consideration

3. Mental health issues and addiction affect many Canadians, with nearly one in five Canadian adults experiencing a mental health or addiction issue.
4. The Law Society as a public interest regulator regularly interacts with licensees and members of the public in a number of its functions and must deal with these issues from time to time.
5. The Law Society recognizes that in the context of its role, mental health issues and addictions issues are important for at least three reasons:

- a. Law Society policies, procedures and initiatives must ensure that the Law Society is responsive to members of the public experiencing mental health or addictions issues, including issues referred to the Law Society's about licensees;
 - b. The Law Society must ensure that licensees are able to appropriately and competently represent people experiencing a mental health or addiction issue; and
 - c. Mental health and addictions issues that affect licensees raise issues for the Law Society related to its obligation to ensure that licensees are able and competent to fulfill their professional responsibilities.
6. A related matter is the mental well-being of Law Society staff who support the Society's regulatory functions, and the Law Society's operational efforts to develop wellness and mental health best practices in the workplace.
 7. Those whom the Law Society serves should be confident in the Law Society's effectiveness. Effectiveness includes being responsive to the issues, like mental health and addictions, that individuals may experience.
 8. To that end, it is appropriate that the Law Society work to establish an organization-wide wellness strategy aimed at dealing with mental health and addictions issues. In this way, the Law Society can ensure that its policies, procedures and programs include measures that will help these issues to be identified and properly handled. A key part of the strategy should be a companion communications strategy to inform and educate.

Key Issues and Considerations

9. Given the prevalence of mental health and addictions issues in Canadian society, it can be reasonably expected that most lawyers and paralegals will encounter legal matters in which mental health or addictions issues will arise. Mental health or addictions issues may arise regardless of a lawyer or paralegal's area of practice.
10. Lawyers and paralegals may also experience mental health or addictions issues themselves. At various points in the Law Society's regulatory process, including the tribunal process, the Law Society deals with licensees who are experiencing mental health and/or addictions issues of various types.
11. A number of initiatives external to the Law Society are already underway to explore means to address mental health and addiction issues. In Ontario, governments and organizations are advancing these initiatives.¹

¹ Recent legal sector initiatives related to mental health include, for example:

- The *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA"), which has as its goal to make Ontario fully accessible by 2025.¹ Certain AODA accessibility standards and service delivery requirements came into force on January 1, 2015.

12. Mental health and capacity issues were identified by the Law Society's Priority Planning Committee as a subject that should be highlighted in the 2015 strategic planning exercise, having been identified earlier as an important issue for the Law Society to address. The Treasurer has asked that a strategy be developed to address the various elements of this issue.
13. The Law Society already addresses mental health and addiction issues in numerous ways. For example:
 - a. processes and procedures have been established at the operational level to address licensee capacity issues with a focus on early identification, to divert licensees from the conduct stream as appropriate where matters call for a regulatory response and to promote early identification of risk;
 - b. the Law Society's Member Assistance Program through Homewood Human Solutions™, operated independently of the Law Society, offers lawyers and paralegals a full range of professional, confidential services, including counselling, peer-to-peer support, crisis management services, substance abuse counselling, lifestyle and specialty counselling, and on-line resources and peer resource tools;
 - c. On May 6, 2015, the Law Society held a program for Mental Health week entitled called "Fostering wellness: a discussion of mental health and the legal profession", a very well attended event, where it was clear that there is fear of stigma around these issues.
14. However, a more cohesive approach would help the Law Society to more proactively address mental health and addiction issues. This dedicated focus would enable a more targeted approach to mental health and addiction issues and provide the basis for a wellness strategy. While wellness and mental well-being of Law Society staff is an operational matter within the Law Society employer-employee relationships, it is

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- The Law Commission of Ontario's September 2012 report *A Framework for the Law as It Affects Persons with Disabilities*.¹
 - The OHRC released *Minds that matter: Report on the consultation on human rights, mental health and addictions* in 2012¹, and the OHRC Policy in January 2014.
 - Legal Aid Ontario is in the process of developing a Mental Health Strategy.¹ As part of this initiative, it has developed a new Mental Health and Addictions Intake Tool in partnership with the Canadian Mental Health Association and Provincial Human Services and Justice Coordinating Committee.¹
 - In the fall of 2014, Ontario's law schools launched www.justbalance.ca to promote law student wellbeing.
 - In December 2014, the Ontario Bar Association launched its Opening Remarks initiative "to advance the conversation about mental health and personal wellbeing among legal professionals". This initiative includes online practice tips, interviews with CBA and OBA leaders describing their experiences with depression, and "The Mindful Lawyer CPD Series", a 6 module CPD series scheduled for January to June 2015.
 - On May 22, 2015, the Ontario Bar Association in partnership with four other professional associations "All Rise: A Summit of Mental Health in the Professions," an all-day free event.

anticipated that this study will assist in raising awareness of these issues and provide valuable information for use within the Law Society's human resources structure.

15. Among the questions that may be explored in forming this strategy are the following:
 - a. Are there Law Society's resources and support for licensees and their families?
 - b. Are there Law Society or other resources and supports that are needed for licensees who deal with clients with mental health and addictions issues, as a function of ensuring competent representation?
 - c. Do the Law Society's existing processes that have a public interface adequately address the issues of mental health and addictions?
 - d. Should enhancements be made in Law Society processes to deal more effectively with the fact that mental health and addictions issues appear to be a co-factor and possible contributing cause in many cases in which the focus is misconduct?
 - e. What can be learned and applied from the approaches of other regulators, including innovations and alternative approaches to mental health and addictions issues, to assist the Law Society in developing its strategy?
 - f. Are there opportunities for the Law Society to partner with others to educate lawyers and paralegals about these issues?
 - g. How can the work of the TAG initiative through its focus on mental health (the mental health "cluster") or other efforts contribute to available resources?

Proposal for a Task Force, Its Membership and Terms of Reference

16. As a starting point to building a strategy, work has begun to identify the Law Society's current or planned initiatives, processes, procedures and programs that address mental health and addictions matters, and create an inventory.
17. Once such an inventory is completed, the next step would be to identify gaps or areas for improvement and propose how they might be addressed or enhanced within an overarching framework. This would be combined with a consideration of potential resources that might assist in this work.
18. It is proposed that the Law Society strategy should be framed around the following key areas, building on the questions set out in paragraph 15 above:
 - a. Assistance to licensees and their families experiencing these issues;
 - b. Competency in representation of clients experiencing these issues;
 - c. Regulation of conduct where these issues manifest themselves in the regulatory stream;
 - d. Facilitating access to justice for those experiencing these issues; and
 - e. Application of equity principles.
19. Elements of a Law Society mental health and addictions strategy would span these areas, but it is expected that all Law Society activities and initiatives around mental health and

addictions issues, to the extent possible, would be interconnected and reinforcing to the greatest degree possible.

20. As expected in an organization like the Law Society, there are numerous points at which mental health and addictions issues may arise. This means that the issues cross program areas and relate to the mandates of several policy committees.
21. A task force structure is suggested as the appropriate vehicle, which will facilitate the appropriate cross-committee discussions, involving the Access to Justice, Equity and Aboriginal Issues, Paralegal Standing, Professional Development and Competence, Professional Regulation, and Tribunal Committees.
22. The following are the proposed members of the task force:

William McDowell (Chair)
Catherine Strosberg (Vice-Chair)
Jack Braithwaite
John Callaghan
Suzanne Clement
Cathy Corsetti
Teresa Donnelly
Julian Falconer
Janet Leiper
Isfahan Merali
Judith Potter
Susan Richer
Joanne St. Lewis

Terms of Reference

23. To guide the study to create the strategy, terms of reference are required. The following terms of reference have been the subject of consultation by the Treasurer with key committee chairs, and are presented for Convocation's consideration.

The Task Force to Create a Strategy to Promote Wellness and Address Mental Health and Addictions Issues is mandated to:

- a. Review Law Society's processes, procedures and initiatives to create an inventory of current practices as they relate to mental health and addictions issues, focusing on:
 - i. Assistance to members of the public experiencing these issues;
 - ii. Assistance to licensees experiencing these issues;
 - iii. Competency in representation of clients experiencing these issues;
 - iv. Regulation where these issues manifest themselves in the regulatory stream;

- v. Access to justice; and
 - vi. Equity principles
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- b. Based on the above review and findings, identify gaps to be addressed and opportunities to improve or enhance the Law Society's approach to these issues, and identify specific issues for study or research, including appropriate consultation, in an effort to propose possible solutions, including additional or alternative approaches.
 - c. Based on the work above, prepare a draft strategy document for Convocation's consideration that includes:
 - i. A vision statement for the Law Society's approach to mental health and addiction issues, linked to its mandate to regulate lawyers and paralegals in the public interest;
 - ii. A description of the elements of the strategy that will account for matters already being accomplished in support of the vision and that will include proposals for near and long term next steps including solutions, improvements or enhancements;
 - iii. A description of those elements of the strategy that may be operationalized upon approval of the strategy;
 - iv. A description of those elements of the strategy that require a policy review by Convocation and a recommendation that Convocation approve the referral of the matter to a committee of Convocation for consideration.
 - d. Determine budgetary considerations, if any, that should be addressed to support the work of the Task Force and seek approval as required;
 - e. Report to Convocation no later than May 2016 with a final report, and provide interim reports and recommendations to Convocation prior to that date as appropriate.

PART 2

PROPOSED TASK FORCE ON COMPLIANCE-BASED ENTITY REGULATION

Motion

24. That Convocation establish a task force to study and make recommendations on a process for professional regulation that focusses on compliance measures for entities through which lawyers and paralegals provide legal services, with membership of the task force and terms of reference as set out in this report.

Issue for Consideration and Background

25. On February 27, 2014, Convocation approved the development of a framework for the regulation of firms, including entities, providing legal services and consideration of the implementation of compliance-based regulation.
26. Convocation referred these issues to the Professional Regulation Committee for review. Following consideration of work completed at the operational level as reported to the Committee and discussion of an appropriate vehicle to study the issues in depth, the Treasurer determined that a task force be created to continue this work.
27. This report describes information about compliance-based entity regulation, the proposed membership of the task force and proposed terms of reference.

Key Issues and Considerations - Information on Compliance-Based Regulation

28. Compliance based regulation (also referred to outcomes based regulation or proactive regulation) is an approach to professional regulation that is based on the encouragement and support of improved practices by the regulator, primarily by setting goals and expectations, and providing supports and information as needed to law firms and legal practices.
29. For legal regulators, compliance based regulation developed first in Australia and subsequently in England and Wales. The Nova Scotia Barristers Society is currently in the process of implementing this form of regulation. In the United States, there is currently significant interest in entity regulation and also compliance based regulation, which is currently referenced as proactive regulation. Some U.S. jurisdictions - New York and New Jersey are examples - have rules applicable to firms.
30. Compliance based regulation shifts regulatory emphasis from responding to complaints and enforcement through discipline to a proactive approach in which goals, expectations and tools for licensees are established. This means that licensees can themselves ensure that they have appropriate systems and processes in place to achieve regulatory compliance.

31. Compliance-based regulation has been generally implemented together with entity regulation. The goal is the improvement of regulatory results through a set of defined objectives that all legal services providers seek to achieve, on the basis that practice processes and systems are most effectively addressed at the firm or entity level.
32. Entity regulation refers to the regulation of entities that provide legal services (firms) in addition to individual licensees. In Ontario, several regulators, including those for engineers, pharmacists, accountants, real estate brokers, apply entity regulation. In Canada an increasing number of provincial law societies are adopting some form of entity regulation. Nova Scotia is most advanced in this process, with a framework in place for entity and compliance based regulation. Other provinces including Manitoba, British Columbia, Alberta and Saskatchewan have some form of entity regulation authority for lawyers.
33. Under the *Law Society Act*, there is currently authority only for the regulation of professional corporations. Section 61.0.4 provides the Law Society with authority to regulate professional corporations in the same manner as individuals. To date, this authority has not been implemented by means of Law Society by-laws or policy-making authority.
34. Entity regulation in its most robust form exists in Australia, England and Wales, and will exist shortly in Nova Scotia. Entity regulation in these jurisdictions shares some common characteristics, including the following:
 - a. A member of the firm is designated to address regulatory issues. The degree of responsibility in this position varies among jurisdictions from informational to confirming compliance.
 - b. Expected outcomes for entities are set out by the legal regulator, and include establishing policies and procedures to ensure that members of the firm comply with the rules of professional conduct, or comply with conflict of interest requirements. These are intended to guide the firms in maintaining an ethical practice infrastructure.
 - c. Some effort is made to delineate those rules that apply to firms, or to create a new set of rules for firms.
 - d. Some jurisdictions, England and Wales in particular, have the authority to monitor, investigate and sanction firms.

The Concept of Compliance Based Entity Regulation for Ontario

35. In Ontario, individual lawyers and paralegals are licensed, provided with remedial and supportive guidelines and information, and are subject to the Law Society complaints-driven discipline process when it responds to complaints about licensees' conduct. This is largely a reactive process in which the Law Society addresses the public interest and risks to the public and the administration of justice by responding to complaints.

36. Many complaints received by the Law Society from clients and others relate to how lawyers and paralegals manage their practices. These include conflicts, communications, and accounting issues that can often be avoided with reliable and appropriate practice management tools.
37. The Law Society's research to date on developments in legal services regulation during the past 10 years provides support for the belief that lawyers and paralegals who focus on how their practices are best managed and who establish policies and procedures to achieve the professional goals set out in the Society's rules and requirements would achieve greater success in their professional practices.
38. A compliance based approach would include the development of objectives and supports for licensees for the improvement of practice systems. In this way, lawyers and paralegals would work towards improving practice outcomes, addressing ethical issues and allowing the Law Society to focus on those practices where identified issues require further remediation.
39. With respect to a compliance based approach through the entity providing legal services, in Ontario, the majority of lawyers and a significant minority of paralegals practice in firms.² If sole practitioners with employed or associate licensees are included, these numbers increase.
40. The firm generally sets the overall practice standards for those within the firm, and organizes the management of trust accounts, conflicts regimes and confidentiality standards. Firms often develop their own cultures, distinct from the culture of individual lawyers in the firm.
41. Firm policies and practices including their management of trust accounts, their marketing and advertising, and services standards, are all currently the individual responsibility of all the licensees in a firm. However, the reality is that these practices are part of the firm's work and not necessarily under a single licensee's control. This means that, in effect, some of the responsibility for common firm practices is a matter for the firm directly. As such, it seems appropriate, and likely more efficient and fairer from the point of view of the individual licensees in the firm, to require the firm to manage and be accountable for these responsibilities.
42. Currently, some of the professional conduct rules for both lawyers and paralegals reference the entity in which they practice. This includes the definition of a client as a client of the firm, the conflict rules, and transferring licensee rules, which indicate how best to effect a transfer without infringing on client confidentiality.
43. It is apparent from the current practices and regulation noted above that the firm is at least implicitly acknowledged as having some professional responsibility for regulatory obligations.

² Approximately 33% of all lawyers and 52% of paralegals in Ontario are in a sole practice

44. For the above reasons, exploring a system of compliance-based entity regulation for Ontario's lawyers and paralegals would be valuable. By focusing on how firms, including sole practices, organize and manage their practices, it is expected that the public, the courts and licensees will experience better outcomes as participants in the administration of justice.

The Scope of the Study, Proposed Membership of the Task Force and Proposed Terms of Reference

45. Using the research and work done to date operationally on this subject, it is proposed that the task force focus on a series of issues which will assist in defining the framework for this approach to regulation and the elements within the framework. This will lead to the consideration of options for discussion as the task force begins to frame its recommendations for Convocation's consideration.
46. As this subject is expected to generate broad interest among lawyers and paralegals, a period of consultation at the appropriate time should be undertaken prior to the task force preparing recommendations.
47. Among the issues that should be the focus of the study are the following:
 - a. Determining the value and merits of a compliance-based entity regulatory scheme for the Law Society in terms of advancing regulation in the public interest;
 - b. How information on Ontario licensee and firm demographics can be used to assist the review;
 - c. Exploring the proportionality of this approach to regulation against the goals to be achieved, including enforcement and accountability issues;
 - d. Determining how information about other regulators' best practices and outcomes in this approach to regulation might be used to advance the study;
 - e. Determining the range of possible ways that regulatory authority can most effectively be applied to firms;
 - f. Deciding how the costs of this approach to regulation should be assessed against its merits.

Proposed Membership

48. It is proposed that the following be appointed to the task force:

Ross Earnshaw (Chair)
Raj Anand
Teresa Donnelly
Howard Goldblatt
Joseph Groia
Carol Hartman

Gavin MacKenzie
Malcolm Mercer
Peter Wardle

Terms of Reference

49. The following terms of reference are proposed for the task force:

In the interests of enhancing public protection and confidence in the Law Society and licensees through a focus on practice management principles, policies and procedures, to regulate more efficiently and effectively through regulation of entities providing legal services, and to permit greater autonomy of firm practise guided by regulatory principles created by the Law Society, the Compliance-Based Entity Regulation Task Force is mandated to:

- a. Review current research and information and undertake further information gathering as appropriate to inform itself on developments in Canada and abroad on compliance-based entity regulation;
- b. Consider the various current models of this approach to regulation, determine the merits of similar approaches for regulation of Law Society licensees, and assess the approach against criteria that would include:
 - i. public protection (risk assessment of the aspects of a particular model or models);
 - ii. alignment with the Law Society's regulatory principles and goals;
 - iii. the effect of this approach to regulation on access to legal services by the public; and
 - iv. any regulatory or legislative constraints related to this approach to regulation.
- c. Prepare a proposal detailing the elements and structure of compliance-based entity regulation, or options as appropriate, and how it may be practically applied to entities providing legal services;
- d. Consult on the proposal with lawyers and paralegals and other interested stakeholders as the case may be, in an appropriate manner as determined by the task force, to obtain input;
- e. Following consultation and assessment of the results:
 - i. Prepare a report for Convocation detailing the task force's conclusions on a compliance-based regulatory approach,

- i. Include discussion of appropriate implementation issues, costs and resource implications of the approach the task force may propose, based on an operational assessment;
 - ii. Report to Convocation with its proposals for consideration.
- f. In formulating its work plan, determine a budget for its work, including the consultation phase, and request approval for a budget, to the extent funds are required beyond current the current budget available for such initiatives;
- g. Provide interim information reports to Convocation on the status of its work from time to time; and
- h. Report to Convocation by June 2016.

