

## Results report – *Legal Profession Act* engagement

### What was this engagement about?

Yukon is updating the *Legal Profession Act* in order to protect and serve the public's interests in policy and in practice, and improve access to legal services. A new *Legal Profession Act* will address:

- changes in the legal profession regarding the provision of legal services;
- regulation of the legal profession; and,
- the practical difficulties with the current Act that present limitations in implementing its provisions, such as outdated, restrictive, and unclear language and procedures that may be inconsistent with best practices or developments in common law.

The stakeholder engagement process for a new *Legal Profession Act* for Yukon was undertaken using multiple streams. Yukon's Department of Justice and the Law Society of Yukon began meeting in in spring 2017 to form a Drafting Advisory Group. This group served to review the issues contemplated on the Law Society's 2011 policy paper, *Toward a New Legal Profession Act*, and its subsequent addendums, and worked together to provide drafting instructions throughout the process.

The Department of Justice also sent letters (dated August 8, 2017) targeting Yukon legal stakeholders and Yukon First Nations, along with a discussion document, inviting them to provide input on the discussion document's questions by mail, phone or email, or to meet with the department either face to face or by teleconference to discuss issues of stakeholder importance. Those meetings were completed by the end of the week of September 22, 2017.

The discussion document was also leveraged as an online public survey hosted by Statistics Yukon and the Department of Justice. The survey was available to complete online or over the phone with Department of Justice officials from August 18, 2017 to September 11, 2017 and contemplated the following:

- *Do you believe that an updated Legal Profession Act should provide a framework for the regulation of the legal profession with operational requirements fully articulated with the Rules of the Law Society of Yukon?*
- *Should government regulatory approval of the Society's Rules be removed?*
- *Should an updated Legal Profession Act include a broad definition of the provision of legal services and set out which categories of members can engage in the full provision of those services (lawyers, law firms, law corporations) and which may engage in a more limited scope of service (paralegals, Aboriginal Court Workers)?*
- *Do you think that the Law Society should be able to stop someone who is not authorized from practicing law without also having to charge that person with an offence?*
- *If a person is charged with an offence, should each day that an offence is committed constitute a separate finable offence up to a maximum of \$250,000?*
- *Should the Act differentiate between issues of member competence and issues of capacity outside of the formal complaint process, where mental health issues or addictions impact a member's ability to practice?*
- *Do you have any further comments or questions regarding an updated Legal Profession Act that you would like to relay to the Department of Justice?*

## **Results at a glance**

The Department of Justice asked the above noted questions of targeted stakeholders and the public based on discussions held with the Law Society of Yukon and the issues noted in their policy paper and subsequent addendums. The following is an account of the survey results, along with some of the feedback we received, either in support of or against the policy direction that has formed the bulk of the drafting instructions.

***Q. Do you believe that an updated Legal Profession Act should provide a framework for the regulation of the legal profession with operational requirements fully articulated with the Rules of the Law Society of Yukon?***

**Responses: 45 (Agree = 77.8%, Disagree = 6.7%, Not sure = 15.5%)**

There was overwhelming agreement that this was the correct tact to take in regards to the updated statute. Those who were not in favour are of the belief that increasing the Law Society's abilities to make rules instead of enshrining all operational provisions in the statute itself is contrary to the public interest, as government and its elected officials should be the ones to safeguard those interests.

- "Act should not be used to define the operational requirements. Things evolve and then it provides flexibility to adjust the operations without amending the Act. Act should be high level to express purpose and boundaries not micro level."
- "Having such provisions in the Rules ensures greater flexibility in adjusting to changes required over time. Given how long it has taken to get amendments to the Act, flexibility must be insured by greater reliance on the Rules. Also, putting practical decision-making into the hands of the Law Society is much more consistent with the principles of a self-regulated profession."
- "It is far too insular and contrary to the public interest to increase the powers of the Law Society by removing requirements from the Act."

***Q. Should government regulatory approval of the Society's Rules be removed?***

**Responses: 44 (Agree = 54.5%, Disagree = 25.0%, Not sure = 20.5%)**

There was general agreement that to protect the public interest, the Law Society of Yukon's rules should not be subject to government oversight.

- "Independence from government is one of the principal cornerstones of the legal profession. To require government approval of the Law Society's Rules is inconsistent with that principle and opens the door to potential political interference or manipulation."
- "There should be no positive requirement for government regulatory approval. However, the government could reasonably preserve its authority to disallow amendments to the Society's Rules that it considers to be contrary to the public interest, within a specified number of days from the day the Rule amendments are filed with the government."
- "Government controls the legislation (in the interest of the public), the Society should control the rules, since we are a self-governing profession."

- “Travelling across Canada to various Provinces it is obvious that each Law Society has different rules to follow. If I had my way there would be a Federal regulatory approval of the all Society's Rules. Law Society's don't always appear to take the Public interest into consideration.”
- “Government regulatory approval provides an effective and appropriate check and balance for the purpose of public protection. If the profession wants the continued protection of legislation, it should accept the responsibility of public/legislative scrutiny.”
- “Independent bodies like the Law Society, which supposedly plays such a key role in public society, should have rules that are subject to the approval of an elected government. The government has an interest in ensuring that the rules are fair and provide for the public interest. Examples would include dealing with complaints of sexual harassment.”

***Q. Should an updated Legal Profession Act include a broad definition of the provision of legal services and set out which categories of members can engage in the full provision of those services (lawyers, law firms, law corporations) and which may engage in a more limited scope of service (paralegals, Aboriginal Court Workers)?***

**Responses: 45 (Agree = 71.1%, Disagree = 11.1%, Not sure = 17.8%)**

Most respondents tended to agree that there are benefits to allowing for alternative service providers to provide a more limited scope of legal services, so long as those services are clearly outlined and regulated fairly.

- “Absolutely. It needs to be clearly outlined the level of service paralegals and Court workers can or cannot provide. These details also protect Yukon public.”
- “This would improve access to justice (i.e. paralegals and court workers who can provide services), while ensuring oversight of the provision of those services. It will also assist other professionals to better understand what services they can and cannot provide. The Law Society has the necessary mechanisms in place to oversee the provision of a limited scope services, so it makes sense to continue to do so.”
- “There are significant concerns with limited scope practitioners. First is the provision of services. What training will they have? Why should lawyers manage non-lawyers? Allowing for an increase in the use of paralegals will decrease work available to lawyers, which will eventually lead to loss of access to justice. While allowing paralegals in large markets like B.C. to practice law, Yukon is not a large enough jurisdiction to allow for paralegals to do wills, estates and real estate. To ensure a vibrant bar, the use of paralegals must be limited. Aboriginal court workers and other justice workers should be allowed to provide for greater access to justice however, as this does not limit access to justice as paralegals would, but expands it.”

***Q. Do you think that the Law Society should be able to stop someone who is not authorized from practicing law without also having to charge that person with an offence?***

**Responses: 45 (Agree = 66.7%, Disagree = 26.7%, Not sure = 6.6%)**

Most respondents were in favour of allowing the Society to seek an injunction or interim order to suspend or put conditions on a member's practice before or in lieu of laying a charge, while an investigation of that member's practice can take place.

- "The alternative of charging someone with an offence is presumably a more cumbersome, inefficient and likely unnecessary step if the same result can be achieved through administrative processes."
- "Yes for expediency and flexibility but prosecution should still be a concurrent option for deterrence."
- "Charging a person with an offence can be a heavy-handed remedy. Instead, enabling the Law Society to go to the Supreme Court to obtain an injunction against unauthorized practice, including provisions for obtaining costs, could serve as an equally effective deterrence. Further, the burden of proof in prosecuting an offence could impose an unnecessary impediment to protecting the public interest in respect of what may be essentially a civil issue. Since offences must be prosecuted by the government, the Law Society's independent role as the regulator and protector of the public interest may also be compromised."
- "Enforcing the law is up to the government, not the Law Society."
- "I think that especially in Yukon it is important that members of the public be made aware of a member's breach of his or her right to practice law."

***Q. If a person is charged with an offence, should each day that an offence is committed constitute a separate finable offence up to a maximum of \$250,000?***

**Responses: 45 (Yes = 42.2%, No = 22.2%, Not sure = 35.6%)**

Responses to this question were quite varied, but in almost all cases noted that fines should be updated to provide a stronger deterrent for unauthorized practice.

- "Discretion is necessary to allow flexibility depending on the circumstances. It is not difficult to envision circumstances where tying enforcement to a "day by day" offence structure may not be suitable (why not lay a charge for each hour, or each minute - daily charges are arbitrary). Same goes for maximum fines of \$250,000 - in most cases this would be sufficient, but it is not too difficult to envision circumstances where this would not be adequate. Perhaps a maximum fine equivalent to a multiple of the cost arising from the unauthorized practice would be a better idea (i.e. 150% or 200% of the cost occasioned by the unauthorized practitioner)."
- "I believe each day should be considered, however the maximum may well be rather high in a per diem type of situation. I believe one off maximums or lower per diems may be more appropriate."
- "Having such a high maximum fine on daily commissions of an offence might in theory stand as a deterrence to commission of the offence, but it would be extremely unlikely that a court would levy such a high fine, except in the most extreme cases. Depending on the kind of legal services involved and the fee potential of such services, a would-be offender might simply consider the risk of a fine as the cost of doing business. Moreover, prosecution of an offence can be a long, drawn-out process that does not adequately address the potential harm to the public that could occur due to an unauthorized lawyer continuing to practice in the Yukon pending the

prosecution. Allowing the Law Society to obtain a Supreme Court injunction is a swifter and potentially more potent remedy, including proceedings for contempt in the face of a breach of the injunction.”

***Q. Should the Act differentiate between issues of member competence and issues of capacity outside of the formal complaint process, where mental health issues or addictions impact a member’s ability to practice?***

**Responses: 45 (Yes = 60.0%, No = 17.8%, Not sure = 22.2%)**

The majority of responses agreed that matter of incompetence and matters of incapacity should be dealt with differently, though there were some respondents felt that an investigation is always appropriate in these matters, but that remedies should be different for dealing with incapacity.

- “Nobody knows the future and have full control over mental health. It needs to be able to provide time for the person to get the support needed to solve the issue and get back their capacity.”
- “It is important for the profession to be at least as supportive as it is disciplinary. Lawyers are people too - and as we all know, they have their own challenges with mental health and addictions. Again, flexibility and discretion are necessary.”
- “This will hopefully reduce the fear of sanction and encourage members to be proactive and forthcoming about issues of mental health and addictions that impact their ability to practice.”
- “The public interest isn't served if addictions or mental health are handled through a separate process. A complaint will initiate an investigation. If that investigation discloses an addictions or mental health issue, the Law Society should have the ability to divert that issue through alternative sentencing provisions.”

***Q. Do you have any further comments or questions regarding an updated Legal Profession Act that you would like to relay to the Department of Justice?***

- “Practicing Law is a profession first, and a business second - period. As a consequence of receiving statutory protections provided by society through its legislators, lawyers have a reciprocal obligation to provide public service that is accessible to everyone with a need to access justice. To the extent that lawyers make themselves inaccessible to the public, typically through the amount charged for fees, they deny the public justice and increase the need for alternate services (i.e. paralegals) - a trend that could eventually make them less and less relevant to society and the justice system.”
- “The Legal Profession Act should be overseen by the Department of Justice otherwise you have a body of "citizens" which changes over time that have governing power. This can, without intention, dilute the enforcement of regulations based on the approach taken by the individuals around the table. There are usually "loopholes" to be found in any Regulations.”
- “Unauthorized practice by Outside lawyers is a persistent and pernicious problem that the Law Society is not equipped to deal with, apart from referring complaints to offending lawyers' home law societies. Some mechanism needs to be put into the Act whereby lawyers practicing law in

the Yukon, even remotely, are deemed to submit to the jurisdiction of the Law Society for the purpose of disciplinary or other regulatory issues.”

### **How will my input make a difference?**

We spoke to you, the public, and we also spoke to members of the Law Society of Yukon, stakeholders in the legal profession, Government of Yukon’s Legal Services branch, non-governmental organizations, First Nations and other jurisdictions using a variety of methods. We gathered all of this information and wrote this report summarizing what you told us.

This process has allowed the Government of Yukon to either confirm public acceptability in terms of policy direction and drafting instructions or to gain an idea of where our proposed direction requires further review or analysis.

While some issues only affect a certain scenario, a small segment of the population or a specific stakeholder, other issues of greater public and stakeholder importance affect an array of provisions throughout the Act. Where possible, the department has approached certain stakeholders with questions regarding very specific provisions or sections of the draft Bill, while the public survey/discussion document contemplates issues that are of concern to a broader audience in how they access legal services.

### **Engagement process - How we engaged**

#### *Engagement Stream 1 – Regular meeting with primary stakeholder*

The Department of Justice’s Policy and Communications Unit began engaging regularly with the Law Society of Yukon with meetings occurring as required between June and September. The meetings were spent reviewing policy issues and developing drafting instructions. Once drafts of the new Act, became available, the legislative drafter began attending meetings to provide input and rationale and to receive updated instructions based on the discussions.

#### *Engagement Stream 2 – targeted invitation for comments and/or meetings*

Letters from the Minister of Justice dated August 8, 2017 went out to legal stakeholders and Yukon First Nations with an attached discussion document inviting comments, completion of the questions contained in the discussion document and/or inviting them to meet with Department of Justice officials.

The department received several responses to the discussion document and also met with several groups from legal stakeholders in Yukon and met face to face or by conference call with the Yukon Law Foundation, the Council of Yukon First Nations and Tr’ondëk Hwëch’in.

#### *Engagement Stream 3 – public survey*

The discussion document used in engagement stream 2 was leveraged into an online public survey that ran from August 18, 2017 to September 11, 2017. Members of the public were also advised through a media release and social media that the survey could be completed by phone with Department of Justice staff.

## **What we learned from the process**

*Add something you learned about the actual public engagement process that you could have done differently. Were there any technical glitches? Did you pick the right venues? Should you have given people more time? Was the survey easy to complete? Summarize participant evaluation of the public engagement process.*

Originally, the Department of Justice had planned on engaging with legal stakeholders through two distinct stakeholder groups: the above-mentioned drafting advisory group (Government of Yukon and the Law Society of Yukon) and a stakeholder advisory group with invitees such as the Law Foundation, the Canadian Bar Association, the Yukon Public Legal Education Association, The Yukon Legal Services Society, the Yukon Chamber of Commerce and Yukon First Nations.

In July, the decision was made to scrap the stakeholder advisory group in favour of more targeted, individualized engagement opportunities with the above-noted stakeholders. This involved letters from the Minister attached to the discussion document and survey and invitations to meet with departmental staff regarding the drafting of the new *Legal Profession Act*.

We believe this change in course allowed us to have more in-depth dialogue and receive better, responses from those stakeholders with concerns or opinions relating to the proposed changes to the Act.

The public survey ran for just over three weeks and we received 45 responses from the public and targeted stakeholders who completed the survey. The department did receive some comments that the engagement period could have been longer and that some of the survey questions could have been more clearly articulated.

Though the department did its best to pose questions that would be of public relevance, the nature of the subject matter was such that those without at least some degree of knowledge regarding legal proceedings and the provision of legal services, would have potentially had trouble articulating responses.

Under ideal circumstances, a longer engagement period and more care given to establishing plain-language survey questions could have enhanced the number of responses received during engagement activities.

For its part, the drafting advisory committee was an excellent venue for debate and negotiation with the Law Society of Yukon and allowed for drafting instructions to be refined and put into action in a manner that suited project timelines.