



NOVA SCOTIA  
BARRISTERS' SOCIETY

## NSBS SEEKS YOUR ASSISTANCE

### Transforming Regulation – Consultation Document

#### Why do we need to talk about transforming regulation?

The legal profession is in the midst of a period of dramatic and profound change. For some it feels chaotic and destructive of traditional professional norms, while for others it is a time of great advancement and opportunity. It is clear that these changes are happening and will happen whether the Society, as the regulator, leads or follows and whether lawyers embrace or try to avoid them.

Consider the following:

1. **The impact of technology on the profession** – access to legal information and products online, virtual law practices, non-lawyer provision of legal information and services;
2. Client empowerment arising from the **unbundling of legal services**, and demands for increased value from legal services at lower cost;
3. **Changes in law firm structures** and ownership around the world, such as multidisciplinary practices and alternate business structures;
4. **Changes in the regulation of the legal profession around the world**, which have shifted focus to risk-based, proactive and appropriate management system-based regimes rather than one-size-fits-all, rules-based models;
5. **Increasing numbers of corporate and in-house counsel** as an alternative to outsourcing legal work;
6. **Globalization of the legal services market**;
7. **Legal process outsourcing** such as document production to firms outside the country in order to reduce costs;
8. Significant **focus on the crisis in access to justice** and access to affordable legal services;
9. **Changing demographics** and an aging population, including lawyers; and
10. A likely change in legal education now made obvious by **the decline in the number of law school applicants**,

According to Society President, J. René Gallant, “In the face of change all around us, we haven’t really changed the way that we regulate lawyers ... . In spite of much change in how and where lawyers practise and why people need lawyers, our method of regulation has not evolved on pace with the advancement of technology or of government, civil and commercial interactions.” Others have said more pointedly that despite all these changes in the profession, we continue to regulate lawyers in essentially the same way as we have for many generations.

For this reason, Council established an ambitious Strategic Framework<sup>1</sup> in 2013, calling for action in relation to two specific Strategic Priorities:

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<sup>1</sup> <http://nsbs.org/sites/default/files/cms/menu-pdf/strategicframework.pdf>

- Transforming regulation and governance in the public interest, and
- Enhancing access to legal services and the justice system for all Nova Scotians.

An essential component of the plans Council has approved in order to advance these Strategic Priorities is meaningful, transparent and deliberate engagement with lawyers, stakeholders and others impacted by regulation of the legal profession. Effective consultation in relation to these priorities is critical to the design and success of any changes in regulation of the profession.

### **What steps has Council taken to date?**

Council adopted its Strategic Framework in May 2013, and approved a work plan in July. Significant research conducted since then has included an environmental scan of issues impacting the legal profession, and new models of regulation designed to embrace and support lawyers in the face of changes impacting the profession and the public interest. The research paper, entitled "[Transforming Regulation and Governance in the Public Interest](#)," is available on the Society's website<sup>2</sup>, along with a [Summary](#) version. It was prepared by Victoria Rees, Director of Professional Responsibility.

Council has discussed the changing legal landscape and the implications for the profession; fully explored the concept of 'public interest' and the role of the regulator; considered the best practices regulatory models identified in the research; and has reached a preliminary consensus on what regulatory best practices might be appropriate for the Nova Scotia context in light of the need to adapt to significant change while continuing to protect the public interest.

Council has focused on the following questions:

- Why do we regulate lawyers?
- What is it that we regulate?
- Who should we regulate?
- When and how should we regulate?

In November, Council approved the next steps to advance this work. Council agreed that the Society, acting in the public interest, will strive to develop a proactive, risk-focused and principles-based regulatory regime. It will "examine the feasibility and options for transforming regulation [and] focus on results rather than rules; empowerment rather than obligation; accountability rather than fault. We will seek out an outcomes-focused approach that reduces the burden of regulation while protecting the public interest<sup>3</sup>."

Council recognizes the importance of remaining grounded when considering regulatory changes. To date, discussions have commenced with firms both large and small, county bar associations, Nova Scotia Legal Aid, the Public Prosecution Service, the Department of Justice, the Judiciary and others. Thus far, responses from lawyers and others involved in the administration of justice have been positive and supportive, encouraging the Society to continue on the path toward transformation.

The next steps in this process focus on meaningful and deliberate engagement with a broader spectrum of lawyers and the public who may be impacted by transformation of the regulatory regime for the legal profession. Three Working Groups are addressing the priority issues:

1. Defining the Society's regulatory objectives;
2. Establishing principles for regulation, and desired outcomes for lawyers and firms acting in the public interest, in the areas of client (trust) account oversight, and law firm regulation; and
3. Developing a comprehensive risk-management process for the Society as an organization.

<sup>2</sup> [http://nsbs.org/sites/default/files/ftp/RptsCouncil/2013-10-30\\_transformingregulation.pdf](http://nsbs.org/sites/default/files/ftp/RptsCouncil/2013-10-30_transformingregulation.pdf)

<sup>3</sup> J. René Gallant, President,

## What does a proactive, risk-focused, and principles-based regulatory regime look like?

Currently, the Society regulates the legal profession generally by creating and enforcing detailed rules and regulations that try to capture every permutation and combination of tasks and responsibilities for **individual lawyers**. With the dramatic changes in the way law is practised, some suggest this has become an impossible task because, in part, it fails to recognize that today, many decisions are made and services provided by **law firms**, rather than individual lawyers. Further, more lawyers now practise in environments – such as large corporate legal departments – that are not contemplated by the traditional one-size-fits-all, rules-based approach.

Regulators also tend to react to situations as they arise, rather than investing resources in trying to identify risk to prevent problems before they arise. The Society's complaints process is one example: despite statistics showing that sole practitioners are consistently at highest risk of practice problems and crises leading to complaints, very few resources are devoted to addressing these problems before they arise, missing the opportunity to better protect the public and clients and provide support to such lawyers.

Finally, lawyers often ask:

- “Why am I required to do this?”
- “How does this actually protect the public?”
- “Why are large law firms and sole practitioners required to adhere to the same operational regulations?”

Annual trust account reports are a good example of the traditional one-size-fits all model of regulation. Every law firm and sole practitioner is required to complete the same detailed checklist confirming adherence to the Society's very detailed Trust Account Regulations, regardless of whether a firm processes five trust cheques per month or five hundred. With many changes in how business and banking are now conducted, this process fails to adequately address and avoid risks.

A proactive, risk-focused, principles-based regulatory regime should include:

- Clear regulatory objectives to which all regulatory requirements and Society programs are closely tied.
- Simplified regulations based on principles rather than details, to reduce regulatory burden and give firms the ability to adopt different ways to achieve principles-based goals, based on the context and nature of their practice and clientele. For example, adopting the principle that law firms are responsible for ensuring that client trust monies and property are properly handled, recorded and protected, and eliminating the current detailed regulations respecting deposit and, withdrawal of trust monies, and maintenance of specific books, records and accounts. The *Code of Professional Conduct*, and many of the current Practice Standards (real estate, family, law office management) are examples of principles-based regulation.
- A proactive approach to regulation through education and engagement with firms, development of appropriate management systems for firms, and the provision of tools and training to help firms of all sizes achieve regulatory objectives, and to practise ethically and competently in the public interest. This would include helping law firms put client management and quality control systems in place, which would reduce future quality of service complaints and professional liability insurance claims.
- A regulatory regime that creates opportunities for new ways to practise law and provide legal information and services, thereby enhancing public access to affordable legal services and helping lawyers reframe their role in the changing legal services marketplace. This could include permitting expansion of legal information and services provision by paralegals under appropriate circumstances, permitting firms to work in collaboration with other professionals, and giving virtual law firms the tools for success.

- A risk-based focus as the framework and foundation for all regulatory requirements and activities. By clearly identifying actual and foreseeable risks to the public, the profession and the Society itself, the Society can better regulate in a way that focuses resources on areas of greater risk. For example, some firms will be better positioned to demonstrate early on that they have adopted appropriate management systems, while others will require more time and assistance. The Society's efforts and resources would therefore be more focused on those firms requiring assistance in achieving regulatory goals, whether through voluntary compliance or enforcement measures.

### **Impact the Society's budget and annual fees in future**

Considerable time over the past three years has been devoted to ensuring that Society operations are efficient and cost-effective. Any changes to the regulatory regime should have little long-term impact on the Society's budget or fees

### **How can you help?**

As stated at the outset, Council has committed to meaningful, transparent and deliberate engagement with lawyers and stakeholders as it researches and designs its proposal for a new regulatory regime. Council needs your support and input in order to achieve the goal of protecting the public interest in developing a proactive, risk-focused and principles-based regulatory regime.

We invite your comments on anything that is part of the current discussion. The online tool below will enable you to offer general comments or reply to specific questions.

**Transforming Regulation Survey:** <https://www.surveymonkey.com/s/ZVPTF2C>

We appreciate your taking the time to provide us with your feedback and information as we pursue this important work of the Society to ensure that our regulatory model is the most appropriate for the public and the profession in 2014 and well into the future.