

Tab 3

Report to Convocation September 28, 2023

Strategic Planning and Advisory Committee

Committee Members:

Jacqueline Horvat (Chair)
Cathy Banning
Gerald Chan
Atrisha Lewis
Michelle Lomazzo
Genevieve Painchaud
Jonathan Rosenthal
Megan Shortreed
Cheryl Siran
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Purpose of Report: Decision

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Law Society
of Ontario

Barreau
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Tab 3.1

Strategic Planning and Advisory Committee

Policy on Bencher Information Requests

September 28, 2023

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Motion

That on the recommendation of the Strategic Planning and Advisory Committee, Convocation approve the policy on bencher information requests set out in this report.

Background

In 2022, the Treasurer appointed an advisory group of benchers and management¹ to develop a policy for responding to bencher requests for information that is not readily available through the Committee and Convocation process and discussions, and to report to the Committee with their proposal. The advisory group prepared a policy for the Committee's review that defines a process and provides direction to the Law Society for managing these requests. The Committee reviewed and considered the policy and recommends that Convocation approve the policy set out in the report.

Benchers' Entitlement and Access to Information

Benchers fulfill a number of roles at the Law Society. Under the *Law Society Act*, they are the individuals who govern the affairs of the Law Society, a corporate entity. As such, they fulfill the role of directors and have fiduciary obligations and a duty of care respecting the Law Society. As policy makers, they make decisions for the regulation of the legal professions and create legislation (regulations and by-laws) as part of that work. If they are adjudicators, they fulfill review and decision making functions as members of the Law Society Tribunal.

Benchers require information to perform their roles as governors including their oversight and fiduciary obligations to the organization. Law Society management supports benchers' work to ensure that they receive relevant and appropriate information at the right time and in the right format to perform their duties. The information benchers routinely receive or have access to in this respect includes the following:

- Committee materials;

¹ Members of the Advisory Group are Robert Adourian, Andrew Spurgeon, Diana Miles and Elliot Spears. Cathy Corsetti and Seymour Epstein, who completed their bencher terms in May and July 2023 respectively, also served on the Group.

- Convocation materials (reports for decision and information, both public and *in camera*) including reports from management, typically through the CEO (both in public and *in camera*);
- Convocation minutes and transcripts (both public and *in camera*);
- Additional supporting and educational resources posted in the benchers resource centre;
- Information about major policy or other initiatives through oral or written briefings including at scheduled benchers information sessions.

Committee materials include but are not limited to policy development reports, research, the results of surveys or consultation, detailed budgetary information, financial reports and related documents, updates on strategic initiatives, operational division or program reports and updates from stakeholders.

For benchers' oversight role and in the exercise of their fiduciary and duty of care obligations, their entitlement to information is akin to that of a corporate director. Otherwise, in their policy making role, benchers require information to make informed decisions on regulatory and related policy matters. In their adjudicative role, benchers receive information within a hearing process that accords with disclosure of information and procedural rules for administrative tribunal decision making.

The Law Society's governance structure, with committees of the board supporting benchers' oversight and policy making functions, enables the availability of wide-ranging and comprehensive information to benchers. It provides opportunities for benchers to engage in a committee setting, under the leadership of the committee chair, and ask for and discuss information to ensure that they have what they need to fulfill their roles, or to ask questions in Convocation through the Treasurer related to reports before the meeting. It also encourages discipline in deciding what is required for decision making to ensure that Law Society resources and the experienced members of management who support benchers work are utilized appropriately.²

² The Law Society's Governance Practices and Policies provide:

55. The Chair is to ensure that planning for the meeting's agenda takes into account the time needed by Law Society management to adequately and appropriately prepare materials for the meeting.

...

57. The Chair is responsible for ensuring that

- a. materials for committee deliberations are appropriate for their purpose and include an appropriate level of detail to permit informed discussion;
- b. reports to Convocation are provided at regular intervals;
- c. matters for Convocation's decision include a motion that is clear in its meaning and purpose;
- d. reports include an appropriate level of detail to permit informed decision-making; and
- e. reports include, where appropriate, a range of options for each matter recommended for approval together with the implications thereof.

Considerations in Framing a Policy

Based on the above, in framing a policy on how to respond to benchers requests for information based on the work of the advisory group, the Committee considered:

- The Law Society's obligations with respect to providing information to benchers;
- The scope of Law Society information that benchers require to do their work and perform their functions;
- The person(s) who should be responsible for dealing with requests and the exercise of discretion under the policy;
- Resource implications related to applying the policy in fulfilling requests, as fulfilling a request may have significant time and resource impacts for management and employees, going beyond and affecting attention to important day-to day responsibilities;
- Circumstances where there is disagreement with how the policy is applied and a process to deal with that;
- Positioning the policy once approved within the Law Society's Governance Practices and Policies.

The Committee reviewed one example of a process to address information requests, based on the advisory group's research, from the municipal council context, found in the Toronto Municipal Code Chapter 27, Council Procedures, Article 7 - § 27-7.11:

§ 27-7.11. Administrative inquiries and answers.

A. How a Member makes an administrative inquiry.³

(1) A member who wants information about the affairs of the City must:

(a) make an administrative inquiry in writing; and

(b) deliver it to the Clerk at least seven business days before the Council meeting.

(2) The relevant City official answers the administrative inquiry in writing and delivers the answer to the Clerk at least one hour before the Council meeting.

(3) The Clerk distributes the answer to members before the start of the Council meeting or reads the answer to Council.

³ Administrative Inquiry - A Member's inquiry seeking information relating to City business.

(4) Despite Subsection A(2), a City official may decide that the answer to an administrative inquiry requires work that exceeds the normal duties of their staff.

(5) If Subsection A(4) applies, the City official informs Council of that decision in a written letter to the Clerk at least one hour before the meeting and the Clerk distributes the letter to members before the Council meeting starts.

B. How Council responds to an administrative inquiry.

(1) If, in response to an administrative inquiry, a City official has told Council that the work of answering the inquiry exceeds normal duties, Council, without debate, may vote on whether the City official should answer the administrative inquiry.

(2) Council receives, or refers to the appropriate Council Committee, all administrative inquiries and answers, without debate.

Context for a Policy – Information and Appropriate Purpose

Through its regular and ongoing support of benchers' oversight and policy making functions, as described, management meets benchers' information requirements by utilizing readily available and existing information and information collected through consultation or research at the direction of committees or Convocation. This will encompass relevant operational information that benchers require to assess risks and benefits, costs or other impacts, including those that may arise when reviewing a proposed policy direction or decision. Management is also sensitive to and responds to the 'information gap' some benchers may experience given the complexities of the Law Society.

These efforts are necessary and meet two related objectives – ensuring that benchers are able to fulfill their appropriate fiduciary, duty of care, oversight and policy decision making responsibilities as governors of the Law Society, and ensuring that corporate purpose is fulfilled through the leadership of Convocation in accordance with the legislative mandate and Convocation's strategic priorities derived from the mandate. Benchers' and management's responsibilities in this framework help to foster a productive and effective board/management relationship that benefits the work of the organization.

As governors, benchers should understand and respect the line between information that is required for the appropriate purpose of their governance responsibilities and information that is

extraneous to that purpose.⁴ The proposed policy is intended to help guide and manage bencher requests for information other than that actively and regularly provided to benchers to meet the appropriate purpose described. The policy defines a process and provides direction to the Law Society for managing these requests.

The Policy

The policy would be engaged where a bencher does not receive information requested.

The following is the proposed policy, which incorporates the process for dealing with requests for information:

1. Information that is requested by a bencher must be directly related to a bencher's appropriate duty as a governor of the Law Society and reasonably required to fulfill their current oversight or policy making responsibilities and be used for such purposes.

⁴ The following from *20 Questions Directors of Not-for-Profit Organizations Should Ask About Director's Duties* published by CPA Canada provides some insight into this issue:

10. How knowledgeable do directors have to be in order to discharge their duties?

The law does not require directors to be experts. While directors of not-for-profit organizations owe a duty of care, it is not realistic to expect directors to understand in detail all of the operations, laws and government policies affecting the organization. However, directors *should* be well-informed.

...

The courts recognize that directors must be guided by what is referred to as the "business judgment rule." They look to see that the directors made a *reasonable* decision, not a *perfect* one. In coming to a decision, directors must show that they acted prudently and on a reasonably informed basis.

As a result, directors should:

- have a general knowledge of what laws affect that type of organization
- inform themselves about the governance model and structure of the organization, what the organization does, how it does it and who its beneficiaries are

The following guidelines have been established by the courts:

- Directors are not liable for mere errors of judgment.
- Directors are not required to give continuous attention to the organization's affairs.
- The directors' responsibilities are intermittent and performed at periodic board and committee meetings.
- Directors need not attend all board meetings.
- Directors may entrust certain matters of business to officers of the organization.
- Where there are no grounds for suspicion, directors are justified in trusting that officers of the organization will perform their duties honestly.

Policy on Bencher Information Requests

2. The request for information is to be made on a form provided by the Law Society and submitted to the Treasurer's office. The request is to include detailed particulars of the information and how the information aligns with the requirements of paragraph 1.
3. The Treasurer will consult with the CEO about the request, consider information from the CEO on the scope of the work and associated costs reasonably necessary to fulfill the request and make a determination in their discretion on the request.
4. If the Treasurer denies a request on the basis that it does not meet the requirements of paragraph 1, the bencher making the request may refer the matter to Convocation (*in camera*) and Convocation is to decide whether the request should be fulfilled.
5. In any case, if responding to the request would, based on the CEO's assessment, exceed the normal duties of employees assigned for this purpose, the Treasurer shall refer the matter to Convocation (*in camera*) and Convocation is to decide whether the request should be fulfilled.
6. In making a decision under paragraph 4 or 5, Convocation is to consider
 - a. the requirements of paragraph 1,
 - b. the scope of the work and associated costs reasonably necessary to fulfill the request, and
 - c. the CEO's assessment described in paragraph 5, as applicable.
7. Information provided in response to a bencher's request for information will be provided to all benchers.
8. Information provided in response to a bencher's request for information remains confidential to the Law Society subject to Convocation's authority to make it public.

Once adopted by Convocation, the policy will form part of the Law Society's Governance Practices and Policies.