Harry Cayton
Professional Regulation and Governance

Report of a Governance Review of the Law Society of British Columbia

November 2021

'While there is no immediate threat to the self-regulation of the legal profession in British Columbia the Task Force believes that in order to maintain that privilege the Benchers must ensure the public interest comes first and this requires the best possible governance framework.'

Final Report of the Governance Review Taskforce; Recommendations and Results
Law Society of British Columbia, November 2012

'A legal profession that is incapable of achieving outcomes that resonate with what society expects is one in which the public will eventually lose confidence.'

Anticipating Changes in the Delivery of Legal Services and the Legal Profession:
The Final Report of the Futures Task Force.
The Law Society of British Columbia, September 2020

Dean Lawton QC
President
The Law Society of British Columbia
845 Cambie Street
Vancouver, BC

25th November 2021

Dear President,

I am pleased to submit the report of my review of the governance of the Law Society.[1] I have set out my observations on how the governance structures, policies and procedures of the Society help or hinder the ability of the Benchers and the staff team to deliver the Society's objectives as a legal regulator. I have assessed the Society's governance in practise against the Standards of Good Governance and found both strengths and weaknesses. I have made recommendations for improvements.

It has been a privilege, as I have made my enquiries, to have met and listened to so many thoughtful, informed, committed and engaged people, both Benchers and members of staff. Everyone has been unfailingly helpful, open and responsive to my questions and they have readily supplied written comments and papers too. I have greatly enjoyed my discussions with many people, and I have listened with interest to the discussions around the Bencher's table.

I must in particular thank Madeleine Holm-Porter, Senior Executive Assistant, who has managed all my requests, meeting arrangements and time zone adjustments with consummate efficiency. Also, Adam Whitcombe QC, Deputy Chief Executive, who has explained the more obscure parts of the Society's legislation and rules and directed me to where I could find documentation or the right person to consult.

I should make clear though that despite the valuable information and insights I have gained from many people the conclusions in this report are mine and mine alone.

I have a personal wish; I have observed in this report that the instinct of the Benchers when ever faced with new issues is to set up a working group. My request is that you do not set up a working group to consider this report. The Benchers should discuss it, accept it in full, or in part, or reject it. If they accept it, they should ask the executive team to assess the practical implications of the recommendations and to present to the Benchers a programme of work for their implementation or not. I would rather the recommendations in this report were rejected than that they are referred to a working group subsequently to die by a thousand cuts over a period of time as I observe previous governance reviews have done. I recognise that this is of course a matter for the Society.

Harry Cayton

[1] In this report the Law Society of British Columbia is referred to as 'the Law Society' or the 'Society'

Contents

1. Executive Summary 4

2. How this review was conducted 5

3. The Law Society's governance framework 6

4. Effective and efficient governance 8

5. The Law Society's governance as practised 13

6. Assessment against the Standards of Good Governance 21

7. Recommendations 27

8. Conclusions 30

Appendix 1 The Standards of Good Governance

Appendix 2 List of Committees, Working Groups and Taskforces

Appendix 3 List of people who contributed to this review

Annex 1 A Checklist for Regulatory Boards

Annex 2 Sample Board Effectiveness Survey

1. Executive Summary

1.1 The Law Society of British Columbia commissioned a review of its governance and this report sets out the findings of that review. The review was conducted between July and November 2021.

1.2 The terms of reference of the review were to consider the Society's governance structure; the extent to which the governance structure supports or inhibits the Law Society's ability to deliver its purpose and functions; how it supports equality, diversity and inclusivity; to assess the governance structure against the Standards of Good Governance and to make recommendations. This is therefore a governance review not a review of the Society's performance as a regulator.

1.3 The review finds that the legal framework within which the Law Society operates is not fit for a modern regulatory body and that it hampers the Law Society's Benchers in fulfilling their responsibilities. In particular, the power of the members to elect the Benchers and to overrule them and to stop changes to the Society's rules means that the Society acts more like a professional association than a professional regulator.

1.4 The review finds that the multiple roles which Benchers are required, or have chosen, to fill results in inevitable conflicts of interest.

1.5 The review finds that the number of Benchers is too many for effective and efficient decision-making, that there are too many committees and groups and that their roles and accountabilities are unclear.

1.6 The review finds that there is a lack of engagement with regulatory matters and that the Society is too involved in responding to the interests of the legal profession.

1.7 The review assessed the Law Society's governance against the Standards of Good Governance. The Society meets four of the nine Standards, partially meets three and does not meet two. This is an acceptable result on a first assessment as the Standards are intentionally demanding.

1.8 The review finds that the Law Society's governance has strengths in its comprehensive governance policies and procedures, its commitment to equity and diversity and truth and reconciliation, its corporate behaviour and respectful discussion of issues and the positive relationship between the Benchers and the executive team. It finds weaknesses in conflicts of interest, lack of focus on regulatory matters, measurement of outcomes and lack of engagement with the users of legal services and commitment to the public's interests.

1.9 Recommendations are made in this report relating to governance structures, membership and elections, reducing conflicts of interest, management of risks of harm and the efficiency and effectiveness of governance.

2. How this review was conducted

2.1 Owing to the restrictions on travel and personal contact imposed because of the global pandemic this review was conducted without the level of direct engagement with, and observation of, the Society's work that would normally be possible and desirable. Despite this, with great cooperation and flexibility on the part of the Society's executive team and its Benchers and with extensive use of virtual communication, I believe that the information gathered and the conclusions drawn from it, are well-founded and fair.

2.2 The terms of reference of the review were to:

- consider the governance structure and relationships between its constituents parts;
- consider the extent to which the governance structure supports or inhibits the LSBC's ability to deliver its purpose and functions and in particular how it supports equality, diversity and inclusivity;
- assess the governance structure against the standards of Good Governance; and
- deliver a report setting out the matters listed above and making recommendations as to areas where its governance structure may be improved to achieve its purpose and functions.

2.3 The information on which this review of governance is based comes from four main sources. The Society's founding legislation[2] and its rules (bylaws); internal codes of conduct, procedures and policies including terms of reference for committees; from observation of meetings, reading the minutes of meetings and of reports to the benchers and face to face discussions with Benchers and senior executives. For the purpose of this report I have used the terms 'non-executive directors' to distinguish the oversight role of Benchers from the 'executive directors,' that is the senior staff responsible for operations. When I am referring to the Executive Committee, I use that title in full.

2.4 I am grateful to the 33 people who agreed to be interviewed during this review and to speak to me about their experience of and views about the governance of the Society. The perspectives they gave me were valuable, combined with my reading and observation of meetings, in helping me to form a picture of how the Society's governance operates in practice. Their views of course differed from each other's on many matters so the conclusions in this report are mine and mine alone. I hope however that many of those who helped me will see their insights and ideas reflected here. The names of those who spoke to me or provided written opinions are in Appendix 2.

2.5 I was given access to all published documents and reports and through the member portal on the website to all the internal documents that I needed. All my questions were answered promptly and helpfully by members of the executive team as necessary. The Benchers were entirely open to scrutiny including allowing me to observe an *in camera* meeting.

2.6 I had of course limited opportunity to observe meetings. This was due to the timing of the review across the summer months, the way in which the Society organises its

[2] Legal Profession Act [SBC 1998]

meetings and the consequences of time zone differences. I am however grateful to the Benchers for allowing me to observe two of their meetings and also to the chairs and members of the Executive Committee and Access to Justice Committee for giving me access to recordings. I also observed the Annual General Meeting in October 2021.

2.7 This review was commissioned in July and took place between July and November 2021. A draft report was submitted in October. Following consideration of comments on the draft and a meeting and discussion and further comments from the Executive Committee in November a final report was presented to Benchers in December of the same year.

2.8 This is a governance review not a performance review. I have not assessed the performance of the Law Society as a regulator; I have not made a judgement as to how well it actually upholds and protects the public interest or sets standards for lawyers in BC or investigates and disciplines those who fall short of its standards. Nor do I come to a conclusion on the effectiveness and efficiency with which it collects, protects and directs its resources.

2.9 What I do make a judgment on, as I was asked to do, is how its governance processes comply with the Standards of Good Governance and how the Society's governance structure and the way in which the Society uses that structure and organises itself within that structure, helps or hinders the delivery of its mandate, independently, ethically, competently and transparently, as the diverse citizens of British Columbia, who gave it that mandate, have a right to expect. I have made recommendations which I believe would enable it to fulfil its responsibilities with greater transparency and assurance and clearer focus on the public's interests (see 5.29 below). My judgements and recommendations are set out in Sections 6 and 7 below.

3. The Law Society's governance framework

3.1 *The Framework*

This is a selective description of the legal framework under which the Law Society operates. The governance documents of the Law Society are numerous and comprehensive, along with their interpretive guidance they fill many hundreds of pages. The documents cover the purpose and functions of the Society, its powers and the limitations to those powers, the arrangements for the selection of the people who govern and work for it, their duties and responsibilities and terms of office, the conduct of meetings, the conduct of people participating in those meetings or observing those meetings, the rules for resolutions, for voting, for the formation of committees, for the business of committees. One might imagine that in terms of governance no 't' has been left uncrossed and no 'i' undotted. So why then a governance review? Indeed, why a fourth governance review within 30 years? The answer perhaps lies in the Law Society's recognition that despite the legal profession's commitment to rules, to procedures, and to precedent, it is important to consider the future and to examine the outcome of governance not merely its inputs.

3.2 *Legislation*

It is worth quoting the object and duty of the Society as set out in the Legal Profession Act. It is against this object and duty that ultimately the competence of governance and the performance of the Society should be judged.

'*It is the object and duty of the society to uphold and protect the public interest in the administration of justice by*

(a) preserving and protecting the rights and freedoms of all persons,

(b) ensuring the independence, integrity, honour and competence of lawyers,

(c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,

(d) regulating the practice of law, and

(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.'[3]

3.3 *Law Society Rules*

The Society has an extensive set of rules - 397 in total. They cover the Benchers, the conduct of meetings, the procedures for elections and formation of committees, membership of the Society, including regulation of law firms and paralegals, international and interjurisdictional practice, admission, reinstatement and credentialing, fees, practice standards, complaints, education, indemnity, financial management and trusts, real estate practice, client identification, discipline, hearings, appeals, and legal partnerships and a number of other matters.

3.4 The Society has, fortunately, the ability to make or amend or rescind its own rules. Proposals relating to changing the rules are considered by the Act and Rules Committee before being recommended to the Benchers. There is no formal procedure for periodically considering the rules as a whole or for keeping them up to date although the Access to Justice Advisory Committee has consulted members of the legal profession on them[4]. Changes are made as and when a change in policy agreed by the Benchers requires it.

3.5 *Code of Professional Conduct*

The Code of Professional Conduct is 'guidance'. In other words it is not mandatory but exists to assist lawyers to interpret the rules, which are mandatory. However the Introduction to the Code is ambivalent in that while it says, 'The Code is published….for the *guidance* [my italics] of BC lawyers' it also refers to 'obligations on lawyers' and says that 'while the Code is not a formal part of the Law Society rules…it is an expression…of the standards the British Columbia lawyers *must* [my italics] meet.'[5] Furthermore the preamble to the Code describes its contents as 'rules' rather than

[3] Legal Professions Act, [SBC 1998] Chapter 9. 1.3
[4] https://www.lawsociety.bc.ca/our-initiatives/access-to-justice/access-to-justice-consultation/ 2021
[5] Introduction to the BC Code, LSBC, 2016

guidance. The formal status of the Code is therefore ambivalent as to whether it is rules or guidance but a wise lawyer will no doubt treat its contents with respect.

3.6 The Code covers an extensive range of topics divided into seven chapters and five appendices. To some extent these complement and explain the rules but they are different is structure and in scope. The Code deals with behavioural and ethical matters such as relationships with clients, quality of service, the importance of avoiding conflicts of interest and relationships with other lawyers, employees and students. These are matters of course where guidance is desirable as good personal conduct arises as much from values and judgement as from following rules.

3.7 *Members Manual*
The Members Manual helpfully provides registrants with copies of the Legal Profession Act, the Law Society Rules and the Code of Professional Conduct for British Columbia. It also gives details of the Lawyers Indemnity Policy provided through the Lawyers Indemnity Fund and of business insurance. It includes Articling Guidelines. The Members Manual is accessible on-line along with, currently, 29 amendment packages. A print version is available at the cost of $75 but members will then be responsible for downloading and printing the amendment packages as they appear.

Bencher Code of Conduct and New Bencher Orientation Pack

3.8 The New Bencher Orientation Pack which includes The Bencher Code of Conduct is given to all Benchers on their election or appointment. The pack is comprehensive including legal and financial responsibilities, the duties and requirements on Benchers and a wealth of practical information from seating during bencher meetings to how to log in to a virtual meeting. The New Benchers Orientation Pack stretches to 80 pages.

3.9 It may be judged from this brief overview that the governance framework of the Law Society is comprehensive, detailed and voluminous. It reaches from the lofty aspiration of 'the rights and freedoms of all persons' to the detail of expenses claims for the Benchers' annual retreat. Nothing it seems has been overlooked but the question for this review is whether the Society's studious commitment to law, rules, guidance, codes, polices, procedures and precedent add up to the outcomes mandated in the object and duty of the Society.

4. Effective and efficient governance

4.1 *The purpose of governance*
A great deal has been written about governance, not all of it helpful and not all of it clear. It may be useful therefore to consider two definitions of governance which I think are applicable in a regulatory context and to propose one of my own. The first is from the National Council of Voluntary Organisations in the UK; '*Governance is the systems and processes concerned with ensuring the overall direction, effectiveness, supervision and accountability of an organisation*'.[6] This definition has the merit of being brief and understandable, but it begs the question of exactly what 'systems and processes' constitute good governance.

[6] National Council of Voluntary Organisations. https://www.ncvo.org.uk/practical-support/information/governance

4.2. A fuller definition is given in the Journal, Not-for-Profit Governance; '*Non-profit governance has a dual focus: achieving the organization's social mission and the ensuring the organization is viable. Both responsibilities relate to fiduciary responsibility that a board of trustees (sometimes called directors, or Board, or Management Committee—the terms are interchangeable) has with respect to the exercise of authority over the explicit actions the organization takes. Public trust and accountability is an essential aspect of organizational viability, so it achieves the social mission in a way that is respected by those whom the organization serves and the society in which it is located'.*[7] The value of this definition is its focus on the dual role of governance in maintaining the viability of the organisation and also delivering its social role. Understanding of dual roles in the governance of professional regulators is one of the key challenges facing board members. (see paras 5.21-5.23 below) below. This definition goes on to highlight that 'public trust and accountability is an essential aspect of organisational viability'. In other words, the dual roles are linked; an effective well-run organisation builds trust and public trust contributes to viability. My proposed definition is that good governance is the effective, efficient, transparent and accountable delivery of an organisation's objectives thus creating confidence and trust in its members, clients and the public. Good governance is as much about outcomes and behaviours as structures.

4.3 *Separation of roles*
Understanding the roles of a professional regulator and of its governing body is an essential first step to effective governance. Many professional regulators in Canada have a dual mandate. If they are an 'association' of professionals as well as a 'regulator' of professionals they have two roles, one to promote the interests of the profession and one to promote the interests of service users. These two roles are frequently in conflict and when governance structures give dominance to the profession over the public then the interests of the profession take precedence. Some regulators such as the Law Society had a dual mandate in the past and still have the residue of that in the way they have been reconfigured as a regulator.

4.4 There are internal roles which need to be kept separate too. Perhaps most important in terms of trust is the conduct of complaints inquiries and discipline. If this process is not independent of the interests of the board, free from bias and partiality neither registrants nor complainants nor the public can have confidence in the regulator.

4.5 Another important distinction internally is that between strategy and oversight and delivery and management. The first are the task of the non-executives on the board, the second of the CEO and the executives. Non-executive board members are not there to run the regulator; they are there to set the direction of its work, oversee the delivery of its strategy and to hold the CEO accountable for managing the organization within that strategy and the values the board has set.

4.6 One of the frequently used approaches to not-for-profit governance in Canada is John Carver's Policy Governance Model®. The Law Society adopted this model after its first governance review in 1993. As Carver himself has written it is 'the most well-known modern theory of governance worldwide and in many cases the least understood.'[8] It is not surprising it is misunderstood. Over the years of its development by Carver and his

[7] *What is Governance?*, Not-for-Profit Quarterly, June 9, 2017
[8] Carver's Policy Governance® Model in Non-profit Organizations, John Carver and Miriam Carver, in *Governance - revue internationale*, Vol. 2, nos. 1, Winter 2001, pp. 30-48.

followers the original valuable insights about the importance of the separation of roles and division of responsibilities have been overlaid with an accretion of procedures, reporting mechanisms and complex terminology which has so baffled boards that for some following the Policy Governance Model has become an end in itself. The Law Society has slowly it seems discarded the model[9] although vestiges of it still remain, for instance the section on 'executive limitations' in the Bencher Governance Policies.[10]

4.7 *Contemporary thinking on governance*

Contemporary thinking about effective governance is focussed on outcomes rather than structures and procedures. It looks for informed decision-making and delivery of results. It doesn't care for Robert's Rules of Order[11] first published in 1876, since an effective board is not a parliament. Contemporary non-executive boards are small, they are skill based not 'representative', they use performance data and outcome measurement to monitor the delivery of their objectives, they limit committees and working groups in favour of well-researched papers by competent staff, calling in external expertise as required. Boards ensure that the organisation's resources are used to deliver its goals rather than allowing its goals to be determined by the available resources. As well as overseeing the executive, boards assess their own performance and seek to learn and improve. Boards are externally accountable, whether it be to the public, to shareholders or to members but they are not slaves to external pressures (see A Checklist for Regulatory Boards, Annex 1).

4.8 *Clarity of purpose*

The governing bodies of regulators need to be very clear to themselves and to others that their purpose is to promote good standards of professional practice, to protect service users from harm and to act in the public interest. They may, as with the Law Society, also have other wider responsibilities. Board members may have been elected or appointed for the first time with no knowledge of the functions of a regulator and very little, if any, experience of serving on a board. It is essential that comprehensive, supportive induction is provided. Of great importance is that board members have read and understood the legislation under which they operate and from which they receive their mandate on behalf of the public. Board members should discuss and agree on their purpose and role; there must be a common understanding of the public's interests if they are to be protected. Decisions should be challenged and checked by the board to ensure they are in-line with the regulator's agreed purpose and with their own strategic plan and objectives.

4.9 *Competence and skill mix*

Neither election nor appointment guarantees competence, nor does it guarantee a balance of skills on a board. In Canada regulatory bodies are hampered by legislation which limits their ability to have board members chosen on merit and against published competencies. That this is so implies no disrespect for the individuals who are elected or appointed to boards. Where possible boards should use any powers available to them to ask for appointed members to be chosen to compensate for deficiencies, for instance lack of financial or regulatory expertise. Some regulators have set up nominations committees (see para 4.17 below) to identify and recommend candidates standing for

[9] *Final Report of the Governance Review Task Force* The Law Society November 2012, p 2
[10] *Final Report of the Governance Review Task Force,* 2012, p. 5
[11] *Robert's Rules of Order (12th Edition)* Hatchett Books 2020.

election, others have introduced mandatory training for potential board members. Effective boards will have an annual appraisal of board members providing an opportunity to review an individual's contribution and the performance of the board as a whole (see para 4.17 below). Increased diversity of membership will also contribute to diversity of skills.

4.10 *Chair or president?*

Being chair of a regulatory body is a job not an honour, a responsibility not a reward. Sometimes, particularly in organisations with elected boards and a 'president', we see ambition and politics drive the election of a chair who may have won strong support from the membership or the board but lacks the competence and skill to lead the organisation or chair meetings effectively. Chairs need to prepare themselves for this important role, be conscious of their own strengths and weaknesses, seek support where needed and be open to regular feed-back from other board members. The relationship between the chair and CEO is fundamental to organisational success. A mutually respectful partnership, an understanding of each other's different roles and responsibilities and an agreement to challenge each other constructively are essential for success.

4.11 *Conflicts of interest*

Conflicts of interest amongst board members or indeed staff are detrimental to good governance[12]. The principles around conflicts of interest are well understood; when a board member knows that they have a personal, professional, or financial interest in a decision they should declare it and withdraw their involvement. Declaring an interest is only a first step it does not of itself remove the interest and board members must absent themselves from the meeting or activity if a direct interest or bias exists. 'Perceived' conflicts of interest are as potentially damaging as direct conflicts. A board member may sincerely believe that they are able to make an objective decision on a matter, but others may perceive that they are conflicted, and their involvement will undermine the integrity of the decision. All boards should keep and publish a register of interests and any new interests should be declared and recorded at the start of each meeting. The importance of identifying and reporting conflicts of interest extends to committees and disciplinary panels. Failure to declare any personal or professional or financial knowledge or relationship may result in a failure of probity or even in the latter a miscarriage of justice.

4.12 *Representation or credibility?*

There has been much debate over recent years as to whether regulatory boards should or should not be 'representative' of their professional membership. There is often confusion between the concept of representativeness on a board and equity and inclusion. Elected boards are only representative of those who are willing to stand and those who vote for them. They are highly likely to be drawn from a narrow socio-economic group and from older members of a profession. It has been observed that when boards believe they are representing the 'democratic' interests of members they fall into error and lose sight of their primary purpose of protecting the public[13]. The UK's Professional Standards Authority has proposed that the concept of credibility with registrants and the public should replace that of representativeness. Professions must

[12] See for example, *Fit and Proper? Governance in the public interest*, Professional Standards Authority, 2013
[13] See for example, *An Inquiry into the performance of the College of Dental Surgeons of British Columbia and the Health Professions Act*, Professional Standards Authority, 2018

remain engaged and committed to their own regulation and regulators must retain the confidence of the profession, it says, '*Nevertheless the time is right to break away from the idea that individual members of regulatory boards are representative of the interests of any particular group or constituency…Board members need to set aside their special interests and work together on the effective governance of the regulator.*'[14] Regulatory boards should not be beholden to the profession they regulate but to the public they serve. Good governance, as observed above, by delivering transparent, fair, effective and efficient regulation will build confidence and trust in all stakeholders. A board that is only interested in its shareholders or members and not its customers or its public duty will inevitably fail.

4.13 *Meetings, meetings, meetings*
Not-for-profit bodies seem obsessed with committees and working groups and taskforces. The meetings and administration that these committees generate consume considerable resources, postpone decisions and rarely add value to performance commensurate to the voluntary, staff and financial resources expended on them. It is often suggested that because committees are comprised of unpaid volunteers, they are a cost-effective way of making decisions but in fact they involve many costs; each committee has to have a staff team dedicated to it, travel and accommodation expenses build up and committees tend to generate a life of their own often living on well beyond the period of their usefulness.

4.14 Many regulatory bodies are hampered in achieving efficiency by a legal requirement for statutory committees that they must establish and on which board members must sit. The functions of some of these committees may be desirable, even essential but whether a committee is needed to carry them out is another matter[15]. Boards should carefully consider the establishment of additional committees; are they necessary, will they add something the board cannot do itself, how will they be resourced, will they be advisory or decision-making, will they be time-limited, how will they report to the board?

4.15 The direction of reform in regulation of professions is clear across numerous jurisdictions. Boards are being reduced in size, elections are being replaced with appointment on merit, the proportion of public members is being increased to half or more. Chairs are appointed separately, and public members may become chair. Terms of office may be three or four years renewable. Board members may be paid an appropriate fee for their work. Board members are no longer responsible for disciplinary decision-making and tribunals are increasingly established as independent of the regulator. The requirements of transparency, accountability and public benefit are coming under greater scrutiny. Self-regulation, it is often said, is a privilege not a right. The terms on which that privilege is granted are getting ever more demanding.

4.16 *Personal ethics and conduct*
The true key to successful governance is not rules and procedures but personal values and behaviour, although of course rules are necessary to govern those whose behaviour does not reflect proper values. The values of courtesy, honesty, openness, objectivity and respect for others should be the common culture of boards and committee meetings. Most regulatory boards have (and all should have) a Code of Conduct for members. That code of conduct must be adhered to by members individually and enforced by members

[14] *Op. sit.* PSA 2013 p. 13
[15] For example the Society's Unauthorised Practice Committee, whose function is operational.

collectively. Members must politely challenge colleagues who behave inappropriately. Bad behaviour unchallenged becomes acceptable. Ultimately it is the responsibility of the chair to ensure the code of conduct is observed, a quiet word outside the meeting may be sufficient or an immediate intervention during a meeting may be necessary. Being a professional person requires self-discipline. Regulators expect those they regulate to behave to the highest standards both professionally and personally. Why should they have respect for their regulator if its board members do not themselves observe the same high standards?

4.17 *Reflection and self-assessment*
Just as a registrant needs to demonstrate their competence to practice their profession those seeking leadership role within a regulator should demonstrate their competence to lead. Some regulators have introduced induction days for potential candidates prior to elections to ensure they are aware of the responsibilities and requirements of the role. A nominations committee may review candidates, assessing knowledge and competence before recommending a candidate for election. A nominations committee is usually independent of an existing board and fulfils a similar role to the short-listing process for candidates for a job.

4.18 Good governance is not a static state. Good governance is a process, it requires reflection, revision, and renewal. Just as we ask the professionals we regulate to reflect on their own performance, learn from their successes and mistakes and continually improve, so we should do ourselves. Good governance should include an annual assessment both performance of the board as a whole and of each of its individual members. This will identify strengths and weakness and allow for both group and individual learning.

5. The Law Society's governance as practised

5.1 *Members*
It is significant that the lawyers who are regulated by the Society are referred to as 'members' not as registrants or licensees. Indeed, this regulator is a society, not a college or a council. Despite being a regulatory authority, the Law Society remains fundamentally a membership-run association. The members elect and do so frequently, the substantial majority of the Benchers who govern them. Benchers serve for only two years before having to stand for re-election, so their attention is directed inevitably to their constituency of fellow lawyers rather to the public.

5.2 As well as elections every two years there are frequent by-elections arising from a bencher's resignation or appointment to be a judge. Following their election in a by-election a bencher may have to stand again only a couple of months later in a general election. This whole process is administratively time consuming, costly and unhelpful to the stability and continuity of the regulator's governance.

5.3 That lawyers, rather than the citizens of BC, 'own' the Law Society is explicit in the holding of an Annual General Meeting (see also para 5.6 below). At this meeting members of the Society can instruct their own governing body through resolutions. These resolutions in order to be debated require the signatures of only two members and if passed must be considered by the Benchers. While the resolutions are not binding on

the Benchers[16], in practice the Benchers act on resolutions passed at annual general meetings even if the matter has no public interest benefit or is not regulatory. Further, members may order the Society to hold a referendum instructing the Society to follow a particular course of action or policy.[17] These are governance arrangements you would expect to see in the structure of a Trades Union or political party rather than an oversight body accountable to the public. This sense of the Society as an association rather than a regulator is also reflected in its annual presentation of awards to individuals for services to the legal profession, an activity that has nothing to do with regulation.

5.4 The Annual General Meeting in 2021 confirms the inappropriateness of the Society's voting rules for a regulatory body as opposed to an association, indeed the inappropriateness of a regulator having an annual general meeting at all. At the AGM there were two member-proposed resolutions. The first aimed to commit the Society to opposing a practice directive made by the courts which some members objected to as as a restriction on their free speech. A practice directive from the courts is not within the Law Society's jurisdiction. It is not for the Law Society as a regulator to campaign for or against a directive from the courts. Only one of the many speakers on this resolution noted, in passing, that it was not a matter for the Society.[18] The second resolution proposed changes to the information in the Society's Lawyer Directory to allow both preferred pronouns and alternative names to be recorded. This is an administrative matter. It was not opposed by the Benchers so why it needed a formal resolution by the members is beyond me. At no point was there any discussion of the public interest in either of these matters.[19] Two further resolutions, this time put forward by the Benchers, had the objective of limiting the number of irrelevant resolutions such as those just voted on. The first proposed that 50 members (fewer than 1% of the practising membership) should be needed to bring forward a resolution, the second proposed that the President should have the power to determine if a resolution was relevant and rule it out of order if it was not. Neither of these proposals was passed. One of these changes, that to increase the number of members necessary to put forward a resolution, was supported by a majority of members voting but because it was a rule change and required a two-thirds majority it was not passed. The other failed to meet even the 50% threshold.

5.5 Unfortunately, it seems that irrelevant and partisan resolutions from members will continue to be brought forward and to distract and misdirect the Society away from the public interest.

5.6 My observation of the resolutions put to the annual general meeting and approved in the immediate past is that few if any have relevance to the public interest or to effective regulation but are concerned with the interests of lawyers. Such resolutions are a distraction for the Benchers and their committees from their strategic plans and proper priorities of the public interest and effective professional regulation. S.12 of the Act requires that rules regarding certain matters cannot be amended or rescinded without the approval of two thirds of those members voting at a general meeting or in a referendum respecting the proposed rule, or the amendment or rescission of a rule. This effectively limits the power of the Benchers and the majority of members to bring about change as a minority can stop any developments they think are against their personal or professional

[16] Legal Profession Act s. 13(1)
[17] Ibid, s. 13(2)
[18] This resolution was not passed.
[19] This resolution was passed.

interests. This was clearly demonstrated by the votes at the 2021 AGM when a minority of members voting were able to block a sensible rule change. One speaker in opposition to the changes said, 'The Law Society is there to serve all members.' No, it is not, it is there to serve the public.

5.7 Both Benchers and the Society's Presidents and vice-Presidents have very short periods in office. This means they are beholden to their electorate and find it hard to sustain both a long-term and independent view of controversial issues. Benchers seeking re-election must respond to the interests of their constituents not to the interests of the public. This is reflected in the electoral statements made by candidates. Eleven candidates stood in two by-elections in 2021. Only three mentioned the Society's purpose to uphold and protect the public interest, none had plans relating to it, most promised to work for improvements in the financial and personal well-being of lawyers and to promote and expand the interests of the profession in the geographical area from which they came. These are the kinds of ambitions one would expect of a membership association not a regulatory body and these professional ambitions are inevitably reflected in Benchers' decisions about the Society's priorities and work programmes.

5.8 There are only six benchers, appointed by the Lieutenant Governor in Council, who are not lawyers and therefore not members of the Society. However expert or vocal they are their influence is limited and they can always be out-voted by lawyers, although in practice they generally vote with them. They are very seldom invited to chair committees, and may not stand to be a vice-president or president.[20] Public membership on the executive committee is restricted to one and there are separate votes for lawyer and public benchers when the committee is chosen. As they are not members of the Society they cannot vote at the Annual General Meeting; these few tribunes of the people are significantly disenfranchised.

5.9 The importance of the independence of the Society in protecting the independence of legal profession and the separation of the rule of law from political and other pressures was stressed to me by Benchers a number of times. It is curious therefore that the Attorney General, the Provincial Government's Senior Law Officer, is ex-officio a Bencher and either attends or is represented by a delegate at meetings.

5.10 *Benchers and Benchers meetings*
Benchers are individually elected or appointed. They meet as individuals at 'Benchers Meetings'. It is worth noting that there is no corporate term for this meeting; it is not 'the board' or 'the council' but rather a meeting of individuals. They vote individually on formal resolutions when necessary. In effect the Benchers meeting is the board of the Society. The Benchers are non-executives, responsible for strategy, oversight, and custodianship, while the executive team implements and delivers on their decisions. In practice the Executive Committee has taken on some of these oversight roles as it is smaller and more capable of making decisions while the Benchers meetings discuss and make policy.

5.11 Thirty-one non-executives is too many for effective discussion, deliberation or decision-making. Benchers' meetings are not deliberative, rather they are a series of speeches and position statements, some clearly prepared in advance. Benchers rarely ask questions of

[20] Legal Profession Act s 5 (5)

each other, rather they make counter statements as though they were in court. Many decisions are by means of formal resolutions. It has been suggested to me that the large number of benchers is necessary because of the large number of committees on which they must serve. This is a circular argument; too many committees does not justify too many Benchers. Even if so many committees and working groups were desirable there are many skilled and knowledgeable lawyers and members of the public in British Columbia who could serve on such committees and bring fresh thinking, experience, and diversity to the Society's policies. Benchers do not have to control everything although some believe that they do.

5.12 Benchers' meetings are very long and require the production of lengthy reports the substantial majority of which are not discussed during those meetings. One Benchers meeting I observed had over 200 pages of supporting documentation, another around 250. Six items were taken under the 'consent agenda' (37 pages of reports) and therefore not discussed at all and only three out of 20 agenda items received substantive discussion. Except in those last items background papers were scarcely referred to. It would in fact be surprising if everyone had been able to read them. If it could be assumed that committee reports had been read by all, the committee chairs could answer questions and deal with comments rather than spending so much time presenting their committee's report.

5.13 *The President and Vice-presidents*
The President is elected to serve for one year only. The consequence of Rule 1.5 is that he or she will have served two years previously as second and then first vice-President. This is curiously referred to as 'the ladder'. Some benchers aim to get onto 'the ladder' during their term of office and once they do so progression to President is pretty much certain and holding these positions is seen as an honour. The rapid turnover of presidents limits their ability to provide consistent leadership and therefore to bring about improvements. Each president has their own style and priorities but insufficient time, opportunity, or control to deliver anything but the most uncontroversial of changes, initiatives they have begun can easily be forgotten when a new President takes over and brings a different set of priorities.

5.14 Presidents do have power and authority during their brief period in office through their control of who chairs committees and groups, and which Benchers are made members of those committees and groups. Presidents also set the mandate for each committee's work during the year within of course the previously agreed terms of reference. Although governance policies suggest some matters which the President should consider when populating committees their powers in this regard are pretty much unfettered.

5.15 *Committees, working groups and task forces*
The Benchers have a general power to create committees in addition to those set out in statute and may make rules for the appointment and termination of members of committees and the practice and procedure of meetings. The Benchers have exercised their powers to create numerous committees, working groups and taskforces. There are currently 21 listed on the member's portal including seven regulatory committees, four oversight committees and four advisory committees, one advisory group, two working groups and four task groups (see Appendix 2).[21] There is even a sub-committee

[21] The *Bencher Governance Policies* 2021, p 15, lists 18 committees

considering the replacement of a statue in the foyer of the Society's office, another self-referential activity imposed on the Society by a resolution at the AGM. By custom and practise these all these bodies are populated by benchers and almost always chaired by one.

5.16 It is not obvious what the classification of committees into oversight committees, regulatory committees, advisory committees, task forces and working groups means in practice. With the exception of regulatory committees and the Executive Committee it does not seem to result in any difference in the way these groups manage their work or are accountable, nor is the terminology coherent. All in some way or other report to the Benchers meeting and receive a 'mandate' from the President of the time but some have limited decision-making powers others are purely advisory. Minutes are not always kept consistently, reports to the Benchers provided irregularly and the clustering of the majority of meetings on the day before the Benchers meeting places a considerable burden on both Benchers and the administrative staff who support them. The Executive Committee appropriately deals with administrative matters, but some Benchers are of the view that the relationship between the Executive Committee and the Benchers meeting is unclear.

5.17 Regulatory committees are necessarily permanent but advisory committees and groups should need to justify their existence by delivering value to the Society. There is no formal mechanism for reviewing the value of committees or working groups. The Equity, Diversity and Inclusion Advisory Committee was established in 1998, 23 years ago. It was itself the result of a merger of three committees. Since its establishment the Benchers have added the Truth and Reconciliation Advisory Committee and the Indigenous Engagement in Regulatory Matters Taskforce. The Mental Health Taskforce has been working for three years. It has produced a detailed report and a clear way forward, but it recommends that it should continue in existence and take responsibility for implementation of its own report. This is not good governance; implementation of decisions is operational and should be passed to the executive team with the Benchers monitoring progress.

5.18 Faced with a new idea, a policy challenge or a resolution from the members the Benchers first resort seems to be to set up a new taskforce or working group. In the last twenty years there have been over 40 advisory committees and working groups. Currently there are seven. One has just been created; others, as indicated above, have been meeting for many years. This is not the most efficient or effective way of dealing with an issue. Talking is not doing. The Executive Committee and Benchers should seek advice from the executive team before deciding how to approach an issue and indeed check if it is a regulatory issue at all. They should not be led by resolutions passed at the AGM. They should be led by their Strategic Plan. Consistent criteria for establishing advisory committees, working groups or task forces and for closing them down if they have completed their report or are no longer useful, should be agreed and adhered to. Resources should be taken into account and the function, performance and continuation of all such groups should be reviewed annually. Despite being populated by volunteers, committees are not a free good. It is worth noting that in 2020-21 the Law Society saved over $900,000 due to travel restrictions, the cancellation of in person events and increased virtual meetings.[22] The Society should aim for fewer, more strategic committees

[22] Law Society of British Columbia Financial Statements, December 31, 2020

and should seek to expand external membership from both the public and the profession. It should separate policy development from policy implementation and pass the latter as a programme of work to the executive team with the Benchers providing oversight of delivery.

5.19 *Appointments to committees and the tribunal*
The President during their term of office has overall control of who is appointed to the Society's committees and to the tribunal (see para 5.12 above). How Benchers are selected and how these jobs are distributed is opaque. There are no open criteria for selection, and it is not apparent if appointments are made on merit. It is worth noting that the annual questionnaire to benchers revealed dissatisfaction with the quality of chairing of some committees.

5.20 In terms of the public interest no committees are more important than the Credentials Committee, the Discipline Committee, the Complainants Review Committees (there are two) and the Tribunal. Their decisions protect or fail to protect the public, are fair or unfair to registrants and can enhance or damage the reputation of the Society. Membership of four of these crucial committees is also in the gift of the President and criteria for membership are not clear. Membership of the hearings panel for the Tribunal is more clearly defined and requires formal training and I note that a Tribunal Appointments Working Group has been considering improvements.

5.21 The Hearing Panels consist of three members drawn from a pool of trained adjudicators, both lawyers and members of the public. The panel must include a Bencher, a lawyer who is not a Bencher and a member of the public. The Society is working to increase the diversity of membership of the pool of Tribunal members.

5.22 *Conflicts of interest and ethical behaviour*
The governance structure of the Society has numerous role and personal conflicts built in. However ethically and carefully Benchers behave overlapping roles and conflicting interests are impossible to avoid. The Society is not unaware of this. In its internal guidance in the Bencher Code of Conduct it acknowledges that 'from time to time Benchers may have a conflict between their various roles at the Law Society and other interests'.[23] Only in July 2021 the rules were changed to state what should have been self-evident, 'A Bencher must not appear as counsel for the Law Society or any member in any proceeding.'[24] The Society's guidance deals only with the possibility that external interests may conflict with Bencher roles within the Society and does not appear to acknowledge that those roles are themselves often in conflict.

5.22 Many potential conflicts are inherent in the Society's Act, rules and services, they include;

- Conflict between the electoral process and the public interest
- Conflict between the electoral process and effective governance
- Conflict between Bencher's duties as non-executive directors and serving on discipline committees and hearing panels
- Conflict between Benchers giving advice to lawyers in confidence and their duties as a Bencher

[23] *Bencher Code of Conduct*, LSBC, para. 6.
[24] Minutes, Benchers, July 9, 2021, item 7 p. 4

- Conflict between the Society's regulatory functions and its protection of lawyers through The Lawyers Indemnity Fund
- Conflicts between Bencher's business interests and their policy decisions.

5.23 As identified in para 5.22 (above) conflicts arise when there is a real or perceived clash between two different objectives or responsibilities. When activities are carried out in secret, you must ask what it is an organisation is trying to hide? When that organisation is a legal regulator, aware that justice not only needs to be done but to be seen to be done, doubts may be justified.

5.24 Two services provided by the Society cause me some concern although I am aware that they have been the subject of considerable debate and thought internally. One is the provision by the legal regulator of indemnity insurance for the lawyers it regulates. The ownership of an indemnity insurance fund is an unusual arrangement for a regulatory body, although I understand it exists elsewhere in Canada. I have no reason at all to believe that the Lawyers Indemnity Fund is not run with integrity and care but in effect the Society funds the defence of lawyers who have complaints against them and are being investigated by the Society. The Benchers may wish to give further consideration to the governance of the Fund to ensure its structural independence from the Society's regulatory functions in order to ensure there is no perception of a conflict of interest.

5.25 The second service is the Equity Ombudsperson. The issue here is not the reasonable desire on the part of the Society to assist those who may be the victims of discrimination, bullying or sexual misconduct but the conflict that arises from doing so in secret at the same time as being responsible as the legal regulator for upholding standards of conduct. An ethical dilemma will occur if a person seeking help discloses a serious breach of the Society's rules or even a potentially criminal act and that information is not passed on for investigation by the Society or the police. This could be done without disclosing the identity of the complainant. There needs to be a transparent limit to confidentiality in the event of serious disclosures. The Society may also wish to consider if the term ombudsperson is appropriate since investigations are not carried out, nor adjudications made nor public reports issued.

5.26 There are also, one hopes rarely, behavioural and ethical conflicts; such as former Benchers writing references for lawyers under investigation, Benchers asking staff about cases under investigation, Benchers advising lawyers who are subject to a complaint, the existence of personal or business relationships between Benchers and lawyers who are acting against the Society and Benchers using their position to pursue policy changes which may ultimately benefit their own area of practice. It is apparent that on occasion Benchers put forward proposals at meetings which would, if agreed, benefit them and or their business interests. They are not challenged, as they should be, by other Benchers or the chair.

5.27 The 'Bencher Position Description' contains the following, 'A Bencher avoids any situation or circumstance that involves a potential or actual conflict of interest or the appearance of conflict of interest relating to Bencher responsibilities.'[25] Given the multiple roles that Benchers are asked to perform, even with the best intentions this seems an almost impossible task.

[25] *Bencher Governance Policies*, 2021, Appendix 1, p 29

5.28 The Bencher's Code of Conduct is clear that if discussions take place *in camera* that they may not be disclosed.[26] Despite this in 2021 a confidential discussion at an *in-camera* meeting was disclosed to an interested external party and subsequently widely spread amongst Society members resulting in active lobbying of Benchers. Such a breach of confidence should result in a resignation by the Bencher responsible. It also demonstrates that the membership system makes it difficult for Benchers to act independently in their governance of the Society.

5.29 *The publics' interests*
I recognise that the leadership of the Law Society is mindful of its task of 'Upholding and protecting the public interest in the administration of justice'. The public interest is notoriously difficult to define, we might better say 'the publics' interests', there being many different publics with varied interests at different times and in different circumstances. The Society in a way recognises this, variously, on its website, subtitling the phrase Protecting the Public Interest as, 'supporting BC lawyers in the practice of law' and 'regulating BC lawyers', 'preserving the rights and freedoms of all persons' and 'setting standards for professional responsibility and competence of BC lawyers. Interestingly it does not include consulting the public in its interests in legal services. In discussion with Benchers, observation of meetings and reading of Society policy papers I have struggled to find explicit arguments articulated as to why polices that affect the way lawyers go about their business are necessarily in the public interest. Of course, they may be and in some matters, such as prevention of money-laundering, it is self-evident that they are but there has been no discussion in any meeting I have observed as to why a particular policy is in the public interest, merely an assertion that it is.

5.30 Three of the current policies of the Society are Improving Mental Health for the Legal Profession, Remuneration and Hours of Work for Articled Students and the Innovation Sandbox. These may all be desirable developments for lawyers but are all three in the public interest? There is no doubt that improving the mental health of lawyers is a proper objective for the Society but its connection to the public interest should be more clearly articulated. In the report of the Mental Health Taskforce presented to the Benchers meeting in September 2021 there is a section on the public interest. It says, *'supporting and assisting lawyers in fulfilling their professional duties*[27] *is one of the ways in which the Law Society can protect and uphold the public interest. This support and assistance ought to extend to all practitioners, including those experiencing health issues'*.[28] This support may be valuable to some lawyers but no reasons are given for the assertion that is is in the public interest and no Bencher at the meeting raised any query about it.

5.31 At the same meeting a paper on the terms and conditions of employment of articled students did not even deal with a regulatory matter. Terms and conditions of employment are not matters for professional regulators, if anything they are a matter for a union. This issue arose from a resolution passed by the members at an Annual General Meeting which the Benchers could have ignored had they chosen to do so. If, as the paper suggests, some articled students are being exploited, the regulatory issue is the unethical behaviour of legal principals as regulated members of the Society not the

[26] *Bencher Code of Conduct*: 'Disclosure of In Camera Proceedings', p 27
[27] See s.3(e) of the Act
[28] Mental Health Taskforce, Recommendation on the Development of an Alternative Discipline Process, para 71.

working conditions of their employees. Surely this should be dealt with by amendment to and enforcement of the Articling Guidelines or Chapter 6 of the Code of Professional Conduct?[29] The solution proposed deals with the symptoms of the problem not its cause, a basic error in dealing with risk.[30] There is no discussion in this paper of how controlling the pay and hours of articled students is in the public interest, only again a statement that the Benchers are required 'to consider the negative implications that may arise from a policy decision to mandate remuneration and place limits on hours of work during articling, particularly as related to the public interest'.[31] The Benchers at this meeting did not ask or consider whether or not there were any negative implications.

5.32 The 'innovation sandbox' is more clearly aligned with the public interest, that is, the interest in access to justice. It recognises that the current provision of legal services does not meet the needs of all BC citizens and seeks to pilot a range of different kinds of services to meet those needs. It focusses on 'unmet needs', defined as lack of access to legal services. I hope it will also address the consumer benefits of choice in legal services both by type and cost. A Sandbox which prioritised ideas from the consumers of services rather than the providers would have a greater focus on the interests of poorly served publics and would better fit with the Society's commitment to equality and diversity. While I am aware that the Society has had access to a number of surveys of public opinion on legal matters and commissioned a report in 12 years ago and again in 2020 on 'legal services need across the province'. [32] I hope the current members of the Task Force will give their attention to what the public *want* in addition to what providers think they *need*. I recognise that this way of working is increasingly used by regulators to test out novel ways of working and to engage the wider community and welcome the Society's initiative is this area.

5.33 There is in a Report to the Benchers from the Access to Justice Committee a model example of transparency about the criteria the Committee has applied in forming its opinions.[33] The report sets out six 'evaluation criteria' making explicit how the Committee assessed the options before it. It is not relevant here to debate whether or not these were the right criteria (although I note that public benefit was not explicitly one of them) but I commend the approach because it allows the reader to make their own assessment of the validity of the conclusions in the report.

5.34 Of the more than 60 advisory committees, working groups and taskforces set up by the Law Society in the last 20 years not one has the word 'public' in its title.

---

[29] ARTICLING GUIDELINES The Mutual Obligations of Principals and Students, Law Society, 2003; Code of Professional Conduct for British Columbia, Chapter 6, 'Relationship to Students Employees and others'.
[30] The first step in *Right-touch regulation* is to analyse the problem before prescribing the solution. *Right-touch Regulation,* Professional Standards Authority 2015
[31] Lawyer Development Taskforce, Recommendations Concerning Remuneration and Hours of Work for Articled Students, para 3, p 2
[32] *Legal Services in BC, Final Report*, IPSOS Reid/Law Society, 2009
[33] *Responding to COVID-19 and adjusting regulation to improve access to legal services and justice,* September 2021

6 Assessment against the Standards of Good Governance

6.1 *The Standards of Good Governance*
The Standards of Good Governance used in this review are adapted from the Professional Standards Authority's Standards of Good Regulation.[34] Our understanding of effective governance of public bodies of course changes over time; Policy Governance, known as the Carver model,[35] for instance, was highly influential in the 1990s, more recently we have learned from board models in the business sector[36]and others have addressed the behaviours of board members rather than structures of organisation (see para 4. 6 above). [37]

6.2 The Standards of Good Governance are intentionally demanding because Right-touch regulation aspires to excellence.[38] As indicated in para 4.7 above good governance is demonstrated by outcome not merely by process. The Standards therefore require demonstration of both process and outcome. Thus a Standard may be partially met when a process is in place but an outcome not demonstrably achieved. Below I assess the extent to which the governance of the Law Society complies with the contemporary Standards of Good Governance.

6.3 Standard 1: *The regulator has an effective process for identifying, assessing, escalating and managing risk of harm, and this is communicated and reviewed on a regular basis by the executive and board*

The purpose of a regulator is to manage risk of harm and promote good professional practise[39]. We should therefore expect a regulator to have an understanding of harms and how they are caused within its sector. The management of the risk of harm should be at the centre of its many roles, whether it be public protection, lawyer education, financial management or policy development. This is sometimes called risk-based oversight.[40] The Society indeed has a well-constructed and comprehensive Enterprise Risk Management Plan. This is reviewed regularly by the executive, and periodically by the Finance and Audit Committee and annually by the Bencher's meeting. Within the Enterprise Risk Management Plan there is priority given to the risk of failure to address lawyer misconduct, but it does not characterise the harm as harm to the public but as loss of reputation or as financial harm to the Society.[41]

6.4 A professional regulator should be able to state with confidence which are the most significant harms to the public that might arise from incompetence or misconduct by its registrants and what action it is taking to minimise the risk of those harms. There is nothing in the Strategic Plans from 2018-20 or 2021-25 or in the 'initiatives' of the Society which suggest that the Society has identified and is focussed on reducing the

---

[34] *The Standards of Good Regulation*, Professional Standards Authority
[35] Policy Governance® model. https://www.carvergovernance.com/model.htm
[36] *Fit & Proper? Governance in the public interest,* Professional Standards Authority, 2013 https://www.professionalstandards.org.uk/docs/default-source/publications/thought-paper/fit-and-proper-2013.pdf?sfvrsn=c1f77f20_6
[37] *Does Governance Matter?* Harry Cayton 2019 https://www.professionalstandards.org.uk/docs/default-source/conferences/presentation/2019-conference/cayton.pdf?sfvrsn=1f9a7420_2
[38] *Right-touch Regulation,* Professional Standards Authority, 2010, p.1
[39] *The Character of Harms,* Malcom Sparrow, Cambridge University Press, 2008
[40] See, for example, the work of the Electrical Safety Authority in Ontario. https://esasafe.com/safety/
[41] Risk #1 Failure to Address Lawyer Misconduct*, Law Society of British Columbia, Enterprise Risk Management Plan,* May 2021, p 5.

potential for harms to clients or to the public interest except in relation to money laundering where there is regulatory action and active engagement with the Cullen Commission.[42]

6.5 When complaints are received, there are procedures to assess the seriousness of the complaint and to direct it to the right place in the system.[43] Certain categories of complaint are automatically referred to senior executives, such as sexual misconduct (see para 7.5 below), money laundering or misappropriation of funds. However, there is no consistently used risk assessment tool to identify the potential for future harm and ensure both consistency and fairness. There is no systematic analysis of complaints data to evaluate and manage risk of harm by identifying serial offenders or amending professional standards. No-one I spoke to could tell me if the confidential advice given by Benchers to lawyers or by the Practice Advisors has reduced the number or nature of complaints nor does it appear that the data from these enquiries is used to improve the Society's guidance to lawyers. The Society's risk management looks inward not outward; it needs to do both.

This Standard is partially met.

6.6 Standard 2: *The regulator has clear governance policies that provide a framework within which decisions can be made in-line with its statutory responsibilities and in the interests of legal clients and the public*

There is, as set out in Section 3 (above), a complex and comprehensive framework for governance. Governance policies are focussed on elections, voting, resolutions, and on structures. There are policies on conduct and conflict of interests, but these are advisory. Committees, working groups and task groups are sometimes formed independently of strategy and out with the Strategic Plan. The decision-making powers and accountabilities of committees, working groups and task groups are not clearly differentiated. The main challenge in meeting this Standard is not that the Society lacks governance policies but that they are not directed towards outcomes and that, particularly as regards conflicts of interest, they are not always observed or enforced. Nevertheless, the Society does have clear governance policies in which decisions *can* be made in the interests of clients and the public although it is not certain that they are.

This Standard is partially met.

6.7 Standard 3: *The board sets strategic objectives for the organisation. The regulator's performance and outcomes for clients and the public are used by the board when reviewing the strategic plan*

There is a Strategic Plan which sets objectives for a five year period.[44] The current plan has five strategic objectives and 38 areas to be addressed within the objectives. However, there are no milestones and no outcome measures. Delivery of the Strategic Plan rightly falls to the executive team. The CEO updates the Benchers on progress on the strategic objectives. However, the Benchers do not seem to take an active interest in monitoring

[42] https://cullencommission.ca/tor/
[43] *Getting complaints to the right place in the right time,* Law Society of British Columbia July 2015
[44] *Strategic Plan 2021-2025* The Law Society of British Columbia, n.d. p 1.

it. At one meeting I observed the only comment on the CEO's written update was a request that it be colour-coded in future.

I get the impression that the Strategic Plans only interest Benchers in so far as they reflect their personal concerns. The 2021-25 Strategic Plan includes the admirable objective to 'apply data-driven solutions, evidence-based decision making and measure our results.' When I asked how this data was collected, reported to and monitored by the Benchers I was told that it was only in there because a former President wanted it to be. The Strategic Plan does not seem to be taken into account when deciding whether or not to set up a new working group or taskforce or whether or not new activities will contribute to or distract from it. When the executive team report on progress there is little in the way of challenge by the Benchers.

There is no systematic consideration by the Benchers of the outcomes for clients or the public when reviewing the strategic plan.

This Standard is partially met.

6.8 Standard 4: *The regulator demonstrates a commitment to transparency in the way it conducts and reports on its business*

The Society has a clear, well-designed website which is accessible to the public. There is an effective search function. It publishes hearing decisions, and the full determination is easily found. There is a prominent link to 'File a Complaint' but the information within it is wordy and not easy for a member of the public to read or understand. The fact that a complaint must be made in writing will be a disincentive for many members of the public. There is no proper provision for complaints in languages other than English or for people with visual impairment.

The Society publishes its Strategic Plan, initiatives and activities within those initiatives, its Annual Report and Financial Statements and minutes of meetings.

The Bencher's meetings are open to the public but only with the agreement of the President. A small part of the meeting is held *in camera*. The principle for such meetings ought to be that everything should be in public unless it must be in private. I judged that the matters discussed in private at the meeting I observed were appropriate.

Two areas of secret activity are of concern: the confidential advice given by Benchers to other lawyers and the confidential Equity Ombudsman Service (see 524-5.25 above). The Society should continue to increase transparency, for example publishing a register of conflicts of interest and seek to improve public access to its work.

This standard is met.

6.9 Standard 5*: The regulator engages effectively with legal clients and the public*

The Society, as far as I can see, does not engage effectively with legal clients or the public There is input from the small number of public Benchers, whose roles are limited and not all of whom think their views are listened to. The Society conducted surveys of

public opinions of legal services in BC in 2009 and 2020.[45] These surveys are revealing but its is not clear how they have influenced the development of policies. Surveys conducted by a third party are not a substitute for engagement. The Society does not appear to try to learn from complaints from members of the public or to engage directly with those who struggle to get access to justice. The five-year Strategic Plan has an aim to 'increase engagement with the profession and the public' but it is not clear how this is being done. The newly formed Indigenous Engagement in Regulatory Matters Taskforce may bring a wider perspective from users or potential users of legal services.

Papers proposing polices do not require reasons to be given to explain why such a policy is in the public interest nor is the issue regularly discussed. When the Society looks outwards it is to the legal professions in other provinces or internationally and rarely it seems to the citizens of British Columbia.

This Standard is not met.

6.10 Standard 6*: The regulator engages appropriately with the legal profession*

There is constant consultation and engagement in addition to the members power at the Annual General Meeting. Despite this concern was regularly expressed to me by Benchers that lawyers' views are not adequately taken into account. The substantial majority of policy issues discussed by Benchers relate to professional interests not to the public interest. Through their control of the Society through elections and resolutions at the AGM members often thwart regulation in the public interest. The Society's active responsiveness to the profession is in stark contrast with its lack of engagement with the public or legal clients. Some Benchers suggested to me that the Society should consult the profession even more regularly and widely. I take the view that the Society engages inappropriately with the profession.

This Standard is not met.

6.11 Standard 7: *The board takes account of equality and diversity in its decision-making*

The Law Society undoubtedly takes its responsibilities for equity and diversity in the legal profession seriously. It currently has three working groups considering different aspects of these complex issues and is about to mandate Indigenous cultural awareness training for all lawyers. Its staff team is diverse, although less so at senior level, the Bencher group similarly but progress is being made. Elections based on geographical constituencies ensures the Society has diversity of locality amongst benchers but nothing else. This is actually a hindrance to it achieving diversity in other more significant areas. All the Society can do, for example, is to encourage lawyers from diverse backgrounds to stand for election.

The three groups looking at these important areas are the Equity, Diversity and Inclusion Advisory Committee, the Truth and Reconciliation Advisory Committee and the recently established Indigenous Engagement in Regulation Task Force. As I understand it only

[45] *Legal Services in BC, Final Report*, The Law Society, 2009 and 2020

the last is concerned with the diversity of the public rather than the diversity of the profession. In terms of work rather than talk these are important issues for Benchers to take action on. It will be important to co-ordinate the recommendations of these different groups and turn them into practical change.

The Benchers I spoke to who raised these issues unprompted were unanimous in their belief that the Society still had a long way to go but all Benchers and the executive showed commitment to change. The Society takes account of equality and diversity and recognises that it must do more.

This Standard is met

6.12 Standard 8: *The board has effective oversight of the work of the Executive*

A few Benchers seem to believe that they should be running the Society rather than governing it. The role of the Benchers meeting in relation to the executive team is to monitor the delivery of strategy and policies which it has approved and to provide stewardship of its resources. The executive team should properly be running the Society on their behalf. The Benchers still appear at times to wish to take control of operations rather than to oversee them. They need more performance data, more outcome measurement and to pay more attention to that part of their role. Relationships between the executive team and Benchers are generally good and mutually respectful, the expertise of senior executives is widely recognised as is the commitment of Benchers. Operationally the Society appears well managed.

This Standard is met

6.13 Standard 9*: The board works corporately, with an appropriate understanding of its role as a governing body and of members' individual responsibilities*

The majority of Benchers and all senior executives I spoke with are conscious of the inadequacies of the Society's governance, but they are hampered by the primary legislation and by the inherent resistance to change within the legal profession. All Benchers and executive express respect for each other and there is, even in a year divided by the pandemic and the impossibility of face-to-face meetings, a strong sense of social unity. Just being elected as a Bencher gives lawyers a pride in and commitment to their profession. The Benchers meeting, as its very name suggests, is however a meeting of individuals not a corporate body. Discussions are individualistic, a succession of statements and counter statements rather than a corporate enquiry. The meeting functions as a policy making body rather than a governance board the tasks of which have at least partially been delegated to the Executive Committee.

Overall, despite these challenges Benchers do mostly work corporately and they do generally understand their role and personal responsibilities.

This Standard is met.

6.14 In meeting four Standards, partially meeting three and not meeting two, the Society is showing competence in most areas of governance but weakness in ensuring that outcomes are fully measured, monitored and reviewed. In comparison with other regulatory bodies this is an acceptable result for a first assessment but not one that allows for complacency.

7. Recommendations

7.1 The recommendations in this section are based on both my assessment of the Society's governance framework against the Standards of Good Governance and on my observations of the Society's governance in practise. I have grouped the recommendations around the areas that need most attention. I think recommendations of this kind should always be practicable and achievable so, although I think a total overhaul of the Legal Profession Act is desirable, I have resisted the temptation to propose that that should be done. My recommendations, therefore, focus on things that I think with effort and good will, the Society can achieve with support from the membership and probably within its current powers.

7.2 *Recommendations: The Public's Interests*

7.2.1 The Society must reinforce its clarity of purpose and make the publics interests the centre of its decision-making by requiring all policy decisions to be justified in the public interest with reasons given. This should apply to both the setting up of new committees or working groups or taskforces and to the acceptance of their proposals.

7.2.2 The Society should open up the membership of advisory committees and groups to suitably knowledgeable and experienced and diverse members of the public. The Society should actively engage the public and legal clients in developing its policies.

7.2.3 Reports from Committees, Working Groups and Taskforces should always set out their evaluation criteria and be explicit about how they engaged the public and why their recommendations are in the publics interests.

7.2.4 The Society should extend its commitment to equality and diversity in the legal profession to understanding the diverse requirements and choices of the multicultural citizens of British Columbia including Indigenous peoples and should give them a respectful voice in its deliberations. It should continue with an annual anonymous diversity data survey and publish the results including the percentage of lawyers who do not respond. These actions will also support its objective to promote the rights and freedoms of all.

7.2.5 An assessment of the impact on equalities should be part of the Regulatory Impact Assessment made on all new initiatives (see 7.7.2 and 7.7.5 below).

7.3 *Recommendations: Governance structures*

7.3.1 The Society should clarify the role of the Benchers meeting in relation to the Executive Committee to ensure that both are effective and not duplicative. The terms of reference of all committees and groups should be reviewed and decision-making powers and lines of accountability clarified. This should apply particularly to advisory committees, working groups and taskforces.

7.3.2 The Society should reduce the number of committees, working groups and taskforces. All advisory committees and groups should justify their value at an annual review or be discontinued. New groups should not be established unless their role is convergent with the Society's Strategic Plan and reasons are clear as to why they are in the public interest.

7.3.3 Criteria for appointment to committees should be transparent and based on expertise and merit. They should be applied consistently even when the President changes.

7.4 *Recommendations: Membership and elections*

7.4.1 The Society should seek amendments to its rules to reduce the number of elected Benchers and increase the proportion of public appointed Benchers. It should seek to remove the power of members to challenge or countermand the decisions of the Benchers meeting and to remove the ability of a minority of members to block changes supported by a majority.

7.4.2 The Society should seek to amend the terms of office so that Benchers serve for two terms of four years and Presidents and vice-Presidents serve for at least two years.

7.4.3 The Society should revisit recommendations made in previous external and internal reviews to reform the electoral college structure and should move away from geographical diversity towards diversity of skills, lived experience, gender and ethnicity.

7.4.4 The Society should introduce an induction day for all candidates for election prior to them deciding whether or not to stand for election and consider creating a nominations committee.

7.4.5 No member who is currently under investigation should be permitted to stand for election while the investigation continues; no member against whom there has been a finding of professional misconduct, conduct unbecoming or a breach of the rules should be allowed to stand for election as a Bencher.

7.4.6 The Society should change the term member to 'registrant' and the title president to 'chair' to better reflect that the Society is a regulatory body not an association.

7.5 *Recommendations: Conflicts of Interest*

7.5.1 Benchers should do less so that they can concentrate more on what matters. In particular they should cease the practice of interviewing articled students, which is time-consuming for both parties and a pointless initiation rite. They should also cease to provide confidential advice to members, a practice fraught with ethical conflicts and a service to members in any event provided by the Society through the Practice Advice service.

7.5.2 The Society should consider changing the name of the Equity Ombudsperson service and should make clear that confidentiality can only extend to disclosures that are not a potentially serious breach of Society rules or against the law.

7.5.3 The Society should consider the relationship between the Society as regulator and the Lawyers Indemnity Fund by further separating the latter from the Society to avoid any perception of a conflict of interest.

7.5.4 The Society should consider separating the disciplinary tribunal from the Society to create independence of adjudication, leaving investigation and prosecution with the regulator. Benchers should not sit on hearing panels at the same time as serving as Benchers. Work to ensure that Tribunal members are drawn from a more diverse group of lawyers and the public should continue and they should be provided, as now, with effective training and support.

7.5.5 The Code of Conduct for Benchers says Benchers should make an annual declaration of interests. This not published and is insufficient to comply with transparency and best practice. The Society should establish a register of conflicts of interest for all Benchers, committee members and senior executives. The register should be published. Benchers should declare any interests relating to the agenda at the beginning of a meeting and that should be recorded in the minutes. The guidance on conflicts of interests in the Benchers Manual should be consistently observed and enforced.

7.6 *Recommendations: Identification and management of risks of harm*

7.6.1 The Society should carry out a comprehensive audit of the risks of harm to legal clients and the public from failures by lawyers to meet the standards in the Law Society Rules and Code of Professional Conduct.

7.6.2 The Society should identify the most frequent and most severe risks of harm and agree specific actions to mitigate them.

7.6.3 The Society should take a preventative approach to regulation, collecting data on outcomes of decisions by the discipline committees and tribunals, and the Professional Conduct group and adjusting its decisions and standards and guidance accordingly.

7.6.4 The Society should take a more serious approach to repeat offending and recidivism, recognising that a very small number of lawyers are responsible for a large number of complaints at great cost to the public interest and indeed to all competent and honest lawyers.[46]

7.6.5 The Society should review the way it receives complaints in the light of its work on equality and diversity and cultural understanding. It should make it easier to make a complaint in ways other than in writing including by telephone and in languages other than English. It should simplify the description of the complaints process on the website and commit itself to actively helping complainants from the public to explain their concerns.

7.7 *Recommendations: efficiency and effectiveness*

7.7.1 The Society should seek to improve the efficiency and effectiveness of its governance arrangements by always bearing in mind the Right-touch regulation principles of proportionality and simplicity.

7.7.2 The Society should review the agendas of Benchers meetings, it should eliminate items that are unnecessary, shorten papers so they are concise and clear and identified as 'for information', 'for discussion' or 'for decision'. It is up to Benchers to ask for more if the information they have is insufficient and up to the chair of the meeting to ensure these categories are adhered to. All policy papers should include a Regulatory Impact Assessment (see 7.7.5 below)

7.7.3 Before setting up any advisory committee, working group or taskforce the Benchers should be aware of the cost and resources necessary. This will include volunteer costs (travel, accommodation, subsistence) and executive team costs, (staff time, administration, external resources and so on). The Benchers should make a decision as to whether setting up a new group is the most efficient and effective way of approaching the issue.

[46] According to the Society's own figures just over 99% of the lawyers with a discipline outcome have at least one prior complaint. See for example THE LAW SOCIETY and AMANDA JANE ROSE, September 2021

7.7.4 Benchers should take account of the convenience to Benchers and the savings the Society has obtained by moving to virtual meetings during the pandemic and continue to use virtual meeting where possible while recognising the value of some person to person meetings and the relationships they enable.

7.7.5 Before implementing any policy change affecting legal services or the public's interests the Society should carry out and publish a Regulatory Impact Assessment, covering three areas; economic impact (including cost to legal providers and the Society), equity, diversity and inclusion impact and public benefit. Benchers must take these impacts into account in making their decisions.

7.7.6 Benchers should fill in and discuss a mandatory board effectiveness questionnaire annually and commit to any necessary individual or group training that is needed (see Annex 2).

8. Conclusions

8.1 In forming my conclusion that The Law Society of British Columbia has work to do to achieve more efficient and effective governance in the public interest I make no criticism of any individual nor of the efforts currently being made by both the non-executive Benchers and the executive team. Everyone I spoke to had good intentions, although in the case of a very few Benchers those intentions showed a lack of understanding of the meaning of the Society's duty to protect the public. This misunderstanding of the role of the Society is evidenced in the electoral statements of many who stand for election to the Society's governing body (see para 5.7 above) where the public interest is rarely mentioned. Sadly, the public interest is also rarely debated at Society meetings where there seems to be an unspoken assumption that what is good for lawyers must consequently be good for the public.

8.2 Following my review, I have concluded the Society meets four of the nine Standards of Good Governance, partially meets three others and fails to meet the remaining two. Key areas of concern are a weakness in engagement with the public and lack of consideration of their interests; a lack of transparency in some areas of the Society's work and a disregard for the Society's agreed strategic objectives in favour of the interests of members and persistent conflicts of interest arising from the many roles Benchers perform. Strengths are a strong commitment to equity and diversity within the profession and to truth and reconciliation, combined with a recognition that there is more to be done, a culture of respect and of calm and intelligent debate in meetings and a strong and mainly appropriate relationship between the Benchers and the executive team.

8.3 In mitigation of the weaknesses however I consider that the Bencher's good intentions and their considerable commitment of time and effort and hard work, that their ability to uphold and protect the public interest is severely hampered by the archaic legislation and rules under which they are required to govern the Society.

8.4 More than one of the senior leaders of the Society told me that changing the Legal Profession Act was not a realistic possibility. What that means is that the legal establishment in British Columbia has no real desire for change. To me that is regrettable, and I hope it is not true. Many Benchers and senior staff said things to me

that showed they were seriously desirous of change. All the well-intentioned Benchers and staff of the Society, who are committed in heart and head to public protection, access to justice and equality and diversity, deserve modernised legislation which enables them to achieve those objectives, resolutely, efficiently, and effectively. I hope the Provincial Government might consider this in the context of other reforms it has already put in place in the Professional Governance Act[47] and is planning in relation to the Health Professions Act.[48]

8.5 Should the Society accept the recommendations in this report it may wish to consider that implementation can be incremental and how to prioritise some recommendations over others. It would perhaps be appropriate to enact those recommendations which require only administrative changes first, followed by those which could have the most impact on culture and behaviours. Those that require a change of attitude by registrants and support at the AGM are likely to be the most difficult to achieve as are those needing legislative change.

8.6 Good governance is not an end in itself but the means to an end. In this case the promotion of the public's interests through the regulation of the legal profession and the services it provides. I hope that in reflecting on its governance in the light of this review the Society will work backwards from the outcomes it wishes to achieve and implement changes to governance practises that are the means to deliver those ends.

[47] Professional Governance Act [SBC 2018]
https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/18047
[48] *Recommendations to Modernise the provincial health profession regulatory framework* , British Columbia, 2020
https://www2.gov.bc.ca/assets/gov/health/practitioner-pro/professional-regulation/recommendations-to-modernize-regulatory-framework.pdf

Appendix 1: The Standards of Good Governance[49]

1. The regulator has an effective process for identifying, assessing, escalating and managing risk of harm, and this is communicated and reviewed on a regular basis by the executive and board

2. The regulator has clear governance policies that provide a framework within which decisions can be made in-line with its statutory responsibilities and in the interests of clients and the public

3. The board sets strategic objectives for the organisation. The regulator's performance and outcomes for clients and the public are used by the board when reviewing the strategic plan

4. The regulator demonstrates a commitment to transparency in the way it conducts and reports on its business

5. The regulator engages effectively with legal clients and the public

6. The regulator engages appropriately with the legal profession

7. The board takes account of equality and diversity in its decision-making

8. The board has effective oversight of the work of the Executive

9. The board works corporately, with an appropriate understanding of its role as a governing body and of members' individual responsibilities

[49] These Standards of Good Governance were developed by the Professional Standards Authority in consultation with regulatory boards in the UK, Canada and Australia. They have been adapted for this review.

Appendix 2: List of Committees, Working Groups and Taskforce

Regulatory Committees
Complainants Review Committee #1
Complainants Review Committee #2
Credentials Committee
Discipline Committee
Ethics Committee
Practice Standards Committee

Administrative Committees
Executive Committee
Finance and Audit Committee
Governance Committee

Advisory Committees (with year of establishment when known)
Access to Justice Advisory Committee (2019)
Act and Rules Committee
Equity, Diversity and Inclusion Advisory Committee (1998)
Rule of Law and Lawyer Independence Advisory Committee (2007)
Truth and Reconciliation Advisory Committee (2016)

Working Groups
Anti-Money Laundering Working Group (2019)
Tribunal Appointments Working Group (2021)

Task forces
Innovation Sandbox Advisory Group (2021)
Lawyer Development Taskforce
Mental Health Taskforce (2018)
Indigenous Engagement in Regulatory Matters Taskforce (2021)

Appendix 3: List of people who contributed to this review

All Benchers were invited to share their thoughts about the governance of the Society. I am grateful to all those who were willing and able to do so and to senior staff members, also the CBA, BC Branch .

Don Avison QC, Chief Executive Officer
Paul Barnett, Bencher
Avalon Bourne, Manager of Governance and Board Relations
Jennifer Chow QC, Bencher, Chair of Equity Diversity and Inclusion Advisory Committee
Barbara Cromarty, Bencher
Jeevyn Dhaliwal QC, Bencher, Chair of Governance Committee
Natasha Dookie, Chief Legal Officer
Craig Ferris QC, Past President
Lisa Feinberg, Bencher
Lisa Hamilton QC, First Vice-President
Sasha Hobbs, Bencher, Member of the Executive Committee
Kerryn Holt, Director of Governance, Privacy & Information Management
Jeff Hoskins QC, Tribunal and Legislative Counsel
Su Forbes QC, Chief Operating Officer, Lawyers Indemnity Fund
Brook Greenberg QC, Bencher, Chair of Mental Health Taskforce
Dean Lawton QC, President
Dr Jan Lindsay, Bencher
Michael Lucas QC, Director of Policy and Planning
Jamie Maclaren QC, Bencher
Claire Marchant, Manager Practice Support, Equity Ombudsperson
Michael McDonald QC, Member, Truth & Reconciliation Working Group
Tim McGee QC, Past Chief Executive Officer
Steve McKoen QC, Bencher, Chair of Unauthorised Practice Committee
Jeanette McPhee, Chief Financial Officer & Director of Trust Regulation
Christopher McPherson QC, Second Vice-President
Jacqueline McQueen QC, Bencher, Chair of Practice Standards Committee
Lesley Small, Senior Director of Credentials, Professional Development & Practice Support
Elizabeth Rowbotham, Bencher, Chair Act & Rules Committee
Karen Snowshoe, Bencher
Thomas Spraggs, Bencher
Michael Welsh QC, Bencher, Chair Innovation Sandbox Advisory Group
Adam Whitcombe QC, Deputy Chief Executive Officer
Guangbin Yan, Bencher

A written submission was received from the Canadian Bar Association, BC Branch

Annex 1: A Checklist for Regulatory Boards

- Be clear about your purpose as a regulator; keep the public interest as your unremitting focus
- Set long-term aims and shorter-term objectives
- Agree how to deliver and monitor those aims and objectives
- Have competencies for board members whether elected or appointed and apply them to everyone though a selection or nominations process, induction, and regular appraisal
- Have a code of conduct for board members and enforce it
- Declare conflicts of interest, keep a register of interests, and ensure that decisions are not tainted by partiality or bias
- Behave with respect and courtesy towards board members and others
- Commit to corporate decision-making and to corporate responsibility for decisions made
- Appoint a competent CEO and trust them
- Ask for reports that include what you need to know not everything you might want to know
- Make clear decisions and follow-up on their implementation
- Provide the resources needed to deliver your objectives
- Make independence, fairness, and justice for the public and registrants the core values of registration and complaints and discipline
- Continue to keep the public interest as your unremitting focus

Annex 2: A sample Board Effectiveness Questionnaire

1.	**Board**	Strongly Agree	Agree	Disagree	Strongly Disagree	Don't know
1.1	The Board has clear terms of reference					
1.2	The roles and responsibilities of the Board are clearly defined and distinct from those of the Executive					
1.3	The Chair leads meetings well with a clear focus on the significant issues facing the organisation					
1.4	The Chair allows full and open discussion before major decisions are taken					
1.5	The Board is cohesive and combines being supportive of the executive with providing appropriate challenge					
1.6	The Board has the right blend of skills, diversity, expertise, and personalities to enable it to face its challenges successfully					
1.7	The Board delegates sufficient and appropriate responsibility and authority to the Chief Executive					
1.8	A Senior Independent Board member role exists to support the non-executives					
1.9	The Board continually strives to improve its effectiveness					
1.10	Induction and development programmes ensure that Board Members remain up to date throughout their terms of office					
1.11	The Board actively makes opportunities to explain the role of the organisation with key stakeholders					
1.12	The Board discharges its obligations under its legislation					
1.13	The Board acts, and is seen to act, independently					
1.14	The Board focuses on strategic matters and does not stray into operational issues.					

comments:

2.	**Objectives, strategy and remit**	Strongly Agree	Agree	Disagree	Strongly Disagree	Don't know
2.1	The Board has a clear set of objectives					
2.2	The Board has developed a strategy that is central to the way it is directed					
2.3	The organisation's capability and resources its people, assets, financial and other resources are aligned to the organisation's strategy					
2.4	The Board devotes sufficient time to reviewing the implementation of the strategy					
2.5	All projects are clearly aligned to the strategy and fall within the organisation's remit					
2.6	The strategy is updated as appropriate according to any changes in the external environment					

comments:

3.	**Board meetings**	Strongly Agree	Agree	Disagree	Strongly Disagree	Don't know
3.1	The number of Board meetings a year is appropriate for the level of business					
3.2	The Board meets for the right length of time					
3.3	The business of each meeting is appropriate in its content, level and quality					
3.4	The split between public or confidential business is appropriate					
3.5	Sufficient information is provided in meeting papers which is of an appropriate format to support Board Members in their role as decision makers					
3.6	The support provided by the Executive is of the necessary quality					
3.7	Due regard is given to potential conflicts of interest in conducting Board business					

comments:

4.	**Performance management**	Strongly Agree	Agree	Disagree	Strongly Disagree	Don't know
4.1	The Board receives regular reports in key outputs that flow directly from the agreed work or wider Board decisions					

4.2	The Board gets early warning signals of problems ahead that will adversely affect outcomes, targets of financial performance					
4.3	The reports on performance provided to the Board provide analysis of performance against budget, targets and key outcomes, and discusses any necessary remedial action					
4.4	The Board takes collective responsibility for the performance of the organisation					

comments:

5.	**Risk Management**	Strongly Agree	Agree	Disagree	Strongly Disagree	Don't know
5.1	The Board is clear on its risk appetite and takes full account of risk in its decisions					
5.2	The Board has a sound process for identifying and reviewing its principal risks and receives regular reports on risk management and internal controls					
5.3	The Board receives reliable and regular budget projections and is confident that the available funding will enable the organisation to operate as planned					
5.4	The Board is satisfied that statutory and similar requirements are implemented to protect against litigation and reputational risk					
5.5	No substantial, unexpected problems have emerged of which the Board should have been aware earlier					

comments:

6. Continuous Improvement

Thinking about the effectiveness of the Board, please provide your thoughts on:

6.1 Key strengths:

6.2 Things that would improve its effectiveness:

Harry Cayton
November 2021