

# **Commissioners for Taking Affidavits and Notaries Public Reform**

Ministry of the Attorney General

For Consultation Purposes

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# Background

- The Attorney General (AG) is responsible for appointing commissioners for taking affidavits and non-lawyer notaries public. These accountabilities have been delegated to Ministry of the Attorney General (Ministry) officials.
- Notaries and commissioners protect the public from fraud by helping to assure the integrity of documents relied upon in commercial and legal transactions.
- This presentation sets out potential reforms to the system of appointments and to the powers of commissioners and non-lawyer notaries.
- The issues set out in this document are designed to support government priorities including:
  - efficiency;
  - cutting red tape;
  - facilitating business;
  - promoting fairness; and
  - increasing access to services.

# Background (Cont'd)

## Commissioners for Taking Affidavits

- A commissioner for taking affidavits is an individual empowered to take affidavits, affirmations and declarations, and to administer oaths. Commissioners are governed by the *Commissioners for taking Affidavits Act* (COTA).
- As of December 2018, there were 28,627 appointed commissioners in Ontario.
- Under the COTA, commissioners must be at least 18 years old.
- The Ministry is permitted to impose restrictions on commissioner appointees relating to the duration, territory or purpose of use of their appointment.
- Members of some professions are commissioners by virtue of their office, without needing appointment. Lawyers, judges and municipal clerks are examples.

# Background (Cont'd)

## Notaries Public

- A notary public is an individual empowered to verify that signatures, marks and copies of documents are true or genuine. Notaries are governed by the *Notaries Act* (NA).
- As of October 2017, there were 599 non-lawyer notaries in Ontario.
- Under the NA, non-lawyer notaries “must be qualified for the office, and...needed for the public convenience in the place where the applicant resides and intends to carry on business.”
- As with commissioners, the Ministry is permitted to impose restrictions on non-lawyer notary appointees relating to the duration, territory or purpose of use of their appointment.
- Notarial services in Ontario are primarily offered by lawyers, who apply for notarial appointment through the government’s Official Document Services (ODS), under the Ministry of Government and Consumer Services (MGCS). Upon application to ODS, lawyers are appointed as notaries for life, without restriction.

# Issues for Discussion

- This document sets out potential reforms to modernize the appointments, and functions of, commissioners and notaries. They are summarized in the table, below.
- The primary goals of these reforms are to provide better access to commissioner and notary services across the province and create more choice for consumers in choosing these services.

## Reforms For Commissioners:

Proposal	Reform Type	Description
Virtual Commissioning	Legislative	Enable oaths and declarations to be taken virtually, in addition to in-person (slide 6-7).
Commissioners by Virtue of Office	Regulatory	Expand list of occupations whose members are commissioners by virtue of office (slide 8).
Increase Appointment Terms	Legislative	Increase appointment terms of commissioners from three years to seven (slide 11).

## Reforms For Notaries:

Proposal	Reform Type	Description
Notarial Powers	Legislative	Clarify legislatively prescribed notarial powers (slide 9).
Paralegals as Notaries	Legislative	Allow paralegals to be appointed as notaries in a similar manner to lawyers (slide 10).
Increase Appointment Terms	Legislative	Increase appointment terms of notaries from three years to seven (slide 11).
Dispense with Notary Examinations	Legislative	Dispense with mandatory notary oral examination (slide 12).

# Virtual Commissioning

- The COTA mandates that “every oath and declaration shall be taken by the deponent in the *presence* of the commissioner or notary public...”
- In view of technological developments, this provision is ambiguous about whether oaths and declarations must be taken *in person*.
- Numerous states in the U.S. allow electronic notarization and have taken steps to protect against fraud. For example, along with video-audio conferencing, Virginia uses “knowledge-based authentication” of the deponent, through software, along with “tamper-evident” technology on the document, itself, to reveal if the document has been altered after the process. States which have adopted e-notarization have codified required standards for the practice.
- Proposal: Consider allowing “commissioning” of documents through video-conferencing.
  - Would need to consider how to protect against fraud and undue influence, for example, through the use of authenticating software. There may be associated costs.
  - Similar issues arise for “virtual notarization”.
- Anticipated Impact: Greater convenience for individuals and businesses; may facilitate access to commissioner services in remote communities.
- Issues to Consider:
  1. How would this reform increase access to these types of services? Which communities or demographics would benefit most from this change?
  2. How important is it to put specific safeguards in place to guard against abuse? If important, what kinds of safeguards should be considered?

# Commissioners by Virtue of Office

- A regulation under the COTA lists certain occupations whose members are automatically commissioners without having to be appointed (*“commissioners by virtue of office”*).
- The Ministry’s Legal Appointments Office routinely grants appointments for members of certain occupations where the need for commissioning of documents frequently arises and where there is a low risk of abuse of powers. For example, applications received from articling students, who supervised by a lawyers, are typically approved.
- Access to commissioner services could be improved through granting certain occupations commissioner by virtue of office status.
- *Proposal:* Consider expanding the categories of persons who are commissioners by virtue of office. (e.g. articling/law practice program students).

# Commissioners by Virtue of Office (Cont'd.)

- Anticipated Impact: Increased access and convenience for individuals and businesses seeking commissioner services.
- Issues to Consider:
  1. Is there currently a lack of commissioners such that certain populations have difficulty accessing services?
  2. What are the benefits and concerns about making the following professions commissioners by virtue of their office, as is found in certain other Canadian provinces: articling/LPP students; police officers, officers in the Canadian Armed Forces?
  3. What are some professions which frequently require commissioning documents as part of their practice?
  4. What are some professions which, if commissioners by virtue of office, could provide services to vulnerable or remote populations?

# Notarial Powers

- The language empowering notaries in the NA is outdated, ambiguous and creates confusion in terms of what notaries are permitted to do.
- Certain activities, such as the drafting of wills, are generally considered to be the exclusive domain of lawyers, as stated by the Law Society of Ontario (LSO), yet the NA, with its wording “power of drawing...all deeds and contracts” appears to empower all notaries to draft wills and contracts.
- Proposal: Amend the NA to limit notarial powers to the attestation of documents, verification of signatures and all the powers of a commissioner.
- Anticipated Impact: Greater clarity on the scope of notarial powers, clear alignment with the LSO’s scope of practice rules and reduced risk of misuse.
- Issues to Consider:
  1. Would changing notarial powers in this way prevent notaries from providing necessary or useful services?
  2. Should there be any other changes to notarial powers?
  3. Should notary powers be expanded and if so, in what areas?

# Paralegals as Notaries

- In Ontario, there are no “notaries by virtue of office.” However, lawyers who apply for appointment are always approved. Upon payment of a one time fee of \$145, lawyers are given an unrestricted, lifetime appointment.
- Paralegals, on the other hand, must apply to the Legal Appointments Office. Enabling paralegals to be appointed notaries in the same manner as lawyers would expand access to notarial services.
- Rather than the Legal Appointments Office processing paralegal applicants individually, it would be preferable to utilize a consolidated, policy-based approach to handle these applicants as a whole.
- Care should be taken to ensure that paralegals do not exceed their scope of practice through notary appointments.
- Proposal: Allow paralegals to become unrestricted notaries for life, in a similar manner to lawyers.
- Anticipated Impact: Increased ability for paralegals to provide services for their clients; enhanced access to notarial services for individuals and businesses.
- Issues to Consider:
  1. Are there any concerns with appointing paralegals, who apply to be notaries, in the same manner as is currently done for lawyers?
  2. If there are concerns, are there any ways to mitigate them?

# Appointment Terms

- Currently, all notary and commissioner appointments are for three-year terms, as per the NA and the COTA.
- Most other provinces in Canada grant non-lawyer notary/commissioner appointments for between three and five years.
- Commissioner renewals and notary reappointment applications are routinely approved.
- Three-year appointment terms lead to high volume of renewals to process for the Legal Appointments Office, create red tape and cause applicant inconvenience.
- Proposal: Extend the duration of appointment terms to seven years.
- Anticipated Impact: Increased convenience for commissioner and non-lawyer notary appointees.
- Issues to Consider:
  1. Are there benefits to maintaining shorter appointment terms?
  2. Would another appointment term, such as five years or ten years, be more suitable?
  3. Should notaries and commissioners be subject to different appointment terms?

# Notary Examinations

- Currently, the NA prescribes that all approved notary applicants (including those for reappointment) must go through an examination by a Superior Court judge or a member of the Legal Appointments Office.
- In 2017, between Superior Court judges and Legal Appointments staff, approximately 175 notary examinations were conducted.
- The screening function for notaries is primarily accomplished through the application process. There is a redundancy between the application process and the notary examination.
- The notary examination consists of an oral exam of approximately seven questions regarding the applicant's understanding of their responsibilities and associated limitations. This is covered more generally in the application process.
- *Proposal:* Amend the NA to dispense with mandatory oral examinations for notaries. Rely on the application process for screening to streamline the process.
- *Anticipated Impact:* Savings in judicial and government time and resources.
- *Issues to consider:*
  1. Are there any risks associated with removing the mandatory oral exam requirement for notaries?
  2. Should the oral examination requirement be replaced by another form of testing?

# Additional Reform Proposals

- Are there additional reforms to the commissioner and notarial schemes that should be considered?