MINUTES OF CONVOCATION

Wednesday, 20th, February, 2002
9:00 a.m.

PRESENT:

The Treasurer (Vern Krishna, Q.C., FCGA), Arnup, Banack, Bindman, Boyd, Braithwaite, Campion, Carpenter-Gunn, Cass, Cherniak, Coffey, Crowe, Diamond, Divinsky, E. Ducharme, T. Ducharme, Epstein, Finkelstein, Go, Gottlieb, Hunter, Laskin, Lawrence, Legge, MacKenzie, Marrocco, Millar, Minor, Mulligan, Murphy, O'Brien, Ortved, Porter, Potter, Ross, Ruby, St. Lewis, Simpson, Swaye, Topp, Wardlaw, White, Wilson and Wright.

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The reporter was sworn.

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PUBLIC

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TREASURER'S OPENING REMARKS

The Treasurer thanked Patricia Gyulay and all the staff responsible for the remarkable work in the preparations of the recent Call to the Bar ceremonies held in London and Ottawa and for the upcoming Toronto Call ceremonies.

The Treasurer drew Convocation's attention to a fact sheet entitled "The Changing Face of the Legal Profession " which had been distributed and advised that it would be released to the press later on.

MOTION – DRAFT MINUTES

It was moved by Mr. Hunter, seconded by Mr. Wright that the Draft Minutes of Convocation of January 24th, 2002 be approved.

Carried

MOTION – APPOINTMENTS RE: By-LAW 34 [PROFESSIONAL CORPORATIONS

It was moved by Mr. Wright, seconded by Ms. Potter THAT the following benchers be appointed to consider applications for review and appeals under By-Law 34 [Professional Corporations]:

George Hunter
Janet Minor
Niels Ortved

Carried

MOTION – AMENDMENTS TO BY-LAWS 13 AND 28

It was moved by Mr. Cherniak, seconded by Mr. Wright

THAT the By-Laws made under subsections 62 (0.1) and (1) of the *Law Society Act* be amended as follows:

BY-LAW 13
[MEMBERS]

1. By-Law 13 [Members], made by Convocation on January 28, 1999 and amended by Convocation on March 26, 1999, December 10, 1999 and March 22, 2001, is further amended by adding the following:

CATEGORIES OF MEMBERS

Categories of members
2.1 (1) The following are the categories of members:

1. Category A members.

2. Category B members.

3. Category C members.

Category A members
(2) Every member who is required to pay, and is not exempt from the payment of, insurance premium levies under By-Law 16 is a category A member.

Category B members
(3) Every member who is not a category A member or a category C member is a category B member.

Category C members
(4) Every member who is exempt from the payment of the annual fee under section 4 of By-Law 15, or who is exempt from the requirement to file an annual report under section 2 of By-Law 17, is a category C member.

Category A members: rights and privileges
2.2 (1) Subject to any order made against the member under the Act, a category A member may practise law without any restrictions.

Category B members: rights and privileges
(2) Subject to any order made against the member under the Act, a category B member may practise law subject to the following restrictions:

1. The member is not permitted to practise law through a partnership.

2. The member is not permitted to practise law through a professional corporation.
3. The member is not permitted to practise law through a sole proprietorship.
4. The member is not permitted to practise law through any arrangement which permits two or more members to share all or certain common expenses but to practise law as independent practitioners.

Category C members: rights and privileges

(3) A category C member is not permitted to practise law.

Interpretation: "Private Practice Refresher Program"

2.3. (1) In this section, "Private Practice Refresher Program" means the program, administered by the Society for the purposes of ensuring that category B and category C members have the practice skills necessary to become category A members, consisting of the following modules:

1. Time management.

2. File management.

3. Financial management.

4. Client relationships/communication.

5. Technology and equipment.

6. Professional management.

7. Personal management.

8. Professional responsibility

Interpretation: "Society official"

(2) In this section, "Society official" means an officer or employee of the Society assigned by the Chief Executive Officer the responsibility of administering and enforcing the provisions of this section.

Changing status: from category B or category C to category A

(3) A category B member or a category C member may become a category A member by applying to the Society for a change in status.

Immediate change in status

(4) An application for a change in status made under subsection (3) shall be considered by a Society official and the Society official shall grant the change in status unless, for 80 percent or more of the five years immediately preceding the date of the application, the member has been a category B member or a category C member.

Change in status upon successful completion of program

(5) If the Society official cannot grant the change in status under subsection (4), the Society official shall grant the change in status after the member has successfully completed the required modules of the Private Practice Refresher Program.

Conditional change in status

(6) Despite subsections (4) and (5), the Society official may grant the change in status conditional on the member successfully completing the required modules of the Private Practice Refresher Program within a specified period of time and practising only as an employee or partner of, and under the supervision of, a category A member approved by the Society official.

Same

(7) If a category B member or a category C member, who is granted a conditional change in status under subsection (6), breaches any condition to which the change in status is subject, the change is status is revoked and, despite subsection (6), the Society official shall grant no further conditional change in status to the member

Private Practice Refresher Program: required modules

(8) If a category B member or a category C member, who applies to the Society for a change of status under subsection (3), is not entitled to be granted the change in status under subsection (4), the Society official shall determine the modules of the Private Practice Refresher Program that must be successfully completed by the member.

Information to be provided by member

(9) For the purposes of assisting the Society official to make the determination under subsection (8), the member shall provide the official with information on the activities engaged in by the member during the five years immediately preceding the date of the member's application for a change in status and such other information relating to the member's practice skills as may be required by the official.

Redetermination by bencher

(10) A member who is dissatisfied with a Society official's determination under subsection (8) may apply to an elected bencher appointed for the purpose by Convocation for a redetermination of the modules of the Private Practice Refresher Program that must be successfully completed by the member.

Procedure on redetermination

(11) Subject to subsection (12), the procedure applicable to a redetermination under subsection (10) shall be determined by the bencher and, without limiting the generality of the foregoing, the bencher may decide who may make submissions to him or her, when and in what manner.

Written submissions

(12) Unless the bencher permits a person to make oral submissions to him or her, all submissions to the bencher shall be in writing.

CATÉGORIES DE MEMBRES

Catégories de membres

2.1 (1) Les catégories de membres sont les suivantes :

1. La catégorie A.

2. La catégorie B.

3. La catégorie C.

Membres de la catégorie A

(2) Est membre de la catégorie A tout membre qui est tenu de payer les cotisations d'assurance prévues au règlement administratif n^{o} 16 et qui n'est pas exonéré de leur paiement.

Membres de la catégorie B

(3) Est membre de la catégorie B tout membre qui n'est ni membre de la catégorie A ni membre de la catégorie C.

Membres de la catégorie C

(4) Est membre de la catégorie C tout membre qui est exonéré du paiement de la cotisation annuelle en application de l'article 4 du règlement administratif n^{o} 15 ou qui est dispensé de l'obligation de présenter un rapport annuel en application de l'article 2 du règlement administratif n^{o} 17.

Droits et privilèges des membres de la catégorie A

2.2 (1) Sous réserve de toute ordonnance rendue à leur encontre en application de la Loi, les membres de la catégorie A peuvent exercer le droit sans restrictions.

Droits et privilèges des membres de la catégorie B

(2) Sous réserve de toute ordonnance rendue à leur encontre en application de la Loi, les membres de la catégorie B peuvent exercer le droit avec les restrictions suivantes :

1. Il leur est interdit d'exercer le droit par l'intermédiaire d'une société de personnes.

2. Il leur est interdit d'exercer le droit par l'intermédiaire d'une société professionnelle.

3. Il leur est interdit d'exercer le droit par l'intermédiaire d'un cabinet individuel.

4. Il leur est interdit d'exercer le droit par l'intermédiaire de tout arrangement qui permet à deux ou à plusieurs membres de partager tout ou partie de frais communs tout en exerçant le droit de façon indépendante.

Droits et privilèges des membres de la catégorie C

(3) Il est interdit aux membres de la catégorie C d'exercer le droit.

Interprétation : « Programme de recyclage en pratique privée »

2.3. (1) La définition qui suit s'applique au présent article.

« Programme de recyclage en pratique privée » Le programme que le Barreau dispense en vue de faire en sorte que les membres de la catégorie B et de la catégorie C possèdent les habiletés à exercer nécessaires pour devenir membres de la catégorie A et qui comporte les modules suivants :

1. Gestion du temps.

2. Gestion des dossiers.

3. Gestion financière.

4. Relation avec la clientèle/communication.

5. Technologie et équipement.

6. Gestion professionnelle.

7. Gestion personnelle.

8. Responsabilité professionnelle.

Interprétation : « responsable du Barreau »

(2) La définition qui suit s'applique au présent article.

« responsable du Barreau » Personne, qu'il s'agisse d'un dirigeant, d'une dirigeante, d'un employé ou d'une employée du Barreau, que le directeur général ou la directrice générale charge d'appliquer les dispositions du présent article.

Passage de la catégorie B ou de la catégorie C à la catégorie A

(3) Les membres de la catégorie B ou de la catégorie C peuvent devenir membres de la catégorie A en présentant une demande de changement de catégorie au Barreau.

Changement immédiat de catégorie

(4) Un ou une responsable du Barreau étudie la demande de changement de catégorie présentée en application du paragraphe (3) et accorde le changement à moins que le membre n'ait été un membre de la catégorie B ou de la catégorie C pendant au moins 80 pourcent de la période de cinq ans qui précède la date de la demande.

Changement de catégorie à la réussite du programme

(5) Si elle ou il ne peut accorder le changement de catégorie en application du paragraphe (4), la ou le responsable du Barreau l'accorde après que le membre a réussi les modules requis du Programme de recyclage en pratique privée.

Changement conditionnel de catégorie

(6) Malgré les paragraphes (4) et (5), le ou la responsable du Barreau peut accorder le changement de catégorie à la condition que le membre réussisse les modules requis du Programme de recyclage en pratique privée dans un délai précisé et n'exerce qu'à titre d'employé ou d'associé et sous la supervision d'un membre de la catégorie A qu'il ou elle approuve.

Idem

(7) Le changement conditionnel de catégorie qui est accordé au membre de la catégorie B ou de la catégorie C en vertu du paragraphe (6) est annulé s'il enfreint quelque condition dont le changement est assorti et le ou la responsable du Barreau ne doit pas accorder d'autre changement conditionnel de catégorie à ce membre.

Modules requis du Programme de recyclage en pratique privée

(8) Le ou la responsable du Barreau décide quels modules du Programme de recyclage en pratique privée doit réussir le membre de la catégorie B ou de la catégorie C qui demande au Barreau un changement de catégorie en vertu du paragraphe (3) et qui n'a pas le droit de se le faire accorder en application du paragraphe (4).

Obligation du membre de fournir des renseignements

(9) Afin d'aider le ou la responsable du Barreau à prendre la décision prévue au paragraphe (8), le membre lui fournit des renseignements sur ses activités au cours de la période de cinq ans qui précède la date de sa demande de changement de catégorie et tout autre renseignement sur ses habiletés à exercer qu'il ou elle exige.

Nouvelle décision d'un conseiller

(10) Le membre qui est mécontent de la décision que prend un ou une responsable du Barreau en application du paragraphe (8) peut demander à la conseillère ou au conseiller élu nommé à cette fin par le Conseil de décider à nouveau quels modules du Programme de recyclage en pratique privée il doit réussir.

Procédure lors de la nouvelle décision

(11) Sous réserve du paragraphe (12), le conseiller ou la conseillère fixe la procédure applicable à la nouvelle décision prévue au paragraphe (10) et, notamment, peut décider qui lui présentera des observations et à quel moment et de quelle façon il pourra le faire.

Observations écrites

(12) Toutes les observations présentées au conseiller ou à la conseillère le sont par écrit, à moins qu'il ou elle ne permette à quelqu'un de lui en présenter oralement.

BY-LAW 28
[REQUALIFICATION]

2. By-Law 28 [Requalification], made by Convocation on October 29, 1999 and amended by Convocation on December 10, 1999, June 22, 2000, September 21, 2000, April 26, 2001 and May 24, 2001, is revoked and the following substituted:

BY-LAW 28

REQUALIFICATION

Delegation of powers and duties of Secretary: Director, Professional Development and Competence
1. (1) An employee or officer of the Society who holds the office of Director, Professional Development and Competence may exercise the powers and perform the duties of the Secretary under section 45 of the Act, as it relates to an order for failure to comply with an order made under subsection 49.1 (1) of the Act, under section 49.1 of the Act and under this By-Law.

Delegation of powers and duties of Secretary: Chief Executive Officer
(2) If for any reason the Director, Professional Development and Competence and the Secretary are unable to do so, the Chief Executive Officer may exercise the powers and perform the duties of the Secretary under section 45 of the Act, as it relates to an order for failure to comply with an order made under subsection 49.1 (1) of the Act, under section 49.1 of the Act and under this By-Law.

Interpretation: "Private Practice Refresher Program"
2. (1) In this section and in section 3, "Private Practice Refresher Program" has the meaning given it in By-Law 13.

Requalification requirements
(2) The requalification requirements that must be met for the purposes of section 49.1 of the Act are successful completion of the required modules of the Private Practice Refresher Program.

Time for meeting requalification requirements
(3) The requalification requirements must be met within the one year period immediately before the member makes a request under section 3.

Determination of required modules
(4) A member who wishes to meet the requalification requirements shall apply in writing to the Secretary for a determination of the modules of the Private Practice Refresher Program that must be successfully completed by the member.

Information to be provided by member
(5) For the purposes of assisting the Secretary to make the determination under subsection (4), the member shall provide the Secretary with information on the activities engaged in by the member since the date of the order made against the member under subsection 49.1 (1) of the Act and such other information relating to the member's practice skills as may be required by the Secretary.

Redetermination by bencher
(6) A member who is dissatisfied with the Secretary's determination under subsection (4) may apply to an elected bencher appointed for the purpose by Convocation for a redetermination of the modules of the Private Practice Refresher Program that must be successfully completed by the member.

Procedure on redetermination

(7) Subject to subsection (8), the procedure applicable to a redetermination under subsection (6) shall be determined by the bencher and, without limiting the generality of the foregoing, the bencher may decide who may make submissions to him or her, when and in what manner.

Written submissions

(8) Unless the bencher permits a person to make oral submissions to him or her, all submissions to the bencher shall be in writing.

Validity of determination, redetermination

(9) The Secretary's determination under subsection (4) and the redetermination under subsection (6) are valid for one year after the date they are made.

RÈGLEMENT ADMINISTRATIF N^{o} 28

REQUALIFICATION PROFESSIONNELLE

Délégation des pouvoirs et fonctions du secrétaire au directeur du perfectionnement

1. (1) La personne qui occupe la charge de directeur du perfectionnement du Barreau peut exercer les pouvoirs et les fonctions que l'article 45 de la Loi, dans la mesure où il vise une ordonnance prise pour inobservation d'une ordonnance rendue en application du paragraphe 49.1 (1) de la Loi, l'article 49.1 de la Loi et le présent règlement administratif attribuent au ou à la secrétaire.

Délégation des pouvoirs et fonctions du secrétaire au directeur général

(2) Si, pour une raison quelconque, le directeur ou la directrice du perfectionnement et le ou la secrétaire ne peuvent le faire, le directeur général ou la directrice générale peut exercer les pouvoirs et les fonctions que l'article 45 de la Loi, dans la mesure où il vise une ordonnance prise pour inobservation d'une ordonnance rendue en application du paragraphe 49.1 (1) de la Loi, l'article 49.1 de la Loi et le présent règlement administratif attribuent au ou à la secrétaire.

Interprétation : « Programme de recyclage en pratique privée »

2. (1) La définition qui suit s'applique au présent article et à l'article 3.

« Programme de recyclage en pratique privée » S'entend au sens du règlement administratif n^{o} 13.

Exigences en matière de requalification

(2) Les exigences en matière de requalification auxquels il doit être satisfait pour l'application de l'article 49.1 de la Loi sont la réussite des modules requis du Programme de recyclage en pratique privée.

Délai

(3) Le membre doit satisfaire aux exigences en matière de requalification au cours de l'année qui précède le moment où il présente la demande prévue à l'article 3.

Décision concernant les modules requis

(4) Le membre qui souhaite satisfaire aux exigences de requalification demande par écrit au ou à la secrétaire de décider des modules du Programme de recyclage en pratique privée qu'il doit réussir.

Obligation du membre de fournir des renseignements

(5) Afin d'aider le ou la secrétaire à prendre la décision prévue au paragraphe (4), le membre lui fournit des renseignements sur ses activités depuis la date de l'ordonnance rendue contre lui en application du paragraphe 49.1 (1) de la Loi et tout autre renseignement sur ses habiletés à exercer qu'il ou elle exige.

Nouvelle décision d'un conseiller

(6) Le membre qui est mécontent de la décision prise par le ou la secrétaire en application du paragraphe (4) peut demander à la conseillère ou au conseiller élu nommé à cette fin par le Conseil de décider à nouveau quels modules du Programme de recyclage en pratique privée il doit réussir.

Procédure lors de la nouvelle décision

(7) Sous réserve du paragraphe (8), le conseiller ou la conseillère fixe la procédure applicable à la nouvelle décision prévue au paragraphe (6) et, notamment, peut décider qui lui présentera des observations et à quel moment et de quelle façon il pourra le faire.

Observations écrites

(8) Toutes les observations présentées au conseiller ou à la conseillère le sont par écrit, à moins qu'il ou elle ne permette à quelqu'un de le faire oralement.

Durée de validité de la décision ou de la nouvelle décision

(9) La décision que prend le ou la secrétaire en application du paragraphe (4) et la nouvelle décision prise en application du paragraphe (6) sont valides pendant l'année qui suit la date où elles ont été prises.

Demande d'attestation

3. (1) Le membre présente par écrit au ou à la secrétaire une demande d'attestation qu'il satisfait aux exigences de requalification et, pour étayer la demande, dépose auprès de lui ou d'elle l'attestation du fait qu'il a réussi les modules requis du Programme de recyclage en pratique privée.

Évaluation des exigences de requalification

(2) Le ou la secrétaire étudie chaque requête présentée en application du paragraphe (1) et :

a) soit, si elle ou il est convaincu que le membre a satisfait aux exigences de requalification dans le délai requis, atteste que le membre y satisfait;

b) soit, si elle ou il n'est pas convaincu que le membre a satisfait aux exigences de requalification ou qu'il l'a fait dans le délai requis, refuse d'attester que le membre y satisfait.

Idem

(3) Malgré l'alinéa (2) b), le ou la secrétaire peut attester que le membre satisfait aux exigences de requalification s'il y a satisfait, mais non dans le délai requis.

Request for certification

3. (1) A member shall make a request in writing to the Secretary for certification that he or she has met the requalification requirements and, in support of the request, the member shall file with the Secretary a certificate of successful completion of the required modules of the Private Practice Refresher Program.

Determination of whether requalification requirements have been met

(2) The Secretary shall consider every request made under subsection (1) and shall,

(a) if he or she is satisfied that the member has met the requalification requirements within the required time period, certify that the member has met the requalification requirements; or

(b) if he or she is not satisfied that the member has met the requalification requirements or has met the requalification requirements within the required time period, refuse to certify that the member has met the requalification requirements.

Same

(3) Despite clause (2) (b), the Secretary may certify that the member has met the requalification requirements if the member has met the requalification requirements but has not done so within the required time period.

Carried

CONFERENCE ON TERRORISM, LAW & DEMOCRACY

Mr. Bindman spoke about the conference on Terrorism, Law & Democracy being held in Montreal on March 25th and 26th. Speakers include the Treasurer and Paul Copeland.

INTER-JURISDICTIONAL MOBILITY COMMITTEE REPORT

Mr. Millar presented the Report of the Inter-Jurisdictional Mobility Committee for approval by Convocation.

Inter-Jurisdictional Mobility Committee
February 20, 2002

Report to Convocation

Purpose of Report: Policy

Prepared by the Policy Secretariat
(Sophia Sperdakos 416-947-5209)

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Committee met on February 4, 2002. Committee members participating were: Derry Millar (Chair), Gavin MacKenzie (Vice-Chair), John Campion, Gillian Diamond, Abe Feinstein, and George Hunter. The Treasurer and Edward Ducharme also participated.

2. The Committee is reporting to Convocation on the following:

   - Consideration of the Interim Report of the Federation of Law Societies Task Force on Mobility

CONSIDERATION OF THE INTERIM REPORT OF THE FEDERATION OF LAW SOCIETIES TASK FORCE ON MOBILITY

Background

1. On November 26, 2001 the Law Society's Committee on Inter-Jurisdictional Mobility (the "Committee") provided Convocation with an information report on the work of the Federation of Law Societies Task Force on Mobility and on the views taken by the Committee with respect to the issues being considered by the Task Force.

2. The Committee provided Convocation with its preliminary view of an appropriate approach to enhanced mobility, for discussion with the Task Force members at their meeting on December 4, 2001.

3. On December 7, 2001, following the Task Force's meeting, the Committee provided Convocation with a further information report setting out the Task Force's proposed direction on permanent mobility, some of which mirrored the approach proposed by the Law Society's Committee.

4. The Federation Task Force met again on January 23, 2002 and considered issues relating to both temporary and permanent mobility. The Task Force has prepared an interim report for presentation to the delegates of the Federation of Law Societies at the Federation mid-winter meeting from March 1 to March 3. The Task Force's interim report is attached as Appendix 1.

5. The interim report sets out the general direction being considered by the Task Force at this stage of its deliberations. Provincial and territorial law societies are being provided with the interim report before the Federation meeting in March so that each has an opportunity to discuss the proposed general direction with their Councils or Convocations and, if appropriate, seek approval in principle for the general direction proposed in the interim report. It is premature to have a full debate on the issues at this stage because of the amount of work still to be done, but it is important to obtain a sense of whether law societies approve the general framework so as to inform the Federation meeting.

The Committee's View

6. The Law Society's Committee on Inter-Jurisdictional Mobility has reviewed the Task Force's interim report and is in agreement with the general direction proposed in that report. Many, though not all, of the components set out in the report reflect the approach proposed by the Law Society's Committee in its information report to Convocation in November 2001. In agreeing with the general direction of the interim report the Committee notes the following:

   a. the interim report describes a general direction for enhanced mobility, without detail. Its purpose is to provide a framework for discussion with details to be worked out if and when the general direction is approved. It is therefore not necessary, at this stage, to have a full debate. Although its focus, at this stage, is on the common law provinces it will be addressing the issue of Québec next.

      All law societies will have opportunities to provide further input as the detail is fleshed out. Among the issues on which the Committee will seek further input, if approval of the general direction is provided by the Federation in March, are the following:

i. Will the calculation of the 183 day "temporary" mobility period be done based on the number of days a lawyer is actually providing service in the province or on number of days in the province, and based on a five-day or seven-day week? Would it be preferable to specify a six month period? This is ultimately important to clarify as different calculations can result in a longer or shorter "temporary" period;

ii. Will appearances in Federal Court or the Supreme Court of Canada, or before federal agencies and public inquiries be excluded from any definition of "providing legal services" within the province in which the proceeding is physically located? The Committee is of the view that such an exclusion is appropriate and should be made clear in the protocol;

iii. To the extent that lawyers seeking to take advantage of the permanent mobility provisions will be obliged to agree to disclosure of their regulatory information from one province to another, will it be made clear that such disclosure is from one law society to another only and not to the public in general?

b. As there may well be changes to the general approach as a result of the meeting in Montreal the Committee will advise Convocation of the outcome and its input will again be sought. As the Task Force continues to develop its approach the Committee will continue to provide the Law Society's perspective and raise any issues of concern.

c. If the Task Force's general approach is approved in Montreal, there will be an opportunity for formal consultation on the issue with the legal profession in Ontario. It is assumed that other law societies will conduct consultations with the profession in their provinces as well.

d. Any draft protocol that is ultimately prepared must be approved by any law society that wishes to participate in the protocol. The Task Force has no decision-making authority.

Request to Convocation

7. Convocation is requested to consider the interim report of the Federation of Law Societies Task Force on Mobility and, if appropriate, to approve in principle the general direction set out in that report.

8. To the extent that Convocation identifies issues it feels should be addressed as an enhanced mobility protocol is fleshed out, it is requested to provide them to the Law Society's Committee on Inter-Jurisdictional Mobility.

APPENDIX 1

FEDERATION OF LAW SOCIETIES

INTER-JURISDICTIONAL MOBILITY TASK FORCE

January 29, 2002

INTERIM REPORT

PREPARED BY THE POLICY SECRETARIAT
LAW SOCIETY OF UPPER CANADA
(416-947-5209)

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BACKGROUND

1. In August 2001, the Federation of Law Societies established a National Task Force on Mobility to examine full mobility rights and conditions for lawyers in Canada. The Task Force members are:

Vern Krishna (Chair)	
George Hunter	Ontario
Eric Macklin	Alberta
Mark McCrea	Nova Scotia
Francis Gervais	Quebec

2. The decision to establish a Task Force grew out of the ongoing policy work that has been undertaken across he country to provide greater flexibility to lawyers who, in the interests of serving their clients, wish to provide legal services outside the province in which they are called to the bar. In particular the Federation sought to consider possible ways to,

   a. build upon the Inter-Jurisdictional Practice Protocol signed in February 1994, which permits members in good standing in any signatory province in Canada to provide legal services in any other signatory province for a maximum of 10 matters over 20 days in any 12 month period (the "10-20-12 rule"); and

b. consider broader application of the western provinces protocol, which entitles members in good standing in any signatory province in Canada to provide legal services for up to 6 months in a 12 month period (the "6-12 rule").[1]

3. The Task Force has met on three occasions in October and December 2001 and January 2002 to consider the issues and develop a proposed framework for an enhanced mobility protocol.

4. The Task Force's deliberations have been assisted by the participation of the following people at some or all of the meetings: Edward Ducharme, Abe Feinstein, Malcolm Heins, Gavin MacKenzie, Derry Millar, (all from Ontario), Darrel Pink (Nova Scotia), Colleen Suche (Manitoba), Don Thompson (Alberta), and Alan Treleaven (British Columbia).

5. The purpose of this interim report to the Federation of Law Societies is to,

a. set out the considerations upon which the Task Force's proposed framework for a protocol on permanent and temporary mobility is based;

b. outline the proposed general framework for permanent and temporary mobility, and

c. identify next steps.

CONSIDERATIONS UPON WHICH THE PROPOSED FRAMEWORK FOR A PROTOCOL ON MOBILITY IS BASED

Mobility and the Public Interest

6. The value and importance of inter-provincial mobility has been recognized for a number of years by Canadian law societies. This recognition varies from province to province, but includes provisions for occasional appearances, transfer from one province to another, and, most recently, temporary mobility ranging from the 10-20-12 rule to the 6-12 rule in place in the western provinces.

7. From a regulatory perspective mobility rules render permissible certain activities that would otherwise run afoul of provincial rules governing the legal profession. But they are much more than this. Mobility provisions are a recognition that an increasing number of clients have matters that cross provincial borders and require lawyers to be able to provide assistance in more than one jurisdiction. These are not just large corporate clients, but, increasingly, individuals with personal legal issues that are not neatly confined within the borders of the province where their lawyer has been called to the bar.[2]

8. In considering the expansion of mobility provisions, it is critical to keep the needs of clients in mind. Limitations on mobility must be based on the public interest, rather than on the imposition or continuation of artificial or arbitrary barriers to entry.

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[1]Currently, only British Columbia, Alberta, Saskatchewan and Manitoba are signatories.

[2]Family law practitioners, for example, are increasingly faced with files in which there are property issues in more than one jurisdiction, children may be improperly removed from one province and taken to another, and clients may have moved back and forth between provinces raising issues about which jurisdiction governs the separation.

9. Moreover, the role of mobility considerations in the development of public policy has become increasingly clear. Mobility is an articulated right within the Canadian Charter of Rights and Freedoms. As well, a number of national and international agreements, to which law societies are not signatories, but to which they are or may become subject have demonstrated an obligation to address mobility issues in creative ways. Among these agreements are:

    i. The Agreement on Internal Trade (AIT)[3];

    ii. The North American Free Trade Agreement (NAFTA); and

    iii. General Agreement on Trades in Services (GATS).

10. This public policy approach is of central importance in considering how best to address the issue of enhanced mobility.

Mutual Recognition of Lawyers Called to the Bar in Canadian Common Law Provinces

11. In discussing mobility issues as they apply to the Canadian legal landscape the Task Force has been particularly aware of the fact that Quebec's situation is different from the rest of the jurisdictions. This is both because it is a civil law province and because its regulatory process is more complex than in other jurisdictions. Professions in Québec are overseen by l'Office des Professions du Québec, which addresses issues affecting all professions throughout the province.

12. The Task Force has had a number of discussions about the differences and similarities of civil and common law legal systems, about the nature of legal practice in Quebec, and the interplay between the Barreau and l'Office des Professions on the mobility issue.

13. In considering how best to address the development of an enhanced mobility protocol the Task Force is of the view that it is important to first address the issue as it relates to the common law provinces and, to the extent that agreement can be reached among them, move on to consider whatever special circumstances are presented by Quebec's legal system and governance of the bar.

14. With this in mind, and focusing for the time being on the common law jurisdictions, one of the considerations that underlies the Task Force's mobility framework is the recognition that lawyers called to the bar in common law provinces are subject to remarkably similar,

    a. educational, admission, and regulatory requirements;

    b. legal principles, statutory structures and procedures; and

    c. codes of conduct arising from a common legal system.

15. Mobility provisions should reflect that this common approach and structural similarity render lawyers from common law bars more similar than not and the transfer from one common law province to another should be as seamless a process as is reasonable. The full inclusion of Québec in an enhanced mobility protocol is also anticipated and will be discussed in the coming months as part of the Task Force's ongoing work.

[3]The Federation's 1994 Protocol on Inter-Jurisdictional Mobility arose out of the necessity to address the AIT.

Rules of Professional Conduct Regarding Competence

16. Each province currently requires lawyers to provide legal services only in those matters in which they are competent to do so. This is an ongoing requirement and is a fundamental underpinning of self-regulation. This is particularly important because lawyers are called to the bar with no restrictions on the areas in which they can practice. The system relies on their sense of professional responsibility to monitor their own competence. It is true that failure to comply with these rules can result in disciplinary action or negligence claims. It is not, however, these punitive measures that are the underpinning of lawyer motivation, but rather a commitment to principles of public service.

17. The Task Force is of the view that since each law society's self-regulation relies on a rule of professional conduct regarding competence and on lawyers' ethical responsibility, it is reasonable to accept the appropriateness of that principle with respect to mobility situations.

18. Having said this, the Task Force is of the view that there should be some responsibility on those who seek to become members of the bar of another province to certify that they have familiarized themselves with local law to the extent required by the relevant law society. Formal examinations are unnecessary for the reasons set out above.

Protection of the Public Through Disclosure of Lawyer Records

19. It is important to ensure that members who are called to the bar of a province are of good character and are, and continue to be, in good standing in any other province in which they are a member of the bar.

20. This entails more than simply disclosing the existence of discipline orders, but should extend to all information on record in all jurisdictions in which a member is called to the bar.

The Importance of Including Provisions both for Temporary and Permanent Mobility

21. The Task Force has concerned itself with two kinds of mobility situations:

    a. Those in which lawyers are required to provide legal services in jurisdictions other than the ones in which they are members of the bar (the "host") without establishing an economic nexus in the jurisdiction. Typically, they will seek to provide services for a particular client, often from their home jurisdiction; handle a single trial or transaction; or provide legal opinions across multiple jurisdictions in a substantive area of law in which they have particular expertise; and

    b. Those in which a clear economic nexus to the host jurisdiction is established such that the lawyer should no longer be distinguished from those who are members of the bar in the host jurisdiction.

22. The Task Force is of the view that there should continue to be separate rules that apply to both situations and protect the public appropriately. In the Task Force's view it is appropriate in the "temporary" situations to rely on the lawyer's connection to the home jurisdiction to ground the rules protecting the public. In the "permanent" situations it is appropriate that the lawyers make a commitment to the host jurisdiction and assume the rights and responsibilities that accompany such a commitment.

Voluntary and Reciprocal

23. The Task Force's approach has been developed on the understanding that, as with the 10-20-12 rule and the 6-12 rule, participation in any enhanced mobility protocol would be *voluntary* and the protocol would only apply *reciprocally* for all signatories.

PROPOSED GENERAL FRAMEWORK FOR PROTOCOL ON TEMPORARY AND PERMANENT MOBILITY

The General Framework

24. The Task Force proposes the following provisions as the basis for a protocol on temporary and permanent mobility:

a. Lawyers who are members in good standing of the common law province or provinces in which they have been called to the bar should be entitled to provide legal services in any other common law province for a period of 183 days in a 12 month period (temporary mobility).[4]

b. As is the case with the current 10-20-12 rules there would be no requirement to check in with the host province during this 183 day period. There would, however, be a national registry of lawyers so that any law society could access relevant information on any lawyer;

c. If the lawyer intends to provide legal services beyond 183 days or does, in fact, provide legal services beyond the 183 days he or she must forthwith notify the host law society that he or she is providing legal services in the province;

d. A lawyer who is providing legal services in the host jurisdiction longer than the 183 days would be deemed to have intended to establish a permanent presence there. A law society would, however, have the discretion to extend the lawyer's temporary status, on application of the lawyer.

e. The assessment of whether the lawyer's intent is to be "permanently" within the province such that the lawyer must cease providing legal services under the temporary rules and apply to become a member under the permanent rules would take into account,
   i. the provision of legal services beyond the 183 days in a 12 month period; or

   ii. the presence of indicia that the lawyer's economic nexus to the host jurisdiction was equal to or greater than in the home jurisdiction, whether or not the 183 day period had been surpassed.

f. Examples of indicia that would point to an economic nexus would include,
   i. opening an office to the public in the host jurisdiction;

   ii. establishing residence, within the meaning of the *Income Tax Act*, in the host jurisdiction; or

   iii. establishing a trust fund in the host jurisdiction.[5]

g. To be eligible for membership in another common-law province under the permanent mobility provisions, the lawyer would have to meet the following pre-requisites:
   i. Be a member of the bar of a common law province;

   ii. Be of good character;

[4]The Task Force has used 183 days rather than six months because it avoids discussion of what is meant by "six months".

[5]Lawyers in the host jurisdiction under temporary mobility rules would not be entitled to open trust funds. It would therefor be presumed that a lawyer who did so intended to establish himself or herself permanently.

iii. Be a member in good standing in all jurisdictions in which he or she is a member of the bar (whether within or outside Canada); and

iv. certify prior to call, that he or she has read all materials with respect to local law mandated by the province as required reading.

h. The oath of each province would include a provision that the lawyer agrees to undertake only work for which he or she is competent to provide service. If the oath does not include such a provision, the lawyer would sign an undertaking to this effect.

25. As part of the application process, the applicant would be required to sign a "consent to disclose" document that would permit the law society of the province in which he or she seeks to be called to have access to the lawyer's regulatory files from any other jurisdiction in which the lawyer is, or has been, a member of the bar.

26. Once called to the bar of the province the lawyer will be subject to all statutory obligations, regulations, rules, and fee and levy requirements of that province, regardless of whether these differ from the provisions of other provinces. This means that lawyers called in more than one province will have rights and responsibilities in each of those provinces.

Protection of the Public

27. The goal of both the temporary and permanent mobility provisions must be to enhance service to the public. By necessity this must also entail appropriate provisions for protection of the public in the event that negligence, client compensation, or disciplinary issues arise in the mobility context.

28. The Task Force has identified the goals that should apply with respect to these issues in developing the protocol as follows:

a. In all instances the application of rules with respect to professional liability insurance, client compensation funds, and disciplinary matters should operate so as to ensure that clients' rights and convenience are not prejudiced by having been represented by a lawyer from another jurisdiction;

b. Nothing in the rules for permanent mobility should result in the creation of economic barriers, such as lawyers being compelled to hold multiple insurance policies with no additional coverage;

c. The rules developed should discourage forum shopping;[6]

d. As a long term goal, efforts should be made to harmonize provincial regulatory provisions or, where possible, create national schemes.

[6]This might, for example, involve a provision that one pays insurance in the jurisdiction in which one is a resident for income tax purposes.

29. If the framework set out in this report is adopted, working groups should be established to consider ways to harmonize or create national programs with respect to,

    i. professional liability insurance;

    ii. compensation funds; and

    iii. financial records.

NEXT STEPS

30. In accordance with its terms of reference, the Task Force is presenting this report to the Federation of Law Societies meeting in Montreal on March 1, 2002 for consideration by the delegates. It is anticipated that individual law societies will receive this interim report before the meeting so that they may have some opportunity to discuss it and raise questions and provide comments at the meeting in Montreal.

31. Thereafter, the Task Force will continue to work on the framework, taking into account the discussions at the meeting in Montreal, and to prepare a draft protocol for the consideration of law societies prior to the Federation meeting in August 2002.

It was moved by Mr. Millar, seconded by Mr. MacKenzie that the interim report of the Federation of Law Societies Task Force on Mobility be approved in principle the general direction set out in the report.

Carried

ADMISSIONS COMMITTEE REPORT

Mr. E. Ducharme presented the Report of the Admissions Committee for approval by Convocation.

Admissions Committee
February 20th, 2002

Report to Convocation

Purpose of Report: Decision Making

Prepared by the Policy Secretariat

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POLICY – FOR DECISION

MILITARY JUDGES: APPLICATION UNDER S.31 OF THE *LAW SOCIETY ACT*

INFORMATION

APPENDICES

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Admissions Committee ("the Committee") met on February 7th, 2002. Committee members in attendance were: Edward Ducharme (Chair), George Hunter (Vice-Chair), John Campion, Pamela Divinsky and Alison Harvison Young. For part of the meeting the Committee was joined by the Treasurer, Vern Krishna. Staff in attendance were Julia Bass, Katherine Corrick, Ian Lebane and Cindy Pinkus.

2. The Committee is reporting on the following matters:

   Policy - For Decision:

   Proposed Regulation under Section 31 of the *Law Society Act*, concerning Military Judges.

   For Information:

   Articling Student Feedback Report, 2001

POLICY - FOR DECISION

MILITARY JUDGES: APPLICATION UNDER SECTION 31

Issue

3. The Acting Chief Military Judge of the Canadian Armed Forces, Lieutenant A. Ménard, has written to the Law Society to request that Military Judges be designated in the regulations under Section 31 of the *Law Society Act*, placing their membership in the Law Society in abeyance for the duration of their appointment.

Background

4. Section 31 of the *Law Society Act* provides in part:

> (1) The membership of a person is in abeyance while the person holds office, …
>
> (b) as a full-time member … of a tribunal that has a judicial or quasi-judicial function and that is named in the regulations for the purposes of this section.

5. The effect of the person's membership being in abeyance is that Law Society fees are not payable, the person is not subject to the disciplinary processes of the Law Society and the person is ineligible to run or vote for Bencher. Section 31 is set out in full at Appendix 1.

6. There are currently no tribunals named in the regulations under section 31.

7. Military judges are appointed by the Governor in Council under section 165.21 of the *National Defence Act*, set out at Appendix 2. Their principal role is to preside at military courts martial.

8. There is at present only one military judge who is a member of the Law Society of Upper Canada, Colonel Kim Carter (the other judges being from other Canadian provinces.) The letter of application from Col. Carter is attached at Appendix 3, together with the supporting letter from the Acting Chief Military Judge.

9. In March, 2001, Convocation adopted a policy that applications under Section 31 would only be considered if supported by the head of the tribunal in question, so that the designation would cover all members of the class equally. Since this application is supported by the Acting Chief Judge and only affects one member, these conditions would appear to be met.

10. In order to fall within section 31 it is necessary for the tribunal to have a 'judicial or quasi- judicial function.' The role of the Military Judges seems to be clearly of a judicial nature.

Financial Implications

11. Since this application only affects one member of the Law Society, there are no significant financial implications.

The Committee's Deliberations

12. Since the Military Judges fall squarely within the wording of Section 31, the Committee considered it appropriate to request that they be listed in the regulations.

13. The Committee felt that the policy behind Section 31 could be more clearly articulated to facilitate consideration of such applications. Accordingly, the Committee considered it desirable that the Admissions Committee, in collaboration with the Professional Regulation Committee, develop a policy for Convocation's consideration, to be followed in applications under Section 31.

Recommendation to Convocation

14. The Committee recommends to Convocation that the Military Judges be designated in the Regulations under Section 31 of the *Law Society Act*.

INFORMATION ITEMS

ARTICLING STUDENT FEEDBACK REPORT 2001

15. This report is attached at Appendix 4.

Attached to the original Report in Convocation file, copies of:

(1)	Section 31 of the *Law Society Act*	Page 5
(2)	Extract from the *National Defence Act*	Pages 6-7
(3)	Letters of Application from the Military Judges	Pages 8-11
(4)	Articling Student Feedback Report 2001	Pages 12

Re: Military Judges: Membership in Abeyance

It was moved by Mr. E. Ducharme, seconded by Mr. Hunter that the Military Judges be designated in the Regulations under Section 31 of the *Law Society Act*.

A debate followed.

Mr. Ducharme consented to have the matter referred back to the Admissions and Professional Regulation Committees for further consideration.

The following item in the Report was for information only:

- Articling Student Feedback Report 2001

PROFESSIONAL DEVELOPMENT & COMPETENCE COMMITTEE REPORT

Mr. Cherniak presented the Professional Development & Competence Committee Report for approval by Convocation.

Professional Development & Competence Committee
February 20, 2002

Report to Convocation

Purpose of Report: Policy - For Decision
For Information

Prepared by the Policy Secretariat
(Sophia Sperdakos 947-5209)

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TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Committee met on February 7, 2002. Committee members in attendance were Earl Cherniak (Chair), Kim Carpenter-Gunn (Vice-Chair), Bill Simpson (Vice-Chair), Abe Feinstein, Barbara Laskin, Janet Minor, Greg Mulligan, and Rich Wilson. Staff in attendance were Diana Miles, Dulce Mitchell, Elliot Spears, and Sophia Sperdakos.

2. The Committee is reporting on the following matters:
Policy - For Decision
   - Reconsideration of Policies respecting Confidentiality of Practice Reviews and of Certain Rules relating to Competence Hearings
   - Necessary Amendments to By-law 13 (Membership) and By-law 28 (Requalification) to implement the Private Practice Refresher Program (approved September 2001)

Information
   - Report on Specialist Certification Matters Finalized by the Certification Working Group on December 6, 2001 and Approved by the Committee on February 7, 2002

POLICY - FOR DECISION

RECONSIDERATION OF POLICIES RESPECTING CONFIDENTIALITY OF PRACTICE REVIEWS AND OF CERTAIN RULES RELATING TO COMPETENCE HEARINGS

Background

1. On September 24, 1999 Convocation approved a recommendation of the Professional Development and Competence Committee with respect to practice reviews as follows:

   ...under no circumstances, save and except where Rule 13, Commentary 1 is applicable [now Rule 6.01 (3) revised],or where an order to participate in practice review is made against a member or an undertaking to participate in practice review is given by the member, will any information obtained solely in the course of, or as a result of, a practice review be disclosed, accessed, or used, either directly or indirectly, to initiate or further a conduct proceeding or be admissible as evidence in a conduct proceeding.

2. In furtherance of the recommendation Convocation also approved the following:
   There should be,

   a. a separate structure and separate staff resources dedicated to practice review;

   b. a physical location that promotes the separateness of practice reviews from investigative approaches;

   c. appropriate staff training throughout the organization to ensure understanding of the remedial nature of practice reviews; and

   d. *an effective communications strategy, embodied in the Law Society's overall strategy on competence issues, that will enhance members' belief in and trust of practice reviews.*

3. The effect of the Committee's September 1999 recommendation was to create a wall between the practice review functions and other regulatory functions in the Law Society. The recommendation had potential implications for the public interest, as will be described below. It also had staffing and financial implications for the conduct of competence hearings, including whether it would be appropriate for the staff of the discipline department who prosecute conduct and capacity hearings to handle competence hearings.

4. Because of concerns about the impact of continuing confidentiality of practice reviews the Committee agreed that there should be a review of the recommendation after August 2001. Work related to the design of the competence model has delayed the intended review until now.

5. The provisions of Rule 3.04.1 of the Rules of Practice and Procedure, more particularly described below, which provide that unless otherwise ordered professional competence proceedings shall be held *in camera*, are also affected by decisions concerning confidentiality of practice reviews. Rule 3.04.1 is provide at Appendix 1.

The Issues

6. In reviewing the issue of confidentiality of practice reviews and the impact on competence hearings, the Committee considered four main issues:

a. Should the policy cease to apply with respect to internal communications within the Law Society?

b. What should the policy be with respect to external communications and specifically,

   i. should the fact that a member is in practice review be confidential or be made public?

   ii. should the terms of a proposal order be confidential or be made public?

c. Should changes be made to the Rules of Practice and Procedure to be consistent with policies developed with respect to practice reviews, specifically,

   i. should the fact that a competence hearing has been ordered be made public

      (1) generally; or
      (2) to complainant(s) only, as is currently the case?

   ii. Should Rule 3.04.1(6) of the Rules of Practice and Procedure, relating to professional competence proceedings, be revoked and replaced with a provision that provides that where a tribunal suspends *or limits* a member's rights and privileges, the order and the decision are a matter of public record?

d. Should Complaints Review Commissioners (CRCs), in appropriate cases, inform complainants whose complaint is not being proceeded with that a member is in practice review or that the CRCs are requesting that the member enter practice review?

a. Should The Policy Cease to Apply With Respect to Internal Communications Within The Law Society?

Voluntariness

7. Prior to 1999, when amendments to the *Law Society Act* gave the Law Society authority to require a member to undergo a practice review under specified circumstances, the Law Society had no authority to compel a member to participate in practice review. As such, members were encouraged to participate by the assurance that nothing learned in a practice review could be used in a conduct proceeding. Staff outside the Professional Standards department could be told of the fact of a practice review, but nothing more.

8. Voluntariness is no longer the hallmark, or even a significant feature of the program and, as such, to the extent that the introduction of a confidentiality policy was influenced by this feature this should no longer be the case.[1]

Remedial Nature

9. The Law Society's decision to seek legislative authority to conduct practice reviews was part of its goal to enhance its competence mandate and better protect the public and the profession-at-large from practitioners who demonstrate serious competence-related deficiencies. Both in the pre-1999 program and since, practice reviews do not arise out of one or two complaints about a member, but out of a pattern or history of competence-related problems that put into serious question the member's ability to serve the public.

10. When, in 1999, the Committee considered the issue of confidentiality for practice reviews the new mandatory program had not yet begun to operate. The non-mandatory program had included the development of sometimes lengthy relationships with participants that had the Law Society acting almost as counsellor rather than regulator. As such, it was difficult to assess whether in such instances the program was successful, since some members continued in the program indefinitely.

11. One of the reasons given in September 1999 for continuing the policy of confidentiality under the mandatory program was the remedial nature of the competence components of the legislation. It was suggested that members would co-operate better if the remedial nature of the program were emphasized and demonstrated by the confidentiality provision.

12. The Committee has considered this reasoning. It is true that the competence provisions of the legislation are different from the conduct provisions in that, whenever possible, they seek to encourage a member to improve the manner in which he or she practises and correct deficiencies, rather than punishing a member for conduct unbecoming a barrister and solicitor or for professional misconduct. Although their remedial nature is clear, however, the competence provisions still exist as part of the formal regulatory structure and, as such, cannot be said to exist outside the Law Society's mandate to regulate in the public interest.[2]

13. In the Committee's view, the "remedial" components of the program are demonstrated by,

    a. the manner in which practice reviewers and Law Society staff interact with the member, by providing suggestions and guidance for improvement;

    b. the extent to which members are given the opportunity to improve their practices and at least to some degree have a say in the plan for improvement;

    c. the member's ability to refuse a proposal order; and

    d. the wide range of recommendations available to address the member's deficiencies.

20. The regulatory features are illustrated by the fact that,

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[1]Although section 42(2)(c) includes a provision for a member to enter practice review voluntarily, there may be limitations on the Society's ability to investigate the practice issues fully if the review is done on consent. As such, to date, voluntary reviews are not being undertaken pursuant to the amendments to the *Law Society Act*.

[2]It is important to note that members ordered into practice review as part of the disposition in a section 35 conduct proceeding do not have the benefit of the confidentiality provisions.

a. practice reviews are considered “investigations” in the legislation;

b. the member must provide appropriate information to the practice reviewer, pursuant to the legislation;

c. a formal practice management checklist is used to evaluate the systems and approaches followed by the member;

d. a formal procedure is set out in the legislation, which must be followed; and

e. where a member refuses to consent to a proposal order it is open to the Law Society to seek the authorization of PAC to commence a competence proceeding.

These regulatory provisions exist to ensure that the process is transparent and the results can be used to further the Law Society’s regulatory mandate in the public interest.

15. The impact of maintaining the confidentiality provisions so that information about practice reviews cannot be shared with other regulatory departments within the Law Society is arguably antithetical to the inclusion of the program in the mandatory regulatory framework of the1999 legislative amendments. Specifically, the current requirement of confidentiality has the potential to result in inconsistent approaches to the same member.

16. If there continues to be a prohibition against exchanges of information within the Law Society there may well be situations in which information obtained in a practice review, which could shed light on the underlying causes of a new complaint against the member, cannot be revealed to help fashion an appropriate remedy in the case of a new complaint. Furthermore, a member will potentially be subject to more than one Law Society “proceeding” or intervention running on parallel tracks. Finally, the potential implication of such an approach is that a Hearing Panel in a conduct proceeding may make a decision regarding a member based on incomplete information, because discipline counsel are unable to gain information about the practice review.

17. Looking at the issue from the public’s perspective it is difficult to justify a regulatory structure in which one department cannot obtain information about a member from another department. If harm comes to the interests of a member of the public that might have been prevented through an internal exchange of information at the Law Society, damage is done to principles of self-regulation.

18. Moreover, the impact of the confidentiality policy on resources should not be under-estimated. It was suggested that one of the implications of the confidentiality policy is that outside counsel would have to be hired to conduct competence hearings arising out of practice reviews. This is because,

a. counsel in the discipline department would not be permitted to handle practice review files in which information might be learned that could give rise to a conduct hearing; and

b. it is unlikely there will be sufficient numbers of competence hearings to justify hiring staff counsel specifically to do such hearings.

19. Hiring outside counsel has serious cost implications for the Society and, by extension, for the membership at large, and should only be done when other alternatives are not available or appropriate. Clearly, since staff in the discipline department handled capacity hearings, they would be capable of handling competence hearings if the confidentiality policy were reversed.

20. Having considered the potential impact of confidentiality of practice reviews with respect to internal Law Society communications the Committee is of the view that the policy should be reversed to permit the free flow and use of information within the Law Society and in proceedings so that the public interest can best be served.

21. The Committee is further of the view that such change in policy should apply on a "going-forward" basis, so as not to affect those practice reviews currently underway where the members were advised of the existence of a confidentiality policy.

Request to Convocation

22. Convocation is requested to consider whether,

    a. to accept the Committee's proposal and reverse its September 1999 policy so that confidentiality of practice reviews would cease to apply with respect to internal Law Society communications, permitting the free flow and use of information among regulatory departments and in proceedings; or

    b. continue the policy.

23. Convocation is further requested to consider whether, in the event it recommends revoking the policy of confidentiality with respect to internal communications, the decision will apply to,

    a. practice reviews currently ongoing; or

    b. those commenced after the policy is changed, as proposed by the Committee.

b. What Should the Policy Be with Respect to External Communications and Specifically,
   (i) Should the Fact That a Member is in Practice Review Be Confidential or Be Made Public?

24. Pursuant to section 49.12(1) in Part II of the Act,

    A bencher, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, *review*, search, seizure or proceeding under this Part. [emphasis added]

25. In fact, with respect to investigations, the Law Society has a policy of not disclosing to the general public *the fact* of an investigation. This is because many possible results may flow from such an investigation, including a determination that no further action should be taken against the member. A practice review is also considered to be an investigation into a member's practice and is included under the provisions of section 49.12. As such, if the fact that an investigation is taking place is not disclosed it is arguable that the fact that a practice review is underway should also remain confidential from the general public.

26. The majority of the Committee accepts this analysis and considers it appropriate that the fact that a member is in practice review should not be disclosed to the public. The practice review process involves an analysis of the member's practice and results in recommendations to improve competence-related deficiencies, all in the public interest. As such, the member is under some scrutiny during this period, even if the public is not notified of the fact of the practice review. Moreover, the results of a practice review may be that no recommendations or only minor recommendations for improvement are suggested, yet the consequences to the member may be far more serious if the fact of the investigation is made public.

27. A concern about this approach was, however, raised by the lay bencher on the Committee, on behalf of the Complaints Review Commissioners, for reasons discussed more fully in section (d) below. If the fact of a practice review cannot be disclosed for the reasons set out above, then the Complaints Review Commissioners would not be able to advise a complainant, whose complaint is not being pursued by the Law Society, that through a practice review some steps are being taken to address the quality of legal services provided by the member. To the extent that a complainant whose complaint is not being proceeded with is of the view that the Law Society is not protecting the public, the ability to advise the complainant of the fact of a practice review could assist.

Request to Convocation

28. Convocation is requested to consider whether the fact that a member is in practice review should,

a. be disclosed; or

b. not be disclosed to the public, in accordance with the view of the majority of the Committee.

(ii) Should The Terms of a Proposal Order Be Confidential or Be Made Public?

29. Pursuant to the Act, following the completion of a practice review recommendations may be made to the member and may be included in a proposal order. If the member accepts the terms of the proposal order it is then presented to a single bencher, appointed by the Chair of the PD&C Committee, to be reviewed and finalized.

30. Currently, there is no policy as to whether the fact of the proposal order or its terms should be made public.

31. Proposal orders may contain a wide range of provisions for improvement of a member's practice, ranging from suggestions for better filing and tickler systems, or attendance at CLE, for example, to much more significant provisions that, for example, restrict a member from practising in certain substantive areas, or require a member to practise only in association with others.

32. In considering whether information concerning the proposal order should be made public it is important to balance the remedial component of the program with the need to ensure the public is protected. In the Committee's view, if the recommendations are directed at improving the management of the practice or the nature of the members' approach to clients, without limiting the member's right to practise, such information can properly remain confidential. The public interest is protected by,

a. the fact that a proposal order has been agreed to in order to address deficiencies;

b. the efficient and appropriate time line provided to the member by the end of which the member is to have addressed the deficiencies;

c. the ongoing monitoring of the member's progress under the terms of the order; and

d. the remedies available to the Law Society if the member is unwilling or unable to improve.

Because no limitations have been placed on the member's right to practise, it must be assumed that the deficiencies are not so severe as to endanger the public.

33. If, on the other hand, the members rights and privileges are limited by virtue of the order it would be contrary to the public interest not to reveal that fact to a member of the public or another member inquiring about the lawyer's standing with the Law Society, because such limitation or restriction goes fundamentally to the member's competence to provide legal services.

34. In practice, such a "balancing approach" would mean that in response to inquiries about a member's practice, where the proposal order does not limit the member's rights, the Law Society would simply indicate that there are no limitations on the member's rights and privileges. Where such limitations exist they would be disclosed.

35. The final issue in this regard is whether the Law Society should publish the fact that there are limitations on the member's right to practise, as is done where there is a finding of professional misconduct or conduct unbecoming a barrister and solicitor. The alternative is to take a more passive approach, simply responding to inquiries should they be made.

36. There is a distinction between a conduct hearing (or even a competence hearing) and a proposal order, in that at the conclusion of a hearing a finding is made against the member, whereas this is not the case with the proposal order, which is a consensual process. The member is co-operating with a process designed to ameliorate practice deficiencies and as such the more passive approach may be in the public interest, to encourage that co-operation. Moreover, since the member is under scrutiny during the term of the proposal order there is less likelihood, in any event, that the member will breach the restrictions.

37. The Committee is of the view that where limitations are placed on the member's right to practise, that information should be public. As to whether the Law Society should publish the names of such members or simply provide the information to a member of the public or the profession who contacts the Law Society, the Committee is of the view that for a period of 18 months the Society should take the more passive approach, reviewing the decision at the end of that time. In this way, there is an opportunity to assess the implications of the passive approach.

Request to Convocation

38. Convocation is requested to consider whether,

a. only a proposal order that limits a member's right and privileges should be made public, as is proposed by the Committee; or

b. all proposal orders should be made public.

39. Convocation is further requested to consider whether, in the event a proposal order that limits a member's rights and privileges should be made public,

a. such information should be made public only on request, as is proposed by the Committee; or

b. such information should be made public by general publication.

40. Convocation is further requested to consider whether, if such information should be made public only on request, this decision should be reviewed in 18 months.

C. Should Changes Be Made to the Rules of Practice and Procedure to Be Consistent with Policies Developed with Respect to Practice Reviews, Specifically,

(i) Should the Fact That a Competence Hearing Has Been Ordered Be Made Public

(1) Generally; or
(2) to Complainant(s) Only, as Is Currently the Case?

41. With the authorization of the Proceedings Authorization Committee (PAC) the Law Society may apply to the Hearing Panel for a determination of whether a member is failing or has failed to meet standards of professional competence. A request for authorization could occur either where a member has refused to consent to a proposal order following a practice review or in circumstances where there has been no practice review.

42. Given that practice reviews and competence hearings will in most instances arise out of a series of complaints or competence-related problems, a complainant may not be identifiable as is the case with conduct proceedings. To the extent that there is a complainant or complainants, however, the Rules of Practice and Procedure require that after a member is served with the application, the Society shall, where practicable, inform a complainant of the fact of the application. (Section 3.04.1 (3.1)

43. Convocation elected to treat professional competence and capacity proceedings differently from conduct proceedings in the Rules of Practice and Procedure. Unlike conduct hearings where, in the normal course, the proceedings are public, competence and capacity proceedings are to be held in the absence of the public. The rationale of the approach as it relates to competence is that the goal of the competence provisions are remedial rather than punitive and as such the content of the proceeding should not be open to the public.

44. Moreover information relied upon in a competence hearing may arise not just from individual complaints, but from the revelations made in the course of the practice review that reveal competence-related deficiencies in a number of areas and with respect to a wide range of client files. As such there may be issues of protecting solicitor-client privilege that make the *in camera* nature of the proceedings critical.

45. It is not clear, however, whether this confidentiality should extend to the fact of a proceeding having been authorized.

46. In assessing whether or not to make public the fact that a competence hearing has been authorized the following factors are relevant:

    a. Unlike a practice review, the competence hearing is not an investigation. Rather it is the consequence of an investigation and has only come about because the PAC is satisfied there is sufficient evidence to go forward.

    b. By and large competence proceedings are engendered not by single incidents, but by a course of continuing conduct that demonstrates serious and ongoing competence-related deficiencies and an inability or unwillingness to rectify the problems.

    c. It may be argued that the remedial character of competence proceedings is illustrated by pre and post hearing features, not by the hearing *per se.* The practice review process has important remedial features, designed to assist a member to improve his or her practice and thereby avoid a competence hearing. If a member is found to have failed to meet standards of professional competence after a hearing the remedies available to hearing panels are broad and largely remedial in nature. Thus, making public the fact of a competence hearing may not interfere with the remedial nature of the process.

    d. In and of itself it cannot be argued that a member's reputation is potentially less harmed by the fact of a conduct proceeding being made public as opposed to a competence proceeding. No finding against the member has yet been made in the conduct hearing, yet the fact of the proceeding is nonetheless revealed to a member of the public who asks. Moreover, the Law Society publishes regular information about upcoming conduct hearings and the conduct allegations against the member and forwards the information to media outlets.

e. Despite all these factors, however, Convocation must have perceived a difference in the nature of competence proceedings, that resulted in a decision that they be held *in camera*. Arguably, in keeping with that approach the extent to which information about the process is made available generally should be less than that done in conduct proceedings. This could mean that either no information is given to the public (as is the case with capacity proceedings) or information is provided if a member of the public or the professions seeks it out, but is not generally published for the public's or the profession's information.

47. The Committee is of the view that so long as competence hearings are held *in camera*, information about the fact that a competence hearing has been ordered against a member should continue to be made known to the complainant(s) only. It would make little sense, in any event, to publish the fact of the competence hearing, but then not allow anyone to observe it, as must be the result under the current rules.

Request to Convocation

48. Convocation is requested to consider whether the fact of a competence hearing,

a. should continue to be made known to the complainant(s) only, as the Committee proposes; or

b. should be made available to members of the general public and the profession.

49. If the information should be made public, Convocation is further requested to consider whether it should be made available,

a. on request only; or

b. through the Law Society publishing such information.

(ii) Should Rule 3.04.1(6) of the Rules of Practice and Procedure, Relating to Professional Competence Proceedings, Be Revoked and Replaced with a Provision That Provides That Where a Tribunal Suspends *or Limits* the Member's Rights and Privileges, the Order and the Decision are a Matter of Public Record?

50. If Convocation agrees with the view that where a proposal order limits a member's rights and privileges that fact should be made public, then it is inconsistent to continue to have Rule 3.04.1(6) of the Rules of Practice and Procedure, which leaves it in the discretion of the tribunal to determine which aspects of the order should be made public and which aspects should be revealed to the complainant(s). It is arguable that there is an even greater responsibility to make known to the public limits on the rights and privileges of a member after an adjudicated decision in a competence hearing than there is with respect to a proposal order, which is a consensual document.

51. Even capacity proceedings do not follow this approach. Instead, where the Hearing Panel makes an order suspending *or limiting* the members' rights and privileges the order is a matter of public record, but the reasons shall not be made public.

52. If Convocation agrees that these types of orders should be made public, another issue is whether the orders should be published, or whether the information should simply be made available upon request. Given that a finding against a member will now have been made it is difficult to contemplate how the public interest is served unless the order is published, as is the case with conduct orders.

53. Further, given Convocation's decision in January 2002 that orders in conduct proceedings should be published in the Ontario Lawyers' Gazette, without waiting for the disposition of any appeal, the Committee is of the view that the procedure for competence orders should follow the same approach.

Request to Convocation

54. Convocation is requested to consider,

a. whether Rule 3.04.1(6) of the Rules of Practice and Procedure, relating to professional competence proceedings, should be revoked, as the Committee proposes, and replaced with a provision that provides that where a tribunal suspends *or limits* the member's rights and privileges, the order and the decision are a matter of public record;

b. if the answer is yes, whether the Law Society should publish the information, as the Committee proposes, or simply make it available to those members of the public who inquire about members' status; and

c. if the Law Society should publish the information, whether it should do so before the expiry of the period for filing an appeal from the decision, as the Committee proposes, or after.

d. Should Complaints Review Commissioners (CRCs), in Appropriate Circumstances, Inform Complainants Whose Complaint is Not Being Proceeded with That a Member is in Practice Review or that the CRCs are Requesting that the Member Enter Practice Review?

55. As mentioned in section b(i) above, the Complaints Review Commissioners have raised the issue of whether they should be able to indicate to complainants whose complaints are not being proceeded with that,

a. the member against whom they have complained is in practice review; or

b. that the CRCs will be proposing that the member be ordered into practice review.

56. The CRCs' interest in taking this approach arises out of their concern for complainants who appear before them frustrated by what they perceive to be inaction on the Law Society's part against members who they feel have failed to provide competent service to them. In the views of the CRCs, the ability to indicate, in appropriate cases, that some steps are being, or will be, taken would assist in assuaging complainants' concerns.

57. In considering the issue it is important to be aware of the Committee's January 2000 policy, reported to Convocation for information, respecting the process that should be followed when CRCs wish to request that a member be considered for practice review, as follows:

a. The CRCs will be provided with information on how the process for mandatory practice review operates;

b. Where a CRC is considering a request for a practice review, the CRC will notify staff and a member profile will be prepared with a staff recommendation on whether the request should go forward to the Chair or Vice-Chair of the PD&C Committee.

c. On the basis of the profile and staff recommendation the CRC would determine whether he or she wishes the request for a practice review to go forward. If the CRC and the staff agree that it should not go forward, the matter is at an end.

d. *If the CRC considers that the request should go forward, but the staff disagrees, the Secretary will make the request to the Chair or Vice-Chair of the PD&C Committee, with the reasons for and against the request being set out in the material, and indicating that the request comes from the CRC.*

e. *The Chair or Vice-Chair will then determine whether he or she is required to direct a practice review in accordance with the Act and by-laws.*

58. Ultimately, a member is directed into practice review when the Chair or Vice-Chair of the Professional Development and Competence Committee is satisfied that there are reasonable grounds for believing that the member has failed or is failing to meet standards of professional competence, within the meaning of the Act. The Chair's decision is based upon a profile of the member setting out the reasons for which the review is sought. If the information satisfies the test the Chair *must* direct the review.

59. If Convocation agrees with the view set out in an earlier section that because a practice review is an investigation the fact of it is not to be made public, then it would be inconsistent for CRCs to reveal to complainants that the member is in a practice review. If Convocation agrees, however, that where a proposal order limits a member's rights and privileges it should be made public, the CRCs could at least reveal this to the complainant.

60. The fact of a "request" from the CRCs for a review does not necessarily mean the review will be directed. Moreover, if the fact of the review being directed is not public then it may be inappropriate to indicate that a request for a review is being sought when it will not be possible to tell the complainant if the review is subsequently directed.

61. The Committee understands the concerns raised by the Complaints Review Commissioners. However, the majority of the Committee is of the view that, on balance, it is important to keep the fact of a practice review confidential, for the reasons set out in section b(i) above. Similarly, the majority of the Committee is of the view that it would not be meaningful to inform the public of the intention to request a practice review, since the CRCs do not know if such a review will, in fact, be directed.

62. It is hoped that as the practice review process continues to improve, becomes more stream-lined, is activated at an earlier stage of complaints about a member, and is concluded more expeditiously, it will have a trickle down effect that will result in fewer members demonstrating serious competence-related deficiencies over a lengthy period of time.

Request to Convocation

63. Convocation is requested to consider whether the CRCs should,

a. indicate to a complainant that a member is in practice review; or

b. indicate to a complainant that they will be requesting that a member be ordered into practice review.

NECESSARY AMENDMENTS TO BY-LAW 13 (MEMBERSHIP) AND BY-LAW 28 (REQUALIFICATION) TO IMPLEMENT THE PRIVATE PRACTICE REFRESHER PROGRAM (APPROVED SEPTEMBER 2001)

1. In 2001, Convocation approved the Committee's recommendation for creating a new program, entitled the Private Practice Refresher Program (the "PPRP"), to replace the Requalification program.

2. The program Convocation approved can be briefly summarized as follows:

a. Member categories will be defined, with rights and privileges that flow under each category:
   i. Category A: Any member eligible for insurance under the Law Society's insurance plan and who is required to have insurance because he or she engages in the practice of law;

ii. Category B: All members who are not in Category A or C;

iii. Category C: Retired members

b. Members seeking to change their category status from B or C to A will be entitled to do so unless for 80 per cent or more of the five years immediately preceding the date of the request the member has been in Category B or C.

c. In such a case the member will be advised which of eight practice management and client relationship modules, if any, he or she must complete. These are:

i. Time management
ii. File management
iii. Financial management
iv. Client relationships/communication
v. Technology and equipment
vi. Professional management
vii. Personal management
viii. Professional responsibility

d. A member who disagrees with the assessment of which modules he or she must take will be entitled to seek a written review of the determination from a bencher.

e. Upon satisfactory completion of the modules the member's category status will be changed.

f. Those members who have already provided undertakings not to return to private practice without completing the former requalification program and those members against whom a prohibition order had been obtained pursuant to the provisions of the former requalification program will continue to be subject to the requirements of By-law 28, which will, however, be amended to allow them to meet the same course requirements as members subject to the PPRP.

g. Members will not be affected by the new program until 2007.

3. The Committee agreed to return to Convocation with a draft By-law embodying the program provisions approved by Convocation as well as with amendments to By-law 28 (the Requalification By-law) to address the group of members who will continue to be subject to it. It also agreed to prepare "guidelines" to address which modules lawyers engaged in various types of work would likely have to do before returning to private practice. The draft guidelines concerning the modules will be provided to Convocation in the coming months and thereafter provided to the profession for input.

4. Appendix 2 contains a motion to amend By-law 13 (Members) and By-law 28 (Requalification) and explanatory notes.

Request to Convocation

5. Convocation is requested to consider the proposed amendments to By-law 13 and By-law 28 and, if appropriate approve the motion to amend them.

INFORMATION

REPORT ON SPECIALIST CERTIFICATION MATTERS FINALIZED BY THE CERTIFICATION WORKING GROUP ON DECEMBER 6, 2001 AND APPROVED IN COMMITTEE ON FEBRUARY 7, 2002

1. The Committee is pleased to report final approval of the following lawyers' applications for certification, on the basis of the review and recommendation of the Certification Working Group.

Construction law	Ronald H,. Jutras (Oakville)
Criminal law	Karen Jokinen (Barrie)

2. The Committee is pleased to report final approval of the following lawyers' applications for recertification, on the basis of the review and recommendation of the Certification Working Group.

Bankruptcy & Insolvency Law:	Miles D. O'Reilly, Q.C. (Toronto)
Civil Litigation:	Paul H. LeVay (Toronto) David Wires (Toronto)
Criminal Law:	Gary R. Barnes (Ottawa)
Environmental Law:	Peter Pickfield (Guelph)
Workplace Safety & Insurance Law	David Brady (Toronto)

APPENDIX 1: RULE 3.04.1 OF THE RULES OF PRACTICE AND PROCEDURE

Professional Competence Proceedings

3.04.1 (1) A proceeding shall, subject to subrules (2), (5), (6) and (7), be held in the absence of the public if it is a proceeding in respect of a determination of whether a member is failing or has failed to meet standards of professional competence.

(2) At the request of the person subject to the proceeding, the tribunal may order that the proceeding be open to the public.

(3) Unless the proceeding before the tribunal is open to the public as provided by subrule (2), an application for a determination of professional competence shall not be made public by the Society except as required in connection with a proceeding except as provided for in the Act, and except as provided for in subrule (3.1).

(3.1) After the member is served with the application, the Society shall, where practicable, inform a complainant of the fact of the application.

(4) Where the hearing of an application for a determination of professional competence has been open to the public in accordance with subrule (2), the decision, order and reasons of the tribunal are a matter of public record.

(5) Where the hearing of an application for a determination of professional competence has been closed to the public, and where the tribunal has made an order suspending the member's rights and privileges, the order and the decision of the tribunal are a matter of public record.

(6) Subject to subrule (7), where the hearing of an application for a determination of professional competence has been closed to the public, and where the tribunal has made an order limiting the member's rights and privileges, the tribunal shall determine what aspects of the order shall be made public in order to protect the public interest.

(7) Where the hearing of an application for a determination of professional competence has been closed to the public, the Society shall, where practicable, inform a complainant of the tribunal's decision as to whether the application was established and the tribunal shall determine which aspects of the order shall be made available to a complainant.

APPENDIX 2

EXPLANATORY NOTE

This motion amends By-Laws 13 and 28 to implement the decisions made by Convocation on September 28, 2001 with respect to requalification and members re-entering private practice after a period of absence therefrom.

AMENDMENT TO BY-LAW 13

The motion amends By-Law 13 to add thereto a new part entitled "CATEGORIES OF MEMBERS". This new part,

(1) establishes three categories of members;

(2) defines the rights and privileges of each of the three categories of members; and

(3) addresses movement between the three categories of members.

Categories of Members

The three categories of members, established by new section 2.1 of By-Law 13, are: category A members; category B members; and category C members.

Category A members are those members who, under By-Law 16 (which governs the payment of insurance premium levies), are required to pay, and not exempt from the payment of, insurance premium levies. These are members who are in private practice.

Category C members are those members who are exempt from the payment of the annual fee (under By-Law 15) or who are exempt from the requirement to file the Member's Annual Report (under By-Law 17). Often described as "retired members", these are members who are over 65 years of age and have "retired" from the practice of law, or who are incapacitated and therefore unable to practise law.

Category B members are all remaining members, that is, those who are not in private practice and those who are not retired members.

Rights and Privileges

Subject to any order made under the *Law Society Act*, the rights and privileges of each of the three categories of members, defined in new section 2.2 of By-Law 13, are as follows:

1. Category A members (*i.e.*, members in private practice) may practise law with no restrictions.

2. Category B members may practise law other than in a "private practice setting".

3. Category C members (*i.e.*, retired members) may not practise law.

To the extent that restrictions are placed on the entitlement of category B and category C members to practise law, these restrictions are of no effect until specified criteria are met. Category B, or category C, members may become category A members (with full practising rights) at any time until they meets the criteria for being required to complete the Private Practice Refresher Program.

Movement between Categories

The process of a category B, or category C, member becoming a category A member is outlined in new section 2.3 of By-Law 13.

The category B, or category C, member, wishing to become a category A member, must apply to the Society for a change in status. On receiving the member's application, the Society will assess whether the change in status may be granted immediately or whether the member must first successfully complete required modules of the Private Practice Refresher Program. A change in status will be immediate unless, for 80 percent of more of the five years immediately preceding the date of the member's application, the member was a category B, or category C, member.

For a category B, or category C, member who must successfully complete required modules of the Private Practice Refresher Program before becoming a category A member, new section 2.3 of By-Law 13 authorizes the Society to grant the member a conditional change in status. This may permit the member, for example, immediately to start working for a law firm. A category B, or category C, member granted a conditional change in status must successfully complete the required modules of the Private Practice Refresher Program within a period of time specified by the Society and may practise law in a private practice setting only under the supervision of a category A member approved by the Society. Failure to comply with any condition will result in the immediate revocation of the conditional change in status. The category B, or category C, member will then not be entitled to become a category A member until he or she successfully completes the required modules of the Private Practice Refresher Program.

An assessment by the Society that a category B, or category C, member must successfully complete required modules of the Private Practice Refresher Program before becoming a category A member will trigger an assessment by the Society of the modules of the Program that must be completed by the member. The modules of the Program that the member must complete will depend on the activities that the member engaged in while not in private practice. A member dissatisfied with the Society's assessment of the required modules of the Program may request an elected bencher (appointed by Convocation for this purpose) to make another assessment.

AMENDMENT TO BY-LAW 28

This motion revokes and replaces the existing By-Law 28. The new By-Law 28 outlines new requalification requirements that will have to be met by members against whom an order was made under section 49.1 of the *Law Society Act.* The new requalification requirements are successful completion of the required modules of the Private Practice Refresher Program. Members against whom an order was made under section 49.1 of the *Law Society Act* will, when they wish to resume private practice, be treated in an equal manner to all other members wishing to re-enter private practice after a period of absence therefrom.

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE *LAW SOCIETY ACT*

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON FEBRUARY 20, 2002

MOVED BY

SECONDED BY

THAT the By-Laws made under subsections 62 (0.1) and (1) of the *Law Society Act* be amended as follows:

BY-LAW 13
[MEMBERS]

1. By-Law 13 [Members], made by Convocation on January 28, 1999 and amended by Convocation on March 26, 1999, December 10, 1999 and March 22, 2001, is further amended by adding the following:

CATEGORIES OF MEMBERS

Categories of members
2.1 (1) The following are the categories of members:
1. Category A members.

2. Category B members.

3. Category C members.

Category A members
(2) Every member who is required to pay, and is not exempt from the payment of, insurance premium levies under By-Law 16 is a category A member.

Category B members
(3) Every member who is not a category A member or a category C member is a category B member.

Category C members
(4) Every member who is exempt from the payment of the annual fee under section 4 of By-Law 15, or who is exempt from the requirement to file an annual report under section 2 of By-Law 17, is a category C member.

Category A members: rights and privileges
2.2 (1) Subject to any order made against the member under the Act, a category A member may practise law without any restrictions.

Category B members: rights and privileges
(2) Subject to any order made against the member under the Act, a category B member may practise law subject to the following restrictions:

1. The member is not permitted to practise law through a partnership.

2. The member is not permitted to practise law through a professional corporation.

3. The member is not permitted to practise law through a sole proprietorship.

4. The member is not permitted to practise law through any arrangement which permits two or more members to share all or certain common expenses but to practise law as independent practitioners.

Category C members: rights and privileges
(3) A category C member is not permitted to practise law.

Interpretation: “Private Practice Refresher Program”
2.3. (1) In this section, “Private Practice Refresher Program” means the program, administered by the Society for the purposes of ensuring that category B and category C members have the practice skills necessary to become category A members, consisting of the following modules:

1. Time management.

2. File management.

3. Financial management.

4. Client relationships/communication.

5. Technology and equipment.

6. Professional management.

7. Personal management.

8. Professional responsibility

Interpretation: "Society official"

(2) In this section, "Society official" means an officer or employee of the Society assigned by the Chief Executive Officer the responsibility of administering and enforcing the provisions of this section.

Changing status: from category B or category C to category A

(3) A category B member or a category C member may become a category A member by applying to the Society for a change in status.

Immediate change in status

(4) An application for a change in status made under subsection (3) shall be considered by a Society official and the Society official shall grant the change in status unless, for 80 percent or more of the five years immediately preceding the date of the application, the member has been a category B member or a category C member.

Change in status upon successful completion of program

(5) If the Society official cannot grant the change in status under subsection (4), the Society official shall grant the change in status after the member has successfully completed the required modules of the Private Practice Refresher Program.

Conditional change in status

(6) Despite subsections (4) and (5), the Society official may grant the change in status conditional on the member successfully completing the required modules of the Private Practice Refresher Program within a specified period of time and practising only as an employee or partner of, and under the supervision of, a category A member approved by the Society official.

Same

(7) If a category B member or a category C member, who is granted a conditional change in status under subsection (6), breaches any condition to which the change in status is subject, the change is status is revoked and, despite subsection (6), the Society official shall grant no further conditional change in status to the member

Private Practice Refresher Program: required modules

(8) If a category B member or a category C member, who applies to the Society for a change of status under subsection (3), is not entitled to be granted the change in status under subsection (4), the Society official shall determine the modules of the Private Practice Refresher Program that must be successfully completed by the member.

Information to be provided by member

(9) For the purposes of assisting the Society official to make the determination under subsection (8), the member shall provide the official with information on the activities engaged in by the member during the five years immediately preceding the date of the member's application for a change in status and such other information relating to the member's practice skills as may be required by the official.

Redetermination by bencher

(10) A member who is dissatisfied with a Society official's determination under subsection (8) may apply to an elected bencher appointed for the purpose by Convocation for a redetermination of the modules of the Private Practice Refresher Program that must be successfully completed by the member.

Procedure on redetermination

(11) Subject to subsection (12), the procedure applicable to a redetermination under subsection (10) shall be determined by the bencher and, without limiting the generality of the foregoing, the bencher may decide who may make submissions to him or her, when and in what manner.

Written submissions

(12) Unless the bencher permits a person to make oral submissions to him or her, all submissions to the bencher shall be in writing.

BY-LAW 28
[REQUALIFICATION]

2. By-Law 28 [Requalification], made by Convocation on October 29, 1999 and amended by Convocation on December 10, 1999, June 22, 2000, September 21, 2000, April 26, 2001 and May 24, 2001, is revoked and the following substituted:

BY-LAW 28

REQUALIFICATION

Delegation of powers and duties of Secretary: Director, Professional Development and Competence

1. (1) An employee or officer of the Society who holds the office of Director, Professional Development and Competence may exercise the powers and perform the duties of the Secretary under section 45 of the Act, as it relates to an order for failure to comply with an order made under subsection 49.1 (1) of the Act, under section 49.1 of the Act and under this By-Law.

Delegation of powers and duties of Secretary: Chief Executive Officer

(2) If for any reason the Director, Professional Development and Competence and the Secretary are unable to do so, the Chief Executive Officer may exercise the powers and perform the duties of the Secretary under section 45 of the Act, as it relates to an order for failure to comply with an order made under subsection 49.1 (1) of the Act, under section 49.1 of the Act and under this By-Law.

Interpretation: "Private Practice Refresher Program"

2. (1) In this section and in section 3, "Private Practice Refresher Program" has the meaning given it in By-Law 13.

Requalification requirements

(2) The requalification requirements that must be met for the purposes of section 49.1 of the Act are successful completion of the required modules of the Private Practice Refresher Program.

Time for meeting requalification requirements

(3) The requalification requirements must be met within the one year period immediately before the member makes a request under section 3.

Determination of required modules

(4) A member who wishes to meet the requalification requirements shall apply in writing to the Secretary for a determination of the modules of the Private Practice Refresher Program that must be successfully completed by the member.

Information to be provided by member

(5) For the purposes of assisting the Secretary to make the determination under subsection (4), the member shall provide the Secretary with information on the activities engaged in by the member since the date of the order made against the member under subsection 49.1 (1) of the Act and such other information relating to the member's practice skills as may be required by the Secretary.

Redetermination by bencher

(6) A member who is dissatisfied with the Secretary's determination under subsection (4) may apply to an elected bencher appointed for the purpose by Convocation for a redetermination of the modules of the Private Practice Refresher Program that must be successfully completed by the member.

Procedure on redetermination

(7) Subject to subsection (8), the procedure applicable to a redetermination under subsection (6) shall be determined by the bencher and, without limiting the generality of the foregoing, the bencher may decide who may make submissions to him or her, when and in what manner.

Written submissions

(8) Unless the bencher permits a person to make oral submissions to him or her, all submissions to the bencher shall be in writing.

Validity of determination, redetermination

(9) The Secretary's determination under subsection (4) and the redetermination under subsection (6) are valid for one year after the date they are made.

Request for certification

3. (1) A member shall make a request in writing to the Secretary for certification that he or she has met the requalification requirements and, in support of the request, the member shall file with the Secretary a certificate of successful completion of the required modules of the Private Practice Refresher Program.

Determination of whether requalification requirements have been met

(2) The Secretary shall consider every request made under subsection (1) and shall,

(a) if he or she is satisfied that the member has met the requalification requirements within the required time period, certify that the member has met the requalification requirements; or

(b) if he or she is not satisfied that the member has met the requalification requirements or has met the requalification requirements within the required time period, refuse to certify that the member has met the requalification requirements.

Same

(3) Despite clause (2) (b), the Secretary may certify that the member has met the requalification requirements if the member has met the requalification requirements but has not done so within the required time period.

Re: Reconsideration of Policies Respecting Confidentiality of Practice Reviews and of Certain Rules Relating to Competence Hearings

It was moved by Mr. Wright, seconded by Mr. Bindman that the Report be tabled.

Carried

ROLL-CALL VOTE

Arnup	Against
Banack	For
Bindman	For
Braithwaite	Against
Campion	Against
Carpenter-Gunn	Against
Cherniak	Against
Coffey	For
Diamond	For
Divinsky	Against
E. Ducharme	Against
T. Ducharme	Against
Epstein	Against
Finkelstein	For
Go	For
Gottlieb	For
Hunter	Against
Laskin	Abstain
Legge	For
MacKenzie	Against
Marrocco	For
Millar	Against
Minor	Against
Mulligan	Against
O'Brien	For
Ortved	Against
Porter	For
Potter	For
Ross	Against
Ruby	For
St. Lewis	For
Simpson	Against
Swaye	For
Topp	For
White	For
Wilson	Against
Wright	For
Treasurer	For

Vote: 19 – For, 18 – Against, 1 Abstention

Convocation took a morning break at 11:00 a.m. and resumed in camera at 11:20 a.m.

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FINANCE & AUDIT COMMITTEE REPORT

Finance and Audit Committee
February 20, 2002

Report to Convocation

Purpose of Report: Information

Prepared by the Finance Department
Andrew Cawse (947-3982)

TERMS OF REFERENCE/COMMITTEE PROCESS

The Finance and Audit Committee (Athe Committee@) met on February 7, 2002. Committee members in attendance were: Ruby C. (c), Epstein S. (vc) Cass R., Chahbar A., Diamond G., Divinsky P., Lamont D., Lawrence A., Swaye G.. Staff attending were Heins M., Tysall W., Corrick K., Grady F., Cawse A..

The Committee is reporting on the following matters:

Decision

X Litigation (in camera)

Information

X Appropriate and Affordable Membership Fee

X Investment Compliance Reports

X Request for Proposal (in camera)

FOR INFORMATION

APPROPRIATE AND AFFORDABLE MEMBERSHIP FEE

7. In the Budget Debate during October 2001 Convocation and the January 2002 Finance and Audit Committee meeting the concept of a budget based on an Aappropriate and affordable@ membership fee was discussed.

8. Additional information was provided to assist the Committee such as a comparison of membership fee to size of regulatory organisation and a comparison of membership fee to provincial income data for lawyers.

9. The usefulness of this size and income information was very limited because of the variations in programs, structures and mandates of the various organisations. This type of comparison can be better carried out on a microeconomic level by the program benchmarking exercise, which is currently being carried out using the Law Society of British Columbia (the next largest of the English model law societies) as part of the budget process.

INVESTMENT COMPLIANCE REPORTS

10. The Investment Compliance Reports for the quarter ending December 31, 2001 are attached and show no breaches in compliance.

The following items were presented for information only:

- Appropriate and Affordable Membership Fee
- Investment Compliance Reports

Attached to the original Report in Convocation file, copies of:

Copies of the Investment Compliance Reports.

(pages 8 – 13)

The Treasurer announced the establishment of an award in honour of The Honourable Lincoln Alexander.

“Whereas Colonel The Honourable Lincoln M. Alexander has by his works demonstrated his longstanding interest and commitment to matters public and to the pursuit of community service

Whereas Colonel The Honourable Lincoln M. Alexander has performed admirably in various capacities on behalf of the residents of Ontario, first as a lawyer and partner in the firm of Millar, Alexander, Tokiwa and Isaacs, then as an elected member of parliament for Hamilton West from 1968 - 1980 and a distinguished member of Cabinet from 1979 - 1980, and then in various capacities as Observer to the United Nations, Member of the Commonwealth Parliamentary Association, Member of the Canadian NATO Parliamentary Association and Member of the Canada-United States Parliamentary Delegation

Whereas Colonel The Honourable Lincoln M. Alexander has served the public of Ontario as Chair of the Workers' Compensation Board (1980 - 1985), and as Lieutenant Governor 1985-1991, and currently serves as Chancellor of the University of Guelph, as Chair of the Canadian Race Relations Foundation and in various capacities including as Honourary Life Bencher of the Law Society of Upper Canada, Honourary Life Member of the Ontario Chamber of Commerce, Honourary Life Member of the Navy League of Canada, Board Member of the Canadian Banking Ombudsman, a Member of the Ontario Press Council and Chairman of the Raptors Foundation

Whereas Colonel The Honourable Lincoln M. Alexander has received numerous honours and awards in recognition of his work, including Honorary Doctor of Laws from the University of Toronto, McMaster University, the University of Western Ontario, York University, Queen's University and the Royal Military College as well as receiving the Award of Excellence by Osgoode Hall Law School Alumni Association and the Lifetime Achievement Award by the Canadian Association of Black Lawyers, and being named Honourary Chief of Police of Metropolitan Toronto, Honourary Chief of the York Regional Police, Honourary Chief of the Hamilton Wentworth Regional Police and Honourary Office of Commissioner of the Ontario Provincial Police, and Invested by the President of Senegal as an Officer of the National Order of the Lion, Inducted into the Terry Fox Hall of Fame and the Hamilton Gallery of Distinction, Appointed Companion of the Order of Canada, recipient of the Harry Jerome Award for Lifetime Achievement and the Black History Month J.C. Holland Award

The Law Society of Upper Canada will establish an award in the name of Colonel The Honourable Lincoln M. Alexander to be conferred each year as part of the Law Society Medal awards to a member of the profession for demonstration of longstanding interest and commitment to matters public and to the pursuit of community service on behalf of the residents of Ontario."

EQUITY & ABORIGINAL ISSUES COMMITTEE REPORT

Mr. Millar presented the Equity & Aboriginal Issues Committee Report for approval by Convocation.

EQUITY AND ABORIGINAL ISSUES COMMITTEE/COMITÉ SUR L'ÉQUITÉ ET LES AFFAIRES AUTOCHTONES

Report to Convocation

Purpose of Report: Decision Making and Information

Prepared by the Equity Initiatives Department

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** The full action plan document is available from Geneva Yee (416-947-3300 ext. 2153) in the Equity Initiatives Department.*

TERMS OF REFERENCE/COMMITTEE PROCESS

The Committee met on Wednesday February 6, 2002 from 4 - 5:30 p.m. in Convocation Room. In attendance were: Paul Copeland (Chair), Derry Millar (Vice-Chair), Stephen Bindman. Staff present were: Charles Smith, Josée Bouchard, Rachel Osborne, Margaret Froh, Jim Varro and Geneva Yee. Tom Cary and Janet Minor were canvassed the following day concerning the Committee's decisions and concurred with them.

The following items are brought to Convocation:

For Decision-Making:

Model Policy on Harassment and Discrimination for Law Firms

For Information:

Equity and Diversity Action Plans

Correspondence on Funding for the Conference *Equity and Diversity in the Legal Profession: Promoting Dialogue, Creating Change*

FOR CONVOCATION DECISION-MAKING

MODEL POLICY ON DISCRIMINATION AND HARASSMENT

1. The Equity Initiatives Department has prepared for release a *Model Policy on Harassment and Discrimination for Law Firms*. This policy is based on the Law Society's own *Workplace Harassment and Discrimination Prevention Policy and Procedures* as well as a review of contemporary case law concerning discrimination and harassment. The proposed policy has been reviewed by several groups and endorsed by the Equity Advisory Group, which includes representatives from Women's Law Association-Ontario, the Advocates' Society, the Canadian Association of Black Lawyers and individuals who have expertise in human rights law.

2. The Law Society has, over the years, produced several model policies for law firms to assist them in developing policies and programs aimed at promoting equity and diversity in all aspects of the legal profession, eg., employment and services. Some of these model policies include: *Guide to Developing Flexible Work Arrangements*, *Developing Equity Policies*, *Personnel Policy on Sexual Harassment* and *Guide to Developing a Policy for Law Firms Regarding Accommodations Requirements*.

3. The *Bicentennial Report on Equity Issues in the Legal Profession* has noted the importance of developing model policies for the profession. The current policy is proposed to address issues related to harassment and discrimination within legal workplaces, particularly as it affects matters related to employment and services.

4. Consistent with the Law Society's *Workplace Harassment and Discrimination Prevention Policy*, the *Model Policy on Harassment and Discrimination* can be used by law firms of all sizes and covers a number of issues, including:

1. Why Law Firms Need Written Policies
2. Legal Requirements and Professional Responsibilities
3. How to Limit a Law Firm's Liability
4. What Should Be Included in a Policy
5. Effective Implementation and Review of the Policy

5. The proposed policy then provides a template for law firms to consider in developing their own policies and procedures.

6. Upon approval of the model policy by Convocation, the Equity Initiatives Department, in consultation with the Communications Department, will communicate the availability of same to the legal profession through notices in the Ontario Reports, via Internet, through promotion at public education activities and through mailings to legal associations across Ontario.

The Committee requests that Convocation adopt the proposed Model Policy.

FOR CONVOCATION INFORMATION

EQUITY AND DIVERSITY ACTION PLAN UPDATE

7. The report at Appendix 2 and the separate attachment provide an update on the implementation of the Law Society's Equity and Diversity Action Plans. These plans have been developed and implemented in compliance with recommendations from the *Bicentennial Report on Equity Issues in the Legal Profession.*

8. The first set of action plans were submitted to Committee in February 2000 and reported by the Committee to Convocation as information. The current plans indicate progress in implementation and address next steps. Progress has been achieved in terms of the Law Society's accommodations of members and the public, communications and outreach, recruitment of employees, education and training of employees, and policy development for Convocation and for internal administration.

9. In terms of next steps, effort is required to assist those areas affected by the Management Reorganization (i.e., Policy and Legal Affairs, Professional Development and Competence, Professional Regulation) to ensure they are consistent with overall organizational development on this issue. There are also corporate initiatives in education and training (i.e., accommodations and workplace harassment procedures) and policy implementation (i.e., contract compliance and equity and diversity in employment) that require attention.

10. These will be addressed in the upcoming year and lead to an evaluation of the overall initiative, including benchmarking, identification of best practices, a critical assessment and recommendations for future implementation.

EQUITY AND DIVERSITY IN THE LEGAL PROFESSION CONFERENCE

11. The Committee provides for Convocation's information at Appendix 3 correspondence received from the Minister of Canadian Heritage and Multiculturalism confirming approval of funding for the conference on *Equity and Diversity in the Legal Profession: Promoting Dialogue, Creating Change.*

APPENDIX 1

THE LAW SOCIETY OF UPPER CANADA

PREVENTING AND RESPONDING TO WORKPLACE
HARASSMENT AND DISCRIMINATION:
A GUIDE TO DEVELOPING A POLICY FOR LAW FIRMS

January, 2002

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INTRODUCTION

The purpose of this Guide is to assist law firms[1] to prevent and respond to workplace harassment and discrimination in order to meet their obligations under the Ontario *Human Rights Code*[2] (the *Code*) and under Rules 5.03 (Sexual Harassment) and 5.04 (Discrimination) of the *Rules of Professional Conduct*[3]. The following introductory material summarizes relevant background studies, discusses law firms' legal and professional responsibility to prevent and respond to workplace harassment and discrimination, and lists some of the benefits to law firms of having a written policy to address these issues. This Guide also discusses how to effectively implement and review such a policy and provides a precedent that firms can utilize on to design their own policy.

WHY LAW FIRMS NEED WRITTEN POLICIES

The Ontario Human Rights Commission has stated that "[t]he best defence against human rights complaints is to be fully informed and aware of the responsibilities and protections included in the *Code*.[4]" It is now well established that the adoption of effective harassment and discrimination policies and procedures and the design and delivery of education programs for employees and members of employment organizations such as law firms have the potential of limiting harm and consequently reducing liability of employers[5].

It is advantageous to a firm to adopt written policies for a number of reasons:

4. Written policies encourage respect for the dignity of all staff and members of the law firm.

5. Written policies show that the firm's management takes seriously its legal and professional obligations.

6. Written policies remove much of the discretion and bias that can otherwise play a part in decision-making about individuals.

7. Written policies clearly set out the nature of comment and conduct which will not be tolerated in the workplace, as well as the preventative, remedial and disciplinary actions that may be taken to address workplace harassment and discrimination.

8. Written policies provide procedures for handling complaints about harassment and discrimination, and encourage prompt resolution of workplace harassment or discrimination.

9. Written policies on equity issues encourage respect for and acceptance of staff and members of the law firm from Aboriginal, Francophone and equity-seeking groups.

10. The existence of written policies allows the firm to communicate its commitment to equity principles to people outside the firm, such as prospective recruits and clients.

11. Written policies minimize the risk of workplace harassment or discrimination and of harm to individual employees, as well as the risk that the firm will be held liable for such unlawful harassment or discrimination.

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[1] Although this Guide refers to law firms, it may be of assistance to other organizations such as legal aid clinics.
[2] R.S.O. 1990, c. H.19.
[3] Adopted by Convocation of the Law Society of Upper Canada on June 22, 2000, effective November 1, 2000.
[4] *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, November 23, 2000) at 41.
[5] For example, see *Ferguson* v. *Meunch Works Ltd.* (1997), 33 C.H.R.R. D/87 (B. C. H. R. T.).

12. Written harassment and discrimination policies may provide the necessary focus for education programs on preventing and responding to workplace harassment and discrimination.

BARRIERS TO EQUALITY IN THE LEGAL PROFESSION

In most professions, there is evidence that Aboriginal, Francophone and equity-seeking groups face serious barriers to equality. The legal profession is no exception. Since 1989, the Law Society of Upper Canada has undertaken and reviewed studies that are indicative of inequality within the profession:

1. Statistics analysed by the Law Society's Special Committee on Equity in Legal Education and Practice in 1990 indicated that visible minorities were seriously under-represented in the legal profession in relation to their populations in Ontario[6].

2. In 1991, the Law Society published a survey of lawyers called to the Bar between 1975 and 1990[7]. Seventy percent of women respondents said they experienced sex discrimination in the course of their work as lawyers. Ten percent of the respondents reported having personally experienced racial or ethnic discrimination in the course of their work as lawyers and seventeen percent reported occurrences of racial or ethnic discrimination against others.

3. A 1992 survey of Black law students, articling students and recently-called lawyers sponsored by the Law Society[8] found that fifty percent of respondents thought they were channelled into particular areas of practice or types of law. Fifty-nine percent of respondents to the 1992 survey believed that certain areas of practice were effectively closed to Black lawyers. The areas of law cited most often as not being open to Black lawyers were corporate/commercial law and related areas of business law such as securities and taxation.

4. In response to complaints from students in 1992, the Law Society conducted a survey of students in 1993 and 1994 concerning inappropriate comments made and questions asked at articling interviews. Students reported that they were asked questions and subjected to offensive remarks concerning age, sex, family status, parenting obligations, sexual orientation, heritage and country of origin, among others.

5. The 1993 report of the Canadian Bar Association's Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability*[9] describes the barriers to equality faced by women in the legal profession. It also demonstrates that these barriers are multiplied for women who face additional forms of discrimination on the basis of race, ethnic origin, sexual orientation or disability. The report urges the profession to remove the barriers and, as one way of doing so, recommends the adoption of model employment policies.

6. In 1996, the Law Society published *Barriers and Opportunities Within Law*, a longitudinal study which compared the success of male and female lawyers called to the Ontario Bar between 1975 and 1990. The report once again confirmed the existence of inequality within the legal profession[10].

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[6] Report of the Special Committee on Equity in Legal Education and Practice adopted by Convocation in February 1991.

[7] *Transitions in the Ontario Legal Profession, A Survey of Lawyers Called to the Bar Between 1975 and 1990* (Toronto: Law Society of Upper Canada, 1991).

[8] Felix N. Weekes and A. Elliot Spears, *Survey of Black Law Students, Black Articling Students, and Recently Called Black Lawyers* (Toronto: Law Society of Upper Canada, July-August 1992).

[9] Canadian Bar Association, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993).

[10] F.M. Kay, N. Dautovich and C. Marlor, *Barriers and Opportunities Within Law: Women in a Changing Legal Profession. A Longitudinal Survey of Ontario Lawyers 1990-1996* (Toronto: Law Society of Upper Canada, November 1996).

7. The Law Society Placement Office surveys for the years 1994-1995 through to 1998-1999, and for 2000-2001 of incoming bar admission course students revealed that Aboriginal students, visible minority students and students with disabilities were over-represented among students who were without articling placements as of September of the year in which they would be expected to commence articles.

8. The Discrimination & Harassment Counsel program, established by Convocation in 1999 to provide services to individuals who allege harassment or discrimination by a lawyer, has reported receiving 582 calls, representing 469 individuals, within 14 months of operation. The overwhelming number of calls received were within the mandate of the program[11].

9. In 2001, the Law Society commissioned Michael Ornstein, Director of the Institute of Social Research of York University, to prepare a demographic survey of the legal profession in Ontario[12]. Using the 1996 Canadian Census, the report shows that 7.3 percent of lawyers in Ontario are non-white, compared to 17.5 percent of the population. Although in 1996 30.1 percent of lawyers in Ontario were women, only 7.8 percent of lawyers between 55 and 64 and 18 percent of lawyers between 45 and 55 were women. The report also notes that the mean annual earnings of non-white lawyers and of women is generally much lower than the mean annual earnings of white male lawyers.

In light of the above-noted studies, the Law Society has undertaken initiatives to promote equality within the legal profession, in accordance with its mandate. The position of the Law Society has been summarized in its *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession*[13].

MODEL POLICIES DEVELOPED BY THE LAW SOCIETY

In the last decade, the Law Society has adopted a number of model policies to promote equality within the legal profession. In 1996, the Law Society of Upper Canada adopted model policies dealing with workplace equity and flexible work arrangements, the *Guide to Developing a Policy Regarding Flexible Work Arrangements* and the *Guide to Developing a Policy Regarding Workplace Equity in Law Firms*[14]. The policies are adaptations of the model policies created by the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, and are updated and tailored to reflect Ontario human rights legislation and the *Rules of Professional Conduct*[15]

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[11]Mary Teresa Devlin, *Discrimination & Harassment Counsel Program* (Toronto: Law Society of Upper Canada, December 2000).

[12] Michael Ornstein, Director of the Institute for Social Research of York University, *Lawyers in Ontario: Evidence from the 1996 Census, A Report for the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, January 2001).

[13] *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* (Toronto: Law Society of Upper Canada, 1997).

[14] *Guide to Developing a Policy Regarding Flexible Work Arrangements* (Toronto: Law Society of Upper Canada, 1996) and *Guide to Developing a Policy Regarding Workplace Equity in Law Firms* (Toronto: Law Society of Upper Canada, 1996).

[15] The Canadian Bar Association Task Force prepared model policies on alternative (flexible) work arrangements, parental leave, sexual harassment, and workplace equity which were published (August 1993) as Appendix 2 of the *Touchstones Report*, *supra* note 9. The model policy on workplace equity, in particular those parts dealing with recruitment, interviewing and hiring, drew upon the recruitment guidelines prepared by the University of Victoria Faculty of Law (reproduced in *Gender Equality in the Legal Profession* (Vancouver: Law Society of British Columbia, 1992).
The CBA's model policy on alternative work arrangements draws upon two other sample policies: the policy prepared by the American Bar Association's Commission on Women in the Profession, which was published in *Lawyers and Balanced Lives: A Guide to Drafting and Implementing Workplace Policies for Lawyers* (Chicago: American Bar Association, 1990), and the policy prepared by the Women's Bar Association of the District of Columbia entitled *Guidelines on Alternative Work Schedules.* .

In 2001, the Equity Initiatives Department of the Law Society published a document entitled *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities; Legal Developments and Best Practices*[16] which provides best practices and a legal analysis of the duty to accommodate. The Law Society also adopted a *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements* based in part on the Human Rights Commission's *Policy on Creed and the Accommodation of Religious Observances*[17] and *Policy and Guidelines on Disability and the Duty to Accommodate*[18].

Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms is one of a number of model policies developed by the Law Society of Upper Canada. The Law Society is in the process of drafting a model policy on benefits for same-sex couples.

LEGAL REQUIREMENTS AND PROFESSIONAL RESPONSIBILITIES

Studies such as those cited above suggest the existence of pervasive discrimination within the legal profession. In human rights law, the fact that there is no intent to discriminate is of no relevance: what counts is the impact that practices, policies and behaviours have on individuals.

Definition of Harassment

Harassment is a form of discrimination. The Supreme Court of Canada has defined sexual harassment in the workplace as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is an abuse of both economic and sexual power. It is a demeaning practice that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being[19].

"Harassment" is defined in subsection 10(1) of the *Code* to mean:

> [...] engaging in a course of vexatious comment or conduct that is known or ought reasonably be known to be unwelcome.

[16] *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities; Legal Developments and Best Practices* (Toronto: Law Society of Upper Canada, March 2001).

[17] *Policy on Creed and the Accommodation of Religious Observances* (Toronto: Ontario Human Rights Commission, October 20, 1996).

[18] Approved by the Ontario Human Rights Commission on November 23, 2000 and released on March 22, 2001.

[19] *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1284.

Although the definition implies that harassment will occur only when there is "a course" of vexatious comment of conduct, case law has indicated that "one" comment or conduct may constitute harassment if it is a serious behaviour[20] Harassment in employment on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or [disability][21] is explicitly prohibited by the following subsections of the *Code*:

s. 5(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, same-sex partnership status, family status or [disability].

s. 7(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

s. 7(3) Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

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[20] Serious forms of harassment, such as physical sexual assault, need not occur more than once to be considered harassment. See Arjun P. Aggarwal, *Sexual Harassment in the Workplace*, 3rd edition (Toronto: Butterworths, 2000) at 140.

In *Hinds* v. *Canada (Employment & Immigration Comm.)* (1988), 10 C.H.R.R. D/5683, the Canadian Human Rights Tribunal determined that Leon Hinds was subjected to racial harassment. Mr. Hinds, a Black man who had been employed with Employment and Immigration for 18 years had received a photocopy of a questionnaire with the heading "Employment Application for Niggers" through the internal mail. The text that followed and the racially derogatory innuendos contained in the document were oppressive. The tribunal determined that the incident amounted to racial harassment.
In *Parsonage* v. *Canadian Tire Corp.* (1995), 28 C.H.R.R. D/42 (Ont. Bd. of Inq.) a manager, while on break in the cafeteria with his colleagues, made a joke with the punch line "there was a nigger in the kitchen". The Board concluded that a single improper and insulting joke, told by employees or supervisors on break does not constitute a violation of the *Code*. However, egregious racial or other threats or comments, even if made only once, could constitute an infringement of the *Code.* (See also *Dhillon* v. *F.W. Woolworth Ltd* (1982) , 3 C.H.R.R. D/743).

[21] Although the *Code* prohibits harassment and discrimination based on "handicap" and provides an extensive definition of the term "because of handicap" (see section 10 of the *Code*), the terms "disability" and "person with a disability" will be used throughout this document instead of "handicap" or "handicapped person". Many persons with disabilities prefer the term "disability". In English, the term handicap is considered obsolete.

The *Code* does not expressly protect against harassment on the basis of sexual orientation but it does protect against discrimination on that basis. Harassment is a form of discrimination[22] and subsection 5(1) of the *Code* may be interpreted to include harassment on the basis of sexual orientation. Further, the Supreme Court of Canada has concluded that human rights legislation that denies equal benefit and protection of the law on the basis of sexual orientation is a violation of section 15 of the *Canadian Charter of Rights and Freedoms*[23]. Denying such benefits under the *Code* would amount to a *Charter* violation.

Harassment is also prohibited by Rules 5.03 (Sexual Harassment) and 5.04 (Discrimination) of the Law Society of Upper Canada's *Rules of Professional Conduct.* Rule 5.03 states:

> A lawyer shall not sexually harass a colleague, a staff member, a client, or any other person.

Rule 5.03 defines sexual harassment as:

> one incident or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature
>
> (a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the recipient(s) of the conduct,
>
> (b) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services,
>
> (c) when submission to such conduct is made implicitly or explicitly a condition of employment,
>
> (d) when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, allocation of files, matters of promotion, raise in salary, job security, and benefits affecting the employee), or
>
> (e) when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment.

Rule 5.04 (Discrimination) of the *Rules of Professional Conduct* not only prohibits discrimination but also harassment based on grounds other than sex. The commentary to Rule 5.04 indicates that:

> In addition to prohibiting discrimination, Rule 5.04 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, or [disability].

Although Rule 5.04 of the *Rules of Professional Conduct* does not prohibit harassment or discrimination based on same-sex partnership status, law firms are bound by the *Code* which prohibits such behaviour.

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[22] The Supreme Court of Canada has recognized that sexual harassment is a form of sex discrimination. *Janzen, supra* note 19 at 1284.

[23] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 applying the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

Disrespectful behaviour, offensive comments or actions, not based on one of the protected ground, which demeans an individual or causes personal humiliation is often referred to as *personal harassment*[24]. While personal harassment is not prohibited under the *Code* or the *Rules of Professional Conduct*, law firms may prohibit such behaviour under their policy on preventing and addressing workplace harassment and discrimination.

Abuse of authority occurs when a person uses authority unreasonably to interfere with an employee or a member of the firm. If the abuse of authority is unrelated to one of the protected grounds, it is not prohibited under the *Code* or the *Rules of Professional Conduct.* However, law firms may prohibit such behaviour in their policy on preventing and addressing harassment and discrimination.

Harassment could also be a *criminal act* and result in a charge under the *Criminal Code*, for example if the behaviour is an assault, constitutes hate propaganda or amounts to criminal harassment[25].

Elements of the Definition of Harassment

The following are elements of the definition of harassment:

- The comment or conduct does not have to be intentional.

- Harassment is usually a series of conduct or comment. It generally has to happen repeatedly for
- a period of time to be considered harassment[26].

- One very serious incident can be harassment[27].

[24] Personal harassment has been defined by the Treasury Board as:

> Harassment is any improper conduct by an individual, that is directed at and offensive to another person or persons in the workplace, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat.

See: http://www.tbs-sct.gc.ca/Pubs_pol/hrpubs/hw-hmt/hara_e.html

The Law Society of Upper Canada's Workplace Harassment and Discrimination Prevention Policy and Procedures prohibits discrimination and harassment on the basis of other human characteristics such as physical appearance, socio economic background or occupational group. It also considers unacceptable behaviour of any kind that is either physically and/or verbally abusive, demeaning or degrading of any employee.

[25] See for example Part VIII, Offences against the Person, *Criminal Code*, R.S.C. 1985, c. C-46.

[26] For example, one homophobic joke might not be harassment, but persistent homophobic comments may become harassment with time.

[27] For example, sexual assault.

- A person does not have to object to the behaviour in order for something to be considered harassment. What is relevant is whether the respondent "knew or ought reasonably to have known" that the behaviour was unwelcome. Tribunals have generally adopted the objective standard of the reasonable person. If a reasonable person were to find the behaviour unacceptable, the alleged harasser ought to have known that the behaviour would be unwelcome. However, in the context of sexual harassment, authors have criticized the reasonable person standard because it legitimizes the dominant social norm of the workplace, the male standard[28]. In some sexual harassment cases, tribunals have adopted the reasonable victim standard and have considered whether the reasonable victim would ind the behaviour unwelcome[29]. Tribunals have been more willing to adopt a contextualized approach in racial harassment cases, by recognizing that social norms in the workplace are often defined by dominant groups and may, in fact, create poisoned work environments for the non-dominant racialized groups[30].

- Harassment may occur where job benefits or security are conditional on an exchange of a favour[31].

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[28] See Kathleen Gallivan, "Sexual Harassment After Janzen v. Platy: the Tranformative Possiblities" (1991) 49 University of Toronto Faculty of Law Rev. 27; Josée Bouchard, "La personne raisonnable en matière de harcèlement sexuel: une appréciation féministe" (1995) 8 C.J.W.L. 89; Maurice Drapeau, *Le harcèlement sexuel au travail* (Cowansville: Les édititions Yvon Blais Inc., 1991).

[29] *Harris* v. *Omni Data Supply Ltd.* (1987), 8 C.H.R.R. D/4385 (B.C. Bd. of Inq.); *Stadnyk* v. *Canada (Employment and Immigration Commn.*) (Can. 1993) 22 C.H.R.R. D/173 (Can. H.R.T.); affd (1995) 22 C.H.R.R. D/196 (H.R. Rev. T.); affd, unreported, November 15, 1996, Doc. T-698-95 (F.C.T.D.).

Kathleen Gallivan, *ibid.* at 56, suggests the adoption of the reasonable victim:

> This standard would first take into account the woman's vulnerability, an umbrella term for a variety of characteristics including her age, her cultural background, her relationship to her employer of co-workers, her relative isolation in the workplace and her position in the workplace hierarchy, her need for the job, and her security in it. In short, it would take account of all the factors that make a woman's resistance to harassment difficult. It would also recognize the various ways in which vulnerable women manifest their profound discomfort with the harassment without expressly telling the harasser to stop. These include such signs of discomfort as nervous laughter, silence, or avoidance of the harasser.

[30] See *Dillon* v. *F.W. Woolworth Co. Ltd* (1982), 3 C.H.R.R. D/743 (Ont. Bd. of Inq.) in which the Board recognized the effect of a racially hostile environment and accepted that the East Indian workers' retaliations were a reflection of how angered and injured they were. In *Francois* v. *Canadian Pacific Ltd.*, (1988), 9 C.H.R.R. D/4724 (C.H.R.C.) a Board held that a workplace poisoned with racist commentary by all workers, irrespective of race, does not allow an employer to ignore the racism. The name calling was unacceptable.

[31] For example, an associate in a law firm asking an assistant to have sex with him and promising a salary raise in return.

- The unwelcome comment or conduct does not have to be directed at a specific person for harassment to occur. Comments or conduct that tend to ridicule or disparage a group causing humiliation, insult, apprehension or disruption may *poison the work environment*[32]. A *poisoned workplace environment* exists when conduct or comments tend to demean a group covered by a protected ground, even if not directed at a specific individual. It is the creation of a negative or unpleasant emotional or psychological work environment[33].

- Harassment may be verbal[34], physical[35] or visual[36].

Definition of Discrimination

Subsection 5(1) of the *Code* prohibits discrimination in employment:

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[32] For example, employees routinely making derogatory jokes and comments about persons of colour.

[33] When considering whether there is a *poisoned work environment*, it is important to consider the context. In *Moffatt* v. *Kinark Child and Family Services*, a Board of Inquiry had to decide whether nasty speculation or rumours, prying and casual gossip about the sexual orientation, health and family life of an employee is harassment or discrimination. The Board observed that:

> [D]iscriminatory conditions can be created by derogatory comments which target a person on the basis of their identification with a prohibited ground of discrimination. Comments which are, for example, racist, sexist, homophobic or mocking of a person's disabilities, whether written or oral, whether said directly to an employee or behind their back, can be the basis for a finding of employment discrimination. An isolated remark may not, on its own, create a poisoned work environment; each case requires consideration based on all the circumstances including the nature and frequency of the remarks and the impact on the complainant[...]
>
> The appropriateness of any particular conversation referencing, in a neutral way, directly or indirectly, the sexual orientation of a colleague, will depend on a number of factors, the most significant of which will be the openness of the employee who is the subject of the conversation. Context is also very important. Even a casual friendly inquiry about a partner may be unwelcome if it has the potential to reveal a person's sexual orientation to an unknown and possibly hostile third party. For a gay man or lesbian, a careless reference to their orientation, even by a friend, can have the effect of forcing them "out of the closet" in a situation where they do not feel safe. When a gay man or lesbian has clearly indicated that they do not expect their sexuality to be a topic of conversation, on-going careless references by colleagues to their sexual orientation, even if not individually offensive, may have the cumulative effect of creating an environment in which they feel vulnerable to hostility from others. (*Moffatt* v. *Kinark Child and Family Services* [1998] O.H.R.B.I.D. No. 19, Decision No. 98-019 at par. 211 and par. 215.)

[34] Such as derogatory comments about a person's sexual attractiveness, demeaning jokes, sexual suggestions and innuendo, sexual solicitations. Unwelcome remarks, jokes, innuendos or taunting about a person's racial or ethnic background, colour, place of birth, citizenship or ancestry. Refusing to speak or work with an employee because of his or her racial or ethnic background or because of his or her disability.

[35] Unwanted touching, such as stroking, tickling or grabbing someone, impeding or blocking movement in an attempt to get physically close. Insulting gestures or practical jokes based on ethnic or racial grounds which cause embarrassment or awkwardness.

[36] Derogatory or degrading posters, explicitly sexual images, cartoons, graffiti or the displaying of racist, derogatory, or offensive pictures or materials.

> Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences[37], marital status, same-sex partnership status, family status or [disability].

Rule 5.04 of the *Rules of Professional Conduct* provides that law firms have a legal and professional duty not to discriminate (on any of the prohibited grounds enumerated in the *Code* and in Rule 5.04):

> A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the *Code*), marital status, family status, or [disability] with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other members of the profession or any other person[38].

For years, courts and tribunals have defined discrimination in terms of "direct", "adverse effect"[39] or "systemic".

"Direct discrimination" exists where an employer adopts a practice or rule which on its face discriminates on a prohibited ground.

"Adverse effect discrimination" means that an employer, for genuine business reasons, adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force.

"Systemic discrimination" means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics.

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[37] "Record of offences" is defined in the *Code* as a conviction for a criminal offence for which a pardon has been granted or a conviction under any provincial enactment.

[38] Although Rule 5.04 does not prohibit discrimination or harassment based on same-sex partnership status, law firms are bound by the *Code* which includes such ground.

[39] Adverse effect discrimination has also been termed "indirect" or "constructive" discrimination.

Discrimination Resulting from a Rule or Policy and the Duty to Accommodate

The *Code* prohibits adverse effect discrimination resulting from a rule or policy. However, under section 11 of the *Code*, an employer may justify a workplace rule that has the effect of discriminating against a person or group of persons on a prohibited ground, including disability, by showing that the rule is a *bona fide* occupational requirement and that the needs of the person or group cannot be accommodated without undue hardship[40].

Section 17 of the *Code* also creates an obligation to accommodate persons with disabilities. Section 17 states that there is no violation of the right of a person with a disability if that person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right. However, this defence is not available unless it can be shown that the needs of the person cannot be accommodated without undue hardship[41].

When one alleges that a rule or policy is discriminatory, the Supreme Court suggests the following three-step analysis:

> Once a plaintiff establishes that the standard is *prima facie* discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a *bona fide* occupational requirement or has a *bona fide* and reasonable justification. In order to establish this justification, the defendant must prove that:
>
> 2. it adopted the standard for a purpose or goal rationally connected to the function being performed;
> 3. it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal ; and

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[40] Section 11 of the *Code* imposes a duty to accommodate:

(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

[41] Section 17 of the *Code* imposes a duty to accommodate persons with disabilities:

> (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of [disability].
>
> (2) The Commission, the board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

4. the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship[42].

In Ontario, the Court of Appeal has adopted the three-step analysis set out by the Supreme Court of Canada which means that, in cases of *prima facie* discrimination based on disability, an individual may rely on section 11 or 17 of the *Code*. In cases of *prima facie* discrimination based on other grounds, an individual may rely on section 11 of the *Code*. Under either section, to justify workplace related rules or policies, the three steps of the analysis must be satisfied[43].

The commentary to Rule 5.04 of the *Rules of Professional Conduct* also imposes a duty to accommodate:

> The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in Rule 5.04.

The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law[44].

Retaliation, Threats or Reprisals

Human rights law not only prohibits harassment and discrimination but also retaliation, threats or reprisals in relation to harassment or discrimination. Complainants and potential complainants are protected against retaliation, threats or reprisals for filing a complaint, assisting in a complaint, or testifying in human rights cases. Further, retaliation, threats or reprisals against a person who exercises her or his right to complain is illegal even if the complaint is unsuccessful.

False and Frivolous Accusations

Although false and frivolous accusations of harassment or discrimination occur in rare instances, such false accusations are serious offenses because they may have very serious adverse ramifications for the accused. Workplace harassment and discrimination policies should encourage victims to come forward, but at the same time, should discourage false and fabricated charges against innocent persons.

Definition of Employment

The *Rules of Professional Conduct* prohibit harassment and discrimination in employment or in professional dealings.

The terms “employer” and “employment” are defined broadly; pursuant to both human rights legislation and the *Rules of Professional Conduct*, employment extends to professional employment of other lawyers, articled students, or any other person, from administrative staff to partners.

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[42] *British Columbia (Public Service Employees Relations Commission)* v. *B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 (the *Meiorin* case) at par. 54.

[43] *Entrop* v. *Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (Ont. C.A.).*111*

[44] The *Code* and the *Rules of Professional Conduct* impose a duty to accommodate differences arising from the personal characteristics up to the point of undue hardship. The duty to accommodate is a legal requirement imposed on employers in Ontario, including law firms. Consequently, law firms are encouraged to adopt a policy to prevent and respond to workplace harassment and discrimination and a policy regarding accommodation requirements.

Although the *Code* does not refer specifically to volunteers, the Human Rights Commission is of the view that "equal treatment with respect to employment" in section 5 of the *Code* can be interpreted to protect anyone in a work context[45]. This would include volunteers, co-op students and dependent and independent contractors.

The term "employment" covers recruitment, interviewing, hiring, promotion, evaluation, compensation, professional development and admission to partnership.

Members of a firm are also prohibited from engaging in harassment or discrimination when dealing with clients, or other parties with whom they interact in a professional capacity.

Definition of "In the Workplace" or "In the Course of Employment"

To constitute a prohibited conduct in the context of employment under the *Code*, the conduct must take place "in the workplace"[46], or "in the course of employment"[47]. The scope of those terms is not clear. The term "in the course of employment" has been interpreted in *Cluff* v. *Canada (Department of Agriculture)*[48] in which an employee alleged that she was sexually harassed in the late evening at a conference. The complainant, a term employee with the Communications Branch at the Department of Agriculture, had become active in the Eastern Canada Farm Writers' Association. She was authorized by her supervisor to organize its annual conference during working hours, provided the work did not interfere with her normal duties. The employer paid her registration fee at the conference. As part of her organizational duties, she was required to host the hospitality suite and, for practical reasons, she was to sleep in the bedroom portion of the suite. She alleges that she was sexually harassed by a senior employee of the Communications Branch of Agriculture Canada between 2:00 a.m. and 3:00 a.m. in the suite. The issue was whether the harassment occurred "in the course of employment" or in "matters related to employment". The Tribunal held, and the Federal Court concurred, that an employee is in the course of employment when, within the period covered by the employment, he or she is carrying out:

- activities which he or she might normally or reasonably do or be specifically authorised to do while so employed;
- activities which fairly and reasonably may be said to be incidental to the employment or logically and naturally connected with it;
- activities in furtherance of duties he or she owed to his or her employer; or
- activities in furtherance of duties owed to the employer where the latter is exercising or could exercise control over what the employee does.

The Federal Court concluded that the complainant's activities in relation to the conference were normal or reasonable adjunct activities from which the Department and the complainant could benefit. The fact that the Department did not control or influence the association was of no consequence. The work undertaken by the complainant was fairly and reasonably incidental to her employment in the Department. However, the Court held that what happened after the hospitality suite closed could not be related to her employment. At some time before 2:00 a.m. and at or shortly after the time the hospitality suite effectively closed, the complainant ceased to be in the course of employment or engaged in matters related to employment[49].

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[45] *Human Rights at Work* (Toronto: Ontario Human Rights Commission, 1999) at 35.
[46] The term "in the workplace" is used in sections 5 and 7 of the *Code.*
[47]The term "in the course of employment" is used in the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.
[48] [1994] 2 F.C. 176 (F.C.).
[49] *Ibid.*

In *Robichaud* v. *R.*[50], the Supreme Court of Canada has recognized that sexual harassment does not only occur in the workplace, and that the phrase "in the course of employment" should be given a broad interpretation and should be understood as meaning "in some way related or associated with the employment".

In *Simpson* v. *Consumers' Assn. of Canada (CAC)*, the Ontario Court of Appeal defined the term "workplace" in the context of harassment. The respondent, an executive director of the appellant association had propositioned a female member of staff during a three-day meeting of the board of directors in Saskatchewan. The incident took place late one evening at the hotel where they were both staying. On another occasion the respondent squeezed another female employee's buttocks while she was bending over. That incident happened at around 11:00 p.m. in the hospitality suite of a hotel in Banff where the CAC was holding its annual general meeting. Finally, while attending a business conference in Quebec, and in the presence of other staff members, the respondent went into the conference hotel's hot tub naked with a secretary who was topless. The Court of Appeal concluded that, although the incidents took place during CAC meetings or retreats held at hotels, they were clearly business meetings, even if they included a social component.

Justice Feldman, for the Court, states:

> That the incidents occurred after the official business of the meetings, and, for example, in a hospitality suite, does not mean that they are outside the workplace and therefore outside the employment context. In *Smith* v. *Kamloops and District Elizabeth Fry Society* (1996), 136 D.L.R. (4th) 644 at 654, the British Columbia Court of Appeal held that "[a]n employee's conduct outside the workplace which is likely to be prejudicial to the business of the employer can constitute grounds for summary dismissal." In *Tellier* v. *Bank of Montreal* (1987), 17 C.C.E.L. 1 (Ont. Dist. Ct.), one of the key events constituting sexual harassment occurred at a cocktail party held by a company that was doing business with the bank [...] These CAC meetings, including the social aspects, were perceived by the staff as job related. The people invited were either employees or volunteers of the association, attending a function paid for by the association. In the cases of Sandy Reiter and Julie Glascott, the women were strictly employees of the association and not friends of the respondent. Although these incidents did not take place within the physical confines of the office, they occurred in the context of the work environment[51].

The Canadian Human Rights Commission and the Ontario Human Rights Commission recognize that harassment can take place in the workplace itself, or outside of the workplace in situations that are in some way connected to work. For example, during off-site meetings, business trips, and any other event or place related to employment when the employee is present in the course of employment. Harassment will not be tolerated in any work-related place or at any work-related event[52].

Liability of Employer

Employers have the ultimate responsibility for ensuring that their workplace is free of harassment and discrimination. In 1987, the Supreme Court of Canada rendered its decision in *Robichaud* v. *Canada (Treasury Board)*[53] pursuant to the *Canadian Human Rights Act* which established employers' liability for acts of their employees in the course of employment. The decision confirmed that human rights legislation imposes a statutory obligation which requires employers to provide a safe and healthy working environment.

The Court placed the responsibility on those who control the organization and are in a position to take effective remedial action to remove undesirable conditions. The response of an employer will have important practical implications, for example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps.

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[50] [1987] 2 S.C.R. 84.

[51] *Simpson* v. *Consumers' Assn. of Canada* (21 December 2001), Toronto C31917 and C31918 (Ont. C.A.)

[52] *Anti-Harassment Policies for the Workplace, An Employer's Guide* (Canadian Human Rights Commission, 1998).

[53] *Supra* note 50.

The *Robichaud* decision recognizes that the employer alone is in a position to enforce human rights in the workplace by implementing policies, creating a healthy work environment, reinstating an employee who has been dismissed, providing benefits to the victims of human rights violations and punishing those who violate human rights laws.

The *Robichaud* decision confirmed that:

1. employers are responsible for the due care and protection of their employees' human rights in the workplace;

2. unless otherwise provided by legislation, employers are liable for the discriminatory conduct of, and harassment by, their agents and supervisory personnel;

3. harassment by a supervisor may be automatically imputed to the employer when such harassment results in a tangible job-related disadvantage to the employee;

4. explicit company policy forbidding harassment and the presence of procedures for reporting misconduct may not be sufficient to offset liability;

5. employers will be pressured to take a more active role in maintaining a harassment/discrimination-free work environment;

6. employers' intentions to have effective harassment policies are insufficient. In order to avoid liability, the policies should be functional and work as well in practice as they do in theory[54].

The Ontario *Human Rights Code* makes an employer responsible for any acts or thing done or not done in the course of employment by an officer, agent, or employee for certain discriminatory conducts. However, it exempts the employer from liability in relation to harassment caused by its agents or employees[55].

The Human Rights Commission nevertheless recognizes that employers have violated the *Code* where the employer:

(a) directly or indirectly, intentionally or unintentionally infringes the *Code*;

(b) constructively discriminates;

(c) does not directly infringe the *Code* but rather authorizes, condones, adopts or ratifies behaviour that is contrary to the *Code*[56].

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[54] Aggarwal, *supra* note 20 at 264.

[55] Subsection 45(1) of the *Code* states:

For the purposes of the Act, except [...] subsection 5(2), section 7 [...], any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.

Subsection 5(2) provides for the right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or [disability].

Subsection 7(2) provides the every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

[56] Ontario Human Rights Commission, *Human Rights at Work, supra* note 45 at 30.

As well, the employer's liability may be engaged in some circumstances where an employee contravenes the *Code* in the course of his or her employment.

A 1993 Board of Inquiry decision, *Broadfield* v. *De Havilland/Boeing*[57], found an employer liable for the acts of its employees for sexual harassment, stating that a significant feature of the case was that the company knew that the complainant would be likely to face resistance from some male employees. The complainant was the first female supervisor at De Havilland/Boeing of Canada Ltd. and she faced ongoing harassment in the form of threats, gender based insults, anonymous obscene phone calls at her home and was shown pornographic magazines by male workers. She reported the harassment to the company which did not react. The Board held that the employer was liable for the sexual harassment. The employer was aware, at the time the complainant became a supervisor, of the potential for harassment and it had an obligation to take the necessary measures to prevent it or to mitigate the effects of the harassment. Once the harassment occurred the company was also liable for the failure to take the appropriate measures to address the issue.

In *Moffatt* v. *Kinark Child and Family Services*[58], an Ontario Board of Inquiry reiterated that an employer is under a duty to take reasonable steps to address allegations of discrimination or harassment in the workplace and that a failure to do so will result in liability under the *Code*. The reasonableness test has been applied to determine quantum of damages, corporate liability in allegations of discrimination and to determine the adequacy of an mployer's investigation into a complaint of discrimination to determine whether a decision to terminate is reprisal[59]. The Board identified six elements that an employer must demonstrate:

1. It is aware that harassment or discrimination is prohibited conduct;
2. A complaint mechanism is in place;
3. It acted with alacrity in handling the complaint;
4. It dealt with the matter seriously;
5. It has met its obligation to provide a healthy work environment; and
6. It met its obligation to inform the complainant of its response.

If an employer fails any of the six elements it necessarily fails the test.

The *Law Society Act*[60] provides that, in Ontario, two or more members may establish a law firm by forming a partnership, within the meaning of the *Partnership Act*, a limited liability partnership within the meaning of the *Partnership Act* or a professional corporation for the purpose of practising law[61].

The Ontario Human Rights Commission states that, in the case of a corporation, a directing mind who discriminates against or harasses anyone in a manner contrary to the *Code*, or who knows of harassment or discrimination and did not take steps to remedy a situation, engages the liability of the employer[62]. The Human Rights Commission provides the following definition of "directing mind":

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[57] (1993), 19 C.H.R.R. D/347 (Ont. Bd. of Inq.).
[58] *Supra* note 33.
[59] See *Jones* v. *Amway of Canada, Ltd.*, [2001] O.H.R.B.I.D. No. 9 (Ont. Bd. of Inq.); *Moffatt, ibid.*; *Wall* v. *University of Waterloo* (1995), 27 C.H.R.R. D/44 (Ont. Bd. of Inq.) adopting *Robichaud, supra* note 50.
[60] R.S.O. 1990, c.L.8.
[61] *Ibid.* at section 61.
[62] *Human Rights at Work*, *supra* note 45 at 30.

> Generally speaking, an employee who performs management duties is part of the "directing mind" of a company. Even employees with only supervisory authority may be viewed as part of a company's "directing mind" if they function, or are seen to function, as representatives of the organization. Holding an employer liable for the conduct of an employee who is part of the "directing mind" is consistent with the "organic theory" of corporate liability.
>
> Non-supervisors may be considered part of the "directing mind" if they have *de facto* supervisory authority or have significant responsibility for the guidance of employees[63].

Ontario Boards of Inquiry have defined "directing mind" of a corporation as "generally speaking, whenever an employee provides some function of management, he is then part of the "directing mind"[64].

In applying the human rights definition of "directing mind" in the context of a partnership or a limited liability partnership, it could be argued that all partners perform management duties and have responsibilities that are equivalent to those of a "directing mind" in a corporation. For this reason, the term "directing mind" will be used throughout this document, when referring to those who may engage the liability of the employer and who have a responsibility to take reasonable steps to address allegations of harassment or discrimination.

Harassment or Discrimination by Clients or Customers

Case law has found employers responsible not only for their own acts of discrimination, but also those of their agents and employees. An employer can also be liable for the acts of third parties such as consumers and customers. An employer has a duty to intervene to stop harassment of its employees by third parties. The employer cannot be absolved of its responsibility by showing that it was responding to the real or perceived preferences of customers. In the case of harassment by consumers or customers, the employer has the greatest control over workplace conditions, and it must intervene effectively to stop harassment by third parties. "While an employer may not be able to control the remarks of a customer or consumer, the employer does have control over how it responds to discriminatory conduct in the workplace, regardless of how the conduct occurred. In deciding whether an employer took reasonable steps to eliminate the problem, a tribunal will determine whether an employer acted promptly and effectively in all the circumstances in response to acts of harassment and will assess the appropriateness of its efforts to prevent harassment. An employer will be found liable unless it can demonstrate that it did not consent to the harassment, that it exercised all due diligence to prevent the harassment from occurring, and that it attempted to mitigate the effect of the harassment. In considering due diligence, the nature of the response will be examined. The response should bear some relationship to the seriousness of the incident. The employer must take reasonable steps to alleviate, as best it can, the distress arising within the work environment, to mitigate the effects of discrimination, and to reassure workers that it is committed to a workplace free of harassment"[65].

HOW TO LIMIT A LAW FIRM'S LIABILITY

Employers, including law firms, can take a number of steps to limit their liability[66]:

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[63] *Ibid.* at 30.

[64] Stra*uss* v. *Cdn. Property Investment Corp. (No. 2)* (1995), 24 C.H.R.R. D/43 (Ontario Bd. of Inq.) at D/50. See also N*araine* v. *Ford Motor Co.* (1996) O.H.R.B.I.D. no. 23; *Fu* v. *Ontario* (1985), 6 C.H.R.R. D/2797 (Ont. Bd. of Inq.); *Shaw* v. *Levac Supply Ltd.* (1990), 14 C.H.R.R. D/36 (Ont. Bd. of Inq.).

[65] *Clarendon Foundation* v. *O.P.S.E.U., Local 593* (2000), 91 L.A.C. (4th) 105; *Stefanik* v. *Michaud and Spectronic Service Ltd.* (1998), 99 C.L.L.C. 145,007; *Jalbert* v. *Moore* (1996), 96 C.L.L.C. 145, 593; Re *Clarke Institute of Psychiatry and Ontario Nurses' Association* (1996), 54 L.A.C. (4th) 129; *Uzuoaba* v. *Correctional Service of Canada* (1994), 94 C.L.L.C. 16; *Mohammed* v. *Mariposa Stores Limited Partnership* (1990), 14 C.H.R.R. D/215 (B.C. Bd of Inq.).

[66] Taken from Arjun P. Aggarwal, *supra* note 20 at 313.

1. Employers should adopt a comprehensive harassment and discrimination policy, that meets the standards imposed by the Ontario Human Rights Commission, the *Code* and the case law. The policy should include several avenues through which the complaint may be brought to the attention of management and should be distributed to all staff and members of the firm and be widely disseminated.

2. Education programs on harassment and discrimination should be designed and delivered to staff and members of the firm.

3. Employers must be aggressive about implementing the policy. It is not enough to wait for complaints. Directing minds should watch for signs of harassment or discrimination and should take action when they observe it, even if no complaint has been filed. Staff should know that the firm is committed to a harassment and discrimination free workplace, will not tolerate any form of harassment or discrimination in the workplace, and that perpetrators may be discharged. The absence of a formal complaint should not stop the firm from investigating rumours and unofficial complaints.

4. The employer's investigation of a harassment or discrimination incident must be prompt, effective, unbiased, and thorough.

5. Where allegations of harassment or discrimination are substantiated, strong and prompt remedial action must be taken. The remedial action must be reasonably calculated to end the harassment and may be disciplinary in nature.

WHAT SHOULD BE INCLUDED IN A POLICY

The following is an outline of the elements of a successful workplace harassment and discrimination policy:

Statement of principles: The members and employees of the firm should know that harassment and discrimination are not tolerated in the workplace, and that the law firm will take immediate steps to end instances of harassment or discrimination.

Objectives: Employees and members of the firm should know the objectives to be accomplished by a written policy.

Application of the policy: The policy should establish clearly who is covered by the policy and what types of relations and environments are covered by the policy. For example, the policy might specify that it applies to everyone working for a law firm and covers any employment-related environment.

Definitions: The policy should provide definitions of concepts such as harassment and discrimination.

Examples: The policy may provide examples of harassment or discrimination.

Rights and Responsibilities: All employees and members of the law firm should know what is expected of them. A section of the policy should spell out the right to be free from harassment or discrimination and the responsibility to raise concerns about discrimination and harassment and to co-operate in the investigation of a harassment or discrimination complaint. Further, the policy should spell out the law firm's responsibility in preventing and responding to workplace harassment and discrimination.

Confidentiality: The policy should spell out clearly the duty of confidentiality.

Advisors: The policy should provide for the selection of advisors who will act as internal resources to all staff and members of the firm concerned about possible or actual harassment or discrimination. The policy should describe the selection process of advisors and provide an outline of their role. Further, the policy should specify that advisors will receive appropriate education and institutional support and assistance for carrying out their responsibilities.

Equality Committee: The policy should designate a person or a committee to handle formal complaints of harassment or discrimination.

Procedures: The procedures should outline clearly the process to be followed when a person considers that she or he or someone else has been subjected to harassment or discrimination. The procedures should include the initial actions that a complainant may take, such as approaching the respondent, an advisor or a directing mind, the outcome of the initial action and the process for issuing a formal complaint. The policy should, when a formal complaint has been issued, provide that the parties may resort to voluntary mediation. Further, the policy should provide for a formal investigation and describe the formal investigation process including the possible outcomes.

Implementation guidelines and strategies: The policy should describe the law firm's implementation strategies.

EFFECTIVE IMPLEMENTATION AND REVIEW OF THE POLICY

Establishing a Drafting Committee

The starting point is to establish a committee to draft the policy. The membership of the committee should be diverse. To the extent possible, the committee should be composed of directing minds, partners, associates, and staff of both sexes and of differing age, race, ethnic origin, family status, sexual orientation, and religion, as well as individuals with disabilities. If there are lawyers or individuals in the firm with expertise in the relevant employment and discrimination law, one or more should be included.

It is most important that the committee include respected staff and members of the firm who appreciate the importance of the issues to be addressed and who will be able to communicate these matters to others within the firm.

The composition of the committee is critical to the credibility of the process and the policies which are produced.

Developing the Policy

Committee members should educate themselves about the applicable law and become familiar with existing firm practices and policies that may be relevant.

A consultative process, which includes diverse staff and members of the firm and others with experience and expertise, should be followed. Harassment and discrimination policies apply to the hiring process and to articling students. Law firms should involve articling students in the consultative process.

The committee should circulate a draft policy throughout the firm for comments. This step is important because it generates support and allows for useful comment. It is important to explain the rationale for introducing such a policy, as well as the effect of the proposed policy on existing arrangements.

Implementing the Policy

The initial presentation of the policy and a clear statement of management committee support are critical to its success.

Once the policy is adopted, it should be distributed to all staff and members of the firm with a covering memorandum emphasizing the strong support of the management committee.

Individuals charged with implementing and applying the policy, such as Advisors appointed under the policy, the Equality Committee (created under the policy) or directing minds should receive special training to ensure that they are well informed of the specifics of the firm's policy, the law, interviewing techniques and information gathering.

Workshops should be organized to inform all staff and members of the firm about the provisions of the policy and the objectives that it is intended to meet.

The workshops should emphasize the changing demographics of the legal profession and the benefits that can come to the firm from adopting a policy on preventing and responding to workplace harassment and discrimination. The workshops should also stress that the right to be free from harassment or discrimination in the workplace is protected by human rights legislation, and is an important value within Canadian society. It is important that staff and members of the firm understand the negative impact that harassment and discrimination has on the dignity of individuals within the workplace, as well as on workplace productivity.

Factors that may cause opposition within the workplace should be identified, and discussed frankly. One example may be the misconception that such policies outlaw personal relationships between members of the firm, and create a "chilling" anti-social atmosphere. These concerns should be recognized and addressed at the outset through discussion of the purposes and goals of workplace harassment policies.

The initial presentation of the policy combined with a clear statement of senior and managing partners' support are critical to its success.

Communicating the Policy

If the firm has a handbook of policies or if policies are available on the internet, the workplace harassment and discrimination policy should be included. If the firm does not have a handbook of policies, or if it does not make its policies available on the internet, the firm may wish to distribute copies of the policy directly to each staff and member, and/or post copies of the policy in a common area.

The policy should be made available to all prospective members of the firm at the initial interview stage. Such a practice will make a strong statement about the firm's support for the policy and its objectives. Further, the *Human Rights Code* applies to the provision of terms and conditions of employment, recruiting, application forms, interviews and promotions. Firms may also wish to publicize the existence of the policy in their recruitment materials.

Reviewing, Evaluating and Revising the Policy

A committee of the firm should have the responsibility to review and revise the policy on a periodic basis. The committee will also attempt to identify barriers that might affect staff and members of the firm identified by personal characteristics listed in the *Code*. The first review should take place after there has been sufficient time to evaluate its operation.

The mandate of the committee should include an evaluation of whether the policy has been fairly implemented.

The goal of the review process is to ensure that the policy meets the needs of the firm and of its members and employees.

Individual staff and members of the firm should be encouraged to communicate their comments on the policy to the committee, either on an ongoing basis, or during the course of the review.

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The pages which follow are a precedent for a policy which firms may adapt for their own use. In some cases, a firm may wish to add details or examples from the endnotes to the actual text of its own policy.

The precedent addresses the most common situation: a firm composed of partners, associates, and other staff or a professional corporation, not subject to a collective agreement. Where a workplace is governed by a collective agreement, modifications may need to be made to the policy, and possibly to the collective agreement.

The policy on Preventing and Responding to Workplace Harassment and Discrimination is simply that: a precedent. It is intended to provide guidance, rather than to represent the ultimate or ideal policy. A firm will need to design its own policy, tailoring the recommended model to its own circumstances.

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PREVENTING AND RESPONDING TO WORKPLACE
HARASSMENT AND DISCRIMINATION

STATEMENT OF PRINCIPLES

1. [Name of firm] is committed to providing a working environment in which all individuals are treated with respect and dignity. Each individual has the right to work in a professional atmosphere which promotes equal opportunities and prohibits discriminatory practices.

2. Harassment and discrimination in employment on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability are illegal. Harassment and discrimination are prohibited by the *Human Rights Code*[1] and by Rules 5.03 (Sexual Harassment) and 5.04 (Discrimination) of the Law Society of Upper Canada *Rules of Professional Conduct*[2].

3. Harassment and discrimination are offensive, degrading and threatening. [Name of firm] has adopted this workplace policy to make clear that harassment and discrimination will not be tolerated in our firm. Regardless of seniority, individuals found to have engaged in behaviour constituting harassment or discrimination may be severely disciplined.

4. [Name of firm] recognizes that proper education and training of staff and members of the firm is important in developing a workplace free from harassment or discrimination. All staff and members of the firm should understand what constitutes harassment and discrimination, that it is harmful to individuals and to firm productivity, and that it is strictly prohibited.

5. [Name of firm] recognizes that its staff and members may be subjected to harassment or discrimination by individuals who are not staff or members of the firm, such as clients, others who conduct business with the firm, opposing counsel, court personnel or judges. The firm considers such harassment or discrimination as unacceptable and acknowledges its responsibility to support and assist an employee or member of the firm subjected to such harassment or discrimination [Name of firm] will do all it can to ensure that the behaviour stops.

6. It is the responsibility of all staff and members of the firm to raise concerns about discrimination and harassment. It is also the responsibility of staff and members of the firm to respond to, or not condone, discrimination or harassment. The firm encourages staff and members to report incidents of harassment or discrimination.

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[1] *Human Rights Code*, R.S.O. 1990, c. H. 19 (the *Code*).
[2] *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000).

7. The firm has the duty to accommodate differences that arise from the protected grounds up to the point of undue hardship. Requests for accommodation may be made under [Name of firm] accommodation policy[3].

8. Notwithstanding the existence of this policy and even though steps are being taken under this policy, every person continues to have a right to seek assistance from external resources, such as the Ontario Human Rights Commission.

OBJECTIVES

9. The objectives of this policy are:

   a. To maintain a working environment that is free from harassment and discrimination and in which staff and members treat each other with mutual respect;

   b. To alert all staff and members of the firm to the fact that harassment and discrimination in the workplace are demeaning practices that constitute a profound affront to the dignity of staff and are an offence under the law;

   c. To set out the types of behaviour that may be considered offensive and which will not be tolerated by the firm;

   d. To establish a mechanism for receiving complaints of harassment and discrimination and to provide a procedure by which [Name of firm] will deal with these complaints;

   e. To outline the preventative, remedial and disciplinary actions which may be taken when a complaint of harassment or discrimination has been brought forward and/or substantiated.

10. This policy is not intended to constrain acceptable social interactions between people in the firm[4].

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[3] Law firms have a duty to accommodate differences that arise from the protected grounds enumerated in the *Code* and under Rule 5.04 of the *Rules of Professional Conduct*, up to the point of undue hardship. Law firms are encouraged to adopt not only a policy on preventing and responding to workplace harassment and discrimination but also an accommodation policy. The *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements* (Toronto: Law Society of Upper Canada, March 2001) and the document entitled *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities, Legal Developments and Best Practices* (Toronto: Law Society of Upper Canada, March 2001) may provide guidance for law firms in drafting an accommodation policy.

[4] Although the recommended policy restricts itself to a statement that it is not intended to constrain acceptable social interactions, firms may wish to include a paragraph which draws attention to the problems which can arise from such relationships. Relationships which begin as consensual may become harassing, particularly where there is a difference in power between the parties. In such cases, the fact that two people once had a consensual relationship does not exempt them from the harassment provisions; furthermore, if a person is subjected to harassment as a result of the termination of consensual relations, this could be construed as a violation of the policy.

APPLICATION OF POLICY

11. This policy applies to everyone working for [Name of firm] or who is a member or an employee of [Name of firm], whether part-time, full-time or casual, regardless of their position in the firm, including secretarial, support, professional and administrative staff, articling and summer students, associates and partners. The policy also applies to others in the work context, such as volunteers, co-op students, dependant and independent contractors[5]. [Name of firm] will not tolerate harassment or discrimination in the workplace, whether by fellow employees, supervisors, associates or partners. It is also unacceptable for staff and members of the firm to engage in harassment or discrimination when dealing with clients, or other third parties with whom they interact in a professional capacity.

12. This policy covers any employment-related environment including, but not limited to:

the office;
work assignments outside the office;
office-related social functions;
work-related conferences and training;
work-related travel;
in the courtroom; and
telephone communications, faxes or electronic mail.

DEFINITIONS

13. "Harassment" means one or a course of vexatious comment or conduct based on a protected ground enumerated in paragraph 18 of this policy that is known or ought reasonably to be known to be unwelcome. Harassment has the effect of creating a degrading, intimidating, hurtful or marginalizing work environment for the person experiencing it.

14. There may be circumstances where a single incident is serious enough to amount to harassment.

15. Harassment based on any of the protected grounds sometimes appears as a poisoned work environment which is usually defined as comments or conduct that tend to demean a group covered by a protected ground, even if not directed at a specific individual. It describes a situation where offensive behaviour poisons the workplace.

16. Harassment may arise when submission to a vexatious comment or conduct on the basis of a protected ground is made either implicitly or explicitly a condition of employment or when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, matters of hiring, promotion, raise in salary, job security and benefits affecting the employee).

[5]The policy should provide that contractors are covered by the policy and subject to complaints under the policy but also that contractors may file complaints under the policy.

17. "Discrimination" means a distinction, whether intentional or not, but based on a protected ground, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society[6].

18. "Protected grounds**"** means any of the following personal characteristics: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability[7].

19. "Directing mind" means, for the purposes of this policy, a member or employee of a law firm who performs management duties[8].

20. "Condonation" relates to individuals who "know or might reasonably know" that harassment or discrimination is occurring and take no action to stop the offending behaviour. If an employer or a directing mind knows or ought reasonably to have known that harassment or discrimination is occurring and fails to act promptly to resolve the matter, he or she has "condoned" the behaviour and may be violating the policy.

21. "Threats, reprisals or retaliation" mean harsh comment or conduct, discipline, criticism, or similar treatment directed toward an individual:

- or having invoked this policy;
- for having participated in or cooperated in any investigation under this policy; or
- for having been associated with a person who has invoked this policy or participated in these procedures[9].

[6]Discrimination includes "direct discrimination" (where an employer adopts a practice or rule which on its face discriminates on a prohibited ground); "adverse effect discrimination" (where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force) and "systemic discrimination" (practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics).

[7] The protected grounds are defined at Appendix A of this policy.

[8]The Ontario Human Rights Commission states that, in the case of a corporation, a directing mind who discriminates against or harasses anyone in a manner contrary to the *Code*, or who knows of the harassment or discrimination and did not take steps to remedy the situation, engages the liability of the employer. See pp. 19-23 of this Guide for a discussion of the definition of "directing mind".

[9] The policy should specifically state that threats, reprisals or retaliation will be treated as harassment or discrimination. The absence of this provision could lead to an unwillingness to report. If the firm considers it appropriate, the policy could also state that in cases harassment or discrimination where there is also threats, reprisals or retaliation against the complainant, more severe disciplinary action will be taken than in the case of harassment or discrimination alone.

[Name of firm] has established this policy to provide staff and members of the firm with an internal method of addressing harassment or discrimination. Any employee or member of the firm who engages in threats, reprisals or retaliation is in violation of this policy. Threats, reprisals or retaliation seriously escalate the situation and will be dealt with accordingly.

22. "Malicious or bad faith complaint" means that a person has made a complaint under this policy that s/he knew was untrue. That is itself a violation of this policy. However, the insufficiency of evidence to prove a complaint does not mean that the complaint was submitted in bad faith. A person who submits a complaint in good faith, even where the complaint cannot be proven, has not violated the policy.

EXAMPLES OF HARASSMENT

23. The following are examples of sexual harassment*:*

- Sexist jokes causing offence, told after the joker has been advised that they are embarrassing or offensive.
- Suggestive or offensive remarks[10].
- Persistent unwanted contact after the end of a consensual relationship.
- Unwelcome physical conduct, such as regularly caressing an employee's shoulders.
- Propositions of physical intimacy.
- Demands for dates or sexual favours, when you know or ought to know that they are unwelcome.
- Verbal abuse or leering.
- Bragging about sexual prowess.
- Display of sexual and/or offensive pictures, graffiti, cartoons or other materials.
- Delivery of sexual and/or offensive e-mail messages.

24. The following are examples of racial harassment:

- Comments, signs, caricatures, or cartoons displayed in the workplace that depict minority racial or religious groups in a demeaning manner.
- An employer who tolerates racial graffiti and does nothing to stop it.

[10]In one case, the complainant had endured 14 years of daily degrading comments from a coworker who would make comments such as "the fat cow screwed up again", or who would refer to the complainant and her sister as "the fridge sisters". *Shaw* v. *Levac Supply Ltd.* (1990), 14 C.H.R.R. D/36 (Ont. Bd. of Inq.).

- Demeaning racial remarks, jokes or innuendoes about an employee told to other employees, and racist, derogatory or offensive pictures, graffiti or materials related to race or other grounds such as ethnic origin[11].

- Racial remarks, jokes or innuendoes made about other racial groups in the presence of employees who are members of a racial group may create an apprehension on the part of those employees that they too are targets when they are not present.

- Repeated racial slurs directed at the language and accent of a particular group.

25. The examples referred to in paragraphs 23 and 24 of this policy are also not to be tolerated if they are derogatory about other groups, such as lesbians, gays and transgenders, persons with disabilities or persons with different religious beliefs.

RIGHTS AND RESPONSIBILITIES

Rights and Responsibilities of Staff and Members of the Firm

26. Each employee and member of the firm has the right to be treated fairly and respectfully in the workplace.

27. Each employee and member of the firm is responsible for playing a part in ensuring that the working environment is free from harassment and discrimination by not engaging in conduct which may constitute harassment or discrimination. In addition, a member or employee who believes that a colleague has experienced or is experiencing harassment or discrimination is encouraged to notify one of the Advisors appointed under this policy and may file a complaint under this policy[12].

28. Each employee and member of the firm has a responsibility to raise concerns about discrimination and harassment and to co-operate in the investigation of a harassment or discrimination complaint. Each employee and member of the firm involved in an investigation under this policy must maintain confidentiality as prescribed in this policy.

[11] A Black man receiving a photocopy of a questionnaire with the heading “Employment Application for Niggers” through internal mail. The employer does nothing to remedy the situation. (*Hinds* v. *Canada (Employment & Immigration Comm.)* (1988), 10 C.H.R.R. D/5683 (C. H. R. T.). An employee receiving a phone call in which a customer uses racial slurs and comments such as “I don’t know why they let you Hindus work with the public? ”. In this case the employee swore back at the customer and was fired. It was held that the employee had been subjected to racial harassment in the workplace and by firing her the employer was condoning the harassment and was liable. The employee should not have been fired (*Mohammed* v. *Mariposa Stores Limited Partnership* (1990), 14 C.H.R.R. D/215 (B.C. Bd of Inq.)

[12] Whenever questionable conduct takes place anywhere in the workplace, it could create a poisoned work environment for other staff or members of the firm as well as the individual target of harassment. The recommended policy suggests that the best course is to remind third parties of their obligation to maintain a work environment free from harassment and to "encourage" rather than "require" reporting.

Responsibility of [Name of firm]

29. [Name of firm] is responsible for:

- preventing and responding to harassment and discrimination on an ongoing basis, whether or not formal written complaints of harassment or discrimination have been brought to the attention of [Name of firm];
- making all staff and members of the firm aware of the issue of workplace harassment and discrimination, and the existence of this policy;
- appointing Advisors and providing the education and resources to assist them to fulfil their responsibilities under this policy;
- regularly reviewing this policy and its procedures of this policy to ensure that they adequately meet the policy objectives;
- responding promptly and seriously to any complaint of harassment or discrimination;
- promptly advising the complainant of any action taken in response to the complaint;
- providing advice and support to persons who are subjected to harassment and discrimination;
- when a complaint of harassment or discrimination is found to have been substantiated, formally acknowledging to the complainant that harassment or discrimination has taken place[13];
- imposing remedial or disciplinary measures when a complaint of harassment or discrimination is found to have been substantiated, regardless of the seniority of the offender;
- maintaining records as required by this policy;[14] and
- doing all in its power to support and assist any member or employee of the firm who complains of harassment or discrimination by a person who is not a member or employee of the firm.

CONFIDENTIALITY

57. [Name of firm] understands that it is difficult to come forward with a complaint of harassment or discrimination and recognizes a complainant's interest in keeping the matter confidential.

[13] It is important to discuss the result with the person who has been subjected to harassment or discrimination, and to officially acknowledge the validity of the complaint. Failure to acknowledge in this manner frequently results in a continued sense of anger on the part of the person alleging harassment or discrimination, against both the employer and the respondent. In such circumstances, the person alleging harassment or discrimination may be unable to return to the full level of commitment and enjoyment of work previously experienced even if the respondent has been completely removed from the workplace. Bringing forward an harassment or discrimination complaint takes courage and this fact should be formally acknowledged by the law firm.

[14] The maintenance of a written record which details the complaint and the outcome of the investigation serves several purposes. It serves as a form of precedent for the firm to ensure that complaints of a similar nature are treated similarly; as a reference should any questions arise concerning the specific complaint; and as a record of prior complaints which may assist in identifying repeat offenders. The maintenance of a written record may also be important in cases where progressive discipline is imposed.

58. To protect the interests of the complainant, the person complained against, and any other person who may report incidents of harassment or discrimination, confidentiality will be maintained throughout the investigatory process to the extent practicable and appropriate under the circumstances.

59. All records of complaints, including contents of meetings, interviews, results of investigations and other relevant material will be kept confidential by [Name of firm], except where disclosure is required by a disciplinary or other remedial process or by criminal law[15].

[15] If the policy is to be effective, confidentiality at every stage of the process is vital. The absence of assurances of confidentiality may discourage individuals from using the policy. A statement of confidentiality is meant to protect the complainant, the alleged harasser (at least until a complaint has been substantiated) and the firm. Lack of confidentiality may lead to damaged reputations. An assurance of confidentiality recognizes that reporting an incident can be embarrassing to all concerned and prevents a respondent from being labelled without having the opportunity to respond to a complaint. Clearly, the nature of an investigation will necessitate some exceptions to the rule and a firm should include a statement to that effect in the policy.

ADVISORS

60. Under this policy, [Name of firm] will appoint [at least two persons who are staff and/or members of the firm[16]] as Advisors[17]For the purposes of this policy, we will assume that the law firm has decided that Advisors appointed under the policy are not "directing minds". This allows staff and members of the firm who have issues of harassment and discrimination, to discuss those issues with Advisors who can reassure complainants that they will not proceed further without their consent. . Advisors act as internal resources to all staff and members of the firm concerned about possible or actual harassment or discrimination.

61. Advisors can assist staff and members of the firm by,

*answering questions;
*explaining any aspect of the policy;
*outlining options for remedy;
*helping staff and members of the firm with the implementation of a remedy; and
*helping staff or members of the firm document a complaint for investigation.

[16] Notwithstanding that the policy recommends the appointment of Advisors who are staff and/or members of the firm, law firms may appoint the Discrimination & Harassment Counsel as the Advisor under the policy. A small law firm with limited staff and/or members might not have the resources to appoint internal Advisors and it might be desirable to rely on the services of the Discrimination & Harassment Counsel. The Discrimination & Harassment Counsel confidentially assists anyone who may have experienced discrimination or harassment by a lawyer or within a law firm. The Discrimination & Harassment Counsel services are provided to the public and lawyers free of charge.

[17] The role of Advisor is vital to the successful implementation of an harassment and discrimination policy -- the success of the policy will stand or fall on the choice of persons to fulfil this responsibility.

An Advisor must be highly respected within the firm and must be able to discuss a complaint with the complainant or respondent, regardless of that person's seniority. He or she must be sensitive to the nature and effects of harassment and discrimination, and must be trusted as a person who will observe the principles of confidentiality as prescribed by this policy.

It is recommended that, to the extent possible, there be at least two Advisors under the policy. This will allow for the fact that some complainants may feel uncomfortable about approaching a particular Advisor. It also recognizes that Advisors themselves are not immune from complaints of harassment.

To the extent possible, the law firm should appoint a group of Advisors composed of partners, associates and other staff of both sexes and of differing age, race, ethnic origin, family status, sexual orientation, and religion, as well as individuals with disabilities.

In appointing Advisors, the law firm should consider the fact that employers have the ultimate responsibility to ensure that the workplace is free of harassment and discrimination. On being made aware of inappropriate comments or conduct, a directing mind has a responsibility to take prompt and effective action to address the situation. An Advisor who is also a "directing mind" cannot abdicate his or her responsibility and may have to pursue a complaint without the complainant's consent. A law firm may deal with this issue in two ways. The policy could specify that:

- a "directing mind" of the firm may not be appointed as an Advisor, or

- a "directing mind" may be appointed as an Advisor. If this is the case, the Advisor who is also a "directing mind" has the responsibility to inform complainants of his or her obligation to take prompt action on being made aware of inappropriate comments or conduct.

62. Advisors are impartial and may provide assistance in resolving issues of harassment and discrimination to any employee or member of the firm. That can include speaking to another employee or member of the firm on behalf of a complainant or respondent, facilitating a solution, between two or more affected parties or assisting a complainant or a respondent through an investigation. Advice provided by Advisors is not and should not be considered as legal advice.

63. Advisors are advocates for a workplace free of harassment and discrimination - they are not advocates for an individual. Advisors maintain confidentiality to the extent practicable and appropriate under the circumstances. They are not investigators under the policy nor are they decision-makers.

64. In carrying out their duties under this policy, Advisors will be directly responsible to [the Equality Committee].

65. The firm will provide an education program for all Advisors on workplace harassment and discrimination and will provide institutional support and assistance for carrying out their responsibilities.

THE EQUALITY COMMITTEE[18]

66. An Equality Committee will be appointed by [the Management Board of the law firm[19]]. The members of the Equality Committee will be appointed for a term of [3] years, renewable by the [Management Board]. The Equality Committee has [no less than three staff or members of the firm. To the extent possible, the committee should be composed of partners, directing minds, associates, and other staff of both sexes and of differing age, race, ethnic origin, family status, sexual orientation, and religion, as well as individuals with disabilities.]

[18] The policy provides for the creation of an Equality Committee to deal with complaints of harassment or discrimination. The creation of such a committee provides an avenue for complainants to proceed to a committee of appointees knowledgeable on human rights issues, who represent different sectors of the organization and who have decision-making authority. However, in some law firms, such as in smaller organizations, the creation of an Equality Committee may not be possible for reasons such as lack of resources. The firm may give this role to an existing committee or to one member of the firm.

Further, a law firm may find that the handling of complaints by a committee may be intimidating for complainants. Consequently, a law firm may decide to appoint one member of the firm to handle complaints under the policy.

[19]The term “Management Board” will be used in this policy to refer to the group that manages the affairs of a law firm (the group that is equivalent to a board of directors of a corporation). Law firms should adapt the language in this policy to reflect their own organizational structure.

PROCEDURES

Initial Action by Complainant:

67. A person who considers that she or he, or someone else, has been subjected to harassment or discrimination (hereinafter "the complainant") is encouraged to bring the matter to the attention of the person responsible for the conduct (hereinafter "the respondent")[20]For these reasons a complaint should not be dismissed simply because it has not been reported in a timely fashion.

68. Where the complainant does not wish to bring the matter directly to the attention of the respondent, or where such an approach is attempted and does not produce a satisfactory result, the complainant should seek the advice of an Advisor or of a "directing mind".

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[20] A direct approach to the person whose conduct has caused offence is suggested as the first step. Frequently, people are unaware that their conduct is offensive and all that is needed to prevent its repetition is a simple statement that the conduct is unwelcome. The recommended policy recognizes, however, that power and status disparities between the respondent and the complainant may make it impossible or unreasonable for the respondent. Therefore the policy does not make such notice a prerequisite to a complaint.

The policy does not stipulate a time limit for reporting a complaint. Ideally, people who have been subjected to harassment and discrimination will report the matter promptly. It should be drawn to the attention of all staff and members as part of the educative process that the longer they wait to report an incident, the more chance there will be that witnesses will be unavailable and/or witnesses will not remember the events.

However, it should be noted that fear of retaliation or embarrassment may cause a person to wait until the harassment or discrimination becomes unbearable before reporting the incident. The very act of having to report harassment or discrimination may also add to the individual's distress.

It has been shown, in the context of sexual harassment, that:

> [...] many women feel uncomfortable, embarrassed, or ashamed when they talk about personal incidents of harassment. They are afraid that it will reflect badly on their character or that somehow they will be seen as inviting the propositions. When women do speak out, they are often ignored, discredited, or accused of misunderstanding their superior's intentions. Many women attribute their silence to practical considerations. Only 18 per cent of the women in the Working Women United Institute survey stated that they complained about the harassment. The most common reasons given for not reporting the incidents were that they believed nothing would be done (52 per cent), that it would be treated lightly or ridiculed (43 per cent), or that they would be blamed or suffer repercussions (30 per cent).

See Arjun P. Aggarwal and Madhu M. Gupta, *Sexual Harassment in the Workplace*, 3rd Edition (Toronto: Butterworths, 2000).

Research also suggests that most women do not report their experiences of sexual harassment for a variety of reasons ranging from a fear of retaliation or disbelief to a fear of losing her job or making the situation worse. (See Sandy Welsh, "Gender and Sexual Harassment" (1999) 25 Annu. Rev. Sociol. 169).

Informal Procedure involving an Advisor:

69. The purpose of the informal procedure is to allow individuals to attempt to develop resolutions to workplace harassment or discrimination with the assistance of an Advisor. Without the consent of the complainant, the Advisor will take no further steps apart from providing information and discussing alternatives.

70. Once a complainant has sought the advice of an Advisor, the Advisor will, where appropriate, provide the complainant with a copy of this policy and advise the complainant of:

1. the right to lay a formal written complaint under this policy when the respondent is a member or employee of the firm;

2. the availability of counselling and other support services provided by the firm;

3. the right to be represented by legal counsel or other person of choice at any stage of the process when the complainant is required or entitled to be present[21];

4. the right to withdraw from any further action in connection with the complaint at any stage[22];

5. other avenues of recourse available to the complainant, such as the right to file a complaint with the Ontario Human Rights Commission; or, where appropriate, the right to lay an information under the *Criminal Code*[23]*;* and

6. any time limits which may apply to such other avenues of recourse.

Outcome of meeting with Advisor

No further action

71. Where, after discussing the matter, the complainant does not wish the Advisor to take any further action, the Advisor will take no further action The Advisor should keep a written record of the discussion without disclosing the content of the complaint to any person, including another Advisor. This record will be kept by the Advisor in a locked filing cabinet. The Advisor will also complete the Workplace Harassment and Intake form (Appendix B), a copy of which will be provided to the Equality Committee to assist it in developing strategies to prevent occurrences which lead to complaints.

Discussion with respondent

45. As part of the informal process, the complainant may decide to discuss the issue directly with the respondent, with or without the Advisor, or the Advisor may, with the consent of the complainant, meet with the respondent with a view to arriving at a solution to the situation. The Advisor will keep a written record of what was said to that person.

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[21]The firm should incorporate language into its policy indicating who will bear the cost of legal representation.

[22] The Advisor might indicate to the complainant that even if he or she withdraws from the process, the firm, if it knows or ought reasonably to know of harassment or discrimination, may nevertheless continue to investigate the complaint.

[23] The Advisor should inform the complainant that the Human Rights Commission may, in its discretion, decide not to deal with a complaint when the facts upon which the complaint is based occurred more than six months before the complaint was filed.

46. Where the complainant and the respondent are satisfied that they have achieved an appropriate resolution, the Advisor will make a confidential written record of the resolution. This record will be kept by the Advisor in a locked filing cabinet[24]. The Advisor will follow up to ensure that the solution is working.

Laying of formal complaint

47. Where the complainant decides to lay a formal written complaint, whether or not the Advisor is of the opinion that the conduct in question constitutes harassment or discrimination, the Advisor may assist the complainant to draft a formal written complaint, based on the form provided in Appendix C, which should be signed by the complainant.

Informal Procedure Involving a Directing Mind

48. When a complainant approaches a directing mind of [Name of firm], that person assumes the same advisory role as Advisors and in this capacity can answer questions, explain the policy and help staff and/or members of the firm resolve or document a complaint.

49. However, on being made aware of inappropriate comments or conduct, a directing mind should take action, even without the consent of the complainant [25]. That obligation should be made clear to the complainant. The directing mind will keep a written record of what was said to that person and the outcome of the meeting and will also complete the Workplace Harassment and Discrimination Intake form (Appendix B), a copy of which will be provided to the Equality Committee to assist it in developing strategies to prevent occurrences which lead to complaints.

50. Once a complainant has sought the advice of a directing mind, he or she will, when appropriate, advise the complainant of:

    1. the right to lay a formal written complaint under the policy;

    2. the availability of counselling and other support services provided by the law firm;

    3. the right to be represented by legal counsel or other person of choice at any stage of the process when the complainant is required or entitled to be present[26];

    4. the right to withdraw from any further action in connection with the complaint at any stage;

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[24] The law firm may also ask that the Advisor forward any written resolution to the Equality Committee or to the senior lawyer in management. The term "Chair of the firm" will be used in this policy to refer to the senior lawyer in management. In the case of a professional corporation, the senior lawyer in management may have the title of Chief Executive Officer, Chief Operating Officer, Executive Director or an equivalent title. In the case of a Limited Liability Partnership or a Partnership, the senior lawyer in management may have the title of Managing Partner or an equivalent title. Law firms should adopt the language in this policy to reflect their own organizational structure.

[25] When questionable conduct is brought to the attention of a directing mind, the employer is put on notice that a possible violation of the *Code* has occurred. Whether formal action by the employer is appropriate is a function of a number of variables. For instance: Is the behaviour complained of in fact harassment or discrimination pursuant to the definition set out in the policy? Is an informal resolution more appropriate than a formal investigation? In light of these variables the recommended policy outlines possible outcomes when a complainant brings an incident (or incidents) to the attention of a directing mind.

[26] The firm should incorporate language into its policy to indicate who will bear the cost of representation.

5. the fact that even if he or she withdraws the complaint, the firm may nevertheless continue to investigate the complaint[27];

6. other avenues of recourse available to the complainant, such as the right to file a complaint with the Ontario Human Rights Commission; or, where appropriate, the right to lay an information under the *Criminal Code;* and

7. any time limits which may apply to such other avenues of recourse[28].

Outcome of Meeting with Directing Mind

No further action

51. Where, after discussing the matter, the complainant and the directing mind agree that the conduct in question does not constitute harassment or discrimination as defined in the policy, the complainant and/or the directing mind will not proceed further under the policy[29].

Discussion with respondent

52. Where the complainant brings to the attention of the directing mind facts which could constitute harassment or discrimination, the directing mind may, with or without the complainant and with or without the complainant's consent, speak to the person whose conduct has caused offence, in which case the directing mind will keep a written record of what was said to that person and the outcome of the meeting.

53. Where the complainant and the respondent are satisfied that they have achieved an appropriate resolution, the directing mind will make a confidential written record of the resolution. This record will be kept by the directing mind in a locked filing cabinet[30]. The directing mind will follow-up to ensure that the solution is working.

Laying of formal complaint

54. Where the complainant decides to lay a formal written complaint, whether or not the directing mind is of the opinion that the conduct in question constitutes harassment or discrimination, the directing mind may assist the complainant to draft a formal written complaint, based on the complaint form provided at Appendix C, which must be signed by the complainant.

Issuing a Formal Written Complaint

55. A formal written complaint under this policy is issued to the Equality Committee.

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[27]Though the complainant should have a right to withdraw from any further action in connection with the complaint at any stage, this does not absolve the firm from the obligation to pursue the complaint to the extent that it is reasonably possible or necessary to do so in the interests of ensuring an harassment/discrimination-free workplace.

[28] The directing mind should inform the complainant that the Human Rights Commission may, in its discretion, decide not to deal with a complaint when the facts upon which the complaint is based occurred more than six months before the complaint was filed.

[29] An argument has been advanced in favour of keeping a confidential record in those cases where no complaint is laid and no action is taken. If, on a later occasion, evidence of further harassment by the same person comes to the attention of the directing mind, the record of the first incident may persuade the directing mind that it is necessary to pursue the matter further.

[30] The law firm may also ask that the directing mind forward any written resolution to the Equality Committee or to the Chair of the firm.

56. Upon the receipt of the formal written complaint, the Equality Committee will, without delay:

- provide a copy of the complaint and of the policy to the complainant and to the respondent; and
- advise the complainant and the respondent that he or she has the right to be represented by legal counsel or other person of choice at any stage of the process when he or she is required or entitled to be present[31].

57. The Equality Committee, or, when requested by the complainant or the respondent, one member of the Equality Committee appointed by the committee to handle the complaints process for that complaint (hereinafter "the appointed member")[32], will, within a reasonable time, interview the complainant to document the details of the complaint, what remedy the complainant is seeking and what process under the policy the complainant wishes to pursue[33].

58. The Equality Committee or the appointed member will, within a reasonable time, interview the respondent to document his or her perspective of the events and ascertain what process under the policy he or she wishes to pursue.

59. When a formal written complaint is filed against a member of the Equality Committee, the member will withdraw from the Equality Committee until such time as the matter is resolved or closed.

Mediation

60. If the Equality Committee or the appointed member and both parties consider that mediation is appropriate, the Equality Committee or the appointed member shall ascertain whether the parties prefer an internal or an external mediation process. If they do not agree, the mediation will be external.

61. If the parties agree to an internal mediation, the Equality Committee or the appointed member will, within a reasonable time, appoint a partner of [Name of firm], a directing mind or a senior employee to act as mediator.

62. If the parties do not agree to an internal mediation, if an internal mediator cannot be appointed or if an internal mediation has failed, the Equality Committee or the appointed member may proceed, with the consent of the parties, with an external mediation. A neutral, trained mediator selected by the Equality Committee or the appointed member will conduct the external mediation process on behalf of [Name of firm]. [Name of firm] will bear the cost of mediation.

63. Where a resolution is reached through internal or external mediation, a written statement shall be prepared. The statement will contain details of the complaint, the response of the respondent, the agreed upon outcome and a mechanism to ensure appropriate implementation of the outcome. The statement will be signed by both parties and the mediator. A copy of the statement of resolution shall be placed in the respondent's personnel file.

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[31] Because of the serious nature of an allegation of harassment and the potential harmful effects on the career of an individual accused of such conduct, it is essential that the parties be informed of the right to retain counsel. The firm should indicate to the parties who will bear the cost of such representation.

[32] Because in many cases complainants and respondents would prefer to discuss sensitive matters with one person, it is important to provide that the process may be handled by a representative of the Equality Committee.

[33] In cases where the Equality Committee has appointed a member to deal with a complaint, the appointed member will replace the Equality Committee throughout the complaints process of that complaint.

64. The outcome of the internal and/or external mediation, and the statement of resolution, will be reported to the Equality Committee or the appointed member. If the Equality Committee or the appointed member believes that, notwithstanding the satisfactory resolution between the parties, the resolution has not addressed the employer's obligations under the policy, the Equality Committee or the appointed member will consider whether an investigation is warranted.

65. If a satisfactory resolution cannot be reached, the Equality Committee or the appointed member will consider whether an investigation is warranted.

Investigation

66. The Equality Committee or the appointed member may, at any stage of the complaints process, proceed with a formal investigation under the policy. The formal investigation may be performed by members of the firm or by an external investigator.

67. If the Equality Committee or the appointed member believes that an internal investigation is warranted, it shall appoint one or more partner(s), senior lawyers, directing minds or employee[34] of the firm to conduct the investigation.

68. The complainant may, at any time after a formal complaint has been filed, make a request, preferably in writing, to the Equality Committee or to the appointed member for temporary accommodation[35] until the process comes to an end. The Equality Committee or the appointed member will make every effort to reasonably accommodate the complainant.

69. If the Equality Committee or the appointed member believes that an external investigation is warranted, it shall appoint a neutral third party who has expertise in human rights and investigation to act as an external investigator. [Name of firm] will bear the costs of such an investigation[36].

70. The internal and/or external investigation process will follow accepted principles of fairness, including

- an impartial investigation;
- the right to know the allegation and the defence;
- the right to offer evidence and witnesses; and
- the right to rebut relevant evidence.

[34] If the firm provides for an internal investigative team, thought should be given to including on the team not only a representative of the managing body but also a person of a similar level of responsibility as the complainant and of the same sex, race, age or other similar personal characteristic.

[35] For example, limiting contacts between the complainant and respondent by relocating the respondent to another area of the workplace or allowing the complainant to report to or to work with someone other than the respondent.

[36] The law firm should indicate clearly who will bear the costs of legal representation for the parties.

71. Whether conducted by an internal or an external investigator, or by an internal investigative team, the investigation will be conducted in confidence. Confidential interviews with relevant parties will be conducted. Both parties will have an opportunity to identify witnesses or others to be interviewed. Any other person who may have information about the incidents may be interviewed[37]

72. The investigation will be undertaken and completed within six months of the appointment of an internal or external investigator, or of an investigative team, unless delays occur in good faith and no substantial prejudice will result to any person affected by the delay.

73. The investigator, or the investigative team, may decide that the matter would best be resolved through voluntary mediation. If that is the case, the investigator[38] will, with the consent of the complainant, the respondent and the Equality Committee or the appointed member, take the role of mediator and the process prescribed in paragraphs 60 to 65 of this policy will apply.

74. The internal or external investigator or the investigative team will provide a written summary of findings which will include:

- the allegations of harassment or discrimination
- the facts
- the findings

75. The written summary of findings will be provided to the complainant and to the respondent. The complainant and the respondent will reply in writing within one week of receipt of the summary of findings or other reasonable period as agreed to by the parties or as determined by the Equality Committee or the appointed member.

76. The internal or external investigator or the investigative team will file a formal report, with the Equality Committee or the appointed member, based on the summary of findings and on the replies from the complainant and the respondent. The report may also include recommendations on appropriate resolutions.

Action taken Following Outcome of Investigation

77. The outcome of the investigation will be communicated to the Equality Committee or to the appointed member and to the Chair of the firm. Based on the findings of that investigation, the Equality Committee or the appointed member and the Chair of the firm, in conjunction with the appropriate level of management shall make a decision as to whether the policy has been violated and what action will be taken as a result of the findings.

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[37] At their request, interviews of staff or members of the firm may occur off site.

Generally, the only person who has access to the witness statement is the investigator. When the investigator provides his or her final report, he or she does not refer to witnesses by name.

The witness statements, signed or unsigned, will be provided, in a sealed envelope, by the investigator to the Equality Committee or the appointed member. The statements will be filed, together with the investigation report, in a sealed envelope. The witness statements are not kept in the witnesses personnel file. .

[38] In the event that the investigation is done by an internal investigative team, the team will appoint one member of the team to act as mediator.

78. The purpose of this policy is preventative and remedial. If it is determined that an employee or a member of the firm has violated this policy, and depending on the severity of the violation, appropriate consequences will be determined and can include an apology, education, counselling, verbal or written reprimand, transfer, a financial penalty, the suspension with or without pay of the employee or member of the firm or the discharge of the employee or member of the firm[39]. Specific consequences will depend on the nature and severity of the incidents.

79. In the event of an investigation against the Chair of the firm, the outcome of the investigation will be communicated to the Management Board. The Chair of the firm will withdraw from participating in the affairs of the Management Board that relate to the complaint against her or him. Based on the findings of that investigation, the Management Board shall make a decision as to whether the policy has been violated and what action will be taken as a result of the findings.

80. The complainant and the respondent will be informed of the outcome of the investigation, the decision made by the Equality Committee or the appointed member, the Chair of the firm and the appropriate level of management as to whether the policy has been violated and what action will be taken as a result of the findings.

81. Where the investigation results in a finding that the complaint of harassment is substantiated, the outcome of the investigation, and any remedial or disciplinary action, will be recorded in the respondent's personnel file. These written records will be maintained for [ten years[40]] unless new circumstances dictate that the file should be kept for a different period of time[41].

82. The Equality Committee or the appointed member will be responsible for monitoring the situation following harassment or discrimination complaints.

83. If the complainant is not satisfied with the outcome of the investigation or the disciplinary action taken by [the Management Board], the complainant will be reminded of the right to file a complaint with the Ontario Human Rights Commission, and shall be advised of any time limits applicable to making such a complaint[42].

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[39]Law firms should include wording to the effect that suspension or discharge of a partner must proceed in accordance with the provisions of the partnership agreement (or in the case of a professional corporation, the equivalent document).

[40] The Equality Committee or the appointed member could decide the length of time that the file should be kept. In some instances, with the agreement of the parties, part of the settlement of the complaint might include the removal of any notation of the complaint from the respondent's file.

[41] It is suggested that files be maintained for ten years so that proof of any pattern of harassment is available. Since an employee or member of the firm will usually have the right to inspect the contents of his or her own personnel file, it is important, for purposes of protecting the confidentiality of witnesses and others, that details of the investigation and the evidence not be kept in the personnel file. Only the outcome of the investigation should be recorded in the personnel file.

[42]The recommended policy does not provide an appeal process. The procedure will depend upon how disciplinary measures are normally appealed in the particular firm. If there are no internal appeal procedures, a harasser who has been disciplined can take the matter to court. A complainant should be informed of the right to a file a complaint with the Ontario Human Rights Commission if dissatisfied with the disposition of the complaint. Where the Human Rights Commission investigates a complaint, the *Human Rights Code* gives to the person investigating the complaint power to request the production of documents. Such documents might include the firm's own investigatory record of the complaint.

Harassment by Persons Who Are Not Members or Staff of the Firm

84. A member or employee of the firm who considers that she or he has been subjected to harassment by a person who is not a member or employee of the firm should seek the advice of an Advisor, the Equality Committee or a directing mind.

85. The Advisor, the Equality Committee or the directing mind will provide the complainant with support and assistance in dealing with and remedying this harassment. The complaint procedures provided in this policy may be followed.

86. A person who is not a member or employee of the firm who considers that she or he has been subjected to harassment or discrimination by a person who is a member or employee of the firm is encouraged to bring the matter to the attention of the Equality Committee. The Equality Committee will do all it can to ensure that the behaviour stops. The complaint procedures provided in this policy may be followed.

IMPLEMENTATION GUIDELINES AND STRATEGIES

87. [Name of firm] will inform all staff and members of the firm of its policy on preventing and responding to workplace harassment and discrimination. [Name of firm] will encourage staff and members of the firm to raise concerns about harassment and discrimination.

88. [Name of firm] will ensure that all members and staff of the firm are educated on the content and the scope of the policy.

89. [Name of firm] will ensure that information on the services of the Discrimination and Harassment Counsel and how to contact her or him is available to all clients, staff and members of the firm.

90. [Name of firm] will ensure that everyone working for [Name of firm] or who is a member or an employee of [Name of firm] and others in the work context, such as volunteers, co-op students, dependant and independent contractors sign a “Commitment to the Prevention of Harassment and Discrimination at [Name of firm]” (included at Appendix E of this policy) acknowledging receipt and understanding of the policy.

91. The Equality Committee will review and revise the policy on a periodic basis and will attempt to identify barriers that might affect staff and members identified by personal characteristics listed in the *Code*. The first review will take place one year after the adoption of the policy and will be done at least once a year.

APPENDIX A
DEFINITIONS OF PROTECTED OR PROHIBITED GROUNDS

For the purposes of this policy:

“Age” means an age that is eighteen years or more.

“Creed or religion” mean a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite. The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed.

“Family status” means the status of being in a parent and child relationship.

“Marital status” means the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage.

"On the basis of a disability" means for the reason that the person has or has had, or is believed to have or have had:

a. any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,

b. a condition of mental retardation or impairment,

c. a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

d. a mental disorder, or

e. an injury or disability for which benefits were claimed or received under the *Workplace Safety and Insurance Act, 1997.*

Disability may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all these factors. The focus is on the effects of the distinction, preference or exclusion experienced by the person and not on proof of physical limitations or the presence of an ailment[43].

"Race, ancestry, place of origin, colour, ethnic origin, and citizenship" collectively describe personal characteristics of an individual associated with his or her nationality, race, cultural or ethnic origin.

a. "Record of offences" means a conviction for,

b. an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked; or

c. an offence in respect of any provincial enactment.

"Same-sex partnership status" means the status of living with a person of the same sex in a conjugal relationship outside marriage.

[43] Case law has found that the term disability includes alcoholism, cancer, AIDS, hypertension, back pains, diabetes, injuries, allergies and asthma, depression and anxiety, cerebral palsy, malformation of fingers and developmental disability.

APPENDIX B

WORKPLACE HARASSMENT AND
DISCRIMINATION INTAKE FORM

(see Appendix B in Convocation file)

APPENDIX C

COMPLAINT FORM

Complaint Form under Workplace Harassment
and Discrimination Policy

I _____ working as a _____ in the
(Name of complainant) (Title)

_____ have reasonable grounds to believe that _____
(Department) (Name of respondent)

working as a _____ in the _____
(Title) (Department)

has discriminated/harassed against me in employment on or about

_____.
(Date)

The grounds of discrimination or harassment are:

The particulars are as follows:

Signed at: (place) _____ on: (date) _____

Complainant's signature:_____

APPENDIX D
RESPONSE FORM

Response Form under Workplace Harassment
and Discrimination Policy

I _____ working as a _____ in the
(Name of respondent) (Title)

_____ have received a complaint signed by _____
(Department) (Name of complainant)

working as a _____ in the _____
(Title) (Department)

alleging that I have discriminated/harassed against him/her in employment on or about

_____.
(Date)

The grounds of the alleged discrimination or harassment are:

I deny the allegations and provide particulars as follows:

Signed at: (place) _____ on: (date) _____

Respondent's signature:_____

APPENDIX E

COMMITMENT TO THE PREVENTION OF
HARASSMENT AND DISCRIMINATION AT [NAME OF FIRM]

I, _____, acknowledge receipt of a copy of [Name of firm]'s "Preventing and Responding to Workplace Harassment and Discrimination" policy.

Having read the policy, I am familiar with the internal complaint resolution process established by [Name of firm] and indicate my understanding of it.

As a _____(i.e. staff person, volunteer, student, member) of [Name of firm], I also agree with the intent to provide a work environment that is free from harassment and discrimination, and which provides for a cooperative, respectful, safe and professional work environment for all staff and members of [Name of firm].

Name:_____

Date: _____

Policy provided by: _____

Date: _____

APPENDIX 2

Equity and Diversity Actions Plans Analysis - 2001 Update

Introduction

1. In January and February 2001, the Equity Advisor and Program Administrator of the Equity Initiatives Department met with Senior Managers and Managers to discuss the equity and diversity actions plans of each department. One year after the initial *Equity and Diversity Actions Plan Summary 2000-2005* document was provided as information to Convocation, the purpose of these meetings was to discuss what initiatives and actions were undertaken within the past year to achieve what was outlined in the plans.

2. Prior to each meeting, departments submitted updated action plans, which have been consolidated into one report titled *Equity and Diversity Action Plans Update - June 2001.(copy attached)*

3. This report provides an overview and analysis of the implementation of the equity and diversity action plans of each department and the Law Society as a whole. It reviews the plans from the previous year and provides insight on the implications of implementing the plans over the next three to five years.

Background

4. The Law Society of Upper Canada has made a commitment to achieve equity and diversity in the legal profession, and to create a workplace free of discrimination and harassment. This commitment was affirmed through the adoption of the *Bicentennial Report on Equity Issues in the Legal Profession*[44] which puts forth 16 recommendations outlining the roles and responsibilities for the Law Society in the advancement of equity and diversity. The recommendations fall under the following categories: policy development; advancement of equity and diversity policies; governance; education; regulation; and employment/contracting of legal services.

5. To create a system-wide agenda to address this matter, corporate as well as departmental equity and diversity action plans were drafted, in compliance with the Bicentennial Report, particularly *Recommendation 4* on monitoring and evaluating equity and diversity initiatives and *Recommendation 15* on the Law Society as an employer [45].

6. In this context, departments submitted a report recognizing the equity and diversity issues and challenges they faced, along with the goals, budget implications and methods of implementation. These plans were consolidated into a report entitled *Law Society of Upper Canada: Development of Equity and Diversity Plans - A Discussion Document* submitted to Convocation in June, 1999. Following a series of consultations with Law Society staff and members of Aboriginal, Francophone and equity-seeking communities, the *Law Society of Upper Canada Equity and Diversity Action Plans* were completed in February, 2000 and submitted to Convocation for information.

7. The Law Society's Equity and Diversity Action Plans is a summary of actions aimed at fulfilling the Law Society's commitment to equity and diversity within its own organization. It provides a framework identifying specific goals, responsibilities, tasks, actions required, budgetary impact, anticipated outcomes and evaluation criteria. Many of the plans address internal matters in day-to-day operations and external issues in servicing the profession and the public, and aim to increase awareness within the organization , the profession, and the public through various initiatives including:

- Accommodations
- Communications and Outreach
- Education and Training
- Staff Recruitment
- Public Education and Support Systems
- Policy Development

Accommodations

8. The Law Society has recently adopted an accommodation policy. This new policy encompasses the duty to accommodate on grounds of family responsibility, gender issues, disability and creed which includes:

- providing flexible work arrangements for family responsibilities or religious observances;
- renovating various areas within the building that may pose physical barriers;
- ensuring work areas are free of barriers;
- purchasing equipment such as TTY machines and large screen monitors; and

[44] The Law Society of Upper Canada, *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* (Report to Convocation, May 1997).

[45] Where *Recommendation 4: Monitoring and Evaluation of Equity and Diversity Initiatives* and *Recommendation 15: Law Society as an Employer*; directly address the responsibility of the organization to ensure equity and diversity is considered and extended to its staff and stakeholders.

Communications and Outreach

9. The Law Society has made great gains in providing inclusive communications strategies on subjects ranging from accessing services to employment opportunities. The increase in equitable communications initiatives resulted in having information, services and employment opportunities more accessible, including:

- Human Resources ensuring that job postings are advertised in the ethnic print media;
- Departments regularly meeting with various organizations which represent the interests of diverse communities to provide information about the services provided by the Law Society;
- Communications Department distributing information about Law Society services to community organizations;
- Information Systems providing increased access to new technologies in telecommunications and wireless communications to increase access in distance learning and provide accommodations to those who are unable to attend meetings in person;
- CSC agents using the AT&T Language Line service for third party telephone interpretation;
- Communications Department developing the Appropriate Language Guidelines to ensure communications are reflective of diverse audiences, gender neutral and culturally sensitive;
- CSC acquiring a TTY machine which will enable staff to communicate with those who are deaf or hard of hearing;
- Investigations Department establishing a French Language Unit; and
- The Education Department designating certain faculty positions as bilingual to better serve Francophone students.
- The Equity Initiatives Department organizing public education events and establishing communications with Aboriginal, Francophone and equity-seeking groups;
- CSC, Investigations and Discipline established a relationship with sexual assault and rape crisis centre to deal with complaints related to sexual harassment.

Education and Training

10. Mandatory training on emerging equity and diversity issues have provided staff with an increased sense of cultural sensitivity, enabling staff to be more inclusive in their day-to-day operations and delivery of services. Departments such as Education, Discipline, The Great Library, Client Service Centre, and Human Resources all have either provided training or expressed the need for training.

- The Education Department held mandatory training sessions to all departmental staff on the use of inclusive language;
- All staff are trained on the new Workplace Harassment and Discrimination Policy, while future training sessions will also cover the new Bencher/Staff Relations Policy and the Accommodations Policy;
- All BAC instructors attend an information session on the Workplace Harassment and Discrimination Policy ;
- Staff were invited to attend information sessions on the Discrimination and Harassment Counsel (DHC) Program presented by the DHC, Mary Teresa Devlin;
- Newly recruited Harassment Advisors have undergone 3 days of training sessions; and
- Staff have the opportunity to learn about particular issues facing Aboriginals, Francophone and equity seeking groups through the monthly Lunch'n'Movie sessions, and the Aboriginal Elders Program.

Staff Recruitment

11. The Law Society has instilled its commitment of ensuring that employees are reflective of the Ontario population through various initiatives within the past year:

- Human Resources placing job opportunities in the ethnic print media;
- interview panels being made up of diverse staff members;
- a statement in all job postings affirming that the Law Society is an equal opportunity employer and encouraging those from diverse communities to apply; and
- Human Resources consulting with departments to determine positions that are to be designated bilingual.

Public Education and Supports to the Profession

12. Public education initiatives has been an increasingly effective tool in educating members of the profession and the public on equity and diversity issues in law and within the legal profession. The goal of these efforts are to not only bring awareness to these issues but, as well, to provide a sense of inclusion for diverse members of the bar and a welcoming environment for students who are interested in pursuing law as a career. An overview of some of the initiatives the Law Society has been involved in include:

- convening a Benchers Advisory Dinner hosted by the former Treasurer as an opportunity for Benchers to listen first hand to the barriers faced by members of the profession from Aboriginal, Francophone and equity seeking communities;
- sponsoring Continuing Legal Education sessions and other seminars focussing on equity and diversity issues, e.g. Sexual Orientation and the Law, The Social Construction of Race, Women and Intersectionality and the Law;
- convening programs for high school students with topics focussing on choosing law as a career;
- providing sponsorship to various legal organizations as a means of support for various educational activities, e.g. Women's Law Association - Ontario, Feminist Legal Analysis Committee, Canadian Association of Black Lawyers, Association des juristes d'expression francaise de l'Ontario;
- hosting seminars and lectures over the course of the year focussing on equity and diversity issues related to significant days of observations; and
- establishing a mentorship program to enable students to be paired with members of the profession in a hands on approach for students to gain knowledge of the legal profession.

Policy Development

13. In terms of policy development, including equity and diversity issues have been included in all areas, in terms of policies that affect the workplace or those that affect the profession and its governance. These include:

- Implementation of workplace policies and procedures including: Workplace Harassment and Discrimination Policy; Bencher/Staff Relations Policy; the Accommodations Policy; French Language Services Guidelines; and the French Language Services Policy;
- a new purchasing policy developed by the Finance Department identifying issues around retaining services from diverse suppliers and development of a contract compliance program;
- the Appropriate Language Guidelines developed by the Communications Department ensuring that all staff provide communications in a manner that is inclusive and culturally sensitive;
- in addition, the Law Society has actively recruited the participation of Aboriginal, Francophone and equity seeking members of the bar on issues of policy development and governance. In recent history, they have participated in a variety of consultation processes regarding the Professional Competence Mandate; the Equity and Diversity Action Plans; The New Rules of Professional Conduct; The Bar Admissions Course Reform; and the Law Society's response to the paralegal practice in Ontario.

Equity and Diversity Action Plans Update - February 2001

14. As the previous section in this report outlined the accomplishments of departments and the organization as a whole, this section will explore those items in last year's plans which have not yet been addressed and any new issues that have arisen, the *Equity and Diversity Actions Plans Update* document identifies progress in implementing equity and diversity action plans and review these action plans to determine what has been achieved, what still needs to be addressed, and whether any changes or additions must be noted from the original action plans. In beginning this assessment, it is important to note that there were several common issues departments consistently indicated as a priority. These were :(1) recruiting staff; (2) providing staff training and development; and (3) increasing the participation of members from Aboriginal, Francophone and equity seeking groups in Law Society services and in Convocation decision making. These are discussed below.

New Staffing Policy and New Recruitment and Selection Procedures

15. Human Resources has taken the initiative in reviewing its policy and procedures for hiring and staffing. The new policies reflect the Law Society's commitment towards equitable recruitment and selection, compliant with the organization's statement towards equity and diversity in developing an organization which is reflective of the population of Ontario. The Recruitment and Selection Procedure provides the opportunity for managers to consult with HR on the recruitment and selection process. This is the opportunity in which the manager may raise to HR it's action plans, ensuring the recruitment process and the individual(s) hired reflect the directions within their plans.

Corporate Plans

16. As part of the Law Society's dedication to create an equitable and diverse workplace environment, Human Resources and the Equity Initiatives Department consulted with James Management Consulting on developing a workplace equity brochure[46] and workforce survey[47]. The consultants were asked to produce documents that would enable the Law Society to develop a program to ensure the organization is representative of the diversity of Ontario by gathering demographic information. The intention of these documents are to inform employees of the objectives of the program and to ask employees to complete a voluntary confidential survey to determine if any groups are under-represented.

Staff Training and Development

17.As in the case for staff training, employees are now expected to attend mandatory training sessions on internal policies and procedures, whereas in the past, training materials were developed and drafted to meet these needs. Particularly since the knowledge and resources provided by staff are an important aspect which greatly impacts on the organizations success in implementing equity and diversity measures, the consistency provided by existing policies and procedures ensure standards are met across the board.

18. The current action plans reflect many training initiatives departments wish to implement or develop in the near future. These include:

- Accommodations Policy;
- Workplace Harassment and Discrimination Policy;
- Bencher/Staff Relations Policy;
- training of Benchers on various equity and diversity topics; and
- training for all Harassment Advisors.

Member Participation

19. The participation of members of the profession from Aboriginal, Francophone and equity seeking groups provides a great opportunity to gain differing perspectives of the law and the legal profession. In recent times, members have been asked to participate in consultations and focus groups to assist in shaping policy issues and have provided their perspectives on: The New Rules of Professional Conduct, The Law Society's Response on Paralegal Issues, the Law Society's Competency Mandate, and The Law Society's Equity and Diversity Action Plans. As well, prominent diverse members of the profession have been asked to participate in education of Benchers, such as the advisory dinner hosted by former Treasurer Robert P. Armstrong Q.C., in which guest speakers shared the challenges Aboriginal, Francophone and equity seeking communities.

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[46] *Workplace Equity Employee Brochure* James Management Consulting, 2000

[47] *Workplace Equity Employee Brochure* James Management Consulting, 2000

20. Committees also began to experience an increasing diverse membership, through alliances created with the Associations des juristes d'expression francophone de l'Ontario (AJEFO), Rotio'taties an advisory group of Aboriginal lawyers and academics, and the Equity Advisory Group a committee comprised of legal professionals representative of various communities. The Equity and Aboriginal Issues Committee/Comité sur l`équité et les affaires autochtones, the Bencher committee which focuses on equity and diversity issues, had a representative from each of the three committees sit as a member. As well, the internal Equity Steering Committee has asked members of EAG and AJEFO to consult on internal policy issues such as the French Language Services Policy and Translation Guidelines. This has led to non-Bencher members from diverse communities participating not only in a consultative basis, but having a more active role in shaping policies and a presence in the way the profession is regulated and governed.

Current Issues to Consider

Management Reorganization Plan
21. Several developments have occurred since the drafting of the *Equity and Diversity Actions Plans Update - June 2001*, which must be addressed as these changes may impact on certain directives outlined in the plans. At the time of publishing this report, due to the organization's restructuring, several areas have not been able to prepare plans that adequately reflect the department's plans. Areas which have not provided plans to fully reflect current changes include Legal Affairs, various areas in Professional Development and Competence, Government Relations, Complaints Resolution, and hearing panels under Professional Regulation.

22. With the reorganization, several departments or units have changed in the reporting structure, although the functions of these departments have not changed. The departments which have been affected by the organizational shift include Resolution and Compliance, Specialist Certification, Advisory Services, Information Systems, Government Relations and Administrative Compliance Processes. It is apparent in these departmental shifts, that specific goals and actions plans will be directly affected (please refer to the organization chart attached).

23. Therefore the challenge to all department and units affected by the change in reporting structure are to ensure their current plans are reflected throughout all units and modifications be made so that goals are achievable within it's reported time frame.

The Griffiths Report
24. The implementation of the Griffiths Report, a document adopted by Convocation that outlined several recommendations on how the Law Society can ensure the legal profession is regulated in the public interest, will have an impact on the action plans submitted by the Professional Regulation Department, particularly Discipline. Recommendations found in the report recognized that additional staff and improved staff training would help to ensure the Law Society could continue to effectively regulate the profession in the public interest.

Conclusion
25. In reviewing the *Equity and Diversity Actions Plans Update - June 2001*, it is apparent that much effort has been placed in increasing equity and diversity within the Law Society. The Law Society has made great progress from the previous year; however it must still be recognised that there is a great amount of work that needs to be done. As departments acknowledge the need to integrate equity and diversity issues into their day-to-day operations and service delivery, the inclusion of such initiatives should be second nature, rather than equity being addresses as a 'specialized' issue, unless circumstances warrant such consideration.

26. Using the *Bicentennial Report* as the guiding principle for integration of equity and diversity initiatives, the following outlines the future directions that the Law Society will undertake to fully integrate equity and diversity throughout its organization:

- including equity and diversity issues in all policy making;

- creating an integrated database of membership information including demographic information. A centralized database for information purposes such as requests for French language services.
- increasing communications with members and non-members, particularly having more exposure in the ethnic media for such things as job postings and services information.
- reviewing the process of committee appointments, task forces and working groups to ensure representation from various communities[48];
- developing materials within the BAC and CLE which are inclusive of all cultures;
- ensuring all Law Society materials are reflective of the demographics within the Province;
- ensuring that discriminatory practices are eliminated in its regulatory processes;
- reviewing the issues surrounding accreditation for those educated in practising law into the profession;
- developing implementation plans for contract compliance and supplier contracts;
- constructing a demographic profile of the workplace and developing outreach and recruitment strategies based on the results;
- monitoring implementation of the accommodations policy and workplace harassment and discrimination policy;
- developing and conducting training for lawyers interested in providing pro-bono legal services for the Connecting Communities with Counsel program;
- monitoring implementation of the French language services policy in terms of public documents and service delivery; and
- providing ongoing education and training to staff on corporate and departmental equity issues.

27. As the profession becomes increasingly diverse, it is important that its governing body which has a variety of roles including policy maker, resource to the public and profession, regulator and educator, recognises and is sensitive to the impact its decisions may have on its stakeholders. While the face of the profession changes, participation from the Aboriginal, Francophone and equity seeking communities, whether they be members or non-members, is essential to ensuring the specific needs of these communities are considered and reflected upon. This is particularly important when dealing with policy development and any decision which affects the community at large. The Law Society must provide opportunities for those from various communities to participate in the decision making process and an outlet to provide feedback on how decisions may affect their community or practice.

APPENDIX 3

Attached to the original Report in Convocation file, copies of:

Correspondence from the Minister of Heritage and Multiculturalism concerning funding for the conference on Equity and Diversity in the Legal Profession: Promoting Dialogue, Creating Change.

(Page 80)

Re: Model Policy on Harassment and Discrimination for Law Firms

It was moved by Mr. T. Ducharme, seconded by Mr. Wilson that the Report be tabled.

Not Put

Mr. Millar consented to have the matter referred back to the Committee for refinement.

[48] The Law Society of Upper Canada, *Bicentennial Report and Recommendations on Equity Issues in the Legal Profession* (Report to Convocation, May 1997).

The following items were for information only:

- Equity and Diversity Action Plan
- Correspondence Received re: Canadian Heritage grant for $74,000

REPORTS FOR INFORMATION ONLY

Professional Regulation Committee Report

Professional Regulation Committee
February 7, 2002

Report to Convocation

Purpose of Report: Information

Prepared by the Policy Secretariat

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on February 7, 2002. In attendance were:

Gavin MacKenzie (Chair)

Neil Finkelstein (Vice-Chair)

Patrick Furlong
Avvy Go
Gary Gottlieb
Ross Murray
Judith Potter
Joanne St. Lewis

Gillian Diamond

Staff: Lesley Cameron, Margaret Froh, Terry Knott, David McKillop, Dulce Mitchell, Charles Smith, Elliot Spears, Jim Varro, Jim Yakimovich.

2. This report contains information reports on

- the work of the working group on guidelines for lawyers involved in Aboriginal Residential School litigation, and
- file and caseload management and staffing information in the complaints resolution, investigations and discipline departments.

WORK OF THE WORKING GROUP ON GUIDELINES FOR ABORIGINAL RESIDENTIAL SCHOOL LITIGATION

3. A joint working group of the Committee and the Equity and Aboriginal Issues Committee ("EAIC") has drafted proposed guidelines for lawyers acting in Aboriginal Residential School cases.

Background

4. The impetus for the Law Society's review of issues related to litigation involving Residential School Survivors, out of which the guidelines have come, came from a number of sources, including

- an October 1998 letter from the National Chief of the Assembly of First Nations to the Society raising concerns about the alleged exploitation of Residential School Survivors by lawyers in Canada.
- a March 2000 report "Restoring Dignity: Responding to Child Abuse in Canadian Institutions", from the Law Commission of Canada, which made several recommendations specific to law societies in regard to providing safeguards for survivors of childhood institutional abuse, as well as guidance and training for lawyers acting in Aboriginal Residential School and childhood institutional abuse cases
- Canadian Bar Association Resolution 00-04-A ("Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools") adopted at the August 2000 Annual General Meeting of the CBA, which called upon all law societies in Canada to adopt the Guidelines as recommended conduct for lawyers acting or seeking to act for survivors of Aboriginal Residential Schools

5. In late 2000 and into mid-2001, EAIC received reports, largely through Rotiio'taties, concerning Aboriginal Residential School issues. While to date, the Law Society has not received any formal complaints against members from Aboriginal Residential School Survivors, unsubstantiated third party allegations of misconduct by lawyers in other Canadian jurisdictions in these types of cases have been brought to the Society's attention. They include reports of:

- Lawyers sending unsolicited letters to Residential School Survivors which may include detailed and lengthy questionnaires requesting explicit information about experiences in residential school including accounts of physical and sexual abuse from the survivor
- Lawyers requiring survivors to sign retainer agreements which do not set out a defined fee, but rather indicate that the fees will be determined by an hourly rate, the complexity of the case, the results obtained in the case, with allowances for the delay in payment for the lawyer's fees. They also state that if the client does not receive damages they will not be billed for services, and if they do receive damages they will be billed at approximately 20% to 25% of the damages awarded.
- Lawyers coming into communities and setting up in a local community centre, putting up posters about the lawyer's ability to sign clients up in residential school cases and actively recruiting clients, without any concern whether that survivor is already represented by counsel.
- Lawyers offering to pay survivors $50 cash if they agree to sign a retainer agreement with the lawyer.
- Lawyers signing on clients in bulk fashion but not delivering on legal services. Lawyers not doing the work required on the case. Lawyers not being knowledgeable of the work required in residential school claims.
- Lawyers not keeping survivor clients informed on the status of their case or the legal process. Lawyers not returning phone calls from clients. Lawyers sending clients detailed opinion letters with complicated instructions requiring clients to opt in or out of certain processes, etc. without making themselves available to the client to discuss and explain the opinion. Lawyers refusing to accept collect phone calls from indigent clients and thereby denying communication with the client altogether.
- Lawyers requiring aging survivor clients to amend their wills naming the lawyer as Executor of their estates prior to agreeing to proceed with their cases.

6. While within the Society there was consensus that the *Rules of Professional Conduct* generally deal with many of the above issues, in light of the developments described above, EAIC considered whether further work could be done to educate the profession. This led to discussions between the Committee and EAIC.

7. In July 2001, Gavin Mackenzie, the Committee's chair, and George Hunter, then Vice-Chair of EAIC, against the above background, requested that staff from the Equity Initiatives Department and Policy and Legal Affairs develop draft "Guidelines for Lawyers Acting in Aboriginal Residential School Cases". In particular, staff were directed to prepare draft guidelines, develop a consultation process with members of the Ontario bar and specific consultation with individuals with expertise in these matters, and ultimately report the guidelines to Convocation.

8. Work on the Guidelines began in the summer and continued into the fall of 2001, resulting in a preliminary report to the Committees in September 2001. At that time, the working group was struck to deal with a number of issues identified in connection with Aboriginal Residential School and Childhood Institutional Abuse cases,[1] which included review of the draft guidelines.

The Guidelines

9. The draft guidelines, appearing below, are based on the August 2000 CBA Guidelines, but have been adapted to reflect the particular provisions of the Society's *Rules of Professional Conduct* and the advisory purpose of similar Society Guidelines. Like other Guidelines published by the Society, they are specific to an issue and are intended to provide additional guidance to the profession beyond the Rules that are applicable to counsel representing parties in litigation. The fourth paragraph of the introductory section of the Guidelines makes this clear:

> The Guidelines are to be read in conjunction with the Rules and provide guidance in their interpretation as they apply in Aboriginal Residential School cases. The Guidelines have been created to identify appropriate practices in the area of residential school litigation with a view to ensuring the competence and professional conduct of the Ontario Bar in providing legal services and non-discriminatory access to legal services in Ontario for Aboriginal Residential School Survivors.

10. The Guidelines deal with the following issues in appropriate detail:

- the special nature of Survivors' cases
- the unique demands that these cases put on the lawyer and other law office staff
- competence to act prior to accepting clients in these matters
- culturally appropriate methods in making legal services available to Survivors
- clear communication and client comprehension regarding all aspects of the solicitor and client relationship and the legal process in which the client is involved
- the lawyer's accessibility to clients and clear lines of communication with the client
- sensitivity to the emotional, spiritual and intellectual needs of Survivors and an effort to understand and respect Survivors' cultural roots, customs and traditions.

[1] These issues were identified in the May 29, 2001 report "Issues Arising in the Area of Aboriginal Residential School and Childhood Institutional Abuse Cases" which was provided to both committees and to Convocation in June 2001. These issues include concerns about the Law Society's complaints, investigation and disciplinary processes, accessibility to the Law Society for Aboriginal Peoples and other survivors of childhood institutional abuse, lack of visibility of the Law Society within Aboriginal communities, and the need for training for Benchers and staff dealing with complaints involving Aboriginal Peoples and survivors of childhood institutional abuse.

PROPOSED GUIDELINES FOR LAWYERS ACTING IN
ABORIGINAL RESIDENTIAL SCHOOL CASES

These Guidelines are provided as a tool to assist members of the Law Society of Upper Canada who act in cases involving Aboriginal Residential School Survivors, those persons who attended residential schools and their descendants (the "Survivors"), whether acting on behalf of plaintiff Survivors or on behalf of individual defendants, churches or government.

The Guidelines were prepared in the context of the Aboriginal community's unique experience and history with Aboriginal Residential Schools across Canada. The Guidelines reflect a response to calls from the Assembly of First Nations, Rotiio'taties, the Law Commission of Canada, and the Canadian Bar Association for law societies to implement safeguards for Survivors engaged in legal processes. These Guidelines are in keeping with the spirit and letter of the *Rules of Professional Conduct* ("the Rules"). In particular, rule 1.03(1)(b) recognizes that lawyers have a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights law in force in Ontario.

While these Guidelines address issues relating specifically to Aboriginal Residential School Survivors, the principles in the Guidelines may apply to lawyers acting in cases involving other victims of institutional abuse or other vulnerable clients.

The Guidelines are to be read in conjunction with the Rules and provide guidance in their interpretation as they apply in Aboriginal Residential School cases. The Guidelines have been created to identify appropriate practices in the area of residential school litigation with a view to ensuring the competence and professional conduct of the Ontario Bar in providing legal services and non-discriminatory access to legal services in Ontario for Aboriginal Residential School Survivors.

1. Lawyers should recognize and respect the unique nature of Aboriginal Residential School cases and appreciate Survivors' need for "healing" in the legal process. Lawyers should recognize and respect the special nature of Survivors' cases and should assist in facilitating their client's healing process through, where possible,:
   a) identifying and providing referrals to appropriate community resources, including counselling resources, to assist the client;
   b) referring their client to treatment programs, if appropriate;
   c) recognizing and respecting the need for the client to develop a personal support network.

2. Lawyers should recognize and respect that Aboriginal Residential School cases place unique demands on the lawyer and other law office staff by virtue of the complicated legal issues, the emotional nature of such cases, the amount of time and resources required for each case, the special needs of Survivor clients, the potential need for crisis intervention and management, and the lawyer's role in facilitating the client's healing process. Lawyers should recognize and respect that these demands may place a practical limit on the number of cases which they can competently and responsibly take on at any one time.

3. Recognizing these additional demands, lawyers should be aware of the possible need for counselling for law office personnel to effectively manage their practice and maintain competent legal service to clients. Lawyers acting in Aboriginal Residential School cases are encouraged to ensure employee assistance programs are available for law office lawyers and staff.

4. Given the specific knowledge required to responsibly serve the legal needs of Aboriginal Peoples, the special nature of Residential School cases, and the various legal processes that exist in those cases, lawyers should ensure they are competent to act prior to accepting clients in these matters. Rule 2.01 provides a definition of a "competent lawyer". Rule 2.01(h) states that being a competent lawyer includes "recognizing limitations in one's ability to handle a matter, or some aspect of it, and taking steps to ensure the client is appropriately served."

5. Lawyers should appreciate the need for the utmost sensitivity in dealings with Survivors. Lawyers should ensure that the methods they employ in making legal services available to Survivors are culturally appropriate and comply with Rule 3.06, in particular Rule 3.06(2)(c) which prohibits unconscionable or exploitive means in offering legal services to vulnerable persons or persons who have suffered a traumatic experience and have not yet had a chance to recover. Lawyers should make reasonable efforts to ensure that initial communications offering legal services to Survivors are welcomed and respectful. Care should be taken to ensure that these communications will not result in further trauma to the Survivor.

6. Lawyers should ensure that advertising aimed at soliciting Survivors is in good taste, is not false or misleading, and complies with Rule 3.04.

7. Lawyers acting on behalf of Survivors must comply with Rule 2.08 and ensure that all fees and disbursements are clearly communicated to the Survivor in a way that is understandable. Given the unique nature of Residential School cases and needs of Survivors, lawyers should make reasonable efforts to ensure that there is clear and understandable communication regarding the solicitor and client relationship, the legal process including settlement and alternative dispute resolution processes, responsibilities of lawyer and client, and fees and disbursements. Accordingly, lawyers should, whenever possible, meet in person with the client before establishing a solicitor and client relationship or accepting retainers from Aboriginal Residential School Survivors.

8. Lawyers shall not enter into an arrangement with a client for a contingent fee except where allowed by statute, in accordance with rule 2.08(4).

9. Lawyers acting for Survivors should ensure that they are accessible to their clients and that clear lines of communication exist with their clients. Lawyers should recognize and respect the special communication needs that some Survivors may have including language barriers, cultural barriers, and limited access to telephone service. Lawyers' written communications to Survivors should be in an accessible format and lawyers should make reasonable efforts to follow up to ensure client comprehension. Rule 2.01 defines a "competent lawyer" to be one who communicates at all stages of the matter in a timely and effective manner that is appropriate to the age and abilities of the client, and performs all functions conscientiously, diligently, and in a timely and cost-effective manner.

10. Sensitivity to the emotional, spiritual and intellectual needs of Survivors is necessary in the provision of legal services to Survivors. Lawyers acting for Survivors should recognize and respect that many Survivors have had control taken from their lives when they were children and therefore, as clients, should be routinely informed about and consulted as much as possible on the direction of their case. Lawyers should ensure they obtain instructions from Survivors at every stage of the legal process. Lawyers should also recognize and respect that for Survivors, interaction with lawyers and the legal process can be extremely stressful and difficult.

11. Lawyers should recognize and respect that Survivors are often at risk of suicide and/or violence toward themselves and others, and should seek appropriate instruction and training for all law office staff to deal with such occurrences. Lawyers should be aware of available and appropriate resources and supports in order to make referrals in times of crisis.

12. Lawyers should recognize and respect that Survivors may be seriously damaged from their experiences which may include cultural damages resulting from being cut off from their own society, culture and traditions. These experiences may be aggravated by having to relive their childhood abuse, and healing may be a necessary component of any real settlement for Survivors. Lawyers acting for both plaintiffs and defendants should endeavour to understand and respect Survivors' cultural roots, customs and traditions.

11. The Committees agreed on the following work plan to finalize the proposed guidelines:

- input on the proposed guidelines will be sought from the profession through publication of the guidelines, with an introductory piece, in the *Ontario Lawyers Gazette*, the *Ontario Reports* and on the Society's web site;
- consultation (through the working group) with a group of individuals representative of the Aboriginal community in the form of a meeting at the Society to discuss the Guidelines and provide input on the issues they address.

12. The Committees also plan to contact, as appropriate, individuals or groups who may have specific knowledge of the issues relating to Aboriginal Residential Schools and who could assist the Committees in their deliberations.

13. After the working group's meeting with the representatives and after receipt of responses to the call for input, the working group will prepare a final draft of the guidelines for review by the Committees. After their review, the Committees will prepare a final report to Convocation on the Guidelines.

FILE AND CASELOAD MANAGEMENT AND STAFFING INFORMATION IN THE COMPLAINTS RESOLUTION, INVESTIGATIONS AND DISCIPLINE DEPARTMENTS

14. Senior regulatory staff reported to the Committee on caseload management in the Complaints Resolution, Investigations and Discipline Departments. The reports appear at Appendix 1. These reports are prepared monthly for review by the Committee as part of its monitoring function respecting file management. The Committee receives general information and statistics on file management and caseloads in the departments noted above.[2] The reports in this report cover the period to the end of January 2002.

[2]The chair, as a member of the Proceedings Authorization Committee, is not a member of the Hearing Panel and accordingly does not and cannot have adjudicative responsibilities. Information received by the Committee, as reflected in the reports appended to this report, does not itemize specific cases.

APPENDIX 1

FILE AND CASELOAD MANAGEMENT AND STAFFING INFORMATION IN THE

COMPLAINTS RESOLUTION, INVESTIGATIONS AND DISCIPLINE DEPARTMENTS

THE LAW SOCIETY OF UPPER CANADA
COMPLAINTS RESOLUTION AND TRUSTEE SERVICES

MEMORANDUM

TO: Professional Regulation Committee

FROM: Dvid McKillop
Manager, Compensation Fund, Resolution and Trustee Services

DATE: February 4, 2002

RE: Management Report - Complaints Resolution and Trustee Services

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The purpose of this memorandum is to provide information about matters in the Complaints Resolution and Trustee Services (Unclaimed Trust Fund) departments for the month of January 2002.

COMPLAINTS RESOLUTION

Summary of Results for January 2002

Complaints in Unit as at December 31/01	1,808
Complaints Reopened During Month	15
Complaints Resolved/Closed During Month	237
Complaints Transferred to CSC & Investigations During Month	17
New Complaints Received During Month	232
Complaints in Unit as at January 31, 2002	1,801
Average Age of Active Complaints (in days)	269

Comparative Results

The following graphs reveal comparative results for a) Complaints Opened and Closed in Period, and b) Number of Open Files in Unit; for the months August 2001 to January 2002 inclusive.

Complaints Resolution – Complaints Opened & Closed in Period

(see graph in Convocation file)

Number of Active Files as at January 31, 2002 by File Type

Number of Open Complaint Files

(see graph in Convocation file)

Type of File	Number of Active Files
Complaint	1,682
Bankruptcy	73
Discipline Costs, Panel Orders & Undertakings	43
Practice Windup	3
TOTAL ACTIVE	1,801

Discipline Costs

As at January 31st 2002 outstanding costs awarded totalled $148,963.40. Of that amount, payment of $117,226.73 is being actively pursued. The remainder of $31,736.67 is not currently being pursued as the Members concerned are under suspension. Suspended Members are monitored bi-annually to determine whether there has been a change in their status to that of practising Member and, if so, the cost award is pursued.

The total amount received in January 2002 was $8,300.00. The total amount collected in 2001 was $60,050.00.

COMPLAINTS REVIEW

As at January 31, 2002, there were 37 files in the Complaints Review process. Further information on these 37 files is found in the following chart.

Hearing Held, Further Investigation Ordered	15
Hearings Pending	14
Hearing Held, Awaiting Decision	3
Files To Be Closed	5
TOTAL	37

The 37 files relate to complaints originally received by the Law Society in the following years:

1996	2
1997	4
1998	4
1999	11
2000	8
2001	8
TOTAL	37

TRUSTEE SERVICES (THE UNCLAIMED TRUST FUND)

The adoption of an amendment to by-law 31 by Convocation in May 2001, enabled the Law Society to proceed with its Unclaimed Trust Fund initiative. This program enables lawyers to submit unclaimed trust funds that they have held for at least two years to the Law Society. Members of the public will be able to check with the Law Society to determine if they are entitled to make a claim.

The Trustee Services department is responsible for the administration of the Unclaimed Trust Fund. The following details the operation of the program since inception.

Applications For Payment Of Unclaimed Trust Funds To Law Society Received From Members

January 2002	Cumulative
63	140

Applications From Members Pending Determination (additional information required)

January 2002	Cumulative
63	93

Applications From Members To Transfer Trust Funds To The Law Society Approved

January 2002	Cumulative
0	43

Applications From Members Rejected

January 2002	Cumulative
0	4

Amount of funds received:

January 2002	Cumulative Amount
$ 2,908.40	$ 17,935.31

Investigations Department Management Report

TO: Gavin MacKenzie, Chair, Professional Regulation Committee

COPY: Richard Tinsley, Secretary

FROM: James Yakimovich, Manager, Investigations

DATE: January 30, 2002

RE: Management Report - Investigations Department -January 2002

Summary of Results for the Month:

Change in Total Case Numbers (More than one investigation may be open against a member)	Net Increase of 11 member cases
Number of Members Under Investigation	198 (Dec = 188)
Cases Completed/Closed in January	46 (Oct = 37, Nov = 35, Dec 23)
Cases Older Than One Year Outstanding	30 (Nov = 31, Dec 30)

At January 29, 2002, the department carries an investigation inventory of 316 member cases and 22 Unauthorized Practice cases, for a total of 338 investigation cases.

Member Case Inventory

(see graph in Convocation file)

Cases Older Than One Year

The number of cases older than one year is thirty (30) (Dec = 30 cases). The following chart provides a summary of action plans associated with the cases:

Planned Result	Total
Awaiting PAC Review	0
Pre-PAC Drafting Agreed Statement of Facts	2
Close or Referred to PAC in February	11
Close or Referred to PAC in March	11
Further Investigation Necessary-Target Beyond February	7
Totals	30

Complaints Files Associated With Investigation Cases

At January 28, 2002, six hundred eighty eight (688) complaints files are associated with the investigation cases reported on page one of this report. The chart tracks the volume of complaints and their age in “days outstanding”. The days outstanding calculation includes time associated with the file while it was in departments other than the Investigations Department.

Month	Number of Complaints Files	Average Age of Complaints Files
December 2001	694	357 Days Outstanding
January 2002	688	345 Days Outstanding
February		
March		
April		
May		

Unauthorized Practice Investigations

The non-member case investigations for unauthorized practice are in addition to the member investigations reported above. The chart that follows depicts the number of cases open.

Unauthorized Practice Investigations

(see graph in Convocation file)

Outstanding Discipline Department Requests

A monitoring system is in place with respect to requests made of investigators for disclosure materials and for additional investigation work. The following information pertains to January 2002.

Requests Outstanding at End of January = 6

DISCIPLINE DEPARTMENT
MEMORANDUM

TO: Professional Regulation Committee

FROM: Lesley Cameron
Senior Counsel - Discipline

DATE: January 31, 2002

RE: *Discipline Department Information*

The purpose of this memorandum is to provide information about matters in the discipline process for the month of January, 2002.

Total Matters in Discipline Process

Attached as Chart 1 is a list of the number of each type of file carried by the Discipline Department at January 31, 2002. As can be seen from Chart 1:

1. 149 matters are pending hearing or appeal;

2. 39 conduct applications have been authorised for prosecution by the Proceedings Authorisation Committee, but have not yet been issued;

3. 85 conduct applications have been issued and are in the discipline process: 54 are before the Hearings Management Tribunal with no hearing date set; 27 have hearing dates set or the hearing is underway; 4 are adjourned sine die;

4. 7 appeals are pending before the Law Society Appeal Panel;

5. 2 judicial reviews are pending before the Divisional Court.

Aging of Matters Authorised but not Issued

Of the 39 files authorised for prosecution but in which the conduct application had not yet been issued as of January 31, 2002, 8 were authorised more than 3 months ago.

Attached as Chart 2 is a summary of the age and carriage of these 8 files. As can be seen from Chart 2, of these 8 files:

i) 6 are between 3 and 6 months old, meaning that between 3 and 6 months has elapsed since authorisation;

ii) 2 are over 1 year old.

Of the 6 files between 3 and 6 months old: 3 required or still require a return to the PAC for direction or amendment; 1 is waiting for the production of additional information promised by a member and will be issued in February if it is not forthcoming ; 1 is the subject of further investigation and 1 will be issued in February.

Of the 2 files over 1 year old, the first required the Law Society to bring an application for search and seizure under section 49.10 and the Law Society is now waiting for a third party (a bank) to produce records. The second file has been authorised for non disciplinary resolution but remains on the list pending the successful completion of this resolution.

The Chair of the Professional Regulation Committee and the Secretary have been provided with the names of the files, a description of the nature of the allegations in each file and a brief status report on each file in this category.

Historical Comparison

Attached as Chart 3 is a summary of the age and carriage of matters which were authorised for prosecution by the Proceedings Authorisation Committee, but in which the conduct application had not yet been issued as of the end of various months beginning in August of 2000. Chart 3 includes the information summarised in Chart 2, but adds figures from previous months for comparison purposes.

Chart 1

Matters in Discipline Process as of January 31, 2002	
Discipline Providing Assistance to Investigations	24
Conduct Applications Authorized But Not Issued	39
Conduct Applications Issued Hearing Date Not Set	54
Conduct Applications Issued Hearing Date Set or Hearing Started	27
Conduct Applications Issued Adjourned Sine Die	4
Non-Compliance Applications Issued Hearing Date Not Set	1
Non-Compliance Applications Issued Hearing Date Set or Hearing Started	1
Capacity Applications Authorized But Not Issued	0
Capacity Applications Issued Hearing Date Not Set	1
Admission Hearings	8
Readmission Hearings	2
Reinstatement Hearings	3
Appeals to Law Society Appeal Panel	7
Appeals/Judicial Reviews Divisional Court	2
Total Matters	173

Chart 2

Conduct Applications Authorized For Prosecution but not Issued as Conduct Applications as of January 31, 2002			
	3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
Law Society Counsel	6	0	1
Outside Counsel	0	0	1
Total	6	0	2

Chart 3

CONDUCT APPLICATIONS AUTHORISED FOR PROSECUTION BUT NOT ISSUED AS CONDUCT APPLICATIONS				
Month	Carriage	3 to 6 Months Old	6 to 12 Months Old	Over 1 Year Old
August 31, 2000	Law Society Counsel	14	5	15
	Outside Counsel	0	0	1
	Total	14	5	16
October 31, 2000	Law Society Counsel	14	3	5
	Outside Counsel	9	1	5
	Total	23	4	10
November 30, 2000	Law Society Counsel	12	2	2
	Outside Counsel	9	1	5
	Total	21	3	7
December 15, 2000	Law Society Counsel	9	2	2
	Outside Counsel	4	3	4
	Total	13	5	6
January 31, 2001	Law Society Counsel	11	4	1
	Outside Counsel	2	6	4
	Total	13	10	5
February 28, 2001	Law Society Counsel	7	2	1
	Outside Counsel	0	5	4
	Total	7	7	5
March 30, 2001	Law Society Counsel	6	1	0
	Outside Counsel	0	4	3
	Total	6	5	3
April 24, 2001	Law Society Counsel	6	2	0
	Outside Counsel	0	3	3
	Total	6	5	3

May 31, 2001	Law Society Counsel	6	3	0
	Outside Counsel	0	1	5
	Total	6	4	5
June 30, 2001	Law Society Counsel	5	3	1
	Outside Counsel	0	0	5
	Total	5	3	6
July 31, 2001	Law Society Counsel	5	5	1
	Outside Counsel	0	0	3
	Total	5	5	4
August 30, 2001	Law Society Counsel	4	5	0
	Outside Counsel	0	0	2
	Total	4	5	2
September 30, 2001	Law Society Counsel	6	4	0
	Outside Counsel	0	0	2
	Total	6	4	2
October 26, 2001	Law Society Counsel	2	3	1
	Outside Counsel	0	0	2
	Total	2	3	3
November 30, 2001	Law Society Counsel	5	0	1
	Outside Counsel	0	0	1
	Total	5	0	2
December 31, 2001	Law Society Counsel	4	0	1
	Outside Counsel	0	0	1
	Total	4	0	2
January 31, 2002	Law Society Counsel	6	0	1
	Outside Counsel	0	0	1
	Total	6	0	2

Emerging Issues Committee Report

Emerging Issues Committee
January 23, 2002

Report to Convocation

Purpose of Report: Information

Prepared by the Policy and Legal Affairs Department

TERMS OF REFERENCE/COMMITTEE PROCESS

1. The Emerging Issues Committee met on January 23, 2002. In attendance were

George Hunter (Co-Chairs)
Niels Ortved

Stephen Bindman
Earl Cherniak
Seymour Epstein
Abe Feinstein
Allan Lawrence

Staff: Jim Varro

2. This report contains information on the activities of the Committee, including
- the Committee's identification of issues that it suggests be considered for study by the Society within the next two years, and
- a proposal for review of Bill C-42.

IDENTIFICATION OF EMERGING ISSUES

3. The Committee, in keeping with its mandate[1] to provide long-range intelligence on developments relevant to the Society's regulatory role, has identified a series of issues for Convocation's consideration for study, either in whole or in part, by the Society.

4. The list of issues is based on information prepared by staff that provided a "scan" of the global legal environment. Information was obtained on special initiatives and ongoing work of a number of organizations, including law societies abroad, the American Bar Association, the International Bar Association and the Council of the Bars and Law Societies of the European Union. In gathering this information, staff attempted to specify those issues that legal organizations see as important areas for study in the next year or two.

[1]The mandate of the Committee is "to monitor emerging policy issues affecting the Society and the legal profession, to undertake and direct research into such policy issues and to develop for Convocation's approval strategic plans and other proposals relating to such policy issues." (By-Law 9, s. 16.2).

5. The Committee also received from its members, as requested by the co-chairs, short memoranda on individual issues that Committee members wished to have included in the list ultimately formulated for Convocation's review.

6. The Committee attempted to group some issues into some larger overarching issues, where individual issues form part of a continuum or are inter-related. Priorities were also assigned to the issues.

7. At this stage, the Committee is reporting its preliminary list to Convocation for information. At its next meeting, the Committee plans to examine more closely the issues it has identified, and prepare for Convocation's consideration a proposal for study of some of the issues. The Committee, through this exercise, recognized that while there are some major issues impacting on the legal profession, the Society's resources for study should be dedicated to those issues the impact of which is related to the Society's mandate, and that have some practical implications for the legal profession and its regulation in Ontario.

8. While the Committee may in fact be the group that should have carriage of some studies, other committees or task forces, perhaps to be created, will be undertaking the study of some issues, if Convocation so directs. The Committee also suggests that other organizations that are considering the same or similar issues (as evidenced, for example, in the scan) be contacted for an exchange of views and, if appropriate, resources once issues have been determined for study.

9. The following are the broad categories of issues identified by the Committee:
   a. Globalization and its effects on law practice
   b. Effectiveness and efficiency of the justice system
   c. Training of lawyers
   d. Balancing career and family
   e. Effects of information technology on the profession
   f. Law Society's role in the Federation of Law Societies of Canada
   g. Core values of the profession
   h. Regulation of the profession
   i. Business structure issues
   j. Image of lawyers/the profession

   Issues a. through f. were assigned first priority, issue g. second priority, and issues h. through j. third priority.

10. The Committee's co-chairs encourage benchers to forward to the co-chairs, Committee members or staff other issues which they consider appropriate for consideration by the Committee.

PROPOSAL FOR REVIEW OF BILL C-42[2]

11. As directed by Convocation, the Committee has begun its assessment of Bill C-42, the *Public Safety Act* ("the Bill"), which introduces new public safety measures as part of the Federal Government's anti-terrorism plan. Bill C-42 is the second anti-terrorist Act promulgated by Parliament, following Bill C-36.

[2]Stephen Bindman is not participating in discussions on the substance of or strategy respecting the Society's position on Bill C-42.

12. The Bill essentially amends certain federal Acts and enacts the *Biological and Toxin Weapons Convention Implementation Act*. A number of the amendments to existing legislation give significant authority to the relevant Minister, and thus, like Bill C-36, concentrate significant power in the executive. In many of the Acts amended by the Bill, the relevant Minister is empowered to make interim orders which generally have the effect of regulations and which are intended to address significant risk to health or safety, where immediate action is required to deal with the risk.

13. The Committee's preliminary approach to review of the Bill is to focus on this area of Ministerial discretion, and staff have been requested to prepare material accordingly. The Committee also determined that it should be prepared to answer two questions to assist Convocation in its ultimate review of the legislation: if the opportunity to make a submission on the Bill to the Federal Government arises, should the Society do so, and if so, what should the submission consist of?

14. The Committee is monitoring the government's agenda for the Bill, and other organizations' plans to make submissions. Further reports to Convocation will follow at the appropriate time.

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The Treasurer thanked Lucy Rybka-Becker, Director of Communications and her staff for the speed with which she produced the fact sheet on the changing face of the legal profession.

CONVOCATION ROSE AT 12:20 P.M.

The Treasurer and Benchers had as their guests for luncheon Dr. William Kaplan, Dr. Irving Abella, Marlys Edwardh and Robert Topp's son, Daniel .

Confirmed in Convocation this 21st day of March, 2002

Treasurer