TAB 4

Report to Convocation
April 26, 2018

Professional Regulation Committee

Committee Members
William C. McDowell (Chair)
Malcolm Mercer (Vice-Chair)
Jonathan Rosenthal (Vice-Chair)
Fred Bickford
John Callaghan
Gisèle Chrétien
Suzanne Clément
Seymour Epstein
David Howell
Carol Hartman
Michael Lerner
Brian Lawrie
Virginia MacLean
Susan Richer
Raj Sharda
Jerry Udell

Purpose of Report: Information

Prepared by the Professional Regulation Division
Matthew Wylie (416-947-3953)

TABLE OF CONTENTS

For Decision

For Information

COMMITTEE PROCESS

1. The Professional Regulation Committee met on April 12, 2018. In attendance were Malcolm Mercer (Vice-Chair), Jonathan Rosenthal (Vice-Chair), Fred Bickford, Gisèle Chrétien (by telephone), Suzanne Clément, Seymour Epstein, David Howell, Brian Lawrie, Michael Lerner (by telephone), Virginia MacLean, Susan Richer, and Jerry Udell (by telephone).

2. Law Society staff members Lesley Cameron, Juda Strawczynski, and Matthew Wylie were also in attendance.

TAB 4.1

FOR DECISION

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT AND THE PARALEGAL RULES OF CONDUCT – LAW SOCIETY OF ONTARIO

MOTION

3. **That Convocation approve amendments to the *Rules of Professional Conduct* and the *Paralegal Rules of Conduct* to substitute any and all references to "The Law Society of Upper Canada" with "the Law Society of Ontario", at the same time that any changes to the *Law Society Act* changing the Law Society's name take effect.**

Nature of the Issue

4. At its meeting of November 2, 2017, Convocation voted to change the name of The Law Society of Upper Canada to the Law Society of Ontario.

5. On March 28, 2018, the Government of Ontario presented amendments to the *Law Society Act* to implement the name change for consideration by the Legislative Assembly. It is proposed that these amendments will come into force on the day that the *Plan for Care and Opportunity Act (Budget Measures), 2018* receives Royal Assent.

6. Rule 1.1-1 of the *Rules of Professional Conduct* and Rule 1.02 of the *Paralegal Rules of Conduct* both provide that "Law Society means The Law Society of Upper Canada".

7. These references need to be changed when amendments to the *Law Society Act* come into force.

TAB 4.2

FOR DECISION

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT –

ARTICLING EXPERIENCE SURVEY

MOTION

8. **That Convocation approve amendments to Sections 6.3 and 6.3.1 of the *Rules of Professional Conduct* as set out at Tab 4.2.1 (English) and Tab 4.2.2 (French).**

Nature of the Issue

9. In response to issues identified in the Articling Experience Survey, the Law Society announced a number of steps including a review of Sections 6.3 and 6.3.1 of the *Rules of Professional Conduct* (the "*Rules*") to ensure that they are up-to-date.

10. The Professional Regulation Committee (the "Committee") conducted that review and is proposing amendments to the *Rules* as detailed below.

Background

11. At its meeting in February 2018, the Committee reviewed the current rules as well as the statutory framework. The Committee noted that the *Rules* clearly and unambiguously prohibit discrimination and harassment, but determined that amendments were warranted to emphasize existing obligations for lawyers and to highlight recent legislative changes applicable to workplaces, including legal workplaces.

12. At its April 2018 meeting, the Committee approved the amendments detailed below, while also noting the importance of the other steps announced by the Law Society to address this issue, including engaging with law firms and legal departments to share best practices in addressing discrimination and harassment and promoting Law Society services and supports to assist people experiencing discrimination or harassment.

Proposed Amendments

13. Rule 6.3.1-1 details a lawyer's "special responsibility to respect the requirements of human rights laws in force in Ontario and . . . to honour the obligation not to discriminate" on enumerated grounds, which mirror those in the *Ontario Human Rights Code*. Rule 6.3.1-2 requires that a lawyer ensure that no one is denied services or provided with inferior services on the basis of any of the grounds set out in the Rule, and Rule 6.3.1-3 currently provides that "a lawyer shall ensure that their employment practices do not offend rule 6.3.1-1 and 6.3.1-2".

14. Sexual harassment is a form of discrimination based on sex.[1] As such, Rule 6.3.1-3 already creates an obligation for lawyers to ensure that their employment practices do not discriminate in the form of sexual harassment. However, given that discrimination in the form of sexual harassment is specifically prohibited by Rule 6.3-3, it is proposed that it should similarly be specifically added to Rule 6.3.1-3 so as to underscore the existing obligation for lawyers to ensure that their employment practices foster a workplace free of all types of discrimination, including sexual harassment.

15. In addition, the Commentary to Rule 6.3.1-3 specifically details requirements under the *Human Rights Code* regarding discrimination in employment or in the provision of services, but does not note requirements under the *Occupational Health and Safety Act* ("*OHSA*") applicable to workplace violence and workplace harassment. As such, it is proposed that the Commentary to Rule 6.3.1-3 highlight existing requirements under the *OHSA* that employers create workplace violence and harassment policies, as well as programs to implement those policies, and creates certain obligations for employers, including a duty to conduct investigations into allegations of workplace harassment that are appropriate in the circumstances.

16. In the course of drafting these proposed amendments, the Commentary to Rule 6.3-0 was also reviewed. That Commentary lists examples of the types of behaviour that constitute sexual harassment and then provides that "sexual harassment can occur in the form of behaviour by men towards women, between men, between women, or by women towards men".

17. This statement has been in the Commentary to Rule 6.3-0 and its predecessor(s) since at least 2000. In 2018, it is outdated and no longer necessary. Not only does it ignore the existence of all gender identities or expressions, it states obvious truths about the circumstances in which harassment may arise that it is not necessary to highlight. While once it may have been viewed as progressive, it now fails to be inclusive and is no longer necessary.

18. Therefore, it is proposed that this sentence be removed from the Commentary and need not be replaced.

19. A redline, showing proposed amendments to the Rules is at Tab 4.2.1 (English) and Tab 4.2.2 (French). A clean version is at Tab 4.2.3 (English) and Tab 4.2.4 (French).

Next Steps

20. Staff will bring a report to the Paralegal Standing Committee to consider whether similar changes should be made to the *Paralegal Professional Conduct Guidelines.*

[1] See for instance *Bell v. Ladas* (1980) 1 C.H.R.R D/155. See also *Jazen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252, available online at https://www.canlii.org/en/ca/scc/doc/1989/1989canlii97/1989canlii97.html.

TAB 4.2.1

SECTION 6.3 SEXUAL HARASSMENT

Definition

6.3-0 In rules 6.3-1 and 6.3-3, sexual harassment is 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.

Commentary

[1] Types of behaviour that constitute sexual harassment include, but are not limited to,

(a) sexist jokes causing embarrassment or offence, or that are by their nature clearly embarrassing or offensive;

[*Amended - January 2009*]

(b) leering;

(c) the display of sexually offensive material;

(d) sexually degrading words used to describe a person;

(e) derogatory or degrading remarks directed towards members of one sex or one's sexual orientation;

(f) sexually suggestive or obscene comments or gestures;

(g) unwelcome inquiries or comments about a person's sex life;

(h) unwelcome sexual flirtations, advances, or propositions;

(i) persistent unwanted contact or attention after the end of a consensual relationship;

(j) requests for sexual favours;

(k) unwanted touching;

(l) verbal abuse or threats; and

(m) sexual assault.

[~~2] Sexual harassment can occur in the form of behaviour by men towards women, between men, between women, or by women towards men.~~

6.3-1 to **6.3-2** [FLSC - not in use]

Prohibition on Sexual Harassment

6.3-3 A lawyer shall not sexually harass a colleague, a staff member, a client, or any other person.

6.3-4 and **6.3-5** [FLSC - not in use]

SECTION 6.3.1 DISCRIMINATION

Special Responsibility

6.3.1-1 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, gender identity, gender expression, age, record of offences (as defined in the Ontario Human Rights 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 licensees or any other person.

[*Amended - June 2007, January 2014*]

Commentary

[1] The Law Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

[2] This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

[3] Rule 6.3.1-1 will be interpreted according to the provisions of the Human Rights Code (Ontario) and related case law.

[4] The Human Rights Code (Ontario) defines a number of grounds of discrimination listed in rule 6.3.1-1. For example,

[5] Age is defined as an age that is eighteen years or more.

[*Amended - January 2009*]

[6] Disability is broadly defined in s. 10 of the Human Rights Code (Ontario) to include both physical and mental disabilities.

[*Amended - January 2009*]

[7] Family status is defined as the status of being in a parent-and-child relationship.

[8] Marital status is defined as 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.

[*Amended - January 2009*]

[9] Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the Criminal Records Act (Canada) and not revoked) or provincial offences.

[10] The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

[11] There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including

(a) Differentiation on prohibited grounds that creates a disadvantage. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.

[*Amended - January 2009*]

(b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 6.3.1-1, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement should only be imposed if driving a vehicle is an essential requirement for the position. Such a requirement may have the effect of excluding from employment persons with disabilities that prevent them from obtaining a licence.

[*Amended - January 2009*]

[12] Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of

the prohibited grounds. The Human Rights Code (Ontario) requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

[13] A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

[14] Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the Human Rights Code (Ontario).

[15] In addition to prohibiting discrimination, rule 6.3.1-1 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited.

[*Amended - January 2009, January 2014*]

[16] Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in rule 6.3.1-1. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

Services

6.3.1-2 A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

Employment Practices

6.3.1-3 A lawyer shall ensure that their employment practices do not offend rule 6.3.1-1, ~~and~~ 6.3.1-2, and 6.3-3.

Commentary

[1] Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario Human Rights Code and related equity legislation.

[2] In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the Ontario Human Rights Code, such questions may be raised at an interview. For example, if an employer has an anti-nepotism policy, the employer may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no

relevance to employment within a law firm, questions about marital status should not be asked.

[*Amended - January 2009*]

[3] An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex or of a particular creed, ethnic origin, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches rule 6.3.1-3 unless changing or eliminating the rule would cause undue hardship.

[4] If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the Ontario Human Rights Code, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

[5] 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 6.3.1-3.

[6] 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. However, the following principles are well established.

[7] If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 6.3.1-1, the rule, requirement or expectation must be examined to determine whether it is "reasonable and bona fide". The following must be taken into account:

(a) if the rule, requirement or expectation is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement, or expectation with the operation of the business; and

(b) if the rule, requirement, or expectation is imposed in good faith and is strongly logically connected to a business necessity, then the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.

[8] The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered to the point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is "undue," that accommodation need not be made.

[9] Lawyers who employ one or more workers or who contract for the services of one or more worker are also required to comply with workplace violence and harassment provisions in the *Occupational Health and Safety Act ("OHSA")*. Under that Act, employers must prepare workplace violence and workplace harassment policies and must review those policies as often as necessary, but at least annually. Lawyers who employ 6 or more workers must have written policies that are posted at a conspicuous place in the workplace.

[10] The *OHSA* requires that employers assess the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work, and then develop and maintain a program to implement their workplace violence policy. That program must set out how the employer will investigate and deal with incidents or complaints of workplace violence, and must include measures and procedures to control any risks identified in the assessment, for summoning immediate assistance when workplace violence occurs or is likely to occur, and for workers to report incidents of workplace violence to the employer or supervisor.

[11] Employers must also develop a program to implement the workplace harassment policy, which must include measures and procedures for workers to report incidents of workplace harassment to the employer or their supervisor, or to another person if the employer or supervisor is the alleged harasser. The program must also set out:

(a) how incidents or complaints of workplace harassment will be investigated and dealt with;

(b) how information obtained about an incident or complaint, including identifying information about any individuals involved, will not be disclosed unless necessary for the investigation or for taking corrective action with respect to the incident or complaint, or is otherwise required by law; and

(c) how a worker who has allegedly experienced workplace harassment and the alleged harasser will be informed of the results of the investigation or the results of the investigation and of any corrective action taken as a result of the investigation.

[12] The *OHSA* also provides that an inspector may order, at the employer's expense, a third party investigation into allegations of workplace harassment.

Onglet 4.2.2

ARTICLE 6.3 LE HARCÈLEMENT SEXUEL

Définition

6.3-0 Dans les règles 6.3-1 et 6.3-3, le harcèlement sexuel s'entend d'un incident ou d'une série d'incidents comportant des avances sexuelles importunes, des demandes de faveurs sexuelles ou d'autres gestes ou remarques de nature sexuelle, dans l'une ou l'autre des situations suivantes :

a) on peut raisonnablement s'attendre que ces gestes ou remarques causeront de l'insécurité, de la gêne, de l'humiliation ou des vexations à une autre personne ou à un groupe;

b) la soumission à ces gestes ou remarques est implicitement ou explicitement présentée comme une condition à la prestation de services professionnels;

c) la soumission à ces gestes ou remarques est implicitement ou explicitement présentée comme une condition d'emploi ;

d) L'acceptation ou le rejet de ces gestes ou remarques sert à fonder une décision reliée à l'emploi (notamment en matière de promotion, d'augmentation de salaire, de sécurité d'emploi ou d'avantages touchant l'employé) ;

e) ces gestes ou remarques ont pour but ou pour effet de nuire au rendement d'une personne ou de créer un cadre de travail intimidant, hostile ou offensant.

Commentaire

[1] Les types de comportements qui constituent du harcèlement sexuel comprennent notamment,

a) les plaisanteries sexistes embarrassantes ou blessantes ou manifestement de nature embarrassante ou blessante ;

[*Modifié – janvier 2009*]

b) les regards concupiscents ;

c) l'affichage de matériel érotique choquant ;

d) la description d'une personne en termes dégradants à caractère sexuel ;

e) les remarques désobligeantes ou avilissantes adressées aux personnes d'un sexe donné ou d'une orientation sexuelle donnée ;

f) les gestes ou propos obscènes ou suggestifs ;

g) les questions ou commentaires importuns sur la sexualité d'une personne ;

h) les flirts offensants et les avances et propositions sexuelles ;

i) les attentions et contacts persistants et non désirés après la fin d'une relation amoureuse ;

j) les demandes de faveurs sexuelles ;

k) les attouchements importuns ;

l) les menaces ou insultes verbales ;

m) les agressions sexuelles.

~~[2] Le harcèlement sexuel peut être le fait de l'homme ou de la femme, envers des personnes du sexe opposé ou du même sexe.~~

6.3-1 à **6.3-2** [FOPJC – Règles non utilisées]

Interdiction du harcèlement sexuel

6.3-3 L'avocat ne doit pas faire subir de harcèlement sexuel à un collègue, à un membre de son personnel, à un client ni à qui que ce soit.

6.3-4 et **6.3-5** [FOPJC – Règles non utilisées]

ARTICLE 6.3.1 LA DISCRIMINATION

Responsabilité particulière de l'avocat

6.3.1-1 L'avocat a une responsabilité particulière quant au respect des lois portant sur les droits de la personne en vigueur en Ontario et, plus précisément, quant au devoir d'éviter la discrimination fondée sur la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, le sexe, l'orientation sexuelle, l'identité sexuelle, l'expression de l'identité sexuelle, l'âge, l'existence d'un casier judiciaire (au sens du *Code des droits de la personne de l'Ontario*), l'état matrimonial, l'état familial ou un handicap, dans le contexte de l'emploi d'avocats, de stagiaires ou de toute autre personne et dans ses relations professionnelles avec d'autres titulaires de permis ou toute autre personne.

[*Modifié – juin 2007, janvier 2014*]

Commentaire

[1] Le Barreau reconnait la diversité de la population ontarienne desservie par les avocats et il s'attend que ces derniers respectent la dignité et la valeur de toutes les personnes et leur assurent un traitement égal, sans discrimination.

[2] La présente règle expose le rôle particulier qui revient à la profession juridique dans la protection de la dignité de la personne et la reconnaissance de la diversité de la population ontarienne.

[3] La règle 6.3.1-1 s'interprète conformément aux dispositions du Code des droits de la personne de l'Ontario (le « Code ») et à la jurisprudence connexe.

[4] Le Code définit un certain nombre de motifs de discrimination énumérés à la règle 6.3.1-1.

[5] « Âge » s'entend de dix-huit ans ou plus.

[Modifié - janvier 2009]

[6] Le terme « handicap », qui reçoit une définition large à l'article 10 du Code, recouvre toute incapacité physique ou mentale.

[Modifié - janvier 2009]

[7] L'état familial est défini comme le fait de se trouver dans une relation parent-enfant.

[8] L'état matrimonial est défini comme le fait d'être marié, célibataire, veuf, divorcé ou séparé. Est également compris le fait de vivre avec une personne dans une union conjugale hors du mariage.

[*Modifié - janvier 2009*]

[9] Le terme « casier judiciaire » est défini de sorte qu'un employeur éventuel ne peut faire subir de discrimination en fonction d'une infraction qui a fait l'objet d'un pardon en vertu de la Loi sur le casier judiciaire (Canada) qui n'a pas été révoqué, ou d'infractions à une loi provinciale.

[10] Le droit à un traitement égal sans discrimination fondée sur le sexe inclut le droit à un traitement égal sans discrimination fondée sur le fait qu'une femme est enceinte ou peut le devenir.

[11] Le terme « discrimination » n'est défini dans aucune loi. Toutefois, la jurisprudence de la Cour suprême du Canada assimile la discrimination à ce qui suit :

a) la différenciation pour des motifs illicites qui crée un désavantage ; par exemple, le refus d'embaucher des personnes d'une certaine race, croyance ou orientation sexuelle, ou d'un sexe donné ;

[*Modifié - janvier 2009*]

b) la discrimination indirecte : des actes ou des politiques qui, ne se voulant pas discriminatoires, ont un effet préjudiciable qui l'est. Si l'application d'une règle apparemment « neutre » a un effet préjudiciable sur un groupe visé par la règle 6.3.1-1, il existe une obligation d'accommodement. Par exemple, s'il peut paraitre raisonnable d'exiger le permis de conduire pour que les stagiaires puissent se déplacer pour des raisons professionnelles, cette exigence ne devrait être imposée que si le fait de conduire un véhicule est essentiel au poste. Cette exigence peut avoir pour effet d'exclure ceux et celles qu'un handicap empêche d'obtenir un tel permis.

[*Modifié - janvier 2009*]

[12] En Ontario, la législation sur les droits de la personne assimile à de la discrimination les gestes ou la conduite qui, ne se voulant pas discriminatoires, ont néanmoins un effet préjudiciable sur une personne ou un groupe de personnes pour des motifs illicites. Le Code impose l'obligation d'accommoder les personnes ou les groupes visés à moins qu'il n'en résulte une contrainte excessive.

[13] L'avocat doit prendre des précautions raisonnables pour empêcher un membre de son personnel ou un de ses mandataires qui se trouve sous sa direction ou son contrôle de faire de la discrimination ou pour la faire cesser.

[14] Ne constituent pas de la discrimination au sens des lois ontariennes les programmes destinés à pallier un désavantage subi par des personnes ou des groupes de personnes pour les motifs énoncés dans le Code.

[15] En plus d'interdire la discrimination, la règle 6.3.1-1 interdit le harcèlement fondé sur la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, le sexe, l'orientation sexuelle, l'identité sexuelle, l'expression de l'identité sexuelle, l'âge, l'existence d'un casier judiciaire, l'état matrimonial, l'état familial ou un handicap. Le harcèlement est également interdit, qu'il soit le fait de supérieurs hiérarchiques, d'autres avocats ou de collègues de travail.

[*Modifié - janvier 2009, janvier 2014*]

[16] Le harcèlement s'entend du « fait pour une personne de faire des remarques ou des gestes vexatoires lorsqu'elle sait ou devrait raisonnablement savoir que ces remarques ou ces gestes sont importuns » pour des motifs énumérés à la règle 6.3.1-1. Faire régulièrement des plaisanteries raciales ou religieuses à l'adresse de la même personne constitue, par exemple, du harcèlement.

Services

6.3.1-2 L'avocat veille à ce que personne ne se voit refuser des services ni offrir des services de qualité inférieure pour des motifs visés par la présente règle.

Pratiques en matière d'emploi

6.3.1-3 L'avocat fait en sorte que ses pratiques en matière d'emploi ne contreviennent pas aux règles 6.3.1-1, ~~et~~ 6.3.1-2 et 6.3-3.

Commentaire

[1] La discrimination en matière d'emploi ou de prestation de services enfreint non seulement les normes professionnelles, mais également le Code des droits de la personne de l'Ontario et les lois connexes sur l'équité.

[2] Les annonces d'emploi doivent éviter de décrire les qualités requises à l'aide de motifs illicites de discrimination. Toutefois, lorsqu'une exception prévue par le Code des droits de la personne autorise un motif de discrimination particulier, il est possible de poser à l'entrevue des questions s'y rapportant. Par exemple, si un employeur a pour politique de ne pas embaucher des membres de la famille de ses employés, il peut leur poser des questions sur leurs liens de parenté (conjoint, enfant, etc.) avec le personnel actuel. Par contre, il faut éviter soigneusement toute question sur l'état matrimonial, puisqu'il n'a rien à voir avec le poste proprement dit.

[*Modifié - janvier 2009*]

[3] L'employeur devrait réfléchir aux effets des règles apparemment « neutres ». Certaines règles d'application générale empêchent ou rendent beaucoup plus difficile l'emploi de certaines personnes en raison de leur sexe, croyance, origine ethnique, état matrimonial ou familial ou d'un handicap. Par exemple, le cabinet peut s'être doté d'un code vestimentaire explicite ou implicite qu'il faudra revoir s'il n'admet pas déjà le port d'un couvre-chef pour des motifs religieux. Le maintien d'une règle qui a un effet discriminatoire contrevient à la règle 6.3.1-3 si sa modification ou son abolition n'entraine pas une contrainte excessive.

[4] L'employeur a le devoir de tenir compte des besoins de la candidate ou du candidat qui ne peut, en raison d'une caractéristique personnelle énumérée dans le Code des droits de la personne, remplir l'une des conditions d'emploi essentielles. Il ne peut refuser d'embaucher un candidat que si ce dernier ne peut pas remplir les conditions essentielles de l'emploi malgré l'accommodement raisonnable offert. Il peut envisager un éventail de mesures. L'accommodement est réputé raisonnable tant qu'il n'entraine pas de contrainte excessive.

[5] La Cour suprême du Canada a confirmé que le critère est l'égalité des résultats et non seulement l'égalité de forme. Si la différence de traitement peut être source d'inégalité, il en est de même de l'application de la même règle à tous et toutes, sans tenir compte de leurs caractéristiques et situations personnelles. L'égalité des résultats nécessite l'adaptation aux différences qui découlent des caractéristiques personnelles énumérées à la règle 6.3.1-1.

[6] La nature de l'obligation d'accommodement de même que son champ d'application dans un cas donné sont des domaines en expansion en matière de droits de la personne. Toutefois, les principes suivants sont bien établis.

[7] Si une règle, une exigence ou une attente crée des difficultés à une personne en raison de facteurs liés à des caractéristiques personnelles visées à la règle 6.3.1-1., il faut examiner la règle, l'exigence ou l'attente pour déterminer si elle est « raisonnable et fondée ». Il faut tenir compte de ce qui suit :

a) Si elle n'est pas imposée de bonne foi et qu'elle n'est pas étroitement et logiquement reliée aux besoins du cabinet, elle doit être supprimée. Il doit exister des preuves objectivement vérifiables qui établissent un lien entre la règle, l'exigence ou l'attente et le fonctionnement de l'entreprise.

b) Si la règle, l'exigence ou l'attente est imposée de bonne foi et qu'elle est étroitement et logiquement reliée aux besoins du cabinet, il importe ensuite de se demander si l'on peut prendre des mesures d'adaptation à l'égard de la personne désavantagée.

[8] L'obligation d'accommodement constitue à la fois une obligation positive et une restriction. La promotion de l'égalité peut entrainer une contrainte, mais l'adoption de mesures d'adaptation ne doit pas créer de contrainte excessive. Si la contrainte qui résulte de l'adoption d'une mesure quelconque est « excessive », il n'est pas nécessaire de la prendre.

[9] Les avocats qui emploient un ou plusieurs travailleurs ou louent les services d'un ou de plusieurs travailleurs se conforment également aux dispositions sur la violence et le harcèlement de la *Loi sur la santé et la sécurité au travail (« LSST »)*. En vertu de cette loi, les employeurs doivent formuler des politiques concernant la violence et le harcèlement au travail et doivent examiner ces politiques aussi souvent que nécessaire, mais au moins une fois par année. Les avocats qui emploient au moins six travailleurs doivent formuler ces politiques par écrit et les afficher dans un endroit bien en vue dans le lieu de travail.

[10] La *LSST* prévoit que les employeurs évaluent les risques de violence au travail qui peuvent découler de la nature du lieu de travail, du genre de travail ou des conditions de travail, puis élaborer et maintenir un programme pour mettre en œuvre leur politique sur la violence au travail. Ce programme doit établir comment l'employeur enquêtera sur les incidents ou les plaintes de violence au travail, et doit inclure les mesures à prendre et les méthodes à suivre pour contrôler les risques indiqués dans l'évaluation, pour obtenir une aide immédiate lorsqu'il se produit de la violence au travail ou qu'il est susceptible de s'en produire, et pour que les travailleurs puissent signaler des incidents de violence au travail à l'employeur ou au superviseur.

[11] Les employeurs doivent également élaborer un programme de mise en œuvre de la politique concernant le harcèlement au travail, qui comprend des mesures et des méthodes que les travailleurs doivent suivre pour signaler des incidents de harcèlement au travail à l'employeur ou à leur superviseur, ou à une autre personne si l'employeur ou le superviseur est le prétendu harceleur. Le programme doit aussi énoncer :

a) la manière dont l’enquête sur les incidents ou les plaintes de harcèlement au travail se déroulera et les mesures qui seront prises pour y faire face ;

b) la manière dont les renseignements obtenus au sujet d’un incident ou une plainte de harcèlement au travail, y compris les renseignements identificatoires au sujet des particuliers impliqués, demeureront confidentiels, sauf si leur divulgation est nécessaire pour enquêter ou prendre des mesures correctives à l’égard de l’incident ou de la plainte, ou encore si elle est exigée par la loi ;

c) la manière dont le travailleur qui aurait fait l’objet de harcèlement au travail et le prétendu harceleur seront informés des résultats de l’enquête et des mesures correctives prises à l’issue de l’enquête, le cas échéant.

[12] La *LSST* prévoit également qu’un inspecteur peut ordonner que l’employeur fasse faire, à ses frais, par une tierce partie l’enquête sur les allégations de harcèlement au travail.

TAB 4.2.3

SECTION 6.3 SEXUAL HARASSMENT

Definition

6.3-0 In rules 6.3-1 and 6.3-3, sexual harassment is 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.

Commentary

[1] Types of behaviour that constitute sexual harassment include, but are not limited to,

(a) sexist jokes causing embarrassment or offence, or that are by their nature clearly embarrassing or offensive;

[*Amended - January 2009*]

(b) leering;

(c) the display of sexually offensive material;

(d) sexually degrading words used to describe a person;

(e) derogatory or degrading remarks directed towards members of one sex or one's sexual orientation;

(f) sexually suggestive or obscene comments or gestures;

(g) unwelcome inquiries or comments about a person's sex life;

(h) unwelcome sexual flirtations, advances, or propositions;

(i) persistent unwanted contact or attention after the end of a consensual relationship;

(j) requests for sexual favours;

(k) unwanted touching;

(l) verbal abuse or threats; and

(m) sexual assault.

6.3-1 to **6.3-2** [FLSC - not in use]

Prohibition on Sexual Harassment

6.3-3 A lawyer shall not sexually harass a colleague, a staff member, a client, or any other person.

6.3-4 and **6.3-5** [FLSC - not in use]

SECTION 6.3.1 DISCRIMINATION

Special Responsibility

6.3.1-1 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, gender identity, gender expression, age, record of offences (as defined in the Ontario Human Rights 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 licensees or any other person.

[*Amended - June 2007, January 2014*]

Commentary

[1] The Law Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

[2] This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

[3] Rule 6.3.1-1 will be interpreted according to the provisions of the Human Rights Code (Ontario) and related case law.

[4] The Human Rights Code (Ontario) defines a number of grounds of discrimination listed in rule 6.3.1-1. For example,

[5] Age is defined as an age that is eighteen years or more.

[*Amended - January 2009*]

[6] Disability is broadly defined in s. 10 of the Human Rights Code (Ontario) to include both physical and mental disabilities.

[*Amended - January 2009*]

[7] Family status is defined as the status of being in a parent-and-child relationship.

[8] Marital status is defined as 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.

[*Amended - January 2009*]

[9] Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the Criminal Records Act (Canada) and not revoked) or provincial offences.

[10] The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

[11] There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including

(a) Differentiation on prohibited grounds that creates a disadvantage. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.

[*Amended - January 2009*]

(b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 6.3.1-1, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement should only be imposed if driving a vehicle is an essential requirement for the position. Such a requirement may have the effect of excluding from employment persons with disabilities that prevent them from obtaining a licence.

[*Amended - January 2009*]

[12] Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Human Rights Code (Ontario) requires that the affected

individuals or groups must be accommodated unless to do so would cause undue hardship.

[13] A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

[14] Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the Human Rights Code (Ontario).

[15] In addition to prohibiting discrimination, rule 6.3.1-1 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited.

[*Amended - January 2009, January 2014*]

[16] Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in rule 6.3.1-1. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

Services

6.3.1-2 A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

Employment Practices

6.3.1-3 A lawyer shall ensure that their employment practices do not offend rule 6.3.1-1, ~~and~~ 6.3.1-2, and 6.3-3.

Commentary

[1] Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario Human Rights Code and related equity legislation.

[2] In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the Ontario Human Rights Code, such questions may be raised at an interview. For example, if an employer has an anti-nepotism policy, the employer may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital status should not be asked.

[*Amended - January 2009*]

[3] An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex or of a particular creed, ethnic origin, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches rule 6.3.1-3 unless changing or eliminating the rule would cause undue hardship.

[4] If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the Ontario Human Rights Code, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

[5] 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 6.3.1-3.

[6] 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. However, the following principles are well established.

[7] If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 6.3.1-1, the rule, requirement or expectation must be examined to determine whether it is "reasonable and bona fide". The following must be taken into account:

(a) if the rule, requirement or expectation is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement, or expectation with the operation of the business; and

(b) if the rule, requirement, or expectation is imposed in good faith and is strongly logically connected to a business necessity, then the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.

[8] The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered to the point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is "undue," that accommodation need not be made.

[9] Lawyers who employ one or more workers or who contract for the services of one or more worker are also required to comply with workplace violence and harassment provisions in the *Occupational Health and Safety Act ("OHSA")*. Under that Act, employers must prepare workplace violence and workplace harassment policies and must review those policies as often as necessary, but at least annually. Lawyers who employ 6 or more workers must have written policies that are posted at a conspicuous place in the workplace.

[10] The *OHSA* requires that employers assess the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work, and then develop and maintain a program to implement their workplace violence policy. That program must set out how the employer will investigate and deal with incidents or complaints of workplace violence, and must include measures and procedures to control any risks identified in the assessment, for summoning immediate assistance when workplace violence occurs or is likely to occur, and for workers to report incidents of workplace violence to the employer or supervisor.

[11] Employers must also develop a program to implement the workplace harassment policy, which must include measures and procedures for workers to report incidents of workplace harassment to the employer or their supervisor, or to another person if the employer or supervisor is the alleged harasser. The program must also set out:

(a) how incidents or complaints of workplace harassment will be investigated and dealt with;

(b) how information obtained about an incident or complaint, including identifying information about any individuals involved, will not be disclosed unless necessary for the investigation or for taking corrective action with respect to the incident or complaint, or is otherwise required by law; and

(c) how a worker who has allegedly experienced workplace harassment and the alleged harasser will be informed of the results of the investigation or the results of the investigation and of any corrective action taken as a result of the investigation.

[12] The *OHSA* also provides that an inspector may order, at the employer's expense, a third party investigation into allegations of workplace harassment.

Onglet 4.2.4

ARTICLE 6.3 LE HARCÈLEMENT SEXUEL

Définition

6.3-0 Dans les règles 6.3-1 et 6.3-3, le harcèlement sexuel s'entend d'un incident ou d'une série d'incidents comportant des avances sexuelles importunes, des demandes de faveurs sexuelles ou d'autres gestes ou remarques de nature sexuelle, dans l'une ou l'autre des situations suivantes :

a) on peut raisonnablement s'attendre que ces gestes ou remarques causeront de l'insécurité, de la gêne, de l'humiliation ou des vexations à une autre personne ou à un groupe;

b) la soumission à ces gestes ou remarques est implicitement ou explicitement présentée comme une condition à la prestation de services professionnels;

c) la soumission à ces gestes ou remarques est implicitement ou explicitement présentée comme une condition d'emploi ;

d) L'acceptation ou le rejet de ces gestes ou remarques sert à fonder une décision reliée à l'emploi (notamment en matière de promotion, d'augmentation de salaire, de sécurité d'emploi ou d'avantages touchant l'employé) ;

e) ces gestes ou remarques ont pour but ou pour effet de nuire au rendement d'une personne ou de créer un cadre de travail intimidant, hostile ou offensant.

Commentaire

[1] Les types de comportements qui constituent du harcèlement sexuel comprennent notamment,

a) les plaisanteries sexistes embarrassantes ou blessantes ou manifestement de nature embarrassante ou blessante ;

[*Modifié – janvier 2009*]

b) les regards concupiscents ;

c) l'affichage de matériel érotique choquant ;

d) la description d'une personne en termes dégradants à caractère sexuel ;

e) les remarques désobligeantes ou avilissantes adressées aux personnes d'un sexe donné ou d'une orientation sexuelle donnée ;

f) les gestes ou propos obscènes ou suggestifs ;

g) les questions ou commentaires importuns sur la sexualité d'une personne ;

h) les flirts offensants et les avances et propositions sexuelles ;

i) les attentions et contacts persistants et non désirés après la fin d'une relation amoureuse ;

j) les demandes de faveurs sexuelles ;

k) les attouchements importuns ;

l) les menaces ou insultes verbales ;

m) les agressions sexuelles.

6.3-1 à **6.3-2** [FOPJC – Règles non utilisées]

Interdiction du harcèlement sexuel

6.3-3 L'avocat ne doit pas faire subir de harcèlement sexuel à un collègue, à un membre de son personnel, à un client ni à qui que ce soit.

6.3-4 et **6.3-5** [FOPJC – Règles non utilisées]

ARTICLE 6.3.1 LA DISCRIMINATION

Responsabilité particulière de l'avocat

6.3.1-1 L'avocat a une responsabilité particulière quant au respect des lois portant sur les droits de la personne en vigueur en Ontario et, plus précisément, quant au devoir d'éviter la discrimination fondée sur la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, le sexe, l'orientation sexuelle, l'identité sexuelle, l'expression de l'identité sexuelle, l'âge, l'existence d'un casier judiciaire (au sens du *Code des droits de la personne de l'Ontario*), l'état matrimonial, l'état familial ou un handicap, dans le contexte de l'emploi d'avocats, de stagiaires ou de toute autre personne et dans ses relations professionnelles avec d'autres titulaires de permis ou toute autre personne.

[*Modifié – juin 2007, janvier 2014*]

Commentaire

[1] Le Barreau reconnait la diversité de la population ontarienne desservie par les avocats et il s'attend que ces derniers respectent la dignité et la valeur de toutes les personnes et leur assurent un traitement égal, sans discrimination.

[2] La présente règle expose le rôle particulier qui revient à la profession juridique dans la protection de la dignité de la personne et la reconnaissance de la diversité de la population ontarienne.

[3] La règle 6.3.1-1 s'interprète conformément aux dispositions du Code des droits de la personne de l'Ontario (le « Code ») et à la jurisprudence connexe.

[4] Le Code définit un certain nombre de motifs de discrimination énumérés à la règle 6.3.1-1.

[5] « Âge » s'entend de dix-huit ans ou plus.

[Modifié - janvier 2009]

[6] Le terme « handicap », qui reçoit une définition large à l'article 10 du Code, recouvre toute incapacité physique ou mentale.

[Modifié - janvier 2009]

[7] L'état familial est défini comme le fait de se trouver dans une relation parent-enfant.

[8] L'état matrimonial est défini comme le fait d'être marié, célibataire, veuf, divorcé ou séparé. Est également compris le fait de vivre avec une personne dans une union conjugale hors du mariage.

[*Modifié - janvier 2009*]

[9] Le terme « casier judiciaire » est défini de sorte qu'un employeur éventuel ne peut faire subir de discrimination en fonction d'une infraction qui a fait l'objet d'un pardon en vertu de la Loi sur le casier judiciaire (Canada) qui n'a pas été révoqué, ou d'infractions à une loi provinciale.

[10] Le droit à un traitement égal sans discrimination fondée sur le sexe inclut le droit à un traitement égal sans discrimination fondée sur le fait qu'une femme est enceinte ou peut le devenir.

[11] Le terme « discrimination » n'est défini dans aucune loi. Toutefois, la jurisprudence de la Cour suprême du Canada assimile la discrimination à ce qui suit :

a) la différenciation pour des motifs illicites qui crée un désavantage ; par exemple, le refus d'embaucher des personnes d'une certaine race, croyance ou orientation sexuelle, ou d'un sexe donné ;

[*Modifié - janvier 2009*]

b) la discrimination indirecte : des actes ou des politiques qui, ne se voulant pas discriminatoires, ont un effet préjudiciable qui l'est. Si l'application d'une règle apparemment « neutre » a un effet préjudiciable sur un groupe visé par la règle 6.3.1-1, il existe une obligation d'accommodement. Par exemple, s'il peut paraitre raisonnable d'exiger le permis de conduire pour que les stagiaires puissent se déplacer pour des raisons professionnelles, cette exigence ne devrait être imposée que si le fait de conduire un véhicule est essentiel au poste. Cette exigence peut avoir pour effet d'exclure ceux et celles qu'un handicap empêche d'obtenir un tel permis.

[*Modifié - janvier 2009*]

[12] En Ontario, la législation sur les droits de la personne assimile à de la discrimination les gestes ou la conduite qui, ne se voulant pas discriminatoires, ont néanmoins un effet préjudiciable sur une personne ou un groupe de personnes pour des motifs illicites. Le Code impose l'obligation d'accommoder les personnes ou les groupes visés à moins qu'il n'en résulte une contrainte excessive.

[13] L'avocat doit prendre des précautions raisonnables pour empêcher un membre de son personnel ou un de ses mandataires qui se trouve sous sa direction ou son contrôle de faire de la discrimination ou pour la faire cesser.

[14] Ne constituent pas de la discrimination au sens des lois ontariennes les programmes destinés à pallier un désavantage subi par des personnes ou des groupes de personnes pour les motifs énoncés dans le Code.

[15] En plus d'interdire la discrimination, la règle 6.3.1-1 interdit le harcèlement fondé sur la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, le sexe, l'orientation sexuelle, l'identité sexuelle, l'expression de l'identité sexuelle, l'âge, l'existence d'un casier judiciaire, l'état matrimonial, l'état familial ou un handicap. Le harcèlement est également interdit, qu'il soit le fait de supérieurs hiérarchiques, d'autres avocats ou de collègues de travail.

[*Modifié - janvier 2009, janvier 2014*]

[16] Le harcèlement s'entend du « fait pour une personne de faire des remarques ou des gestes vexatoires lorsqu'elle sait ou devrait raisonnablement savoir que ces remarques ou ces gestes sont importuns » pour des motifs énumérés à la règle 6.3.1-1. Faire régulièrement des plaisanteries raciales ou religieuses à l'adresse de la même personne constitue, par exemple, du harcèlement.

Services

6.3.1-2 L'avocat veille à ce que personne ne se voit refuser des services ni offrir des services de qualité inférieure pour des motifs visés par la présente règle.

Pratiques en matière d'emploi

6.3.1-3 L'avocat fait en sorte que ses pratiques en matière d'emploi ne contreviennent pas aux règles 6.3.1-1, 6.3.1-2 et 6.3-3.

Commentaire

[1] La discrimination en matière d'emploi ou de prestation de services enfreint non seulement les normes professionnelles, mais également le Code des droits de la personne de l'Ontario et les lois connexes sur l'équité.

[2] Les annonces d'emploi doivent éviter de décrire les qualités requises à l'aide de motifs illicites de discrimination. Toutefois, lorsqu'une exception prévue par le Code des droits de la personne autorise un motif de discrimination particulier, il est possible de poser à l'entrevue des questions s'y rapportant. Par exemple, si un employeur a pour politique de ne pas embaucher des membres de la famille de ses employés, il peut leur poser des questions sur leurs liens de parenté (conjoint, enfant, etc.) avec le personnel actuel. Par contre, il faut éviter soigneusement toute question sur l'état matrimonial, puisqu'il n'a rien à voir avec le poste proprement dit.

[*Modifié - janvier 2009*]

[3] L'employeur devrait réfléchir aux effets des règles apparemment « neutres ». Certaines règles d'application générale empêchent ou rendent beaucoup plus difficile l'emploi de certaines personnes en raison de leur sexe, croyance, origine ethnique, état matrimonial ou familial ou d'un handicap. Par exemple, le cabinet peut s'être doté d'un code vestimentaire explicite ou implicite qu'il faudra revoir s'il n'admet pas déjà le port d'un couvre-chef pour des motifs religieux. Le maintien d'une règle qui a un effet discriminatoire contrevient à la règle 6.3.1-3 si sa modification ou son abolition n'entraine pas une contrainte excessive.

[4] L'employeur a le devoir de tenir compte des besoins de la candidate ou du candidat qui ne peut, en raison d'une caractéristique personnelle énumérée dans le Code des droits de la personne, remplir l'une des conditions d'emploi essentielles. Il ne peut refuser d'embaucher un candidat que si ce dernier ne peut pas remplir les conditions essentielles de l'emploi malgré l'accommodement raisonnable offert. Il peut envisager un éventail de mesures. L'accommodement est réputé raisonnable tant qu'il n'entraine pas de contrainte excessive.

[5] La Cour suprême du Canada a confirmé que le critère est l'égalité des résultats et non seulement l'égalité de forme. Si la différence de traitement peut être source d'inégalité, il en est de même de l'application de la même règle à tous et toutes, sans tenir compte de leurs caractéristiques et situations personnelles. L'égalité des résultats nécessite l'adaptation aux différences qui découlent des caractéristiques personnelles énumérées à la règle 6.3.1-1.

[6] La nature de l'obligation d'accommodement de même que son champ d'application dans un cas donné sont des domaines en expansion en matière de droits de la personne. Toutefois, les principes suivants sont bien établis.

[7] Si une règle, une exigence ou une attente crée des difficultés à une personne en raison de facteurs liés à des caractéristiques personnelles visées à la règle 6.3.1-1., il faut examiner la règle, l'exigence ou l'attente pour déterminer si elle est « raisonnable et fondée ». Il faut tenir compte de ce qui suit :

a) Si elle n'est pas imposée de bonne foi et qu'elle n'est pas étroitement et logiquement reliée aux besoins du cabinet, elle doit être supprimée. Il doit exister des preuves objectivement vérifiables qui établissent un lien entre la règle, l'exigence ou l'attente et le fonctionnement de l'entreprise.

b) Si la règle, l'exigence ou l'attente est imposée de bonne foi et qu'elle est étroitement et logiquement reliée aux besoins du cabinet, il importe ensuite de se demander si l'on peut prendre des mesures d'adaptation à l'égard de la personne désavantagée.

[8] L'obligation d'accommodement constitue à la fois une obligation positive et une restriction. La promotion de l'égalité peut entrainer une contrainte, mais l'adoption de mesures d'adaptation ne doit pas créer de contrainte excessive. Si la contrainte qui résulte de l'adoption d'une mesure quelconque est « excessive », il n'est pas nécessaire de la prendre.

[9] Les avocats qui emploient un ou plusieurs travailleurs ou louent les services d'un ou de plusieurs travailleurs se conforment également aux dispositions sur la violence et le harcèlement de la *Loi sur la santé et la sécurité au travail (« LSST »)*. En vertu de cette loi, les employeurs doivent formuler des politiques concernant la violence et le harcèlement au travail et doivent examiner ces politiques aussi souvent que nécessaire, mais au moins une fois par année. Les avocats qui emploient au moins six travailleurs doivent formuler ces politiques par écrit et les afficher dans un endroit bien en vue dans le lieu de travail.

[10] La *LSST* prévoit que les employeurs évaluent les risques de violence au travail qui peuvent découler de la nature du lieu de travail, du genre de travail ou des conditions de travail, puis élaborer et maintenir un programme pour mettre en œuvre leur politique sur la violence au travail. Ce programme doit établir comment l'employeur enquêtera sur les incidents ou les plaintes de violence au travail, et doit inclure les mesures à prendre et les méthodes à suivre pour contrôler les risques indiqués dans l'évaluation, pour obtenir une aide immédiate lorsqu'il se produit de la violence au travail ou qu'il est susceptible de s'en produire, et pour que les travailleurs puissent signaler des incidents de violence au travail à l'employeur ou au superviseur.

[11] Les employeurs doivent également élaborer un programme de mise en œuvre de la politique concernant le harcèlement au travail, qui comprend des mesures et des méthodes que les travailleurs doivent suivre pour signaler des incidents de harcèlement au travail à l'employeur ou à leur superviseur, ou à une autre personne si l'employeur ou le superviseur est le prétendu harceleur. Le programme doit aussi énoncer :

a) la manière dont l'enquête sur les incidents ou les plaintes de harcèlement au travail se déroulera et les mesures qui seront prises pour y faire face ;

b) la manière dont les renseignements obtenus au sujet d'un incident ou une plainte de harcèlement au travail, y compris les renseignements identificatoires au sujet des particuliers impliqués, demeureront confidentiels, sauf si leur divulgation est nécessaire pour enquêter ou prendre des mesures correctives à l'égard de l'incident ou de la plainte, ou encore si elle est exigée par la loi ;

c) la manière dont le travailleur qui aurait fait l'objet de harcèlement au travail et le prétendu harceleur seront informés des résultats de l'enquête et des mesures correctives prises à l'issue de l'enquête, le cas échéant.

[12] La *LSST* prévoit également qu'un inspecteur peut ordonner que l'employeur fasse faire, à ses frais, par une tierce partie l'enquête sur les allégations de harcèlement au travail.

TAB 4.3

FOR INFORMATION

REPORT OF THE ALTERNATIVE BUSINESS STRUCTURES WORKING GROUP

Introduction

21. The ABS Working Group ("Working Group")[1] reports with:

    a. A status report on the implementation of Convocation's approval, in principle, of a policy to permit lawyers and paralegals to provide legal services through civil society organizations ("CSO") such as charities and not-for-profit organizations;[2]

    b. Its recommendation that the Law Society make no further changes to business structures at this time, following its exploration of non-licensee minority ownership of law firms, changes to multi-discipline partnership ("MDP") structures, law firm franchises with non-licensee minority owners, and the potential use of innovative alternative business structures ("ABS") to address unmet legal needs; and

    c. Its recommendation that the Law Society continue to consider appropriate regulatory approaches to new forms of legal services in the context of globalization, technology and innovation, unmet legal needs and the access to justice crisis.

Background

22. The Working Group was established in 2012 to study business structures and law firm financing given rapid changes in legal regulation, and the emergence of ABS in other jurisdictions, most notably England and Wales. Its mandate included:

    - monitoring and assessing changes in business structure regulation;
    - identifying models and regulatory changes which should be considered for potential implementation; and

---

[1] The Working Group is chaired by Malcolm Mercer and Susan McGrath. Current members are Fred Bickford, Marion Boyd, Suzanne Clément, Cathy Corsetti, Janis P. Criger, Carol Hartman, Brian Lawrie, Jeffrey Lem, and Anne Vespry.

[2] September 2017 ABS Working Group Report, Professional Regulation Committee Report to Convocation at Tab 5.3 ["September 2017 Report"].

- reporting to Convocation as appropriate.[3]

23. In September 2014, the Working Group released a discussion paper with illustrative models to seek input regarding the potential benefits and risks of different types of ABS structures.

24. In September 2015, the Working Group reported that it would not continue to consider majority non-licensee ownership of traditional law firms in Ontario.[4] Considering the feedback it received in response to its discussion paper, and the evolution of ABS developments in other jurisdictions, the Working Group continued to explore and assess the following "more targeted"[5] potential ABS options:

- Delivery of legal services through CSO;
- Non-licensee minority ownership of law firms;
- Changes to existing MDP structures;
- New franchise models for the delivery of legal services; and
- Means to harness innovative alternative legal service providers to deliver services where there are unmet legal needs.

Delivery of legal services through CSO

25. Based on discussions with civil society organizations, Legal Aid Ontario, legal clinics and the legal professions, the Working Group recommended, and in September 2017, Convocation approved in principle, a policy to permit lawyers and paralegals to provide legal services through CSO.[6]

26. The Working Group is now overseeing Law Society staff development of a regulatory framework to implement the policy. The Law Society is working with justice sector partners as it develops the framework. Once the framework is developed, the Working Group will invite public comment, likely commencing in fall 2018. The Working Group will refine the framework based on input received. Depending on the feedback received, the earliest the Working Group would return

---

[3] Terms of Reference of the ABS Working Group, September 2015 ABS Working Group Report to Convocation, Professional Regulation Committee Report to Convocation, ["September 2015 Report"] at page 132. See the ABS Working Group webpage at http://www.lso.ca/abs/ for more information on the steps taken by the Working Group to meet its mandate. The webpage includes background materials, further resources, submissions received by the Working Group and the Working Group's reports to Convocation.
[4] September 2015 Report at para. 56.
[5] *Ibid.* "Exploring More Targeted ABS Models" at page 17.
[6] September 2017 Report.

to Convocation would be in the late fall 2018, for Convocation to consider the framework for implementation to commence in 2019.

No further changes to business structures

27. The Working Group recommends no further changes to business structures at this time. This recommendation is based on both the Ontario experiences to date and on the evidence from jurisdictions where ABS are already permitted.

28. In the course of formal consultations and informal discussions, the Working Group determined the following:

    - Many licensees have noted that many of the objectives of ABS, such as attracting expertise, fostering innovation, and adopting multidisciplinary approaches to assisting clients, can and in certain instances are being achieved within currently permitted structures. While currently permitted structures have inherent limitations, it is doubtful that changing ownership or control of existing law firms will significantly advance the objectives of ABS.
    - There are significant concerns about how such structures would operate in practice, and whether they would introduce unacceptably high levels of risk. While the Working Group is of the view that professionalism issues can be appropriately addressed, it also recognizes that such structures, if permitted, would be subject to additional regulatory requirements, which may deter licensees from choosing to practice through ABS even if they were permitted to do so.
    - There appears to be limited interest among licensees in minority non-licensee ownership of law firms, in potential changes to MDP structures, or new franchise models based on non-licensee minority ownership.

29. The Working Group has also continuously monitored and assessed the impacts of ABS in jurisdictions where minority ABS are permitted. Recent research indicates that there has been limited impact of minority non-licensee owned firms, multi-disciplinary structures or franchise structures where such structures are permitted.

30. Considering the feedback it has received to date and the research findings on the impacts of ABS in other jurisdictions, the Working Group concludes that the new business structure models currently under consideration, if adopted in Ontario, would likely be used infrequently, and the benefits of their use would also likely be minimal. As the regulatory inputs would be disproportionate to the expected benefits, the Working Group recommends no further action at this time.

31. The Working Group also considered whether there might be innovative alternative legal service providers or products, such as those which use technology in place of or in addition to licensees to deliver services, which the Law Society should consider permitting in order to facilitate access to justice where there are clear unmet legal needs. The Working Group considered a range of legal innovations (other than CSO) and how they might be applied to provide some assistance where there are current gaps in service delivery. Ultimately, however, the Working Group concludes that these new forms of legal service ought to be considered from a broader perspective.

32. With this report the Working Group has completed its assessment of potential ABS for Ontario.

Recommendation: innovating regulation to meet innovations in legal services

33. The Working Group was established in part to consider rapid changes in the legal services sectors. Although the Working Group has completed its review of ABS, the changing nature of and demand for legal services continues. These changes, accelerated by globalization, technology and innovation, unmet legal needs and the access to justice crisis, have broad regulatory implications and require further exploration. Permitted business structures are only one aspect of all of this. A broader consideration of the changing legal services field is necessary.

34. The Working Group therefore recommends that the Law Society continue to consider these significant shifts and unmet demands and how the Law Society should regulate in the future, recognizing that certain legal services will be provided by lawyers and paralegals, and that certain services may be delivered directly to consumers through technology or other innovative means.

a. Legal services through CSO: Update

Background

35. The policy decision to permit delivery of legal services through CSO is rooted in the Law Society's duty to facilitate access to justice. The model is based on the idea, suggested by certain responses to the Working Group's consultations, that "ABS regulation could be developed in a manner to facilitate access to justice and

those most in need of legal services."[7] One submission described this as an "ABS+" approach.[8]

36. The policy was developed in consultation with Ontario civil society organizations, Legal Aid Ontario, legal clinics, and legal organizations. It was also informed by the emergence of not-for-profit ABS in England and Wales and Australia, and certain existing embedded legal service delivery models already operating in Ontario.

37. Through a series of informal discussions with legal organizations and not-for-profit entities, the Working Group learned that there is interest in permitting delivery of legal services through CSO to those with unmet legal needs. It learned that the potential benefits of delivery of legal services by CSO may include for example:

- Providing an accessible entry point for vulnerable people requiring legal services;
- Identifying legal issues early, before they contribute to a "cascade" of legal and other problems; and
- Being able to address interconnected legal and non-legal problems holistically.[9]

38. The Working Group reported its initial findings and recommendations to Convocation in June 2017. Upon receipt of further stakeholder input, the Working Group further refined the proposal. In September 2017, Convocation approved in principle a policy to permit lawyers and paralegals to provide legal services through CSO, provided that:

- The legal services will be provided at no cost to the client (including by way of fee for service, membership fee or otherwise);
- CSO may not refer clients to licensees in exchange for donations, payments or other consideration; and
- The regulatory framework will expressly exclude Legal Aid Ontario funded organizations and will not affect existing permitted provision of legal services, legal information and support services.[10]

---

[7] September 2015 Report at para. 137.
[8] *Ibid*. See also David Wiseman, December 31, 2014 submission to the ABS Working Group.
[9] June 2017 ABS Working Group Report, Professional Regulation Committee Report to Convocation ["June 2017 Report"] at para. 91.
[10] September 2017 Report, at para. 18.

39. In September 2017, Convocation approved in principle a policy to permit lawyers and paralegals to provide legal services through CSO.[11]

Implementation Update

40. Ongoing discussions with legal organizations and not-for-profit entities has assisted the Working Group in identifying the key pillars for a regulatory framework. The Working Group is now overseeing staff development of the regulatory framework for the delivery of legal services through CSO, which will include the following:

- Guidelines for CSO explaining how to register, and the key elements of licensee professionalism and ethics which must be safeguarded.
- A straight forward CSO registration process and annual filing requirements.
- Insurance requirements.
- Updates to the Lawyer and Paralegal Annual Reports as may be required.
- Rule and By-Law changes.
- Practice supports for licensees working in CSO.

41. The Law Society will be liaising with the Law Foundation of Ontario, Pro Bono Law Ontario, Legal Aid Ontario, legal clinics, legal organizations and other interested groups through 2018 as it develops the proposed regulatory framework. Once staff have developed a regulatory framework, the Working Group will launch a Call for Comment, which the Working Group expects will commence by fall 2018. The framework will be developed with a view to being ready to implement, subject to Convocation approval, in 2019.

b. Review of Other "Targeted" ABS Models

Criteria for Considering ABS Models

42. The Working Group has assessed the "targeted" ABS options against its established criteria ("ABS Criteria"):

a. Access to justice;
b. Responsive to the public's needs for legal services;
c. Professionalism should be safeguarded;
d. Protection of solicitor-client privilege;
e. Promote innovation to better serve the public;

[11] *Ibid*., at para. 19.

f. Orderly transition to new regulatory frameworks;
g. Efficient and proportionate regulation.[12]

(i) Non-Licensee Minority Ownership Models

Background

43. The Working Group reported in September 2015 that it would explore and assess potential non-licensee ownership models in part because:

- Certain stakeholders remained open to "relatively small" non-licensee minority ownership levels;[13]
- Minority ownership might enable law firms to access additional capital and expertise which may enable innovation;[14]
- Minority ownership structures were the most common form of ABS in England and Wales and Australia[15] and are permitted in certain Canadian provinces (as described further below); and
- If introduced, non-licensee minority ownership would represent an "evolutionary" regulatory shift.[16]

44. In deciding to continue to explore this area, the Working Group was mindful of cautions raised by Ontario's legal community, including that:

- There might be certain situations in which an inherent conflict could arise from a non-licensee minority interest in a law firm.[17]
- External investors may not be interested in a minority ownership stake in a law firm.[18]
- There may be other simpler means for law firms to access external capital and expertise without the need for non-licensee ownership.

45. The Working Group ultimately considered ownership models in the 25% to 33% non-licensee ownership range, both with and without voting rights.

---

[12] September 2015 Report at paras. 64-67.
[13] *Ibid.* at para. 14.
[14] *Ibid.* at para. 112.
[15] *Ibid.* at para. 132.
[16] *Ibid.* at para. 112.
[17] One example of an inherent conflict of interest is that of a company funding bail bonds also offering criminal defence: September 2015 Report at para. 126.
[18] February 2014 ABS Working Group Report, Professional Regulation Committee Report to Convocation ["February 2014 Report"], at para. 165.

Jurisdictional Scan

46. The Working Group considered non-licensee ownership approaches in different jurisdictions. This jurisdictional scan assisted the Working Group in determining the potential strengths and risks of minority non-licensee ownership structures.

47. Non-licensee minority ownership is permitted in England and Wales, Australia, Singapore, Quebec and New Brunswick.

48. In England and Wales and Australia, ownership has been fully liberalized. Minority non-licensee ownership structures are permitted, as are majority non-licensee ownership structures.

49. In November 2015 Singapore amended its law firm ownership rules to permit minority external ownership, ranging from 25% to 35% external ownership levels.[19] A few Singapore law practices have external ownership.

50. In Québec, minority ownership is permitted so long as the majority of the voting rights are held by lawyers and other regulated professionals and the majority of the board of directors, or of the internal management board, are lawyers and other regulated professionals.[20]

51. In New Brunswick, minority ownership of professional corporations is permitted so long as the majority of the issued voting shares are legally and beneficially owned by lawyers, all of the directors of the corporation are licensed lawyers and the corporation's practice of law is managed only by directors who are practicing licensed lawyers in good standing.[21]

52. While the potential benefits of non-licensee minority ownership include raising capital to invest in people, processes and technology and accessing non-legal

---

[19] *Legal Profession (Law Practice Entities) Rules 2015,* Rule 3 "Threshold requirements for Singapore law practice", Singapore Statues Online. Where a Singapore law practice has both foreign lawyers and non-lawyers altogether they can own up to 35% of the practice: Rule 3(f). Where there are no foreign lawyers, non-lawyers can own up to 25% of a Singapore law practice: Rule 3(e).
[20] Règlement sur l'exercice de la profession d'avocat en société et en multidisciplinarité, Loi sur le Barreau (chapitre B-1, a. 4).
[21] *Law Society Act*, 1996 (NB) as amended, s. 37(4).

expertise by allowing equity participation, significantly, there has been little take-up of this structure in jurisdictions where it is permitted.[22]

53. In Quebec and New Brunswick, where minority non-lawyer ownership structures have been in place for some time, these structures are rarely used.

54. In England and Wales, although the number of ABS has increased over time, as of the end of March 2017, there were only 892 active ABS licenses[23] from over 10,000 regulated entities.[24] One "half of ABSs have less than 50% non-lawyer ownership".[25] Few of these minority-ownership ABSs have raised capital through newly permitted funding sources.[26] In short, although there has been significant regulatory investment in England and Wales to introduce ABS, there are few ABS with non-lawyer minority ownership relative to the legal services market generally or the number of regulated entities and these few ABSs continue to rely on traditional sources of funding for their investments.

Analysis: Applying the ABS Criteria

55. The Working Group applied the ABS Criteria to test potential non-licensee minority ownership models with and without voting rights in the 25% to 33% non-licensee ownership range. Based on this analysis, the Working Group concludes that the expected benefits from minority non-licensee ownership in Ontario would likely be small, but would require significant regulatory resources to achieve.

---

[22] The exception is that there have been shifts in England and Wales and Australia to make a non-licensee family member an owner for the purpose of receiving more favourable tax treatment. The Working Group has already rejected amending rules solely for this purpose, stating that "any amendment to permit ownership by family members is too limited in scope to be of any significant benefit in the public interest" (February 2014 Report at para. 149). In any event, the federal government is currently working to remove "income sprinkling", and this potential benefit to licensees is likely to be unavailable or more restricted shortly.
[23] Legal Services Board, Evaluation: ABS and investment in legal services 2011/12-2016/17 – Main Report, June 2017 at para. 3.10 ["LSB 2017 ABS Report"].
[24] *Ibid.* at para. 3.12. In England and Wales, four Licensing Authorities ("LAs"), the Solicitors Regulation Authority ("SRA"), Council for Licensed Conveyancers, Institute of Chartered Accountants of England and Wales and Intellectual Property Regulation Board may grant ABS and related Licensed Bodies. The SRA is the only LA with the authority to issue a license permitting an ABS to provide services in all areas of law: *Ibid.* at page 11. The SRA regulates over 10,000 firms: SRA, "Regulated population statistics".
[25] *Ibid.* at para. 3.19.
[26] *Ibid.* at para. 3.43, 3.46 and 3.47.

Access to Justice

56. The access to justice benefits appear to be minimal at this time in jurisdictions where minority non-licensee ownership is permitted.

57. In 2015 the Working Group determined that, while ABS was "still unfolding", ABS "has not served as a major catalyst to spark transformative access to justice innovations by regulated entities."[27] As described further below, the theory that ABS would innovate in a manner that would facilitate access to justice has not been borne out by the evidence. While there have been some innovative ABS focused on enhancing access to justice, they appear to be the rare exception with ABSs generally focusing on the more lucrative markets.

58. The experience in Australia, Quebec and New Brunswick confirms the experience to date in England and Wales. In Australia, the most significant impact of liberalized ownership has been in the personal injury sector. While there have been significant innovations in Australia, with Salvos Legal being the principal example, there is little evidence of any material access to justice impact from permitting minority non-lawyer ownership. The same is true in respect of Quebec and New Brunswick. The Working Group therefore concludes that generally permitting minority non-licensee ownership structures is unlikely to bring about significant access to justice benefits.

Innovation

59. One of the stated rationales for permitting new business structures is to promote innovation which would lead to enhanced delivery of legal services. The theory is that new access to capital and new non-licensee owners and investors would facilitate innovation, which could improve access to legal services.[28]

60. However, according to the LSB 2017 Report:

> Our research also shows ABS firms accessing a wide range of sources of finance, and only a small proportion indicating difficulties in accessing finance. However, only 12% of ABS we surveyed had used any form of external finance. Instead, the most frequent source of funding for investments was business

[27] September 2015 Report at paras. 93 and 91.
[28] See, for example, LSB 2017 ABS Report at paras. 3.3 and 3.4 [footnotes omitted].

profits or cash reserves, followed by bank loans and overdraft facilities.[29]

61. Although access to non-lawyer equity capital was expected to be a key to innovation, the take-up of non-traditional financing has not been significant generally and presumably even less so for minority-owned ABSs.

62. The research in England and Wales suggests that ABS have had marginal impacts on legal services innovation to date. Although the Legal Service Board found in 2015 that "ABS are more likely to have higher levels of innovative activity of all types than other solicitors, including higher levels of investment, staff engagement and external involvement in innovation"[30] it ultimately reports that "levels of innovation are not increasing" through ABS entities.[31]

63. The experience in Australia is also instructive. While a substantial number of traditional firms have taken on Incorporated Legal Practice status (which permits non-lawyer ownership), it does not appear that access to capital and innovation has been a significant motivation for Australian firms. Similarly, there is little if any evidence that permitting non-lawyer ownership in Quebec and New Brunswick has resulted in any significant accessing of new capital or delivery innovation[32]

64. Given these findings, the Working Group does not expect that generally permitting minority external ownership in Ontario law firms would bring about significant innovation, or that any new innovations would likely focus on serving unmet legal needs. In short, the expected innovation gains through such structures would likely be quite limited.

---

[29] *Ibid.* at para. 6.2. It is very likely that minority-owned ABS access less non-lawyer equity capital given their limited non-lawyer ownership and the reasons given by them for taking on ABS status.
[30] *Ibid.* at para. 3.6.
[31] *Ibid.* "Overall conclusions" page 6.
[32] After nearly a decade of liberalization, the then Legal Services Commissioner of New South Wales observed that "There are a number of reasons as to why incorporation has become so popular. Firstly, ILPs offer limited liability for their partners, as those partners become shareholders, whose liability is limited to that of their investment in the practice. Secondly, there are a number of financial benefits in a corporate structure including tax advantages. And favourable superannuation and redundancy arrangements. Thirdly, the ILP structure provides better management options for firms.": '*Before and after*' Law Management Magazine, The Law Society of England and Wales, Issue 50, November 2010 at p. 30-31

Responsive to the public

65. The Working Group recognizes that such structures could be responsive to public needs for legal services, but given the findings on innovation and access to justice, such benefits would likely be relatively minor.

Professionalism and Protection of Solicitor-Client Privilege

66. The Working Group reaffirms its view that professionalism and solicitor-client privilege could be protected were such structures permitted. However, further consideration would need to be given to whether certain ownership relationships might raise inherent conflicts of interest and be prohibited.

Orderly transition

67. Shifting to a minority non-licensee model would be an evolutionary, rather than disruptive regulatory shift. While this factor does not raise any barriers, it does not in itself necessarily support change. The Working Group considers this factor as neutral.

Efficient and Proportionate Regulation

68. At the heart of its analysis, the Working Group seeks to weigh the expected benefits of generally allowing minority non-licensee ownership against the resource requirements to implement any change.

69. As the above analysis indicates, the Working Group expects that the potential access to justice, innovation and public benefits from generally allowing minority non-licensee ownership in law firms would be relatively minimal.

70. In addition, the Working Group has learned through its discussions with the professions since 2015 that interest in minority non-licensee ownership appears to have diminished.

71. The Working Group has heard continued concerns that ABS risk adding complexity to the licensee's duties to maintain independence, protect solicitor-client privilege and confidentiality, and otherwise maintain professional standards. When licensees weigh the potential additional risks and regulatory burden against potential benefits of non-licensee minority ownership, most appear uninterested in any such model. The Working Group therefore concludes that were minority non-licensee ownership to be permitted in Ontario, the take-up would likely be minimal.

72. However, the development of a regulatory framework for minority non-licensee ownership would require significant Law Society resources. For example, new registration requirements would need to be developed. Potential inherent ownership conflicts would need to be fully addressed.

73. The Law Society would need to dedicate significant resources to implement minority non-licensee ownership, but it expects that few would use such a structure. In short, permitting this shift would not be expected to generate significant benefits in the public interest.

74. Considering all the criteria, the Working Group concludes that the expected benefits from minority non-licensee ownership structures are insufficient to warrant dedicating regulatory resources to them.

(ii) MDPs

Background

75. The Working Group heard from certain stakeholders responding to its September 2014 Discussion Paper that the MDP model would need to be expanded for the full benefits of multidisciplinary practice approaches to be realized, and that ownership restrictions have limited the use of MDPs in Ontario.[33] Some suggested that MDP models "could lead to more tailored, appropriate and affordable professional services, including legal services in family law."[34] The Working Group explored and assessed potential expansions to the MDP model on this basis.[35]

The Current MDP Regime

76. Although MDPs were intended to be used by licensees to provide a "one stop shop" experience, MDPs are rarely used in practice. There are currently only 14 MDPs currently operating in Ontario.

77. Under the current MDP requirements, a licensee or licensee firm is only permitted to enter into an MDP with an individual professional or a professional corporation established under an Act of the Legislature of Ontario, where the non-licensee professional provides services that "support or supplement" the licensed activity.[36]

---

[33] February 2015 Report at paras. 18 and 22.
[34] *Ibid.* at para. 22.
[35] September 2015 Report at para. 79.
[36] Law Society of Ontario, By Law 7, Part III, s.17.

The relationship is either a partnership or an association, and the MDP requires Law Society approval.

78. Under the current MDP structure, the legal services always come first. The non-legal services are to enhance, complete, reinforce or otherwise assist in the provision of legal services. Generally, if one were seeking one of the "supporting services" without legal services, these non-legal services could not be delivered within the MDP. Moreover, under By-Law 7, s.18(2)4 the non-licensee professional must agree that, "outside of his, her or its partnership or association with the licensee, the professional will practice his, her or its profession, trade or occupation independently of the partnership or association and from premises that are not used by the partnership or association for its business purposes."

79. In considering the current MDP structure, it is useful to understand that Affiliation rules provide an alternative structure.[37] Under the Affiliation structure, licensees may on "a regular basis join with an affiliated entity in the delivery or promotion and delivery of the services of the licensee and the services of the affiliated entity". It appears that the Affiliation structure is seen as more advantageous than the current MDP structure.

Potential New MDP Structures

80. The Working Group considered potential new ways of structuring MDPs to make them more efficient vehicles to deliver "one stop" services, including:

- MDP models through which both individuals who provide services to clients could be partners (currently permitted) *and* individuals who provide services to the firm could be partners (currently not permitted).
- MDP models permitting the delivery of non-legal services without requiring the delivery of legal services to the client through the MDP.

Analysis: Applying the ABS Criteria

81. The Working Group considered the ABS Criteria. It remains of the view that the attendant risks of expanding MDPs are manageable. It maintains that issues relating to professionalism, protecting confidentiality and privilege, and risks of inherent conflict of interest could be addressed if the Law Society sought to introduce MDP reforms. As any reforms to MDP would build off of the existing

[37] Law Society of Ontario, By Law 7, Part IV.

MDP framework, reforms could be brought about in an orderly fashion.

82. However, the key issue is whether the benefits of introducing MDP reforms exceed the regulatory costs of doing so. The Working Group is not convinced that the potential benefits of new MDP structures merit the regulatory resources.

83. The Working Group recognizes that MDP structures were intended to enhance client service and facilitate access to justice. But in reality, MDPs are rarely used, and rarely to facilitate access to justice.

84. In its outreach to date with the professions, there was little interest in reforming for-profit MDP structures in order to facilitate access to justice. Certain family law practitioners have suggested that multi-disciplinary approaches in family law would assist clients, and that ABS could represent one means of facilitating such an approach. But aside from this area, there appears to be little appetite to consider new MDP structures at this time. Indeed, while MDP structures make intuitive sense in the family law context, there does not appear to be evidence from other jurisdictions that MDPs in more liberal jurisdictions have had any material impact on access to justice.

85. The Working Group also notes, as was pointed out by several stakeholders, that many of the intended benefits from MDPs can be achieved through other means. Licensees can engage in affiliations with other professionals. A licensee, for example, can share space with another professional in order to provide “one stop” shopping, or can refer clients requiring other professional services to others.

86. Given the limited use of permitted MDP structures, the limited interest in expanded MDP models, the experience in other jurisdictions and that there are ways under the current regulations to provide clients with forms of multidisciplinary service, the Working Group concludes that the expected benefits from new MDP structures would likely be marginal.

87. The access to justice and innovation criteria support targeted reforms to address particular areas where there are unmet legal needs, and where new multi-disciplinary approaches may bring new benefits. However, given the above, the Working Group concludes that the regulatory resources required to develop new for-profit MDPs are disproportionate to the expected limited benefits to the public.

(iii) Franchise Models

Background

88. When the Working Group first started exploring ABS, certain sole and small practitioners expressed interest in franchise models.[38] The Working Group decided to explore potential franchise models further on the basis that "a franchise model may offer opportunities to traditional practices to innovate, enhance competency, enable a more dedicated focus on the practice of law rather than the business of law and encourage licensees to develop new legal services."[39]

89. As discussed further below, licensee-owned and operated law firm franchises are permitted and already exist in Ontario. The Working Group therefore explored and assessed franchise models with non-licensee ownership.

Jurisdictional Scan

90. Ontario permits franchises where the franchisor and franchisee are licensees. There are already a few law firms operating as franchises in Ontario. However, the Law Society does not permit non-licensee owned or operated law firm franchise systems.

91. Despite the theoretical attractiveness of the franchise model for the delivery of legal services,[40] non-licensee owned law firm franchises have not emerged as a business structure in other jurisdictions where they are permitted.

Analysis: Applying the ABS Criteria

92. Recognizing that law firm franchises already exist in Ontario where both the franchisor and franchisee are licensees, the Working Group considered whether there may be merit in permitting non-licensee ownership in law firm franchise systems. As the Working Group has already ruled out majority non-licensee ownership structures in Ontario, it only considered whether to recommend minority non-licensee ownership of law firm franchisors and franchisees.

---

[38] February 2014 Report at para. 124.
[39] September 2015 Report at para. 134.
[40] See the February 2014 Report at page 23, and September 2015 Report at para. 73 regarding the potential benefits of franchise models.

93. Once again the Working Group considered its ABS Criteria, and distilled the issue as balancing potential benefits with efficient and proportionate regulation.

94. The Working Group recognizes that developing non-licensee ownership requirements for non-licensee minority owners at the franchisor and/or franchisee level would require significant regulatory resources.

95. However, it is doubtful to the Working Group that there would be any interest in a restricted non-licensee franchise model in Ontario. The Working Group did not hear any demand for this particular franchise model from licensees or legal stakeholders. Moreover, in jurisdictions where this type of franchise structure is permitted, it has not emerged. The Working Group concludes that any potential benefits (such as access to justice / innovation / responsive to the public benefits) would likely be marginal at best.

96. As with the other "more targeted" areas it considered, the Working Group concludes that the remaining criteria are neutral factors, at best. The Working Group maintains that issues related to professionalism could be addressed if necessary. Permitting non-licensee ownership in a law firm franchise would represent an incremental step, given the presence of franchise systems. However, minority ownership in franchise systems would add a further layer of regulatory complexity and would require the Law Society to develop new infrastructure to manage risk. Ultimately such efforts are not recommended given the low likelihood of take-up of a minority non-licensee owned franchise system.

(iv) ABS+ : Innovative ABS to address unmet legal needs

Background

97. In September 2015, the Working Group indicated that it would continue to consider the opportunities and risks associated with permitting ABS to provide legal services through technologically innovative means to serve areas of unmet legal needs. The Working Group was motivated by several factors, including that:

- There are significant unmet legal needs in Ontario;
- Innovative new ways of providing services are emerging, both in Ontario and in other jurisdictions;
- These and new innovative providers might be able to help meet existing unmet legal needs;

- Some of these services are "operating outside or on the margins of the regulated sphere";[41] and
- It might serve the public interest to permit such new providers to provide services under Law Society regulation, in a manner that balances access to justice goals with the need for public protection.[42]

98. However, the Working Group also recognized in the early stages of its mandate that broad policy questions about how to engage with providers of services who currently operate outside of the Law Society's regulatory ambit are matters which should also be considered separately from ABS.[43]

99. The Working Group raised these issues again in September 2015. It reaffirmed its view that these broad issues should be considered separately from ABS. However, in order to fulfil its mandate, and given ongoing unmet legal needs, the Working Group determined that it would also continue to consider whether permitting ABS in unserved and underserved areas might be a viable access to justice option at this time.[44]

Analysis

100. The Working Group considered various types of innovations which might be used to address particular unmet legal needs, including, for example:

- Legal research tools using machine learning algorithms to refine results;
- Websites and online apps which provide new pathways for individuals to receive legal information, and, in some cases, legal advice;
- Predictive tools which use inputs to provide a range of likely outcomes to legal disputes;
- Smart forms that take user inputs to create legal documents;
- Models combining do-it-yourself approaches with the support of a legal professional (such as models where the client completes a document with lawyer support available at key points or at the end of completing the document); and
- Online dispute resolution mechanisms.

---

[41] September 2015 Report at para. 145.
[42] See generally, September 2015 report at paras. 145 and 151.
[43] See generally February 2014 Report at paras. 101 and 105.
[44] September 2015 Report at para.151.

101. The Working Group considered whether there might be particular areas where the regulator could consider permitting the deployment of certain ABS to address particular unmet legal needs.

102. Ultimately the Working Group concludes that new services being provided using new technologies taking place outside of or on the margins of the regulatory sphere raise significant regulatory questions that should not be addressed principally from a business structures perspective. How the Law Society should regulate in the face of new providers and new means of delivering legal services, particularly given significant unmet legal needs, is a fundamental issue that goes beyond the Working Group's more limited mandate.

103. The Working Group therefore does not propose further changes in this area at this time. However, the Working Group recommends that the Law Society seek out future opportunities to develop focused pilot projects or other initiatives to test innovative means of delivering legal services where there are unmet legal needs.

104. The Law Society must fulfil its duty to act so as to facilitate access to justice for the people of Ontario and its obligation to have regard to the principle that restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.[45] In our view, access to justice is the perspective through which further regulatory innovation should be examined. Business structures are a means, not an end, and not the only available means. It is important to consider all available tools when addressing access to justice in general and in particular contexts.

c. Recommendation: The Law Society should consider appropriate regulatory approaches to new forms of legal services

105. The Working Group has repeatedly noted the significant shifts occurring in how legal services are being delivered. Globalization, technology and innovation, unmet legal needs and the access to justice crisis are all putting pressure on traditional models for delivering legal services and traditional approaches to legal regulation. They are also creating new opportunities to develop new ways to provide Ontarians with timely, tailored legal information and advice.

---

[45] *Law Society Act*, RSO 1990, c L.8, as amended, at s. 4.2

106. The new forms of service delivery observed by the Working Group raise questions going to the heart of the Law Society's regulatory function. The emergence of new ways of providing legal services requires the Law Society to think about what constitutes the provision of legal services in the 21st Century, and who and how the Law Society should regulate. If the Law Society is ultimately responsible for regulating legal services delivered through technology, systems, or entities applying legal principles and legal judgment, consideration needs to be given to what regulatory tools are necessary to regulate in the public interest.

107. The Working Group recommends that the Law Society engage in a review of these new forms of legal service delivery in the context of globalization, technology and innovation, unmet legal needs and the access to justice crisis.

Next Steps

108. The Working Group will report further on its implementation of the framework for the delivery of services by lawyers and paralegals through CSO as it progresses.