

**HUMAN RIGHTS IN LEGAL
TRAINING, SERVICES & WORKPLACES¹**

**Prepared for University of Ottawa Faculty of Law
Diversity Workshops
January 2010**

**November 2008
[Updated November 2009]**

¹ This document is an abridged, updated and adapted version of Law Society of Upper Canada, “Preventing and Responding to Workplace Harrassment and Discrimination” (March 2002), online: <http://rc.lsuc.on.ca/pdf/equity/modelHarassmentPolicy.pdf>. It also draws heavily from Ontario Human Rights Commission, “Teaching Human Rights in Ontario: An Educational Package for Ontario Schools” (2001), online: <http://www.ohrc.on.ca/en/education/about/thrio-r2001.pdf>

Who to Contact about Accommodation Requests and Discrimination in the Faculty

This section is intended to identify people at the University of Ottawa Faculty of Law to whom student requests for accommodation and reports of harassment and discrimination may be made.

A. Requests for Accommodation

Equity-based requests for accommodations (e.g. individualized arrangements for students with disabilities or chronic health conditions, extensions or deferrals related to child- or elder-care responsibilities, resolving scheduling conflicts related to religious observations, etc.) should be directed to the Manager, Equity and Academic Success (Chef, équité et succès scolaire)(Jessica Simon).

B. Reports of Harassment and Discrimination

If you experience harassment or discrimination while you are a student at the University of Ottawa Faculty of Law, you should always feel free to report your concerns to any member of faculty or staff with whom you feel comfortable discussing the matter. If you would prefer, however, you may also report your concerns to the following people:

- (i) Assistant Dean, Academics and External Relations (Karen Jensen) - complaints of harassment or discrimination by a student or students against another student or students;
- (ii) Vice Dean of your common law programme (Nicole LaViolette for French Common Law and Ellen Zweibel for English Common Law) - complaints of harassment or discrimination by a faculty member against a student or students; and
- (iii) Dean of Common Law (Bruce Feldthusen) - complaints of harassment or discrimination by a Vice Dean against a student or students.

Any concern or complaint specifically relating to sexual harassment may also be directed to the University of Ottawa Harassment and Discrimination Prevention Officer in the Sexual Harassment Office, pursuant to the University of Ottawa Policy 67, Policy on Sexual Harassment (see Appendix “C”). The Officer can be reached at 613.562.5200 and may also be consulted as a resource person relating to harassment and discrimination on other grounds.

I. Introduction

This document is intended to insure that all participants in the January term diversity workshops at the University of Ottawa Faculty of Law are familiar with key concepts relating to human rights in legal training, workplaces and in the provision of legal services. As you embark on the legal training that comprises an essential component in the life of a legal professional, this document and the diversity workshops to which it is a prelude are designed to:

- (i) facilitate awareness of the kinds of discrimination that can arise at law school and in the legal workplace;
- (ii) familiarize you with your rights should you encounter discrimination in law school or in the legal workplace; and
- (iii) familiarize you with your responsibility to create and maintain learning and workplace environments that are free of discrimination and to encourage you to actively engage with that responsibility.

This document and the diversity workshops provide an overview of a number of key human rights concepts related to promoting equality and preventing and responding to discrimination during your legal education, in your future legal workplaces and in your future delivery of legal services to clients. Included among these concepts are equality, discrimination, harassment (which is a species of discrimination), accommodation and the responsibilities of persons in authority. This document and the diversity workshops will explore these concepts as they are defined in the Ontario *Human Rights Code* (the “Code”), the Rules of Professional Conduct of the Law Society of Upper Canada (the “Rules”) and in some of the case law developed in relation to them. These concepts and the expectations of conduct that give practical implementation to them are enumerated in human rights codes and the codes of conduct of various law societies throughout Canada.

The concepts will be brought to life through examples provided throughout this document, as well as in scenarios that you will work through during the diversity workshops themselves in order to familiarize you with your rights and avenues of recourse in the event that you experience discrimination at law school or in a legal workplace.

The examples and scenarios are designed to encourage you to proactively engage with your responsibilities as a law student and future legal professional to create and maintain legal environments free of discrimination. Your classmates and your professors will be your future colleagues in the practice of law. As such, building a reputation in law school as someone engaged with and committed to creating and maintaining equitable environments will be an invaluable professional asset to you and to your future employers and clients. Conducting yourself according to the highest ethical and professional standards in classes and at other events involving your law school colleagues is an important step in developing that asset.

However, working to create and maintain discrimination-free legal environments is not only a matter of professional reputation. It is also a matter of legal obligation. This document and the diversity workshops are designed to make certain that you know not only your legal rights

relating to harassment and discrimination, but also your legal obligations to ensure school and work environments free of harassment and discrimination.

Building your reputation as a legal professional begins in law school. The creation and maintenance of legal environments free of discrimination rests with all legal institutions and their members, and comprises an important component of their individual and collective professional reputations. We hope that this document and the diversity workshops that follow it will encourage you to actively engage in promoting equality, both at law school and in your future legal work, and to recognize commitments to equality and diversity as essential components of legal professionalism.

II. The Legal Framework of Equality

All provinces, territories and the federal sector have enacted human rights legislation that prohibits discrimination in access to and provision of public services such as education and in all workplace-related activities including job advertisement, recruitment, hiring, training, operation, advancement opportunities and norms of interacting with clients, students, support staff and institutional leaders. Provincial codes of professional conduct promulgated by the self-regulating law societies of each province complement human rights legislation and, in some cases, supplement its general provisions. In Ontario, the relevant documents are the *Code* (see select provisions in Appendix A) and the “*Rules*” (see Rules 5.03 and 5.04 in Appendix B). The goal of both the *Code* and the *Rules*, as captured in the Preamble to the *Code* is:

“to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.”

III. The Definition of Equality²

Before delving into the *Code* and the *Rules* designed toward achieving equality, it is necessary to step back and consider the meaning of “equality” itself.

The traditional approach to equality might be described as a “formal” one. The idea is that equality will be achieved if everyone is treated the same, regardless of actual differences in their circumstances. Often treating everyone the same adds to the disadvantages already being experienced by members of particular groups. This is a central shortcoming of “formal” equality. As the Ontario Human Rights Commission (“OHRC”) has noted “by failing to recognize that people have different needs as a result of their physical or mental abilities, race, ethnicity, creed, gender, sexual orientation, etc., it ignores the unequal effects that identical treatment can sometimes produce. Treating all people the same without regard to their histories

² This section draws heavily upon and quotes from the discussion of equality set out in Ontario Human Rights Commission, *supra* note 1 at 61.

of exclusion or restricted access to resources and opportunities perpetuates group-based inequalities and compounds the experience of disadvantage.”

“For example, if a business requires that all its employees be available to work Monday to Saturday, those persons whose faith requires that they do not work on Saturdays may be excluded from employment in that business. A residence or business that can be accessed only by stairs denies entry to those of us who have certain physical disabilities. Similarly, an organization that provides information solely in print form excludes blind persons or those with certain types of learning disabilities from access to that information.”

All of the above examples amount to discrimination because they apply to everyone rules or practices which conform to the needs or traits of dominant groups. Some discriminatory rules exclude by requiring capabilities that tend to be rare among disadvantaged groups. For example, requiring an employee to have a car to be able to perform distant job functions, or to be available to work overtime on short notice tend to exclude low income employees or the primary care givers of small children.

Current Canadian approaches to legal guarantees of equality focus on achieving “substantive” rather than “formal” equality. Substantive equality requires a contextual examination of peoples’ circumstances, including the social, economic, political and legal realities of their existence in light of both historic and contemporary patterns of discrimination against groups of which they are members. This contextual examination will reveal that in some cases, *same treatment* will lead to *unequal results and that differential treatment that is responsive to real differences in situation* will sometimes be required to accomplish an *equality of results*. Achieving a more substantive or meaningful equality of results requires that [differences in experience] be acknowledged, as well as accommodated, in our laws and in the policies and practices of our social and business institutions.”

Attaining substantive equality, or a lived social equality for all members of society will require changing rules and practices that may on their face appear to be neutral. It may also involve creation of special programmes to affirmatively assist historically disadvantaged individuals and groups to overcome discriminatory practices that have become ingrained in our institutions and organizations. All human rights codes in Canada, as well as the Canadian Charter of Rights and Freedoms, provide that affirmative action programmes, including education and employment equity programmes are lawful. Rather than viewing affirmative action as an exception to or departure from anti-discrimination laws, Canadian equality law explicitly recognizes that affirmative action is consistent with and promotes actual equality of groups disadvantaged by past and continuing direct, indirect and systemic discrimination.

IV. Discrimination at Law School and in the Workplace

Section 1 of the *Code* guarantees to all Ontarians the right to equal treatment in access to and use of public services, goods and facilities. This guarantee ensures the right to equality within educational institutions such as law schools and legal aid clinics, and to educational services such as bar admission courses and continuing educational opportunities. Section 5 of the *Code*

prohibits discrimination in all aspects of employment. All legal employment relations are subject to s. 5.

Both s. 1 and s. 5 prohibit discrimination based on one or more prohibited grounds, including race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences³, marital status, family status or disability.

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

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

It is unnecessary to prove discrimination was intentional in order to make out a breach of human rights law or the *Rules*: what counts is the impact that practices, policies and behaviour have on individuals. If the impact is discriminatory on a prohibited ground, a breach has occurred.

For years, courts and tribunals have defined discrimination in terms of “direct”, “adverse effect”⁴ or “systemic”.

Direct discrimination exists where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. Examples would include a rule asking gay or lesbian employees not to bring their same-sex partners to law firm receptions for clients or a rule prohibiting employees from wearing religious clothing.

Adverse effect discrimination (also termed “indirect” or “constructive” discrimination) means that an employer, for genuine business reasons, adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which disproportionately burdens or excludes members of groups identified by one or more prohibited grounds. For example a rule which requires all articling students to work two Saturdays per month would have an adverse effect on religious adherents whose Sabbath falls on Saturdays.

Systemic discrimination⁵ is discrimination that is part of the routine operations of many organizations such as schools, universities, businesses, professional associations, government offices, courts, etc. It usually involves an inter-connected web of rules, policies and practices related to organizational recruitment, public relations, applicant screening and selection, formal and informal training, academic or occupational streaming, client relations, promotional opportunities, wage and benefits scales, social

³ “Record of offences” is defined in the *Code* as a conviction for a criminal offence for which a pardon has been granted or a conviction under any provincial enactment.

⁴ Adverse effect discrimination has also been termed “indirect” or “constructive” discrimination.

⁵ This definition adapts and quotes from the discussion of systemic discrimination set out in Ontario Human Rights Commission, “Teaching Human Rights in Ontario: An Educational Package for Ontario Schools” (2001), p. 75, online: <http://www.ohrc.on.ca/en/education/about/thrio-r2001.pdf>

networks and so on that have the cumulative effect of excluding members of groups historically un- or under-represented throughout the organization. Such under-representation will be increasingly pronounced at the upper end of institutional hierarchies.

Where a web of rules, practices and policies systematically results in the under-representation of historically excluded groups, such exclusion is commonly reinforced and, often, rationalized by the culture of the institution as reflected in its informal interactions, expressed attitudes, and norms of acceptable behavior. The institutional culture will tend to communicate the unwelcomeness of excluded groups or will rationalize under-representation as deserved.

It is the cumulative exclusionary impact of these webs of institutional rules, practices and cultures that leads such discrimination to be described as systemic. Changing a single discriminatory practice will not alter the system of barriers accounting for exclusion or under-representation of particular groups.

“The [*Code*] allows special programs to relieve disadvantage or achieve equal opportunity in order to counter the effects of systemic discrimination. Such programs include measures to remove direct and indirect institutional barriers that impede full inclusions of groups under-represented in proportion to their availability in qualified applicant pools.”

V. Discrimination and the Duty to Accommodate

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

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

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

The *Code* prohibits discrimination and imposes a duty to accommodate. Section 11 enables educational institutions and workplaces to justify rules, policies or practices that have the effect of discriminating against a person or group of persons on a prohibited ground by showing that the rule is a *bona fide* occupational requirement and that the needs of the person or group cannot be accommodated without undue hardship.

When an individual or group complaining of discrimination establishes that a rule, policy or practice (hereafter, the “standard”) has adversely affected the complainant in provision of

services or in the workplace on one or more of the grounds like race, age or disability that are prohibited by the *Code* or the *Rules*, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a *bona fide* institutional or occupational requirement or has a *bona fide* and reasonable justification. In order to establish this justification, the defendant must prove three things.

1. **Rational connection:** First, the defendant must prove that it adopted the standard for a purpose or goal rationally connected to institutional or workplace operation. Suppose the complaint centres on requiring all employees to work for half a day two Saturdays per month. The employer will have to demonstrate the rule's rational connection to its operational needs such as its efficiency or profitability.

2. **Good faith:** Second, the defendant must demonstrate that it adopted the standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal. If the rule were simply a pretext to screen out religious minorities, it would fail here. If there were evidence that the requirement is simply arbitrary and that management does not actually believe it is necessary, it would also fail here.

3. **Reasonably necessary:** Finally, the defendant would have to prove that the Saturday work requirement is, in fact, reasonably necessary to accomplish its efficiency, in the sense that there are no reasonable alternatives to the blanket rule such that religious minorities could be accommodated without imposing undue hardship on the workplace. There might be several possible alternatives to the blanket rule including letting individual employees decide when to work the extra eight hours, allowing fellow workers to substitute and receive overtime, allowing religious minorities to put in the extra hours on Sundays. Some of those alternatives might involve disproportionately high costs, or problems in scheduling supervision, or problems insuring the operations, or problems meeting minimum staffing levels. If such costs are considered "undue" in the sense of unacceptably costly to profits, safety or efficiency, they will not be required as an accommodation option.

VI. Harassment

Harassment is a form of discrimination. As defined in subsection 10(1) of the *Code*, *harassment means* "[...] engaging in a course of vexatious comment or conduct that is known or ought reasonably be known to be unwelcome."

Although the definition implies that harassment will occur only when there is "a course" of vexatious comment or conduct, case law has indicated that even a single comment or act may constitute harassment if it is seriously invasive. Harassment may be expressed orally, in writing, graphically or physically. It may be expressed through "jokes", mockery, disparagement, derogatory stereotypes, intimidation or threatening behaviour. It is not the form, but the discriminatory message, that defines the misconduct.

The Supreme Court of Canada has defined harassment as unwelcome conduct that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is "an abuse of both economic and [personal] power. [It] is a demeaning practice

that constitutes a profound affront to the dignity of the employees forced to endure it ... both as ... employee[s] and as ... human being[s].”⁶

Both s. 5 of the *Code* and Rule 5.04 of the *Rules* prohibit harassment on any of the prohibited grounds enumerated in the *Code*. This includes harassment based on any one or more of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, “age, record of offences, marital status, family status or disability.

Although the *Code* does not expressly protect against harassment on the basis of sexual orientation, the general *Code* prohibitions against sexual orientation discrimination have been interpreted to cover such harassment.

As with other forms of discrimination, harassing communications or conduct do not have to be intentional to be contrary to the *Code* and the *Rules*. Nor does the target of harassment have to object to the behaviour in order for it to be considered harassment. What is relevant is whether the respondent “knew or ought reasonably to have known” that the behaviour was unwelcome. Tribunals have generally adopted the objective standard of the reasonable person: if a reasonable person were to find the behaviour unacceptable, the alleged harasser ought to have known that the behaviour would be unwelcome. However, in the context of sexual harassment, some scholars have criticized the reasonable person standard because it legitimizes the dominant social norm of the workplace, the male standard.⁷ In some sexual harassment cases, tribunals have adopted a standard focused on whether a reasonable person targeted by harassment would find the behaviour unwelcome.⁸ Tribunals have also adopted a contextualized approach in racial harassment cases, by recognizing that social norms in the workplace are often defined by dominant groups and may, in fact, create poisoned work environments for the non-dominant racialized groups.

The unwelcome comment or conduct does not have to be directed at a specific person for harassment to occur. Comments or conduct that tend to ridicule or disparage a group on a prohibited ground and cause humiliation, insult, apprehension or disruption may *poison the work environment*. A *poisoned workplace environment* exists when conduct or comments demeaning to a group covered by a protected ground creates a negative or unpleasant emotional or psychological work environment.

Both the *Code* and the *Rules* contain special provisions prohibiting sexual harassment.

⁶ *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1284.

⁷ See Kathleen Gallivan, “Sexual Harassment After Janzen v. Platy: the Transformative Possibilities” (1991) 49 *University of Toronto Faculty of Law Rev.* 27; Josée Bouchard, “La personne raisonnable en matière de harcèlement sexuel: une appréciation féministe” (1995) 8 *C.J.W.L.* 89; Maurice Drapeau, *Le harcèlement sexuel au travail* (Cowansville: Les éditions Yvon Blais Inc., 1991).

⁸ Kathleen Gallivan, *ibid.* at 56, suggests the following approach: “This standard would first take into account the woman’s vulnerability, an umbrella term for a variety of characteristics including her age, her cultural background, her relationship to her employer or co-workers, her relative isolation in the workplace and her position in the workplace hierarchy, her need for the job, and her security in it. In short, it would take account of all the factors that make a woman’s resistance to harassment difficult. It would also recognize the various ways in which vulnerable women manifest their profound discomfort with the harassment without expressly telling the harasser to stop. These include such signs of discomfort as nervous laughter, silence, or avoidance of the harasser.”

Section 7(3) of the *Code* provides:

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

- a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
- b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.”

Rule 5.03 states:

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

The Rule defines sexual harassment as:

“One incident or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature,

- a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the recipient(s) of the conduct;
- b) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services;
- c) when submission to such conduct is made implicitly or explicitly a condition of employment;
- d) when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, allocation of files, matters of promotion, raise in salary, job security, and benefits affecting the employee); or
- e) when such conduct has the purpose or the effect of interfering with a person’s work performance or creating an intimidating, hostile, or offensive work environment.”

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

VII. Retaliation, Threats or Reprisals Following a Complaint

Human rights law not only prohibits harassment and discrimination but also retaliation, threats or reprisals in relation to complaints of harassment or discrimination. Complainants and potential complainants are protected against retaliation, threats or reprisals for filing a complaint, assisting in a complaint, or testifying in human rights cases. Further, retaliation, threats or reprisals against

a person who exercises her or his right to complain is illegal even if the complaint is unsuccessful.⁹

VIII. Discrimination in Employment

A. The Definition of Employment

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

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

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

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

B. The Definition of “In the Workplace” or “In the Course of Employment”

Case law has determined that an employee is acting in the course of his or her employment when carrying out

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

Activities need not occur in the workplace to constitute activities in the course of employment. They may occur off-site and before or after regular working hours, so long as they are related to or associated with the individual’s employment. For example activity occurring at business-related conferences, receptions, recruitment efforts, parties, sales trips or pro bono undertakings like competitive moots would be considered to fall within the course of employment.

C. Legal Responsibility of the Employer to Prevent Discrimination

⁹Reprisals may include social ostracism, the undermining of careers or damage to the reputation. The vulnerability of complainants and the impact on the relation of complainants with colleagues and peers increases when complaints of harassment and discrimination are not dealt with appropriately by law firms.

A web of workplace-related laws requires employers to provide a safe and healthy working environment for their employees. Such employer responsibility includes ensuring that the workplace is free of discrimination, including all forms of harassment by maintaining policies that promote principles and practices consistent with equality throughout the workplace, by communicating sanctions for non-compliance with equality principles and by responding promptly and effectively to any complaints of discrimination reported to supervisory staff. Employers who have failed to take prompt and effective action to respond to and prevent discrimination against their employees by customers or consumers have also been held liable for the conduct of these third parties.

As a general common law rule, employers are responsible for the conduct of their employees who are acting within the “course of employment”. This means that individuals who experience discriminatory treatment in the workplace may seek to hold the company liable for such misconduct in addition to the individual perpetrator. To the extent companies are more likely to be able to pay damage claims arising from the discrimination, employer liability is an important legal principle.

Human rights statutes have elaborated upon and, in some instances, qualified, this common law rule. The relevant rules vary by jurisdiction. The resulting jurisprudence is technically complicated and beyond the scope of this introductory paper. The basic law of employer liability under the Ontario *Code* is as follows:

- A corporate employer is directly liable for discriminatory acts or omissions by staff who are acting in the course of their employment and who have managerial or supervisory functions and can thus be perceived as operating on behalf of or with corporate authority. Individuals who are not formally designated supervisors but who, in fact, exercise supervisory powers over employees will be considered supervisory as a matter of law, and the corporate employer will be legally responsible for any discriminatory conduct on their part. Arguably partners in a law firm may be considered to perform managerial or supervisory duties sufficient to trigger direct liability of the corporate partnership if one partner discriminates against or harasses a junior employee or a client.
- Pursuant to s. 46.3 of the *Code*, employers are indirectly (or “vicariously”) liable for discriminatory conduct of non-supervisory employees whether or not the employer was aware of such discriminatory acts. However s. 46.3 specifically exempts employers from such indirect liability in the case of harassment on prohibited grounds by non-supervisory employees. Harassing behaviour committed by a manager or supervisor would be attributed to the company, so the company would be directly liable according to the first rule above.
- Finally, where harassment has become so extreme or pervasive as to poison the working environment, case law has held employers directly liable on the basis that supervisors can be considered to know about and condone the misconduct that has become so pervasive.

**APPENDIX “A”
ONTARIO HUMAN RIGHTS CODE, R.S.O., C. H.19, as am.
(Excerpts)**

CONTENTS

[Preamble](#)

[PART I](#) FREEDOM FROM DISCRIMINATION

- [1.](#) Services
- [2.](#) Accommodation
- [3.](#) Contracts
- [4.](#) Accommodation of person under eighteen
- [5.](#) Employment
- [6.](#) Vocational associations
- [7.](#) Sexual harassment
- [8.](#) Reprisals
- [9.](#) Infringement prohibited

[PART II](#) INTERPRETATION AND APPLICATION

- [10.](#) Definitions re: Parts I and II
- [11.](#) Constructive discrimination
- [12.](#) Discrimination because of association
- [13.](#) Announced intention to discriminate
- [14.](#) Special programs
- [15.](#) Age sixty-five or over
- [16.](#) Canadian Citizenship
- [17.](#) Disability
- [20.](#) Restriction of facilities by sex
- [23.](#) Employment
- [24.](#) Special employment
- [25.](#) Employee benefit and pension plans
- [26.](#) Discrimination in employment under government contracts

...

[PART V](#) GENERAL

- [46.1](#) Civil remedy
- [46.2](#) Penalty
- [46.3](#) Acts of officers, etc.
- [47.](#) Act binds Crown

Preamble

Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

And Whereas these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

PART I FREEDOM FROM DISCRIMINATION

Services

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 1; 1999, c. 6, s. 28 (1); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (1).

....

Employment

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (1); 1999, c. 6, s. 28 (5); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (5).

Harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (2); 1999, c. 6, s. 28 (6); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (6).

Vocational associations

6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 6; 1999, c. 6, s. 28 (7); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (7).

Sexual harassment

Harassment because of sex in accommodation

7. (1) Every person who occupies accommodation has a right to freedom from harassment because of sex by the landlord or agent of the landlord or by an occupant of the same building. R.S.O. 1990, c. H.19, s. 7 (1).

Harassment because of sex in workplaces

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

employer or agent of the employer or by another employee. R.S.O. 1990, c. H.19, s. 7 (2).

Sexual solicitation by a person in position to confer benefit, etc.

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

- (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
- (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person. R.S.O. 1990, c. H.19, s. 7 (3).

Reprisals

8. Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing. R.S.O. 1990, c. H.19, s. 8.

Infringement prohibited

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. R.S.O. 1990, c. H.19, s. 9.

PART II INTERPRETATION AND APPLICATION

Definitions re: Parts I and II

10. (1) In Part I and in this Part,

“age” means an age that is 18 years or more; (“âge”)

“disability” means,

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental impairment or a developmental disability,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; (“handicap”)

“equal” means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination; (“égal”)

“family status” means the status of being in a parent and child relationship; (“état familial”)

“group insurance” means insurance whereby the lives or well-being or the lives and well-being of a number of persons are insured severally under a single contract between an insurer and an association or an employer or other person; (“assurance-groupe”)

“harassment” means engaging in a course of vexatious comment

or conduct that is known or ought reasonably to be known to be unwelcome; (“harcèlement”)

“marital status” means the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage; (“état matrimonial”)

“record of offences” means a conviction for,

(a) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or

(b) an offence in respect of any provincial enactment; (“casier judiciaire”)

“services” does not include a levy, fee, tax or periodic payment imposed by law; (“services”)

“spouse” means the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage. (“conjoint”) R.S.O. 1990, c. H.19, s. 10 (1); 1993, c. 27, Sched.; 1997, c. 16, s. 8; 1999, c. 6, s. 28 (8); 2001, c. 13, s. 19; 2001, c. 32, s. 27 (2, 3); 2005, c. 5, s. 32 (8-10); 2005, c. 29, s. 1 (1).

Pregnancy

[\(2\)](#) 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. R.S.O. 1990, c. H.19, s. 10 (2).

Past and presumed disabilities

[\(3\)](#) The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability. 2001, c. 32, s. 27 (4).

Constructive discrimination

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

- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. R.S.O. 1990, c. H.19, s. 11 (1).

Idem

(2) The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 11 (2); 1994, c. 27, s. 65 (1); 2002, c. 18, Sched. C, s. 2 (1).

Idem

(3) The Commission, the Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. R.S.O. 1990, c. H.19, s. 11 (3); 1994, c. 27, s. 65 (2); 2002, c. 18, Sched. C, s. 2 (2).

Discrimination because of association

12. A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination. R.S.O.

1990, c. H.19, s. 12.

Announced intention to discriminate

13. (1) A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I. R.S.O. 1990, c. H.19, s. 13 (1).

Opinion

(2) Subsection (1) shall not interfere with freedom of expression of opinion. R.S.O. 1990, c. H.19, s. 13 (2).

Special programs

14. (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I. R.S.O. 1990, c. H.19, s. 14 (1).

Application to Commission

(2) A person may apply to the Commission for a designation of a program as a special program for the purposes of subsection (1). 2006, c. 30, s. 1.

....

Age sixty-five or over

15. A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification or consideration for preferential treatment. R.S.O. 1990, c. H.19, s. 15.

Canadian Citizenship

16. (1) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law. R.S.O. 1990, c. H.19, s. 16 (1).

Idem

(2) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence. R.S.O. 1990, c. H.19, s. 16 (2).

Idem

(3) A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions. R.S.O. 1990, c. H.19, s. 16 (3).

Disability

17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability. R.S.O. 1990, c. H.19, s. 17 (1); 2001, c. 32, s. 27 (5).

Accommodation

(2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O.

1990, c. H.19, s. 17 (2); 1994, c. 27, s. 65 (2); 2002, c. 18, Sched. C, s. 3 (1); 2006, c. 30, s. 2 (1).

Determining if undue hardship

[\(3\)](#) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any standards prescribed by the regulations. 2006, c. 30, s. 2 (2).

[\(4\)](#) Repealed: 2006, c. 30, s. 2 (3).

...

Restriction of facilities by sex

[20. \(1\)](#) The right under section 1 to equal treatment with respect to services and facilities without discrimination because of sex is not infringed where the use of the services or facilities is restricted to persons of the same sex on the ground of public decency. R.S.O. 1990, c. H.19, s. 20 (1).

...

Employment

[23. \(1\)](#) The right under section 5 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 23 (1).

Application for employment

[\(2\)](#) The right under section 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 23 (2).

Questions at interview

(3) Nothing in subsection (2) precludes the asking of questions at a personal employment interview concerning a prohibited ground of discrimination where discrimination on such ground is permitted under this Act. R.S.O. 1990, c. H.19, s. 23 (3).

Employment agencies

(4) The right under section 5 to equal treatment with respect to employment is infringed where an employment agency discriminates against a person because of a prohibited ground of discrimination in receiving, classifying, disposing of or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or agent of an employer. R.S.O. 1990, c. H.19, s. 23 (4).

Special employment

24. (1) The right under section 5 to equal treatment with respect to employment is not infringed where,

- (a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;
- (b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;
- (c) an individual person refuses to employ another for reasons of any prohibited ground of discrimination in section 5, where the primary duty of the employment is

attending to the medical or personal needs of the person or of an ill child or an aged, infirm or ill spouse or other relative of the person;

- (d) an employer grants or withholds employment or advancement in employment to a person who is the spouse, child or parent of the employer or an employee;
- (e) a judge or master is required to retire or cease to continue in office on reaching a specified age under the *Courts of Justice Act*;
- (f) a case management master is required to retire on reaching a specified age under the *Courts of Justice Act*;
- (g) the term of reappointment of a case management master expires on the case management master reaching a specified age under the *Courts of Justice Act*; or
- (h) a justice of the peace is required to retire on reaching a specified age under the *Justices of the Peace Act*. R.S.O. 1990, c. H.19, s. 24 (1); 1999, c. 6, s. 28 (11); 2001, c. 32, s. 27 (5); 2005, c. 5, s. 32 (14); 2005, c. 29, s. 1 (2).

Reasonable accommodation

(2) No tribunal or court shall find that a qualification under clause (1) (b) is reasonable and *bona fide* unless it is satisfied that the circumstances of the person cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 24 (2); 1994, c. 27, s. 65 (4); 2002, c. 18, Sched. C, s. 4 (1); 2006, c. 30, s. 3 (1).

Determining if undue hardship

(3) In determining for the purposes of subsection (2) whether there would be undue hardship, a tribunal or court shall consider any

standards prescribed by the regulations. 2006, c. 30, s. 3 (2).

Same

(4) Clauses 24 (1) (e), (f), (g) and (h) shall not be interpreted to suggest that a judge, master, case management master or justice of the peace is an employee for the purposes of this Act or any other Act or law. 2005, c. 29, s. 1 (3).

24.1 Repealed: 1995, c. 4, s. 3 (2).

Employee benefit and pension plans

25. (1) The right under section 5 to equal treatment with respect to employment is infringed where employment is denied or made conditional because a term or condition of employment requires enrolment in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer, that makes a distinction, preference or exclusion on a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 25 (1).

Same

(2) The right under section 5 to equal treatment with respect to employment without discrimination because of sex, marital status or family status is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the *Employment Standards Act, 2000* and the regulations thereunder. R.S.O. 1990, c. H.19, s. 25 (2); 1999, c. 6, s. 28 (12); 2005, c. 5, s. 32 (15); 2005, c. 29, s. 1 (4).

Same

(2.1) The right under section 5 to equal treatment with respect to employment without discrimination because of age is not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act, 2000* and the regulations thereunder. 2005, c. 29,

s. 1 (5).

Same

[\(2.2\)](#) Subsection (2.1) applies whether or not a plan or fund is the subject of a contract of insurance between an insurer and an employer. 2005, c. 29, s. 1 (5).

Same

[\(2.3\)](#) For greater certainty, subsections (2) and (2.1) apply whether or not “age”, “sex” or “marital status” in the *Employment Standards Act, 2000* or the regulations under it have the same meaning as those terms have in this Act. 2005, c. 29, s. 1 (5).

Same

[\(3\)](#) The right under section 5 to equal treatment with respect to employment without discrimination because of disability is not infringed,

- (a) where a reasonable and *bona fide* distinction, exclusion or preference is made in an employee disability or life insurance plan or benefit because of a pre-existing disability that substantially increases the risk;
- (b) where a reasonable and *bona fide* distinction, exclusion or preference is made on the ground of a pre-existing disability in respect of an employee-pay-all or participant-pay-all benefit in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer or in respect of a plan, fund or policy that is offered by an employer to employees if they are fewer than twenty-five in number. R.S.O. 1990, c. H.19, s. 25 (3); 2001, c. 32, s. 27 (5).

Compensation

[\(4\)](#) An employer shall pay to an employee who is excluded because of a disability from an employee benefit, pension or

superannuation plan or fund or a contract of group insurance between an insurer and the employer compensation equivalent to the contribution that the employer would make thereto on behalf of an employee who does not have a disability. R.S.O. 1990, c. H.19, s. 25 (4); 2001, c. 32, s. 27 (5).

Discrimination in employment under government contracts

26. (1) It shall be deemed to be a condition of every contract entered into by or on behalf of the Crown or any agency thereof and of every subcontract entered into in the performance thereof that no right under section 5 will be infringed in the course of performing the contract. R.S.O. 1990, c. H.19, s. 26 (1).

Idem: government grants and loans

(2) It shall be deemed to be a condition of every grant, contribution, loan or guarantee made by or on behalf of the Crown or any agency thereof that no right under section 5 will be infringed in the course of carrying out the purposes for which the grant, contribution, loan or guarantee was made. R.S.O. 1990, c. H.19, s. 26 (2).

Sanction

(3) Where an infringement of a right under section 5 is found by the Tribunal upon a complaint and constitutes a breach of a condition under this section, the breach of condition is sufficient grounds for cancellation of the contract, grant, contribution, loan or guarantee and refusal to enter into any further contract with or make any further grant, contribution, loan or guarantee to the same person. R.S.O. 1990, c. H.19, s. 26 (3); 2002, c. 18, Sched. C, s. 5.

...

PART V GENERAL

...

Civil remedy

46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect. 2006, c. 30, s. 8.

Same

(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I. 2006, c. 30, s. 8.

Penalty

46.2 (1) Every person who contravenes section 9 or subsection 31 (14), 31.1 (8) or 44 (13) or an order of the Tribunal is guilty of an offence and on conviction is liable to a fine of not more than \$25,000. 2006, c. 30, s. 8.

Consent to prosecution

(2) No prosecution for an offence under this Act shall be instituted except with the consent in writing of the Attorney General. 2006, c. 30, s. 8.

Acts of officers, etc.

46.3 (1) For the purposes of this Act, except subsection 2 (2), subsection 5 (2), section 7 and subsection 46.2 (1), any act or thing

done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization. 2006, c. 30, s. 8.

Opinion re authority or acquiescence

[\(2\)](#) At the request of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization, the Tribunal in its decision shall make known whether or not, in its opinion, an act or thing done or omitted to be done by an officer, official, employee or agent was done or omitted to be done with or without the authority or acquiescence of the corporation, trade union, trade or occupational association, unincorporated association or employers' organization, and the opinion does not affect the application of subsection (1). 2006, c. 30, s. 8.

Act binds Crown

[47. \(1\)](#) This Act binds the Crown and every agency of the Crown. R.S.O. 1990, c. H.19, s. 47 (1).

Act has primacy over other Acts

[\(2\)](#) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act. R.S.O. 1990, c. H.19, s. 47 (2).

APPENDIX “B”
Rules 5.03, and 5.04 of the
LSUC Rules of Professional Conduct

SEXUAL HARASSMENT

Definition

5.03 (1) In this rule, 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

Types of behaviour that constitute sexual harassment include, but are not limited to, (a) sexist jokes causing embarrassment or offence, told or carried out after the joker has been advised that they are embarrassing or offensive, or that are by their nature clearly embarrassing or offensive, (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. Sexual harassment can occur in the form of behaviour by men towards women, between men, between women, or by women towards men.

Prohibition on Sexual Harassment

5.03 (2) A lawyer shall not sexually harass a colleague, a staff member, a client, or any other person.

5.04 DISCRIMINATION

Special Responsibility

5.04 (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, 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, articulated students, or any other person or in professional dealings with other licensees or any other person.

[Amended - June 2007]

Commentary

The 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.

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.

Rule 5.04 will be interpreted according to the provisions of the Ontario *Human Rights Code* and related case law.

The Ontario *Human Rights Code* defines a number of grounds of discrimination listed in rule 5.04. For example,

Age is defined as an age that is eighteen years or more, except in subsection 5(i) where age means an age that is eighteen years or more and less than sixty-five years.

The term disability is not used in the Code, but discrimination on the ground of handicap is prohibited. Handicap is broadly defined in s. 10 of the Code to include both physical and mental disabilities.

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

Marital status is defined as the status of being married, single, widowed, divorced, or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage.

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.

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.

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

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

(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 5.04, 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 effectively excludes from employment persons with disabilities that prevent them from obtaining a licence. In such a case, the law firm would be required to alter or eliminate the requirement in order to accommodate the student unless the necessary accommodation would cause undue hardship.

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 Ontario *Human Rights Code* requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

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.

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 Code.

In addition to prohibiting discrimination, rule 5.04 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, or handicap. Harassment by superiors, colleagues, and co-workers is also prohibited.

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 5.04. This could include, for example, repeatedly subjecting a

client or colleague to jokes based on race or creed.

[Amended - June 2007]

Services

5.04 (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

5.04 (3) A lawyer shall ensure that his or her employment practices do not offend this rule.

Commentary

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.

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, an employer may ask whether an applicant has been convicted of a criminal offence for which a pardon has not been granted. An employer may ask applicants not yet called in Ontario about Canadian citizenship or permanent residency. 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.

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 5.04 unless changing or eliminating the rule would cause undue hardship.

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.

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

The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. However, the following principles are well established.

If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 5.04, the following obligations arise:

The rule, requirement or expectation must be examined to determine whether it is "reasonable and *bona fide*." 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.

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

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.

APPENDIX “C”

University of Ottawa Policy 67

Policy on Sexual Harassment

(Online: http://web5.uottawa.ca/admingov/policy_67.html)

Policy 67

Approved Administrative Committee 944.2

POLICY ON SEXUAL HARASSMENT

PREAMBLE

1. Whereas the University of Ottawa Act, 1965, provides that one of the University of Ottawa's objectives is *to promote the advancement of learning and the dissemination of knowledge*;

and whereas the Ontario Human Rights Code, 1981, provides inter alia that every person who is an employee has a right to freedom from harassment in the workplace because of sex;

and whereas, in recognition of its responsibility to have an appropriate environment for the discovery and sharing of knowledge, the University has made a commitment to create an atmosphere of reciprocal respect among members of the University community;

and whereas, the University recognizes as well that all members of the University community are entitled to a working and learning environment which is pleasant, professional, and promotes due respect of and regard for the rights and feelings of all;

and whereas romantic or sexual relationships between faculty members and students or between supervisors and employees or students are ones in which a power differential may exist;

and whereas an abuse of that power differential creates a negative environment for work and study and casts doubt on the validity of the consent to such relationships;

the University therefore strongly disapproves of romantic or sexual relationships between faculty members and students or between supervisors and employees or students, and expects members of its community to refrain from engaging in them;

the University affirms that sexual harassment is a negation of reciprocal respect in addition to being a violation of the fundamental rights, dignity and integrity of the person and that it undermines the environment required for the advancement of learning and the dissemination of knowledge.

DEFINITION

2. Sexual harassment is:

- a) unwanted sexual attention from a person who knows or ought reasonably to know that such attention is unwanted; or

- b) implied or expressed promise of reward for complying with a sexually oriented request;
or
- c) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request; or
- d) a sexual relationship which constitutes an abuse of power in a relationship of trust; or
- e) a sexually oriented remark or behaviour which may reasonably be perceived to create a negative psychological and emotional environment for work or study.

COMMITTEE ON SEXUAL HARASSMENT (CSH)

STRUCTURE

3. The Committee is chaired by the Secretary of the University.
4. Each of the groups listed below must forward five nominations to the Secretary of the University, who then appoints members of the Committee as follows:
 - a) Administrative Committee - two people
 - b) Students' Federation - one person
 - c) Graduate Students' Association - one person
 - d) Support Staff Executive Committee - three people
 - e) 772A, 772B - one person
 - f) Association of Part-Time Professors of the University of Ottawa (APTPUO) - one person
 - g) Association of Professors of the University of Ottawa (APUO) - two people
 - h) Clinical professor - two people
5. Appointments are for a period of two years.

TERMS OF REFERENCE

6. The primary mandate of the Committee is to develop and coordinate an education and awareness program on campus relating to sexual harassment.
7. The Committee must, in addition,
 - a) maintain confidential records;
 - b) make recommendations with respect to the Sexual Harassment Policy and Procedure;
 - c) provide an investigative and hearing process for the settlement or determination of sexual harassment complaints;
 - d) report its activities annually to the Administrative Committee.

COMPLAINT PROCEDURE

GENERAL

8. The Chair of the Committee on Sexual Harassment must appoint a Sexual Harassment Officer whose duties include counselling and recommending on matters related to sexual

harassment as well as investigating under the authority of the Chair of the Committee on Sexual Harassment or Dean where appropriate.

9. In a case of suspected or alleged sexual harassment, the offended party may contact the Sexual Harassment Officer for advice or to make a verbal or written complaint.

10. Any complaint should be made as soon as possible but in any event, unless exceptional circumstances exist, a complaint will not be considered if it is made more than six months after the alleged incident.

11. A complaint may be made by either the individual or individuals who have been directly affected by the alleged sexual harassment or by any person who has actual knowledge that sexual harassment has taken place.

12. The Sexual Harassment Officer must, within five working days of the receipt of complaint, arrange a meeting with the complainant in order to obtain information to confirm and clarify the circumstances giving rise to the complaint, and determine whether there is a need to refer the matter to another appropriate body. In the case of a complaint made verbally, if the matter cannot be resolved informally, the Sexual Harassment Officer assists the complainant with the written form. No further official steps may be taken unless the complaint is in writing and signed by the complainant.

13. The Sexual Harassment Officer then forwards to the person against whom the complaint is made (hereinafter referred to as the respondent) a copy of the written complaint filed, any additional information obtained from the complainant and a request that the respondent reply to the complaint in writing within five working days. The Sexual Harassment Officer may assist the respondent in the preparation of a response.

14. If a response is received, the Sexual Harassment Officer forwards a copy of such response to the complainant and the complainant has five working days to reply in writing. The Sexual Harassment Officer may assist the complainant in formulating a reply.

15. Except where the Sexual Harassment Officer is absolutely convinced that there is no possibility of settlement by agreement or withdrawal, the Sexual Harassment Officer will convene a meeting with the parties to attempt a settlement.

16.a) The Sexual Harassment Officer files as soon as possible, but in any event within thirty days of receipt of the complaint, a report with the Chair of the CSH, setting out all of the information obtained as well as copies of all documentation filed by both parties and recommending:

- i) that no further action be taken because the complaint is frivolous, vexatious or vindictive, or because the conduct complained of cannot reasonably be said to fall within the definition of sexual harassment as set out in section 2; or
- ii) that no further action be taken because a settlement has been reached; or
- iii) that a Complaint Panel be appointed.

A copy of the report is sent to the complainant and the respondent.

b) Where the respondent is a member of APUO, the following provisions apply.

- i) If the Sexual Harassment Officer determines that 16.a)i) or 16.a)ii) applies, he or she will inform the complainant and the respondent of his or her determination in writing,

and the file will then be closed.

- ii) If the Sexual Harassment Officer determines that neither 16.a)i) nor 16.a)ii) applies, but that the complaint should be dealt with further, he or she, pursuant to 39.5.6 of the APUO collective agreement, forwards the appropriate documentation to the member's Dean, the Chief Librarian or the Director of the Career and Counselling Service, who then proceeds with an investigation pursuant to 39.1.2 of the agreement. The Sexual Harassment Officer notifies the complainant and the respondent that the matter has been referred to the Dean, the Chief Librarian or the Director of the Career and Counselling Service.

17. In the event that the recommendation is to appoint a Complaint Panel, the Chair immediately appoints three members of the CSH and nominates one of the appointees to the chair.

18. The Complaint Panel invites the complainant and the respondent to appear before it to submit any additional pertinent documentation and make oral submissions. Such meeting will be held on a mutually convenient date, but in any event within twenty working days of the appointment of the Panel.

19. The Complaint Panel must determine whether the acts complained of constitute sexual harassment and, if so:

- a) recommend appropriate disciplinary action, if any;
- b) recommend any other measures it considers appropriate for remedying or mitigating any academic or employment harm or disadvantage suffered by any person as a result of the sexual harassment.

20. The report of the Complaint Panel must be in writing and delivered to the Chair of the CSH within ten working days of the meeting referred to in paragraph 18. The report must provide:

- a) a summary of the relevant facts;
- b) a determination as to whether the acts complained of constitute sexual harassment as defined in article 2;
- c) recommendations as to appropriate disciplinary action and other measures which in its opinion are necessary in the circumstances.

21. If the report of the Complaint Panel contains any recommendations, the Chair must forward a copy of the report to the Administrative Committee for appropriate action.

APPEALS

22. In the event that the Sexual Harassment Officer recommends that no further action be taken pursuant to sub-paragraph 16.a)i) the complainant has the right to appeal such a decision by forwarding to the Chair a notice to that effect within ten working days of the receipt of the Sexual Harassment Officer's report.

23. The notice of appeal must clearly set out all of the factors relied on by the complainant in disputing the recommendation made.

24. In the event that a notice of appeal is filed, the Chair appoints a Complaint Panel pursuant to paragraph 17.

25. The Complaint Panel will, after the expiry of the time granted to the respondent to reply

to the notice of appeal, review all the material considered by the Sexual Harassment Officer as well as all other material filed to determine whether the grounds of appeal reasonably establish that the Sexual Harassment Officer was in error in making his or her recommendation and that the appointment of a Complaint Panel should have been recommended.

26. a) The Complaint Panel notifies the parties in writing of its decision within five working days, and if the Panel agrees with the complainant that the Sexual Harassment Officer should have recommended the appointment of a Complaint Panel then the matter proceeds in accordance with paragraphs 18, 19 and 20.

b) When the respondent is a member of APUO, the following replaces the provisions of 26.a). The Complaint Panel notifies the parties in writing of its decision within five working days. If the Panel agrees with the complainant that the Sexual Harassment Officer should have forwarded the file to the Dean, the Chief Librarian or the Director of the Career and Counselling Service pursuant to 39.5.6 of the APUO collective agreement so that an investigation pursuant to 39.1.2 could be carried out, the Panel orders that this be done.

27. If the Panel confirms the Sexual Harassment Officer's recommendation, the complaint file will be closed and no further action may be taken by the complainant pursuant to this policy.

28. Nothing in this policy prevents a complainant from seeking redress in any court and/or through the Ontario Human Rights Commission in addition to or instead of following the procedures outlined above. The University's procedures for dealing with complaints of sexual harassment are carried out independently of any investigations being or to be conducted by any outside agency.

DISCIPLINARY ACTION

29. For the purpose of this policy, disciplinary action includes but is not limited to an apology, reprimand, transfer, suspension, expulsion or dismissal, depending on the seriousness of the conduct, the respondent's connection to the University, the respondent's prior record and any mitigating factors, it being understood that any disciplinary action must be undertaken in conformity with the procedures set out in the relevant collective agreement or University policy.

30. Any disciplinary action taken against an employee or a student may be subject to a grievance or an appeal in accordance either with the procedures set out in any applicable collective agreement or with the policies and procedures of the University.

CONFIDENTIALITY OF RECORDS

31. Any complaint received pursuant to this policy must be considered to be strictly confidential and all committee members are under a duty to take all necessary steps to maintain such confidentiality. In particular, but without limiting the generality of the foregoing, the Committee must ensure that:

a) any reports of the Sexual Harassment Officer or reports of the Complaint Panel required to be considered by the CSH be amended so as to protect the identity of the complainant and of the respondent;

b) all procedures and deliberations of the Complaint Panel be held in camera.

RIGHTS OF COMPLAINANT AND OF RESPONDENT

32. The filing of a complaint of sexual harassment is the right of every member of the University community and may be exercised without fear of reprisal or threat thereof. In addition, the mere fact that a complaint has been filed against an individual does not, in and of itself, constitute grounds for disciplinary action against that individual.

EXCEPTION

33. No exception may be made to this policy without the written consent of the Administrative Committee.

Revised March 17, 1998

(Office of the Secretary)