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THE LAW SOCIETY OF UPPER CANADA

PREVENTING HARASSMENT, DISCRIMINATION AND VIOLENCE IN THE LEGAL WORKPLACE: GUIDE TO DEVELOPING POLICIES FOR LAW FIRMS OR LEGAL ORGANIZATIONS

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ADDRESSING HARASSMENT, DISCRIMINATION AND VIOLENCE IN THE LEGAL WORKPLACE: GUIDE TO DEVELOPING POLICIES FOR LAW FIRMS AND LEGAL ORGANIZATIONS

INTRODUCTION

The Ontario *Human Rights Code*¹ (the *Code*), Rules 6.3 (Sexual Harassment) and 6.3.1 (Discrimination) of the *Rules of Professional Conduct*² (the *Rules*) and Rule 2.03 of the *Paralegal Rules of Conduct*³ (the *Paralegal Rules*) prohibit harassment and discrimination in the legal workplace, in professional dealings and in the delivery of services. Effective June 15, 2010, the *Occupational Health and Safety Act* (the *OHSA*)⁴ requires most employers in Ontario to adopt policies and programs that address workplace violence and harassment. As a result, the Law Society has developed this Guide, which includes sample policies for addressing harassment and discrimination and for addressing workplace violence within law firms⁵, and sets out procedures to address these matters in a prompt, effective and confidential manner. The Guide is one of a series of guides adopted by the Law Society to assist law firms and legal organizations in developing their own resources.⁶

The Guide is divided as follows:

- Reasons to Adopt a Policy
- How Law Firms Should Approach the Sample Policies
- Part 1 –Addressing Harassment and Discrimination
 - Overview of Legal Principles
 - Sample Policy - Preventing Harassment and Discrimination
 - Considerations for Small Law Firms
- Part 2 –Addressing Workplace Violence
 - Overview of Legal Principles
 - Sample Policy – Preventing Workplace Violence

¹ R.S.O. 1990, c. H.19.

² Adopted by Convocation of the Law Society of Upper Canada on June 22, 2000, effective November 1, 2000 and amendments current to October 1, 2014.

³ Adopted by Convocation of the Law Society of Upper Canada on March 29, 2007 effective May 1, 2007 and amendments current to October 2, 2014.

⁴ R.S.O. 1990, c. O

⁵ The term law firm in this document will be used to include providers of legal services, legal clinics, legal departments and legal non-profit organizations.

⁶ Law Society guides are available online at <http://rc.lsuc.on.ca/jsp/equity/policies-publications-reports.jsp>

REASONS TO ADOPT A POLICY

The *OHSA* mandates most employers in Ontario to adopt policies and programs to address workplace harassment and violence. It is also well established that the adoption of effective harassment and discrimination prevention policies and procedures and the design and delivery of education programs assist in creating a respectful work environment and in reducing the risk of liability for employers.⁷

The advantages of written policies include the following:

- a. they encourage respect for the dignity of all individuals in the firm;
- b. they demonstrate that the firm's management takes these issues seriously and promotes a respectful workplace;
- c. they provide procedures for handling complaints and enhance transparency;
- d. they encourage prompt resolution of workplace harassment and discrimination;
- e. they outline preventative, remedial and disciplinary actions that may be taken; and
- f. they minimize the risk of harm to staff, paralegals and lawyers, as well as the risk that a firm will be held liable.

HOW LAW FIRMS SHOULD APPROACH THESE SAMPLE POLICIES

The sample policies included in this document are precedents and are intended to provide guidance, rather than to represent the ultimate or ideal policy. The precedents apply to a legal environment composed of partners, associates and other staff, not subject to a collective agreement. Firms should adapt and tailor the precedents to their own structure and culture. For example, where a workplace is governed by a collective agreement, the firm may have to design its policies to take the agreement into account, and the firm may have to consider its policies when negotiating its collective agreement.

The *OHSA* provides that employers with more than five employees must have written policies that address workplace harassment and violence. Because of the different nature of workplace harassment and workplace violence and the fact that organizations will likely establish different processes to address these issues, we have developed one precedent to address workplace harassment and discrimination and a separate one to address workplace violence. Law firms and legal organizations could address both concepts in one policy.

⁷ For example, see *Ferguson v. Meunch Works Ltd.* (1997), 33 C.H.R.R. D/87 (B. C. H. R. T.).

PART 1 - PREVENTING HARASSMENT AND DISCRIMINATION

OVERVIEW OF LEGAL PRINCIPLES

The *Code*⁸, Rules 6.3 (Sexual Harassment) and 6.3.1 (Discrimination) of the *Rules*⁹ and Rule 2.03 of the *Paralegal Rules*¹⁰ prohibit harassment and discrimination in the workplace. The *OHSAA*¹¹ requires employers with more than five regular employees in Ontario to adopt written policies on workplace harassment. This part discusses firms' legal and professional responsibility to prevent and respond to harassment and discrimination.

Definition of Harassment

"Harassment" is defined in the *Code*¹² and the *OHSAA*¹³ as "[...] 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 more than one or a series of vexatious comment or conduct, "one" comment or conduct may constitute harassment if it is of a serious nature or egregious.¹⁴

The *Code*, the *Rules* and the *Paralegal Rules* prohibit harassment in employment on the basis of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex¹⁵, sexual orientation, gender identity, gender expression¹⁶, age, record of offences, marital status, family status or disability (the "enumerated grounds"). A Workplace harassment that is not based on enumerated grounds is also prohibited under the *OHSAA*.

⁸ *Supra* note 1.

⁹ *Supra* note 2.

¹⁰ *Supra* note 3.

¹¹ *Supra* note 4.

¹² Subsection 10(1) of the *Code*, *supra* note 1.

¹³ Subsection 1(1) of the *OHSAA*, *supra* note 4.

¹⁴ In *Parsonage v. Canadian Tire Corp.* (1995), 28 C.H.R.R. D/42 (Ont. Bd. of Inquiry) and *Prestressed Systems Inc. v. L.I.U.N.A.* [2005] O.L.A.A. No. 551 (Ont. Arb. Bd.) both boards concluded that a single improper and insulting joke, told by employees or supervisors on break, does not constitute a violation of the *Code*, but egregious racial or other threats or comments, even if made only once, could constitute an infringement of the *Code*. See *Prestressed Systems Inc. v. L.I.U.N.A., Local 625* (2005) 143 L.A.C. (4th) 340. Serious forms of harassment, such as physical sexual assault, need not occur more than once to be considered harassment. See Arjun P. Aggarwal, *Sexual Harassment in the Workplace*, 3rd edition (Toronto: Butterworths, 2000) at 140.

¹⁵ Subsections 7(2) and 7(3) of the *Code*, *supra* note 1, explicitly prohibit sexual harassment.

¹⁶ Gender identity and gender expression were added to the *Code* in 2012.

The *Rules*¹⁷ and *Paralegal Rules*¹⁸ are consistent with the *Code* and prohibit harassment and discrimination based on enumerated grounds done by a lawyer or paralegal against a colleague, a staff member, a client, or any other person.

Elements of the Definition of Harassment

The following are elements of the definition of harassment:

- a harassment may be verbal,¹⁹ physical²⁰ or visual;²¹
- b the criteria is whether a reasonable person in the shoes of the victim would be offended;
- c the comment or conduct does not have to be intentional;
- d it may be a series of conduct or comment that happens for a period of time²² or it may be one incident, if the incident is serious, egregious or constitutes a threat;²³
- e the victim does not have to object to the behaviour to establish that there is harassment;²⁴
- f the unwelcome comment or conduct does not have to be directed at a specific person for harassment to occur;²⁵

¹⁷ Rules 6.3 (Sexual Harassment) and 6.3.1 (Discrimination) of the *Rules*, *supra* note 2.

¹⁸ Rule 2.03 of the *Paralegal Rules*, *supra* note 3.

¹⁹ Such as derogatory comments about a person's sexual attractiveness, demeaning jokes, sexual suggestions and innuendo, sexual solicitations. Unwelcome remarks, jokes, innuendos or taunting about a person's racial or ethnic background, colour, place of birth, citizenship or ancestry. Refusing to speak or work with an employee because of his or her racial or ethnic background or because of his or her disability.

²⁰ Physical harassment includes such things as unwanted touching, such as stroking, tickling or grabbing someone, impeding or blocking movement in an attempt to get physically close. Physical harassment also include such behaviour as insulting gestures or practical jokes based on ethnic or racial grounds which cause embarrassment or awkwardness.

²¹ Derogatory or degrading posters, explicit sexual images, cartoons, graffiti or the displaying of racist, derogatory, or offensive pictures or materials or the delivery of offensive e-mail.

²² For example, one homophobic joke might not be harassment, but persistent homophobic comments may become harassment with time.

²³ *Greater Essex County District School Board v. E.T.F.O.* (2007) 160 L.A.C. (4th) 162 (Ont. Arb. Bd.); *Prestressed Systems Inc. v. L.I.U.N.A. Local 625* (2005) 143 L.A.C. (4th) 340 (Ont. Arb. Bd.); *Parsonage v. Canadian Tire Corp.* (1995), 28 C.H.R.R. D/42; *Gray v. A. & W. Food Services Lt.* (May 12, 1994), No. 94-011 (Ont. Bd. of Inquiry).

²⁴ A person does not have to object to the behaviour for that behaviour 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 an objective/subjective standard of the reasonable person in the shoes of the victim. If a reasonable person in the shoes of the victim were to find the behaviour unacceptable, the alleged harasser ought to have known that the behaviour would be unwelcome. The comments do not have to be directed at the complainant to amount to harassment. See *Cuff v. Gypsy Restaurant* (1987), 8 C.H.R.R. D/3972 (Ont. Bd. Of Inquiry); *Morano v. Nuttal* (1988), 9 C.H.R.R. D/4876 (Ont. Bd of Inquiry), *Sharp v. Seasons Restaurant* (1987), 8 C.H.R.R. D/4133 (Ont. Bd. of Inquiry) and *Lee v. T.J. Applebee's Food Conglomeration* (1987), 9 C.H.R.R. D/4781 (Ont. Bd. of Inquiry).

²⁵ Comments or conduct that tend to demean a group covered by a protected ground, even if not directed at a specific individual, can create a poisoned work environment resulting in unequal terms and conditions of employment. For example, employees routinely making derogatory jokes and comments about a person who is a member of a racialized community could qualify as harassment.

- g comments or conduct that tends to ridicule or disparage a group causing humiliation, insult, apprehension or disruption may *poison the work environment*.²⁶

Definition of Discrimination

“Discrimination” is defined as differential treatment, whether intentional or not, that imposes a disadvantage or a burden on a person or group of persons, or that result in the denial of a benefit to a person or group of persons, based on one or more of the prohibited grounds of discrimination. The differential treatment must result in the perpetuation of prejudice or reinforcement of stereotypes.²⁷

The fact that there is no intention to discriminate is of no relevance. When deciding whether discrimination has occurred, one must look at the impact that practices, policies and behaviour have on individuals.

Retaliation, Threats or Reprisals

Retaliation, threats or reprisals in relation to a complaint or a proceeding related to harassment or discrimination are prohibited. The *Code* grants every person the right to claim and enforce her or his rights under the *Code* without a threat of reprisal or reprisal for doing so. This includes the institution and participation in proceedings under the *Code* and also the refusal to infringe a right of another person. Therefore, 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.²⁸

Malicious or Bad Faith Complaint

Malicious or bad faith complaints of harassment or discrimination mean that a person has made a complaint that he or she knew was untrue. Although such complaints are rare, they are serious offenses because they may have very serious adverse ramifications for the respondent. Workplace harassment and discrimination prevention policies should encourage victims to come forward, but at the same time, discourage malicious or bad faith complaints against innocent persons.

²⁶ A poisoned work environment refers to the creation of a negative, hostile or unpleasant workplace which causes significant and unreasonable interference to a person’s work environment. When considering whether there is a *poisoned work environment*, it is important to consider the context. See *Moffatt v. Kinark Child & Family Services* [1998] O.H.R.B.I.D. No. 19, Decision No. 98-019 at par. 211 and par. 215.

²⁷ *Ontario (Disability Support Program) v. Tranchemontagne* (2010) O.N.C.A. 593 (Ont. C.A.)

²⁸ Retaliation may include social ostracism, the stymieing 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. Section 8 of the *Code*, *supra* note 1. Retaliation is a ground for alleging discrimination which is distinct from any particular alleged act of discrimination. It stands by itself and is designed to encourage complainants to pursue their rights without the fear of recrimination for doing so. See *Abouchar v. Toronto (Metro) School Board (No. 3)* (1998), 31 C.H.R.R. D/411 (Ont. Bd. Of Inquiry).

Submitting a complaint in good faith, even where the complaint cannot be proven, is not tantamount to a malicious or bad faith complaint.

Definition of Employees

The *Code's* protection extends to employees. The definition of employees includes temporary, casual and contract staff, and other persons in a work context, such as people who work to gain experience or for benefits, volunteers, co-op students and dependent and independent contractors.²⁹ The Supreme Court of British Columbia found that partners may be in an employment relationship with each other and bound by the human rights legislation.³⁰

Definition of “In the Workplace” or “Employment”

Both the *Rules* and the *Paralegal Rules* prohibit harassment and discrimination in employment and professional dealings with members of the respective professions.³¹ In the *Rules*, employment extends to professional employment of other paralegals, lawyers, articulated students, or any other person, from administrative staff to partners. In the *Paralegal Rules*, employment extends to others, particularly other licensees or any other person.

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

The *Code* applies to “the workplace”,³² or “the course of employment”.³³ The scope of those terms is broad. The workplace includes,

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

²⁹ *Human Rights at Work 2008* (Toronto: Ontario Human Rights Commission, 2008). It should be noted that all employment relations, including those governed by a collective agreement and probationary employees are subject to the *Code* (see *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324* (2003), 230 D.L.R. (4th) 257 (S.C.C.)).

³⁰ *Fasken Martineau DuMoulin LLP v. British Columbia Human Rights Tribunal and John Michael McCormick* (2011) B.C.S.C. 713 (Sup. Ct. B.C.).

³¹ While the language in the *Rules* and the *Paralegal Rules* is not identical, it is assumed that they are intended to communicate the same sentiment.

³² The term “in the workplace” is used in sections 5 and 7 of the *Code*.

³³ The term “in the course of employment” is used in the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

Harassment can take place in the workplace itself, or outside of the workplace in situations that are in some way connected to work.³⁴ For example, during off-site meetings, business trips, social gatherings taking place off-site, recruitment lunches or dinners with potential articling students or other hiring candidates, end of the year parties and any other event or place related to employment when the employee is present in the course of employment.³⁵

The *OHSA* defines the “workplace” in a slightly more restrictive way. It states “workplace means any land, premises, location or thing at, upon, in or near which a worker works.” The *OHSA* also provides exceptions to the definition of workplace, including one that states that the *OHSA* does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection.

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.

Liability of Employer

Employers have the ultimate responsibility for ensuring that their workplace is free of harassment and discrimination and for providing a safe and healthy working environment.³⁶

The response of an employer will have important practical implications. For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps.³⁷

It is not acceptable to choose to stay unaware of harassment or discrimination. Employers have a legal obligation to take steps to prevent and address human rights violations and to create a workplace environment that is respectful. Employers may be in violation of the *Code* if they “directly or indirectly,

³⁴ *Simpson v. Consumers’ Assn. of Canada* (2001), 209 D.L.R. (4th) 214. The respondent, an executive director of the appellant association had propositioned a female member of staff during a three-day meeting of the board of directors in Saskatchewan. The incident took place late one evening at the hotel where they were both staying. On another occasion the respondent groped another female. That incident happened at around 11:00 p.m. in the hospitality suite of a hotel in Banff where the CAC was holding its annual general meeting. While attending a business conference in Quebec, and in the presence of other staff members, the respondent was also inappropriate while in the conference hotel’s hot tub with a secretary. The Court of Appeal concluded that, although the incidents took place during CAC meetings or retreats held at hotels, they were clearly business meetings, even if they included a social component.

³⁵ See *Anti-Harassment Policies for the Workplace, An Employer’s Guide* (Ottawa: Canadian Human Rights Commission, 2006). Also online <http://www.chrc-ccdp.ca/sites/default/files/ahpoliciesworkplace_en_1.pdf>.

³⁶ *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84.

³⁷ An employer must respond to internal complaints of discrimination lodged by its employees. Failure to do so will itself result in liability under section 5 of the *Code*. The employer must also take the matter seriously and act promptly (see *Murchie v. JB’s Mongolian Grill* (2006) HRTO 33.

intentionally or unintentionally infringe the *Code*, or where they do not directly infringe the *Code* but authorize, condone or adopt behaviour that is contrary to the *Code*".³⁸

Some factors that are considered when deciding whether an employer has met its duty respond to a human rights claim include:

- a procedures in place to address harassment and discrimination;
- b the promptness of the organization's response to the complaint;
- c how seriously the complaint was treated;
- d resources made available to deal with the complaint;
- e whether the organization provided a healthy environment for the person who complained;
- f how well the action taken was communicated to the person who complained.³⁹

In addition to direct liability under section 5, the *Code* deems employers to be responsible for any acts or omissions to act carried out in the course of employment by an officer, agent, or employee. Employers are exempted from deemed liability in relation to harassment caused by its agents or employees.⁴⁰ However if the employer is indifferent to harassment caused by its agents or employees, or if it allows harassment by its agents or employees to create a poisoned work environment, the employer is directly liable.⁴¹

In the case of a corporation, a directing mind⁴² who discriminates against or harasses anyone in a manner contrary to the *Code*, or who knows of harassment or discrimination and did not take steps to remedy a situation, engages the liability of the employer. A "directing mind" of a corporation is "generally

³⁸ *Policy on Preventing Sexual and Gender-Based Harassment* (Toronto: Ontario Human Rights Commission, 2011) at 44.

³⁹ *Ibid.* at 45.

⁴⁰ Subsection 46.3 (1) of the *Code* states: For the purposes of this Act, except [...] 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. Section 46.2 provides that "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. No prosecution for an offence under this Act shall be instituted except with the consent in writing of the Attorney General."

⁴¹ *Naraine v. Ford Motor Co.* (1996) O.H.R.B.I.D. no. 23; *McKinnon v. Ontario (Ministry of Correctional Services)*, (1998) O.H.R.B.I.D. no. 10.

⁴² The Human Rights Commission provides the following definition of "directing mind": generally speaking, an employee who performs management duties is part of the "directing mind" of a company. Even employees with only supervisory authority may be viewed as part of a company's "directing mind" if they function, or are seen to function, as representatives of the organization. Holding an employer liable for the conduct of an employee who is part of the "directing mind" is consistent with the "organic theory" of corporate liability. Non-supervisors may be considered part of the "directing mind" if they have de facto supervisory authority or have significant responsibility for the guidance of employees. See *Human Rights at Work*, supra note 44 at 30.

speaking, whenever an employee provides some function of management, he is then part of the directing mind”.⁴³

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

In addition, the *OHSA* now imposes a responsibility on employers to develop and maintain programs to implement a policy on workplace harassment. This includes measures and procedures for employees to report incidents of workplace harassment, set out how the employer will investigate and deal with incidents and complaints of workplace harassment. The employer must also provide information and instruction that is appropriate for the employee on the contents of the policy and program with respect to workplace harassment.

Harassment or Discrimination by Clients

An employer has a responsibility to maintain a work environment that is free of harassment or discrimination and it has a duty to intervene harassment of its employees by third parties. The employer cannot be absolved of its responsibility by showing that it was responding to the real or perceived preferences of clients. In the case of harassment by clients, the employer has the greatest control over workplace conditions, and it must intervene effectively to stop such harassment.

While an employer may not be able to control the conduct of a client, the employer does have control over how it responds to the conduct in the workplace, regardless of how the conduct occurred. In deciding whether an employer took reasonable steps to eliminate the problem, a tribunal will determine whether an employer acted promptly and effectively in all the circumstances in response to acts of harassment and will assess the appropriateness of its efforts to prevent harassment.

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

SAMPLE POLICY – PREVENTING HARASSMENT AND DISCRIMINATION

The following is a sample policy that firms can use to develop their own policy. The sample policy includes the following: statement of principles, objectives, application of the policy, a confidentiality clause, definitions, and addressing threats, reprisals or retaliations and bad faith. The procedures include informal procedures and formal procedures. These clauses and procedures are presented to make law firms aware that these are options available when addressing harassment or discrimination complaints. Law firms are not obligated to adopt all or some of these options in their policies. Policies should be developed based on context and the culture of the firm.

POLICY FOR _____ (HEREINAFTER “THE FIRM”)

Note: Square brackets “[]” are used throughout the sample policy to indicate that firms should include terminology or information relevant to their organization.

Note:

It is important to review the policy on a periodic basis. It is proposed that the first review take place approximately one year after the adoption of the policy so that the firm can assess early on the effectiveness of the policy and whether it addresses all anticipated issues.

Communicating the Policy

Once adopted, it is important for firms to communicate the policy to all staff, paralegals and lawyers at the firm and develop an education strategy. The initial presentation of the policy and a clear statement of management support are important.

Education programs should be organized to inform all staff, paralegals and lawyers of the firm about the provisions of the policy and the objectives that it is intended to meet.

It is advisable that individuals charged with implementing and applying the policy, for example members of an equality committee, appointed advisors under the policy or directing minds, be fully versed in the specifics of the policy, the law, interviewing techniques and information gathering.

The firm might consider asking those covered by the policy to sign a commitment pledge acknowledging receipt and an understanding of the policy. This increases the acceptance and understanding of the policy and allows the firm to ensure that its staff, paralegals and lawyers are fully aware of the policy.

It is a good practice to make the policy available to all prospective staff, paralegals or lawyers of the firm by informing the public and legal professionals of the availability of the policy. Such a practice will make a strong statement about the firm’s support for the policy and its objectives. The *Code* applies to the provision of terms and conditions of employment, recruiting, application forms, interviews and promotions.

Statement of Principles

1. The Firm recognizes that harassment and discrimination are offensive, degrading and are prohibited under the Ontario *Human Rights Code*, the *Rules of Professional Conduct* and the *Paralegal Rules of Conduct* of the Law Society of Upper Canada. The Firm also recognizes its obligations under the *Occupational Health and Safety Act*.
2. The Firm is committed to providing a work environment that promotes equality and ensures that all individuals are treated with respect and dignity.
3. Harassment and discrimination are not tolerated. Regardless of seniority, individuals found to have engaged in behaviour constituting harassment or discrimination may be severely disciplined.

Objectives

4. The objectives of this policy are to,
 - a. foster and maintain a respectful working environment in which staff, paralegals and lawyers treat each other with mutual respect;
 - b. alert all staff, paralegals and lawyers to the fact that harassment and discrimination will not be tolerated within the Firm and are illegal;
 - c. set out the types of behaviour that may be considered offensive and will not be tolerated;
 - d. provide a procedure to deal with harassment and discrimination complaints; and
 - e. outline the preventative, remedial and disciplinary actions that may be taken when a complaint of harassment or discrimination has been brought forward and/or substantiated.
5. This policy is *not* intended to constrain acceptable social interactions between people in the Firm.

Application of Policy

6. This policy applies to all staff, paralegals and lawyers of the Firm, whether part-time, full-time or casual and to others in the work context, such as volunteers, articling students, co-op students, dependant and independent contractors.
7. The policy applies to employment relationships and professional dealings within the context of the legal work environment and includes dealings by and between partners, along with dealings related to the partnership.

8. The policy applies to every aspect of the legal work environment, including recruitment, selection, promotion, transfer, training, compensation and performance reviews.
9. This policy covers any legal work-related environment and professional dealings including,
 - a. any place where the business of the firm is conducted or where social and/or other functions related to the business of the firm occur;
 - b. activities that are incidental or connected to the business of the firm, including activities that are incidental or connected to the business of partners or the partnership;
 - c. incidents that occur after the official business of a meeting but are incidental or connected to the meeting; or
 - d. conduct outside the workplace which is likely to be prejudicial to the business of the firm.

Note:

The application of the policy to all those in the work context (including volunteers), to all types of employment relationships (including partners), and to any legal work-related environment and professional dealings is consistent with Ontario human rights law.

Confidentiality

10. To protect the interests of the persons involved, confidentiality will be maintained throughout the process to the extent practicable and appropriate under the circumstances except where disclosure is required by law or is necessary for a proper investigation and resolution of the matter.

Note

If the policy is to be effective, confidentiality at every stage of the process is important. The absence of assurances of confidentiality may discourage individuals from using the policy. A statement of confidentiality is meant to protect the complainant, respondent and the firm. However, the nature of an investigation will necessitate some exceptions to the rule of confidentiality and a firm should include a statement to that effect in the policy.

Definitions

11. “Discrimination” means a differential treatment, whether intentional or not, that imposes a disadvantage or a burden on a person or group of persons, or that results in the denial of a benefit to a person or group of persons, based on one or more of the prohibited grounds of discrimination. The differential treatment must result in the perpetuation of prejudice or reinforcement of stereotypes. (See Appendix 1 for examples).

12. “Prohibited grounds” means any of the following:
- a. race;
 - b. ancestry;
 - c. place of origin;
 - d. colour;
 - e. ethnic origin;
 - f. citizenship;
 - g. creed (religion);
 - h. sex (including pregnancy and breastfeeding);
 - i. sexual orientation;
 - j. gender identity
 - k. gender expression;
 - l. age (in employment, an age that is 18 years or more);
 - m. record of offences (criminal conviction for a provincial offence, or for an offence for which a pardon has been received);
 - n. marital status (including the status of being married, single, widowed, divorced, separated, or living in a conjugal relationship outside of marriage, whether in a same sex or opposite sex relationship);
 - o. family status (being in a parent-child relationship);
 - p. or disability (including mental, physical, developmental or learning disabilities).
13. “Harassment” means engaging in a course of vexatious comment or conduct against an individual in the workplace that is known or ought reasonable to be known to be unwelcome. The course of comment or conduct does not have to be based on one of the enumerated grounds. (See Appendix 1 for examples).

Threats, Reprisals or Retaliations and Bad Faith Complaints

14. Any staff, paralegal or lawyer of the Firm has the right to make a complaint or enforce his or her rights under this policy without threats of reprisals, reprisals or retaliations. The Firm prohibits threats, reprisals or retaliations in relation to the policy and such actions will be treated in the same manner as harassment or discrimination.
15. Any staff, paralegal or lawyer of the Firm who makes a malicious or bad faith complaint is in violation of the policy. A malicious or bad faith complaint means that a person has made a complaint under this policy that she or he knew was untrue. Submitting a complaint in good faith, even where the complaint cannot be proven, is not a violation of the policy.

PROCEDURES

Roles and Responsibilities

16. All members of the Firm are expected to uphold this policy by refraining from any form of harassment or discrimination, and by cooperating in any investigation of a harassment or discrimination complaint.
17. Those with supervisory authority, including partners, have the additional responsibility to act immediately on observations or allegations of harassment or discrimination. They are responsible for creating a working environment that is free of harassment and discrimination and should address issues before they escalate.
18. The Firm appoints [number of Advisors] staff, paralegals or lawyers as Advisors. The Advisors are neutral. They provide information about human rights and the policy to any person who is concerned about possible harassment or discrimination within the Firm. Advisors are not advocates and do not provide legal advice. Advisors maintain confidentiality of communications, unless under a legal obligation to disclose the information by law or under this policy. Advisors who are made aware of harassment or discrimination that, if proven, would be in violation of this policy, will report the incident to the Equality Committee for consideration and inform the complainant of the action taken.

Note:

Appointed advisors under a policy are not investigators or decision-makers. They help to clarify options available, answer questions and explain the policy.

The role of advisors is important to the successful implementation of the harassment and discrimination policy, but the success of the policy depends on the choice of persons to fulfil this responsibility. An advisor should be well respected within the firm and be able to discuss a complaint with the complainant or respondent, regardless of that person's seniority. He or she should be sensitive to the nature and effects of harassment and discrimination, and be trusted as a person who will observe the principles of confidentiality.

The number of appointed advisors usually depends on the number of staff, paralegals and lawyers in the firm, in addition to the culture and structure of the firm. The appointment of more than one advisor allows staff, paralegals and lawyers to have choices when requiring the assistance of an advisor. To the extent possible, a law firm should appoint advisors that reflect the diversity and the hierarchical structure of the firm.

An advisor should not condone harassment or discrimination. As a result, the policy suggests that, in instances where an advisor is made aware of harassment or discrimination that, if proven, would be a violation of human rights law, he or she should report the incident and inform the complainant of the action taken.

A law firm may also appoint the Discrimination and Harassment Counsel (DHC) to be an advisor under the policy. If that is the case, however, the mandate of the DHC is limited to providing advice about harassment or discrimination by lawyers or paralegals.

The Equality Committee

24. An Equality Committee is created. Members are appointed for a term of [numbers of years] years, renewable by the [name of management board]. The Equality Committee has no less than [number of] staff, paralegals or lawyers of the Firm. The Equality Committee is mandated to deal with complaints filed under this policy. Members of the Equality Committee must be knowledgeable of human rights law and principles, and of this policy and its application.

Note:

The sample policy suggests that an equality committee be created to deal with complaints of harassment or discrimination. The creation of such a committee provides an avenue for complainants to proceed to a committee of appointees knowledgeable on human rights issues, who represent different sectors of the organization and who have decision-making authority. Every effort should also be made to include members from diverse communities on the equality committee.

In lieu of an equality committee, it may be appropriate for a firm to appoint one or more members to handle complaints under the policy. Another option could be to appoint an existing committee to handle complaints. Firms should take into account their culture and context to determine what process would be the least intimidating and to ensure that complaints are brought forward.

External Avenues

25. While the Firm is committed to resolving incidents of harassment or discrimination internally, nothing in this policy precludes staff, paralegals or lawyers from pursuing other avenues, such as filing an application with the Human Rights Tribunal.

Initial Action by Complainant

26. A person who considers that she or he, or someone else, has been subjected to harassment or discrimination (the complainant) is encouraged to bring the matter to the attention of the person responsible for the conduct (the respondent).
27. Where the complainant does not wish to bring the matter directly to the attention of the respondent, or where such an approach is attempted and does not produce a satisfactory result, the complainant may approach a [insert position such as group leader, supervising paralegal or lawyer, Human Resources, Advisor] to seek assistance.

Note:

Directly approaching the person whose conduct has caused offence is usually the first step in a policy. Frequently, people are unaware that their conduct is offensive and all that is required to prevent its repetition is a simple statement that the conduct is unwelcome. However, power and status disparities between the respondent and the complainant may make it impossible or unreasonable for the complainant to approach the respondent. Therefore, such a first step should not be a mandatory step to the process.

A firm may wish to stipulate a time limit for reporting a complaint. If that is the case, it may be desirable to abide by the time limit of the *Code*, which stipulates that an application may be made “within one year after the incident to which the application relates; or if there was a series of incidents, within one year after the last incident in the series.”

The *Code* also allows a person to apply after the expiry of the time limit if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay. (see s. 34 of the *Code*) A firm may wish to include a clause to indicate that a complaint will not be dismissed simply because it has not been reported in a timely fashion. Frequently, fear of retaliation or embarrassment may cause a person to wait until the harassment or discrimination becomes unbearable before reporting the incident. The very act of having to report harassment or discrimination may also add to the individual’s distress.

It has been shown that complainants often feel uncomfortable, embarrassed, or ashamed when they talk about personal incidents of harassment. Some may also feel that they will be ignored, discredited, or accused of misunderstanding their superior’s intentions. Common reasons given for not reporting the incidents are that the complainant believes nothing would be done, that the complaint will be treated lightly or ridiculed or that the complainant will be blamed or suffer repercussions.

Informal Procedure

28. Once a complainant has approached [insert position such as group leader, supervising paralegal or lawyer, Human Resources, Advisors] the [insert position such as group leader, supervising paralegal or lawyer, Human Resources] provides the complainant with a copy of this policy and advises the complainant of:
- a. the right to lay a formal written complaint under this policy;
 - b. the availability of counselling and other support services provided by the Firm;
 - c. the right to be accompanied or represented by [legal counsel or other person of choice] at any stage of the process where the complainant is required or entitled to be present;

Note:

If the firm allows the complainant or respondent to be accompanied by legal counsel, it may wish to specify whether the firm covers the costs of legal counsel and whether paralegals or lawyers from the firms are allowed to act for either the complainant or the respondent.

- d. the right to withdraw from any further action in connection with the complaint at any stage; and
- e. other avenues of recourse available to the complainant, such as contacting the Discrimination & Harassment Counsel, contacting the Human Rights Legal Support Centre and/or filing an application with the Ontario Human Rights Tribunal, and where appropriate, any time limitations for filing an external complaint.

Outcome of Meeting

29. Where appropriate, the [insert position such as group leader, supervising paralegal or lawyer, Human Resources, Advisors] will offer the parties an opportunity to informally resolve the issue. No person is required to try to resolve the issue informally.
30. Where the complainant and the respondent are satisfied that they have achieved an appropriate resolution, the [insert position such as group leader, supervising paralegal or lawyer, Human Resources, Advisors] makes a confidential written record of the resolution and keeps it in a locked filing cabinet. The written record may be signed by both parties and both parties may also be given a copy of the resolution.
31. The [insert position such as group leader, supervising paralegal or lawyer, Human Resources, Advisors] should follow-up to ensure that the resolution is working.

Laying a Formal Complaint

32. A formal written complaint is filed with the Equality Committee. (See Appendix 2 for template form). The Equality Committee appoints one of its own members (the Appointed Member) to investigate the complaint. Where the complaint involves a member of the Equality Committee, the member withdraws from the Equality Committee until such time as the matter is resolved or closed.

Investigation Process

33. Any investigation process under this policy follows accepted principles of fairness, including the following:
 - a. impartiality;
 - b. the right to know the allegation and the defence;
 - c. the right to offer evidence and witnesses; and
 - d. the right to rebut relevant evidence.

Internal Investigation

34. The Appointed Member provides a copy of the complaint to the complainant and respondent, and interviews the complainant, respondent and witnesses.
35. This procedure is completed within [insert number of days] days of receipt of the formal complaint, unless a longer period is appropriate in the circumstances and does not disadvantage either the complainant or respondent.
36. The Appointed Member provides a written summary of findings which includes the allegations of harassment and discrimination, the facts and the findings, to the complainant and to the respondent. They each have one week of receipt of the summary of findings to reply unless a longer period is appropriate in the circumstances and does not disadvantage the complainant or respondent.
37. The Appointed Member files a formal report with the Equality Committee based on the summary of findings and on the replies from the complainant and the respondent. The formal report may also include recommendations on appropriate resolutions.

External Investigation

38. The Equality Committee may, at any stage of the process, decide that there are reasonable grounds to proceed with an external investigation. In that case, it appoints a neutral third party to act as the external investigator. The external

investigation follows the same process as the internal investigation described above.

Note:

Since staff, paralegals and lawyers of the firm usually have the right to inspect the contents of their own personnel file, it is important, to protect the confidentiality of witnesses and others, that details of the investigation and the evidence not be kept in the personnel file. Only the outcome of the investigation should be recorded in the personnel file.

Generally, the only person who has access to witness statements is the investigator. When the investigator provides his or her final report, he or she does not refer to witnesses by name.

Temporary Accommodation

39. The complainant may, at any time after a formal complaint has been filed, make a request to the Equality Committee or to the Appointed Member for temporary accommodation until the complaint resolution process comes to an end and every effort will be made to reasonably accommodate the complainant.

Note:

Temporary accommodation can include limiting contacts between the complainant and respondent by relocating the respondent to another area of the workplace or allowing the complainant to report to work with someone other than the respondent. One must be mindful that the complainant should not bear the inconvenience of job relocation. Care must be taken not to affect negatively the career development of the complainant as the process unfolds.

Action Taken Following Investigation

40. Based on the outcome of the investigation, the Equality Committee, in conjunction with the appropriate level of management, makes a decision about whether the policy has been violated and what action will be taken as a result of the findings. The complainant and the respondent are informed of the outcome of the investigation and any decisions as to whether the policy has been violated.

Types of remedial action

41. Based on the nature and severity of the violation, the remedial action may include an apology, education, counselling, verbal or written reprimand, transfer, a financial penalty, a suspension with or without pay or dismissal up to and including dismissal without notice. The remedial action may also include suspension or removal from the partnership.
42. Disciplinary actions that involve a financial penalty, suspension or removal from the partnership will be approved by the [Executive Committee]. Suspension or removal of a partner must proceed in accordance with the provisions of the partnership agreement.
43. Where the complaint is substantiated, the confidential outcome of the proceedings will be placed in the respondent's personnel file. Where the complaint is not substantiated, no documentation under this policy will be placed in any respondent's personnel file. All other documentation under this policy will be kept in a locked filing cabinet by the [Managing Partner].

Note:

A remedy should be based on the nature and severity of the violation; the more serious the violation, the harsher the remedy. It should be noted that harassment and discrimination policies are usually remedial in nature and aim at establishing a workplace that is respectful.

The resolution may include a reinstatement of the complainant if he or she was forced to terminate his or her employment due to harassment or discrimination, back pay for wages lost, restoration of benefits that may have been denied or an apology to the complainant.

Other remedial options include education and counselling for all parties, a verbal or written reprimand, a financial or monetary penalty as compensation for the humiliation, transfer of the harasser and in the most severe cases of a violation of the policy, a suspension with or without pay or dismissal up to and including dismissal without notice.

Harassment or Discrimination in the Provision of Services

44. The Firm recognizes that its staff, paralegals and lawyers may be subjected to harassment or discrimination by individuals who are not staff, paralegals or lawyers of the Firm, such as clients or opposing counsel. The Firm acknowledges its responsibility to support and assist staff, paralegals and

lawyers subjected to such harassment or discrimination and to do all it can to ensure that the behaviour stops.

45. The Firm also prohibits harassment and discrimination in the provision of services to third parties, including clients, suppliers or service providers. The Firm acknowledges its responsibility to address such behaviour.

Note:

Appeal Process and Other Avenues of Recourse

The sample policy does not provide an appeal process. An appeal process will depend upon how disciplinary measures are normally appealed in the firm. If there are no internal appeal procedures, a respondent who has been disciplined can take the matter to court.

A complainant should be informed of the right to file an application with the Human Rights Tribunal of Ontario if he or she is dissatisfied with the disposition of the complaint.

A complainant may also be informed that the Discrimination and Harassment Counsel (DHC) for the Law Society of Upper Canada offers confidential advice to those who may have been subjected to harassment or discrimination by a lawyer or paralegal. The DHC works independently from the Law Society. The Services offered by the DHC are available to anyone who has experienced discrimination or harassment by a paralegal or lawyer. The DHC can outline options for recourse and if both parties agree, attempt to resolve the complaint through mediation.

While the DHC does not have investigative powers, nor does it operate a formal complaints process that involves fact-finding, the DHC may be able to assist a complainant by intervening informally as a neutral facilitator or by conducting formal mediation, where appropriate.

Appendix 1: Examples of Harassment and Discrimination

Note:

It is not necessary to include examples of harassment or discrimination. However, some firms prefer to include examples to provide staff, paralegals and lawyers with some guidance regarding the types of behaviour that is inappropriate. Providing examples also serves to educate the firm.

The following are examples of workplace discrimination and harassment,

- a unwelcome remarks, jokes, slurs, innuendos or taunting based on a person's place of origin;
- b interference with a person's ability to perform his or her work responsibilities because of a person's disability;
- c refusing to work or interact with a staff, paralegal or lawyer based on a person's race;
- d sexist jokes causing offence;
- e sexually suggestive or offensive comments, remarks or gestures;
- f unwelcome physical contact, such as unwanted touching;
- g propositions of physical intimacy;
- h demands for dates or sexual favours, when a person knows or ought to know that they are unwelcome;
- i sexual and/or offensive e-mail messages;
- j comments, signs, caricatures, or cartoons displayed in the workplace that depict minority racial or religious groups in a demeaning manner;
- k demeaning racial remarks, jokes or innuendoes about a staff, paralegal or lawyer told to other employees, and racist, derogatory or offensive pictures, graffiti or materials related to race or other grounds such as ethnic origin;
- l delivery of racist and/or offensive e-mail message or exchange of racist and/or offensive message through any form of communication, including social media such as twitter or facebook;
- m repeated slurs directed at the language and accent of a particular group;
- n constant unwelcome remarks based on false assumptions about a person's background or beliefs.

Appendix 2 Complaint Form

**Complaint Form under Workplace Harassment
and Discrimination Policy**

I _____ working as a _____ in the
(Name of complainant) (Title)

_____ have reasonable grounds to believe that _____
(Practice Group) (Name of respondent)

working as a _____ in the _____
(Title) (Practice Group)

has discriminated/harassed against me in employment on or about

_____.
(Date)

The grounds of discrimination or harassment are:

The particulars are as follows:

Signed at: (place) _____ on: (date) _____

Complainant's signature: _____

**Response Form under Workplace Harassment
and Discrimination Policy**

I _____ working as a _____ in the
(Name of respondent) (Title)

_____ have received a complaint signed by _____
(Practice Group) (Name of complainant)

working as a _____ in the _____
(Title) (Practice Group)

alleging that I have discriminated/harassed against him/her in employment on or about

_____.
(Date)

The grounds of the alleged discrimination or harassment are:

I deny the allegations and provide particulars as follows:

Signed at: (place) _____ on: (date) _____

Respondent's signature: _____

CONSIDERATIONS FOR SMALL LAW FIRMS ⁴⁴

The legal and professional responsibility to prevent and respond to workplace harassment and discrimination and the principles applicable in the effective implementation and review of the policy also apply to small law firms. Management of the firm should support the policy and ensure that it is clear, fair, known and applicable to everyone in the law firm.

Even in the small law firm context, prospective new staff, paralegals and lawyers should be informed of the existence of the policy. Ongoing education and periodic review of the policy are also important.

The biggest difference between small law firms and larger organizations is that smaller organizations will frequently have limited financial resources or personnel to adopt the same kind of processes as a larger law firm. This resource issue will impact what a policy for a smaller firm will look like.

In lieu of an equality committee, smaller firms may wish to appoint one person, usually a senior member of the law firm, to implement the policy. He or she should be well positioned to be aware of situations of harassment or discrimination, be able to take action when necessary and set an example of appropriate firm behaviour.

The senior member's role may include interviewing the complainant, documenting the details of the complaint, identifying the remedy that is sought and whether the complainant wishes to proceed through mediation.

It is suggested that small law firms provide staff, paralegals and lawyers of the firm with accessible information about what specific behaviour is unacceptable; the procedure if they want to make a complaint and the types of remedial or disciplinary actions that may be taken by the law firm.

⁴⁴ Based on *Anti-Harassment Policies for the Workplace: An Employer's Guide* (Ottawa: Canadian Human Rights Commission, December 2001).

PART II – PREVENTING WORKPLACE VIOLENCE

OVERVIEW OF LEGAL PRINCIPLES

Under the *Occupational Health and Safety Act* (“*OHSA*”), employers in Ontario have an obligation to prepare a policy with respect to workplace violence and develop and maintain a program to implement the policy.⁴⁵ For employers with more than five regular employees, the policies must be in written form.⁴⁶ This guide includes a sample policy on preventing workplace violence, along with information about how to develop the policy and other legal obligations under the *OHSA*.

Definitions

“Workplace” is defined under the *OHSA* as “any land, premises, location or thing at, upon, in or near which a worker works”. There are exceptions to this definition. For example, the *OHSA* does not apply to “work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection therewith”.⁴⁷ It is unlikely therefore, that the *OHSA* would apply to the work of a lawyer or paralegal working from home.

“Workplace Violence” is defined in the *OHSA* as follows:

- the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;
- an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker;
- a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

“Worker” is defined as a “person who performs work or supplies services for monetary compensation [...]”.⁴⁸ For the purpose of this guide, the term “employee” is used instead of the term “worker” and includes staff, paralegals and lawyers, including associates and partners of the firm.

General Obligations

Both employers and employees have obligations under the *OHSA*.

Employers must,

⁴⁵ Subsection 32.0.1 and subsection 32.0.2 of the *OHSA supra* note 4.

⁴⁶ Subsection 32.0.1(2) of the *OHSA, ibid.*

⁴⁷ Section 1 and subsection 3(1) of the *OHSA, ibid.*

⁴⁸ Section 1 of the *OHSA, ibid.*

- take every precaution reasonable in the circumstances to protect employees;⁴⁹
- provide information, instruction and supervision to employees to protect the health and safety of employees;⁵⁰
- provide assistance and co-operation to a joint health and safety committee or health and safety representative;⁵¹
- prepare and review, at least annually, the written occupational health and safety policy and develop and maintain a program to implement that policy;⁵²
- assess the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work.⁵³

Employees must,

- act respectfully towards other employees in the workplace and when participating in work-related activities;
- work in compliance with the *OHSA*;⁵⁴
- not engage in any prank, contest, feat of strength, unnecessary running or rough and boisterous conduct;⁵⁵
- protect and ensure their immediate physical safety in the event of workplace violence and report the incident to the appropriate authority promptly (See **Appendix A** for examples of workplace violence);
- cooperate with any efforts to investigate and resolve matters arising under the policy;
- where applicable, keep their security access cards on their person or in a secure location; and
- alert the security personnel of any suspicious situation or person in the confines of the facility.

Developing and Maintaining a Program

In addition to the obligation under the *OHSA* to prepare a policy with respect to workplace violence and to review the policy as often as is necessary, but at least annually, the *OHSA* requires employers to assess the risks of workplace violence that may arise due to the nature of the workplace, the type of work or the conditions of work.

⁴⁹ Subsection 25(2)(h) of the *OHSA*, *ibid.*

⁵⁰ Subsection 25(2)(a) of the *OHSA*, *ibid.*

⁵¹ Subsection 25(2)(e) of the *OHSA*, *ibid.*

⁵² Subsection 32.0.1 (1) of the *OHSA*; Subsection 32.0.2 (1) of the *OHSA*, *ibid.* This applies to workplaces where five or more employees are regularly employed. See subsection 25(2)(j) of the *OHSA*, *ibid.*

⁵³ Subsection 32.0.3 (1) of the *OHSA*, *ibid.*

⁵⁴ Subsection 28(1)(a) of the *OHSA*, *ibid.*

⁵⁵ Subsection 28(2)(c) of the *OHSA*, *ibid.*

The workplace violence program must include,

- measures and procedures to control the risks that are identified in the employer's assessment;
- measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur;
- measures and procedures for employees to report incidents of workplace violence to the employer or supervisor;
- how the employer will investigate and deal with incidents or complaints of workplace violence; and
- any other elements prescribed in regulations.⁵⁶

In assessing the risk of workplace violence, an employer must,

- take into account the circumstances of the workplace and circumstances common to similar workplaces, as well as any other elements prescribed in regulation (See **Appendices B and C** for samples of workplace violence surveys to be completed by employees and supervisors);⁵⁷
- develop measures and procedures to control identified risks that are likely to expose a worker to physical injury;⁵⁸
- advise the joint health and safety committee or health and safety representative of the assessment results and if in writing provide a copy to the committee or representative;⁵⁹
- advise the employees of the assessment results, if there is no committee or representative and if in writing, provide copies of the assessment to the employees on request or advise the workers how to obtain copies;⁶⁰
- repeat the assessment as often as necessary to ensure the workplace violence policy and related program continue to protect employees from workplace violence and inform the joint health and safety committee, health and safety representative, or employees of the results of the re-assessment.⁶¹

The *Developing Workplace Violence and Harassment Policies and Programs: What Employers Need to Know*⁶² report ("What Employers Need to Know report") produced by the Occupational Health and Safety Council of Ontario, recommends that the workplace violence prevention program include four steps: identifying the hazards of workplace violence, assessing the risks of workplace violence, controlling the risks of workplace violence through, for example the development of a policy, and monitoring and evaluating.⁶³ Firms may also wish to consult the *Developing Workplace Violence and Harassment Policies and Programs: A Toolbox* for templates.⁶⁴

⁵⁶ Subsection 32.0.2 (2) of the *OHSA*, *ibid.*

⁵⁷ Subsection 32.0.3 (2) of the *OHSA*, *ibid.*

⁵⁸ Subsection 32.0.2 (2) (a) of the *OHSA*, *ibid.*

⁵⁹ Subsection 32.0.3 (3) (a) of the *OHSA*, *ibid.*

⁶⁰ Subsection 32.0.3 (3) (b) of the *OHSA*, *ibid.*

⁶¹ Subsection 32.0.3 (4); 32.0.3 (5) of the *OHSA*, *ibid.*

⁶² At http://www.labour.gov.on.ca/english/hs/pubs/wvps_guide/index.php.

⁶³ *Ibid.* at 11.

⁶⁴ See http://www.labour.gov.on.ca/english/hs/pubs/wvps_toolbox/index.php.

In step 1, it is suggested that firms use information through a survey, focus group or other committees to,

- identify the risks that employees perceive and their sense of personal safety in the workplace;
- consider the workers' experiences with violence;
- identify jobs or locations in which workplace violence is a concern; and
- gather opinions about the effectiveness of the measures, procedures, and training in place.

Employers may also wish to review internal reports of incidents involving workplace violence.

The samples of workplace violence surveys, to be completed by employees and supervisors, are precedents that can be used by law firms to assess the risk of workplace violence. Employers do not have to use the sample surveys, or any survey, to comply with the *OHSA*.

In step 2, it is suggested that the employer assess the risks of violence in the workplace. The information gathered in step 1 will assist to identify whether there are jobs or locations in which violent incidents have already occurred, how employees feel about their safety at work and whether there are higher risks of workplace violence.

In step 3, the report proposes that the employer adopt a workplace violence policy and program based on steps 1 and 2.

The *OHSA* requires that employees receive information and instruction on the content of the policy and program, including the measures and procedures that apply to the work, and the complaint and investigation processes.

The format for the instruction or training is not specified. It could be integrated into orientation training, health and safety training, anti-harassment and anti-discrimination training or it could be specific to workplace violence prevention training.

In step 4, it is suggested that employers monitor and evaluate the workplace violence policy and program to ensure its effectiveness. The *OHSA* requires that employers review the policy as often as necessary, and at least annually. It also requires that the risks of workplace violence be reassessed as often as necessary in order to ensure that the policy and program continue to protect workers.

Obligations related to Releasing Personal Information

An employer must ensure that an employee is provided with information, instruction and supervision to protect the health and safety of the employee.⁶⁵ This includes the duty to provide information, including personal information, related to a risk of workplace violence from a person with a history of violent behavior.⁶⁶ Employers must limit this duty to circumstances where,

- the employee can be expected to encounter the violent person in the course of his or her work; and
- the risk of workplace violence is likely to expose the employee the physical injury.⁶⁷

Employers and supervisors must also not disclose more information than is reasonably necessary for the protection of an employee from physical injury.⁶⁸

Please note that the *OHSA* does not define a “history of violent behavior”.

Obligations related to Domestic Violence

Although the *OHSA* does not define domestic violence, the *What Employers Need to Know* report provides the following definition: “A pattern of behavior used by one person to gain power and control over another person with whom he/she has or has had an intimate relationship. This pattern of behavior may include physical violence, sexual, emotional, and psychological intimidation, verbal abuse, stalking, and using electronic devices to harass and control”.⁶⁹

When employers are aware, or ought reasonably to be aware, that domestic violence may occur in the workplace, they must take every precaution reasonable in the circumstances for the protection of employees when it would likely expose an employee to physical injury.⁷⁰

It is in the best interest of employers and employees to be able to recognize the signs of domestic violence. The document *Recognizing Domestic Violence in the Workplace* outlines some signs that may be noticed in the workplace.⁷¹

⁶⁵ Subsection 25 (2) (a) of the *OHSA*, *supra*, note 4.

⁶⁶ Subsection 32.0.5 (3) of the *OHSA*, *ibid.*

⁶⁷ *Ibid.* at (a) and (b), *ibid.*

⁶⁸ Subsection 32.0.5 (4) of the *OHSA*, *ibid.*

⁶⁹ *Supra* note 61 at 22.

⁷⁰ Subsection 32.0.4 of the *OHSA*, *supra* note 4.

⁷¹ See http://www.labour.gov.on.ca/english/hs/pubs/wvps_toolbox/toolbox_8.php

Right to Refuse to Work

An employee may refuse to work or do particular work where he or she has reasons to believe that workplace violence is likely to endanger him or her.⁷² When that is the case, the employee must promptly report the circumstances of the refusal to his or her employer or supervisor who will investigate.

Until the investigation is completed, the employee must remain in a safe place that is as near as reasonably possible to his or her work station; and available to the employer or supervisor for the purposes of the investigation.⁷³

Where, following the investigation or any steps taken to deal with the circumstances that caused the employee to refuse to work, the employee has reasonable grounds to believe that the workplace violence continues to be likely to endanger him or her, the employee may continue to refuse to work and an inspector under the *OHS*A will be notified.⁷⁴

The inspector investigates the refusal to work and decides whether a circumstance is likely to endanger the employee or another person. The inspector gives his or her decision, in writing, as soon as is practicable, to the employer and the employee.

Pending the investigation and decision of the inspector, the employee remains, during the employee's normal working hours, in a safe place that is as near as reasonably possible to his or her work station and available to the inspector for the purposes of the investigation.

A person who refuses to work under the *OHS*A is deemed to be at work and the person's employer shall pay him or her at the regular or premium rate.

⁷² Section 43(3)(b.1) of the *OHS*A, *supra* note 4.

⁷³ *Ibid.* section 43(5)

⁷⁴ *Ibid.* section 43(6).

SAMPLE POLICY – PREVENTING AND RESPONDING TO WORKPLACE VIOLENCE

The following is a sample policy that firms can use to develop their own policy. The sample policy includes the following: statement of principles, objectives and application of the policy. The procedures include informal procedures and formal procedures. Law firms are not obligated to adopt all or some of these options in their policies. Policies should be developed based on context and the culture of the firm.

POLICY FOR _____ (HEREINAFTER “THE FIRM”)

Note: Square brackets “[]” are used throughout the sample policy to indicate that firms should include terminology or information relevant to their organization.

Statement of Principles

1. The Firm recognizes its obligations under the *Occupational Health and Safety Act* and is committed to,
 - a. promoting a violence-free workplace and protecting workers from workplace violence;
 - b. investigating reported incidents of workplace violence in an objective and timely manner;
 - c. taking necessary action to respond to incidents of workplace violence; and
 - d. providing support to complainants.
2. The Firm is committed to providing a work environment that promotes equality and ensures that all individuals are treated with respect and dignity.
3. The Firm believes that violent behaviour in the work place is unacceptable and will not tolerate such behaviour. Regardless of seniority, individuals found to have engaged in behaviour constituting violence in the workplace may be severely disciplined.

Objectives

4. The objectives of this policy are to,
 - a. educate employees, including staff, paralegals and lawyers about workplace violence and make them aware that workplace violence is considered a serious offence for which necessary action will be taken;
 - b. encourage those subjected to workplace violence to access any assistance they may require in order to pursue a complaint;
 - c. advise individuals of available recourse if they are subjected to, or become aware of, workplace violence; and

- d. make employees including staff, paralegals and lawyers aware that they must be committed to maintaining a healthy and safe work environment.

Definition of Workplace Violence

5. “Workplace violence” means,
 - a. the exercise of physical force by a person against an employee, in the workplace, that causes or could cause physical injury to the employee;
 - b. an attempt to exercise physical force against an employee, in the workplace, that could cause physical injury to the employee; or
 - c. a statement or behaviour that an employee can reasonably interpret as a threat of physical force against him or her, in the workplace.⁷⁵

Application of Policy

6. This policy applies to all staff, paralegals and lawyers of the Firm, whether part-time, full-time or casual and to others in the work context, such as volunteers, articling students, co-op students, dependant and independent contractors (“staff, paralegals and lawyers”).
7. The policy applies to employment relationships and professional dealings within the context of the legal work environment and includes dealings by and between partners, along with dealings related to the partnership.
8. This policy covers any legal work-related environment and professional dealings including,
 - a. any place where the business of the firm is conducted or where social and/or other functions related to the business of the firm occur;
 - b. activities that are incidental or connected to the business of the firm, including activities that are incidental or connected to the business of partners or the partnership;
 - c. incidents that occur after the official business of a meeting but are incidental or connected to the meeting; or
 - d. conduct outside the workplace which is likely to be prejudicial to the business of the firm.

⁷⁵ See Appendix A examples of workplace violence.

Note:

The *OHSA* applies to workers, which is defined as a person who performs work or supplies services for monetary compensation. This definition does not cover, for example, a volunteer. Similarly, the definition of workplace covers any land, premise, location or thing at, upon, in or near which an employee works, but may not cover, for example, activities that are incidental or connected to the business of the firm.

A firm may wish to draft its Workplace Violence Prevention Policy to make it consistent with its harassment and discrimination prevention policy and with the *Code*. This sample policy uses this approach and is drafted to be applicable to all those in the work context (including volunteers), to all types of employment relationships (including partners), and to any legal work-related environment and professional dealings is consistent with the definition of employee.

Workplace Violence Prevention Committee and Representative

9. A Workplace Violence Prevention Committee (“the Committee”) is created. Members of the Committee are appointed for a term of [number of years] renewable by the [name of management board]. The Committee will address matters under this policy and related procedures. One member of the Committee will be designated as the Workplace Violence Prevention Representative (“the Committee Representative”).
10. The Committee is responsible for,
 - assessing and reassessing as necessary the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work;
 - maintaining a copy of the assessment in writing;
 - providing staff, paralegals and lawyers with information and instruction on the content of the policy and programs with respect to workplace violence;
 - identifying and coordinating the education needs of staff, paralegals and lawyers under the policy;
 - developing workplace arrangements that minimize the risk of workplace violence;
 - taking every precaution reasonable in the circumstances for the protection of staff, paralegals and lawyers;
 - providing staff, paralegals and lawyers with information, including personal information, related to a risk of workplace violence from a person with a history of violent behaviour if the staff, paralegal or lawyer can be expected to encounter that person in the workplace and the risk of workplace violence is likely to expose the him or her to physical injury. The Committee shall refrain from disclosing more personal information in the circumstances than is reasonably necessary to protect the employee from physical injury;

- reporting on a yearly basis to staff, paralegals and lawyers on how the policy has been applied; and
- posting the policy in a conspicuous place in the workplace.

PROCEDURES

Immediate Response

At no time should a staff, paralegal or lawyer remain in a conversation, situation or meeting in which workplace violence is occurring or in which he or she reasonably believes workplace violence is about to occur. When a number of Firm staff, paralegals and/or lawyers are involved in, or are witnesses to, an incident of workplace violence, their safety should be taken into consideration when addressing the workplace violence.

At the Firm's Office

If a staff, paralegal or lawyer of the Firm is concerned about or involved in a situation of workplace violence while at the offices of the Firm, he or she should *immediately*

- remove himself or herself from the situation, where possible;
- contact security personnel;
- call 911 or the police in cases of imminent physical violence or if the circumstances warrant; and
- report the matter to the Committee Representative at the earliest opportunity, and no later than the next day.

Working off-site

If a staff, paralegal or lawyer of the Firm is working off-site and he or she is concerned about or involved in a situation of workplace violence, he or she should *immediately*

- remove himself or herself from the situation;
- call 911 or the police in cases of imminent physical violence or if the circumstances warrant; and
- report the matter to the Committee Representative at the earliest opportunity, and no later than the next day.

Report to the Committee

The Committee Representative records and reports any incidence of workplace violence by filing an incident report with the Committee as soon as possible, and no later than the next day.⁷⁶

Duty to Report to Health and Safety Committee

The Committee Representative informs the Health and Safety Committee of a violent incident within 4 days if the staff, paralegal or lawyer is incapacitated from performing his or her job or requires medical attention.

⁷⁶ See Appendix D for a sample workplace violence incident report form.

Duty to Report to Ministry of Labour

If a workplace violence incident results in a person being killed or critically injured, the [Committee Representative or other person in authority at the Firm]

- immediately notifies, by direct means such as telephone, a Ministry of Labour inspector, the workplace's joint health and safety committee or health and safety representative and union, if any; and
- within 48 hours notifies, in writing, a director of the Ministry of Labour, giving the circumstances of the occurrence and any information that may be prescribed.

Investigation

Upon receipt of an incident report of workplace violence, the Committee determines whether there are reasonable grounds to proceed with an investigation under the policy. The investigation is conducted by one or more person appointed, either internally or externally, by the Committee to conduct the investigation. Any investigation is completed within six months, unless delays occur in good faith and no substantial prejudice results to any person affected by the delay.

The investigation process follows accepted principles of fairness, including,

- impartiality and objectivity;
- the right of the parties to know the allegation and the defence;
- the right of the parties to offer evidence and witnesses; and
- the right of the parties to rebut relevant evidence.

Once the investigation is concluded, a formal written report is filed with the Committee. The report includes the allegations of workplace violence, the facts and the findings.

Based on the findings of the investigation, the appropriate level of management, makes a decision about whether the policy has been violated and what action, if any, will be taken as a result of the findings.

Domestic Violence

If a supervisor becomes aware, or ought reasonably to be aware, of domestic violence that would likely expose a staff, paralegal or lawyer to physical injury and could occur in the workplace, the supervisor takes every precaution reasonable in the circumstances for the protection of the employee.

In such circumstances, the supervisor should contact [security personnel or other measure that the Firm may have in place]. If a staff, paralegal or lawyer believes that he or she is at risk of domestic violence while at the Firm, he or she should inform [security personnel or other measure that the Firm may have in place] as soon as reasonably possible.

Retaliation and Malicious Complaints

The Firm prohibits *reprisal or threats of reprisal* against anyone who makes use of this policy or takes part in an investigation under this policy. Action, which may include disciplinary action, will be taken against any person who retaliates against a staff, paralegal or lawyer who reports workplace violence.

A *malicious or bad faith complaint* made under this policy will lead to action, and may include disciplinary action, against the responsible employee. It is however appropriate to file a complaint, even if the complaint is not successful, if the complaint is made in good faith.

Right to Refuse to Work

A staff, paralegal or lawyer may refuse to work or do particular work where he or she has reasons to believe that workplace violence is likely to endanger himself or herself. In such cases, the staff, paralegal or lawyer will promptly report the circumstances of the refusal to the Committee Representative who will investigate.

Until the investigation is complete, the staff, paralegal or lawyer remains in a safe place that is as near as reasonably possible to his or her workstation; and available for the purposes of the investigation.

Where, following the investigation, the staff, paralegal or lawyer has reasonable grounds to believe that the workplace violence continues to endanger him or her, he or she may continue to refuse to work and an *OHS*A inspector will be notified to investigate and render a decision.

Pending the investigation and decision, the staff, paralegal or lawyer remains, during normal working hours, in a safe place that is as near as reasonably possible to his or her workstation and available to the inspector for the purposes of the investigation.

A staff, paralegal or lawyer who refuses to work under the policy will be deemed to be at work and will be compensated at the regular or premium rate as the case may be.

Types of Remedial Action

Based on the nature and severity of the violation, the remedial action may include an apology, education, counselling, verbal or written reprimand, transfer, a financial penalty, a suspension with or without pay or dismissal up to and including dismissal without notice. The remedial action may also include suspension or removal from the partnership.

Disciplinary actions that involve a financial penalty, suspension or removal from the partnership will be approved by the [Executive Committee]. Suspension or removal of a partner must proceed in accordance with the provisions of the partnership agreement.

Where the complaint is substantiated, the confidential outcome of the proceedings will be placed in the respondent's personnel file. Where the complaint is not substantiated, no documentation under this policy will be placed in any respondent's personnel file. All other documentation under this policy will be kept in a locked filing cabinet by the [Managing Partner].

Other Avenues of Recourse

An individual affected by workplace violence has the right to pursue their concern through alternate forums such as mediation, or other forms of dispute resolution. The policy does not prevent an individual from pursuing other remedies to an incident of workplace violence such as a criminal or civil action, an application to the Ontario Human Rights Tribunal or a complaint with the Law Society of Upper Canada.

Confidentiality

To the extent practicable and appropriate under the circumstances, and subject to the duty to provide information, including personal information, related to a risk of workplace violence from a person with a history of violent behaviour, confidentiality is maintained throughout the process, including confidentiality of records of complaints, content of meetings, interviews, results of investigations and other relevant materials.

Assistance

A Firm the staff, paralegal or lawyer with questions, concerns or a complaint regarding workplace violence may contact Committee members for help and advice.

Review

The Firm will review this policy as often as necessary, but at least annually.

Appendix A

Examples of Workplace Violence

The following may be examples of workplace violence,

- a. verbally threatening to attack a employee;
- b. leaving threatening notes at or sending threatening e-mails;
- c. shaking a fist in an employee's face;
- d. wielding a weapon at work;
- e. hitting or trying to hit a colleague;
- f. throwing an object at a colleague;
- g. sexual violence against a colleague.⁷⁷

⁷⁷ *Workplace Violence and Harassment: Understanding the Law* (Toronto: Occupational Health and Safety Branch, Ministry of Labour, March 2010) at 1.

Appendix B

Sample Workplace Violence Survey to be Completed by Employees

Adapted from the Workplace Survey of the Ministry of Labour⁷⁸

The survey is used to ask employees about their perception of their safety in the workplace. Employers do not have to use this survey, or any survey, to comply with the *OHSA*.

Department:

Position:

1. Do you feel safe at work?
2. In your opinion, are there adequate measures to protect you from workplace violence?
3. If you answered no, please indicate whether the following areas require improvement:
 - a. Lighting
 - b. Security
 - c. Restrictions on public access
 - d. Security of restrooms
 - e. Security of parking lots
 - f. Emergency procedures
4. Have you been hit, pushed, physically assaulted, or otherwise attacked while working at the firm?
 - a. If yes, where and when did the incident occur?
 - b. Did you report the incident?
 - c. How did you report the incident?
 - d. Who assaulted or attacked you?
5. Have you been sexually assaulted or been the target of a sexual incident while working for the firm?
 - a. If yes, where and when did the incident occur?
 - b. Did you report the incident?
 - c. How did you report the incident?
 - d. Who assaulted or attacked you?
6. Have you been harassed (sexual harassment, insults, or bullying) while working at the firm?
 - a. If yes, where and when did the incident occur?
 - b. Did you report the incident?
 - c. How did you report the incident?
 - d. Who assaulted or attacked you?
7. Are there procedures in place to report violent incidents?
8. Are they easy to understand?

⁷⁸ http://www.labour.gov.on.ca/english/hs/pubs/wvps_toolbox/toolbox_2.php

9. Are they broadly accessible?
10. Would you fear retaliation if you were to report workplace violence?
11. Does your supervisor or manager react promptly to incidents of workplace violence?
12. Are support programs in place to help you if you are directly or indirectly affected by workplace violence?
13. Do you think you are prepared to handle a violent situation, a threat, or escalating behaviours by clients?

The completion of this section is voluntary. Information gathered from this section will only be used for statistical analysis and to identify trends in workplace violence. Complete individual confidentiality will be maintained.

Male Female

Length of service 1 year
 1 – 3 years
 3 –5 years
 5 – 10 years
 more than 10 years

Appendix C

Sample Workplace Violence Risk Assessment Survey to be Completed by Supervisors

Date:

Completed
By:

This form is designed to assist in identifying the potential risk of physical violence within your work area. It should be completed by a supervisor or designate.

Section 1: Work area

Please indicate the work area your responses relate to in this document:

Section 2: History

Are you aware of any incidents where employees in your department have experienced or been threatened with physical violence?

No Yes – Please describe

Section 3: Identifying higher-risk activities

Do employees in your department:

a) Handle cash or valuables? No Yes

b) Transport people? No Yes

c) Transport items of significant value? No Yes

d) Deal with the public? No Yes

e) Deal with people who may be under the influence of drugs or alcohol? No Yes

f) Deal with people who are mentally ill, or otherwise troubled or distressed? No Yes

a) Perform security or related functions? No Yes

b) Perform duties that may result in a negative or confrontational response? No Yes

Section 2: History

Comments:

Section 4: Factors that increase the risk of violence

For areas whose employees meet with others (clients, lawyers, paralegals, suppliers, vendors, etc.) outside the Firm's premises:

- a) Which departments/positions hold these types of meetings?
- b) Where are these meetings held? (Check all that apply and provide details if appropriate)

the other persons' offices

the other persons' homes

"Neutral" locations (coffee shop, restaurant, library, etc.)

Other (please specify)

- c) Are these meetings ever held outside business hours (8am – 6pm)? No Yes

Section 5: Prevention

- a) Which precautions have already been taken to reduce the risk of violence in your department? (Check all that apply and provide details)

Physical/environmental controls

Administrative procedures

Violence prevention training

Documentation/handouts

Other (please specify)

Medical Attention Required:

Yes No

Were the police or other law enforcement authorities contacted?

Yes No

Additional Comments

The purpose of this form is to document your claim to assist in a thorough investigation of the complaint.

Signature of person reporting incident

Date

Upon completion, please forward to: _____

Resources and Tools on Workplace Violence

Brian Kreissl, Andrew Treach and Judy Lutz, *Bill 168 Implementation Guide* (Toronto: Carswell, 2010)

The Ministry of Labour resources include the following:

- *Developing Workplace Violence and Harassment Policies and Programs: What Employers Need to Know*
- *Developing Workplace Violence and Harassment Policies and Programs: A Toolbox*
- *Domestic Violence Doesn't Stop When Your Worker Arrives at Work: What Employers Need to Know to Help*
- *Workplace Violence and Harassment: Understanding the Law*

The Ministry of Labour's resources are available at
<http://www.labour.gov.on.ca/english/hs/topics/workplaceviolence.php>