



LAWYERS | AVOCATS

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November 16, 2016

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Dear Ms. Spears:

RE: **Opinion on Working Group's Recommendations re Challenges Facing Racialized Licensees**

The Law Society of Upper Canada ("**Law Society**") has asked us to provide a legal opinion on the following question in respect of its *Challenges Faced by Racialized Licensees Working Group Final Report*, ("**Final Report**"):

Are any of the following recommendations – 3 (1), (2) and (3) – inconsistent with the rights and obligations of The Law Society of Upper Canada and its licensees under the *Law Society Act*, the Ontario *Human Rights Code* and/or the *Canadian Charter of Rights and Freedoms*?

The recommendations constitute three subsections of Recommendation 3 in the *Final Report* dealing with:

The Adoption of Equality, Diversity and Inclusion Principles and Practices

The Law Society will:

- 1) require every licensee to adopt and to abide by a statement of principles acknowledging their obligation to promote equality, diversity and inclusion generally, and in their behaviour towards colleagues, employees, clients and the public;



- 2) require a representative of each legal workplace of at least 10 licensees in Ontario to develop, implement and maintain a human rights/diversity policy for their legal workplace addressing at the very least fair recruitment, retention and advancement; and
- 3) require a representative of each legal workplace of at least 10 licensees in Ontario to complete, every two years, an equality, diversity and inclusion self-assessment for their legal workplace, to be provided to the Law Society.

(Hereinafter the “**Recommendations**”)

Our opinion is organized as follows:

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## 1. Executive Summary

The Law Society has identified a significant problem in the lawyer and paralegal professions: widespread barriers experienced by racialized licensees at all stages of their careers. In its *Final Report*, the Working Group noted, at page 4:

The qualitative and quantitative data the Working Group obtained from the engagement process identified widespread barriers experienced by racialized licensees within the legal professions at all stages of their careers.

The Working Group has proposed several recommendations, in particular, Recommendation 3, dealing with the Adoption of Equality, Diversity and Inclusion Principles and Practices. The Law Society has asked us to determine whether the three specific recommendations under Recommendation 3 are inconsistent with the *Law Society Act* (“*LSA*”), the Ontario *Human Rights Code* (“*Code*”), and the *Canadian Charter of Rights and Freedoms* (“*Charter*”). We have concluded as follows:

- Recommendation 3(1) is consistent with the rights and obligations of the Law Society and its licensees under the *LSA*, the *Code*, and the *Charter*. The Law Society has an obligation to promote human rights in the legal profession and licensees are already bound by human rights equality, diversity and inclusion principles under their respective professional rules of conduct and the *Code*.

The implementation challenge that we envisage is that, for in-house licensees or licensees working in government, their employer may already have a human rights policy in place so there may be inconsistencies between the employer’s policy and the licensee’s statement of principles. While we describe this as a “challenge,” the challenge may be more apparent than real.

- Recommendation 3(2) is consistent with the rights and obligations of the Law Society and its licensees under the *LSA*, the *Code*, and the *Charter* assuming that the “representative” referred to in the Recommendation is a licensee of the Law Society and assuming that the intended benefit of such a human rights/diversity policy is limited in its application to licensees only. We recommend that the Working Group amend this Recommendation to clarify the above limits and application of the Recommendation.

While we acknowledge that Recommendation 3(2) may face some implementation challenges, we do not see them as insurmountable. We note that Recommendation 3(2) uses the word “maintain,” which we interpret as meaning “maintenance of” or “providing support to.” However, “maintain” does not necessarily mean making decisions under the policy. We suggest that the measure of whether the representative is implementing and maintaining the human rights/diversity policy be based on effort and not purely on outcome.

- Recommendation 3(3) is consistent with the rights and obligations of the Law Society and its licensees under the *LSA*, the *Code*, and the *Charter* assuming that the “representative” referred to in the recommendation is a licensee of the Law Society and assuming that the intended benefit of the self-assessment is limited in its application to licensees only. We recommend that the Working Group amend this Recommendation to clarify the above limits and scope of application to the Recommendation.

We acknowledge that nothing in Recommendation 3(3) can compel an employer (who is not a licensee) to complete and submit a self-assessment for its workforce. Rather, this Recommendation simply requires a representative licensee in a given legal workplace of 10 licensees or more to conduct a self-assessment *amongst licensees* and report their findings to the Law Society. This is more akin to a licensee completing their annual report for the Law Society, but in a collaborative way with all other licensees in their workplace.

We determined that, under the *LSA*, the Law Society and its licensees have the following relevant rights and obligations:

- The Law Society has a duty to advance the cause of justice and the rule of law.
- The Law Society has a duty to facilitate access to justice for the people of Ontario.
- The Law Society has a duty to protect the public interest.
- The Law Society has a duty to act in a timely, open and efficient manner.
- Regulation should be proportionate to the regulatory objectives intended.
- Licensees have a duty to discharge all their professional responsibilities including to other members of the profession honourably and with integrity.
- Licensees have a special responsibility to recognize the diversity of the Ontario community and to respect human rights.
- Licensees have a duty to advance the goals of the legal profession.

- Lawyers should not hesitate to speak out against an injustice.
- Licensees have a special responsibility to respect the requirements of human rights including with respect to the professional employment of others in the profession and with respect to licensees' employment practices.
- The Law Society has historically acted to remove obstacles to the profession and to provide previously excluded groups the opportunity to become members of the profession.

The Law Society's regulatory authority under the *LSA* extends to regulating licensees. The Law Society does not have authority to regulate non-licensees or other types of enterprises. However, there is nothing in the *LSA* that prohibits the Law Society from regulating licensees that are employed "in-house" or in government legal departments.

Human rights law in Ontario is governed by the *Code*. The *Code* applies to every person in Ontario, including public and private institutions and businesses. The *Code* regulates conduct in certain social areas and in respect of certain prohibited grounds. It does not regulate thought, belief, or conscience. Individuals are free to think and believe what they want including disagreeing with the precepts of equality and non-discrimination in the *Code*; however, it is at the point of conduct that their freedom is constrained.

The *Code* has primacy over any other statute in Ontario (generally, in cases of conflict, other legislation must conform to the *Code*); and is viewed by the courts as being quasi-constitutional in nature because of its unique and fundamental importance.

The rights and obligations deriving from the *Code* that are applicable to the Law Society and its licensees are as follows:

- Licensees have the right to be free from discrimination on the basis of race (and any other enumerated ground of discrimination) in their employment (which includes hiring and promotion), in contracts (which might include partnership agreements), and in vocational associations (including membership in the Law Society). This right of a licensee to be *free from* discrimination in employment entails the corollary, namely, that employers of licensees have a duty under the *Code* to *ensure* a discrimination-free environment for its licensees.

- Licensees also have obligations not to discriminate against members of the public who seek out or retain their legal services, or with regard to one another in their employment.
- Licensees also have a right not to be forced to disclose a human rights ground, such as their sexual orientation, age or disability, since such disclosure would have a disproportionate impact on certain *Code*-protected groups and has, historically, led to discrimination.
- The Law Society has an obligation not to discriminate against its members. Under the *Code*, promoting equality, diversity and inclusion is not inconsistent with this obligation.

The *Charter* is part of the Constitution of Canada. It is the supreme law of the land and all federal and provincial/territorial laws, and government action under those laws, must comply with the *Charter*. Law societies may be subject to the *Charter* where they are exercising statutory authority. In *Doré v Barreau du Québec* (“*Doré*”), the Supreme Court directed that law societies must take *Charter* values into account in their discretionary regulatory decisions.

The *Charter* applies to the Law Society’s Recommendations and how they will impact licensees. Per *Doré*, a court or tribunal would examine whether the Law Society has sufficiently balanced its statutory objectives against licensees’ *Charter* rights and freedoms.

The *Charter* values that appear to be implicated are: freedom of conscience; freedom of thought, belief, opinion and expression; freedom of association; right to liberty; and the right to equality. It is conceivable that a licensee may assert that some or all of the above constitutional rights and freedoms are compromised by the implementation of the Recommendations. However, the Recommendations sufficiently represent a balancing of the Law Society’s statutory objectives (which include ameliorating discrimination) and protecting licensees’ constitutional rights. If the Recommendations are challenged from the perspective that they constitute discrimination against non-equity seeking groups, the Law Society would likely be able to characterize its equity, diversity and inclusion initiatives as an ameliorative program, defensible under section 15(2) of the *Charter*.

Perfection can be the enemy of the good. The Law Society should be careful not to see only problems in the implementation of the Recommendations where, in fact, opportunities to make progress through the Recommendations exist.



## 2. Our Approach

We consider it helpful to indicate what our opinion entails. We are being asked about whether the Recommendations are inconsistent with the rights and obligations of the Law Society and its licensees under the three statutes. While the question does not ask us to opine *directly* on whether the Recommendations are workable in practice, our opinion ultimately entails an examination of the Law Society's regulatory reach, particularly beyond licensee firms and into corporations and governments where licensees work, yet where the Law Society has no control.

The Law Society is interested in knowing whether the Recommendations can be implemented given that the Law Society does not regulate non-licensees, yet the Recommendations appear on their face to require licensees to promote certain principles, develop / implement / maintain a policy, and report to the Law Society in respect of their "legal workplaces." We are asked whether the implementation of the Recommendations can be reconciled with the principle that the Law Society has no power to regulate non-licensees, corporations or governments.

Recommendations 3(2) and 3(3) refer specifically to "legal workplaces" which is a term that is not defined, including in any of the three statutes we were tasked with reviewing. In its *Final Report*, the Working Group noted an internal disagreement about the meaning of "legal workplace" and whether the Recommendations should apply in the same way to all types of legal workplaces:

Working Group members' opinions differ as to the definition of "legal workplace". The majority of Working Group members believe that all law firms, in-house legal departments, government legal departments, clinics and other practise settings in Ontario should be subject to the requirements outlined in the recommendations. Other members of the Working Group, however, believe that at this time, government legal departments and in-house legal departments should not be required to comply with the mandatory recommendations as government and in-house licensees are employees whose hiring, promotion and retention are client decisions. Government and in-house legal departments should, however, be encouraged to engage in the mandatory activities outlined in this report. The definition of "legal workplaces" used in the report is that of the majority perspective.<sup>1</sup>

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<sup>1</sup> *Final Report*, p. 5-6, note 7.

In our legal review and analysis below, we bear in mind the above noted concern about the definition of “legal workplace” raised within the Working Group, and whether and how the Recommendations may apply to in-house counsel and licensees who work in government. It is vital to note that limiting and applying the Recommendations only to licensee firms misses the opportunity to effect change throughout the professions who work in diverse organizational settings. This was emphasized by the Working Group’s guiding principle:

The Working Group’s recommendations stem from an intention to create long lasting systemic change within the professions. The recommendations are put forward in an effort to support the Law Society’s ongoing commitment to ensure that both the law and the practice of law are reflective of all peoples in Ontario and that the professions are free of discrimination and harassment. The Rules of Professional Conduct and the Paralegal Rules of Conduct speak to the special responsibility of lawyers and paralegals to adhere to the requirements of human rights laws in Ontario, including the obligation not to discriminate.<sup>2</sup>

We propose to look at the relevant rights and obligations under the three statutes first, and then apply those rights and obligations to the Recommendations we have been asked to review.

Unless otherwise noted, underlined passages indicate our own emphasis, as opposed to emphasis in the original.

### **3. The Law Society Act**

#### **A. Functions, Duties and Powers of the Law Society**

The Law Society is a not-for-profit corporation that derives its authority from its enabling statute the *Law Society Act*.<sup>3</sup> The *LSA* creates a framework of authority for the Law Society to regulate lawyers and paralegals in Ontario by way of legislated functions, duties and powers, including the power to make by-laws.

Section 4.1 of the *LSA* sets out the Law Society’s functions:

4.1 It is a function of the Law Society to ensure that,

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<sup>2</sup> *Final Report*, p. 14.

<sup>3</sup> *Law Society Act*, RSO 1990, c L 8 [“*LSA*”].



- (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
- (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.

Section 4.2 of the *LSA* sets out the principles to be applied by the Law Society:

4.2 In carrying out its functions, duties and powers under this Act, the Law Society shall have regard to the following principles:

1. The Law Society has a duty to maintain and advance the cause of justice and the rule of law.
2. The Law Society has a duty to act so as to facilitate access to justice for the people of Ontario.
3. The Law Society has a duty to protect the public interest.
4. The Law Society has a duty to act in a timely, open and efficient manner.
5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.

We consider the Recommendations to fall within the Law Society's regulation of "professional conduct," although some may consider that the Recommendations relate as well to professional competence or standards of learning that are necessary for licensees in a pluralistic society.

We note that, with respect to section 4.2 of the *LSA*, the Law Society's duty is not just to maintain but also advance the cause of justice and the rule of law; and that it must do so in a timely, open and efficient manner. It appears that acting in an untimely manner, or simply maintaining the status quo which perpetuates injustice would be contrary to the principles that govern the Law Society in the conduct of its functions. Finally, on this point, we note that the Law Society should regulate in a manner proportionate to the significance of the regulatory objectives sought to be realized.



The recommendations we are asked to look at refer to a “licensee,” which is defined in the *LSA* as:

- (a) a person licensed to practise law in Ontario as a barrister and solicitor, or
- (b) a person licensed to provide legal services in Ontario.<sup>4</sup>

## **B. Rules of Conduct for Licensees**

The Law Society’s *Rules of Professional Conduct* and *Paralegal Rules of Conduct* (collectively, the “**Rules of Conduct**”) set out the standards of professional conduct for lawyers and paralegals, respectively.<sup>5</sup>

The Rules of Conduct and their Commentaries indicate strong support for the principle that licensees have special duties and responsibilities in terms of recognizing diversity and respecting human rights. For example, the *Rules of Professional Conduct* state:

Rule 2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity

### **Commentary**

[4.1] A lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario.

The duty of a lawyer also extends to advancing the goals of the legal profession and improving the administration of justice.

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<sup>4</sup> *LSA* s. 1 (1).

<sup>5</sup> Under section 62(0.1) -10 of the *LSA*, Convocation may make by-laws regarding a Code of Professional Conduct and Ethics. Under section 120(b) of By-Law 3 (*Benchers, Convocation and Committees*), the Professional Regulations Committee has a mandate to provide policy options for Convocation’s approval in relation to the *Rules of Professional Conduct*. Under section 130-4 of By-Law 3, the Paralegal Standing Committee has the mandate to provide the equivalent for paralegals.



Rule 2.1-2 A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

Based on the concept that lawyers have greater responsibilities than private citizens and lawyers' special role in the community, lawyers' obligations to encourage public respect for, and to try to improve the administration of justice, extends beyond their professional activities.

Rule 5.6-1 A lawyer shall encourage public respect for and try to improve the administration of justice.

#### Commentary

[1] The obligation set out in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet for the same reason, a lawyer should not hesitate to speak out against an injustice.

Non-Discrimination Rule: Rule 6.3.1 deals specifically with lawyers' special responsibility not to discriminate including with respect to the professional employment of licensees:

6.3.1-1 A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on [grounds prohibited in the Code] 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.

Moreover, Rule 6.3.1 contains a comprehensive Commentary section, fleshing out a lawyer's human rights duties and responsibilities. Key points from the commentary are:

#### Commentary

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

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

And, further, Rule 6.3.1 states:

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

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

Section 2.03 of the *Paralegal Rules of Conduct* contains a similar requirement to acknowledge and abide by human rights laws in Ontario with respect to both the provision of services to the public and employment practices.

### **C. Judicial Commentary on the *Law Society Act***

In *Trinity Western University v The Law Society of Upper Canada*,<sup>6</sup> the Divisional Court held that a complete reading of the *LSA* shows that the Law Society is empowered to carry out more functions than just the one set out in s. 4.1 and that:

[58] For all of these reasons, therefore, we conclude that the principles that are set out in s. 4.2, and that are to govern the respondent's exercise of its functions, duties and powers under the *Law Society Act*, are not restricted simply to standards of competence. Rather, they engage the respondent in a much broader spectrum of considerations with respect to the public interest when they are exercising their functions, duties and powers, including whether or not to accredit a law school.

[96] In addition to those realities, we are satisfied that, in carrying out its mandate under its enabling statute, the respondent, throughout its long history, has acted to remove obstacles based on considerations, other than ones based on merit, such as religious affiliation, race, and gender, so as to provide previously excluded groups the opportunity to obtain a legal education and thus become members of the legal profession in Ontario.

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<sup>6</sup> *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 (Div Ct) ["TWU"].

[97] In keeping with that tradition, throughout those many years, the respondent has acted to remove all barriers to entry to the legal profession save one – merit. It is the respondent’s position that it is in the public interest to ensure that the legal profession is open to everyone. It views that approach as being fundamental to its functions. In adopting that position, the respondent says that it achieves two companion objectives. One is to ensure diversity in the legal profession. The other is that, if the legal profession is open to everyone then, perforce, it is open to “the best and the brightest”.

On appeal of that decision, the Ontario Court of Appeal grappled with section 4.1 and 4.2 of the *LSA*, finding that:

[108] I agree with Ms. Kristjanson’s analysis and the Divisional Court’s conclusion. There is no wall between ss. 4.1 and 4.2 of the *LSA*. The LSUC has an obligation to govern the legal profession in the public interest: see *Groia v. Law Society of Upper Canada*, 2016 ONCA 471 (CanLII), at para. 89. In setting and maintaining standards of learning, professional competence and professional conduct under s. 4.1 of the *LSA*, the LSUC is entitled to do so against the backdrop of the composition of the legal profession, including the desirable goal of promoting a diverse profession.

[110] That the LSUC is also subject to the *Charter* and the *HRC* means that *Charter* and human rights values must inform how the LSUC pursues its stated objective of ensuring equal access to the profession.<sup>7</sup>

The Court of Appeal also noted a key component of the Divisional Court’s reasons that:

...in assessing the “public interest”, the LSUC is entitled to consider that the impact of TWU’s Community Covenant on members of the LGBTQ community is contrary to the equality rights protections in the *Charter* and the *HRC*;<sup>8</sup>

Similarly, we might say that in its duty to advance the cause of justice, the Law Society is entitled to consider that the impact of systemic barriers on racialized licensees in the legal professions is contrary to their equality rights protections in the *Charter* and the *Code*.

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<sup>7</sup> *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 [“TWU”].

<sup>8</sup> *Ibid.* at para. 51.

#### **D. Summary of the *Law Society Act***

Our review of the *LSA*, the Rules of Conduct and relevant judicial commentary indicates that:

- The Law Society has a duty to advance the cause of justice and the rule of law.
- The Law Society has a duty to facilitate access to justice for the people of Ontario.
- The Law Society has a duty to protect the public interest.
- The Law Society has a duty to act in a timely, open and efficient manner.
- Regulation should be proportionate to the regulatory objectives intended.
- Licensees have a duty to discharge all their professional responsibilities including to other members of the profession honourably and with integrity.
- The Law Society's exercise of its functions, duties and powers are not restricted simply to standards of competence and engage a much broader spectrum of considerations with respect to the public interest.
- Licensees have a special responsibility to recognize the diversity of the Ontario community and to respect human rights.
- Licensees have a duty to advance the goals of the legal profession.
- Lawyers should not hesitate to speak out against an injustice.
- Licensees have a special responsibility to respect the requirements of human rights including with respect to professional employment of others in the profession and with respect to licensees' employment practices.
- With the desirable and legitimate goal of ensuring diversity in the profession, the Law Society has historically acted to remove obstacles to the profession and to provide previously excluded groups the opportunity to become members of the profession.

#### **4. The Ontario Human Rights Code**

Human rights law in Ontario is governed by the *Human Rights Code*.<sup>9</sup> The *Code* applies to every person in Ontario, including both public and private institutions and businesses. "Person" is broadly defined and includes an individual as well as a corporation.<sup>10</sup>

The Preamble to the *Code* states that 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.

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<sup>9</sup> *Human Rights Code*, RSO 1990, c H 19 ["Code"].

<sup>10</sup> *Code* s. 46 and *Legislation Act, 2006*, SO 2006, c 21, Sch F, s. 87.



The *Code* aims to create a climate of understanding and mutual respect for the dignity and worth of each person.

The *Code* provides protection from discrimination in the following five “social areas”:

- employment
- goods, services and facilities
- accommodation (housing)
- membership in a vocational association (including a self-governing profession)
- contracts

There are 17 “prohibited grounds” of discrimination under the *Code*:

- race, ancestry, place of origin, colour, ethnic origin
- citizenship
- creed
- sex
- sexual orientation
- gender identity
- gender expression
- disability
- age
- marital status
- family status
- receipt of public assistance (in accommodation only)
- record of offences (in employment only)

The *Code* regulates conduct in the above social areas and in respect of the prohibited grounds. It does not regulate thought, belief, or conscience. This point cannot be overstated. Individuals are free to think and believe what they want including disagreeing with the precepts of equality and non-discrimination in the *Code*; however, it is at the point of conduct that their freedom is constrained. The Supreme Court of Canada explained this succinctly: “The freedom to hold beliefs is broader than the freedom to act on them.”<sup>11</sup> In other words, people are entitled to hold

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<sup>11</sup> *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 36.

prejudicial views; but they are not entitled to act upon them (i.e. discriminate) in the social areas identified in the *Code*.

The *Code* has primacy over any other statute in Ontario (generally, in cases of conflict, other legislation must conform to the *Code*); and is viewed by the courts as being quasi-constitutional in nature because of its unique and fundamental importance.<sup>12</sup>

The *Code* prohibits both direct and indirect discrimination. Section 9 of the *Code* provides that: “No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.”

The sections of the Ontario *Code* that are germane to this opinion are:

- Section 1 (equal treatment without discrimination in services);
- Section 5 (equal treatment without discrimination in employment);
- Section 6 (equal treatment without discrimination in the area of vocational associations, which includes membership in a self-governing profession);
- Section 14 (special programs)

The *Code* makes specific provision for the implementation of a special program designed to ameliorate discrimination and disadvantage. Section 14 of the *Code* states:

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.

In *Carter v Elementary Teachers Federation of Ontario*, the Human Rights Tribunal of Ontario held:

[24] Section 14 of the *Code* is a complete defence to an allegation of discrimination when the challenge to the program comes from someone whose needs do not fall within the purpose or underlying rationale of the program (*Ball v. Ontario (Community and*

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<sup>12</sup> *Code*, s. 47(2). See also: *Tranchemontagne v Ontario (Directors, Disability Support Program)*, 2006 SCC 14 at para 33 [“*Tranchemontagne*”]. The Court cites *Battlefords and District Co-operative Ltd v Gibbs*, [1996] 3 SCR 566 at para 18 and *Insurance Corp of British Columbia v Heerspink*, [1982] 2 SCR 145 at 158.



*Social Services*), 2010 HRTO 360 (CanLII) (at para. 123). In *Ontario (Human Rights Commission) v. Ontario* (1994), 1994 CanLII 1590 (ON CA), 19 O.R. (3d) 387 (C.A.) (“*Roberts*”), at page 401, the court stated that the exemption of section 14 is invoked when the challenge to the program comes from a member of a historically privileged group. A special program can only be challenged by a member of a disadvantaged group that the special program is designed to assist, but who is otherwise excluded from that program (on the basis of age, for example).<sup>13</sup> (Emphasis in original)

The rights and obligations deriving from the *Code* that are applicable to the Law Society and its licensees are as follows:

- Licensees have the right to be free from discrimination on the basis of race (and any other enumerated ground of discrimination) in their employment (which includes hiring and promotion), in contracts (which might include partnership agreements), and in vocational associations (including membership in the Law Society). This right of a licensee to be *free from* discrimination in employment entails the corollary, namely, that employers of licensees have a duty under the *Code* to *ensure* a discrimination-free environment for its licensees.<sup>14</sup>
- Licensees also have obligations not to discriminate against members of the public who seek out or retain their legal services, or with regard to one another in their employment.
- Licensees also have a right not to be forced to disclose a human rights ground, such as their sexual orientation, age or disability, since such disclosure would have a disproportionate impact on certain *Code*-protected groups and has, historically, led to discrimination. In the section below dealing with Recommendation 3(3) (self-assessment survey) we deal with the question of whether asking individuals to self-disclose is inconsistent with the *Code*.
- The Law Society has an obligation not to discriminate against its members. In the section below dealing with Recommendation 3(1) (adopt and abide by a set of principles) we

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<sup>13</sup> *Carter v Elementary Teachers Federation of Ontario*, 2011 HRTO 1604 at para 24.

<sup>14</sup> We note that licensees working in a federally regulated environment would not be subject to the *Code*, but rather the *Canadian Human Rights Act*.

deal with the question of whether this obligation extends to “promoting equality, diversity and inclusion” in the professions.

## 5. The Canadian Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms*<sup>15</sup> is part of the Constitution of Canada. It is the supreme law of the land and all federal and provincial/territorial laws, and government action under those laws, must comply with the *Charter*. The *Charter* does not directly regulate private activity or activity where there is no state involvement. Law societies and quasi-governmental institutions like universities may be subject to the *Charter* where they are found to be implementing a specific governmental policy or program, or exercising statutory authority.<sup>16</sup>

In Mahmud Jamal’s legal opinion on the *Charter*,<sup>17</sup> provided to Convocation in the context of TWU’s request for accreditation, he explained how the Law Society may be subject to the *Charter*:

The *Charter* may apply to an organization such as the Society as part of the apparatus of government or as a delegate of statutory authority. Even though the Society is insufficiently linked to or controlled by government to be considered part of its apparatus (given the independence of the bar), the *Charter* applies to the Society when it exercises its statutory discretion to set the requirement for licensing under the *LSA*. The Society must in these instances reach a decision that is consistent with the *Charter*.

Mr. Jamal’s opinion went on to describe the impact of the Supreme Court’s decision in *Doré v Barreau du Québec*:<sup>18</sup>

In *Doré*, the Court had to decide whether the Disciplinary Council of the Barreau du Québec had failed to respect a lawyer’s freedom of expression under s. 2(b) of the *Charter* when it decided to reprimand him for writing an inflammatory letter to a judge

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<sup>15</sup> *Canadian Charter of Rights and Freedoms*, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [“*Charter*”].

<sup>16</sup> See: *McKinney v University of Guelph*, [1990] 3 SCR 229; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at paras 42-43; and *Pridgen v University of Calgary*, 2012 ABCA 139 at paras 78-99.

<sup>17</sup> Jamal, Mahmud, “The *Charter* and the Law Society’s accreditation decision” April 5, 2014. Online: <http://www.lsuc.on.ca/uploadedFiles/IssuesCanadianCharterRightsFreedoms.pdf>. In the excerpts from Mr. Jamal’s legal opinion, we have not included legal citation, but it can be found in his opinion.

<sup>18</sup> *Doré v Barreau du Québec*, 2012 SCC 12 [“*Dore*”].

after a court hearing. In addressing this issue, the Court took the opportunity to clarify “how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions.”

The Court held that administrative decision-makers must consider the *Charter* when they exercise discretion granted under statutory authority. The Court stated that “administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values.” The Court embraced what it called a “richer conception of administrative law, under which discretion is exercised ‘in light of constitutional guarantees and the values they reflect’”, such that “administrative decisions are always required to consider fundamental values.” The Court stated that “administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise.”

*Doré* also provides guidance on how the *Charter* applies when a decision-maker exercises discretion granted under statutory authority. The Court stated that, fundamentally, a statutory decision-maker must “balance the *Charter* values with the statutory objectives.” This involves a two-step process:

At the first stage, “the decision-maker should first consider the statutory objectives.”

At the second stage, “the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives.” This “requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.”

The Court explained that this decision-making process is fundamentally about ensuring “balance and proportionality.” That is, the decision-maker must strike “an appropriate balance between rights and objectives” to ensure that the “rights at issue are not unreasonably limited.” Put differently, the decision-maker must ensure that any decision “interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives.”

In *Doré* and *TWU*, the Barreau du Québec and the Law Society respectively were making specific discretionary decisions that would directly impact a licensee (or potential licensee). Here, the Law Society is engaged in a similar kind of exercise, the imposition of conditions on



licensees in relation to their acknowledgment and promotion of equality, diversity and inclusion principles, and certain reporting requirements. Accordingly, we believe that *Doré* applies.

The first stage of the analysis, considering the statutory objectives, has already been done (see the above section on Summary of the *LSA*). The Law Society is pursuing a statutory mandate to advance justice in the public interest to eradicate barriers for racialized licensees, and others, in the legal professions.

The second stage involves identifying the *Charter* values at issue and determining if the Law Society has struck the appropriate balance to ensure *Charter* rights are not unreasonably limited. In *Doré*, the Supreme Court clarified that, to determine whether administrative decision-makers have exercised their statutory discretion in accordance with *Charter* protections, the review should be in accordance with an administrative law approach (set out in *Doré*), not a s. 1 *Oakes* analysis. The standard of review is reasonableness.

The *Charter* values (and corresponding *Charter* sections) that appear to be implicated are:

- Freedom of conscience (s. 2a)
- Freedom of thought, belief, opinion and expression (s. 2b)
- Freedom of association (s. 2d)
- Right to liberty (s. 7); and
- Right to Equality (s.15).

It is conceivable that a licensee may assert that some or all of the above constitutional rights and freedoms are compromised by the implementation of the Recommendations. The licensee could assert that, pursuant to the Recommendations, they must abide by a statement of principles that they may not believe in; hire, promote and associate with licensees they may otherwise avoid; and complete certain reporting activities that they would rather not. Further, the licensee may take the position that the Recommendations favour racialized and/or other equity seeking groups and, in that sense, discriminate against other licensees contrary to the equality provisions of the *Charter*.

On the last point, we are confident that the Law Society would avoid liability and be able to characterize its Recommendations as an ameliorative program, defensible under section 15(2) of the *Charter*. In *R v Kapp*, the Supreme Court held that:

[3] ...where a program makes a distinction on one of the grounds enumerated under s. 15 or an analogous ground but has as its object the amelioration of the conditions of a disadvantaged group, s. 15's guarantee of substantive equality is furthered, and the claim of discrimination must fail. ...<sup>19</sup>

With respect to the other *Charter* rights and freedoms, the question is whether the Recommendations strike the appropriate balance between removing barriers for entry and progression in the professions and licensees' constitutional freedoms. We think they do. The Divisional Court in Ontario, albeit in the *TWU* context, has already spoken favourably about the Law Society attempting to eradicate discrimination in its ranks:

[116] In exercising its mandate to advance the cause of justice, to maintain the rule of law, and to act in the public interest, the respondent was entitled to balance the applicants' rights to freedom of religion with the equality rights of its future members, who include members from two historically disadvantaged minorities (LGBTQ persons and women). It was entitled to consider the impact on those equality rights of accrediting TWU's law school, and thereby appear to give recognition and approval to institutional discrimination against those same minorities. Condoning discrimination can be ever much as harmful as the act of discrimination itself.

We provide further reasons for why the Recommendations likely satisfy the *Doré* requirement to balance statutory objective with *Charter* values in our discussion of the specific Recommendations below.

In summary, the *Charter* applies to the Recommendations and how they will impact licensees. Per *Doré*, a court or tribunal would examine whether the Law Society has sufficiently balanced its statutory objectives against licensees' *Charter* rights and freedoms. If the Recommendations are challenged from the perspective that they constitute discrimination against non-equity seeking groups, the Law Society would likely be able to characterize its equity, diversity and inclusion initiatives as an ameliorative program, defensible under section 15(2).

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<sup>19</sup> *R v Kapp*, 2008 SCC 41 at para. 3 [*"Kapp"*].



## 6. Analysis

***Are any of the following recommendations – 3 (1), (2) and (3) – inconsistent with the rights and obligations of The Law Society of Upper Canada and its licensees under the Law Society Act, the Ontario Human Rights Code and/or the Canadian Charter of Rights and Freedoms?***

In this section we apply the rights and obligations of the Law Society and its licensees in the *LSA*, *Code*, and *Charter* to determine whether or not the Recommendations are inconsistent with these rights and obligations. We also identify any implementation challenges.

### A. **Recommendation 3(1)**

***The Law Society will... require every licensee to adopt and to abide by a statement of principles acknowledging their obligation to promote equality, diversity and inclusion generally, and in their behaviour towards colleagues, employees, clients and the public.***

In our view, there is nothing inconsistent with Recommendation 3(1) having regard to the rights and obligations of the Law Society and its licensees under the *LSA*, *Code*, or *Charter*. The reality is that licensees are already bound by human rights equality, diversity and inclusion principles under the *LSA*, lawyer and paralegal Rules, and the *Code*. What Recommendation 3(1) would do, is:

- i. Require licensees to adopt a statement of principles regarding their own behaviour;
- ii. Require licensees to abide by and acknowledge their own statement of principles;
- iii. Require that the statement of principles acknowledges the obligation is to promote equality, diversity and inclusion generally; and
- iv. Specifically in their behaviour towards colleagues, employees, clients and the public.

We deal with each of these aspects in turn to determine if the proposal is inconsistent with the three statutes or raises implementation challenges.

#### i) **Require licensees to adopt a statement of principles regarding their own behaviour**

The Law Society is within its authority to require the adoption of a statement of principles since section 62 of the *LSA* provides Convocation with the power to make By-Laws including with respect to “prescribing oaths and affirmations for applicants for a license” and “authorizing and providing for the preparation, publication and distribution of a code of professional conduct and

ethics.” By-Law 4 sets out the general requirements for issuing a license, which includes an applicant taking an oath.<sup>20</sup>

Furthermore, By-Law 3 of the Law Society creates and empowers the Professional Regulation Committee and Paralegal Committee to recommend, for Convocation’s approval, policy options in relation to the regulation of licensees, and creates and empowers the Equity and Aboriginal Issues Committee to develop policy options for the promotion of equity and diversity related to the practice of law and provision of legal services in Ontario.<sup>21</sup> In our view, the Law Society does not need to create a new By-Law specifically for a “Human Rights Statement of Principles.”

Conceptually, requiring licensees to adopt a human rights statement of principles is likely to make tangible, more personal and more readily accessible what is a currently a generic human rights obligation towards the professions that already exists in the *LSA*, lawyer and paralegal Rules, and the *Code*.

**ii) Require licensees to abide by and acknowledge their own statement of principles**

Under this Recommendation, not only must licensees adopt a human rights statement of principles, but they must also abide by it. This represents licensees having to “walk the walk” in respect of their human rights obligations towards the professions. Once again, we do not see this as inconsistent, in any way, with licensees’ current obligations as outlined above, except the obligations would be specified in an “in-house” statement of principles document, not located in some regulatory document maintained by the Law Society.

**iii) Require that the statement of principles acknowledges the obligation to promote equality, diversity and inclusion generally**

The *Final Report* has identified a significant problem of system discrimination in the lawyer and paralegal professions:

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<sup>20</sup> The Law Society of Upper Canada, By-Law 4, s. 8(1).

<sup>21</sup> The Law Society of Upper Canada, By-Law 3, ss. 120 and 122.



The qualitative and quantitative data the Working Group obtained from the engagement process identified widespread barriers experienced by racialized licensees within the legal professions at all stages of their careers.<sup>22</sup>

Recommendation 3(1) represents the Law Society taking action on this problem by requiring that every licensee effectively promote equality, diversity and inclusion generally. At first glance, this particular aspect of the Recommendation gave us pause. We wondered whether the obligation on licensees to “promote” equality, diversity and inclusion is something wholly different than a mere obligation to not discriminate; and further, we were uncertain what promoting equality, diversity and inclusion “generally” meant (discussed below).

We concluded that promoting means “to encourage” and encouraging equality, diversity and inclusion is indeed something more than not discriminating. It connotes taking an active, not passive, role. However, given statutory mandates to “advance the cause of justice,” “act in a timely manner,” and act “in the public interest” nothing in this Recommendation was inconsistent with the three statutes. We also do not think that the language of “promoting equality, diversity and inclusion” is so vague as to set an impossible standard of professional regulation. The *Rules of Professional Conduct*, for instance, contain other terms such as acting “honourably and with integrity,” which similarly have a broad meaning.

Recall that the Commentary to the non-discrimination Rule 6.3.1 speaks of “the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario,” and that Rule 6.3.1-2 requires that lawyers ensure that their employment practices do not offend the non-discrimination Rule. Also recall the Ontario Court of Appeal’s language in *TWU* that “the LSUC is entitled [in setting and maintaining standards of professional conduct] to do so against the back drop of the composition of the legal profession, including the desirable goal of promoting a diverse profession.”<sup>23</sup> Furthermore, since the Law Society has identified systemic barriers facing licensees as a significant problem, and eradicating those barriers as a goal, lawyers have a duty to advance that goal (Rule 2.1-2). Mandating promotion of equality, diversity and inclusion is within the scope of permissible regulation, not something outside of it.

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<sup>22</sup> *Final Report*, p. 4.

<sup>23</sup> *TWU (CA)*, *supra* note 7, para. 108.



**iv) Promoting equality, diversity and inclusion “generally” versus “in their behaviour towards colleagues, employees, clients and the public”**

We had difficulties interpreting the word “generally” in the Recommendation. Does the Recommendation mean that licensees have a general responsibility to promote equality, diversity and inclusion beyond their professional activities? This would be akin to a lawyer’s obligation, resulting from the lawyer’s position in the community, to encourage public respect for and to try to improve the administration of justice.<sup>24</sup>

Conversely, does the Recommendation mean that licensees must promote equality, diversity and inclusion in their professional practices only? Or does the word “generally” refer to the breadth and variety of the groups that are to be assisted under promotion of equality, diversity and inclusion? For instance, even though the focus of the *Final Report* is on racialized licensees, perhaps the Law Society is encouraging licensees to think of equality, diversity and inclusion in all its facets (gender, regional, income, etc.). Or alternatively, is the juxtaposition of “generally” and what follows meant to suggest that licensees have an obligation to promote equality, diversity and inclusion in their behaviour and other people’s behaviour towards colleagues, employees, clients and the public?

We recommend that the Law Society clear up this ambiguity but, without necessarily knowing the Law Society’s exact intention here, we feel that the present language is not inconsistent with the *LSA* or the *Code*.

With respect to the *Charter*, Recommendation 3(1) appears to balance the Law Society’s statutory objectives sufficiently with licensees’ constitutional rights and freedoms. The words “acknowledging their obligation to promote” suggest that freedom of conscience, and freedom of thought, belief, opinion and expression are all constrained. However given that:

- equality and non-discrimination (s.15) is a *Charter* value itself;
- s.15(2) of the *Charter* permits an ameliorative program to combat discrimination;
- the *LSA* already incorporates a balancing requirement whereby professional regulation for licensees must “be proportionate to the significance of the regulatory objectives sought to be realized”;

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<sup>24</sup> *Rules of Professional Conduct*, Rule 5.6-1.

- the statutory mandate of the Law Society includes non-discrimination as per the *Code*, which is quasi-constitutional legislation; and
- the special responsibility of licensees to respect human rights including with respect to professional employment of others in the profession,

it appears that the Recommendation is not a disproportionate response to a serious problem.

The Law Society is not ordering licensees, as a condition of their license, to hire and promote racialized lawyers and paralegals. Rather, the Law Society is requiring licensees to adopt and abide by a set of principles which will inform how they approach recruitment, retention and promotion decisions. Systemically, Recommendation 3(1) is designed to create a new framework where licensees adopt a set of principles that is more likely to reduce or remove barriers for racialized licensees and other equity seeking groups in the legal professions, but it does not direct a particular hiring or promotion outcome in any given case.

The implementation challenge that we envisage is that, for in-house licensees or licensees working in government, their employer may already have a human rights policy in place so there may be inconsistencies between the employer's policy and the licensees' statement of principles. While we describe this as a "challenge," the challenge may be more apparent than real.

First, we assume that any human rights policy will promote ("encourage") equality. We cannot imagine a so-called human rights policy that promotes "inequality." Second, while many institutional human rights policies may not necessarily promote diversity and inclusion, it would be surprising if the licensees' new Law Society obligation to promote diversity and inclusion *contradicts* the corporation's or government's human rights policy. Finally, federal, provincial and municipal governments all now have diversity and inclusion principles so, upon closer examination, we do not believe that the implementation of this Recommendation places the licensee, or for that matter their employer, in conflict.<sup>25</sup>

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<sup>25</sup> Federal Public Service, "Employment Equity Policy" <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12543&section=html>

Ontario Public Service, "Diversity and accessibility" <https://www.ontario.ca/page/about-ontario-public-service#section-3>;

City of Toronto, "Employment Equity Policy" <http://wx.toronto.ca/intra/hr/policies.nsf/9fff29b7237299b385256729004b844b/755a03e5d9c008fd85256927004b786c?OpenDocument>

We repeat, however, that in implementing this Recommendation the Law Society is not regulating the employer of the licensee. Instead, the Law Society is imposing upon licensees a new obligation, as per Recommendation 3(1), that is based on a duty that already exists arising from, *inter alia*, the Non-Discrimination Rule (Rule 6.3.1): a special responsibility to respect the requirements of human rights including with respect to the professional employment of others in the profession and with respect to licensees' employment practices.

#### **B. Recommendation 3(2)**

***The Law Society will... require a representative of each legal workplace of at least 10 licensees in Ontario to develop, implement and maintain a human rights/diversity policy for their legal workplace addressing at the very least fair recruitment, retention and advancement.***

In our opinion, Recommendation 3(2) is consistent with the *LSA*, *Code*, and *Charter* assuming that the “representative” referred to in the recommendation is a licensee of the Law Society and assuming that the intended benefit of such a human rights/diversity policy is limited in its application to licensees only. We recommend that the Working Group amend this Recommendation to clarify the above limits and application of the Recommendation.

There are a variety of examples in the law where an employer is required to develop and implement a workplace policy. The *Occupational Health and safety Act*, for example, requires that an employer prepare policies addressing workplace violence and harassment, including workplace sexual harassment.<sup>26</sup> The *Accessibility for Ontarians with Disabilities Act, 2005*, requires certain organizations to develop, implement and maintain accessibility standards for persons with disabilities.<sup>27</sup> We note that there will be a subset of licensees in Ontario who work for federally regulated entities or the federal government that are already subject to the federal *Employment Equity Act*. The *Employment Equity Act* seeks to achieve employment equity in private sector employers as well as portions of the federal public administration in part through instituting “positive policies and practices... as will ensure that persons in designated groups achieve a degree of representation in each occupational group in the employer’s workforce...”<sup>28</sup>

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<sup>26</sup> RSO 1990, c O1, s. 32.0.1 (1).

<sup>27</sup> SO 2005, c 11, s. 1 and Part III.

<sup>28</sup> SC 1995, c 44, s. 5 (b).



The Ontario *Code* has no such requirement to develop and implement a human rights or diversity policy. Notwithstanding this lack of statutory obligation, in our opinion it is not inconsistent with the *Code* for the Law Society to be proactive and require certain legal workplaces to do so.

First, the Ontario Human Rights Commission (the “Commission”) strongly encourages organizations to have an internal human rights policy for their workplace and the Commission has prepared two documents to assist organizations with developing human rights policies and procedures.<sup>29</sup>

Second, in the Human Rights Tribunal of Ontario’s (“Tribunal”) Form 2 (Response to an Application under Section 34 of the *Human Rights Code*), the Tribunal explicitly asks organizational respondents whether or not they have internal human rights policies related to the alleged discrimination.

Third, section 45.2 of the *Code* vests the Tribunal with a remedial power to make an order in the public interest and aimed at future compliance with the *Code*. In practice, this often translates into an order requiring an employer that is found to have violated a right under the *Code* to develop and implement a human rights policy if it does not already have one.

Thus, we can take from the above that the creation of a human rights and diversity policy under Recommendation 3(2) is consistent with the *Code*.

We also believe that Recommendation 3(2) represents a reasonable balancing between the Law Society’s statutory objectives, including with respect to advancing human rights, and licensees’ *Charter* rights. We do not take a position on what number of licensees should be present in each legal workplace before the obligation to maintain a human rights/diversity policy is engaged. However, for reasons similar to those explained in regards to Recommendation 3(1), we believe that Recommendation 3(2) is not inconsistent with the *Charter*. Requiring a group of licensees in a legal workplace to develop, implement and maintain a policy, while constraining their *Charter* liberty rights, among others, does not seem to attack the core of an individual’s liberty interests. Put another way, if a licensee were to define his or her liberty interest as “the right to

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<sup>29</sup> Ontario Human Rights Commission, *Guidelines on Developing Human Rights Policies and Procedure* (Toronto: Ontario Human Rights Commission, June 19, 1996 (revised January 30, 2008)); and Ontario Human Rights Commission, *A policy primer: Guide to developing human rights policies and procedures* (Toronto: Ontario Human Rights Commission, June 19, 1996 (revised December 2013)).



do whatever I want to in my legal workplace,” even in the face of non-discrimination laws, that liberty interest is not the kind that has enjoyed much protection at law.

To the extent that someone may object to this requirement, the Law Society may look to avail itself of the Special Program exemption under the *Code* or the protection of section 15(2) under the *Charter*.

In summary, nothing in this Recommendation is inconsistent with the *LSA*, the *Code*, or the *Charter* so long as the representative in question is a licensee.

Notwithstanding our view that this Recommendation is consistent with the three statutes, we wish to comment on the issue of the Recommendation applying to a “representative of each legal workplace... to develop, implement and maintain a human rights/diversity policy for their legal workplace....”

First, the Law Society has regulatory authority over licensees only. To the extent that this Recommendation purports to regulate a non-licensee “representative” it goes beyond the Law Society’s scope of authority. Thus, we recommend that the Working Group amend the wording of this recommendation to clarify that a “representative” must be a licensee.

Second, as noted above and in the *Final Report*, the term “legal workplace” is not defined in the *LSA* and remains a contentious term within the Working Group. We note that Recommendations 3(2) and 3(3) use the terminology “their legal workplace.” This suggests that the target of the Recommendations 3(2) and 3(3) is, or ought to be, the licensees in a licensee firm, corporation or government. With respect to Recommendation 3(2), once there are more than 10 licensees in an Ontario workplace (howsoever defined), the Recommendation would require that a licensee representative (i) develop; (ii) implement; and (iii) maintain a human rights/diversity policy *for the benefit of* the licensees in that workplace; (iv) with the specification that a minimum standard for the content of the human rights/diversity policy is that it address fair recruitment, retention and advancement.

We see the implementation of Recommendation 3(2) occurring along a spectrum: the further one moves away from law firms / paralegal firms, and the more employers object to the “licensees only” human right/diversity policy, the greater the challenge.



Let's start with the easy end of the spectrum: Recommendation 3(2) applying to a firm of lawyers and/or paralegals. The Law Society clearly regulates licensees so when the representative licensee is developing, implementing and maintaining the human rights/diversity policy, as required by the Law Society, the representative's actions can speak to and for the entire organization made up of licensees.

Moving further along the spectrum we next envisage the example of licensees employed by the Government of Ontario, which has its own human rights, diversity and inclusion principles and policies. There, the Law Society is not purporting to regulate the government, however, under Recommendation 3(2) a representative of those licensees (or multiple representatives if there are multiple workplaces) would be charged with developing, implementing and maintaining a human rights/diversity policy for those licensees which may or may not "bump up" against the government's human rights policy. While this scenario is clearly different than the law firm scenario, the implementation challenges may not be all that difficult if, in practice, it means that the representative can adopt or "tweak and adopt" the government's human rights/diversity policy assuming that the government's policy addresses "fair recruitment, retention and advancement" practices.

Moving even further along the spectrum, let's use the example of a large private corporation with 15 licensees with no human rights/diversity policy. In the extreme scenario, the corporate employer may reject outright and prohibit a licensee from developing, implementing and maintaining a human rights/diversity policy for licensees at its workplace. However, the employer would still be legally bound by the *Code* to ensure its employment practices are non-discriminatory, which, in effect, would require substantive compliance by the employer with the "unwritten" policy. We would envisage that the resolution of this issue may be left to discussions amongst the representative, the licensees, the Law Society and the corporation. We see outright non-cooperation with the Law Society's Recommendation 3(2) and the failure of a resolution a rather farfetched scenario.

In a less extreme scenario, while we do not think that the representative "developing" a policy just for the 15 licensees presents much of an issue, the employer may raise an issue around who controls the implementation of the policy; that is, the representative's vision of what that the policy means for the corporation's employment practices may diverge from the corporation's vision. We note that Recommendation 3(2) uses the word "maintain," which we interpret as meaning "maintenance of" or "providing support to." However, "maintain" does not necessarily mean making decisions under the policy. But even if we were to assume that "maintain"



included a decision-making role, we think the representative's role would be advisory and not necessarily determinative. For instance, with respect to the promotion of a racialized lawyer to a General Counsel position, the representative may, on balance, believe that the racialized lawyer is deserving of the position including based on an interpretation of the representative's human rights/diversity policy, whereas the corporation may see things differently. Does this mean that if the corporation places another candidate in the General Counsel position that the representative has failed to "implement and maintain" the licensees' human rights/diversity policy? We think not.

In both corporate employer scenarios described above, we believe that the concept of best efforts or, in the alternative, reasonable efforts, as opposed to outcome should be the correct measure of whether the representative has, in fact, complied with their regulatory obligation.

So, while we acknowledge that Recommendation 3(2) may face some implementation challenges, we do not see them as insurmountable so long as:

- (a) The representative is a licensee;
- (b) The target or beneficiaries of the human rights/diversity policy are only licensees; and
- (c) The measure of whether the representative is implementing and maintaining the human rights/diversity policy is based on effort and not purely on outcome.

We think that the Law Society should be candid about the impact and cultural change that it seeks to achieve by the implementation of Recommendation 3(2): requiring all entities that employ licensees, including corporations and governments, to use the proposed human rights/diversity policy and thereby be more self-conscious about the impact of their recruitment, retention and advancement decisions on racialized licensees. However, while this is the goal, it does not mean that the Law Society is now regulating these entities. The effects of the Recommendation should be distinguished from the Recommendation itself, which is limited in scope to licensees.

### **C. Recommendation 3(3)**

***The Law Society will... require a representative of each legal workplace of at least 10 licensees in Ontario to complete, every two years, an equality, diversity and inclusion self-assessment for their legal workplace, to be provided to the Law Society.***



In our opinion, Recommendation 3(3) is consistent with the *LSA*, *Code*, and *Charter* assuming that the “representative” referred to in the recommendation is a licensee of the Law Society and assuming that the intended benefit of the self-assessment is limited in its application to licensees only. We recommend that the Working Group amend this recommendation to clarify the above limits and scope of application to the Recommendation.

The Recommendation raises a few questions, including whether the intention is for a representative to complete a self-assessment of only licensees for their legal workplace, or of all employees at a legal workplace; would this create a mandatory requirement on licensees to answer the self-assessment or can a licensee opt not to answer, in similar fashion to the voluntary self-assessment contained in a licensee’s annual report?

In its *Final Report*, the Working Group provided further insight into the motivation behind and intention of this Recommendation:

- Legal workplaces would report to the Law Society on whether they had completed the self-assessment and, if not, explain their reasons for not having done so
- Recommendation 3(3) stems from an intention to have legal workplaces engage in dialogue and reflection on the current state of diversity and inclusion within their workplace, and an intention to encourage legal workplaces to work proactively to advance diversity and inclusion efforts<sup>30</sup>

To the extent that this recommendation would make it mandatory for every licensee (in a legal workplace of 10 or more licensees) to disclose personal information, it may run afoul of the *Code* unless they can opt out.

The Law Society already has a self-assessment demographic survey for licensees, but it qualifies the survey with it being voluntary, confidential and anonymous.<sup>31</sup> The survey asks about a licensee’s Francophone status, Indigenous status, ethnic identity, religion or creed, disability status, and sexual orientation. For each question there is an option to select “I do not wish to answer.” This type of survey is not inconsistent with either the *Code* or the *Charter*. And, if this

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<sup>30</sup> *Final Report*, pp. 19 and 21.

<sup>31</sup> The Demographic Survey is part of the Law Society’s Lawyer Annual Report and the Law Society’s Equity Initiatives Department, made pursuant to section 62 of the *LSA* and By-law 8. Convocation approved the inclusion of the voluntary question in these reports at its May 2009 meeting.



type of survey qualifies as “completing” a self-assessment for a legal workplace, then there should be no concern.

It is also the view of the Ontario Human Rights Commission that seeking such demographic information is not a violation of the *Code*. The Commission makes recommendations for how to undertake such data collection to ensure it is compliant with the *Code*.<sup>32</sup> The Commission makes the following recommendations to collecting data in a *Code*-consistent way:

- Clearly set out a purpose that is consistent with the *Code* such as an intention to assist disadvantaged licensees in the profession;
- Advise why such information is being gathered and its potential uses;
- Inform how the data will be collected, steps that will be taken to protect privacy and confidentiality, benefits of collecting data, and progress reached in achieving stated goals and objectives;
- Consult with affected communities about the need for data collection and appropriate methodology;
- Use the least intrusive means that most respects the dignity and privacy of individuals: one means is self-identification, another is observation through a trained employee or external expert;
- Assure anonymity;
- Distinguish between collection, use and disclosure; and
- Comply with freedom of information and privacy protection legislation.

With respect to the *Charter*, Recommendation 3(3) appears to be very reasonable when it requires, only once every two years, the completion of an equality, diversity and inclusion self-assessment. It seems a stretch for a licensee to assert that their *Charter* liberty interest or freedom of conscience is constrained in a disproportionate manner.

We acknowledge that nothing in Recommendation 3(3) can compel an employer (who is not a licensee) to complete and submit a self-assessment for its workforce. Rather, this Recommendation simply requires a representative licensee in a given legal workplace of 10 licensees or more to conduct a self-assessment *amongst licensees* and report their findings to the Law Society. There is nothing inconsistent in this Recommendation with respect to the Law

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<sup>32</sup> Ontario Human Rights Commission, *Count me in! Collecting Human Rights-Based Data* (Toronto: Ontario Human Rights Commission, 2010).



Society or its licensees' rights and obligations under the three statutes. We do not see the concern that requiring licensees in non-law firm settings somehow overreaches on the Law Society's regulatory authority; or that this Recommendation in any way places an obligation on non-licensees or their employer. Rather, this is more akin to a licensee completing their annual report for the Law Society, but in a collaborative way with all other licensees in their workplace.

## 7. Conclusion

The process of determining whether the Recommendations are inconsistent with the *LSA*, the *Code* and the *Charter* should begin by acknowledging the reality of the situation. That reality, according to the *Final Report*, is "widespread barriers experienced by racialized licensees within the legal professions at all stages of their careers"<sup>33</sup> As the Divisional Court noted in *TWU*, "condoning discrimination can be ever much as harmful as the act of discrimination itself."<sup>34</sup>

It is unlikely that most licensees intend to discriminate. Yet, it is the impact of conduct on protected groups and not intention that counts. The *Final Report* concluded that systemic barriers for racialized licensees continue to persist. The Recommendations represent the Working Group's proposal to do something about the problem consistent with the Law Society's obligation to advance the cause of justice and the rule of law in the public interest. Whereas constraints and implementation challenges do exist, in terms of how far the Law Society can go, our review of the Recommendations suggests that they do not cross the line into impermissible professional regulation. They are not inconsistent with the *LSA*, the *Code* or the *Charter*. Some of the implementation challenges are more apparent than real and, in the most challenging scenario where employers and representatives disagree on the outcome of employment decisions, it does not mean that the representative has necessarily failed to abide by their professional obligation.

Perfection can be the enemy of the good. The Law Society should be careful not to see only problems in the implementation of the Recommendations where, in fact, opportunities to make progress through the Recommendations exist.

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<sup>33</sup> *Final Report*, p. 4.

<sup>34</sup> *TWU* (Div Ct), *supra* note 6, para 116.



We hope that the Law Society will find our opinion of assistance in their upcoming deliberations.

Yours truly,  
**PINTO WRAY JAMES LLP**

A handwritten signature in blue ink that reads "Andrew Pinto".

Andrew Pinto