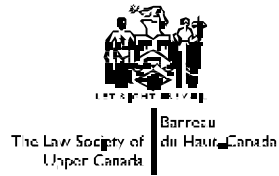


**SEXUAL ORIENTATION AND GENDER IDENTITY:
CREATING AN INCLUSIVE WORK ENVIRONMENT**

A MODEL POLICY FOR LAW FIRMS AND OTHER ORGANIZATIONS

May 2004





THE LAW SOCIETY OF UPPER CANADA

SEXUAL ORIENTATION AND GENDER IDENTITY: CREATING AN INCLUSIVE WORK ENVIRONMENT

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INTRODUCTION

Law firms¹ recognize their responsibility under the *Ontario Human Rights Code* (the *Code*)² and the *Rules of Professional Conduct* (the *Rules*)³ to provide a discrimination and harassment-free workplace. While overt acts of differential treatment may be less frequent than before the inclusion of protections in the *Code* and the *Rules*, lawyers who are gay, lesbian, bisexual, Two-Spirited or transgender continue to be apprehensive that deeply personal characteristics such as sexual orientation or gender identity may have serious consequences if expressed in the realm of their professional lives. Firm culture, which is often reflective of broader societal norms, typically assumes heterosexuality and birth-assigned sex to be the norm. Yet for gay, lesbian, bisexual, Two-Spirited and transgender individuals, expression of their sexual orientation or transgender status may not only be detrimental to their professional relationships with colleagues, but may also jeopardize their position and advancement within a firm. An individual's choice to openly express his or her own sexual orientation or gender identity is a statutorily protected right. Under the *Code* and the *Rules*, law firms have a positive obligation to develop a work environment that promotes respect for the personal characteristics of all individuals affiliated with the legal profession.

The Law Society of Upper Canada is committed to providing model workplace protocols that promote a discrimination and harassment-free workplace. This model policy is designed to assist law firms in fostering a work environment in which employment and pension benefits are conferred in a non-discriminatory manner and in which participation in the social culture of the firm is a viable option for all individuals working there. The Law Society of Upper Canada envisions that adoption and implementation of this policy will contribute to law firms becoming a place in which an individual's choice to keep confidential or to disclose information about his or her sexual orientation or gender identity neither results in discrimination or harassment nor detracts from either the individual's dignity and self-worth or value to the firm.

The document is divided into the following four parts:

- Part I – Background information including why law firms need written policies and information about the legal profession.
- Part II – How to effectively implement and review a policy.
- Part III – The model policy: a precedent for a policy that firms may adapt for their own use.
- Part IV – Outline of legal developments.

¹ References to 'law firms' in this document also encompass other organizations such as legal clinics and non-profit organizations.

² *Human Rights Code*, R.S.O. 1990, c. H.19.

³ *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000).

PART I- BACKGROUND

WHY LAW FIRMS NEED WRITTEN POLICIES

The Ontario Human Rights Commission has stated that “[t]he best defence against human rights complaints is to be fully informed and aware of the responsibilities and protections included in the *Code*.”⁴ It is now well established that the adoption of effective policies and procedures to promote equity and diversity and the design and delivery of education programs for individuals working in law firms have the potential of limiting harm and consequently reducing liability of employers.⁵

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

1. Written policies encourage respect for the dignity of all individuals working at the law firm.
2. Written policies show that the law firm’s management takes seriously its legal and professional obligations. They also minimize the risk of workplace harassment or discrimination and of harm to individuals working at the firm
3. Many firms provide benefits over and above those mandated by law but do so on an *ad hoc* basis. Relying on a discretionary system often causes concern among individuals working at the firm about whether decisions are being made on an even-handed, consistent basis. A written policy is indicative of a firm’s commitment to transparency in the provision of employment and social benefits.
4. A written policy reflects the tenor of a firm’s culture. It can signal to those working at the firm that inquiries about its policies and benefits are encouraged and may be made without risk of embarrassment.
5. Written policies on equity issues encourage respect for and acceptance of individuals from diverse groups, such as those protected under the *Code* and the *Rules*. In the context of employment, both the *Code* and the *Rules* protect against harassment and discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, same-sex partnership status or disability.⁶ The *Code* and the *Rules* also impose a duty to accommodate.
6. The existence of written policies allows the law firm to communicate its commitment to equity principles to people outside of the law firm, such as

⁴ *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, November 23, 2000) at 41.

⁵ For example, see *Ferguson v. Meunch Works Ltd.* (1997), 33 C.H.R.R. D/87 (B. C. H. R. T.).

⁶ While the *Code* does not specifically prohibit harassment on the ground of sexual orientation, the Ontario Human Rights Commission accepts such complaints as discrimination because of sexual orientation. See *Policy on Discrimination and Harassment Because of Sexual Orientation* (Toronto: Ontario Human Rights Commission, January 11, 2000) at 9.

prospective recruits and clients. Written policies may also have value as a recruitment tool that serves to signal the firm's commitment to a discrimination and harassment-free workplace.

7. A carefully drafted written policy may reduce the necessity of an individual seeking external legal remedies, as well as the risk that a law firm will be held liable for such unlawful harassment or discrimination.
8. Written policies may provide the necessary focus for education programs on preventing and responding to subtle or systemic workplace harassment and discrimination.

THE LEGAL PROFESSION

In most professions, there is evidence that gay, lesbian, bisexual, Two-Spirited and transgender individuals experience barriers to equality. The legal profession is no exception. Studies undertaken by the Law Society of Upper Canada and other organizations have indicated that there is discrimination on the basis of sexual orientation and gender identity within the community and profession:

1. In 2000, as a result of a 1996 community consultation undertaken to review the social climate as related to gay, lesbian and bisexual individuals, the Ontario Human Rights Commission drafted a policy on discrimination and harassment because of sexual orientation.⁷ The policy recognizes that the inclusion of sexual orientation as a prohibited ground in the *Code* does not guarantee equality. In spite of statutory protections, gay, lesbian, bisexual and Two-Spirited individuals continue to have their dignity and self-worth challenged by being subjected to discrimination and harassment on the basis of sexual orientation.
2. In 2001, the Law Society conducted a survey of students who had undergone articling recruitment for 2001-2002 to evaluate the frequency that firms asked inappropriate or discriminatory questions. Thirty percent of the students indicated a belief that their membership or association with a group influenced the questions asked during interviews. One-fifth of the respondents reported that they were asked questions and subjected to offensive remarks that constituted sexual harassment or discrimination on the basis of sex, marital status, socio-economic status and political affiliation among others.
3. The Discrimination and Harassment Counsel (DHC) Program was established by Convocation in 1999 to provide services to individuals who allege harassment or discrimination by a lawyer. In her report to Convocation for the period of July 1 to December 31, 2003, the DHC noted that members of the profession used the service not only to report discrimination but also to make general inquiries about discrimination and harassment. Information was sought concerning a variety of employment rights and obligations, including those surrounding sex-reassignment

⁷*Policy on Discrimination and Harassment Because of Sexual Orientation* (Toronto: Ontario Human Rights Commission, January 11, 2000).

surgery.⁸ In 2003, approximately 5% of the complaints of discrimination within the mandate of the *DHC* were based on sexual orientation.⁹

4. In 2004, the Law Society of Alberta released the results of a study on bias and equity in Alberta's legal profession.¹⁰ Eighty-eight percent of the gay, lesbian or bisexual lawyers and sixty-eight percent of the heterosexual lawyers who responded believed that there is discrimination on the basis of sexual orientation in the profession. In the five-year period preceding the survey, 40% of the gay, lesbian and bisexual respondents had experienced discrimination while seeking or during employment. In addition to experiencing bias in the courtroom, gay, lesbian and bisexual lawyers reported being subjected to discrimination in pay, quality of work assignments, rain-making opportunities, performance evaluations and exclusion from social events.
5. The Law Society of Alberta did not locate any Canadian studies on sexual orientation bias in the legal profession for the literature review section of the *Final Report on Equity and Diversity in Alberta's Legal Profession*.¹¹ However, the authors cited a number of American studies that support the finding of discrimination on the basis of sexual orientation in the profession.¹²

In light of the above-noted studies, the Law Society has undertaken initiatives to promote equality for gay, lesbian, bisexual, Two-Spirited and transgender individuals within the legal profession, in accordance with its mandate.

⁸C. Peterson, *Report of the Activities of the Discrimination and Harassment Counsel for the Law Society of Upper Canada for the Period of July 1 to December 31, 2003* (Toronto: Law Society of Upper Canada, 2003) at 4.

⁹ *Ibid.* at 15.

¹⁰ M. Cooper, J. Brockman & I. Hoffart, *Final Report on Equity and Diversity in Alberta's Legal Profession* (Calgary: Law Society of Alberta, 2004).

¹¹ *Ibid.*

¹²For example, see Judicial Council of California, *Sexual Orientation Fairness in the California Courts. Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's*

Access and Fairness Subcommittee (Orange County, CA: Judicial Council of California, 2001); Lesbian and Gay Law Association of Greater New York, *LeGaL Report on Sexual Orientation Fairness in Second Circuit Courts* (New York: LeGaL, 1997) available at <http://www.le-gal.org>; King County Bar Association, *In Pursuit of Equality. The Final Report of the KCBA Task Force on Lesbian and Gay Issues in the Legal Profession* (Washington, DC: King County Bar Association, 1995), cited in Washington State Bar. "Trends and Issues Affecting Lesbians and Gays in the Legal Profession" (1999) 12 Washington State Bar News Online, available at <http://www.wsba.org/media/publications/barnews/archives/1999/dec-99-diversity.htm>; Los Angeles County Bar Association, Committee on Sexual Orientation, *Report of the Committee on Sexual Orientation Bias* (Los Angeles, CA: County Bar Association, 1994).

MODEL POLICIES DEVELOPED BY THE LAW SOCIETY

In the last decade, the Law Society has adopted a number of model policies to promote equality within the legal profession. These include:

Guide to Developing a Policy Regarding Workplace Equity in Law Firms¹³

To assist law firms in meeting their obligation to avoid discrimination in employment practices, this guide outlines a model policy for the promotion of workplace equity. The guide includes reference to employment practice topics in the areas of recruitment, interviewing job candidates, hiring and promotion, the right to equal opportunities at work, professional development, accommodation, evaluation, mentors and compensation.

Available at <http://www.lsuc.on.ca/equity/models.jsp>

Available in French at http://www.lsuc.on.ca/equity/pdf/policy1_fr.pdf

Guide to Developing a Law Firm Policy Regarding Accommodation Requirements¹⁴

The *Code* prohibits discrimination in services and employment on enumerated grounds and mandates employer accommodation of differences to the point of undue hardship. Based in part on the Ontario Human Rights Commission's *Policy on Creed and the Accommodation of Religious Observances*¹⁵ and *Policy and Guidelines on Disability and the Duty to Accommodate*,¹⁶ this document sets out legal duty to accommodate employees' creed and religious beliefs, disability, as well as gender and family status. Particularly practical is the section on model procedures for requesting and granting accommodation.

Available at <http://www.lsuc.on.ca/equity/models.jsp>

Available in French at <http://www.lsuc.on.ca/equity/pdf/policyaccommodation.pdf>

¹³ *Guide to Developing a Policy Regarding Flexible Work Arrangements* (Toronto: Law Society of Upper Canada, updated March 2003).

¹⁴ *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements* (Toronto: Law Society of Upper Canada, March 2001).

¹⁵ *Policy on Creed and the Accommodation of Religious Observances* (Toronto: Ontario Human Rights Commission, October 20, 1996).

¹⁶ *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, March 22, 2001).

Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities: Legal Developments and Best Practices¹⁷

This document is a companion piece to the *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements*. It includes a summary of best practices and a comprehensive legal analysis of the duty to accommodate.

Available on request from equity@lsuc.on.ca

Guide to Developing a Policy Regarding Flexible Work Arrangements¹⁸

One means of fulfilling an employer's legal duty to accommodate employees with family responsibilities or disabilities is through the adoption of flexible work arrangements. This guide outlines various alternate work arrangements for both associates and partners of law firms in addition to outlining responses to the challenges presented by each option.

Available at <http://www.lsuc.on.ca/equity/models.jsp>

Available in French at http://www.lsuc.on.ca/equity/pdf/policy2_fr.PDF

Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms¹⁹

The Law Society published this document in 2002 to guide law firms in taking a proactive approach and having an effective complaints mechanism in place so that they, as employers, can limit their vicarious liability for discrimination and harassment in the workplace. The guide includes an overview of legal requirements, a discussion of policy and implementation issues, a sample model policy for law firms, and step by step complaints procedures for both medium/large and small law firms. Model forms are provided for convenience.

Available at <http://www.lsuc.on.ca/equity/models.jsp>

Available in French at http://www.lsuc.on.ca/equity/pdf/modelharassment3_fr.pdf

¹⁷ *Accommodation of Creed and Religious Beliefs, Gender Related Accommodation and Accommodation for Persons with Disabilities: Legal Developments and Best Practices* (Toronto: Law Society of Upper Canada, March 2001).

¹⁸ *Guide to Developing a Policy Regarding Workplace Equity in Law Firms* (Toronto: Law Society of Upper Canada, updated March 2003).

¹⁹ *Preventing and Responding to Workplace Harassment and Discrimination: A Guide to Developing a Policy for Law Firms* (Toronto: Law Society of Upper Canada, March 2002).

PART II- EFFECTIVE IMPLEMENTATION AND REVIEW OF THE POLICY

ESTABLISHING A DRAFTING COMMITTEE

The starting point is to establish a committee to draft the policy. The membership of the committee should be diverse. To the extent possible, the committee should be composed of partners and employees of both sexes and of differing age, ethnic origin, marital and partnership status, gender identity and sexual orientation. If there are lawyers or individuals in the law firm with expertise in the relevant employment and discrimination law, one or more should be included.

It is most important that the committee include respected individuals of the law firm who appreciate the importance of the issues to be addressed and who will be able to communicate these matters to others within the law firm. The composition of the committee is critical to the credibility of the process and the policies that are produced.

DEVELOPING A POLICY

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

A consultative process should be followed. It is essential that the committee is respectful of gay, lesbian, bisexual, Two-Spirited or transgender individuals' desire to keep confidential these characteristics or to openly express them.

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

IMPLEMENTING THE POLICY

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

Once the policy is adopted, it should be distributed to all individuals working at the law firm with a covering memorandum emphasizing the strong support of management. The letter should outline that the right to be free from harassment or discrimination on the basis of sexual orientation or gender identity in the workplace is protected by human rights legislation, and is an important value within Canadian society. It is essential that individuals working at the law firm understand the negative impact that harassment and discrimination has on the dignity of gay, lesbian, bisexual, Two-Spirited and transgender individuals within the workplace, as well as on workplace productivity.

Factors that may cause opposition within the workplace should be identified, and discussed frankly. One example may be the misconception that such policies outlaw

personal relationships between members of the law firm, and create a “chilling” anti-social atmosphere. These concerns should be recognized and addressed at the outset through discussion of the purposes and goals of workplace policies.

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

COMMUNICATING THE POLICY

If the law firm has a handbook of policies or if policies are available on-line, the law firm’s workplace policy on benefits for gay, lesbian, bisexual, Two-Spirited and transgender individuals should be included. If the law firm does not have a handbook of policies, or if it does not make its policies available on-line, the law firm may wish to distribute copies of the policy directly to each individual working at the firm, and/or post copies of the policy in a common area.

The policy should be made available to all individuals who are interviewed for a position at the firm. Such a practice will make a strong statement about the firm’s support for the policy and its objectives. Further, the *Code* applies to the provision of terms and conditions of employment, recruiting, application forms, interviews and promotions. Firms may also wish to publicize the existence of the policy in their recruitment materials.

REVIEWING, EVALUATING AND REVISING THE POLICY

A committee of the law firm should have the responsibility to review and revise the policy on a periodic basis. The committee will also attempt to identify barriers that might affect gay, lesbian, bisexual, Two-Spirited and transgender individuals working at the firm. The first review should take place after there has been sufficient time to evaluate its operation.

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

The goal of the review process is to ensure that the policy meets the needs of the law firm and of those who work there.

Individuals in the law firm should be encouraged to communicate their comments on the policy to the committee, either on an ongoing basis, or during the course of the review.

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

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

The Sexual Orientation and Gender Identity model policy is simply a precedent. It is intended to provide guidance, rather than to represent the ultimate or ideal policy. A firm will need to design its own policy, tailoring the recommended model to its particular circumstances.

PART III- MODEL POLICY

SEXUAL ORIENTATION AND GENDER IDENTITY: CREATING AN INCLUSIVE WORK ENVIRONMENT

MODEL POLICY FOR [THE FIRM]¹

APPLICATION

1. This policy applies to everyone working for [the Firm] or who is a partner, director, member or employee of [the Firm], whether part-time, full-time or casual, regardless of their position in [the Firm], including [secretarial, support, professional and administrative staff, articling students, summer students, salaried lawyers, contract lawyers, associates and partners].² The policy also applies to others in the work context, such as [volunteers, co-op students, dependent and independent contractors].³

DEFINITIONS

2. The term “**spouse**” is considered by [the Firm] to include two persons cohabiting in a conjugal relationship, whether or not the persons are legally married to each other, and includes persons who are of the same or opposite sex.⁴
3. [The Firm] defines “**transgender person**” as a term used to describe individuals who are uncomfortable with, or who reject, in whole or in part, their birth assigned sex.⁵ For the purposes of this policy, this includes “**transsexual persons**”, whether or not they have undergone sex reassignment surgery.⁶ It is further

¹ When drafting its own policy, a legal organization may wish to substitute “the Organization”, “the Non-Profit Organization”, “the Legal Clinic” or other relevant terminology where the words [the Firm] appear throughout the document.

² The terminology used in this paragraph may have to be adapted based on terminology used by the firm or organization. For example, some law firms do not have “directors”.

³ *Ibid.*

⁴ The firm may wish to include a minimum period of conjugal cohabitation in this definition. The length of required periods of conjugal cohabitation vary according to various statutes, such as the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the *ESA, 2000*) or the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.) (the *ITA*), as well as [the Firm]’s employment benefit providers. If a time period is included, the firm should verify its compliance with the requirements of relevant statutes.

⁵ *Policy on Discrimination and Harassment because of Gender Identity* (Toronto: Ontario Human Rights Commission, March 30, 2000).

⁶ The term “transsexual person” denotes an individual who lives fully as a person of the sex opposite to that which the person was born. “Transgender” is an umbrella term that is ascribed to individuals who live some aspect(s) of their lives as an individual of either sex and includes individuals who are born intersexed, or who cross-dress.

acknowledged that “**gender identity**” refers to those characteristics that are linked to an individual’s intrinsic sense of self, based on attributes reflected in the person’s psychological, behavioural, emotional, and/ or cognitive state. Gender identity may also refer to one’s intrinsic sense of being a man or woman.⁷ It is fundamentally different from, and not determinative of, sexual orientation.⁸

4. “**Two-Spirited person**” is a term derived from interpretations of Aboriginal languages used to describe an individual who has received the gift of having the privilege to house both male and female spirits in their bodies. The concept Two-Spirited person relates to today’s designation of being a gay, lesbian, bisexual and transgender person of Aboriginal origins.
5. A Glossary of Terms can be found at *Appendix A* of this policy.

STATEMENT OF PRINCIPLES

6. Discrimination in employment on the basis of sex, which includes gender identity, sexual orientation, marital status, same-sex partnership status and/or family status is illegal. The *Ontario Human Rights Code* (the *Code*),⁹ laws and regulations that govern employment benefits, pension plans and the employer-employee relationship, as well as the *Rules of Professional Conduct* (the *Rules*)¹⁰ prohibit discrimination on enumerated grounds set out in the *Code*.
7. [The Firm] recognizes that the choice of a spouse and the manner in which one chooses to live with that individual, as well as the expression of one’s intrinsic gender identity are fundamental human rights worthy of respect and non-discriminatory treatment.
8. While others’ knowledge of their sexual orientation may not be of concern to heterosexual individuals, [the Firm] recognizes that gay, lesbian, bisexual individuals and Two-Spirited individuals often experience overt and subtle discrimination because of their sexual orientation. For some individuals, confidentiality of their sexual orientation will be essential, while other individuals will want to exercise his or her right to express it.
9. [The Firm] recognizes that discrimination based on gender identity is a form of sex discrimination.¹¹ Where [the Firm] confers employment and pension benefits,

⁷ When interacting with transgender individuals, it is appropriate to ask how the person prefers to be identified.

⁸ *Supra* note 5.

⁹ R.S.O. 1990, c. H.19.

¹⁰ *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000). See particularly Rule 5.03 (Harassment) and Rule 5.04 (Discrimination).

¹¹ This position reflects that of the Ontario Human Rights Commission as set out in the *Policy on Discrimination and Harassment because of Gender Identity* (Toronto: Ontario Human Rights Commission, March 30, 2000).

it will do so in a manner that does not discriminate on grounds protected by the *Code* and the *Rules*.

10. Individuals covered by this policy shall not be excluded from participation in [the Firm]'s social culture (such as firm sponsored events held to acknowledge meaningful occasions in the personal lives of individuals who work at [the Firm]) because of sexual orientation, gender identity, marital status or any other ground protected by the *Code* and the *Rules*. [The Firm] shall expand its understanding of "meaningful occasions" in such a way that reflects the values of gay, lesbian, bisexual, Two-Spirited and transgender culture.
11. [The Firm] shall not contract with providers of employment benefits who administer their plans in a discriminatory manner based on sexual orientation or gender identity.

DUTY OF CONFIDENTIALITY

12. [The Firm] respects each individual's choice to disclose or to keep confidential information about his or her sexual orientation.
13. [The Firm] is aware that individuals may choose to keep confidential their gender identity and/or experience as a transgender person so as to avoid stigmatization, discrimination and harassment.
14. [The Firm] understands that sensitivity in the administration of employment benefits and pension plans is necessary so as not to expressly or inadvertently reveal the sexual orientation or gender identity of an individual who may wish to keep this information private.¹²
15. To enable an individual to register for, or to collect employment or pension benefits, [the Firm] may be required to record information that directly or indirectly identifies an individual's sexual orientation or gender identity. Subject to reasonable limits, [the Firm] will ensure the confidentiality of the information collected for these purposes. [The Firm] will also request that, as much as may be practical, the benefits and pension plan provider will keep the information confidential.
16. Procedures to limit access to confidential information that may reveal an employee's sexual orientation, spouse or gender identity will be adopted by [the

¹² [The Firm] is aware that information which identifies the gender of an individual's spouse, or claims for benefits for certain prescription drugs/ medical treatments, can indirectly reveal an individual's sexual orientation or gender identity.

Firm].¹³ Pension plan and employment records, including, but not limited to, requests for bereavement and parental leave, medical/dental insurance claims, next-of-kin declarations, beneficiary designations, inquiries about the extension of benefits/pensions to a spouse, as well as resumés, academic transcripts, and letters of reference, shall be kept confidential except where disclosure is required by law.¹⁴

17. Personal information disclosed to [the Firm] shall be stored in a manner so as to limit access to this information to those appointed under paragraph 19 of this policy.¹⁵ This may be achieved, for example, by keeping the information in a locked filing cabinet or in a computer system accessed by password.

PROCEDURES

I. IMPLEMENTATION

18. [The Firm] has revised all its employment benefits and pension plans to ensure that they comply with the statement of principles and duty of confidentiality outlined in this policy.
19. [The Firm] shall appoint [insert title of position(s) responsible, hereinafter “the Appointed Person”]¹⁶ to review all employment benefits and pension plan policies on a periodic basis and shall ensure that all future policies adopted by [the Firm] are consistent with this policy.¹⁷

¹³ For example, emergency contact lists that include the name of individuals who work at [the Firm] and their next-of-kin will not be posted in public. The list will remain confidential and be used only in emergency situations.

¹⁴ As of January 1, 2004, every Ontario law firm and lawyer in private practice is subject to the federal *Personal Information Protection and Electronic Documents Act*, 2000, c.5 (*PIPEDA*). (See *PIPEDA*, s. 30(2) and *Order Fixing the Dates of the Coming into Force of Certain Parts of the Act*, SI/2000-29, C. Gaz.2000.II.914). *PIPEDA* applies to the disclosure and use of personal information collected in the course of any commercial activity in a province unless the province has adopted privacy legislation that is substantially similar. Under *PIPEDA*, collection, use and disclosure of an individual’s personal information requires either express or implied consent of the individual. *PIPEDA* sets out 10 steps to be followed to achieve compliance with the legislation. For further detail about compliance, please consult http://www.privcom.gc.ca/legislation/02_06_01_e.asp

¹⁵ Where practical, [the Firm] will arrange for individuals who work there to register and submit claims directly to the provider with whom [the Firm] has contracted for employment benefits and pension plans. Where that provider is unwilling/unable to consent to the request that individuals who work at [the Firm] submit claims directly to that provider, [insert title of position appointed under paragraph 19] will be responsible for assisting in the registration and collection of benefits. Individuals entrusted with this responsibility will be trained with regard to [the Firm]’s expectation that any information acquired while carrying out related duties is to be kept in strict confidence.

¹⁶ Depending on the size and structure of the organization, the firm may wish to appoint the Director of Human Resources, a Senior Partner, or a committee of individuals to fulfill this role.

¹⁷ The Appointed Person should be provided with a private workspace or office area so as to be able to answer questions about employment benefits in confidence. When completing administrative work related to the

20. The Appointed Person shall also be available to answer, in confidence, any questions an employee or partner may have with regard to this policy or [the Firm]'s employment benefits and pension plan.¹⁸

II. APPLICATION

A. Employment and Pension Benefits and Employment Practices

21. Typically, the following employment and pension benefits are conferred on individuals who work at [the Firm] and extended to the spouses of those individuals:

- a. **Bereavement Leave-** a leave granted to an individual, either with or without pay, on the death of a relative or a relative of a spouse.
- b. **Dental Benefits-** see Medical Benefits.
- c. **Emergency Leave-** a leave granted to an individual,¹⁹ either with or without pay, to attend to a matter, emergency or otherwise, of a family member.²⁰

registration and collection of benefits, the Appointed Person must ensure that the general public or others who are in the vicinity cannot see the enrollment and claim forms or computer submissions.

¹⁹ The Firm may choose to extend Emergency Leave to all individuals who work at the Firm regardless of its size and regardless if they fall within the ambit of the *ESA, 2000*.

²⁰ Unlike this policy, the *ESA, 2000* relies on the separate-but-equal distinction between spouse and same-sex partner. Section 50(1) of the *ESA, 2000*, sets out an entitlement to a leave of absence without pay for employees of employers who regularly employ 50 or more employees because of:

2. The death, illness, injury or medical emergency of an individual described in subsection (2) [or] 3. An urgent matter that concerns an individual described in subsection (2).

Section 50(2) states that:

Paragraphs 2 and 3 of subsection (1) apply with respect to the following individuals:

1. The employee's spouse or same-sex partner.
2. A parent, step-parent or foster parent of the employee, the employee's spouse or the employee's same-sex partner.
3. A child, step-child or foster child of the employee, the employee's spouse or the employee's same-sex partner.
4. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse or same-sex partner.
5. The spouse or same-sex partner of a child of the employee.
6. The employee's brother or sister.
7. A relative of the employee who is dependent on the employee for care or assistance.

- d. **Group Life Insurance-** a spouse is recognized to be either of the same or opposite sex and may be designated the beneficiary of group life insurance.²¹ The plan provider may require disclosure of the plan members' beneficiary designations.
 - e. **Maternity Leave-** a leave, either with or without pay, granted to a birth mother to provide time off for pregnancy and childbirth and to provide time to bond with the newly born child.
 - f. **Medical Benefits-** the employer may claim premiums paid for medical and dental insurance coverage for spouse of individuals who work at [the Firm] as a tax credit.²²
 - g. **Parental Leave-** a leave granted, either with or without pay, to an individual following the birth of a child or the coming of a child into the individual's custody, care and control for the first time. Parental leave cannot be denied to qualifying employees on the basis of sexual orientation.²³
 - h. **Pension Plan Survivor Benefits-** as of December 19, 2003, the *Canada Pension Plan* survivor benefits available to opposite sex spouses are available to same-sex spouses,²⁴ retroactive to April 17, 1985. Spouses (common law, opposite-sex or same-sex) who at "relevant times" live separate and apart from the pension plan member lose entitlement to benefits.
 - i. **Relocation Allowances-** expenses arising from the relocation of an individual who works at [the Firm] and his or her spouse that are reimbursed by [the Firm] shall be reimbursed by [the Firm] regardless of an individual's sexual orientation.
22. The following relationships are considered by [the Firm] to be '**family**' in the context of employment benefits:
- Spouse as defined in paragraph 2 of this policy;
 - Parent, step-parent or foster parent, as well as those of the individual's spouse;
 - Child, step-child or foster child, as well as those of the individual's spouse;

²¹ While the term 'spouse' in this document has an inclusive meaning, legislation governing group insurance benefits uses either the term same-sex partner or common-law partner.

²² The Firm should be cognizant that some insurers may discriminate by denying transgender individuals, or their spouses, benefits for sex reassignment surgery, prosthetics, hormone therapy, and electrolysis.

²³ Under s. 48(1) of the *ESA, 2000*, an employer must grant a minimum parental leave to qualifying employees. This section of the Act does not distinguish between same-sex and opposite-sex couples.

²⁴ The term 'spouse' has been used in this instance to reflect the Firm's understanding of this term. However, the *Canada Pension Plan* uses the term 'common-law partner', which applies equally to opposite and same-sex partners.

- Grandparent, step-grandparent, grandchild or step-grandchild, as well as those of the individual's spouse;
- Spouse of a child of the employee, as well as the spouse of the child of the individual's spouse;
- Brother or sister, or those of the individual's spouse; and
- A relative of [the Firm] employee or member who is dependent on that individual for care or assistance.

23. **Next of Kin Declarations-** Human Resources or the Appointed Person shall keep this confidential information on file for use in the event of a medical emergency.

24. The following employment practices may be adopted to ensure that transgender persons are treated equally and with dignity:

a. **Washroom and other Gender-Specific Facilities-** [The Firm] will accommodate the needs of transgender persons regarding the use of washrooms and gender-specific facilities as required by the *Code*.

b. **Dress Code Policy-** [The Firm]'s Dress Code policy will respect the rights of transgender persons.

B. Social Benefits

25. Discrimination and harassment on the basis of sexual orientation, marital status and gender identity is often subtle. [The Firm] is committed to creating a work environment in which gay, lesbian, bisexual, Two-Spirited and transgender individuals who work at [the Firm] are treated with respect and are included in all aspects of [the Firm]'s social culture. Milestones in the personal lives of individuals who work at [the Firm] that are celebrated by [the Firm] shall not exclude those covered by this policy because of their sexual orientation or gender identity.

26. Typically, the following events in the personal life of an individual who works at [the Firm] may be either officially or informally observed:

a. **Events to Celebrate the Birth of a Child/ Adoption/ Weddings/ Commitment Ceremonies/ Anniversaries-** [The Firm] will encourage the celebration of significant events in the lives of those covered by this policy as it would in equivalent heterosexual and non-transgender contexts.

b. **Funerals-** [The Firm] will extend expressions of sympathy on the death of a spouse or family member of those covered by this policy as it would in equivalent heterosexual and non-transgender contexts.

- c. Holiday or Firm Parties-** [The Firm] will encourage those covered by this policy and their spouses/guests, if they wish, to attend holiday or firm parties as it would for heterosexual and non-transgender individuals who work at [the Firm].

RECOURSE

27. It is the responsibility of [the Firm] to abide by all legislation that governs employment and pension benefits. Should an individual believe that benefits are being conferred or administered in a discriminatory manner, [the Firm] encourages that individual to report it to [insert the title of the position responsible for handling complaints], who shall do what is necessary to address the situation. All complaints or inquiries made under this section will be confidential.
28. Further recourse may be available under other policies adopted by [the Firm], including [the Firm should list other applicable policies, such as a policy on discrimination and harassment; an accommodation policy, etc...].
29. Nothing in this policy precludes an individual from seeking assistance or filing complaints under other avenues of recourse. [The Firm] undertakes to provide individuals with information on:
- The services offered by the Discrimination and Harassment Counsel;²⁵
 - The right to file a complaint with the Ontario Human Rights Commission under the *Code*;
 - The right to file a complaint with the Law Society of Upper Canada under the *Rules*.

EDUCATION AND TRAINING

30. As an extension of its commitment to a discrimination and harassment-free workplace, all current and future individuals who work at [the Firm] will be informed of the policy on equal benefits for gay, lesbian, bisexual, Two-Spirited

²⁵ The Law Society of Upper Canada's By-Law 36 – Discrimination and Harassment Counsel, provides that Convocation shall appoint a Discrimination and Harassment Counsel whose function is set out in s. 4(1) which reads:

4. (1) It is the function of the Counsel,
- (a) to assist, in a manner that the Counsel deems appropriate, any person who believes that he or she has been discriminated against or harassed by a member or student member;
 - (b) to assist the Society, as required, to develop and conduct for members and student members information and educational programs relating to discrimination and harassment; and
 - (c) to perform such other functions as may be assigned to the Counsel by Convocation.
- (2) Despite clause (1) (a), the Counsel has no authority to require an investigation to be conducted or to conduct an investigation under section 49.3 of the Act.

and transgender employees. [The Firm] will make copies of this policy available to all individuals who work at [the Firm].²⁶

31. Training on the duty of confidentiality under this policy will be provided for all individuals at [the Firm] who have access to confidential information collected for the purposes of registration and administration of the employment benefits and pension plans.

²⁶ The firm may wish to state in its recruiting materials that where it extends benefits to spouses, it is committed to providing those benefits in a non-discriminatory manner. Also, the firm may assert in its recruiting materials that it is commitment to encouraging full participation in the firm's employment and social benefits, regardless of sexual orientation and gender identity.

APPENDIX A- GLOSSARY OF TERMS

The definitions in this glossary are adapted from the Ontario Human Rights Commission document *Policy on Discrimination and Harassment because of Gender Identity*²⁷ and the *National Lesbian and Gay Journalists Association Stylebook Supplement*.²⁸ The definition of “Two-Spirited person” was developed by the *McGill Project: Two-Spirited People*.²⁹

Biocentric - the presumption that one’s sex and gender matching is universal and/or superior to the experience of being transgender.

Bisexual used as a noun describes an individual who may be attracted to either sex. As an adjective of, or relating to, sexual and affectional attraction to either sex.³⁰

Gay is an adjective that has largely replaced “homosexual” in referring to men who are sexually and affectionally attracted to other men. For women, “lesbian” is preferred. To include both, use “gay men and lesbians.”³¹

Gender identity refers to those characteristics that are linked to an individual’s intrinsic sense of self that is based on attributes reflected in the person’s psychological, behavioural, and/or cognitive state. Gender identity may also refer to one’s intrinsic sense of being male or female. It is fundamentally different from, and not determinative of, sexual orientation.³²

Heterosexism/Heteronormativity is the presumption that heterosexuality is universal, normative and/or superior to homosexuality. Also: prejudice, bias or discrimination based on such presumptions.³³

Homophobia refers to fear, hatred or dislike of homosexuality, gay men and lesbians.³⁴

Intersexed means being born with both XX and XY chromosomes, the full or partial sex organs of both genders, or with underdeveloped or ambiguous sex organs, in addition to a hormone balance reflective of both genders. Individuals who are born intersexed may

²⁷ *Policy on Discrimination and Harassment because of Gender Identity*, *supra* note 5.

²⁸ Available online April 20, 2004, at <http://www.nlgja.org/pubs/style.html>

²⁹ Available online, April 20, 2004, at <http://www.mcgill.ca/interaction/mission/twospirit/>

³⁰ *Supra*, note 28.

³¹ *Ibid.*

³² This definition is a modification of that found in the Ontario Human Rights Commission *Policy on Discrimination and Harassment because of Gender Identity*, *supra*, note 5.

³³ *Supra*, note. 2.

³⁴ *Ibid.*

also embody secondary sex characteristics of either gender. This word replaces the inappropriate term 'hermaphrodite'.³⁵

Lesbian is the preferred term, both as a noun and an adjective, for women who are sexually and affectionally attracted to other women.³⁶

Sexual orientation is more than simply a status that an individual possesses; it is an immutable personal characteristic that forms part of an individual's core identity, including innate sexual attraction. Sexual orientation encompasses the range of human sexuality from gay and lesbian to bisexual and heterosexual orientations.³⁷

Sex-reassignment surgery is the medical procedure by which an individual is surgically altered to create the physical appearance of the opposite sex.³⁸

Two-Spirited person is a term derived from interpretations of Aboriginal languages used to describe a person who has received the gift of having the privilege to house both male and female spirits in their bodies. The concept of Two-Spirited person relates to today's designation of being a gay, lesbian, bisexual and transgender person of Aboriginal origins. Being given the gift of two-spirits means that the individual has the ability to see the world from two perspectives at the same time.

Transgender person is a term used to describe individuals who are uncomfortable with, or who reject, in whole or in part, their birth assigned sex. This may include transsexual persons, whether or not they have undergone sex reassignment surgery.³⁹

Transgenderists self-identify and live as the opposite gender but have decided not to undergo sex reassignment surgery.⁴⁰

Transition is the process of changing sex, including hormones, cross living, and surgery. A practical minimum duration for this process is about two years but it is not unusual for it to take longer.⁴¹

Transphobia is the unrealistic or irrational fear and hatred of cross-dressers, transsexuals and transgenderists. Like all prejudices, it is based on negative

³⁵ *Supra*, note 27.

³⁶ *Supra*, note 28.

³⁷ This definition combines elements of that used by the Ontario Human Rights Commission and that used by the National Lesbian and Gay Journalists Association.

³⁸ *Supra*, note 27.

³⁹ This definition is a modification of that found in the *Policy on Discrimination and Harassment because of Gender Identity*, *supra*, note 27.

⁴⁰ *Supra*, note 27.

⁴¹ *Ibid.*

stereotypes and misconceptions that are then used to justify and support hatred, discrimination, harassment, and violence toward people who are transgender.⁴²

Transsexual is an individual who identifies himself or herself as a member of the opposite sex and who acquires the physical characteristics of the opposite sex. The individual can be of any sexual orientation.⁴³

⁴² *Ibid.*

⁴³ *Supra*, note 28.

PART IV- LEGAL DEVELOPMENTS AND EMPLOYER OBLIGATIONS

A. LEGAL DEVELOPMENTS

I. SAME-SEX BENEFITS

(1) Sexual Orientation as Prohibited Ground of Discrimination

1. Sexual orientation has been a prohibited ground of discrimination since its inclusion in the *Ontario Human Rights Code* (the *Code*)¹ in 1986. Although equal treatment in employment contexts was articulated in the *Code*, the protection was not extended to the same-sex partners of gay and lesbian employees. This created a paradox in which equality was granted so long as a fundamental aspect of being gay, lesbian, bisexual or Two-Spirited was not expressed in the workplace; namely, an employee's acknowledgment of an intimate relationship with an individual of the same sex. Gay and lesbian individuals were forced to seek recourse through the Human Rights Tribunal and the courts to achieve recognition that same-sex relationships are fundamentally worthy of the same respect, dignity and equal treatment as the intimate relationships of heterosexual individuals.

(2) Protection Extended to Same-Sex Partners

(a) *Ontario Human Rights Code*²

2. In response to a complaint filed by a Crown Attorney employed by the government of Ontario, the Board of Inquiry (*Board*)³ held in *Leshner v. Ontario (No.2)*⁴ that the denial of employment benefits for an employee's same-sex partner amounted to discrimination on the basis of sexual orientation.⁵

¹ R.S.O. 1990, c. H.19.

² While not a defined term in the *Code*, the definition developed by the Human Rights Commission states that “[s]exual orientation is more than simply a “status” that an individual possesses; it is an immutable personal characteristic that forms part of an individual’s core identity. Sexual orientation encompasses the range of human sexuality from gay and lesbian to bisexual and heterosexual orientations. The protection of the *Code* extends to all individuals who are denied equal treatment because of sexual orientation.” *Policy on Discrimination and Harassment Because of Sexual Orientation* (Toronto: Ontario Human Rights Commission, 2000).

³ Currently known as the Ontario Human Rights Tribunal.

⁴ (1992), 16 C.H.R.R.D./184 (Ont. Bd of Inq.) [hereinafter *Leshner*].

⁵ Before the *Board* reached its conclusion in *Leshner*, the provincial government began extending employment benefits to same-sex partners of employees. However, the *Income Tax Act (ITA)*, R.S.C. 1985, c.1 (5th Suppl.) which defined ‘spouse’ as being a person of the opposite sex prevented the province from extending survivor pension benefits to same-sex partners. The *Board*, recognizing its limited jurisdiction over federal legislation, ordered the employer to set up a separate pension plan to provide survivor benefits, equal to those available under the *ITA*, to the same-sex partners of employees. Although the order was suspended for three years, the *Board* ordered the province to implement a pension arrangement that would provide persons living in same-sex conjugal relationships with survivor pension benefits and eligibility equivalent to those provided to persons living in heterosexual conjugal relationships.

(b) Canadian Human Rights Act⁶

3. The same year that the *Leshner* decision was released by the *Board*, the Ontario Court of Appeal held in *Haig and Birch*⁷ that the absence of sexual orientation in the *Canadian Human Rights Act (CHRA)* contravened s. 15 of the *Charter*.⁸ The section in question was declared invalid and sexual orientation was read into the *CHRA*.⁹

(c) Canadian Charter of Rights and Freedoms¹⁰

4. In 1995, the Supreme Court of Canada (SCC) held in *Egan v. Canada*¹¹ that sexual orientation is an analogous ground under s. 15(1) of the *Charter*. The appellant, Egan, had argued that the opposite-sex definition of 'spouse' in the *Old Age Security Act*¹² was discriminatory on the ground of sexual orientation. Although the majority concurred with Mr. Egan, the court held that the distinction was saved under s.1.
5. *Egan* was not an employment benefits case, however, the SCC recognized the historical disadvantage and the social and political vulnerability experienced by gay and lesbian individuals in Canadian society. Writing for the majority, La Forest J. observed that "[...] whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds."¹³
6. In *Vriend v. Alberta*¹⁴ the SCC acknowledged that the intentional omission of gay and lesbian individuals from the protections of Alberta's *Individual's Rights Protection Act*¹⁵ was not only an affront to those individuals' dignity but also had the effect of condoning discrimination against the individuals by suggesting that "...all

⁶ R.S.C. 1985, c. H-6.

⁷ *Haig and Birch v. Canada* (1992), 94 D.L.R. (4th) 1 (Ont.C.A.).

⁸ *Canadian Charter of Rights and Freedoms*, s.15, Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

⁹ Birch was a captain in the Armed Forces who, subsequent to informing his superior that he was gay, was advised that he would be subject to a policy in which gay and lesbian individuals were ineligible for promotion and professional development. The Court of Appeal held that sexual orientation is analogous to the enumerated grounds set out in s. 15(1) of the *Charter* and ordered that it be read into the *CHRA*.

¹⁰ *Supra* note 8.

¹¹ [1995] 2 S.C.R. 513 (S.C.C.) [hereinafter *Egan*].

¹² R.S.C., 1985, c. O-9.

¹³ *Egan*, *supra* note 11 at 5.

¹⁴ *Vriend v. Alberta*, [1998]1 S.C.R. at 493 [hereinafter *Vriend*].

¹⁵ R.S.A. 1980, c. I-2.

persons are equal in dignity and rights except gay men and lesbians.”¹⁶ The SCC, in ordering sexual orientation to be read into the legislation, created a precedent for its inclusion in all provincial human rights legislation.

(3) ‘Spouse’ Reflects Same-Sex Common Law Conjugal Relationships

(a) *Income Tax Act*¹⁷

7. The definition of spouse as exclusive to the domain of heterosexual couples was challenged in *Rosenberg v. Canada (Attorney General)*.¹⁸ Rosenberg was employed by C.U.P.E., which required mandatory enrollment in a private pension plan. Under the plan, surviving opposite-sex spouses of deceased members were entitled to two-thirds of the member’s benefits. The C.U.P.E. plan was registered with Revenue Canada (now the Canada Customs and Revenue Agency) in order to take advantage of the tax deferral benefits offered under the *ITA*. However, s. 252(4) of the *ITA* limited private pension plans registration to plans which restricted survivor benefits to opposite-sex spouses. Under the *ITA*, the term ‘spouse’ was expansive, encompassing opposite-sex couples who were both legally married and those who had been living in common law conjugal relationships for a period of 12 months. The Ontario Court of Appeal held that the definition was discriminatory on the basis of sexual orientation and that the appropriate remedy would be to include same-sex partners into the *ITA* definition.

(b) *M. v. H.*¹⁹

8. The *M. v. H.* decision released in 1999 by the Supreme Court, held that the opposite-sex definition of spouse in s. 29 of the *Family Law Act (FLA)*²⁰ was discriminatory under s. 15 of the *Charter*. M and H were lesbians whose relationship had dissolved after many years of cohabitation. M sought spousal support under the *FLA* from her former partner. The SCC ordered s. 29 severed in its entirety from the Act and declared of no force and effect. The remedy was suspended for six months to allow the legislature to amend all similar provisions that applied to common law couples while excluding same-sex couples in a discriminatory manner.

¹⁶ *Vriend*, *supra* note 14 at 104.

¹⁷ *Supra* note 5.

¹⁸ [1998] O.J. No.1627 (Ont.C.A.) [hereinafter *Rosenberg*].

¹⁹ [1999] 2 S.C.R. 3 [hereinafter *M. v. H.*].

²⁰ R.S.O. 1990, c. F.3.

(c) Legislated Changes as Response to *M. v. H.*

9. The Ontario legislature's response to *M. v. H.* was to introduce omnibus legislation²¹ with the purpose of amending 67 provincial statutes that had the effect of granting rights and obligations to opposite-sex common law partners while denying them to, or placing additional burdens on, same-sex couples. The legislature granted all opposite-sex couples, whether legally married or common law partners, spousal status and created a new, separate class of relationships for same-sex partners. The effect of this legislation was to create a 'separate but equal' category for individuals living in same-sex partnerships. Critics argue that this approach has the effect of reinforcing the inequality of same-sex partners with their opposite-sex counterparts; that is, same-sex couples are incapable of marrying, and by being relegated to a separate category, are therefore inferior to spouses. By extension, same-sex couples are not worthy of equal status and recognition. The *Halpern*²² decision, however, grants same-sex partners the legal capacity to marry leaving unmarried same-sex partners in the separate but equal category.
10. The *Code* was amended in three ways as a result of the decision in *M. v. H.*: references to 'marital status' were struck out and replaced by 'marital status, same-sex partnership status'; references to 'spouse' were amended to embody the term 'same-sex partner'; and, definitions for same-sex partner and same-sex partnership were added to s. 10 of the *Code*.²³
11. The federal government's response to *M. v. H.* was significantly different than that of Ontario. The federal government introduced Bill C-23, *An Act to modernize the statutes of Canada in relation to benefits and obligations*,²⁴ the effect of which was to preserve the traditional definition of spouse (defined as "opposite sex couples who are legally married") and to introduce the term 'common law partner' which included both opposite-sex and same-sex couples. The term 'common law partner' was the government's attempt to encompass all people in common law relationships without creating a separate category of 'same-sex partner'. Prior to its final reading and subsequent enactment in June 2000, Bill C-23 was amended so as to include a provision to the effect that it would not affect the meaning of the word 'marriage', defined as "the lawful union of one man and one woman to the exclusion of all others." That marriage is exclusively available to opposite-sex couples has been negated by the Ontario Court of Appeal's decision in *Halpern*.

²¹ Bill 5, "An Act to amend certain statutes because of the Supreme Court of Canada decision in *M. v. H.*" 1st Sess., 37th Leg., Ontario, 1999, cl. 8 (assented to 22 Dec. 1999, S.O. 1999, c.15).

²² [2003] O.J. No. 2268 (Ont.CA) [hereinafter *Halpern*].

²³ Section 10 of the *Code*, *supra* note 1 reads:

"Same-sex partner" means the person with whom a person of the same sex is living in a conjugal relationship outside marriage; same-sex partnership status means the status of living with a person of the same sex in a conjugal relationship outside marriage.

²⁴ *Modernization of Benefits and Obligations Act*, 2000, c. 12.

(4) Legal Recognition of Same-Sex Marriage

12. In June of 2003, the Ontario Court of Appeal unanimously held in *Halpern v. Canada (Attorney General)*²⁵ that the common law definition of marriage, stated as “the voluntary union for life of one man and one woman, to the exclusion of all others,”²⁶ infringed the rights of same-sex couples under s. 15(1) of the *Charter* and that the infringement could not be justified under s. 1. The Court declared the definition invalid to the extent that it referred to “one man and one woman” and then reformulated a gender-neutral definition stated as “the voluntary union for life of two persons to the exclusion of all others”.²⁷ This paved the way for same-sex couples in Ontario to have the right to marry and to have their union legally recognized.
13. The *Halpern* decision was consistent with the British Columbia Court of Appeal’s judgment in *EGALE Canada Inc. v. Canada (Attorney General)*,²⁸ which was delivered in May 2003, as well as with the Cour Supérieure du Québec 2002 decision in *Hendricks v. Québec (Procureur général)*.²⁹ In both *EGALE* and *Hendricks*, the orders were initially suspended for 24 months. However, after the *Halpern* decision was delivered in Ontario, an application to amend the British Columbia Court of Appeal’s order was allowed and in July 2003, the suspension was lifted to permit immediate effect. A decision released by the Quebec Court of Appeal on March 19, 2004 concurred with the Ontario and British Columbia judgments, making same-sex marriage valid and available immediately in the province of Quebec.
14. The *Halpern*, *EGALE* and *Hendricks* decisions combine to convey the courts’ commitment to ensuring substantive equality rights for gay and lesbian members of Canadian society. The willingness of the Ontario, British Columbia and Quebec Courts of Appeal to intervene and not defer to the legislatures reflects the Supreme Court’s recognition that laws are simultaneously capable of harming and enhancing human dignity³⁰ and that courts must undertake to initiate changes where the

²⁵ *Halpern*, *supra* note 22.

²⁶ *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130 (H.L.) at 133.

²⁷ *Ibid.* at 148.

²⁸ In *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] BCCA 251 [hereinafter *EGALE*] the court reformulated the definition of marriage to read “the lawful union of two persons to the exclusion of all others” at 159.

²⁹ In *Hendricks v. Québec (Procureur général)*, [2002] J.Q. no 3816 at 200 [hereinafter *Hendricks*] the complainant sought, among other things, a declaration that there was no legislated or common law bar to same-sex marriage. After finding that limiting marriage to opposite-sex couples is discriminatory under s. 15 of the Charter, Lemelin J found that the infringement can be remedied in the following manner: “On pourrait facilement modifier le texte de l’article 5 de la Loi d’harmonisation pour le rendre compatible avec l’article 15 de la *Charte canadienne* en remplaçant les mots “d’un homme et d’une femme” par “deux personnes” [emphasis added].

³⁰ Writing for the Court in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at 530, Iacobucci J noted that “[h]uman dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their

government might be reluctant to make unpopular choices. In light of the legislative outcome of *M. v. H.* which resulted in same-sex couples being granted separate but equal status in Ontario, the *Halpern* decision signals the Ontario Court of Appeal's unease entrusting the government with the responsibility of legislating changes that would ensure equality rights for gay men and lesbians.

II. GENDER IDENTITY

15. Recognition of rights for people whose gender identity differs from that assigned at birth is a relatively recent development in Canadian society. Relatively little jurisprudence dealing with these issues and few human rights cases and arbitration awards have proceeded to judicial review, resulting in a restricted number of legal precedents. It is helpful to consider decisions made at the tribunal level in Ontario and other jurisdictions, in order to understand the employer's responsibility to respect the rights of transgender individuals.
16. In 2000, the Ontario Human Rights Commission released a policy document addressing discrimination and harassment based on gender identity. Although not enumerated in the *Code*, it is the position of the Commission that a liberal and broad interpretation of the ground "sex" encompasses gender identity and can support complaints of differential treatment that amounts to discrimination and harassment.³¹
17. A Tribunal in Quebec ruled that the term 'sex' amounts to more than the state of 'male' or 'female' but also includes the transformation from one to the other.³²
18. In Ontario, a person who undergoes sex-reassignment surgery may apply to have the birth-assigned sex noted on his or her birth certificate changed to reflect the person's sex as a result of the sex-reassignment surgery.³³
19. In British Columbia, a volunteer at a rape crisis centre was prevented by the organization from leading group counselling sessions when it discovered that the individual became a female as the result of sex-reassignment surgery.³⁴ Despite the fact that the individual self-identified as a woman, the Supreme Court of British

differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society."

³¹ *Policy on Discrimination and Harassment because of Gender Identity* (Toronto: Ontario Human Rights Commission, March 30, 2000).

³² *M.L. and Commission des droits de la personne et des droits de la jeunesse du Quebec v. Maison des jeunes*, [1998] J.T.D.P.Q. No 31 (Trib. Queb.).

³³ *Vital Statistics Act*, R.S.O. 1990, c. V-4, s. 36.

³⁴ *Vancouver Rape Crisis Society v. Nixon* [2003], B.C.J. No. 2899 [hereinafter *Nixon*], notice of appeal filed in British Columbia Court of Appeal, January 14, 2004, Court of Appeal File No. 31546.

Columbia (BCSC) overturned the Human Rights Tribunal's finding that the rape crisis centre had discriminated against her on the ground of sex.³⁵

20. In the employment context in Ontario, the *Code* provides that every person has the right to equal treatment without discrimination because of sex, which includes gender identity. The *Code* aims to protect individuals who may be targeted for discriminatory behaviour because of stereotypes, rather than being judged on their individual merits. An employer is prohibited from limiting employment opportunities for transgender individuals and from discriminating against individuals based on their gender identity.

B. SUMMARY OF EMPLOYER OBLIGATIONS

I. PROFESSIONAL RESPONSIBILITY

21. Despite the plethora of terms used to describe the conjugal relationships of opposite- and same-sex couples, the Courts have acknowledged that same-sex couples, whether married or living in common law relationships, are worthy of the same dignity, respect and legal recognition as that granted to their opposite-sex counterparts. This places a positive duty on employers to confer employment benefits in a non-discriminatory manner. The obligation to confer employee benefits in a fair and equal manner is found not only in human rights legislation and case law, but also in legislation that governs employment and pension benefits.

22. Rule 5.04 (Discrimination) of the *Rules*³⁶ imposes an obligation on all lawyers to refrain from discrimination on enumerated grounds. Under the same rule, lawyers are charged with the responsibility of respecting human rights laws in force in Ontario.

23. A prohibition on sexual harassment is found in Rule 5.03 (Sexual Harassment) of the *Rules*. The commentary to the Rule suggests that behaviours such as making unwanted inquiries or comments about another's sexual orientation or sex life, making degrading comments about a particular sex, as well as making derogatory comments of a sexual nature toward an individual are unacceptable actions. The Rule imposes a duty on all members of the profession to refrain from such offensive behaviour.

II. PENSION BENEFITS

24. Pension benefits previously only available to opposite-sex spouses are now extended to same-sex partners of plan members. Of particular note is that a spouse or same-sex partner can receive a pre-retirement benefit where the plan member dies before retirement, or a survivor benefit if the plan member dies after retirement.

³⁵ *Ibid.* at 147-158.

³⁶ *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000).

The *Pension Benefits Act (PBA)*³⁷ was amended by Bill 5 and the *Pension Benefits Statute Law Amendment Act, 1999*³⁸ so that 'spouse or same-sex partner' replaced any reference to 'spouse'.

25. The *Modernization of Benefits and Obligations Act* amended the *Canada Pension Plan (CPP)*³⁹ so that same-sex survivors are entitled to benefits upon the death of their same-sex partner. Although the *Act* came into force and effect in 2000, the amendment was grandfathered to apply retrospectively to claims made on behalf of same-sex partners who had died after January 1, 1998. This provision was found to be discriminatory in *Hislop v. Attorney General (Canada)*,⁴⁰ a December 2003 class action proceeding decision by the Ontario Superior Court of Justice. The Court found that the class members, individuals whose same-sex partners died after s.15 of the *Charter* came into effect in April 1985 but before January 1, 1998, were discriminated against on the basis of sexual orientation by being unlawfully excluded from survivor pension benefits following the death of their partners.
26. Married spouses, living separate and apart, continue to be eligible for survivor pension benefits as long as the marriage has not ended in divorce or the contributor has not resided in a conjugal relationship with another person for at least one year. However, upon the separation of common law spouses, their right to survivor pension benefits is relinquished. Thus, the common law spouses must be living together at the time of the contributor's death in order to collect survivor pension benefits.⁴¹

III. REGISTRATION OF PENSION PLANS

27. The definition of 'spouse' in s. 252(4) of the *Income Tax Act (ITA)* has been amended to include same-sex partners. Pension plans that entitle same-sex partners of the plan members to survivor benefits may be registered under the *ITA*. The amended definition in s. 252(4) has been grandfathered back to April 23, 1998 to accept the registration of pension plan amendments that included same-sex couples.⁴²

³⁷ R.S.O. 1990, c. P.8.

³⁸ *Pension Benefits Statute Law Amendment Act, 1999*, 1st Sess., 37th Leg., Ontario, 1999, S.O. 1999, c.15.

³⁹ *Canada Pension Plan*, R.S. 1985, c. C-8.

⁴⁰ *Hislop v. Attorney General (Canada)*, [2003] O.J. No. 5212 [hereinafter *Hislop*]. Notice of appeal filed January 19, 2004. Case scheduled to be heard June 10, 2004. CA File No. C41224.

⁴¹ See *Hodge v. Canada (Minister of Human Resources Development)(C.A.)*, [2002] S.C.C.A. No. 345, leave to appeal this provision granted by the SCC, November 13, 2003. The SCC heard this case March 18, 2004 but reserved judgment.

⁴² See *Rosenberg*, *supra* note 18.

28. The general definitions section of the *ITA* (s. 248(1)) has also been amended to include a definition of 'common law partner' that encompasses same-sex partners.

IV. PRIVATE HEALTH PLANS

29. In 1998, s.118.2(2) of the *ITA* was amended so that premiums paid for same-sex spousal medical and dental plan coverage can be claimed as a tax credit.⁴³

V. EMPLOYMENT BENEFITS- GENERALLY

30. Benefits granted in addition to those set out in the *Employment Standards Act, 2000* (*ESA, 2000*)⁴⁴ and its companion, *O.Reg.286/01*, are conferred at the discretion of the employer. Employers have a legal obligation to extend benefits to opposite-sex and same-sex spouses and partners alike.

VI. EMPLOYMENT BENEFITS- GROUP INSURANCE PLANS

31. Section 44 of the *ESA, 2000* expressly prohibits discrimination on the basis of same-sex partnership status (and by implication, on the basis of sexual orientation) in the provision of employee benefits.⁴⁵ Regulation 286/01 sets out exceptions where distinctions are permitted on the basis of sex, age, disability and marital status. In essence, it is not permissible to differentiate on the grounds of marital status between people with opposite-sex partners and those with same-sex partners. It is permissible, however, to distinguish between employees with partners (either of the opposite or same sex) and those without partners. The legislation mandates that permitted differential treatment must be made on an actuarial basis.

⁴³ *Canada (AG) v. Moore (T.D.)*, [1998] 4 F.C. 585 Affirming (1997), 97 C.L.L.C. 230-018, (*sub nom. Canada (Attorney General) v. Moore (No. 2)*) 29 C.H.R.R. D/185 (Can. Human Rights Trib.).

⁴⁴ *Employment Standards Act, 2000*, S.O. 2000, c. 41.

⁴⁵ *ESA, 2000*, s.44 (1) provides:

Except as prescribed, no employer or person acting directly on behalf of an employer shall provide, offer or arrange for a benefit plan that treats any of the following persons differently because of the age, sex, marital status or same-sex partnership status of employees:

1. employees.
2. beneficiaries.
3. survivors.
4. dependants.

VII. PREGNANCY⁴⁶ AND PARENTAL LEAVE

32. Minimum pregnancy and parental leaves are mandated by the *ESA, 2000* and are available to employees who qualify. In the case of maternity leave, it is available to all qualifying birth mothers.
33. Parental leave is available under the *ESA, 2000* to a qualifying adult who is a parent following the birth of a child or the coming of the child into the individual's custody, care and control for the first time.⁴⁷ "Parent" as defined in s. 45 of the *ESA,2000*, "includes a person with whom a child is placed for adoption and a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own ...". Because the leaves are a statutory right, employers have no discretion to grant or withhold maternity and parental leave to qualifying individuals.
34. Under the *Employment Insurance Act, 1996 (EIA)* maternity benefits are available to qualifying individuals who can prove their pregnancy.
35. The *EIA* makes parental benefits available to qualifying individuals for the care of one or more new-born children of the claimant or one or more children placed with the claimant for the purposes of adoption under the laws governing adoption in the province in which the claimant resides.
36. An employer may supplement benefits ("top up") received under the *EIA* provided the conditions set out in s. 38 the *Employment Insurance Act Regulations* are met.⁴⁸ The conditions are that the combined weekly benefits received under the *EIA* and from the employer do not exceed the employee's weekly earnings and that the amount paid by the employer does not reduce the individual's accumulated sick or vacation leave, severance pay or other accumulated credits from employment.

VIII. EMERGENCY LEAVE

37. The *ESA, 2000* provides for unpaid leaves for employees whose employer regularly employs 50 or more employees in the event of death, injury or medical emergency of a spouse or same-sex partner or other family members.⁴⁹

⁴⁶ The *Employment Insurance Act, 1996*, c.23 uses the terminology "maternity plans" and "benefits for pregnancy".

⁴⁷ *ESA,2000*, s. 48(1).

⁴⁸ SOR/96-332 as amended SOR/2002-274, s. 2; SOR/202-274, s.3.

⁴⁹ Section 50(2) provides an exhaustive listing of the particular individuals and their relationship to the employee.

IX. PUBLIC COMMITMENT CEREMONIES

38. In *Boutilier v. Canada (Natural Resources)*⁵⁰ the Canadian Human Rights Tribunal held that the Treasury Board's practice of denying leave to employees for the purpose of participating in public same-sex commitment ceremonies was discriminatory. In addition to ordering the employer to cease the discriminatory practice, the Tribunal ordered the Treasury Board to grant leaves for marriage and public commitment ceremonies on the same terms. The employer was further ordered to credit the complainants' annual leave used when marriage leave was denied and to pay \$5,000 for the pain and suffering of each complainant.

⁵⁰ [2003] C.H.R.D. No. 14 (C.H.R.T.).