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Agenda

- Articling survey results
- Legislation and Common Law
- Model Policy and Guides
- Code of Conduct
- Complaint Process
- Self-assessment Tool

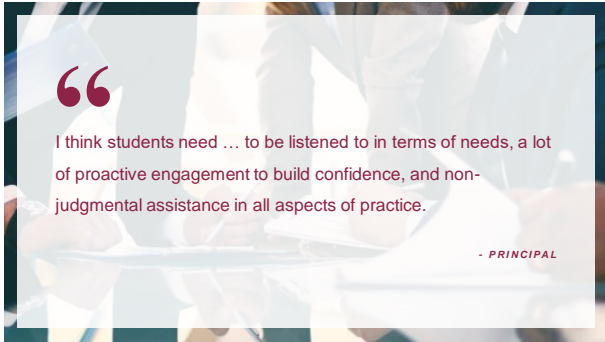


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METHODOLOGY HIGHLIGHTS

12-14-minute online surveys (May 8 – June 17, 2019)

Completed by 736 articling students and new lawyers

- 549 in Alberta
- Response rate: 23%
- 104 in Saskatchewan
- 83 in Manitoba

Completed by 407 principals, recruiters and mentors

- 295 in Alberta
- Response rate cannot be determined as the role of mentor is not tracked by the Law Society
- 64 in Saskatchewan
- 48 in Manitoba



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EXECUTIVE SUMMARY

The top three takeaways from the Articling Program Assessment survey.



32% Experience Discrimination and/or Harassment during Recruitment or Articling

Most discrimination and harassment is primarily based on gender or race/ethnicity.

Articling students feel:

1. Resources are not available to address discrimination and harassment concerns.
2. The process to deal with discrimination and harassment will negatively impact them.



Inconsistency in Competencies Learned and Level of Preparedness for Entry Level Practice

- 49% of new lawyers felt prepared for entry level practice.
- 51% lacked confidence and felt only somewhat prepared or unprepared.
- Only one third of students and new lawyers state a learning plan was used.
- Training is weaker in four competency areas:
 - Adjudication/dispute resolution
 - Conducting matters
 - Practice management
 - Client relationship management



Quality of Mentorship and Feedback is a Challenge for Principals/Mentors and Students

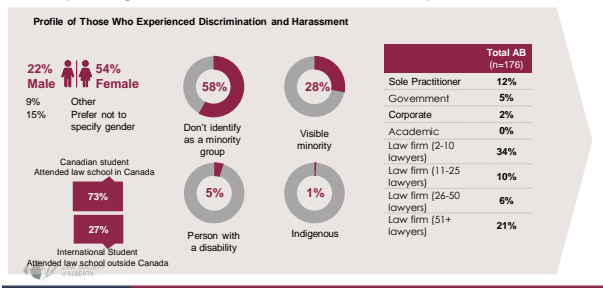
- Students feel receiving feedback on work performance, skills and development are areas for improvement.
- Principals and mentors mention lack of time, resources and training as key challenges with mentoring articling students.



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HIGHLIGHTS

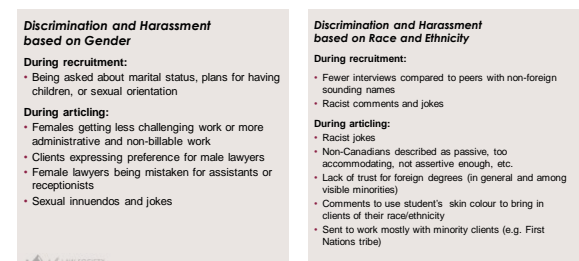
Those experiencing discrimination and/or harassment are more likely to be female.



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Types of Discrimination and Harassment Experienced

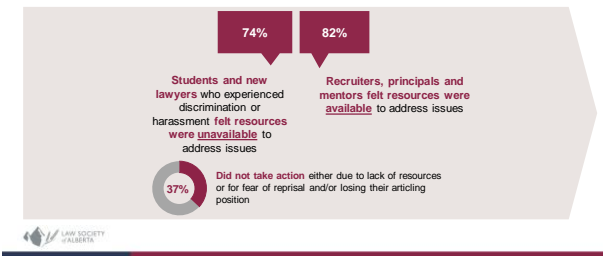
Primary types of discrimination and harassment described by students and new lawyers.



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HIGHLIGHTS

Students feel resources are not available to address discrimination and harassment concerns. There are also concerns that the process to deal with discrimination and harassment will negatively impact them.



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DISCRIMINATION AND HARASSMENT SUPPORT

While some principals, recruiters and mentors state that no action was taken in situations where articling students reported situations of harassment or discrimination, others provided support for the articling student.

How did you or your firm/organization handle the situation?

Among Alberta principals, recruiters and mentors who had candidates/articling students report being discriminated or harassed during the recruitment process or articling experience, n=40

30% Provided support for the articling student

30% Reported to appropriate department or person

30% No action / No help

- 5% No consequences for the offender
- 5% Partners failed to believe the complaint
- 5% Articling student was yelled at for reporting

28% Took action against the offender

- 15% Held a discussion with affected individuals
- 8% Serious talk with offender / offender was disciplined
- 3% Termination of the offending party after investigation

8% Investigation

8% Educating about and reviewing relevant policies



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Regulation of the Workplace

- Occupational Health and Safety Legislation
- Human Rights Legislation
- Law Society of Alberta Code of Conduct

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Purpose of Regulation and Policies Arising from Regulation

- Foster positive working relationships
- Manage conflict within the workplace
- Ensure all employees are treated with respect
- Create an environment where individual differences are welcomed and valued

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Men are always whining about how we're suffocating them.

Personally, I think if you can hear them whining you're not pressing hard enough on the pillow!

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OHS Requires Respectful Workplace Policy to Cover:

- 1. Workplace conflict
- 2. Discrimination
- 3. Sexual harassment
- 4. Personal harassment
- 5. Retaliation

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Workplace Conflict...



negatively affects ability to work

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Ask yourself...

I would approach a co-worker if their behaviour was causing a problem for me.

True or False



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Discrimination & Harassment



Equality in employment means that no one is denied opportunities for reasons that have nothing to do with inherent ability.

Abella, Equality in Employment Royal Commission Report (1984), at p. 2 cited in Janzen v Pasty Enterprises, [1988] 1 SCR 1252 at p. 2



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The Role of Power



Harassment involves an abuse of economic power. Sexual harassment involves an abuse of sexual power and can involve abuse of economic power



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Ask yourself...

If I want to date a co-worker, I can.

True or False



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Harassment is:



Unwanted, objectionable or offensive conduct, not of a trivial nature, that serves no legitimate workplace purpose and has the effect of creating a hostile or poisoned work environment



Janzon v Pasty Enterprises Ltd, [1989] 1 SCR 1252 23

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Harassment is subjective, but based on a standard of reasonableness

How does the complainant perceive the behaviour?

How would the reasonable person react?



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Defining Sexual Harassment

The successful applicant in a workplace sexual harassment complaint must show:

1. An employment relationship;
2. Conduct which was unwelcome, when assessed objectively;
3. Emanated from an employee or agent of the employer;
4. The harassment was connected to the workplace; and
5. The offensive conduct was due to the gender of the victim

CU v Blencowe, 2013 HRTO 1667



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Cyber-Harassment



Employers must protect employees from harassment at the hands of other employees or managers, *and* from outsiders in the virtual world.



Amalgamated Transit Union, Local 113 v Toronto Transit Commission, 2016 OLRB No 267

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Evolution of Human Rights Law



Where there is a power imbalance, express objection to or rejection of conduct may not be required.



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American Bar Association

“There are, of course, a number of factors. But one of the most pernicious hurdles to achieving a satisfying legal career [for women] is the unfortunate and continuing problem of sexual harassment.”

Stephanie Ann Scharf
Chair, American Bar Association Commission on Women in the Profession
February 2018



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Ask yourself...

Singling out one employee in front of others constitutes harassment.

True or False



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Normal exercise of management's right to manage such as the day-to-day management of operations, performance at work or absenteeism, the assignment of tasks, reference checks, and the application of progressive discipline, up to and including termination, constitute the legitimate exercise of management's authority.

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Ask yourself...

There has to be more than one incident for harassment to exist.

True or False



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It's Not Just About Sexual Harassment



Discrimination is harassment on the basis of one or more protected ground

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New Rules Under OHS

- ✓ Define workplace harassment and violence in all forms, including domestic and sexual violence
- ✓ Require employers to investigate incidents of violence and harassment and take corrective action
- ✓ Require employers to develop separate violence and harassment prevention plans
- ✓ Require review of plans at least one every 3 years
- ✓ Require employers to advise workers of treatment options if harmed by violence or harassment; workers are entitled to wages and benefits while attending treatment programs

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What is Workplace Harassment?

A single or repeated incident of objectionable or unwelcome conduct, comment, bullying or action intended to intimidate, offend, degrade or humiliate a particular person or group.

It's a serious issue and creates an unhealthy work environment resulting in psychological harm to workers.

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What is NOT Workplace Harassment?

- Welcome, professional and appropriate social interaction
- Setting performance goals consistent with organizational/industry standards
- Competently conducted performance appraisals and feedback
- Requiring reasonable cooperation and interaction to get the job done

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Violence in the Workplace

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Workplace Violence

Violence, whether at a work site or work related, is defined as the threatened, attempted or actual conduct of a person that *causes or is likely to cause* physical or psychological injury or harm. It can include:

- physical attack or aggression
- threatening behaviour
- verbal or written threats
- domestic violence
- sexual violence

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Domestic Violence

- Becomes a workplace hazard when it occurs or spills over into the workplace
- May put the targeted worker at risk and may pose a threat to coworkers.

Employers must take reasonable precautions to protect affected workers if they are likely to be exposed to domestic violence at a work site.

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Sexual Violence

As a workplace hazard sexual violence refers to:

- any sexual act, attempt to obtain a sexual act, or other act directed against a worker's sexuality using coercion,
- by any person regardless of their relationship to the victim,
- in a workplace or work-related setting.

Sexual Violence:

- exists on a continuum from obscene name-calling to sexual assault and/or homicide
- includes online form of sexual violence, such as internet threats and harassment, and sexual exploitation.

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Employee Reporting

When an employee reports an incident of harassment or workplace violence, employers must:

- investigate any incident of harassment or violence
- take action to address the incident
- prevent it from happening again
- prepare an investigation report outlining the circumstances of the incident and the corrective action

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Employee Reporting (cont'd)

When an employee reports an incident of harassment or workplace violence, employers must:

- Retain the investigation report for at least 2 years after the incident
- Keep the investigation report readily available
- Provide the investigation report to OHS on request



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What You Can Do

- Model positive and respectful behaviour
- Challenge inappropriate behaviour
- Do not participate in, tolerate or ignore behaviour that is contrary to the respectful workplace policy
- Support and assist employees who seek your help



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What You Can Do (cont'd)

- Know the firm policies
- Foster an understanding of the firm policies to those you supervise
- Facilitate application of the firm policies by listening without judgment to employee concerns, clarify options, consult with internal resources, and make appropriate referrals
- Follow-up on concerns expressed



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Retaliation is **PROHIBITED**



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MODEL POLICY & GUIDES



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Policy Statement

- Contextualizes Policy
- Notes in the Model Policy

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Scope

- Applies to *all* employees
- Does not exclude complaints under legislative regimes
- Applies to conduct that occurs "off-site": "Workplace" is broadly defined

Definitions

- Tracks the definitions in OH&S, and Common Law
- Includes non-exhaustive examples of harassment, sexual harassment, violence
- Discrimination a form of harassment
- Confirms that reasonable action to manage the workplace is not harassment or discrimination

Employee Responsibility

- Each employee is responsible for creating the respectful workplace
 - Not engaging in harassment, discrimination or violence
 - Reporting harassment, discrimination or violence
 - No "punishment" for unsubstantiated complaints brought in good faith

Employer Responsibility

- Take reasonable **preventive** steps
- **Investigate** all instances of violence, discrimination or harassment and take corrective action
- **Support** employees who are subject to discrimination or harassment by those not covered by the policy (eg. clients, opposing counsel)
- **Protect** employees from retaliation

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Procedure: Employee Steps

- **Only if they are comfortable**, ask the offending party to stop
- Make a formal complaint
 - Written
 - Details

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Procedure: Employer Steps - Review

- Genuinely **review** and consider the complaint
- Interview parties and witnesses
- Determine whether investigation required
- Communicate findings within 10 days to complainant and respondent
- If investigation required, advise parties in writing and assign to investigator

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Procedure: Employer Steps - Investigation

- Internal versus external
- Review report and have plan of action within 15 days of receiving report
- Advise parties in writing of outcome
 - Finding of harassment or discrimination reported to LSA
 - Report earlier?
- False complaint made knowingly or maliciously – discipline complainant

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Confidentiality

- Employer must maintain confidentiality as much as possible
- All records kept separate from employee file unless complaint substantiated

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Ask yourself...

What happens at the company holiday party or after-hours events is of no concern to the Law Society?

True or False



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Current Code

- 6.3-1 The principles of human rights laws and related case law apply to the interpretation of this rule.
- 6.3-2 A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.
- 6.3-3 A lawyer must not sexually harass any person.
- 6.3-4 A lawyer must not engage in any other form of harassment of any person.
- 6.3-5 A lawyer must not discriminate against any person.

Commentary
 [1] A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.



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Old Code – Discrimination and Harassment

- Discrimination, on the basis of all protected grounds, prohibited in personal, social and professional settings
- Harassment prohibited in the workplace, in relationships with others in the justice system and members of the public
- Workplace policy and complaint process recommended



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Old Code – Sexual Harassment

- Prohibited in relation to colleagues, staff members, clients or others
- Included examples and definitions
- Commentary seemed to limit application to the work environment

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New Developments

- Federation of Law Societies' consultation on new rules and commentary - 2020
- Separate rule for each of discrimination, harassment and sexual harassment
- Definitions and examples included
- Reprisal prohibited
- Ethical standards extend to conduct outside the lawyer's office or practice

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Complaint Processes

- Duty to report
- Simultaneous investigations
- New Intake Protocol – sexual assault or sexual harassment is an automatic referral into the conduct stream
- Options and outcomes
- Examples of hearings and sanctions

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Self-Assessment Tool

- Commitment to equity, diversity and inclusion
- Business case for diversity
- Respectful workplace policies and complaint processes a "must"
- Awareness of disabilities, and equity in hiring, policy development
- Equitable work assignments, parental leave policies
- Training on implied bias and intercultural competence

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