



NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM

From: Frank Demont, Chair, Code of Professional Conduct Committee and Elaine Cumming,
Professional Responsibility Counsel

Date: June 19, 2020

Subject: FLSC's Standing Committee on the Model Code – Proposed Revisions to 6.3

(Discrimination and Harassment)

The Federation of Law Societies' Standing Committee on the Model Code was established to review the Model Code on an ongoing basis to ensure that it is both responsive to and reflective of current legal practice and ethics. The Standing Committee is mandated by the Federation to monitor changes in the law of professional responsibility and legal ethics, to receive and consider feedback from law societies and other interested parties regarding the rules of professional conduct, and to make recommendations for amendments to the Model Code.

The amendments proposed in the attached Consultation Report address issues related to the duties regarding non-discrimination and harassment, as well as *ex parte* communications with courts and tribunals.

The Law Societies Equity Network ("LSEN") is a network of law society staff engaged in efforts to prevent discrimination and harassment in Canadian legal workplaces and to promote diversity and inclusion. In June 2019, the LSEN sent a Memorandum to the Standing Committee suggesting that the current Model Code rules were insufficient. The LSEN identified one shortcoming in particular: the rules and commentary may not adequately reflect the importance of preventing discrimination and harassment. The LSEN suggested that the Standing Committee propose revisions to the Model Code directed at clarifying the obligations.

Many of the concerns raised by the LSEN were shared by the members of the Standing Committee, and the work to amend rule 6.3 was prioritized. The recommendations made by the LSEN provided the Standing Committee with an excellent foundation on which to draft rules that more accurately reflect the significant importance of these rules.

The Standing Committee is now requesting feedback from a wide range of stakeholders including all Canadian law societies, the Canadian Bar Association, the federal Department of Justice, the legal academy, and the general public on the draft amendments to the Model Code. Consultation with the law societies, their members and other interested stakeholders is an essential component of the process to amend the Model Code.

The Society is obliged to consider and balance *Charter* values, including the right of free expression as well as the right to be free from discrimination and harassment. In this regard, the Code of Professional Conduct Committee has taken note of the similarities between the proposed definition of

harassment in the new model rule, and the definition of cyberbullying in the *Cyber-safety Act*, SNS 2013 c 2. That *Act* was struck down as unconstitutional by the Nova Scotia Supreme Court in *Crouch v Snell*, 2015 NSSC 340. The *Act* was found unconstitutional in part because the definition of cyberbullying was too broad. The Court noted that the *Act* applied to private as well as public communication, that it provided no defences such as those available in defamation law, and that it did not require proof of harm. The court also remarked on the absence of a requirement for malice. The court found that the definition would catch speech that was at or near the core of protected free expression under the *Charter*.

While generally supportive of the Federation's proposed amendments to the Model Code, the Code of Professional Conduct Committee intends to raise the potential issues with the definition of harassment, given Nova Scotia's experience with the *Cyber-safety Act*. Not all of the issues raised by the court in *Crouch v Snell* will be applicable in the context of harassment under the Code, but some will be. The Committee specifically requests member comments regarding the proposed definition of harassment in Commentary [1] to Rule 6.3-2.

Please provide us with your feedback by **Friday, September 4, 2020** and your comments can be directed to Elaine Cumming at ecumming@nsbs.org.

All comments received will be provided to the Code of Professional Conduct Committee who will then communicate any themes or specific concerns to the FLSC's Standing Committee. The Standing Committee will then be tasked with preparing an updated version of the rule amendments based on the feedback received from all jurisdictions. The final amendments will be presented to the Council of the Federation for approval in December 2020 and then submitted to the law societies for adoption and implementation.

Attached: Model Code of Professional Conduct Consultation Report - January 29, 2020