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#### Recommended Citation

Cox, AALS as Creative Problem Solver: Implementing Bylaw 6-4(a) to Prohibit Discrimination on the Basis of Sexual Orientation in Legal Education, 56 J. LEGAL EDUCATION 22 (2006).

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# AALS as Creative Problem-Solver: Implementing Bylaw 6-4(a) to Prohibit Discrimination on the Basis of Sexual Orientation in Legal Education

Barbara J. Cox

## Introduction

In 1985, 1987, and 1990, Professor Gene Schultz of St. Louis University School of Law sent questionnaires to U.S. law schools concerning several issues relating to sexual orientation and legal education. In 1985, 23 of 151 AALS member schools reported that they had adopted non-discrimination policies that included sexual orientation; by 1990, that number had increased to 105 schools.<sup>1</sup> By 2004, the Law School Admissions Council's (LSAC) brochure, *Out and In: Information for Gay, Lesbian, Bisexual, and Transgendered Law School Applicants*, indicated that all 157 AALS member schools listed in the brochure provided

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I would like to thank the McGill Center for Creative Problem-Solving and Dean Steven R. Smith for supporting this project through a research grant from the Center; Thomas Barton, Jean Love, Carl Monk, Linda Morton, Katharine Rosenberry, Joyce Saltalamachia, Steve Smith, Barbara Studenmund, and Janet Weinstein for commenting on previous drafts of the article; Steve Jodlowski, Marc Mullette, Art Severance, and Jill Smith for providing research assistance; and Linda Weathers and Karen Miller for technical assistance. This research project would have been impossible without the help and assistance of Barbara Studenmund, Administrative Coordinator for Membership Review and Business Manager, every step of the way, and I owe her a great debt of gratitude. I also thank my spouse, Peg Habetler, for her continuing support.

1. See Gene P. Schultz, *The Inclusion of Sexual Orientation in Nondiscrimination Policies: A Survey of American Law Schools*, 2 L. & Sexuality 131, 162-63 (1992). He also provided information on non-AALS schools: for these schools, one of eighteen respondents had a policy in 1985 that included sexual orientation; and five of twelve respondents had a policy in 1990. *Id.* at 164-65.

protection against sexual orientation discrimination.<sup>2</sup> The research conducted for this article shows that every AALS member school protects members of its community from discrimination based on sexual orientation.<sup>3</sup>

### *Overview and Summary of Research*

The Association of American Law Schools (AALS) amended its Bylaw 6-4(a)<sup>4</sup> in 1990,<sup>5</sup> adding sexual orientation, age, and handicap or disability to the list of those individuals that member schools are required to protect from discrimination. Legal education's almost universal prohibition of sexual orientation discrimination is a direct result of the AALS's efforts to implement this Bylaw.<sup>6</sup>

Equally important was the decision to amend the Bylaw and the efforts by lesbian, gay, bisexual, and transgendered (LGBT) members of legal education, such as Arthur Leonard, who spoke in favor of the amendment before the House, and other supporters who helped convince the AALS member schools to adopt this Bylaw amendment by voice vote, showing strong support for its adoption. Many influential LGBT faculty members were involved

2. See Out and In: Information for Lesbian, Gay, Bisexual, and Transgendered Law School Applicants (data was current as of July 2004, available at <<http://www.lsac.org/LSAC.asp?url=lsac/information-gay-lesbian-bisexual-applicants.asp>> (last visited July 20, 2006.) Schools that are not listed did not provide information for the brochure. Several non-AALS member schools are also included in the brochure and have non-discrimination policies including sexual orientation.
3. Separate from my research efforts based on AALS files and internal documents, my research assistants, Steven Jodlofski, Mark Mullette, and Art Severance located policies that prohibit discrimination on the basis of sexual orientation on web sites or in the publications of all 166 AALS member schools. Of course, some of these protect discrimination based on status only, but all prohibit discrimination to that extent and most prohibit all discrimination based on sexual orientation.
4. "A member school shall provide equality of opportunity in legal education for all persons, including faculty and employees with respect to hiring, continuation, promotion and tenure, applicants for admissions, enrolled students, and graduates, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, or sexual orientation." Bylaw 6-4(a) was renumbered as 6-3(a) during the Bylaws revisions adopted by the House of Representatives on January 5, 2004. See Deans' Memo 04-02 (Jan. 28, 2004). Because the Bylaw was numbered 6-4(a) during the entire time period of my study, I continue to refer to it as Bylaw 6-4(a) throughout this article.
5. See Proceedings of the 1990 Annual Meeting, Association of American Law Schools 196-203, (adding "age" to the amendment) and Deans' Memo 89-88 (Nov. 20, 1989) from Betsy Levin, reporting that the EC was proposing the amendment of Bylaw 6-4(a) to add "handicap or disability, or sexual orientation." Annual Meeting at 128, 136. Bylaw 8-3 states that a two-thirds vote is needed to amend any Bylaw.
6. I was involved in the AALS process from 1990-2002. I served as the chair-elect of the Section on Gay and Lesbian Legal Issues (the Section) during the January 1990 conference when the Bylaw amendment was adopted; served from 1991-1993 on the Working Group that wrote "The Interpretive Principles to Guide Religiously-Affiliated Member Schools as They Implement Bylaw 6-4(a) and ECR 6.17"; served on the Membership Review Committee from January 1999-December 2001, and staffed the MRC as Interim Deputy Director in 1998.

on the committees overseeing implementation of the Bylaw, including Jean Love, who served on the Accreditation Committee at the beginning of AALS implementation of the Bylaw; Mary Louise Fellows, who served on the Executive Committee in the early 1990s; and David Chambers, who served on the Executive Committee in the late 1990s, as well as many others. Although their importance in this effort cannot be overstated, my focus here is on the AALS's efforts as an institution trying to implement a controversial Bylaw amendment across its membership.

In 2000, I wrote to Carl Monk, Executive Director of the AALS, and asked permission to research the AALS's role in using Bylaw 6-4(a) to lead its member schools to adopt non-discrimination policies that included protection against sexual orientation discrimination. Using AALS Executive Committee Regulation (ECR) 5.7, which permits the Executive Director to provide access to confidential AALS documents, I requested access to the Accreditation Committee or Membership Review Committee's (MRC)<sup>7</sup> files on each member school (including correspondence between the school and the AALS during the membership review process), and the minutes of the Executive Committee's (EC) meetings. Over the course of four years, I researched two aspects of the AALS process of implementing Bylaw 6-4(a). I tracked each school's process from the amendment of Bylaw 6-4(a) in January 1990 until that school adopted a policy prohibiting sexual orientation discrimination, or through the end of 2002 (whichever occurred first). I separately tracked the policy decisions made by the MRC and the EC from 1989 through 2002. I focused on how effective the AALS was in leading its member schools through the process from amending the Bylaw to adopting a non-discrimination policy at each school.

I wrote this article because it is important for the legal education community to understand the important leadership that the AALS has provided in lessening the discrimination that sexual minorities encounter in legal education, and to know of the challenges and problems it encountered in making this Bylaw into more than a membership requirement in name only.

The following chart details all 162 member schools' responses to the steps the AALS took to implement Bylaw 6-4(a) and describes the steps

7. In January 1997, the AALS changed the name of its process for reviewing schools' continued membership in the AALS from an accreditation process to a membership review process in an effort to move from a regulatory approach to more of a peer advice approach. See Deans' Memo 97-1 (Jan. 5, 1997). For simplicity, I refer to both committees as the Membership Review Committee (MRC). However, it is important to recognize that AALS's efforts to implement Bylaw 6-4(a) began when it still considered itself to be in a regulatory relationship with its member schools. Much discussion within in the AALS about whether to become an open membership organization came from Deans and schools troubled by the extent of the AALS's efforts to implement this Bylaw. See the sections on impasses, *infra*, which further discuss these issues. See also Michael H. Cardozo, *Decision Making in the Association of American Law Schools, The Association Process 1963-1973*, at 8 (Wash., D.C., 1975).

necessary to move a resistant and significant minority to adopt compliant non-discrimination policies.<sup>8</sup>

Schools with compliant policies and no correspondence with AALS about Bylaw 6-4(a)	107
Schools reviewed by AALS, limited correspondence occurred, schools then adopted compliant policies	15
Schools with policies including sexual orientation but whose policies were rejected by AALS, and schools then adopted compliant policies	
Rejected because they prohibited only “illegal” or “unlawful” discrimination	8
Rejected because they were inconsistent or did not cover all community members	7
Schools that required significant correspondence with AALS before adopting compliant policies, but did not appear to actively resist doing so	
Religiously affiliated schools that struggled to adopt policies, but that complied following special site visit/seeing other schools’ policies	2
Public schools with universities/state agencies that limited their ability to adopt compliant policies; AALS refused to grant any variance; and schools adopted compliant policies after some struggle	6
Private schools that struggled against adopting compliant policies but ultimately agreed to do so	4
Schools that appeared to be actively resisting AALS efforts but that ultimately adopted compliant policies	
Religiously affiliated schools that adopted compliant policies only after significant correspondence, site visits, and/or viewing other schools’ compliant policies	9
Private/public university schools that actively resisted AALS requirements that policies must be in writing, exclude reference to “unlawful” discrimination, and be widely disseminated	4
<b>Total Member Schools</b>	<b>162</b>

8. The AALS had 162 member schools before admitting St. Thomas University School of Law (2001), University of Memphis (2001), Oklahoma City School of Law (2003), University of Nevada Las Vegas (2004), Chapman University School of Law (2006), and Roger Williams University School of Law (2006). I excluded the first two because they had compliant policies when they joined, and I excluded the last four because they joined the AALS after the end of my research. All six Schools’ web sites list compliant policies.

While this chart shows 107 schools required little or no pressure by the AALS before adopting compliant policies, the other 55 schools required some time and effort before they agreed to do so, and many schools required significant time and effort before they agreed to adopt such policies.

*AALS as a Model of Creative Problem Solving and Effective Institutional Design*

In 1990, only two states prohibited discrimination against members of the LGBT communities, and only sixteen states do so today.<sup>9</sup> Despite this limited legal protection, the AALS implemented Bylaw 6-4(a) across a diverse membership consisting of schools from every region of the country, whether private, public, or religiously affiliated. It did so without losing a single member school, despite threats of such defections throughout the process. It also did so without sanctioning any school. After reading all of the MRC's and the EC's policy discussions and all the letters sent by the EC to member schools during this period, I conclude that the AALS was successful because it functioned as a "creative problem-solver" in taking steps to implement Bylaw 6-4(a) and because its institutional design enabled it to manage this conflict effectively. By using creative problem-solving techniques and institutional design principles, we can understand why the AALS was able to achieve this success. Other complex institutions can use these frameworks and this case study to enhance their ability to implement controversial regulations across a diverse membership despite significant resistance from a strong minority of members.

The AALS process in implementing Bylaw 6-4(a) is an example of creative problem-solving in action. The law school where I teach, California Western School of Law, states that part of our mission is to educate our students to be creative problem solvers. Most of us understand creative problem solving as an approach that educates lawyers to seek "collaborative, long-term, interdisciplinary, and symbiotic solutions" to problems.<sup>10</sup> In resolving the range of problems facing society today,

Creative Problem Solvers must have the skill sets to select collaboration and facilitation in some contexts, and a litigious, adversarial and competitive approach in others. These professionals must also have the ability to avoid

9. Only Wisconsin (1982) and Massachusetts (1989) had nondiscrimination laws that included sexual orientation in 1990. See State Nondiscrimination Laws in the U.S. (as of Apr. 1 2005, available at <<http://www.thetaskforce.org/downloads/nondiscriminationmap.pdf>> (last visited July 20, 2006)). Since then, thirteen additional states have adopted statutes: Connecticut (1991), Hawaii (1991), New Jersey (1992), Vermont (1992), New Hampshire (1997), Nevada (1999), Maryland (2001), Rhode Island (2001), New York (2002), New Mexico (2003), California (2003), Illinois (2005), and Maine (2005). An Oregon appellate court has also ruled that state law prohibiting sex discrimination in the workplace also covers sexual orientation. *Id.*
10. James M. Cooper, Towards a New Architecture: Creative Problem Solving and the Evolution of Law, 34 Cal. W. L. Rev. 297, 312 (1998).

problems, and the ability to intervene in situations before a dispute arises and protagonists become inflexible.<sup>11</sup>

Creative problem solving encourages expanding the context when defining the problem and exploring a variety of techniques when seeking to solve each problem.<sup>12</sup> This variety of techniques is needed to build, maintain, and strengthen relationships between seemingly adversarial parties.<sup>13</sup> It emphasizes inclusiveness, decentralized decision making, and respect for human differences.<sup>14</sup>

The AALS, in its steps to implement Bylaw 6-4(a) and require its member schools to adopt internal policies that prohibit discrimination on the basis of sexual orientation, has shown all the hallmarks of the creative problem solver. While it was not infallible in these efforts, and I criticize some aspects of the implementation process below, the AALS achieved its desired result: a membership of schools that pledge that they will not discriminate against those members of their communities who are LGBT.<sup>15</sup> The AALS was successful in part because it used numerous techniques to convince its member schools to adopt compliant non-discrimination policies, rather than resorting to adversarial procedures alone, even when faced with serious objections from many schools.

The AALS persistently worked to remove the barriers that might prevent schools from implementing Bylaw 6-4(a), while maintaining ongoing long-term relationships with each member school. Whether it changed its own actions (for example, by initially withdrawing the amendment to ECR 6.17 after the objection of numerous religiously affiliated schools), or refused to relent when schools originally told the AALS it would be impossible for them to adopt a compliant policy (such as when it refused to permit a variance because of a “higher authority” problem),<sup>16</sup> the AALS repeatedly focused on how to implement the Bylaw without forcing its members to leave the AALS. It reached this goal because it did not simply assert its power against its members, but rather engaged in a continuing dialogue, whether with the AALS membership as a whole, with groups of schools who opposed implementation, or with each individual member school.

11. Thomas D. Barton, *Creative Problem Solving: Purpose, Meaning, and Values*, 34 Cal. W. L. Rev. 273, 313 (1998).

12. See Katharine Rosenberry, *Organizational Barriers to Creativity in Law Schools and the Legal Profession*, 41 Cal. W. L. Rev. 423, 425 (Spring 2005).

13. James M. Cooper, *Creative Problem Solving and the Castro Conundrum*, 28 Cal. W. Int'l L. J. 391, 416 (1998).

14. Barton, *Creative Problem Solving*, *supra* note 11, at 274.

15. It is important to note that at some schools this pledge not to discriminate extends only to one's “status” as a member of the LGBT community, and does not extend to “conduct” that a particular school may find objectionable.

16. See the section *Building Consensus Using Persuasion Rather Than Coercion*, *infra*.

Thus, it showed how these creative problem solving techniques, when used effectively, can resolve seemingly intractable problems.

Bylaw 6-4(a) can also be viewed from another framework by focusing on the AALS as an institution that manages conflict within its membership. Its efforts can be analyzed by asking how well its internal design allowed it to implement a controversial non-discrimination bylaw across a diverse membership.<sup>17</sup> Even though only two states outlawed discrimination based on sexual orientation in 1990, the AALS and its member schools, faculties, and staffs recognized the role that the AALS could play in helping to prevent such discrimination within legal education. Once the AALS headed down this path, its design and administration made it possible to manage conflict effectively while implementing Bylaw 6-4(a) to be more than simply aspirational.

Khalif Shariff uses dispute resolution literature to explain how institutions' internal design may help or hinder their efforts to serve as agents of social change and manage conflict within their memberships. He developed institutional design principles to improve an institution's ability to manage conflict. Building on the work of Barbara Koremenos, Charles Lipson, and Duncan Snidal,<sup>18</sup> Shariff developed seven principles to "enhance the problem solving and conflict management character of an institution."<sup>19</sup> Those principles are:

(1) Institutions should strive for inclusiveness by incorporating into their structure all stakeholders likely to be affected by the institution's work.

(2) Institutions should seek broad coverage of related issues of interest to the institutional membership rather than being limited to a narrow issue area.

(3) Institutions should seek depth of jurisdiction on individual issues so that they are empowered to take a variety of actions on issues within their mandate.

(4) Institutions should seek to build central sources of information gathering and dissemination.

(5) Institutions should decentralize and proliferate discussions and conversations among institutional members in multiple forums and forms.

(6) Institutions should vest control over decisions in those most interested and affected by them.

(7) Institutions should embed opportunities for regular review of principal design decisions in order to integrate learning from experience.<sup>20</sup>

17. See Khalil Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 Harv. Negot. L. Rev. 133 (2003).

18. *Id.* at 141.

19. *Id.* at 143.

20. *Id.* at 143-54. For each design principle, Shariff explains how it is derived from dispute resolution literature and cites numerous well-known works from this literature. The principles listed in the text are directly quoted from Shariff, but the editors of the Journal have omitted quotation marks to avoid typographical clutter.



In the rest of this article, I apply these institutional design principles, along with other problem-solving values and techniques, to the AALS's efforts to implement Bylaw 6-4(a) by requiring its member schools to adopt compliant non-discrimination policies. Although it is unlikely that the AALS ever consciously considered itself as a creative problem solver or purposefully designed itself using these principles to enhance its ability to resolve this particular conflict, the AALS was successful because it used these techniques and principles effectively.

The AALS implemented Bylaw 6-4(a) because it allowed its diverse, culturally, and geographically distinct member schools to adopt compliant policies in a style that meets each institution's needs. This process, both for the AALS and for its member schools, serves as an excellent example of how creative-problem solving values and techniques could be used to obtain results in complex organizations that could not be obtained by use of strict regulation and rigid application of rules alone. While many organizations, states, and countries take steps to prohibit discrimination on many bases, few manage to implement those policies in such a creative, successful manner. This case study may permit other institutions to follow the AALS's leadership and incorporate these techniques and principles in ways that will better permit them consciously and intentionally to resolve controversial problems effectively. Taking a written bylaw and breathing life into it as the AALS has done is a story that deserves to be told.

### **Using Problem-Solving Techniques and Institutional Design Principles When Implementing Bylaw 6-4(a)**

This section places the AALS's efforts to implement Bylaw 6-4(a) into the larger frameworks of creative problem-solving and institutional design to explain how it was successful in persuading its member schools to amend their non-discrimination policies to include protection based on sexual orientation. The AALS implemented Bylaw 6-4(a) because it used a variety of problem-solving values and techniques effectively, and used its institutional design to better manage the conflict caused by requiring all member schools to adopt compliant policies.

#### *Amending Bylaw 6-4(a) but Delaying Implementation*

Any person or institution must recognize that achieving results when using these problem-solving techniques may take a significant amount of time and flexibility. Since these techniques "require a process that is designed to endure, adapt and evolve as circumstances change," people or institutions using them must understand that progress will not come quickly.<sup>21</sup> Such delays occurred during the AALS process to implement Bylaw 6-4(a). Although the House amended Bylaw 6-4(a) to prohibit sexual orientation discrimination in January

21. Michael Mirande, Sustainable Natural Resource Development, Legal Dispute, and Indigenous Peoples: Problem-Solving Across Cultures, 11 Tul. Envt'l L. J. 33, 58 (1997).

1990, the EC did not send any letters to schools about their non-compliant internal non-discrimination policies until after its May 1993 meeting. This delay in implementing the bylaw, although troubling, may have allowed numerous schools to adopt compliant policies on their own and did allow the AALS to use problem-solving techniques, such as consensus building, to build support for fully implementing the Bylaw.

One delay was caused by the EC locating implementation of Bylaw 6-4(a) within the membership review process as a factor to be considered in the overall evaluation of each law school.<sup>22</sup> But it did not do so quickly. None of the membership review letters the AALS issued in May 1990, November 1990, May 1991, or November 1991 questioned whether sexual orientation had been added to those schools' non-discrimination policies.<sup>23</sup> Not until January 1992 did the EC even discuss what instructions should be given to members of the joint ABA/AALS inspection teams on how to report on Bylaw 6-4(a).<sup>24</sup>

At its May 1992 EC meeting, the report from the MRC showed that it had begun discussing schools' actions with regard to Bylaw 6-4(b) and 6.19 (use of career services by employers that discriminated on the basis of sexual orientation). But no discussion occurred on enforcing Bylaw 6-4(a). After its November 1992 meeting, a few schools received letters from the EC concerning problems with Bylaw 6-4(b) and ECR 6.19, but still nothing was said about Bylaw 6-4(a).

At its May 1993 meeting the EC finally considered two letters that raised some question about Bylaw 6-4(a). Thus, almost three and one-half years elapsed after Bylaw 6-4(a) was adopted by the House of Delegates before the EC first sent letters questioning specific schools on their compliance with Bylaw 6-4(a). Some of this time was spent grappling with the question of applying Bylaw 6-4(a) to religiously affiliated schools. Even if that question needed to be resolved before deciding how to handle such schools, the AALS could have taken steps sooner to question non-religiously affiliated member schools on whether their non-discrimination policies included sexual orientation.

22. The original draft of this article cited the date and page in the EC confidential minutes for every letter, memorandum, and policy decision, and for all quoted language from those minutes. In keeping with the format of the *Journal of Legal Education* to limit footnotes and recognizing that others cannot access those confidential minutes without special permission from the AALS, I eliminated the footnotes containing those references. A fully footnoted version of this article is available on my faculty web page, available at <<http://www.cwsl.edu/faculty/cox>> (last visited July 20, 2006).
23. Of course, the earliest time that the MRC and EC could have considered whether member schools had compliant policies was in October/November 1990 since their April/May 1990 meetings would have considered schools inspected before the bylaw amendment was adopted, and thus not asked whether sexual orientation was included in their non-discrimination policies.
24. The AALS appoints one member of the joint ABA/AALS inspection teams that visit ABA-approved and AALS member schools every seven years as part of the accreditation/membership review processes. This person is responsible for gathering information of special concern to the AALS, including each school's non-discrimination policies.

Although it may not be surprising that the AALS did not begin to enforce Bylaw 6-4(a) sooner,<sup>25</sup> it is troubling because schools reviewed during this 3 ½ year period and not questioned about whether their non-discrimination policies complied with Bylaw 6-4(a) would not come back for review again until seven years later. Thus, by not implementing Bylaw 6-4(a) more quickly, the AALS permitted non-compliant schools to wait seven additional years before they would be asked to address the question of whether their non-discrimination policy included protections based on sexual orientation.

This delay may have permitted some schools to amend their non-discrimination policies on their own initiative, perhaps lessening animosity towards the AALS. Since 107 schools were never asked whether they had compliant policies within the membership review process and yet all 107 have compliant policies, this delay by the AALS may have permitted some of these schools to amend their policies without any external pressure. Perhaps this delay also helped build the consensus, described in the next section, that the AALS was so eager to achieve. Although a balance may have needed to be struck between requiring compliance and allowing enough time to attain consensus, it seems that the AALS erred on the side of trying to attain consensus while ignoring the possibility that numerous schools were not meeting this requirement of membership and thus not protecting LGBT members of the legal education community from discrimination.

*Building Consensus While Addressing Concerns of Religiously Affiliated Schools and the Section on Gay and Lesbian Legal Issues*<sup>26</sup>

The AALS's efforts to build a consensus within its membership while implementing Bylaw 6-4(a) show it using creative problem-solving values and techniques, and following institutional design principles that better permitted it to manage the conflict that arose when it decided that the bylaw would apply to all of its member schools. Although Bylaw 6-4(a) was amended on a voice vote of members, once the EC applied the bylaw to all member schools, including religiously affiliated schools and schools in states with anti-sodomy laws, the danger of losing this support was significant. This section discusses the importance consensus-building plays in both creative

25. This delay is consistent with prior efforts to prevent discrimination. For example, adopting a membership Bylaw prohibiting discrimination based on race or color took over seven years (from 1950-1957) and proposals to amend the Bylaw to prohibit sex discrimination were belittled by the Special Committee during the 1950s. See, e.g., Report of the Special Committee on Discrimination in Law School Admissions, Proceedings of the 1951 Annual Meeting, AALS, at 278, 282, and Proceedings of the 1957 Annual Meeting, AALS, at 95-109 (discussion and vote of House of Representatives, prohibiting race or color discrimination as part of the Bylaws). See also Cardozo, Decision Making in the Association of American Law Schools, *supra* note 7, at 19, 66 (discussing AALS efforts opposing racial discrimination and segregation) and 19-20 (discussing AALS efforts opposing sex discrimination).

26. The Section is now called the Section on Sexual Orientation and Gender Identity Issues. I use the previous name because that was its name during most of the time period covered in this article.

problem-solving and designing institutions to manage conflict effectively. It focuses on two instances when the EC waited before moving forward to implement Bylaw 6-4(a) to build consensus and to obtain broader support within its membership.

The legitimacy of the AALS's efforts to implement its Bylaw hinged on ensuring that a broad consensus of its membership supported those efforts.

The legitimacy of consensus building processes...depends on whether they are viewed by all stakeholders...as representative of all interests and points of view. A bedrock principle of consensus-based processes, therefore, is that everyone with a stake in the decision should be represented at the table. This principle helps to ensure that any consensus agreement reached will be seen as legitimate by all relevant parties....<sup>27</sup>

Creative problem solving also promotes inclusiveness as one of its values, and suggests active listening, consensus-building, and proactive dialoguing to help resolve problems and build, maintain, and strengthen relationships between parties who could become adversarial.<sup>28</sup>

Similarly, institutional design principle 1 explains that institutions are better able to manage conflict when they invite all stakeholders affected by the institution's work to participate in its decisions. Additionally, the "legitimacy of outcomes in any process of conflict management often turns on the involvement of all parties," so that even when those parties are dissatisfied with specific decisions, their involvement in the process helps mitigate their disenchantment with the results.<sup>29</sup> Institutional design principle 5 focuses on decentralizing discussions and promoting conversations in multiple forums as ways to best manage conflict within an institution's membership. Institutional design principle 6 emphasizes that institutions that are going to successfully manage conflict must "vest control over decisions in those most interested and affected by them."<sup>30</sup>

The AALS used these problem-solving techniques and followed these institutional design principles at two important junctures when deciding how to best implement Bylaw 6-4(a). The first occurred when the AALS initially proposed amendments to ECR 6.17, which permits religiously affiliated schools to prefer co-religionists in hiring and admissions, but also requires that these

27. Shariff, *Designing Institutions to Manage Conflict*, *supra* note 17, at 144, n. 34.

28. See Cooper, *Castro Conundrum*, *supra* note 13, at 416.

29. Shariff, *Designing Institutions to Manage Conflict*, *supra* note 17, at 144. The discussion of the Working Group's Principles expresses this principle well—neither the Section nor the religiously affiliated schools were satisfied with the results. For a discussion of how some religiously affiliated schools view the AALS efforts and/or the reactions in their own schools in this area, see Symposium, *The First Conference of Religiously-Affiliated Law Schools*, 78 Marq. L. Rev. 247-546 (1995) (several articles discuss the AALS, its Working Group, and the Accreditation Committee).

30. Shariff, *Designing Institutions to Manage Conflict*, *supra* note 17, at 152.

schools not discriminate on the bases contained in Bylaw 6-4(a).<sup>31</sup> If the AALS forced religiously affiliated schools to comply with Bylaw 6-4(a), then some schools would be faced with potential conflicts between the religious tenets of their sponsoring religions (which oppose homosexuality on religious grounds) and the requirements of AALS membership. The second occurred when the AALS was preparing to adopt the report of the Working Group appointed to develop Interpretive Principles to guide religiously affiliated schools in prohibiting discrimination based on sexual orientation, and the Section on Gay and Lesbian Legal Issues (the Section) informed the AALS of its opposition to this report. As the following sub-sections explain, in both instances the AALS delayed taking these steps to permit all stakeholders to participate in the discussions and to ensure that those most affected by these decisions would be included in their resolution. In this way, the AALS showed itself to be an institution committed to using problem-solving techniques and designed in such a way as to permit it to better manage the conflict arising from this controversial bylaw amendment.

#### Steps Taken to Achieve Consensus While Amending ECR 6.17(4) to Require Religiously Affiliated Law Schools to Prohibit Sexual Orientation Discrimination

At the EC's May 1991 meeting, the Bylaws Revisions Subcommittee recommended that "age, handicap or disability, or sexual orientation" be added to the prohibited categories of discrimination listed in ECR 6.17(4). The EC spent quite some time grappling with whether to require religiously affiliated schools whose sponsoring religions condemned homosexuality to adopt non-discrimination policies that prohibit discrimination based on sexual orientation. It was concerned that the governing boards of those schools might not have permitted their schools to remain members of the AALS if such a requirement were imposed.

During the same meeting, the EC considered one EC member's concern that "the AALS should be inclusive and that it is going in the wrong direction to establish standards that schools providing quality legal education cannot meet." Another member responded that if ECR 6.17 were not amended, then the AALS would be giving its imprimatur for the exclusion of LGBT people from all religious schools. Several members were concerned about how the AALS could pursue the important principle of non-discrimination without being unduly confrontational. The EC ultimately decided to propose that ECR 6.17 be amended to add sexual orientation to the grounds on which religiously affiliated law schools could not discriminate.<sup>32</sup>

31. ECR 6.17, now renumbered as 6-3.1, permits "schools with a religious affiliation or purpose to adopt preferential admissions and employment practices that directly relate to the school's religious affiliation or purpose so long as... (4) the practices do not discriminate on the ground of race, color, national origin, sex, age, disability, or sexual orientation."

32. See Deans' Memo 91-47 (June 14, 1991) from Betsy Levin, announcing EC decision to amend ECR 6.17 by adding "age, handicap or disability, and sexual orientation" to section 4, which

By the end of August 1991, the AALS had received letters from at least eleven deans opposing the amendment and one supporting it. One letter expressed concerns that religious doctrine frequently proscribed homosexual sexual conduct and requiring schools to adopt practices that conflicted with their religious affiliation or purpose violated the free exercise of religion under the First Amendment. Another letter expressed that "it would be most unfortunate if the AALS should take a position which requires some of its member institutions to either abandon their religious convictions or violate AALS policy." Other objections centered on the fact that the AALS had a "proud tradition fostering and upholding" academic freedom and that, by applying Bylaw 6-4(a) to all member schools (including those that were religiously affiliated), it might be seen as "turning away from its traditional role of guardian of the integrity of and autonomy of its individual member institutions."

A dean from a non-religiously affiliated school urged moderation. He recognized that two important rights were in conflict and was concerned that "steps taken in haste or taken without efforts to clearly understand the depth of feelings on both sides of the issue could lead to an error of grievous proportions." He suggested that a meeting be held to discuss the issue. Some schools objected that they needed more time to discuss the amendment within their schools and that the EC's time line, which forced responses during the summer when most faculty members were unavailable, was too short.

At its November 1991 meeting, the EC noted that approximately seventeen to nineteen member schools (about one-eighth of its membership) opposed the amendment of ECR 6.17 (including about one-third of the religiously affiliated member schools). One EC member's memo to the EC explained that the opponents advanced primarily two claims: (1) amending "ECR 6.17 ignores the importance of the value of religion by broadly and unqualifiedly preferring the value of equal opportunity in this context over the value of religious freedom;" and (2) "[e]nforcement of Bylaw 6-4(a), without an exception for religiously affiliated schools, may have the unintended effect of increasing homogeneity, rather than diversity, among our member schools by driving from the Association a group of schools whose religious affiliation gives them a distinct approach to legal education."

Based on these letters, the EC withdrew the amendment to ECR 6.17 and extended the time for comments into the fall of 1991.<sup>33</sup> It also adopted four proposals: (1) that a forum for discussion of ECR 6.17 be held at the January 1992 annual meeting; (2) that no change be made to ECR 6.17 at that time; (3) that a Working Group (WG) be established to decide whether any changes should be made to ECR 6.17 or the way it was implemented; and (4) that the WG have equal representation from the religiously affiliated law schools, the LGBT community, and members of the EC.

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prohibits discrimination by religiously affiliated schools, and asking for any objections.

33. See Deans' Memo 91-68 (Aug. 14, 1991), from Betsy Levin, extending time to comment.

The EC's January 1992 minutes reported that the Annual Meeting forum on January 5, 1992, was well attended, that fifteen people spoke for over seventy-five minutes, that both sides were represented, and that the discussion was earnest, compassionate, and well reasoned. The EC concluded that the forum had "unquestionably" produced a better understanding of both sides' concerns. The EC focused on the importance of continuing "the process of listening and dialogue" and showing the member institutions that any changes would only be made after "a long and careful consultative and listening process."

A consensus developed in the EC that the WG's role would be to "extend and continue" the consultative process, that the ways to do that would be left to the WG, and that it would be encouraged to include the individual member schools in its work so that it would be clear to the AALS membership that the process was open and the EC was sensitive to its member schools' concerns. The WG was to consider "whether any accommodation could be made to the legitimate concerns of religious schools that affected their educational mission without undercutting the principle of non-discrimination" in admissions or hiring.

Although the EC had ultimate, and centralized, decision-making power on how to implement Bylaw 6-4(a), it understood the need to provide opportunities for affected stakeholders to express their concerns. It involved those most interested in the process each step of the way: the EC (the policymaker for the AALS), the religiously affiliated law schools, their representatives, and their supporters (those most concerned that AALS membership requirements not conflict with the religious tenets of their sponsoring religions), and the Section, their representatives, and supporters (those who were perhaps most interested in ensuring that discrimination on the basis of sexual orientation was prohibited in legal education).

Thus, the AALS and the EC showed that they understood that consensus-building required it to slow its process, open it to all stakeholders, listen carefully, and provide numerous opportunities for decentralized discussion and conversation between concerned individuals, the EC, and its member schools. Its efforts here are exactly those of an institution designed to better manage conflict and its techniques are those that promote problem-solving.

#### Steps Taken to Achieve Consensus during the Working Group's Process

In late 1991, AALS President Robert Gorman appointed the WG to discuss whether to amend ECR 6.17 to include sexual orientation as a type of discrimination not permitted by religiously affiliated law schools.<sup>34</sup> At the EC's May 1992 meeting, the EC members on the WG reported that it achieved some consensus during its first meeting. Among the *Interpretive Principles* tentatively

34. The WG consisted of Curtis Berger (Columbia) (Chair), Geoffrey Stone (Chicago), and Mary Kay Kane (UC-Hastings), all from the EC; Reese Hansen (BYU) and Rudolph Hasl (St. Johns), representing the religiously affiliated law schools; and Arthur Leonard (New York) and myself (Cal Western), representing the Section. Later, two additional members were added: Richard Huber (Boston College) and Robert Wasson, Jr. (Suffolk) (Section chair).

adopted were: (1) the importance of protecting academic freedom; (2) the inappropriateness of any law school directly inquiring into an applicant's sexual orientation in making its admissions or hiring decisions; (3) that disadvantage should not be premised solely on an individual's status as a member of the LGBT community or on an organization's focus on the subject of sexual orientation; (4) that religiously affiliated schools could follow "their essential religious tenets" so long as they made good faith efforts to protect the rights of individuals and organizations under Bylaw 6-4(a); and (5) that religiously affiliated schools must provide clear notice of each school's religious tenets and values to prospective members of the law school community prior to their affiliation with the school.<sup>35</sup>

The EC's discussion of the WG's initial report was intense and divided. Some members were concerned that Principles 3 and 4 permitted a status/conduct distinction that would be difficult to handle. *Bowers v. Hardwick*, the controlling Supreme Court precedent at the time, permitted states to criminalize sexual conduct between members of the LGBT community. Many courts discussed a status/conduct distinction, which permitted regulation of sexual conduct while not imposing penalties based on an individual's status as a sexual minority.<sup>36</sup> These EC members saw Bylaw 6-4(a) and ECR 6.17 as providing the right to be free from discrimination on the basis of sexual orientation in legal education, and thought the WG's Principles would eliminate those rights.

The WG members on the EC explained the difficulty that arose in trying to draw lines and stressed that guideline 4 was particularly problematic since it permitted discrimination if the discrimination was required by a school's "essential religious tenets." Some questions also arose about whether a school could simply assert a good faith basis for its discrimination. The EC agreed that the Principles should make it clear that religiously affiliated schools would have to find specifically that the non-discrimination principles in Bylaw 6-4(a) and ECR 6.17 conflicted with their essential religious tenets before the school would be permitted to discriminate against any member of its community. The WG members also explained that guideline 4 tried to meet the concerns of members of the LGBT community by placing the

35. This initial draft is similar to the final Interpretive Principles adopted by the EC. See Interpretive Principles to Guide Religiously Affiliated Member Schools as They Implement Bylaw Section 6-4(a) and Executive Committee Regulation 6.17 (adopted by the EC on Aug. 5, 1993), AALS Handbook 83-84 (2005). Bylaw 6-4(a) is now renumbered as 6-3(a) and ECR 6.17 is renumbered as 6-3.1, available at <[http://www.aals.org/about\\_handbook\\_requirements.php#6](http://www.aals.org/about_handbook_requirements.php#6)> and <[http://www.aals.org/about\\_handbook\\_regulations.php#6](http://www.aals.org/about_handbook_regulations.php#6)>, respectively (last visited July 20, 2006).

36. For articles discussing the problems with this distinction, see Francisco Valdes, Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct, 27 Creighton L. Rev. 381, 384 (1994); Patricia A. Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 Va. L. Rev. 1551 (1993); and Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. Rev. 915 (1989).



burden on religious schools to try to meet the needs of those members of their communities before permitting discrimination against them.

At its November 1992 meeting, the EC was informed that the Section had expressed its “unrelenting” opposition to the Principles as proposed. Among its objections were that: (1) the Principles established a status/conduct dichotomy that it considered to be based on homophobia; (2) they provided protection only so long as LGBT people “hide their sexual identities and engage in no activity—social or political—that reflects” that identity; and (3) that the schools should not be permitted to restrict student organizations. Although the EC had been prepared to adopt the WG’s report, it decided instead to add two additional members to the WG (one from the Section and one from another religiously affiliated school) and to ask the WG to meet again and try to achieve consensus in its final report.

At the EC’s May 1993 meeting, the EC members on the WG said that the Section’s opposition to the status/conduct distinction went “beyond the AALS position.” One member of the EC who was also on the WG explained that additional time was needed to resolve the Section’s representatives’ concerns about the language of the WG’s final report to the EC. In particular, the Section’s representatives wanted to issue a separate statement, neither concurring nor dissenting, but rather expressing their concerns about adopting Principles that prohibited discrimination based on one’s sexual orientation status, but that did not prohibit discrimination based on one’s sexual conduct if that conduct “conflict[ed] with the religious values of the school.”<sup>37</sup>

The EC adopted the WG’s final report on August 5, 1993, over one member’s dissent based on the status/conduct distinction permitted under the Principles.<sup>38</sup> The majority seemed pleased with result. One member noted that the principles were a model of consensus building and that the document had been carefully crafted. Several EC members believed that the status/conduct distinction would be troublesome to use in practice, but felt that the EC understood it would have to deal with those problems on a case-by-case basis. One member noted the importance of all nine WG members signing onto the document, even though the separate statement by the Section’s representatives suggested that problems would continue. One WG member on the EC noted that the WG’s meetings involved “a healing process” for those on all sides of the issue and that it would have been useful for more people to witness it.

37. See also Additional Statement of Barbara Cox, Arthur Leonard, and Robert Wasson, in Deans Memo 93-50 (Sept. 14, 1993) from Carl Monk concerning the WG’s final report.

38. Interpretive Principle 3 indicates that no disadvantage should result “solely because of the status of the individual’s sexual orientation” and Principle 4 indicates that “exclusion of members from or limitation on the participation of members within the law school community based upon conduct occurs only to the extent necessary, in compelling circumstances, and when essential religious tenets require such a result.” See Interpretive Principles, *supra* note 35, at 84; Deans’ Memo, *supra* note 37, from Carl Monk to Deans and Members of House of Representatives, which includes the WG’s final report.

Thus, the AALS demonstrated its skills as a creative problem solver, using techniques of active listening, consensus building, and proactive dialogue among the EC, its member schools, opponents and proponents of amending ECR 6.17, its WG, and the entire membership. It also established itself as an institution appropriately designed to manage conflict by having a structure that included all stakeholders in its efforts to end sexual orientation discrimination, by decentralizing and proliferating discussions and conversations among members in multiple forums and forms, and by vesting control over decisions in those most interested and affected by them.

### Implementing the WG Principles in Practice

Once the EC adopted the WG's Principles and amended ECR 6.17 to require religiously affiliated schools to prohibit discrimination based on sexual orientation, the EC showed that it would follow those Principles during the membership review process of its religiously affiliated member schools. For example, at its November 1994 meeting, the EC told a religiously affiliated law school, which stated that it did not discriminate on the basis of sexual orientation even though its non-discrimination policy did not comply with Bylaw 6-4(a), that it had interpreted Bylaw 6-4(a) to require member schools to provide written statements of policy that they do not discriminate on the basis of sexual orientation. Assurances from the dean or the president were insufficient. At its May 1995 meeting, the EC sent a letter to a religiously affiliated school explaining that adopting its University's non-discrimination policy, which did not include sexual orientation, was insufficient under Bylaw 6-4(a) and the school must adopt its own policy if the University's policy was non-compliant.

At its May 1996 meeting, in a letter to a religiously affiliated school, the EC noted that "[i]f the school's religious tenets lead to a prohibition of all non-marital sexual conduct, the school must give clear notice of its conduct code and the code must be applied evenhandedly to all unmarried persons." At its May 1997 meeting, the EC wrote another religiously affiliated school and stated that it could not simply give notice that "gay and lesbian conduct or advocacy is inconsistent with the University's religious tenets," and that while schools could regulate conduct within the WG's Principles, they must also "refrain from discrimination based solely on the identified status of an individual."

At its November 1997 meeting, the EC acknowledged a religiously affiliated school's sincere belief that it could not include sexual orientation within its nondiscrimination policy given its religious affiliation, but emphasized in its letter that equality of opportunity and nondiscrimination were core values of the AALS, that it was committed to enforcing these obligations with regards to all its member schools, and that it also was committed to working with member schools to achieve "voluntary compliance" with all membership requirements. Noting that the school had "failed to report any concrete steps" trying to include sexual orientation in its non-discrimination policy, the EC

requested that a meeting of AALS representatives and school officials be held during the 1997-98 academic year.

At this same meeting, another religiously affiliated school reported that it was going to supplement its previous policy with one that condemned discrimination on the basis of sexual orientation and restated its commitment to “an inclusive and supportive community for all students.” However, the school’s policy indicated that its affiliated religion regarded “homosexual acts” as “immoral,” which prompted a letter from the EC that such a statement might reflect disparate treatment against LGBT persons. The EC noted that “the Church’s teachings” seemed to disapprove of all sexual activity outside of marriage and suggested that the school might want to follow the approach used by other schools “censuring all sexual relations outside marriage rather than limiting the stated disapproval to homosexual conduct.” (Of course, no state then and only Massachusetts today permit same-sex couples to marry, thus resulting in the disparate treatment that the EC was trying to avoid.)

At its May 2000 meeting, the EC continued an ongoing struggle with two religiously affiliated schools’ efforts to comply with Bylaw 6-4(a). One school’s policy prohibited “advocacy” concerning sexual behavior that might conflict with the school’s religious identity. Concerned that this prohibition on “advocacy” might raise academic freedom issues during class discussions of state regulation of sexual behavior, which were expressly protected by the WG’s Principles, the EC worked with the school to clarify its policy to eliminate these academic freedom concerns.

The other school wanted to satisfy Bylaw 6-4(a) yet not adopt a non-discrimination policy that included sexual orientation because of concerns that this policy might subject it to civil litigation. This school, the MRC, and the EC went through several rounds of correspondence, grappling with whether a school could satisfy Bylaw 6-4(a) without having a non-discrimination policy that included sexual orientation. The University was willing to adopt other documents intended to show that the University welcomed people of all backgrounds, including those who were LGBT. The AALS had already sent a special site visit team to the school; but neither the University nor the law school would change their positions. The MRC sought a compromise, not wanting to sanction the school but concluding that it could not satisfy Bylaw 6-4(a) without having some form of nondiscrimination policy. It suggested a “statement of principle” or “statement of intent” not to tolerate sexual orientation discrimination based on status alone, and offered another school’s policy as an alternate approach, while recognizing that each school has “distinctive characteristics, and that an approach taken by any other school” may not be directly applicable.

The EC encouraged the school to use statements that the school, “as a member of the AALS, is committed to abide by AALS’ standards of nondiscrimination.” This approach had been approved for other schools and might be a way to resolve the issue. At the EC’s November 2000 meeting, the question of whether the AALS and the law school had reached an impasse arose more

clearly than at previous times. The dean and university counsel rejected the EC's suggestions that the school adopt a "statement of principle" consistent with AALS standards of nondiscrimination. They proposed a slight change to the introduction to the University's documents, but the MRC found those modifications to be "so slight as to have no real relevance." Recognizing that an impasse was looming, the EC permitted this school to combine several documents that would be published and distributed together to express its commitment to non-discrimination on the basis of sexual orientation status alone. The EC also accepted the school's insistence that its documents explain that the AALS bylaw requirements were to "recognize important obligations of member schools that are enforceable within the AALS structure."

Even though this impasse was resolved, the EC's final meeting of 2002 found it again dealing with this same school as it underwent a new sabbatical inspection. In its letter from the EC, this school was informed that students reported to the site team that the school did not have a welcoming environment for gay and lesbian students. These reports seem to indicate that the school's pledge to provide a welcoming environment to its LGBT community members has not succeeded, despite more than seven years of efforts by the school, the MRC, and the EC to attain such a result.

The EC's efforts to implement Bylaw 6-4(a) within the WG's Principles primarily met with success as religiously affiliated schools agreed to adopt policies protecting sexual orientation based on status alone. This compromise seems particularly questionable today due to the Supreme Court's 2003 decision in *Lawrence v. Texas* declaring statutes criminalizing private, consensual, adult sexual conduct to be unconstitutional (thus eliminating any legal basis for the status/conduct distinction permitted under the WG's Principles). It is not surprising, however, that this compromise was adopted, given the state of the law in the early 1990s. As gay men and lesbians seek the freedom to marry and be free from other forms of discrimination, perhaps it will become possible to eliminate this distinction in the future and ensure protection from discrimination on all bases throughout legal education.<sup>39</sup>

*Design of the Membership Review Process Allowed the AALS the Flexibility Needed to Press its Commitment against Discrimination Without Losing any Member Schools*

The membership review process permitted the AALS to press its commitment to prohibit discrimination based on sexual orientation without losing or sanctioning any member schools. Although the membership review process was not designed for individual charges of discrimination, and did not work well, in fact when such charges arose,<sup>40</sup> it did allow the AALS to push reluctant schools to

39. See also Additional Statement, *supra* note 37, where the authors noted that "[w]e hope, however, that the time will come when religiously affiliated institutions will revise their policies to provide appropriate respect for the privacy of their community members."

40. In May 1994, the EC considered several letters between Carl Monk, Anne Goldstein (Western New England and Section chair), and an openly gay faculty candidate who reported that he was told by an AALS member school that he was "absolutely disqualified" from

adopt compliant policies while providing the flexibility needed to keep member schools from believing their only option was to resign their membership.

Four policy decisions reflect the AALS's commitment to adopt compliant non-discrimination policies. First, the MRC and the EC devoted significant time to reviewing each member school's non-discrimination policy, making policy decisions, and writing letters to those schools that resisted adopting compliant non-discrimination policies. Second, the EC required all schools to adopt written non-discrimination policies that included sexual orientation and to widely disseminate those policies. Third, the EC determined that policies prohibiting "unlawful" or "illegal" discrimination were insufficient, a particularly important step because few states outlaw discrimination on the basis of sexual orientation. Fourth, the EC refused to exempt schools from complying with Bylaw 6-4(a) simply because a "higher authority" (such as the larger university, state system, or state political body) initially refused to allow the law school to adopt a compliant policy for the law school itself.<sup>41</sup>

Thus, the AALS continued to emphasize creative problem-solving values and techniques. Important to its success in pressing these requirements while retaining all of its member schools were its flexibility and openness to options for resolving the conflicts that arose. Throughout the correspondence with its member schools and within the discussions of both the MRC and the EC, it was clear that the AALS did not want to lose member schools, and the member schools did not want to lose their membership in the AALS. Because all parties wanted to remain in relationship with each other, they had to emphasize problem-solving values and techniques that permitted them to work through these conflicts. These values and techniques provide more flexible alternatives than traditional legal responses and procedures while also emphasizing the importance of maintaining the relationships between those involved.<sup>42</sup> By fitting the problems with implementing Bylaw 6-4(a) within

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teaching at that school because he was gay. When Monk told him that the only option available to the EC for handling reports of discrimination was to forward the complaint to the school's dean, to include the information in the school's file, and to wait until its next sabbatical site inspection, the candidate replied that he thought that process was impractical. The candidate indicated: if this school's policies did not conflict with the AALS's non-discrimination Bylaw, "then I can only conclude that the hard work of the AALS in forging a comprehensive non-discrimination policy was for naught, for a non-discrimination policy that permits blatant discrimination is inadequate even to assuage a guilty conscience or calm a fleeting twinge of tolerance."

41. This refusal to permit a "higher authority" exception is different than the EC's handling of problems caused while Bylaw 6-4(b) and ECR 6.19 were being implemented. There, because of the possible loss of federal funding to universities that did not permit the military to recruit on campus, the AALS permitted an exception allowing the military to recruit at those campuses, so long as schools took steps to ameliorate the military's presence within the law school. See, e.g., Deans' Memo 00-6 (Feb. 9, 2000) on interim regulations ending sub-unit exemptions.
42. Barton, Creative Problem Solving, *supra* note 11, at 284.

the broader context of the membership review process, the AALS used the creative problem solving process effectively.

The AALS's commitment to implementing its Bylaw without losing any member schools shows that it is an institution designed to manage conflict effectively. Institutional design principle 2, which says that institutions should seek "broad coverage of many issues," and principle 3, which says that institutions should seek "depth of jurisdiction on individual issues," existed in the membership review process and thus permitted the AALS broad power to work with member schools on these issues.<sup>43</sup>

By having broad coverage over many issues, as seen in Principle 2, the institution "enlarges the zone of possible agreement by creating possibilities for value-creating trades."<sup>44</sup> The AALS membership review process considers a vast range of issues concerning the quality of each member school, including the student body, the faculty, the library, the school's facilities, its financial strength, and other diversity concerns. Thus, the AALS could focus on Bylaw 6-4(a) while still reviewing and signing off on other equally important issues for each school. Depth of jurisdiction on individual issues is equally important, as explained by design principle 3, because it empowers the institution to take a wide range of actions on issues within its mandate. Because the AALS had complete jurisdiction over all aspects of the membership review process, it was not limited in the actions it could take to address each member school's concerns. The AALS could take strong stands on some issues (such as requiring written policies and not permitting policies outlawing only "unlawful" or "illegal" discrimination) while compromising on other issues (sending countless rounds of correspondence, sending in special site visit teams paid for by the AALS, and negotiating on specific language in the policies).

The following sections review the four ways the AALS expressed its commitment to prohibit discrimination on the basis of sexual orientation across legal education. Even though the AALS refused to relent in its efforts to persuade member schools to adopt compliant policies, the problem-solving techniques it used and the institutional design principles it followed gave it the flexibility to reach its goals without losing any member schools.

43. The AALS membership review process also shows how institutional design principle 4 can work effectively by using centralized sources for "information gathering and dissemination." Shariff, *Designing Institutions to Manage Conflict*, *supra* note 17, at 148. This avoids needless arguments about basic facts, and removes frequent barriers to resolving conflict between the parties. *Id.* at 148. The AALS obtained all of its information from the AALS summarian who was appointed by the AALS and was a member of the joint ABA/AALS site inspection team, and from documents submitted as part of the membership review process. Other information was provided by the dean and/or university president directly to the AALS, either when conflicts arose about the information reported by the AALS summarian or when new information occurred after the visit and/or between rounds of correspondence. Because everyone had essentially the same facts gathered using the same system for every school, questions of fact were rarely an issue.

44. Shariff, *Designing Institutions to Manage Conflict*, *supra* note 17, at 146.

Time Spent by the EC, the MRC, and the AALS on  
Implementing Bylaw 6-4(a)

Following most MRC meetings, the chair wrote a policy memo to the EC detailing the policy issues that arose during its meeting. Each memo discusses policy issues that required significant time by both the MRC and the EC. For example, at its November 1995 meeting, the EC considered a policy memorandum from Steve Smith (Cal Western), chair of the MRC, reporting that about one-half of the MRC's meeting consisted of discrimination issues, primarily sexual orientation. In a memorandum for the EC's November 1996 meeting, H.G. Prince (UC Hastings), chair of the MRC, reported that issues relating to Bylaw 6-4(a) are "a frequent basis for requiring progress reports," most likely because the Bylaw has been "enforced" for fewer than seven years and many schools are being "examined for compliance for the first time." He indicated that "[n]ot surprisingly, difficult issues continue to emerge or take more definitive shape..."

The sheer amount of time spent by the MRC and the EC on Bylaw 6-4(a) issues is outlined in the following chart detailing the 134 rounds of correspondence with over 50 schools from May 1993 through November 2002. But those numbers do not adequately represent the time invested by the AALS, its committee members, and its member schools. Each school was assigned to one member of the MRC to review the school's materials and the summarian's report. In the early years particularly, this often entailed digging through reams of materials for each school trying to locate the school's nondiscrimination policy and determine whether it complied with Bylaw 6-4(a). After the MRC made general policy decisions concerning implementation and drafted proposed letters from the EC on applying those decisions to each member school, the school was again reviewed by two EC members before the general policy decisions and individual letters were discussed and adopted or amended by the EC. Additionally, it took significant time for the deans, faculties, and university administrators at each member school to also discuss these issues and take whatever steps were required to become compliant with Bylaw 6-4(a).

This chart shows that numerous schools returned repeatedly to the MRC and the EC as both worked to bring each school into compliance. The chart lists the date of the EC meeting, whether the Bylaw 6-4(a) issue was raised in a sabbatical review (a new site inspection report every seven years) or in a progress report (a response by the school to an earlier letter from the EC), and categorizes each school as either religiously affiliated (which are all private schools), non-religiously affiliated private schools, or public schools.

<u>Date</u>	<u>Sabbatical/ Progress</u>	<u>Religious Affil</u>	<u>Private</u>	<u>Public</u>
May 1993	2 S, 0P	0	1	1
Nov 1993	3 S, 0P	1	1	1
May 1994	3S, 4P	1	2	4
Nov 1994	8S, 3P	3	5	3
May 1995	2S, 2P	1	2	1
Nov 1995	3S, 4P	3	1	3
May 1996	2S, 2P	2	1	1
Nov 1996	3S, 6P	5	1	3
May 1997	3S, 7P	5	2	3
Nov 1997	1S, 10P	5	2	4
May 1998	1S, 8 P	5	2	2
Nov 1998	2S, 6P	4	1	3
May 1999	4S, 9P	9	1	3
Nov 1999	3S, 5P	4	2	2
May 2000	1S, 5P	3	1	2
Nov 2000	3S, 3P	4	0	2
May 2001	1S, 3P	1	0	3
Nov 2001	4S, 4P	4	3	1
May 2002	0S, 3P	1	1	1
Nov 2002	1S, 3P	1	2	1
<b>Totals</b>	<b>50S, 87P</b>	<b>62</b>	<b>28</b>	<b>44</b>

Another way to evaluate the time spent by the MRC and the EC is to consider the rounds of correspondence required before some schools adopted compliant non-discrimination policies. While it is impossible to list the amount of correspondence for every school and still protect its confidentiality, looking at the thirteen schools that actively resisted the AALS shows the diligence and persistence the AALS exhibited. For these thirteen schools, the table below shows the rounds of correspondence between the school and the AALS (each round includes one letter from the AALS and one letter from the school); the number of site inspections (one every seven years); and the number of years of correspondence required before a compliant policy was finally adopted.



<u>School</u>	<u>Rounds</u>	<u>Site Inspections</u>	<u>Years</u>
School 1	5	2	7.5
School 2	4	1	3
School 3	3	1	3
School 4	6	2	8
School 5	4	1	3
School 6	8	2	6.5
School 7	9	2	7
School 8	4	1	2.5
School 9	3	1	2
School 10	4	1	2
School 11	6	1	3.5
School 12	7	2	7
School 13	7	2	8.5

Anyone doubting the AALS's resolve to implement Bylaw 6-4(a) should have those doubts eliminated after considering the efforts described here. Once it began to implement the bylaw, the AALS consistently and repeatedly devoted significant time, effort, and resources to prod its member schools into fulfilling the promise made by Bylaw 6-4(a) to prohibit or at least lessen bias against members of the LGBT communities in legal education.<sup>45</sup>

#### Requiring Member Schools to Adopt Written Non-Discrimination Policies and to Disseminate those Policies Broadly

One of the most important policy decisions the AALS made was to require each member school to have a written non-discrimination policy that included sexual orientation and to disseminate that policy to the entire law school community. This decision was controversial because many schools argued, legalistically, that Bylaw 6-4(a) itself did not require the non-discrimination policy to

45. Of course, discrimination still exists against LGBT people, just as it exists against people of color, women, members of religious minority communities, disabled persons, and others. But the AALS has convinced virtually all of its member schools to make the same pledge not to discriminate against LGBT people, based on their status alone, that they have made not to discriminate against these other minority group members.

be in writing.<sup>46</sup> But the EC concluded that adequate protection from discrimination based on sexual orientation required its member schools to put that pledge in writing and to make it available to all members of the community and to those considering joining the community. This insistence on a written policy brought the EC as close as it came to imposing sanctions when a private university law school repeatedly refused to add sexual orientation to its existing written policy, while insisting that it did not discriminate on that basis.

At its November 1994 meeting, the EC imposed the requirement that non-discrimination policies be in writing, in response to a memorandum from the MRC. That memo explained that community members could not know that discrimination was prohibited without a “written, announced policy,” and that assurances by the dean or the university president may only last while that person was in office. The EC unanimously interpreted Bylaw 6-4(a) and the first sentence of 6-4(b) to require member schools to have written nondiscrimination policies.

The EC handled numerous cases where deans or university officials tried to avoid adopting a written policy prohibiting sexual orientation discrimination. For example, in November 1994, the EC received a progress report from the dean of a religiously affiliated school arguing that, even though its policy did not include sexual orientation, the law school had never discriminated against anyone and “[t]o insist that we go beyond the fact of non-discrimination and affirmatively endorse an orientation frequently associated with conduct that is proscribed by the...church is contrary to the principles of religious freedoms we, as lawyers, strive to uphold.” The EC responded that the dean’s letter indicates an “apparent misunderstanding” of AALS policy, explaining that the EC interpreted Bylaw 6-4(a) to require member schools to provide a written statement that they do not discriminate on the basis of sexual orientation. The letter also referred to the WG Principles and explained that “the statement of policy required by Bylaw 6-4(a) must articulate only an institutional commitment not to discriminate based upon status; no endorsement of conduct is involved.” At its May 1996 meeting, the EC found another religiously affiliated school to be out of compliance because the school’s policy did not include sexual orientation. It rejected the school’s response that neither the law school nor the university engaged in actual discrimination, and explained that a written policy was appropriate to ensure that all community members were aware of the school’s policy.

At its November 1997 meeting, after three rounds of letters with one private non-religiously affiliated university, the MRC characterized the school’s responses as “evasive,” when it again refused to provide a copy of its written non-discrimination policy. The EC sent a letter explaining that assurances were not sufficient, a written policy must be disseminated to the law school community, and the school was asked to report back. At its May 1998 meeting, it received a report from this same school, agreeing to describe its policy but refusing to

46. See *supra* note 4, for Bylaw language.

provide a copy of it. The EC again explained that this was insufficient because “the purpose of the publication requirement is to provide information about the law school’s policy to interested persons, including applicants, so that they will be in a position to make informed judgments.” The EC explained that the discrepancy between the school’s published nondiscrimination policy that excluded sexual orientation and its policy as stated to the AALS that included sexual orientation “may be misleading.” The school was asked either to provide a copy of its policy or to appear before the MRC and explain its refusal to do so.

At its November 1998 meeting, the EC considered a draft letter from the MRC imposing sanctions against this same school which continued to refuse to provide a copy of a written nondiscrimination policy that included sexual orientation. The MRC recommended that the EC reprimand the school for not having a compliant, written policy of nondiscrimination and publish the reprimand in a letter to other member schools.

This letter was tabled until the EC’s January 6, 1999, meeting when the EC adopted a letter expressing its disappointment about the school’s “continuing refusal to make publicly available a written statement of a law school policy that you insist exists.” Noting the school’s insistence that it did not discriminate, “we find it difficult to understand your refusal to transform your stated, but unpublished, policy into a stated and published policy.” The EC expressed its concern that the school’s “refusal to publish and disseminate a nondiscrimination policy that includes sexual orientation implies that you are treating sexual orientation differently than you are treating other protected classes for whom you are willing to publish a written nondiscrimination policy.” Thus a person reading the policy “might reasonably conclude that the omission of sexual orientation from the list of prohibited forms of discrimination was deliberate and that [the University and its law school] have no policy to protect gay and lesbian applicants or students from discrimination on the basis of their orientation.” Again asking for a copy of the school’s policy, the EC backed away from imposing sanctions by giving the school another chance to comply with Bylaw 6-4(a).

After the EC finally voted to censure this school at its May 10-11, 1999, meeting but before it actually did so, the School sent a letter indicating that it would revise its written policy to include sexual orientation. Ultimately, this school and every other school has agreed to adopt a written policy pledging not to discriminate on the basis of sexual orientation.

#### Prohibiting “Unlawful” or “Illegal” Discrimination not Sufficient

At its November 1994 meeting, the EC dealt for the first time with a private university law school that stated that its “University does not ‘unlawfully discriminate against any person on the basis of...sexual orientation.’” At its May 1995 meeting, the EC also addressed this issue with several law schools that were part of larger universities. These universities’ non-discrimination policies only prohibited “unlawful” discrimination, even though the EC had

interpreted Bylaw 6-4(a) to “prohibit discrimination on the basis of sexual orientation, whether or not such discrimination is also prohibited by applicable law.” This was an important step because most states and the federal government still do not prohibit discrimination on the basis of sexual orientation; thus, if only “unlawful” discrimination were prohibited few law schools would provide any protection for members of the LGBT community.

After its November 1996 session, the EC sent a letter to a public university that limited its nondiscrimination policy to “unlawful” discrimination, explaining that schools should not limit their nondiscrimination policies to protecting against unlawful discrimination because (1) the scope of Bylaw 6-4(a) may be broader than that available under applicable law, and (2) the phrase, unlawful discrimination, is clear only to one who knows what unlawful discrimination is. The EC continued to address this issue at several other meetings. At its November 1998 meeting, the EC addressed three public schools whose nondiscrimination policies included sexual orientation but that were permitted by their Universities only to outlaw “unlawful discrimination.” One of the schools had obtained “special approval” from its State University system to adopt its own internal compliant policy, and the EC “commended” both the law school and the University for the flexibility they had shown. Cases continued to arise and the EC resisted all efforts to permit schools to limit their non-discrimination policies to include illegal discrimination alone.

#### Not Providing Variance When “Higher Authority” (University or State) Refused to Permit School to Adopt Compliant Non-Discrimination Policy

At its May 1997 meeting, a public law school reported that its university precluded it from adopting an internal policy prohibiting discrimination on the basis of sexual orientation. The EC responded by sending a letter indicating that the AALS “does not recognize any variance from the nondiscrimination requirements of Bylaw 6-4(a).” At its May 1999 meeting, when addressing another University’s policy that excluded sexual orientation, the EC repeated its refusal to permit any variances from the requirements of Bylaw 6-4(a), and stated that “[i]f the University’s policy does not meet the requirements of Bylaw 6-4(a), the law school itself must obtain permission to adopt a policy in compliance with the Bylaw.” At its November 1999 meeting, the EC commended another public university law school for having “requested and received permission from the University to adopt a written Statement of Principles proscribing discrimination on the basis of sexual orientation” that differed from the University’s uniform written policy that excluded sexual orientation.

As all of these policy decisions show, the EC combined flexibility with persistence when insisting that its member schools fulfill the requirements of Bylaw 6-4(a) by adopting policies prohibiting sexual orientation discrimination. Because it had sufficiently broad and deep jurisdiction to address all issues concerning member schools’ compliance with its bylaws, the AALS could insist on written policies that prohibited discrimination based on sexual orientation while still convincing schools that it was better to reach

accommodation on this issue than to risk sanctions for not fulfilling this membership requirement.

*Using Persuasion Rather than Coercion to Convince Member Schools to Adopt Compliant Non-Discrimination Policies*

The AALS used other creative problem-solving techniques and institutional design principles to persuade schools to comply with Bylaw 6-4(a). To help religiously affiliated schools struggling with how to act in a manner consistent with the Working Group's Principles and the religious doctrine of their sponsoring religions, the AALS sent copies of other schools' compliant policies to schools having difficulty drafting their own policies, and coordinated special site visit teams paid for by the AALS to meet with deans and university officials to persuade them to comply with Bylaw 6-4(a).<sup>47</sup>

The problem-solving techniques most often used here were active listening and proactive dialoguing. The AALS realized its religiously affiliated law schools were caught in a difficult bind: they wanted to remain AALS members but their sponsoring religious organizations had religious tenets that considered homosexual sexual conduct to be "immoral" or "unacceptable." Many schools could not see how they could pledge not to discriminate on the basis of sexual orientation while prohibiting sexual conduct that its sponsoring religion deemed to be "immoral" or "unacceptable." The WG Principles seemingly "solved" this problem for these schools and the AALS by permitting distinctions to be made between status and conduct, and extending protection against discrimination only for one's status as a member of the LGBT community.<sup>48</sup> But schools still struggled to find a way to adopt a policy that pledged not to discriminate on the basis of sexual orientation. By listening to the schools' concerns, trusting they were sincerely having difficulties, and being willing to spend the time, money, and effort to provide these schools with other schools' compliant policies and/or send in a special site team, the AALS used problem-solving techniques that showed its willingness to avoid reaching a final impasse with any member school.

Starting in November 1996, the EC took two steps that helped persuade member schools to continue working toward adopting compliant non-discrimination policies. For the first time, it sent a religiously affiliated school copies of other religiously affiliated schools' compliant non-discrimination policies after the school expressed its willingness to consider other schools' policies. After providing such policies to several schools, it became clear to the MRC and the EC that seeing how other schools drafted their policies provided some schools with options they might otherwise have not considered.

47. The AALS also sent other schools' policies to a few public schools which also struggled with adopting a policy that would be approved by its larger university and/or state bodies. Since this happened in fewer cases than with religiously affiliated law schools, I focus on the religiously affiliated law schools. The issues were similar although public law schools more often dealt with university/state officials who wanted their policies to prohibit only "illegal" or "unlawful" discrimination, which usually did not include sexual orientation.

48. See discussion in Working Group's Progress, *supra*.

At this same meeting, the EC also first discussed using a special site visit to a school as an interim response to continued noncompliance. It sent a letter to a dean and university president informing them that "it might be helpful to meet with members of the law school community to discuss the nondiscrimination provisions." At its May 1997 meeting, the EC discussed what the AALS should do when a school appeared to be willfully not complying with the bylaws. Keeping in mind the EC's directive that noncompliance with Bylaw 6-4(a) should be addressed the same way as noncompliance with other membership requirements, the MRC recommended that the next step should be a special site inspection or special appearance before the MRC. The MRC had reviewed past AALS efforts when dealing with racial discrimination by law schools in the 1950s and determined that the AALS approaches of written, oral, and personal consultations between noncomplying schools and AALS representatives with a goal of "persuading member schools to come into compliance" were most promising for resolving these problems also. The AALS moved cautiously, preferring persuasion over gross imposition of sanctions.

After considering a range of responses including sanctions, the MRC recommended meetings between AALS representatives and school officials with "the goal of impressing upon the member school the seriousness of the failure to comply and trying to persuade the school to find a way to comply with the bylaw requirements." While the possibility of sanctions, such as public reprimand or censure, remained available, the MRC encouraged the EC to "resort to such sanctions, however, only when all avenues for resolution by persuasion have been exhausted." The EC agreed with the MRC that special meetings should be the next step when seeking compliance, but also decided to spend time at its upcoming July retreat discussing sanctions that might be imposed if the special meetings were not fruitful.

These efforts reflect the institutional design principles discussed above, such as including all stakeholders in its efforts (here the MRC, the EC, and the member schools), decentralizing and proliferating discussions and conversations among institutional members (by permitting those conversations to occur outside the document-driven membership review process), and vesting control over decisions in those most interested and affected by them (here the MRC, the EC and the member schools, including university officials). Sharing other schools' policies (which were frequently unavailable until they were published at the conclusion of the confidential membership review process) and sending site visit teams consisting of one EC member and one representative from a religiously affiliated school that had already come into compliance was valuable "because of the possibility for experimentation within the institution, the results of which can be shared and adopted by the institution as a whole."<sup>49</sup> According to the interest-based lessons of modern negotiation theory, we can expect "better solutions to emerge from difficult conflicts where

49. Shariff, *Designing Institutions to Manage Conflict*, *supra* note 17, at 153.

decisions could be taken by those most familiar with the interests and preferences of the parties involved in the dispute.”<sup>50</sup> The AALS permitted its member schools to be integrally involved in its conflict management process and shared the policies and ideas of those schools successful in adopting policies that complied with Bylaw 6-4(a) while remaining true to the demands of their sponsoring religions.

These efforts seeking compliance with the Bylaws while not rushing to sanction the struggling schools show creative problem-solving and conflict management at its best. By April 2000, MRC Chair Dale Whitman (Missouri-Columbia) was able to inform the EC that: “[t]he difficult problems experienced by some of the religiously affiliated schools in adopting an acceptable nondiscrimination policy now seem to be largely behind us.” The AALS’s success in obtaining acquiescence from most of its religiously affiliated member schools, those most concerned from the outset and those that struggled the most to find a middle ground between the requirements of AALS membership and the religious tenets of their sponsoring religions, best demonstrates its ability to manage the conflict it found itself faced with after Bylaw 6-4(a) was amended to include sexual orientation. In particular, the AALS’s efforts to persuade, rather than to sanction, show its willingness to place this problem in a broader context, and demonstrate the effectiveness of creative problem solving techniques and institutional design principles aimed at resolving conflict.

*When Impasse Occurred, the EC was Willing to Seek Sanctions against Non-Compliant Member Schools but Did Not Rush to Impose Them*

Having expended so much effort to avoid impasse, the AALS considered imposing sanctions twice and came close to imposing sanctions only once during the more than twelve years contained in my research. Ultimately, even then, the AALS was able to persuade both schools to comply with Bylaw 6-4(a) before even sending a request for censure to all member schools. Given the serious conflict between the AALS and some of its member schools over each school’s requirement to adopt a compliant non-discrimination policy and the amount of time and effort expended by both the AALS and its members, it speaks volumes about the AALS’s success in managing this conflict that it considered seeking sanctions only twice.

The AALS spent a good deal of time struggling with how to best use its sanctioning authority. As early as its November 1996, the EC recognized that the refusal of some schools to comply with Bylaw 6-4(a) “raise[s] the distinct possibility that the time will come when a member school, perhaps at the insistence of the university, will simply refuse to comply with Bylaw 6-4(a). . . .” The MRC considered recommending that the EC publish the names of schools that refused to comply, but was concerned that some schools may view being named in such a list as “a badge of honor.” When first considering sanctions in

50. *Id.*

this context, the EC expressed a concern that sanctions needed to be available for all serious breaches of the Bylaws to avoid undermining the “political credibility” of the Association if it were seen as focusing only on noncompliance with Bylaw 6-4.

A sanctions subcommittee was appointed after the EC’s May 1997 meeting, and it issued its first report in October 1997. That report explained the current AALS system for imposing sanctions; noted shortcomings in its regulatory language, such as not defining key terms; and noted inconsistencies between bylaws that controlled the AALS’s sanctioning authority. The memo summarized the sanctions that historically had been imposed: reprimand (one time); censure (four times); probation (four times); suspension (two times); exclusion (seven times), and resignation (five times). Only four schools had been sanctioned in the past twenty-seven years, and no school had been dropped from AALS membership in the past fifty-four years.<sup>51</sup>

Throughout 1998 and 1999, the EC continued to discuss a range of questions about how and under what circumstances sanctions should be used. It also considered amending several ECRs to clarify the requirement that nondiscrimination policies be written. During its May 1999 meeting, the EC considered a memo from the MRC proposing that the EC begin the process for imposing sanctions against one private school for repeatedly failing to respond to requests for information. At its August 1999 meeting, the EC adopted a resolution to seek censure against this school for repeatedly refusing to adopt a policy that complied with Bylaw 6-4(a). After preparing to seek sanctions for refusing to adopt a written, non-discrimination policy including sexual orientation, the AALS heard from this school indicating that it would revise its non-discrimination policy to include sexual orientation. As a result of that letter, the EC signed off on the school’s policy and did not pursue sanctions against it.

During the EC’s regular meeting in July 2000, it considered a memo from Deputy Director H.G. Prince (UC-Hastings) on the Membership Review Self-Study and whether the AALS should eliminate its membership review process and become an open membership institution. The memo recognized that many schools had resisted adopting non-discrimination policies that were compliant with Bylaw 6-4(a) and that this “resistance might have been more stubborn and persistent if the implicit threat of sanctions had not been present.” As the memo stated:

51. Of those schools excluded, all had been reinstated; of those that resigned, four had sought readmission. The exclusions all occurred before 1930 for schools without proper libraries, not imposing or violating minimum student admission requirements, insufficient record-keeping or faculty size, and political interference. Those schools that resigned either provided no reasons, had financial difficulties, or did not meet minimum admissions requirements. Those placed on probation had admissions or serious financial issues. Those suspended had political interference issues or financial difficulties. Those censured or reprimanded had academic freedom violations, engaged in racial discrimination, required loyalty oaths, or prevented faculty participation in clinical education on university time. EC Memo 97-84 (Oct. 27, 1997) from Greg Williams (Ohio State), David Chambers (Michigan), and Dale Whitman (Missouri-Columbia).



The threat of sanctions has without doubt been an important factor in convincing member schools to come into compliance with the Association's standards regarding sexual orientation discrimination. However, that compliance is now very nearly complete. Virtually all law schools have implemented the required policies, and remaining unresolved issues of submission to this standard are of marginal importance and affect relatively few schools. It is unlikely that a school once having come into compliance, with the standard, will "backslide" into noncompliance. In effect, this battle has been fought and won, insofar as a national membership organization like the AALS can win it. Further, there are no comparable battles in sight.

The memo concluded that "[i]n sum, the risk that moving to an 'open membership' approach will deprive the Association of its capacity to engage in a moral campaign comparable to that involving sexual orientation discrimination seems remote."

By showing this commitment and perseverance to consensus-building, persuasion, and a willingness to impose sanctions, the AALS has won over virtually all of its member schools. It was able to win them over by its willingness to place this problem within its broader context and use a variety of techniques when working to solve this problem.

*How Implementation of Bylaw 6-4(a) Changed the AALS and Its Process of Membership Review*

The final institutional design principle, number 7, states that "institutions should embed opportunities for regular review of principal design decisions in order to integrate learning from experience."<sup>52</sup> Shariff notes that because institutions involve "complex systems of interacting people, processes, and structures" the outcomes from those interactions are not often predictable and can even be surprising.<sup>53</sup> Thus, a design process that casts the institution's structure in stone may prevent it from changing based on new experience, information, and evolving understanding. Instead, a design that permits "a capacity for learning and evolutionary change in institutional structure" provides the flexibility that can be an important step toward "creative problem solving and conflict management."<sup>54</sup>

Viewing the AALS as a learning institution, open to discovering how its own actions and efforts changed it as an institution, fits with the twelve year period of my research. The process of implementing 6-4(a) over the previous decade appeared to impact two aspects of the AALS's most recent self-study: (1) whether the AALS should continue the membership review process or become an "open membership" association, and (2) what were the core values of the Association and whether those values should be emphasized during the membership review process.

52. Shariff, *Designing Institutions to Manage Conflict*, *supra* note 17, at 154.

53. *Id.* at 154-55.

54. *Id.* at 155.

The EC considered a memo from Deputy Director H.G. Prince (UC-Hastings) on the Membership Review Self-Study at its regular meeting in July 2000. The memo discussed the fact that prior reviews of the membership review process in 1986, 1988, 1989, and 1996 all focused on the “core academic values” of the Association, rather than focusing on the “micro-management” that sometimes results from an accreditation, as opposed to a membership review, process. The memo also referred to the 1988 review and its conclusion that membership review should continue but needed to respect individual member schools’ “institutional autonomy” and needed to avoid “unnecessary substitution of Association judgment for that of individual member schools.”

At the EC’s May 2001 meeting, Carl Monk reported on the progress of the AALS’s self-study efforts after meetings with focus groups and compiling the results from questionnaires sent to deans and faculty members. Both showed a “strong majority” who favored continuing membership requirements, while believing that they should focus on “a few core academic values.” Although the majority expressed a concern that the current process focused on issues that did “lead to micro-management,” they also believed the process was “presently effective in promoting core values.” At its November 2001 meeting, the EC received another memo from Carl Monk indicating that the AALS had found “substantial support” for the current membership review structure so long as its “primary focus” was on compliance with AALS core values.

The EC’s discussion of the self-study and the membership review process continued at its January 2002 meeting. The committee considering AALS core values recommended that new language be substituted for Bylaw 6-1 that would “foster better understanding of our regulatory framework.” The proposed language stated that:

The obligations of membership imposed by this Article and the ECRs are intended to reflect the Association’s core values and distinctive role as a membership association, while according appropriate respect for the autonomy of its member schools.

The AALS’s dedication to equal opportunity in legal education is one of its core values, a dedication seen from its efforts implementing Bylaw 6-4(a) prohibiting sexual orientation discrimination.<sup>55</sup> Although the AALS changed its process for reviewing its members’ compliance with all its Bylaws and ECRs from an accreditation process to a membership review process to better reflect its desire to have a less regulatory relationship with its member schools, it has not become an open membership association. It continues to focus its membership review process, and thus its member schools, on the core values expressed in current Bylaw 6-1(b). Compliance with Bylaw 6-4(a) continues to be a core value of the AALS.

55. See Bylaw 6-1(b), listing core values of the Association as including “a diverse faculty and staff hired promoted, and retained...in accordance with principles of non-discrimination,” and “selection of students...through a fair and non-discriminatory process designed to produce a diverse student body and a broadly representative legal profession.”

### Conclusion

Almost twenty years after Professor Gene Schultz found that only twenty-three schools had policies prohibiting discrimination based on sexual orientation, the 2004 LSAC brochure indicates that virtually all AALS member schools have adopted nondiscrimination policies that include protections against sexual orientation discrimination. Although many members of the LGBT community and others may find several of these policies to be troubling because their coverage extends to LGBT status alone, this nearly universal adoption of non-discrimination policies reflects a significant change from the much more limited number of schools that prohibited such discrimination in 1990 when Bylaw 6-4(a) was amended. The reason the AALS could persuade all of its member schools to adopt compliant policies is that they used creative problem solving techniques and values, along with institutional design principles, that best allowed it to manage the conflict that arose when schools were asked to adopt policies of their own.

These creative problem solving techniques and values and institutional design principles can be used by any organization or institution that seeks to transform its aspirational non-discrimination bylaws or regulations into actual protections for members of its community. Although controversial and ahead of its time when prohibiting sexual orientation discrimination, the AALS's efforts show that institutions can lead a wide-ranging and diverse membership to achieve social change in ways that "respect the links that people want to keep and the decisions that they want to retain."<sup>56</sup>

56. Barton, Creative Problem Solving, *supra* note 11, at 290.