

November 14, 2016

VIA EMAIL: racialized.licensees@lsuc.on.ca

Ekua Quansah
Policy Counsel
The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, ON M5H 2N6

Dear Ms Quansah:

RE: Response to the Final Report of the Challenges Faced by Racialized Licensees Working Group entitled *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions*

The Advocates' Society, founded in 1963, is a not-for-profit association of over 5,500 lawyers throughout Ontario and the rest of Canada. The mandate of The Advocates' Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates.

The Advocates' Society has reviewed with interest the Final Report of the Challenges Faced by Racialized Licensees Working Group entitled *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions* ("Law Society Report"), presented to Convocation on September 22, 2016. As stated in our letter of February 27, 2015 to Josée Bouchard, past Director, Equity Initiatives Department, The Advocates' Society is committed to the principles of substantive equality and access to justice, and supports redressing the challenges faced by racialized licensees. The Advocates' Society makes the following comments on the Recommendations as outlined in the Report, speaking to the perspective of lawyers (based on the membership of The Advocates' Society) and not paralegals.

General Comment

In respect of many of these recommendations, The Advocates' Society believes that it is important that the Law Society deal with diversity as a whole (including disability, gender and sexual orientation) rather than focusing only on measuring progress and inclusion with respect to racialized licensees. Many of The Advocates' Society's members' firms have diversity committees and diversity policies which address the whole spectrum of diversity issues. Our view is that the Law Society ought to be addressing the entire spectrum of issues here; if the administrative infrastructure is being put into place to implement these recommendations with respect to racialized licensees, it would be most efficient to address all diversity issues, both in self-reporting and the proposed inclusion questions, subject to any additional privacy issues that this might raise.

Accelerating Culture Shift (Recommendations 1-3)

Recommendation 1: Reinforcing Professional Obligations

Summary of the Working Group's Recommendation:

- The Law Society would amend the *Rules of Professional Conduct* to recognize, acknowledge and promote principles of equality, diversity and inclusion.

Comments:

- The Advocates' Society agrees with Recommendation 1 and would welcome the opportunity to provide input into proposed changes to the *Rules of Professional Conduct* and their Commentaries.

Recommendation 2: Diversity and Inclusion Project

Summary of the Working Group's Recommendation:

- The Law Society would develop model policies and resources to encourage best practices in legal workplaces.

Comments:

- The Advocates' Society agrees with Recommendation 2 and recognizes the central importance of diversity to the profession. It would welcome the opportunity to comment on model policies and resources to address the challenges faced by racialized licensees.
- The Advocates' Society would bring the perspective and experience of lawyers who practise as advocates to issues such as competency hiring, assignment of work and career development. The Advocates' Society also has expertise in the mentoring of young advocates and could offer its experience in the development of mentoring programs.

Recommendation 3: The Adoption of Equality, Diversity and Inclusion Principles and Practices

Summary of the Working Group's Recommendation:

- The Law Society would require every licensee to adopt and abide by a statement of principles to promote equality, diversity and inclusion.
- The Law Society would require every legal workplace of at least 10 licensees to develop a diversity policy to cover recruitment, retention and advancement, and to file a compliance self-assessment every two years with the Law Society.

Comments:

- The Advocates' Society agrees with Recommendation 3 and supports the nuanced approach to implementation proposed by the Law Society which recognizes that the nature of policies and self-assessment tools will vary based on the size and type of legal workplace.
- The Advocates' Society supports the Law Society's proposal that templates for the statements of principles, policies and self-assessment tools be developed collaboratively with legal workplaces and organizations that wish to participate. The development of resources that take into account the realities of legal workplaces is important to the success of the initiative.

Measuring Progress (Recommendations 4-8)

Recommendation 4: Measuring Progress through Quantitative Analysis

Summary of the Working Group's Recommendation:

- The Law Society would collect the self-identification data from licensees in the Lawyer Annual Report and provide reports to legal workplaces of at least 25 licensees, to compare to provincial statistics (and to use in requests for proposal, student recruitment, etc.).

Comments:

- The Advocates' Society believes that the proposal to analyze the self-identification data provided by licensees in their Annual Reports and to pass that information along to firms may provide useful information about their progress relative to the profession as a whole.
- However, The Advocates' Society believes that limiting this initiative to "legal workplaces of at least 25 licensees" would overlook a large group of lawyers in solo and smaller workplaces, practising in a wide range of practice areas and geographical areas.¹ Data from smaller workplaces could be aggregated and reported on an anonymous basis, by size of workplace and geographic region, for example.
- The Advocates' Society would also appreciate clarification from the Law Society as to whether it suggests that the diversity makeup in all legal workplaces should *mirror* the aggregate data, which may be an unreasonable expectation for certain workplaces.
- The Advocates' Society would also appreciate clarity as to whether organizations like banks or insurance companies that have more than 25 licensees qualify as "legal workplaces".

¹ See p. 32 of the Law Society Report: "Data gathered through the LAR and PAR show that 24% of racialized lawyers are in sole practice and 33% of racialized lawyers practice in legal workplaces of two to five.

Recommendation 5: Measuring Progress through Qualitative Analysis

Summary of the Working Group's Recommendation:

- The Law Society would ask licensees, every four years, for their assessment of inclusion at their workplace, and then provide reports to the legal workplaces of at least 25 licensees.

Comments:

- The Advocates' Society believes that this recommendation raises privacy concerns; even workplaces with 25 or more licensees may have a small (and thus identifiable) number of racialized lawyers.
- The Advocates' Society is concerned that providing law firms, particularly smaller law firms closer to the 25-member end of the spectrum, with the results of inclusion questions and a summary of the information gathered will be problematic because the respondents will know that the data will be reported back to their place of employment, even if the information is in "summarized" or "compiled" form. The prospect of this disclosure may discourage candid responses.
- The Law Society should give consideration to collecting responses on an anonymous basis and advising individuals who provide responses that their views will be kept confidential by the Law Society and not provided to their places of employment. An anonymous and confidential elicitation of comments is more likely to capture representative information. The Law Society could then use this anonymous data for its own analysis and reporting on an aggregate basis to the profession.
- Consideration might also be given to advising or reminding all licensees of the existing avenues available to them (or perhaps new avenues) to make an anonymous whistleblower comment or complaint with the Law Society if the individual wishes the Law Society to do something about a particular incident or workplace.
- To the extent the Law Society decides to collect this information for its own purposes, but not report or publish the information, with attributions, to law firms or the public, it should consider whether to collect this information from smaller law firms as well (given that privacy would no longer be an issue). Proceeding with anonymous or confidential comments would allow the Law Society to canvass a broader cross-section of licensees than simply licensees at workplaces with 25 or more licensees. A large part of the practice would be excluded numerically, geographically and by practice area in focusing on licensees in these larger workplace environments – thereby not providing a truly accurate measurement of progress, insight or accountability across the profession.

Recommendation 6: Inclusion Index

Summary of the Working Group's Recommendation:

- The Law Society will publish the data about workplaces of at least 25 licensees – meaning the self-assessment; the quantitative data; and the qualitative data – as a means of transparency and accountability.

Comments:

- The Advocates' Society is concerned about the publication of the qualitative information recorded in the proposed "inclusion index" on an individual firm basis without any consideration of the merits or context of the comments.
- Further, there are more robust means of reviewing a workplace's commitment to racialized persons and diversity than simply looking at quantitative numbers, which may under-represent the initiatives of employers. For example, a more comprehensive matrix of indices of commitment to diversity can be developed (e.g. TSX board matrix) that not only looks at the number of racialized licensees, but also elements such as programs and training implemented, outreach program participation, articling positions offered to racialized licensees (whether or not accepted), and participation in workplace leadership positions.

Recommendation 7: Repeat Challenges Faced by Racialized Licensees Project Inclusion Survey

Summary of the Working Group's Recommendation:

- In 2013, the Law Society had all licensees complete an anonymous survey as to career barriers, stereotypes, and disadvantages. A similar survey would be conducted every four years to evaluate systemic change.

Comments:

- The Advocates' Society believes that an interval of four years for measuring and reporting data on diversity and inclusion will not capture the full story, given the rate at which lawyers, particularly young lawyers and lawyers from diverse backgrounds, leave law firms. The administrative burden posed by a shorter interval must be balanced with the quality and impact of the data collection.

Recommendation 8: Progressive Compliance Measures

Summary of the Working Group's Recommendation:

- The Law Society would use graduated responses to address non-compliance by legal workplaces, from meetings and warnings, to discipline.

Comments:

- The Advocates' Society believes the profession would benefit from further detail on progressive compliance. It is unclear how the Law Society proposes to deal with compliance on an entity-based level and it is unclear how enforcement will define or address issues of systemic discrimination.

Educating for Change (Recommendations 9-10)

Recommendation 9: Continuing Professional Development (CPD) Programs on Topics of Equality and Inclusion in the Professions

Summary of the Working Group's Recommendation:

- The Law Society will offer a three-hour accredited program for equality and inclusion, and will assist workplaces to offer their own programs.
- Licensees will be required to complete a three hour CPD program every three years.

Comments:

- The Advocates' Society supports the recommendation of a three-hour accredited program. Program developers should consult not only legal resources, but also equity-seeking groups and leading thinkers in the areas of psychology, neuroscience and organizational behavior, with materials tailored to the legal context. Other groups (e.g. Human Resources Professionals Association) may be well ahead in the development of appropriate programming, and, in any event, can offer a diverse perspective.
- The Advocates' Society recommends that the Law Society actively work with groups in other jurisdictions experienced in the development of diversity and inclusion practices to ensure that we are meeting or exceeding the international standards in development.
- Given the importance of early and frequent exposure to effect change, the Law Society should consult with law faculties to express the Law Society's commitment to issues of diversity, equality and inclusion, to allow it to benefit from programs deployed in law schools, and to coordinate the development of programs to ensure educational continuity.
- The Advocates' Society also supports the recommendation of having licensees complete accredited programming focused on equality and inclusion, but would suggest one hour every year, rather than three hours every three years, as a minimum requirement, following an initial, three-hour training program.

Recommendation 10: The Licensing Process

Summary of the Working Group's Recommendation:

- The Law Society would include equality and inclusion principles in licensing materials.

Comments:

- The Advocates' Society supports this recommendation, subject to its comments above.

Supporting Racialized Licensees (Recommendations 11-12)

Recommendation 11: Building Communities of Support

Summary of the Working Group's Recommendation:

- The Law Society would increase mentoring and advisory services to address in particular the isolation of racialized lawyers in sole or small firms.
- The Law Society would assist legal associations and support networking events.

Comments:

- The Advocates' Society commends the Law Society for its commitment to improving access to mentoring and networking opportunities for racialized licensees. Improving access to mentoring improves access to the profession, and improves the opportunities for racialized licensees to excel in the profession. The Advocates' Society supports the specific proposals put forward by the Law Society, and thanks the Law Society for having considered and adopted many of the recommendations put forward by The Advocates' Society in our letter of February 25, 2015.
- The Advocates' Society would be pleased to share information with the Law Society about the mentoring and programming initiatives which are offered by The Advocates' Society.
- As noted in our letter for February 25, 2015, The Advocates' Society offers a variety of mentoring programs and initiatives that our young advocate members (advocates who have been called to the bar for 10 years or less) have found to be beneficial in their professional development. For example, The Advocates' Society offers a variety of Group Mentoring programs. While Group Mentoring events have their own limitations and are not meant to be a substitute for one-on-one mentoring relationships that should ideally be developed within a licensee's own practice setting, Group Mentoring has several benefits. Group Mentoring events offer mentees the opportunity to pose questions to mentors in a safe environment outside the mentees' own firm settings, where they may be reluctant to ask certain questions or otherwise do not have good (or any) internal mentoring networks. Mentees also benefit from hearing the questions posed by their peers, which lets them know they are not alone in their questions or concerns. The social setting demonstrates that a variety of approaches and styles can be used to address challenges and achieve success in the profession.
- The Advocates' Society would welcome the development by the Law Society of cultural/diversity content that organizations such as The Advocates' Society can incorporate into their mentoring, education and other programs.
- In addition to the networking opportunities available at our mentoring programs, The Advocates' Society also offers a variety of affordable networking opportunities, including: family-friendly programs; Brown Bag and Court House continuing legal education series; Young Advocates' Pub Nights; and Practice Group programs and events.
- For all of our mentoring and networking programs, The Advocates' Society will continue to advertise these events in the normal course, but they could also be promoted through the Law Society and through groups representing racialized licensees to increase diversity of attendance and communication/collaboration among associations.

Recommendation 12: Addressing Complaints of Systemic Discrimination

Summary of the Working Group's Recommendation:

- The Law Society is concerned that incidents of systemic discrimination are not being reported. It plans to review its own processes, and the *Rules of Professional Conduct*, and re-train its disciplinary staff, including creating a specialized team, all to raise awareness and effectiveness in responding.
- The Law Society is considering soliciting anonymous complaints, in order to approach identified workplaces for remedial, not punitive, discussions.

Comments:

- The Advocates' Society commends the Law Society for its commitment to addressing issues of systemic discrimination in the legal profession.
- The Report proposes, among other things, to amend the *Rules of Professional Conduct* (the "Rules") so that systemic discrimination is clearly identified as a breach of professional conduct. Given that the Rules presently focus on *individual* accountability, whereas systemic discrimination operates on a systems-wide and institutional level, this endeavour will undoubtedly involve challenging practical and legal questions. We look forward to working with the Law Society and other stakeholders in exploring these questions further.
- Recognizing the limits of enforcement in combating the root causes of systemic discrimination, The Advocates' Society emphasizes the importance of education, training and remediation in identifying and eliminating systemic discrimination. Where possible, professional regulation should focus on securing voluntary compliance with best practices rather than enforcement through the disciplinary process.

Thank you for providing The Advocates' Society with the opportunity to make these submissions. I would be pleased to discuss these submissions with you at your convenience.

Yours very truly,



Bradley E. Berg
President

Task Force Members:

Dana M. Peebles, Chair, *McCarthy Tétrault LLP*, Toronto
Sarah J. Armstrong, *Fasken Martineau LLP*, Toronto
Colin S. Baxter, *Conway Baxter Wilson LLP*, Ottawa
P. A. Neena Gupta, *Gowling WLG*, Kitchener
Nader R. Hasan, *Stockwoods LLP*, Toronto
Dominique T. Hussey, *Bennett Jones LLP*, Toronto
Peter W. Kryworuk, *Lerners LLP*, London
J. Scott Maidment, *McMillan LLP*, Toronto
Malik Martin, *Rueters LLP*, Toronto

David C. Nahwegahbow, LSM, *Nahwegahbow, Corbiere Genoodmagejig*, Rama
Yashoda Ranganathan, *Ministry of the Attorney General, Constitutional Law Branch*, Toronto
Chloe Snider, *Dentons Canada LLP*, Toronto
Steve Tenai, *Norton Rose Fulbright Canada LLP*, Toronto
Dave Mollica, Director of Policy and Practice