



February 23, 2015

Sent via email: jbouchar@lsuc.on.ca

Ms. Josée Bouchard
Director, Equity Initiatives Department
The Law Society of Upper Canada
Osgoode Hall
130 Queen Street West
Toronto ON M5H 2N6

Dear Ms. Bouchard:

Re: “Addressing Challenges Faced by Racialized Licensees” Consultation Paper

The Federation of Asian Canadian Lawyers (“FACL”) is pleased to make submissions to Convocation in response to the consultation paper released by The Challenges Face by Racialized Licensees Working Group titled “Developing Strategies for Change: Addressing Challenges Faced by Racialized Licensees”. As you are aware, FACL is a diverse coalition of Asian Canadian legal professionals working to promote equity, justice and opportunity for Asian Canadian legal professionals and the wider community, and to foster advocacy, community involvement, legal scholarship and professional development. FACL members have contributed to this initiative by participating in the Working Group’s various engagements and consultations since August 2012. The following submissions are made in FACL’s own capacity and supplement our previous contributions.

Racial equality has long been an issue within the legal profession and diversity is only the beginning of the challenges faced by racialized lawyers and licensees. Diversity is only scratching the surface on the equality spectrum and there needs to be a systemic shift in the profession to truly achieve not only diversity, but equity. FACL submits the following response to the questions posed in the consultation paper that will help achieve this goal.

Question 1: How should the Law Society act as a catalyst for the establishment of diversity programs within firms and why?

1. While diversity programs are important, they must not merely be “window dressing” for law firms. The Law Society of Upper Canada (“Law Society”) should require firms and organizations with in-house counsel services over a certain size as well as government to



adopt standards for the recruitment, retention, and career advancement of racialized law students and licensees, and require such firms and organizations to report annually on their progress or explain why they have not adopted such standards.

2. A model to follow would be the Ontario Security Commission's ("OSC") recently established "comply or explain" regime with respect to disclosing diversity on corporate boards. In an effort to increase corporate transparency and accountability, the OSC has adopted rules requiring companies to publicize the following information:
 - Director term limits and a description of how the board is renewed;
 - Policies regarding the representation of women on the board;
 - How the board or nominating committee considers the representation of women in the director identification and selection process;
 - How the company considers representation of women in filling executive officer positions;
 - Company targets regarding the representation of women on the board and in executive officer positions; and
 - The number of women on the board and in executive officer positions.

Similar rules requiring public disclosure could be put in place for law firms concerning the representation of racialized licensees.

Question 2: What is the preferred model for the collection of firm demographic data and why?

3. The Law Society should collect demographic data of licensees through annual reports, publicly report the data based on firm size and region, and disclose to firms their own data. In conjunction with the proposed "comply or explain" regime, the Law Society should require firms to comment on their own demographic data and how it tracks the standards they have adopted, if applicable.
4. Data collection should not only include questions of gender and racial identity but also of other identifiers that may combine with race to further compound the challenges faced by racialized (and non-racialized) licensees, including: sexual orientation, ability, socio-economic disadvantage, etc.
5. Recognizing that the above proposal is a larger, long-term project, FACL recommends that more immediate measures be put in place, such as expanding the scope of the *Justicia* Project to include the retention and advancement of racialized licensees while the more expansive "comply or explain" regime is developed.
6. FACL's proposal to expand the *Justicia* Project includes the publication of individual results of its progress in the retention, recruitment and partnership rates of racialized licensees on an annual basis, and the publication of those firms with high success rates on the Law Society's webpage. This is similar to the Law Society of England and Wales' approach in its



adoption of the *Diversity and Inclusion Charter* which require its practices to annually report their progress and areas in need of improvement. Although the Law Society does not directly regulate law firms or organizations consisting of in-house counsel, it has an obligation to uphold the integrity of the legal profession by ensuring that barriers faced by racialized licensees are eradicated. Publishing results of the firms by category (ie. size) would provide law firms with an incentive to change their diversity standards and protocols as the results would have a direct impact on recruitment efforts and client relationships. This would create a sense of accountability by encouraging transparency in those firms whose names do not appear on the list and award those firms who have made vast improvements. Although this approach risks increased controversy and backlash among the legal community, it should be noted that many large organizations have begun to follow the Bank of Montreal's practice of sending out RFPs to all firms who are interested in doing their work, thus it would benefit firms to complete this process earlier, for those that have not already done so.

7. Data on racialized licensees needs not only to be collected but regularly updated, maintained, and analyzed to measure progress. Since 1989, the Ontario Judicial Appointments Advisory Committee maintains and annually publishes relatively detailed statistics on the number of appointments from "Representative Groups" including: women, francophones, First Nations, visible minorities, and persons with disabilities. Also published are the number of new applicants and the number of those applicants that are female. FACL views this type of data collection and publication as a valuable tool for measuring progress and transparency in judicial appointments and submits that it can be applied to legal employers in the public and private sector.

Question 3: How could the Law Society work with in-house legal departments to develop model contract compliance programs?

8. FACL strongly urges the Law Society to develop and implement a contract compliance regime that requires the collection and disclosure of demographic data, sets goals and targets for the advancement and retention of racialized licensees, and uses policy audits to promote diversity. FACL recommends that the Law Society partner with Legal Leaders for Diversity and/or other expert groups committed to the promotion of diversity within in-house legal departments to come up with appropriate model contract compliance programs. FACL further submits that in order for any contract compliance program to be successful, it must be enforceable with meaningful consequences for non-compliance.
9. The Law Society can also consider creating a position or office whose role is to assist law firms and in-house legal departments with the creation of their diversity policies, practices, and model contract compliance programs. This office could be the first point and resource for research, templates, and examples of best practices from other jurisdictions or industries. It could offer concrete support for firms and/or companies who are willing to make genuine changes in the legal industry regarding diversity.



Question 4: What are the preferred mentoring and/or advisory services models for racialized licensees?

Question 5: What are the preferred networking models for racialized licensees?

10. Racialized licensees should not be limited to networking with and receiving mentorship from other racialized licensees. This can reinforce the sense of isolation they may already feel because of their racialized status and also increase the burdens on racialized licensees as a whole. The Law Society can and should create opportunities for different parts of the bar to come into contact with one another, which would serve the dual purpose of enabling racialized licensees to enhance their networks, while creating mentorship opportunities and greater cultural awareness/competence among other parts of the profession. To this end, the Law Society can facilitate the development of a cross-cultural mentoring program, established for the purpose of advancing racialized licensees.
11. At the same time, FACL submits that racialized mentors have an important role to play in providing mutual support and assisting racialized mentees in navigating the present professional climate. Recognizing that there are senior, experienced racialized licensees who are well positioned to provide mentorship, the Law Society can assist by facilitating and promoting both cross-cultural and culturally-specific mentorships as outlined below.
12. The Law Society can work with diversity seeking legal associations to organize mentoring/advisory services models for racialized licensees. Many of these associations already carry out mentoring activities, such as speed mentoring sessions; however, finding funding for these activities is often challenging. The Law Society could consider subsidizing or funding mentorship initiatives provided by such organizations and/or assisting with their organization in cooperation with the Roundtable of Diversity Associations. This would ensure that these initiatives are able to reach a larger number of racialized licensees.
13. The Law Society should survey the existing landscape of mentoring programs offered by bar associations, and provide that consolidated information to the profession. The Law Society should also strive to better inform its licensees of the mentoring programs and advisory services that it already offers practitioners; perhaps through multiple advertisements in the Ontario Reports – and through the bar associations. In addition, the Law Society should develop, with the help of the bar associations, "best practices" toolkits/guidelines to improve existing mentoring programs and assist new organizations in adopting their own.
14. The Law Society should consider incentivizing senior, non-racialized members of the bar to participate in the Law Society's mentorship program or mentorship initiatives organized by groups such as FACL by providing professionalism CPD hours, CPD credits, and/or free CPD sessions at the Law Society in exchange for mentorship hours. The Law Society should also consider the implementation of diversity awards.
15. To go a step further, the Law Society should consider creating a panel of advisors, who would be remunerated, to provide advice to sole practitioners (many of whom are racialized licensees) who are at risk of failing to fulfill their professional obligations. When a lawyer at a



large firm receives a Law Society complaint, he or she has access to a strong support network. Sole practitioners do not and are therefore at much greater risk of running afoul with the regulator. Statistically, this burden falls disproportionately on racialized licensees. It may be more cost effective for the Law Society to re-allocate the resources dedicated to discipline to a more preventative function such as the one proposed. Many Law Society complaints could be resolved with a proper and prompt response from the licensee, but he or she may not provide such a response without proper guidance, which often can only be given by a senior member of the bar with experience in the relevant practice area.

16. Other mentorship activities that the Law Society can facilitate include low-cost, content-specific information sessions (e.g., continuing legal development for a particular area of law), which also include a networking session. This will allow licensees practicing in an area to meet each other. Through these events, mentoring relationships may form organically. This would, of course, be in addition to (and not a substitute for) the formal mentorship program, that can be established through both the Law Society and diversity seeking legal associations.

Question 6: How could the Law Society enhance the profession's cultural competence through its CPD programs?

17. FACL supports the call for enhanced cultural competency in the profession, and the accreditation of training in cultural competency through inclusion in the PRP course as well as provision of credit towards professionalism hours for licensees. FACL is mindful, however, of the danger of reinforcing stereotypes through such training if presented in an inappropriate fashion. Cultural competency should go beyond learning about cultural practices of “other” cultures and towards an examination of bias, inequality and discrimination. In addition to the definition of cultural competency provided in the Law Society’s consultation report, cultural competency should include a focus on how to achieve the following goals:

- Legal services that are accessible to a diverse range of clients, delivered in a culturally-appropriate manner.
- Range of services that respond to the differing needs of diverse communities.
- The ability to identify and respond to issues involving bias, discrimination and racism.

Pay, Cynthia. "Teaching Cultural Competency in Legal Clinics." *Journal of Law and Social Policy* 23. (2014): 188-219 at 217 <http://digitalcommons.osgoode.yorku.ca/jlsp/vol23/iss1/12>

18. Such training should be provided by experts who are themselves representative of diverse communities, and should not only focus on cross-cultural communication, which ranges from communication styles to barriers that stem from the surrounding context of inequality and racism in which the parties are meeting (ibid, at 214), but also on issues and stereotypes facing specific racialized communities (ibid, at 211 to 213). It should also focus on how to provide services that are both accessible to diverse communities (eg. through working with

language interpreters) and responsive to their legal needs.

19. This training should include an awareness of how stereotypes and biases can adversely impact racialized people in their participation in the legal system, their history and the issues facing these communities. Legal organizations representing racialized communities, such as the FACL, South Asian Legal Clinic and Canadian Association of Black Lawyers, could be appropriate sources of expertise to lead such training.
20. The professionalism component of the annual CPD requirement should be able to be satisfied by sessions focused on cultural competence. The Law Society should work with knowledgeable experts to adopt general standards of the appropriate content for these sessions before accrediting them. “Refresher” sessions should be mandated at appropriate intervals over the course of licensees’ careers.
21. Many law students and newer lawyers in Ontario are racialized and are deeply affected by biased hiring practices. The Law Society can assist the profession in eradicating latent or unconscious bias in a practical way by providing cultural competence training and/or CPDs for lawyers involved in recruitment and hiring. This training should involve programs on how to appropriately structure and word interviews and questions to focus more on merit than “fit”.
22. As part of its eventual regulation of law firms, the Law Society could implement mandatory programs directed at all partners in law firms, which raise awareness of the challenges faced by racialized licensees, the insidious effect of latent or unconscious biases, as well as the business and principled reasons for diversity in law firms.

Question 7: How should the Law Society ensure that complaints of discrimination are brought to its attention and effectively addressed?

23. In addition to the proposals set forth on page 37 of the Consultation Paper, the Law Society’s Discrimination and Harassment Counsel (“DHC”) Program could be better harnessed to ensure that complaints of discrimination are brought to the Law Society’s attention and addressed.
24. The DHC Program is an ombuds-type program that is available free of charge to anyone who has experienced discrimination by lawyers and paralegals, including racialized licensees. It operates independently of and at arm’s length from the Law Society. The DHC fields complaints, and offers confidential advice on potential avenues of recourse; where appropriate and with the parties’ consent, the DHC will mediate complaints. Cynthia Petersen has been the DHC since November 2002. Lynn Bevan and David Bennett are the two Alternate DHCs. In 2012, 165 people contacted the DHC; 71 raised specific complaints of discrimination. It is unclear how many of the calls or complaints made to the DHC were

from racialized licensees, though we do know that racial discrimination is the third most common type of complaints.

25. Given the prevalence of discrimination (as detailed in the Law Society's Consultation Paper) the number of complaints to the DHC appears disproportionately small. The small number of complaints suggests that the program may not be as broadly known as it should be. Accordingly, the Law Society may consider devoting more resources to informing lawyers of the DHC service – be it by way of community outreach initiatives, targeted outreach to equity-seeking law associations, or otherwise.
26. Fear of reprisal and the negative effect on one's career may be a contributing factor to the relatively low number of complaints of discrimination and/or harassment. The Law Society should consider addressing this legitimate concern in Chapter 6 of the Rules of Professional Conduct. Treating acts of reprisal as professional misconduct affords the complainant a degree of protection and remedial action.
27. The DHC program has the potential to offer a great deal of insight to the Law Society on discrimination in the legal profession. Without sacrificing the privacy of the complainants, the DHC can gather important (and anonymized) statistics relating to the complaints, the demographics of the complainants and targets of the complaints, the manner in which complaints are resolved, etc. With this information, the DHC can prepare an annual report to the Law Society on the statistics and trends of that year, which the Law Society can in turn share with the public. Such anonymized reports will ensure that information about discrimination in the profession is brought to the Law Society's attention, which will then allow it to devise or modify strategies to effectively address any systemic or widespread issues.
28. Notably, neither the DHC nor her alternates are racialized lawyers. In planning for the succession of the DHC, the Law Society should give serious consideration to ensuring that the individuals at the helm of and running the DHC program are reflective of our increasingly diverse profession, and the population in general.
29. The Law Society should ensure that all of its staff, including tribunal members and those in the DHC office are trained in cultural competence, and trained to be alert and sensitized to (and thus be able to effectively address) discrimination and harassment issues. They should be trained to properly direct those issues to the appropriate personnel, and to keep a track of discrimination issues that have been brought to their attention. "Refresher" sessions should be mandated at appropriate intervals. In addition, the Law Society should continue and enhance its recruitment and hiring efforts to ensure diversity within and throughout the organization, including on the hearing panel roster.

Question 8: Which initiatives/strategies should the Law Society consider to develop a more diverse and inclusive public image/face?

30. The Law Society needs to take an active leadership role to address the systemic challenges faced by racialized lawyers and licensees through organizational change. The



Law Society, in developing an inclusive public image/face and legitimizing this issue, should do this by undertaking its own equity audits, which should include examining and developing policies on staff composition (i.e. hiring, promotions, training) and committee compositions, as well as providing the oversight and standards if it chooses to adopt any of Convocation's recommendations.

31. Either the Policy Secretariat or Convocation itself should make a concerted effort to ensure that bench candidates are recruited from equity-seeking groups, and provide support for those efforts. Historically, equity candidates and racialized candidates have not fared well; with the very few high profile member exceptions who are frequently used as figureheads for specific communities. More information and assistance can be made available and/or better strategies can be adopted to communicate to the profession about the election process and the importance of the work of benchers.
32. FACL recognizes that the Law Society undertook a similar study of challenges faced by Aboriginal lawyers in its 2009 Aboriginal Bar Consultation. After that consultation, the Law Society committed to and implemented various initiatives meant to address those challenges, which continue to this day. FACL hopes to see a similar commitment and implementation of initiatives for racialized licensees, based on input collected through this consultation process.
33. The distinct concerns of Aboriginal lawyers and racialized licensees require different initiatives. However, many of the challenges faced by the Aboriginal bar intersect with those faced by racialized licensees including, but not limited to: discrimination, isolation, lack of mentorship and access to networks, as well as biased perceptions of being less qualified and competent. In light of these and other shared common issues, this process could benefit from the experience of the Aboriginal lawyers in their consultation process and their assessment of the Law Society initiatives meant to address their concerns. FACL also believes that there may also be opportunities to implement joint initiatives.

Thank you for considering our submissions. Should you have any questions about this matter, we would be happy to discuss this with you further.

Yours very truly,

Lai-King Hum
President, Federation of Asian Canadian Lawyers