A Critical Review of the Law Society's *Challenges* Report: Representations to the Law Society EIA Committee and Benchers

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Introduction

On October 30, 2014, a meeting of the Benchers of the Law Society was presented with a summary of a major research report on *Challenges Facing Racialized Licensees* (herein the *Challenges* Report, or simply the "Report"). The *Challenges* Report, completed in March 2014, had been prepared by an outside consulting firm on behalf of a special Working Group of Benchers and some Law Society staff. That Working Group had been mandated to study, and discuss solutions for, challenges faced by racialized lawyers and paralegals. The summary presented on October 30 was contained in a *Consultation Paper* provided to the Benchers on that date which also included a detailed going-forward proposal for an extensive consultation process with lawyers and paralegals generally in Ontario, and with various legal professional organizations.

The *Challenges* Report (summarized in the *Consultation Paper* of October 30, 2014) described a broad information gathering process conducted largely in 2013 that had consisted, chronologically, of interviews with "key informants", followed by consultations with focus groups, and finally an extensive opinion survey of the entire membership of the lawyer and paralegal professions in Ontario.

The Benchers on October 30, 2014 were urged to distribute the *Consultation Paper* widely in the legal professions to gather input on next steps. Various Benchers who spoke at the meeting lauded the *Consultation Paper*, and Convocation approved the proposed plan for distribution of the *Consultation Paper*.

After those extensive consultations, the Working Group prepared a major report entitled *Working Together for Change*, which recommended sweeping, complex and far-reaching policy initiatives at the Law Society, with major effects throughout the legal professions in the province. The Working Group's recommendations were adopted by Convocation on December 2, 2016, again to much acclaim.[1] Those policy initiatives are presently in the process of being implemented.

This writer believes that it is fair to say, and important to underscore, that all of the reports, consultations, and policy-initiatives on this topic on and after October 30, 2014 were fundamentally based on and purportedly justified by the findings and information in the *Challenges* Report of March 2014.

This writer, as a decades-long practicing lawyer, had always more or less trusted the Law

[1] The *Working Together for Change* Report, as presented to the Benchers on December 2, 2016, is found at https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf

Society to carry out its role based on credible evidence and careful analysis. However, when this writer eventually read the *Challenges* Report, he began to feel considerable disquiet. After extensive study, and much agonizing, this writer has concluded that the *Challenges* Report is methodologically invalid, seriously misleading, driven by a particular political ideology, and an unacceptable basis for serious policy-making by the Law Society, in particular the policy initiatives which are currently being implemented.

Among other issues, the province-wide survey of all legal professionals described in the Report, which was a key part of the study, and which was held up as justifying many of its findings, in fact tended to show that the rest of the *Challenges* Report was not well-founded. The *Challenges* Report was and is a misleading and deficient foundation for the extensive consultations and for the *Working Together for Change* report that followed and were based on the Report.

Summary

The reasons for these conclusions are summarized as follows, with more detailed explanations set out below (all references to "the Report" refer to the *Challenges* Report).[2]

1. A province-wide survey of all legal professionals was a key part of the *Challenges* Report. However, importantly, the response rate to the survey was very, very low. This raises serious issues, which were not disclosed to the reader of the Report.
2. In particular, the survey response rate amongst *racialized* lawyers and paralegals, who were the focus of the entire study, was also very low. Again, this fact, and the serious issues that it raises, were not disclosed to the reader.
3. The Report entirely avoided the important issue of *why* the survey response rates were so low.
4. The Report's survey, and many of the Report's conclusions, were based on a non-random sample, which raises fundamental questions about what, if any, conclusions can be drawn from the survey responses.
5. The Report's survey was marred by many leading questions.
6. A previous survey of lawyers in Ontario had found little evidence of racial prejudice, an important finding which was not referred to or discussed in the Report.
7. The survey sample was skewed due to self-selection, and the Report's "adjustments" to the survey sample did not fix the self-selection bias in the sample.
8. The significance of the answers to many survey questions was misrepresented in the Report.
9. The views of the 'key informants" were largely not validated, and were often contradicted, by the public survey.
10. The Report was very one-sided and seemingly driven by a particular political ideology.
11. The subsequent extensive consultation process in the legal professions was thoroughly undermined by the invalid and misleading "findings" in the preceding Report, on which the entire consultation process was premised.
12. The Report's various "input" groups likely had considerable overlap and duplication,

[2] The *Challenges* Report does not appear to be on the Law Society's website, but can be found at https://www.stratcom.ca/wp-content/uploads/manual/Racialized-Licensees_Full-Report.pdf . This writer encourages the reader to download or print the Report for ease of reference and to read it closely, taking into account the points raised in this *Review*.

meaning that the input received was actually from only a very small segment of the professions, creating a misleading picture.

1. The response rate of lawyers and paralegals to the *Challenges* Report survey was very, very low.

The *Challenges* Report says that a survey questionnaire was sent to all lawyers and paralegals in Ontario, but it does not say how large that population was; that is, the Report does not state how many survey questionaires were actually sent out. All it says is that 3,296 questionaires were returned. That sounds like a reasonable number until one realizes that the total polled population was 51,996 lawyers and paralegals (according to Law Society numbers for 2013), which means that the response rate was only 6.3% (another number that is not mentioned in the Report).

It is customary and good professional practice to include such numbers in a serious study. The omission of these key statistics from the *Challenges* Report is odd and obscures some very serious issues. The missing statistics would be a "red flag", a "caution sign", about what the survey results mean (if anything), and how they should be used (or not).

Essentially, the problem raised by the extremely low return rate is that the views of the proportionately very small group of legal professionals who responded to the survey have a rather low probability of being representative of the views of the entire population of lawyers and paralegals in the province. A very low response rate in a study typically means that great caution must be exercised in extrapolating the study findings to the overall population. One would have thought that the researchers who conducted and reported on the *Challenges* survey understood the limitations associated with interpreting the data from such a small and unrepresentative group of respondents. But no such caution was mentioned in the Report. On the contrary, the Report unqualifiedly and repeatedly declared its findings as accurately representing the professions as a whole.

2. Even the response rate of *racialized* lawyers was very low.

The information on how many (and what proportion of) *racialized* lawyers and paralegals completed the survey is similarly important for assessing the Report's claims. However, again, and disturbingly, the Report gave us no numbers on these critically important points.

Although in this writer's opinion these statistics are fundamental to assessing the validity of the Report's findings and therefore should have been provided in the Report (and should be provided now), it is possible to reconstruct the numbers from various disconnected parts of the Report and from Law Society records. Based on these sources[3], the number of racialized lawyers and paralegals in Ontario in 2013 (the time the survey was conducted) was 11,617 (or close to that), and the number of racialized legal professionals who responded to the survey was 1,118 (or close to that). This represents about 9.6% - *only* 9.6% - of that important group of lawyers and paralegals.[4]

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[3] On pages 23, 24, and 25 of the Report, and the Law Society's numbers on its website.

[4] It must be emphasized that although this writer believes that these reconstructed numbers are likely quite accurate,

Hence, once again, the very low response rate of *racialized* lawyers and paralegals —who were the focus of the study—should strongly caution both researchers and readers against making broad and definitive generalizations about the views and experiences of the population of racialized legal professionals in the province as a whole. This is especially true given the significance of the issue being examined – racial barriers and racial prejudice.

In fact, the possibility that the realities of racial barriers and racial prejudice in the legal professions have been misrepresented based on unwarranted interpretations of the *Challenges* survey data is an extremely serious concern because of the Report's key role as the basis for far-reaching new Law Society policies which will have extensive repercussions on the ways lawyers and paralegals practice and on the ways the public is served by lawyers, paralegals and legal firms.

3. *Why* the very low response rate from lawyers and paralegals in general and from racialized lawyers and paralegals in particular? The *Challenges* Report avoided answering this important question.

The *Challenges* study obtained very low return rates from the population of lawyers and paralegals in the province and specifically from the population of racialized licensees despite extensive efforts to obtain responses from those licensees and despite a format for the survey which was extremely favourable towards obtaining responses from licensees (including guaranteed confidentiality, multiple reminders being sent out, and an extended period of time given to licensees to complete the survey, at times convenient for licensees). According to the research company, "the online survey was advertised in advance through Law Society communications channels, including email to all licensees work addresses, and website promotions. Members were notified by email and invited to participate immediately prior to the posting of the survey and [they were] reminded by email twice during the period that the survey was accessible online" (p. 6). The research company also states that "the subject matter of the study was widely known to the LSUC [Law Society of Upper Canada] members..." (p. 22).

Therefore it seems unlikely that licensees were unaware of the survey.

So, what was the reason for the extremely low response rates from the survey population as a whole and from the *racialized* lawyers and paralegals in particular? We don't know because the non-responders did not say why they did not respond, and the survey company seemingly did not attempt to find out. And the *Challenges* Report avoids any discussion of this fundamental and glaringly important question. To this writer, this omission, in and of itself, seriously undermines the credibility of the Report.

It is possible to hypothesize as to why lawyers and paralegals would not respond to a survey such as this one. One plausible reason is that lawyers and paralegals were just too busy. Nevertheless, the Report questionnaire says "This survey will take about ... max 20 min to complete", which is not an imposing amount of time, especially since licensees were given several weeks to complete the survey, at their convenience. It seems that the time required was not a problem.

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the real issue is that these numbers should have been provided in the original Report, and should be provided now.

At any rate, the *Challenges* Report simply ignores the critical issue of the very low response rates.

This writer believes that this issue puts a clear spotlight on "the elephant in the room." It may be that the reason for the extremely low survey response rates from both the overall population of licensees and specifically from racialized lawyers and paralegals is that the great majority of lawyers and paralegals in the province are not all that concerned about "racism" in the professions, *perhaps because we have progressed to the point where the legal professions are characterized more by openness and equality and opportunity than by "systemic racism."*

Surely, if a substantial proportion of lawyers and paralegals in the professions, especially those who self-identify as "racialized," felt that "systemic racism" was a serious issue, more than 9.6% of the racialized licensees would have responded to the survey (and it must be remembered that a large portion of those 9.6% who responded did not in fact express such concerns, as will be discussed below).

The Law Society's comprehensive Working Group Report *Working Together for Change* which was published after the *Challenges* Report, and which was based on the *Challenges* Report, forcefully stated (in the second paragraph of its Executive Summary), its conclusion that "racialized licensees face widespread barriers within the professions at all stages of their careers."

Frankly, it appears to this writer that the more than 90% of the racialized Law Society licensees who chose not to respond to the survey (and many of the 10% who did) either don't agree with that conclusion, don't think the issue is all that serious, or prefer to have a more positive outlook.[5]

Of course, this is not to say that there is no ethnic and racial prejudice and discrimination in the legal professions in Ontario. A certain amount of prejudice and discrimination undoubtedly exists—it probably exists everywhere that humans interact—but the extremely low survey response rate from racialized legal professionals gives good reason to believe that the nature and extent of such prejudice and discrimination is nothing like the picture portrayed in most of the *Challenges* Report or in the Working Group Report.

4. The *Challenges* study used a non-random sample.

The very low survey response rates would not have been as much of a concern in the *Challenges* study if the legal professionals who responded were an unbiased sample of lawyers and paralegals in the province. The best way to obtain an unbiased sample is to ensure that respondents are randomly sampled. If a sample is random, readers can be confident that the experiences, views, and characteristics of that sample fairly represent those of the overall population, within easily computed (and disclosed) limits (which is called a standard error of the

[5] To this writer, the Working Group's forceful and important conclusion seems to be very "artfully" worded. For example, *how many* racialized licensees are they suggesting face such barriers? All of them? Including the 90% who chose not to respond to the survey? And the large portion of the 9.6% who did respond, but who did not express concerns about such barriers? And "widespread"? And "at all stages of their careers"?

measurement).

However, the respondents to the *Challenges* survey were *not* a random sample of the population. In fact, the respondents were a special group created through self-selection; that is, they chose to participate in the survey while the non-responders chose *not* to participate. There is no reason to think that that self-selected sample was representative, and good reason to think the opposite. [6] Therefore the results of the survey were almost certainly a biased set of responses which did not accurately represent the views and experiences of the overall population of lawyers and paralegals in the province.

According to the author of a contemporary Canadian textbook on public opinion surveying:

> Social science researchers conceptually divide sampling strategies into non-probability sampling and probability sampling.... *Data collected from non-probability samples* can be summarized using descriptive statistics but *cannot be used to make generalizations about a larger population.* In contrast, probability sampling relies on the principle of random selection.... *When researchers use probability samples, they rely on the laws of probability to make generalizations about the larger population.* [emphasis added][7]

Or, to quote the blunt "bottom line" of the textbook author: "Non-probability samples cannot be used to generate population estimates." (p. 542)

The failure of the *Challenges* survey to obtain a random sample therefore has serious implications for how the results of the survey can and should be interpreted, presented, discussed and acted upon. When the *Challenges* Report says that 40% of racialized *respondents* answered "yes" to a question, *there are no grounds to say that 40% of all racialized licensees felt that way.* One *can* say that 447 racialized licensees felt that way (being 40% of racialized *respondents*). But one can, and should, also note that 447 licensees *out of 11,617* racialized licensees felt that way. And one can, and should, also note that *out of 11,617 racialized licensees who were asked the question, 11,170 either chose not to answer or did not answer yes.*

Failure to be frank about the importance of obtaining a random sample, and about the serious limitations of a sample that is not randomized, is an abuse of survey methodology, and seriously misleading, in a study of the scope and seriousness of the *Challenges* Report.[8] Unfortunately, the *Challenges* Report does not even acknowledge the gravity of this problem.

5. The *Challenges* survey included many leading questions.

The *Challenges* survey contains yet another problem: a great many of its questions were framed with a highly emotional undertone or in a suggestive way. For example, the responders were

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[6] One obvious reason is that given how the survey was characterized, those racialized licensees with concerns about racial prejudice and racial disadvantage in the professions would have had a much higher motivation to respond than those racialized licensees who, for various reasons, did not see them as big issues.

[7] *Social Statistics in Action: A Canadian Introduction*, by Andrea M. Noack, Oxford University Press, 2018, p. 137.

[8] This writer does not know the extent of the resources spent by the Law Society on the *Challenges* Report, but suspects that the direct costs and indirect costs (such as considerable staff time) amount to hundreds of thousands of dollars, perhaps many hundreds of thousands of dollars.

asked to indicate their agreement (or disagreement) with a number of statements like: "You have been subjected to prejudicial attitudes on the part of other legal professionals, based on your racialized status," "Your employment environment is not very diverse," and "Your beliefs or cultural practices preclude you from participating in many of the social networking functions of Ontario legal firms."

Clearly, these statements steer respondents towards identifying or interpreting experiences in a way that would align with the conclusion that there are considerable racial barriers or racial prejudice in the legal professions. In the social sciences, such statements are called "loaded," or "leading," questions, because they lead respondents to respond in particular ways.[9]

Thus, the biased question format is another reason why the information obtained from the lawyers and paralegals responding to the survey cannot be considered to fairly represent the way the respondents, and by extension, the population of lawyers and paralegals in the province, truly feel or think. Framing survey items in this biased way is widely recognized as a very poor practice, and consequently the information obtained from such questions cannot be treated as valid.[10] The leading questions in the survey instrument are yet another source of intrinsic bias in the *Challenges* study.

6. A previous survey of Ontario lawyers found little evidence of racism in the profession.

The likelihood that the information in the *Challenges* study was not a fair reflection of the views and experiences of the overall membership of the legal professions is supported by the results of another previous survey study. The results of that study, the Kay Report of 2004,[11] revealed little evidence of racial prejudice or discrimination experienced by lawyers who identified themselves as racialized.

Specifically, the researchers of the Kay study asked both racialized and non-racialized lawyers nine questions aimed at illuminating whether or not there was "exclusion and discrimination according to racial/cultural group identity" in the legal profession. The evidence showed that, while there were a few small differences between racialized and non-racialized lawyers in their answers, "*none of the differences are* large in magnitude or *statistically significant*" (p. 65, emphasis added). In fact, the Kay Report stated:

> Lawyers from racialized communities are slightly more likely to report they had been assigned tasks beneath their skill level routinely or frequently (14%, compared with 11% among non-racialized lawyers). Lawyers from racialized communities are slightly more likely to report exclusion, routinely or frequently, from social gatherings (4%); rude or inappropriate remarks by clients (4%); and a lack of support from staff at the firm (5%).

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[9] It seems possible and in fact likely to this writer that the "loaded" nature of the questions would in fact have "turned off" some of those who were initially interested in the survey, resulting in many non-completions.

[10] See, for example, L. Gideon, "The Art of Question Phrasing," in *Handbook of Survey Methodology for the Social Sciences*, ed. L. Gideon (New York: Springer, 2012).

[11] Kay, Fiona M., Cristi Masuch, and Paula Curry. 2004. *Contemporary Lawyers: Diversity and Change in Ontario's Legal Profession*. Report submitted to the Law Society of Upper Canada (Toronto: The Law Society of Upper Canada) (157 pages). See: https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/p/professor_fiona_kay_-_diversity_and_change_-_the_contemporary_legal_profession_in_ontario_2004.pdf

> Yet, *their slight differences remain statistically insignificant.* (p. 66, emphasis added)[12]

These results are noteworthy because they do not support the claim of "systemic racism" made in or based on the *Challenges* Report, and would tend to call that claim into question. The fact that the authors of the *Challenges* study did not compare their results with the results of the Kay Report, and discuss the contrasting findings, is not in keeping with the recognized practice in scientific research in which newly obtained findings are put into the context of the existing evidence. By failing to contextualize its findings, the *Challenges* Report undermines its credibility, especially since its findings are in clear contradiction with the findings of a previous well-conducted study.[13]

7. The *Challenges* Report's "adjustments" did not fix the self-selection bias.

The *Challenges* Report's authors acknowledge that the racialized lawyers and paralegals who completed the survey questionnaires were over-represented in the survey results.[14] In response to this over-representation, the Report states that the researchers had made adjustments to the sample to eliminate this biasing effect. The survey company said that this procedure would ensure that the responses accurately represented the members of the professions and that such biases could be corrected for if:

> the source and scale of the numeric over- or under-representation of particular subgroups are understood. A typical remedy is to 'weight' the survey data so that the results align with the known (or precisely estimated) proportions from a census or other prior reliable quantitative survey (p. 22).

The survey company then described its "weighting" procedure used "to achieve a representative sample" (p. 22):

> We used a weight-ranking (sample balancing) algorithm to adjust the samples of lawyers and paralegals separately, using the 2010 Law Society snapshot documents as estimates of the true proportions of different subgroups of licensees. The survey data were weighted to align with the distributions of different subgroups for racial and ethnic groups....

In essence, the "weighting" amounts to a reduction in the number of racialized survey responses in the Report's calculations so that instead of including all the 1,118 survey responses from racialized licensees,[15] only 741 of the questionnaires completed by these lawyers and paralegals

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[12] Of the nine questions, responses to one question (referencing disrespectful remarks by judges or other lawyers), showed a small difference which passed the "statistically significant" threshold, but which the Report describes as not large.

[13] Readers of the *Challenges* Report would not even become aware of the issues raised by the Report's conflict with a previous major study.

[14] The only comment in the Report about the possible reason(s) for this over-representation is that it is "due to the subject matter of the study" (p. 22). This ambiguous wording avoids the likely reality that those with certain particular views on racial matters were much more likely to complete the survey, resulting in a skewed sample.

[15] Again, that 1,118 is this writer's (approximately accurate) calculated number. Again, this writer believes that the actual number of racialized respondents should have been originally disclosed, and should be disclosed now.

were included in the analyses.

Put simply, the logic appeared to be that because 1,118 represents a disproportionately high number of racialized lawyers and paralegals in comparison with the proportion of racialized licensees in the overall population, the number of racialized questionnaires used would be reduced to 741 to bring the sample of racialized licensee respondents in line with the proportion of racialized lawyers and paralegals in the professions.

Following this, the *Challenges* Report authors say: "This process results in a sample that produces representative, unbiased estimates of the views and opinions of Law Society licensees" (p. 23, and also at p. v).[16]

There is no apparent basis for this statement, and it is very likely false. The Report gives no grounds for believing that the 1,118 self-selected racialized survey-responders (9.6% of all racialized licensees in the province) were representative of the views and experiences of the overall population of racialized licensees.[17] Given that, simply adjusting downward the number of racialized lawyers and paralegal responses used for the analyses does not create a representative sample of the racialized population of licensees in the province.

In fact, because the sample was self-selected, there is no practical way to "weight" the sample to ensure that the sample fairly represents all lawyers and paralegals in the province.[18]

8. The answers to many (or most) survey questions were misrepresented in the Report. For example, according to the *Challenges* Report, 40% of racialized licensees reported that their ethnic/racial identity was a barrier or challenge to entry into practice. That claim is not true.

The *Challenges* Report states that "fully 40% of racialized licensees identified their ethnic/racial identity as a barrier or challenge to entry into the practice of law or provisions of legal services" (p. 38).[19]

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[16] The Report repeatedly claims the fundamental point that its survey results, after this "weighting" procedure, accurately reflect the views of licensees *as a whole*. The Executive Summary of the Report states that the purpose of using selective interviews and focus groups at the beginning of the study was to generate a detailed account of experiences from those licensees "perspective," and then "measure or validate those findings across the whole population of licensees." (p. ii), and that "it is important to understand... how we ensured that the views of all licensees are accurately portrayed in the data and final report (representativeness)" (p. iv) [emphasis added]. In the Conclusions of the *Challenges* Report the authors state that its methodology has "yielded a nuanced account of the experiences of racialized licensees, validating much of that experience through detailed measurement across the whole population" (p. 77) [emphasis added].

[17] That is, there is no basis for asserting that the mix of views and experiences in the self-selected group of 1,118 was the same as, or "mirrored," the views and experiences in the group of 10,499 racialized licensees who chose not to respond (11,617-1118=10,499).

[18] There are some recently developed, highly sophisticated and complex survey methods which some companies are experimenting with to try to adjust for self-selection bias. There is no indication in the Report that the authors have any knowledge of such techniques, or even of the complexity and seriousness of the issue.

[19] This specific example is chosen, from amongst many survey questions in the Report, because this statistic has been cited repeatedly in public discussions, in staff summaries of the Report, in the consultation process, in the Law Society's Continuing Professional Development videos, and in at least one law journal article.

Actually, that isn't true. All we know is that 447 racialized licensees said that (40% of 1,118), out of a total of 11,617 racialized lawyers and paralegals. **That's 4%, not 40%, of the survey population.**[20]

The problem is the Report's extrapolation from the small sample (the actual 447 respondents who said yes on that point) to the overall study population. Since this small sample is non-random and skewed, the answers cannot and should not be simply generalized to the overall population.

Furthermore, as discussed earlier, the fact that 96% of racialized lawyers and paralegals chose either to not answer the question, or answered but did not agree (11,617 – 447 = 11,170; 11,170/11,617 = 96%), legitimately raises the suggestion that 96%, or at least a very large majority, of racialized lawyers and paralegals in Ontario do not perceive ethnic/racial barriers as being a major issue for entry into the legal professions.[21]

At no point does the *Challenges* Report even discuss this possibility, which is clearly raised and tentatively supported by the survey results.[22] Instead, in this writer's opinion, the data has been presented in a seriously misleading way in the Report, and in many subsequent presentations and discussions.

Further, this same concern applies to many other "findings" in the Report. The Report constantly states, on a variety of issues, that a certain percentage of "licensees" agreed with a specific proposition when it can, truthfully, only be claimed that the results refer to the far smaller number of actual "respondents" who agreed. Because of the Report's methodological deficiencies, we only know what *those respondents* said, and to make statements about what *licensees* said or believe (suggesting licensees as a whole), which the Report does repeatedly, is seriously misleading.

9. The views of the 'key informants" were largely not validated by the public survey.

The *Challenges* Report adopted as one of the first steps in its methodology the recruitment of 27 "key informants", whom it describes as "individuals in the legal profession with deep expertise in the realm of diversity and equity" (p. 3). Somewhat ambiguously, the Report states that three of the 27 self-identified as non-racialized, seeming to suggest that 24 of the "key informants" self-identified as racialized, although that is left unclear. However, despite their key role, the Report does not tell us their identity or anything about their backgrounds, so the reader, and the legal professions, have no way of assessing whether they in fact have what should be considered as expertise in anything. Nevertheless, their views appeared to have driven the structure of much

[20] These are the numbers before the Report's "adjustments". The "adjustments" would not affect the point.

[21] This particular question dealt with "entry into" the legal professions. A similar related question in the Report dealt with "advancement" in the professions (subsequent to "entry"), for which the equivalent percentage was stated as 43%. The comments above would apply equally to that question (and to many or most others in the Report).

[22] Again, this writer is by no means suggesting that the views of those 447 respondents are not important. And there were probably others who did not respond to the survey who agree with the 447. On the other hand, based on the very low response rate, there were probably a very large number of racialized licensees who had something quite different to say on this issue, whose views were not appropriately discussed in the Report.

of the Report.

The Report does not state why the identity or background of the "key informants" was kept confidential. Presumably it was to encourage frankness from individuals who considered themselves vulnerable in their careers in the professions. This writer considers that understandable. However, given that we consequently know nothing about these individuals, how much "weight" should be given to their "expertise" is a serious question (for example, it is important but unclear as to how much of their asserted "expertise" is really in the form of a political perspective on which others might seriously differ).[23]

The problem raised by the complete anonymity of these "experts" is highlighted because the survey results of the entire legal professions, including in particular the results from *racialized* licensees, do not actually back up or validate many of the opinions which derive from their "expertise", and often contradict them, as described above.

To pick one example, according to the Report: "Through the key informants we got a *strong* indication that ... *overt* discrimination and bias – often unconscious – is a feature of *daily life* for many, or *most*, racialized licensees" (p. 8, emphases added). This is a shocking assertion. However, this writer has to also consider the fact that the 90% of racialized lawyers and paralegals in the province who chose not to answer the survey at all, and approximately half of the 10% who did answer the survey, apparently did not see things that way.

Frankly, to this writer, many of the problems with the Report (such as the failure to discuss, or even to disclose, the very low survey response rates) appear to arise from the authors of the Report attempting to deal with the fact that the survey of the professions in many ways did not support, and in many ways contradicted, what the "key informants" described as the situation in the professions. The key informants' "expertise" did not seem to fit the facts.

10. The *Challenges* Report was very one-sided and seemingly driven by a particular political ideology.

One of the first questions in the survey as sent to all members of the legal professions was: "Do you self-identify as racialized or non-racialized?". That idea, of "racialization", is the central and key concept of the entire survey aspect of the Report (and, seemingly, of the entire Report). Most of the survey responses were analyzed based on whether or not the respondents self-identified as "racialized".

However, the term "racialized" is a highly theoretical, politicized and ideological term.[24] The

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[23] It is quite ironic that the governing body of lawyers and paralegals in Ontario has been accepting, unquestioned, the views of "experts" in a way that no court would come anywhere close to tolerating. Not only are these experts anonymous, but their asserted expertise is not even described, and their actual views are not quoted either, but are instead collectively "summarized" by an unknown person, often with broad and what this writer considers significantly politically slanted language.

[24] The suffix "ized", when added to a word, denotes some "action" in the past, and it therefore builds right into the word itself the idea that "somebody or something has done something to somebody". In other words, simply changing the word from "racial" to "racialized" automatically imports a political and ideological conclusion. Central to the idea of "racialization" is the political theory of "social constructionism", specifically that "race is

Report's authors acknowledge that the term "racialized" is "relatively new", and that its use in the study is "innovative" and controversial (p. 21). They hint that the use of that term in the survey was based on "clear direction" from the LSUC and the Working Group (p. 21). To this writer, that appears to be politically motivated interference in the work of the opinion survey technicians.

In fact, by the explicit terms of the survey questionnaire, survey respondents were being asked not whether they were a member of an ethnic or visible minority, but whether their racial identity was socially constructed. To this writer, that is simply a bizarre survey question, in this context.

In this writer's view, the use of the esoteric and political term "racialized" in itself was probably an important factor affecting and skewing the response rates to the survey. It seems likely to this writer that many members of the professions were puzzled or downright annoyed by the use of the term, and simply declined to complete the survey for that reason. The use of that term also likely skewed the composition of the sample by "filtering out" licensees who did not agree with the political conclusions they sensed were already "built into" the term itself.

Further, and unsurprisingly to this writer, 11% of survey respondents answered that they were "Unsure" or "Don't know" whether they were "racialized" or not (p. 25). The Report's authors do not explain how they dealt with that "Don't know" category, which seems important, since for many of the "findings" of the Report, that 11% potential "swing vote" would make a critical difference in the results.[25]

The use of the term "racialized" also appears to have produced some very strange and problematic specific results. The Report states that the *majority* of Aboriginal/Indigenous and Jewish survey respondents did *not* report themselves as "racialized" (p. 26). Further, *6% of Caucasians identified themselves as "racialized"* (p. 26).[26] To this writer, these results veer into the absurd. They also raise the important practical question of how these seeming miscategorizations affected the actual statistical findings. For example, would all the survey answers of the majority of Aboriginal/Indigenous respondents have been tallied as "non-

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socially constructed". U.S. professors of ethnic studies and sociology Omi and Winant, the leading theorists of the term, in their classic text *Racial Formation in the United States* (Routledge, originally published in 1986, third edition, 2015) emphasize ("stress" is their word) that "race is a social construction" (p. 12) and define racialization as "the extension of racial meaning to a previously racially unclassified relationship, social practice, or group." (p. 111). Further, this socially created "racial meaning" is not neutral. Omi and Winant say that: "We regard race as a *master category* of oppression and resistance in the United States. ... The establishment and reproduction of race has established supposedly fundamental distinctions among human beings ("othering"), ranking and hierarchizing them for purposes of domination and exploitation". (p. 245, emphasis in original). This is not the place to debate the validity, usefulness, limitations, excesses or harms of "social constructionist" theory in general and regarding "race" in particular. The point is that the term "racialized" brings with it a lot of baggage, including if used in a survey. Suffice to say that this writer is not "all in" on that "social constructionist" approach, and does not believe that the Law Society should be either.

[25] This writer's two young adult sons are genetically 50% Caucasian and 50% Taiwanese. This writer considered testing the survey question by asking his sons whether they "self-identified" as "racialized", but concluded that asking them that was patently ridiculous, and that we had better things to talk about.

[26] The Report makes it clear that the respondents' self-identification on the "are you racialized" question was considered definitive. This hints at the further intrusion of "identity" politics or ideology into the survey and Report – anyone's "mode of self-identification" must be respected and is not open to discussion or questioning.

racialized"? The Report does not discuss this issue.[27]

Overall, to this writer, the central use of the politically and ideologically loaded term "racialized" as a key component of the survey has alone completely distorted the Report's survey results, rendering them essentially useless for purposes of serious policy-making by the Law Society.[28]

In addition to the very serious problems arising from the use of the term "racialized", the Report systematically sidelines and disparages any parts of the survey results that do not match, or that contradict, its overriding political theme of systemic racism. For example, survey respondents, *including "racialized" respondents*, overwhelmingly agreed that "It is important to reduce discrimination but the profession's main responsibility is to the client and making sure they are being served by competent lawyers and paralegals" (p. 59, the figure for racialized respondents is 74%). This validation of the emphasis on "competence" does not fit well with the thrust of the Report. Further, the majority of survey respondents, *including a majority of "racialized" respondents*, agreed that "It is natural and desirable that licensees from various backgrounds conform to the professional culture that is already established in Ontario" (p. 59, the figure for racialized respondents is 53%).[29]

Rather than taking these kinds of responses seriously, the report dismisses them as "conservative or status quo statements" (p. 60). That categorization appears to be disparagingly and misleadingly labelling anyone who does not embrace the particular political ideology espoused by the Report (and those seem to include the majority of the members of the legal professions, and include this writer). It is also demeaning of respondents, including "racialized" respondents, who may have complex views about the present state of affairs in the professions, and about the appropriate path of progress going forward.

Finally, the Report makes no allowance for the variety of important causal factors, other than "systemic racism," that could, and likely do, contribute to the ethnic/racial statistics that are evident in the legal professions. These causal factors include "demographic lag" (the fact that the increasing racial diversity in the Ontario population simply takes time to work its way into the legal professions), the highly complex, difficult and skills-based nature of legal work (which

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[27] This writer has spent large portions of his decades-long legal career advocating for the rights and interests of Aboriginal/Indigenous peoples, and in this writer's view, if there is one group in Canada that has indisputably suffered from "systemic racism", it is Aboriginal/Indigenous peoples. In fact, in this writer's opinion, the history and situation of Aboriginal/Indigenous peoples in Canada is so different from all other groups that to "lump them together" with others is fundamentally mistaken. That may have been in the minds of Aboriginal/Indigenous respondents who declined to self-identify as "racialized". They may also have been offended by the suggestion that their identity is "merely" "socially constructed", as opposed to being real in a more fundamental sense.

[28] Even Professors Omi and Winant, the doyens of "racialization" theory, have recently "added back in" to their theory (in the most recent edition of their classic text) the idea of visible bodily differences as an essential element of "racialization" (what they refer to as "ocularity", see *Racial Formation*, 2015, pp. viii, 13, 145, 245 and 246). It looks like the term "visible minority" isn't such an "outdated" term after all. In this writer's view, the *Challenges* Report's survey of the professions would have been far more useful if the survey had used the term "visible minority", or something similar. That wasn't apparently ideologically correct enough for the managers of the study, but it is ironic that at least some leaders in the "ideology" itself have since "moved on".

[29] It is worth repeating that since the survey responses were very likely skewed, the strong affirmation of these sentiments in the survey responses is particularly surprising. The likely skew of the sample also means that these numbers in fact probably understate the actual frequency of these views in the professions overall.

means that it takes time, often many years, for entrants to become, or to feel, genuinely successful, or to reach senior positions in firms or government), and "sub-culture effects" (the fact that not all sub-cultures in the Ontario population equally value the legal professions as a career).[30]

The existence or potential significance of these causal factors, which in this writer's opinion are very important considerations for any thoughtful understanding of the issues, are ignored by the Report (and by the follow up Working Group Report).

11. The *Challenges* Report was a seriously misleading basis for the subsequent extensive consultation process.

The *Challenges* Report was presented to Law Society Convocation by the Working Group on October 30, 2014, with a recommendation to the Benchers that an extensive "consultation" process be implemented within the legal professions generally, and with a large number of "equity" or "diversity" organizations, including by inviting written representations, all based on the Report.

Unfortunately, in this writer's assessment, the entire consultation process used as its starting point, and was premised on, a Report that was methodologically invalid and seriously misleading, but which was presented as accurately representing an overall picture of the professions (that is, the views of a small and skewed sample or subgroup of the professions were put forward as accurately representing the views and experiences of the professions as a whole, while the omission of key information – such as the extremely low survey response rates – effectively hid serious issues from the readers).

There would have been few, if any, members of the professions who were invited to comment on the Report who would have been able to identify these issues, given the way the Report was written.

This writer has read all of the consultation responses which the Law Society has made public. It is effectively impossible, in this writer's opinion, to know what to make of them, given that they were all premised on the mistaken and misleading information and conclusions of the *Challenges* Report. In effect, members of the legal professions, and the consulted organizations, were asked to respond to something that wasn't true, without them realizing that it wasn't true.

12. The various "input" groups likely had considerable overlap and duplication, suggesting that the Report overall, and the consultations that followed, represent the views of only a very small number in the legal professions.

It appears to this writer that throughout the whole process, from the Report's "key informants", to the focus group members, to the respondents to the survey, and then to the consultation input

[30] This writer's sub-culture of origin had no use for lawyers and offered no encouragement towards becoming one, and this writer had never spoken to or met a lawyer until he was in law school. In several other sub-cultures with which this writer has considerable familiarity, parents would much rather have their children become doctors, engineers or business entrepreneurs than lawyers.

from various organizations, there is the likelihood of considerable overlap, or duplication, of the individuals involved. That is, it is likely that many individuals participated in more than one of these processes. It is likely, therefore, that the Law Society is hearing the views of a small group of several hundred licensees, repeated and duplicated through different channels. That does not mean that those views are not important – they are – but it does mean, in this writer's opinion, that there is another reason for caution in extrapolating the results to the legal professions as a whole. In fact, it appears that the vast majority of the professions, and the vast majority of racialized licensees, have not spoken on these issues.

Conclusion

The Law Society has spent a very large amount of time and effort, and apparently a very large amount of funds, on an attempt to address challenges faced by lawyers and paralegals from visible or ethnic minorities. In this writer's opinion, the Law Society could have ended up with a thoughtful and constructive result, but did not.

This writer has concluded that the *Challenges* Report, which is the foundation and justification for all of the subsequent reports, consultations, and policy plans, is methodologically invalid, seriously misleading, and driven by a particular political ideology, and was and is an unacceptable basis for serious policy-making by the Law Society, in particular the policy initiatives which are currently being implemented.[31]

[31] This writer welcomes comments on this *Review*, which may be sent to murray.klippenstein@klippensteins.ca.