

# Relationships First, Business Later

## Aboriginal Justice Strategy consultation report: Part 1

June 2021

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*Legal Aid Ontario recognizes that our work, and the work of our community partners takes place on traditional Indigenous territories across Ontario. We are thankful to be able to work and live in these territories. We are thankful to the First Nations, Metis and Inuit people who have cared for these territories since time immemorial and who continue to contribute to the strength of Ontario and to all communities across the province.*

*Legal Aid Ontario would also like to acknowledge that our Provincial Office is located in Toronto on the traditional territory of many nations including the Mississaugas of the Credit, the Anishnabeg, the Chippewa, the Haudenosaunee and the Wendat peoples and is now home to many diverse First Nations, Inuit and Métis peoples. LAO also acknowledges that Toronto is covered by Treaty 13 signed with the Mississaugas of the Credit, and the Williams Treaties signed with multiple Mississaugas and Chippewa bands.*

# FORWARD

Written By Rebecca Hammond, Policy Counsel – Aboriginal Justice Strategy

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In 2019, the Aboriginal Justice Strategy (AJS) at Legal Aid Ontario (LAO), commenced province-wide consultations with Indigenous communities, stakeholders and service providers about the direction that the AJS should be taking in its next phase of development.

At that time, the AJS was not able to conduct consultations with Nishnawbe-Aski Legal Services Corporation (NALSC) and/or with any of the communities within the Nishnawbe Aski Nation (NAN) territory.

In October of 2019 and as a result of the consultations that were conducted in 2019, outside of the NAN territory, the AJS drafted the following report: “Relationships First, Business Later”.

Recognizing that NALSC and the communities in the NAN territory are such an important partner in the delivery of legal services to Indigenous Peoples in Ontario, and also acknowledging the uniqueness of the legal needs of the communities within the NAN territory, the AJS, with the support of the LAO Board, developed an in-community consultation plan for the communities in the NAN territory. This plan was developed in collaboration with NALSC and was presented and supported by the NALSC Board in February 2020. The intention was to complete these in-community consultations by July 2020 and incorporate the information gathered into both the report and recommendations included in the first draft of “Relationships First, Business later”.

As a result of the Covid-19 pandemic, these in-community consultations were indefinitely postponed because of safety concerns for all of those who would be participating in this process.

LAO and the AJS are still committed to community-based consultations with communities within the NAN territory when it is safe to do so and when the communities themselves feel comfortable extending us an invitation. The AJS continues to be committed to consult with any community or stakeholder that wishes to not wait on the formalized in-person/ in-community sessions and that feel comfortable with discussing issues remotely. These kinds of consultations would not be seen as a replacement for in-community consultations

but rather would be seen as complementary to them.

As a result of the ongoing Pandemic and our inability to determine when in-community consultations within the NAN territory will be able to commence, LAO and the AJS have made a decision to release the findings of the initial consultations that were conducted outside of the NAN territory. These findings will be released as “**Relationship First, Business Later: PART I**”.

**Please note:** As a result of an absence of any consultations with NALSC and/or the communities within the NAN territory, the content and recommendations included in “**Part I**” of this report are not meant to be applied to NALSC and/or the communities within the NAN territory. The intention of LAO and the AJS is to complete fulsome consultations with NALSC and the communities within the NAN territory once the Pandemic no longer poses a threat to the health and safety of all those involved. Once these consultations are completed, “**Relationships First, Business Later: PART II**” will be drafted along with recommendations that will be focused on the unique experience and reality of the NAN territory.

The AJS would like to thank all who participated in this consultation process from 2019 to present. Chi Miigwetch for your time, your commitment and your truth.



# Table of Contents

Executive Summary .....	4
Context and background: history of the aboriginal justice strategy .....	8
Scope of the aboriginal justice strategy consultations .....	21
Findings of the aboriginal justice strategy consultations .....	25
Input of Indigenous staff at Legal Aid Ontario .....	66
Review of other similarly situated justice programs .....	70
Systemic barriers within legal aid Ontario .....	73
Service delivery model issues .....	82
Conclusion .....	84
Summary of recommendations .....	87
Appendix A: Consultation questions .....	91
Appendix B: List of communities/ organizations consulted .....	94
Appendix C: Survey results .....	96
Appendix D: Bibliography .....	108
Appendix E: Legal Aid Ontario's commitment to the truth and reconciliation commission calls to action .....	111

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## Executive Summary

1. Indigenous Peoples in Canada – First Nations, Inuit, and Métis – are unique from other equity-seeking groups given their distinct constitutional and Treaty relationships with Canada. In addition, the Indian Act and reserve system create unique application of Canadian law for First Nations Peoples. The fact that Parliament has singled out Indigenous Peoples in remedial criminal, correctional and family legislation requires recognition of this distinct status in the form of explicit policies, programs and commitments that coincide with this legislation.
2. As a government agency, Legal Aid Ontario (LAO) has a responsibility to recognize and affirm this commitment in the way it delivers services to Indigenous Peoples. LAO has made public commitments to work in partnership with Indigenous Peoples, and federal and provincial governments to eliminate Indigenous overrepresentation in incarceration – both youth and adult – in accordance with the Calls to Action made by the Truth and Reconciliation Commission. This is equally true in the context of child welfare.
3. Indigenous Peoples remain overrepresented in the criminal justice, correctional and child protection systems at crisis levels. The need for innovative and responsive service delivery must remain an organizational priority, even in difficult financial times.
4. LAO's Aboriginal Justice Strategy (AJS) met with Indigenous communities, political organizations, and service providers and users in early 2019. These consultations revealed common themes/concerns about current LAO services and service-delivery. They also demanded that LAO take seriously these concerns and formulate a concrete plan to improve relationships with the Indigenous clients and communities LAO serves. These themes include:
  - Need for LAO to recognize Indigenous Peoples' unique status in Canada: Countless Reports and Commissions as well as cases have confirmed that the primary reason for Indigenous overrepresentation in criminal justice, correctional and child welfare systems is the enduring legacy of colonization. Participants stressed first and foremost that LAO needed to acknowledge this and the unique status of Indigenous Peoples in all policies, practices, training, and organizational structure.
  - Perceived tokenism and lack of organizational commitment to provide responsive services and to reconciliation: Participants stressed that LAO has significant work to do to improve its relationship with Indigenous Peoples, and to be understood as doing more than "checking a box". It was stated repeatedly that LAO should see any Indigenous legal services program or strategy as an investment, not an expense, and that the status quo cannot continue.
  - Concerns about quality of representation (staff and private bar) and the inaccessibility of LAO services: Concerns were raised about accountability to the clients and communities regarding the quality of services that LAO provides. It was made clear that LAO has a lot of work to do to repair what is seen as a broken

system of service-delivery. Clients are not happy with the services they receive, feel exploited in legal proceedings, and worse, feel that their outcomes were negatively affected by LAO processes and staff (including Client Lawyer Service Centre staff, Duty Counsel and certificate lawyers). Telephone and online services were seen as especially problematic, inaccessible and ineffective. In addition, it was stated that services are provided in a way that values quantity over quality, with clients often not knowing what happened/was communicated or what their obligations are.

- Need for cultural safety in services for Indigenous Peoples: Everyone who participated felt that LAO had a role to play in providing training and holding lawyers accountable, primarily through proper enforcement of the Gladue Panel standards. Participants were clear that Indigenous clients and communities want services that are rooted in culture and for LAO to value and support services such as Elders, Restorative Justice, Alternative Dispute Resolution and community-driven Gladue Report programs and services.
- Lack of accountability to the Indigenous clients and communities LAO serves: Participants were impressed with LAO's initiative to consult on what is working and what is not, but it was expressed that this happens too infrequently. It was stressed that LAO needs to build their business plan around the needs of the clients and not the other way around. Many stated that LAO rolled out programs without first getting input from front line service providers and as a result, some did not succeed or have buy-in from local communities and clients. Participants felt strongly that LAO's advisory mechanisms should be reviewed for effectiveness and that LAO needs to report back to participants on how it will respond to the feedback received.
- Need for relationship building and increased participation of Indigenous communities in decision making. Indigenous Communities want to work in partnership to improve services: Participants expressed concern that often services are not appropriate, are duplicated and often off-loaded onto Indigenous service providers by LAO staff. That being said, participants were very interested in working together to make the services more accessible and more culturally relevant to Indigenous clients.
- Representative services are essential and service delivery models need revisiting. Most participants wanted to see partnerships to have legal services embedded within Indigenous organizations: Consistent feedback was that Indigenous Peoples who are in conflict with the justice system go to Indigenous service providers first and last: first to get advice about options and last to have translated the service that was received from outside of the Indigenous community. Participants also indicated that clients don't like "picking a name off a list" and that they would much prefer to go somewhere they already access services that are culturally safe and where they have trusting work relationships. As one participant noted "It does clients a disservice to make them go to a million different places to get help. Clients want to access services that provide wrap-around care and that are grounded in culture." Staff models and services embedded in Indigenous organizations were flagged as options to consider.

5. Participants in the consultations noted some LAO-funded programs that were helpful in improving justice outcomes for Indigenous clients including the Gladue Report and Community Justice programs. They also noted innovative LAO service delivery models that were responsive to the needs of the Indigenous clients and communities they serve. In particular, Aboriginal Legal Services in Toronto and the Indigenous Legal Services in Lambton County were highlighted as particularly positive, given the representative staff, client-driven services, and the partnerships with Indigenous communities that have developed. Participants stated they want to see more programs and models like these, and to see these programs continue to adapt to meet the needs of Indigenous clients. For example, given the concerns about quality of services in criminal and child protection matters, embedded staff lawyers was raised numerous times as an initiative for LAO to consider going forward.
6. It was also clear that there is a strong willingness to work together. Areas for collaboration include: providing input on policies, developing and delivering public legal education and cultural safety training, and service delivery.
7. Many of the changes proposed by the Indigenous service providers and communities the AJS met with would be easy and relatively inexpensive to do. Others will require more extensive consultation and thorough examination for viability. It was put forward, however, that follow-through is critical.
8. Faced with significant fiscal constraints, LAO has to make difficult decisions about how to utilize its funding. Cutting what isn't working and finding practical and cost-efficient ways of improving services is essential both for improving justice outcomes for Indigenous Peoples, and for balancing LAO's reduced budget.
9. The AJS Consultation Report should be a companion document for any decisions regarding direction in Indigenous legal services at LAO. This is critical for ensuring LAO understands the systemic nature of the problems, as well as the practical and workable solutions that Indigenous communities and organizations proposed
10. Participants were clear that it is essential that LAO make symbolic and strategic commitments. It was stressed that this would best be accomplished in the form of developing a permanent Indigenous legal services program or division to implement the recommendations that were received and developed through the consultation process.
11. Key recommendations focused on collaboration with Indigenous communities and service providers in the areas of:
  - Creating training for LAO staff and private bar that is trauma-informed and strengths-based on issues of cultural safety, emerging legal needs such as human trafficking, and the proper and remedial application of Gladue principles;
  - Developing and delivering public legal education on legal issues that impact Indigenous Peoples;
  - Developing mechanisms for better information sharing and ongoing communications



to ensure meaningful participation going forward; and

- Ensuring quality services through better Panel Management of lawyers representing Indigenous clients and evaluations of services and service delivery models.

Significantly, recommendations focused on reducing structural barriers within LAO to make Indigenous legal services more informed, accountable, and robust.

12. It is abundantly clear that resolving the issues raised about Indigenous alienation from LAO services is going to take time. Consequently implementation of various recommendations will need to be prioritized, and milestones and targets scheduled. A timeline will be proposed as part of the Proposal. Many initiatives, including collaboration in the development of training and Public Legal Education, coincide with work LAO is already undertaking and will be inexpensive to implement. Other initiatives, including looking at other service models such as staff models in some areas, will require more quantitative evaluation that works with existing LAO departments (such as Lawyer Payment Services and Human Resources) to develop for Board approval.
13. LAO has made public commitments to work in partnership with Indigenous Peoples. This has to be more than lip-service. The organization must, as part of this commitment, ask how every policy being considered will impact the Indigenous clients and communities LAO serves. LAO can and should build on the relationships that have been born out of the consultation process to help answer those questions.

# CONTEXT AND BACKGROUND: HISTORY OF THE ABORIGINAL JUSTICE STRATEGY

## THE DEVELOPMENT OF AN ABORIGINAL JUSTICE STRATEGY AT LEGAL AID ONTARIO

The Aboriginal Justice Strategy (AJS) was developed in 2008 after Legal Aid Ontario (LAO) met with more than 250 individuals to provide input into the development of the strategy. LAO developed a paper “The Development of Legal Aid Ontario’s Aboriginal Strategy” (the Development Paper) which was released that year identified four pressing concerns with LAO service delivery and organizational structures and priorities:

1. Indigenous Peoples are deeply impacted by systemic barriers to accessing justice;
2. There is a lack of Indigenous representation within LAO and LAO’s Advisory Systems;
3. LAO needs to work at improving service on Indigenous-specific legal issues and addressing the role of LAO in participating or supporting Indigenous-specific or driven processes; and
4. There is a lack of Indigenous legal representation or legal representation that is appropriately informed on the unique needs of Indigenous clients.

## THE FIRST PHASE OF THE AJS (2008 – 2013)

Based on the findings of the Development Paper, the AJS was developed with a mandate to establish a plan to achieve measurable improvements in service to First Nation, Métis and Inuit clients regardless of whether they live on or off-reserve, are status or non-status or live in rural or urban contexts.

In addition to the mandate, the AJS developed specific recommendations to address the four concerns that the Development Paper identified. These recommendations included practical changes in how services are delivered, and in how the organization could follow through with its commitment to actualize solutions to the concerns raised.

Recommended responses to the four identified priority areas included:

<b>Ameliorating Barriers to Accessing Justice</b>	<b>Aboriginal Representation within LAO and LAO's Advisory Systems</b>	<b>Improving Legal Services and Supporting Aboriginal Justice Processes</b>	<b>Representative and Informed Legal Services</b>
LAO certificate applications on reserve.	Hire more Indigenous people at all levels at LAO.	Create ability or question for Duty Counsel to be able identify Indigenous clients.	Create Panel Standards for lawyers representing Indigenous clients.
Provide legal advice services on reserve.	Increase advisory and input mechanisms into LAO's work.	Increase and create a separate process for access to test case funding for legal issues affecting Indigenous Peoples.	Build better networks with Indigenous organizations.
Expand Aboriginal Legal Services Corporations (LASAs.14).	Include Indigenous experience and knowledge as a required qualifications in particular areas.	Develop public seminars on Child Protection and Criminal processes affecting Indigenous peoples.	Increase Cultural Competency Training.
Expand access to Gladue Reports.	Start recognizing Indigenous languages as an asset for all positions.	Support and advocate for Indigenous-driven legal processes and programs, including Restorative Justice.	Increase access to / develop Continuing Legal Education on legal issues affecting Indigenous peoples for Duty Counsel and Certificate lawyers
Increase communication of LAO resources and services.	Create law student scholarships for Indigenous students and Articling grants.		
	Create a mentorship program for Indigenous staff who work with Indigenous clients.		

Some accomplishments during this time included hiring an Indigenous Policy Counsel to lead the AJS, developing and providing “Cultural Competency Training” for 500 LAO Staff and Lawyers over two days, creating the Aboriginal Self Identification Question to help LAO staff identify who was Indigenous, and developing an extension of legal aid certificate coverage for Gladue submission preparation (i.e., the “Gladue Enhancement” or “CRIM600”).

While there were some positive developments and initiatives, performance measures were never developed and so it is difficult to report back on the success in meeting the AJS’s mandate during those first five years (2008-2013). The Gladue Enhancement, for example, was rolled out without mechanisms for measuring the number of times it was billed against a certificate or how much LAO has spent on the program. LAO should consider completing a comprehensive analysis to examine the effectiveness of the Gladue Enhancement on improving services for Indigenous clients.

In addition, not all the recommendations or Action Items were followed. For example, no concrete plan was developed to increase Indigenous representation at LAO and no changes were made to the governance structures to ensure Indigenous representation at the decision-making level.

## **THE SECOND PHASE OF THE ABORIGINAL JUSTICE STRATEGY (2013 – 2018)**

In 2013, the Board of Directors (Board) renewed the Strategy for an additional five years and approved four strategic priorities to guide the organization during that time:

1. Improve and increase access to Gladue services for Indigenous Peoples and communities.
2. Develop a localized model for delivering legal aid services that is responsive to the needs of Aboriginal individuals and communities.
3. Improve relationships and increase LAO’s understanding of the legal needs and unique circumstances of Indigenous populations in Ontario and how to address them.
4. Strengthen LAO’s internal capacity to enhance services to Indigenous clients and communities, and ensure sustainability of improvements.

A significant success in this time-period has been the expansion of the Gladue Report program. LAO is now providing approximately 1.5 million in Gladue Report services to three Indigenous organizations: Aboriginal Legal Services, Nishnawbe-Aski Legal Services Corporation, and Grand Council Treaty #3. The positive impact and value of these Reports cannot be over-stated. Available studies have confirmed they reduce the use of incarceration as a default sentence and shorten jail sentences where ordered, even for offenders who have received jail sentences for the same offence in the past.<sup>1</sup> There is

also some evidence to suggest that the timing of the Gladue Report program expansion corresponds with decreases to adult sentenced admissions.<sup>2</sup>

	2012/13	2016/17
<b>Indigenous Admissions (Adult)</b>	3,772	2,590

Gladue Reports improve outcomes because in addition to information about the individual and their community, they identify the culturally relevant resources available to assist judges in assessing an Indigenous person's moral culpability in order to determine an appropriate – and proportionate – sentence.

Gladue Reports are an essential client-facing service that have proven effective in reducing the number and duration of custodial sentences for Indigenous Peoples. Significantly, the Supreme Court of Canada has noted that:

“Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a Gladue report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the Criminal Code.”<sup>3</sup>

The Indigenous organizations LAO funds to provide these services do so in a much more cost-effective manner than through disbursements. The organizations have repositories of information, researched and collected over the years to give appropriate context to

<sup>1</sup> See for example: Sébastien April and Mylène Magrinelli Orsi. Gladue Practices in the Provinces and Territories. (Department of Justice, Research and Statistics Division, 2013); Clark, Scott, Evaluation of the Gladue Court Old City Hall, Toronto – Report prepared for Aboriginal Legal Services (2016); Campbell Research Associates, “Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program, Year Two, October 2005-September 2006”, November 2006, available online: [http://Aboriginaloriginallegal.ca/docs/Year\\_2.pdf](http://Aboriginaloriginallegal.ca/docs/Year_2.pdf); Hebert, Alexandra. “Change in Paradigm or Change in Paradox? Gladue Report Practices and Access to Justice.” (2017) 43:1 Queen’s L.J. 149-174.

<sup>2</sup> Data from: Statistics Canada. Table 35-10-0016-01 Adult custody admissions to correctional services by Aboriginal Identity. 2018.

<sup>3</sup> R v Ipeelee, [2015] 1 S.C.R. 433 at 60 [Ipeelee] (emphasis added).



the Reports depending on the client's individual circumstances. This creates an efficient way to operationalize the principles set out in the Gladue and Ipeelee decisions, and ensures consistency in the quality of Reports that LAO is funding. In addition, it helps communities build capacity to create justice services that meet their particular needs.

Other notable projects of the AJS during this time included engagement sessions with staff, and expanding and improving on the ASIQ to include all LAO staff with mandatory cultural safety training developed by the AJS in consultation with an Indigenous consultant and heavily informed by the input of the Aboriginal Issues Advisory Committee. The AJS and LAO have come to be recognized as pioneers in the collection of Indigenous identity information, and have worked to advise other public sector agencies and legal clinics in this regard. Further, in some regions, LAO explored Indigenous service models, such as in Lambton County, and created pilots to enable Indigenous organizations to provide LAO services, such as at Aboriginal Legal Services in Toronto, both of which will be outlined later in this Report.

This time period coincided with a number of external factors including: the Auditor General's Report, the release of several significant government-sponsored reports on Indigenous Peoples and the justice system, major decisions of the court that impact Indigenous Peoples, legislative changes to child protection, and the 2019 Budget Announcement, which reduced LAO's budget by \$133 million. As these impact the organization and the legal needs of the Indigenous clients and communities that LAO serves, they will be explored below.

### **Auditor General's Report**

During this time period, LAO had an external audit by the Auditor General. Notable and relevant concerns included:

- Follow-ups on billing issues on Guaranteed Daily Rate (Daily Rate) are not timely.

The Daily Rate is a fixed fee of \$1,181 paid to lawyers if they are required to fly in to remote courts, or drive to a court that is more than 200 kilometres from the lawyer's office. Legal Aid Ontario noted instances of inaccurate billing from lawyers, but has not taken timely action to follow up on each case. For example, a lawyer billed almost \$150,000 from May 2013 to August 2016 under the Daily Rate despite the fact that the lawyer's office was only a short distance from the court. The lawyer should be paid an hourly rate, not the higher Daily Rate, for the service provided. While Legal Aid Ontario stopped paying for the Daily Rate since it notified the lawyer in August 2016 of its concern, it has not examined how much of the \$150,000 is allowed under the hourly rate and has not recovered any overpayment from the lawyer.

- Private-sector lawyers are not assessed for quality nor are they peer reviewed.

More than 90% of certificate services and over one-third of duty counsel assists were delivered by private-sector lawyers in 2017/18. The Legal Aid Services Act<sup>5</sup> states that Legal Aid Ontario has the authority to direct the Law Society of Ontario to perform quality assurance audits of lawyers, but since its inception Legal Aid Ontario had not asked the Law Society of Ontario to do so. It did, however, refer lawyers to the Law Society, on a reactive basis, when it became aware of serious matters such as potential misconduct.

Legal Aid Ontario received 211 complaints in 2016/17, of which about one-third concerned lawyers' services. This was a 30% increase from 162 complaints in 2012/13.

- Private-sector lawyers are providing services without meeting all of Legal Aid Ontario's professional requirements.

Legal Aid Ontario lacks a policy to follow up on lawyers who have not met all its professional requirements for more than two years and on those who do not submit their annual self-report on continuous learning requirements. As a result, Legal Aid Ontario cannot ensure these lawyers have maintained the required competency level. For example, during the 2016 calendar year, 1,959 of the 5,423 private-sector lawyers on Legal Aid Ontario's rosters did not provide their annual self-report. Of the 1,959 lawyers who did not self-report, 395 billed Legal Aid Ontario \$7.7 million during the period from April 1, 2017, to March 28, 2018.

LAO should examine these concerns as it moves forward, particularly as they impact quality of services for Indigenous clients and communities, and to demonstrate accountability and transparency in how LAO spends tax payer dollars.

## Legal/Political Landscape

Other significant developments that occurred during this time included:

- The Truth and Reconciliation Commission Final Reports: "Honouring the Truth, Reconciling for the Future", "The Survivors Speak", "The Final Report of the Truth and Reconciliation Commission of Canada", and "What We Have Learned"

Constituted and created by the Indian Residential Schools Settlement Agreement which settled the class actions, the Truth and Reconciliation Commission (TRC) spent

<sup>5</sup> Legal Aid Services Act, 1998, S.O. 1998, c. 26.

six years travelling to all parts of Canada to hear from 6000 witnesses, many of whom were Indigenous people who had been taken from their families as children, forcibly if necessary, and placed for much of their childhoods in residential schools. This Report detailed the experiences of the former students, contextualized within the Canadian government's sustained policies and practices of cultural genocide which it engaged in to divest itself of its legal and financial obligations to Indigenous people and gain control over their land and resources. It committed all Canadians to a process of reconciliation.

- The Truth and Reconciliation Commission's "Calls to Action"

In order to redress the legacy of residential schools and advance the process of Canadian reconciliation, the Truth and Reconciliation Commission made 94 Calls to Action, 18 of which were directed at justice for Indigenous Peoples. Significantly, LAO's President and CEO, David Field, made a commitment in 2016 to be responsive to the Calls to Action, specifically those directed at justice issues impacting Indigenous Peoples and the elimination of over-incarceration of Indigenous youth and adults.

- National Inquiry into Missing and Murdered Indigenous Women "Interim Report: Our Women and Girls are Sacred" and "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls"

With a broad mandate to look into and report on the systemic causes of all forms of violence against Indigenous women and girls, including sexual violence, the Inquiry is examining the underlying social, economic, cultural, institutional, and historical causes that contribute to the ongoing violence and particular vulnerabilities of Indigenous women and girls in Canada. The mandate also directs them to look into and report on existing institutional policies and practices to address violence, including those that are effective in reducing violence and increasing safety. The Interim Report outlined what they had accomplished to date, acknowledged challenges, made recommendations, and served as a blueprint for moving the National Inquiry forward. It found violence against Indigenous women and girls, including LGBTQ2S people, must be understood as a result of Canadian colonialism.

The Final Report, "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls" released in June 2019, concluded that Canada's history of colonization has contributed to the crisis of Missing and Murdered Indigenous Women and Girls and amounts to genocide. It included 231 "Calls for Justice" and called specifically for a decolonizing and survivor-driven National Action Plan to implement the Calls. Many of the Calls relate to the justice systems and are intended to remedy the denial of services, or improperly regulated and delivered services, that address the social, economic, political, and cultural marginalization of, and violence against, Indigenous women, girls, and 2SLGBTQQIA people.

- Justice Frank Iacobucci's Report, "First Nations Representation on Ontario Juries"

This report outlined systematic and structural barriers to First Nations participation

on Ontario juries and concluded that the justice system, as it relates to First Nations peoples, and particularly in Northern Ontario, is in crisis. Several recommendations were made, including developing a permanent Indigenous Justice Division at the Ministry of the Attorney General under the direction of a newly created executive position, Assistant Deputy Attorney General (currently Kimberly Murray, Mohawk of Kanehsatake). The Report spoke of the overwhelming need to improve relationships between the justice system and Indigenous Peoples.

- Ontario's Political Accord with First Nations

In 2015, the Chiefs of Ontario and the Government of Ontario signed a historic Political Accord to guide the relationship between First Nations and the province. The Accord:

- Affirms that First Nations have an inherent right to self-government and that the relationship between Ontario and the First Nations must be based upon respect for this right.
- Commits the parties to work together on issues of mutual interest, including resource benefits sharing, the treaty relationship and jurisdictional matters.
- Sets a path for further reconciliation between First Nations and the people of Ontario

- Ontario's Roll-Out of The Journey Together Funding

Ontario's response to the Truth and Reconciliation Commission, The Journey Together, committed \$250 million in new investments to work with Indigenous communities to close gaps and remove barriers to accessing equitable health, educational and justice programming. \$45 million was earmarked for "creating a culturally relevant and responsive justice system." Indigenous Victim Services, Restorative Justice and Gladue Programs, Revitalization of Indigenous Legal Principles and Systems Projects, Indigenous Bail Verification and Supervision Programs and cultural supports within the correctional system were some initiatives that were developed or expanded under this funding portfolio.

- Barriers to Accessing Justice: Legal Representation of Indigenous People within Ontario ("Themes Report")

This report addressed broad themes related to both the adequacy of legal representation of Indigenous people within Ontario and the prevalence of guilty pleas among Indigenous people in the Northern part of the province. In particular, the report identifies three types of barriers to accessing justice for Indigenous people within Ontario: structural, practical and social. The report concluded that systemic barriers included:

- Inequitable resourcing of Fly-In courts, including both scheduling and facilities.
- Gaps for Indigenous people in accessing LAO services across Ontario including

the types of services offered, the inaccessibility of LAO services, and the lack of strategically located legal aid clinics created to serve Indigenous communities, all of which combine to create significant barriers to meaningful access to legal representation for Indigenous peoples.

- Lack of community-based justice programs, such as Restorative Justice or Alternative Dispute Resolution programs.
- Displacement and disproportionate denial of release based on structural discrimination in the bail system.
- Limited Indigenous-specific training available to and utilized by lawyers in Ontario.

The report also noted with concern that LAO has not created any new Aboriginal legal services corporations pursuant to section 14(1)(f) of the *Legal Aid Services Act*, with the exception of NALSC.

- Ontario Independent Police Review Director's Report: "Broken Trust: Indigenous People and the Thunder Bay Police Service"
- This systemic review of the Thunder Bay Police Service (TBPS) detailed chronic under-policing of Indigenous Peoples by the TBPS including inadequacies of TBPS sudden death investigations, so that that at least nine of these cases were earmarked to be reinvestigated. The report found that failure to conduct adequate investigations and the premature conclusions drawn in these cases is, at least in part, attributable to racist attitudes and racial stereotyping. It held that their investigation revealed "nothing short of a crisis of trust afflicting the relationship between Indigenous people and TBPS" and stated:

*"If we are to understand the broken relationship between Indigenous people and police, we must first understand the history and impact of colonization on Indigenous people. Much of the suspicion and distrust that Indigenous people feel toward police is rooted in a history of colonial policies."*

- Office of the Correctional Investigator's Report: "Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act"

This report looked at federal corrections and found that over the years a series of barriers have been created in Correctional Service Canada's (CSC) implementation of Sections 81 and 84 provisions of the Corrections and Conditional Release Act including lack of institutional commitment and re-routing of designated funding. It found that in failing to make Section 81 and 84 arrangements more readily accessible to more Indigenous offenders, CSC bears some responsibility for widening performance discrepancies and disproportionate representation between Indigenous and non-Indigenous offenders.



- Ontario Human Rights Commission Report: “Interrupted childhoods: Over-representation of Indigenous and Black children in Ontario child welfare”

This report confirmed that Indigenous and Black children are disproportionately represented in child welfare proceedings and foster care placements, and that for Indigenous children, this is a continuation of colonial practices that stem from the same racist values and ideologies that supported the Residential School system. It also found evidence that racial discrimination is a contributing factor to the over-representation of First Nations children in care.

- Independent Review of Ontario Corrections Reports: “Segregation in Ontario” and “Corrections in Ontario: Directions for Reform”

These two reports, authored by Howard Sapers, examined provincial corrections in Ontario.

*“Segregation in Ontario” found that there was an overuse of segregation, particularly for Indigenous inmates who experienced segregation more frequently and for more prolonged periods. It highlighted the case of Adam Capay, an Indigenous inmate on remand at the Thunder Bay jail who spent 1,647 days detained on remand in continuous segregation in deplorable conditions.*

- *“Directions for Reform” outlined 62 recommendations to improve conditions at Ontario jails after findings of human rights violations, failure to view health care as an essential right and a distinct government obligation, unconstitutional searches, ineffective grievance procedures, aging infrastructure and inadequate staffing, inappropriate reliance on risk assessment tools that are culturally biased, improper and inadequate use of Gladue Reports, anti-Indigenous discriminatory beliefs of correctional staff including management, and inadequate support for Elders as a resource for Indigenous inmates. The report affirmed that the over-representation of Indigenous peoples in the correctional system has been well documented and is just one symptom of centuries of colonialism and discrimination.*
- United Nations Declaration on the Rights of Indigenous Peoples

In 2016, Canada became signatory to the United Nations Declaration on the Rights of Indigenous Peoples. This requires that state actors recognize First Nations, Inuit, and Métis as the original peoples of this country and as self-determining peoples with unique Treaty, constitutional, and human rights that must be recognized and respected. It is seen as the framework through which reconciliation between Indigenous Peoples and the rest of Canada can be achieved.

- Bill C-75

This Bill received Royal Assent in 2019. It includes provisions that require Justices exercise restraint when making decisions regarding judicial interim release, with

particular reference to Indigenous accused. It states:

- 493.1 In making a decision under this Part, a peace officer, justice or judge shall give primary consideration to the release of the accused at the earliest reasonable opportunity and on the least onerous conditions that are appropriate in the circumstances, including conditions that are reasonably practicable for the accused to comply with, while taking into account the grounds referred to in subsection 498(1.1) or 515(10), as the case may be.
- 493.2 In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of
  - a. Aboriginal accused; and
  - b. accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

## Case Law Update

- *R v. Ipeelee* [2015] 1 S.C.R. 433

The Supreme Court of Canada (SCC) affirmed the Gladue principles as remedial and, correcting lower courts practice since *R v Gladue*, as being applicable even in matters that are considered “serious” such as Long Term Supervision Order breaches. The SCC explained that the experience of colonization has meant that Indigenous Peoples in Canada have a unique history and circumstances that require a nuanced approach that considers substantive over formal equality in sentencing proceedings. The decision also affirmed the important contribution of Gladue Reports in assisting judges in their statutory responsibilities under s.718.2(e).

- *Ewert v Canada* [2018] 2 SCR 165

The SCC confirmed that the Corrections and Conditional Release Act (CCRA) is remedial legislation meant to ameliorate disparate and negative correctional outcomes for Indigenous inmates. The Court found that Correctional Service Canada had breached their statutory obligations by failing to take adequate steps to ensure actuarial tools which they had been relying on had been tested for reliability on Indigenous inmates given longstanding concerns about cultural bias.

- *R v. Barton*, 2019 SCC 33

The Supreme Court of Canada overturned an acquittal of a man charged with murder in the death of Cindy Gladue, an Indigenous woman, and ordered a new trial on manslaughter. They cited numerous errors including failure to comply with s.276 of the Criminal Code with translated into a failure to expose and properly address misleading

evidence and mistakes of law arising out of the accused's defence of honest but mistaken belief in consent and accident. The SCC, like the Alberta Court of Appeal before it<sup>9</sup>, admonished the trial judge for allowing anti-Indigenous stereotypes to infect the trial process. Cindy Gladue was referred to as the "Native girl" or "Native prostitute" over two dozen times in the trial without any instruction to the jury on what inferences could or should not be made. This case garnered public outcry as it was the first case where preserved pelvic tissue was allowed into the courtroom. Indigenous and women's groups were outraged by the court's treatment of Cindy Gladue – a victim – and a number of Intervenor appeared to address concerns about the criminal justice system's treatment of Indigenous women in trial processes. The Court held:

*"Our criminal justice system holds out a promise to all Canadians: everyone is equally entitled to the law's full protection and to be treated with dignity, humanity, and respect. Ms. Gladue was no exception. She was a mother, a daughter, a friend, and a member of her community. Her life mattered. She was valued. She was important. She was loved. Her status as an Indigenous woman who performed sex work did not change any of that in the slightest. But as these reasons show, the criminal justice system did not deliver on its promise to afford her the law's full protection, and as a result, it let her down — indeed, it let us all down."*

The Court held that judges must address discrimination against Indigenous women in the justice system "openly, honestly and without fear".

- *First Nations Caring Society v. Canada (Minister of Indian Affairs and Northern Development)*, [2016] C.H.R.D. No. 2

The Canadian Human Rights Tribunal (the Tribunal) found that the federal government's underfunding of child welfare services on First Nations reserves (at least 22% less per child than what provincial governments dedicate for child protection services in other, predominantly non-Indigenous communities) was discriminatory under the *Canadian Human Rights Act*<sup>10</sup>. The Tribunal ordered the government to "cease its discriminatory practices" and reform its funding system to adequately provide for Indigenous children's welfare needs. The Tribunal also ordered that the federal government "take measures to immediately implement the full meaning and scope of Jordan's principle," which requires that government actions to meet children's needs to not be delayed or obstructed by jurisdictional disputes between different government departments or different levels of government.

- *R v Capay* [2019] O.J. No. 1025

Application by the accused for a stay of proceedings granted due to violations of ss. 7, 9, 12, and 15 of the Charter of Rights and Freedoms<sup>11</sup> after Adam Capay, a young

<sup>9</sup> *R v Barton*, [2017] A.J. No. 681

<sup>10</sup> Canadian Human Rights Act (R.S.C. 1985, c. H-6).

Indigenous man with mental health issues spent 1,647 days detained on remand in continuous segregation in deplorable conditions. This case was made public through the Chief Commissioner of the Ontario Human Rights Commission, Renu Mandhane.

## SUMMARY

In the past ten years of the AJS, there have been a number of decisions and findings that find the criminal justice, correctional and child welfare systems continue to discriminate against Indigenous Peoples. Justice Iacobucci's report, for example, found a number of systemic issues have contributed to Indigenous alienation from and disproportionate representation in the criminal justice system in Ontario including:

- Conflict between First Nations and Euro-Canadian approaches to criminal justice;
- Mistreatment of First Nations inmates in prison, general disrespect by police and discriminatory public reaction to First Nations complaints;
- The almost universally-held view of First Nations individuals that the justice system is alien or foreign;
- The problem of inadequate legal representation of First Nations individuals, particularly in the north, resulting in virtually automatic guilty pleas;

Indigenous overrepresentation in criminal justice, correctional and child welfare systems in Ontario remains at crisis levels. Recommendations have called for:

- Increased participation of Indigenous leadership, communities and service providers in decision-making on justice issues impacting Indigenous Peoples;
- Training for all participants in the justice systems on the history of colonization and its' lasting impacts on the lives of Indigenous Peoples and the rest of Canada;
- Need for Indigenous-led community justice initiatives that are grounded in culture;
- Increased use of culturally-relevant processes to improve access to meaningful access to justice and ameliorate the longstanding discriminatory treatment of Indigenous Peoples;
- Recognition in all processes, policies and decision-making of the unique constitutional and Treaty relationship of Indigenous Peoples in Canada.

In moving forward with a proposal for improved services for Indigenous clients, LAO

<sup>11</sup> Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. (Charter)

must take these historical and contemporary issues into account, as well as its own commitments. New initiatives, approaches and partnerships designed to close gaps in outcomes and remove barriers to access to justice must come from a deepened place of understanding and commitment.

## SCOPE OF THE ABORIGINAL JUSTICE STRATEGY CONSULTATIONS

### THE NEED FOR CULTURALLY RESPONSIVE AND RESPECTFUL CONSULTATIONS

In June 2016, LAO committed to working with Indigenous communities, as well as the provincial and federal governments, to implement the Truth and Reconciliation Commission's 94 Calls to Action, particularly those addressed to the justice community. This included LAO's continuing to build upon its Aboriginal Justice Strategy to address key elements in the report and recognizing that "true reconciliation can only happen through reflection, action, and partnership with First Nation, Métis and Inuit communities." Partnership with First Nation, Métis and Inuit communities requires listening as they identify the areas and ways that LAO can improve services for Indigenous peoples in Ontario.

In 2018, the Board approved a proposal that LAO, through the AJS, engage Indigenous communities, and particularly Indigenous justice-related service providers, Indigenous political organizations and leadership in a meaningful way with a view to determining the future direction of improved services for Indigenous clients and communities.

Consultation is a critical issue for Indigenous peoples and the Board agreed that the practice must reflect the following considerations:

- Consultation signals respect for Indigenous peoples.
- Consultation provides the opportunity for Indigenous peoples to protect their rights and identify their concerns.
- Engaging in consultation can result in a longer term commitment to build a sustainable relationship and reconcile the ongoing issues originating from the past.
- Consultation will provide an increased role for the community to participate in decision-making.

As such, the AJS used an approach that respected these considerations for getting input from community, attempting to be representative of all the different regions and Indigenous Nations. Invitations and follow-ups were sent to all First Nations, Indigenous political organizations, Indigenous service providers, and service providers who work in the justice



system who assist Indigenous Peoples.

Based on responses, meetings were held in/with representatives from: Atikameksheng Anishinawbek First Nation, Aboriginal Legal Services, Animbiigoo Zaagi'igan Anishnaabek, Barrie Native Friendship Centre, Biinjitiwaabek Zagging, Centre of Excellence for Matrimonial Real Property, Cochrane, Curve Lake First Nation, Dufferin County Cultural Resource Circle, Dryden, Dryden Chamber of Commerce, Enaahtig Healing Lodge, First Nations Caring Society, First Nations Technical Institute, Fort Frances, Fort William First Nation, Georgian Bay Native Friendship Centre, Ga Beh Shoo In Aboriginal Men's Shelter, Grand Council Treaty #3, Grassy Narrows, Hamilton, Independent First Nation Alliance, Ininew Friendship Centre, John Howard Society, Kenora, Kenora Métis Council, Kingston Indigenous Patient Navigator South East Regional Cancer Program, London, Métis Nation of Ontario, Mohawk Council of Akwesasne, Mohawks of Tyendinaga, N'Amerind Friendship Centre, Napanee, Nechee Friendship Centre, Nipissing Parry Sound District Children's Aid Society, Nogojiwanong Friendship Centre, N'Swakamok Native Friendship Centre, Nokiiwin Tribal Council, , Nogojiwanong Friendship Centre, North Bay Indigenous Friendship Centre, Odawa Friendship Centre, Ontario Federation of Indigenous Friendship Centres, Ontario Métis and Aboriginal Association Ontario Native Women's Association, , Onigaming First Nation, Ottawa, Peace Builders International, Rainy Lake Chiefs Secretariat, Red Lake Indian Friendship Centre, Red Rock Indian Band, Sarnia, Sarnia Lambton Native Friendship Centre, Sault Ste. Marie Indian Friendship Centre, Seventh Generations Midwives, Six Nations of the Grand River, Siene River, Sudbury, Thunder Bay, Timmins, Toronto, Tungasuvvingat Inuit, United Chiefs and Councils of Mnidoo Mnising, United Native Friendship Centre, Victim Witness Assistance Program (North Bay), Wabaseemoong First Nation, Wabigoon First Nation, Walpole Island First Nation, Wiikwemkoong Unceded Territory.

While this list is by no means exhaustive in terms of the Indigenous communities or organizations represented in Ontario, it was a significant turn-out. Making and/or deepening these connections was an important step for LAO and further work is needed to build ongoing communication with these and other interested groups, communities, leadership and service-providers.

Nishnawbe-Aski Legal Services Corp. (NALSC) were not able to participate in the consultations, and LAO has and will be continuing to reach out to them to ensure that their voice is heard. (\*\*PLEASE SEE FORWARD FOR UPDATE ON THIS PIECE\*\*)

## **LAO'S COMMITMENT TO MEANINGFUL CONSULTATIONS WITH FIRST NATIONS, INUIT AND MÉTIS COMMUNITIES.**

The Board-approved consultation plan included four provisions for ensuring meaningful consultation with First Nations, Inuit and Métis communities, political organizations, service providers and users.

**Formal notice of the matter to be decided**

**Sufficient information and a reasonable period of time in respect of the matter to permit them to prepare their views**

**An accessible and respectful opportunity for them to present their views**

**Full and fair consideration of any views on the matter**

**Formal notice of the matter to be decided.** In this case, the AJS was responsible for letting those being consulted know that the AJS would be asking for input on the AJS renewal in terms of form and content and that this input will likely be informed by their previous experience with LAO, needs of their community members/clients, and emerging justice trends. Formal notice was given in writing with LAO asking permission to engage on this subject. Follow up calls were made to ensure no one was accidentally missed.

**Sufficient information and a reasonable period of time in respect of the matter to permit them to prepare their views.** Whenever meeting with Indigenous leadership and organizations, LAO must recognize the demands on their time and not leave things to the last minute and expect responses. Proper notice and timelines for responses must be fair and transparent. The AJS sent out invites the first week of January 2019. Meetings commenced at the end of February and went well into May 2019.

**An accessible and respectful opportunity for them to present their views.** Face-to-face interactions are always best practice and LAO did offer some travel money to assist. Unfortunately, the AJS's budget did not permit fulsome participation of the Métis Nation of Ontario who asked, according to protocol, to have two representatives from each of their nine districts to be brought in to a meeting in Toronto. In the future, this should be worked into any consultation budget to ensure representative participation that is respectful of

protocol. The AJS held at least one meeting in each LAO district to provide an opportunity for those that wish to attend in person to do so, and for input that identifies regional issues to be brought forward. The AJS also met with smaller groups in their areas, where requested. In addition to in-person meetings, the AJS offered a variety of ways to respond: in writing, by email or over the phone.

**Full and fair consideration of any views on the matter.** The AJS was transparent and open with those who participated in providing input about how it will be used in its strategic planning. It is significant that the Board agreed to a consultation proposal that required any proposal for renewal must be informed by the input we get.

## FORMAT OF MEETINGS

The initial response to the AJS invite to participate brought questions about what LAO does, and what the AJS does specifically. As such, the AJS developed a presentation on LAO services that was presented at each in-person meeting.<sup>12</sup>

Staff facilitating the meetings used a pre-set list of questions<sup>13</sup> that (a) solicited feedback on LAO services and initiatives, (b) identified gaps in services or service-delivery, and (c) drew out input and suggestions for the direction for any future services or program at LAO that seeks to advise the organization on the unique legal needs of Indigenous Peoples in Ontario.

In-person meetings were generally four hours in duration. The AJS also held telephone or online consultations, and allowed for written submissions. Online surveys for Indigenous staff and Clinic staff were developed and distributed.

## LESSONS LEARNED

Indigenous communities and service providers that did not have pre-existing relationships with LAO or the AJS were less responsive to the invitation to participate in the consultations than those who did. This is not surprising since a fundamental principle in working with Indigenous communities is that relationships come first, business later. The lesson learned was that work needs to be done to ensure good communication with all Indigenous communities, and that follow up calls and emails are crucial to getting a response. Another lesson-learned was that this type of meeting is difficult to arrange during “year-end” and that this prevented many from participating. In the future, care should be taken to ensure timing is canvassed in advance, and done on a consistent and on-going basis. Finally, LAO should always ensure strict compliance with cultural protocol. Budget constraints prevented the AJS from following Métis Nation of Ontario (MNO) protocol and

<sup>12</sup>See Appendix F

<sup>13</sup>See Appendix A

as a result, important perspectives were missed. Some members of the MNO participated in tension with their organizational rules. This put them in a difficult situation of wanting to ensure their community and area were represented but at the cost of political solidarity. In the future, the budget should be built around these protocols.

## **FINDINGS OF THE ABORIGINAL JUSTICE STRATEGY CONSULTATIONS**

Many of those who participated in the consultations expressed frustration with Legal Aid Ontario and took this opportunity to voice the concerns they and their membership have with both the types of services offered, and the way services are delivered. It became clear from the first meeting that the status quo is not working for Indigenous Peoples.

While there were regional disparities and gaps that were identified (and will be explored later in this Report), a number of common themes emerged in all areas where the AJS met with or received other input from First Nations, Inuit and Métis communities, political organizations, service providers and users, including:

- Failure of LAO to recognize Indigenous Peoples' unique status in Canada
- Tokenism and lack of organizational commitment to Reconciliation and to providing responsive services
- Concerns about quality of representation (staff and private bar) and the inaccessibility of LAO services
- Need for cultural safety in services for Indigenous Peoples
- Lack of accountability to the Indigenous clients and communities LAO serves
- Need for relationship building and increased participation of Indigenous communities in decision making. Indigenous Communities want to work in partnership to improve services
- Representative services are essential and service delivery models need revisiting

For each of these areas of concern, the consultations yielded a number of pragmatic solutions. Direct quotes from those who participated are included in this Report to ensure that their voices are front and centre of this Report and any proposal going forward.

### **1. FAILURE TO RECOGNIZE THE UNIQUE STATUS OF INDIGENOUS PEOPLES IN CANADA**

“It’s not a justice system to Indigenous Peoples. It’s a legal system. And one that consistently hurts us. LAO is complicit in that.”

“These models and processes are nothing more than a manifestation of a colonial structure.”

“Indigenous people can’t be grouped together with other strategies. As a legal organization, surely you understand that there is a unique history and relationship here.”

Underlying all other concerns and input received was the concern that LAO lacks the legal and political understanding with regard to Indigenous Peoples and their unique Treaty, constitutional/legal status in Canada. Participants explained that this undermines any prospects of improving services.

### Issue Identified by Participants

### Solution Proposed by Participants

Lumping the AJS within the larger Policy department demonstrates a lack of knowledge, recognition and respect for the unique Treaty and constitutional relationship between Indigenous Peoples and Canada.

1. Any program or division designed to identify and problem-solve issues of systemic discrimination impacting Indigenous clients and communities needs to be distinct, permanent, and prioritized by LAO as an organization.

Services for Indigenous clients and communities need to be driven and delivered by Indigenous Peoples.

2. LAO should continue to consult in a meaningful way with Indigenous communities on service delivery models that support Indigenous Peoples assuming greater responsibility in the administration of justice services for their community members.



**Issue Identified by Participants****Solution Proposed by Participants**

LAO needs to re-evaluate its role in providing services to Indigenous clients and communities and defer to the needs identified by the community.

3. LAO should, immediately upon receiving this Report and corresponding Proposal, commence an evaluation of service-delivery models that includes, as a starting point, meeting with Indigenous leadership

Countless Reports and Commissions, as well as cases, have confirmed that the primary reason for Indigenous overrepresentation in criminal justice, correctional and child welfare systems has been the enduring legacy of colonization. It also flows from systems that fail to recognize the unique status of Indigenous Peoples. This unique status stems from four separate grounds:

1. Canada was built through Treaties with Indigenous Peoples;
2. Canada's Constitution recognizes Indigenous Peoples as having unique status and rights;
3. Indigenous rights are recognized through International instruments that Canada is signatory to; and
4. Parliament has created distinct remedial provisions regarding Indigenous Peoples in legislation relating to criminal law, corrections, and child protection. In addition, the Indian Act and reserve system create unique application of Canadian law for First Nations Peoples.

**Treaties**

We are all Treaty People. This expression is meant to capture the reciprocal nature of the founding relationship between Canada and Indigenous Peoples. It means recognizing that non-Indigenous Peoples benefit from the agreements that were made to share this territory, now known as Canada, including the prosperity most Canadians now know.

The Treaty-making process has evolved over more than 300 years between Indigenous and non-Indigenous peoples in Canada from the early diplomatic and economic relationship developed between European settlers and Indigenous Peoples to the Modern Treaties and Comprehensive Land Claim Agreements that have been signed since the mid-1970s, some of which include provisions regarding self-government. Some First Nations remain uncaded within Ontario, including Wiikwemkoong Unceded Territory.

No other group in Canada shares this distinct status because no other group was the original peoples who negotiated terms of settlement and reciprocity.

## **Constitutional**

Canada recognizes and affirms the “existing aboriginal and Treaty rights of the aboriginal peoples of Canada” in s.35 of the Constitution Act. “Aboriginal Peoples” includes First Nations, Métis and Inuit. Again, no other group shares this distinct status under the Constitution.

The 2016 Census found that there were 374,395 Indigenous people in Ontario, making up 2.8% of the population.<sup>15</sup> Of the Indigenous population in Ontario, 63.2% (236,680) were First Nations, 32.2% (120,585) were Métis, and 1.0% (3,860) were Inuit.<sup>16</sup>

It was submitted that going forward, LAO must, in all its communications, policies and practices, acknowledge the distinctiveness of Indigenous Peoples and avoid pan-Indigenous approaches.

## First Nations

There are 133 First Nations in Ontario. Within the First Nations population, 63.9% (151,210) had Registered or Treaty Indian status, as defined under the Indian Act. 65.1% of First Nations Peoples lived off-reserve while 34.9% lived on-reserve.

The Chiefs of Ontario (COO) are the political forum and secretariat for collective decision-making, action, and advocacy for the 133 First Nations communities located within the boundaries of the province of Ontario. The activities of the COO are mandated through and guided by Resolutions passed by the Chiefs in Assembly and the Political Confederacy made up of the Grand Chiefs of Political Territorial Organizations (PTOs) and Independent First Nations.

## Métis

Ontario has the largest Métis population in Canada. Métis hold a unique cultural and historic place among the Indigenous Peoples in Canada, with distinct traditions, culture and language (Michif). Métis in Ontario are represented by the Métis Nation of Ontario (MNO) who have worked to establish bilateral and tripartite processes with the federal and provincial governments, and who through its province-wide infrastructure delivers a range of programs and services in the areas of health, labour market development, education and housing to Ontario Métis and other Indigenous people.

<sup>15</sup> Statistics Canada. 2017. Focus on Geography Series, 2016 Census. Statistics Canada Catalogue no. 98-404-X2016001. Ottawa, Ontario. Data products, 2016 Census.

<sup>16</sup> Ibid.

## Inuit

Inuit are a growing Indigenous population in Ontario, with many people coming down from the North for health services. The majority of this population reside in urban centres of Ottawa and to a lesser extent, Toronto. Inuit have national representation through the Inuit Tapiriit Kanatami.

## **International**

In 2016, Canada became signatory to the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*. The *UNDRIP* is an international instrument adopted by the United Nations to enshrine (according to Article 43) the rights that “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.” The *UNDRIP* guarantees the rights of Indigenous peoples to enjoy and practice their cultures and customs, their religions, and their languages, and to develop and strengthen their economies and their social and political institutions. Indigenous peoples have the right to be free from discrimination, and the right to a nationality.

Article 3 the *UNDRIP* recognizes Indigenous peoples’ right to self-determination, which includes the right “to freely determine their political status and freely pursue their economic, social and cultural development.” Article 4 affirms Indigenous peoples’ right “to autonomy or self-government in matters relating to their internal and local affairs”. Significantly, in Article 5 protects their right “*to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.*”

Participants reminded the AJS of this and of LAO’s role to play in supporting Indigenous communities as they revitalize Indigenous legal systems which have been suppressed since colonization.

## **Legislation**

Canada is the only remaining Nation with race-based legislation, the Indian Act. The Indian Act is federal legislation that regulates registered Indians and lands reserved for Indians (i.e. reserves) which were assumed as a federal fiduciary and constitutional responsibility under s.91(24) of the Constitution Act, 1867 . First passed in 1876 and still in force with amendments, the Indian Act is the primary document which defines how the Government of Canada interacts with the 614 First Nations in Canada and their members. It has, at various times, controlled all aspects of life for First Nations Peoples including:

- Who is a citizen (i.e. who is entitled to “Indian Status”);
- When they could leave their reserve (i.e., the pass system);

- The lawfulness of practicing their culture (i.e., making it illegal to participate in Sundance and Potlatch ceremonies or wear regalia/traditional clothing off-reserve); and
- The lawfulness of hiring counsel to challenge Canada on provisions under the Act or otherwise.

It also:

- Extinguished traditional governance systems and replaced with the electoral Band Council system;
- Interrupted economic systems, making it illegal to sell or trade goods without a permit from the Indian Agent; and
- Authorized the Residential School system and enforcement of that system.

In so doing, it interfered with traditional economies, created dependencies, and fractured families and communities. This targeted and forceful attempt at assimilation has contributed to Indigenous overrepresentation in the criminal justice system, as was recognized by the Royal Commission on Aboriginal Peoples. In 1996, Parliament responded with revisions to the *Criminal Code*, including s.718.2(e) which states:

**718.2** A court that imposes a sentence shall also take into consideration the following principles

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders.*

*In R v. Ipeelee*, the Supreme Court noted that “Parliament, in enacting s. 718.2(e), evidently concluded that nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly.” The Court also addressed the criticism that Gladue created an unfair distinction over other equity-seeking groups:

“This critique ignores the distinct history of Aboriginal peoples in Canada. The overwhelming message emanating from the various reports and commissions on Aboriginal peoples’ involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism (see, e.g., RCAP, at p. 309). As Professor Carter puts it, “poverty and other incidents of social marginalization may not be unique, but how people get there is. No one’s history in this country compares to Aboriginal peoples”

Indigenous Peoples are also singled out in correctional legislation. Section 4(g) of the *Corrections and Conditional Release Act (CCRA)* requires that correctional policies, programs and practices respect differences and be responsive to the special needs of Aboriginal peoples. The Supreme Court has held:

“(T)he principle set out in s. 4(g) of the CCRA can only be understood as a direction from Parliament to the CSC to advance substantive equality in correctional outcomes for, among others, Indigenous offenders. Section 4(g) represents an acknowledgement of the systemic discrimination faced by Indigenous persons in the Canadian correctional system. This is a long-standing concern, and one that has become more, not less, pressing since s. 4(g) was enacted.”

Specifically, the Court held that by including Indigenous Peoples specifically, this requires Correctional Service Canada ensure its policies and practices, however neutral they may appear to be, do not discriminate against Indigenous persons. The *CCRA* also contains specific provisions that require consideration of different correctional options (i.e. Healing Lodges and community-based release negotiated with Indigenous communities) for Indigenous offenders in ss.81-84.

Again, as participants reminded the AJS, *there is no other group with the same or equivalent codified provisions because it has been explicitly acknowledged by Parliament that Indigenous Peoples are distinct and therefore require distinct laws, policies and processes*. This is consistent with the often-cited finding of the Royal Commission on Aboriginal Peoples<sup>19</sup>:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada -- First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural -- in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice” (at p. 309).

Similarly, in the child welfare context, provisions regarding Indigenous children and youth are explicitly codified. *The Child, Youth and Family Services Act (CYFSA)*<sup>20</sup> came into force in Ontario on April 30, 2018. Part IV, “First Nations, Inuit and Métis Child and Family Services”, is an entire section of the CYFSA dedicated to making child welfare legislation more culturally responsive and relevant when dealing with Indigenous families. It has provisions for agreements to be made between the Ministry with First Nations, Inuit or Métis communities requiring any Society, person or entity that provides services or

<sup>19</sup> Royal Commission on Aboriginal Peoples, “Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada” (1996).

<sup>20</sup> Child, Youth and Family Services Act, 2017, S.O. 2017, c. 14, Sched. 1

exercises powers under the CYFSA with respect to First Nations, Inuit or Métis children or young persons to regularly consult with their First Nation, Inuit or Métis community about the provision of the service, the exercise of the power, and about all matters affecting the children or young persons. This includes the placement of children in residential care, the provision of family support services; the preparation of plans for the care of children; status reviews; temporary care agreements; society agreements with 16 and 17 year olds; adoption placements; the establishment of emergency houses; and any other matter that is prescribed. They must consult with a representative chosen by each of the child's or young person's bands and First Nations, Inuit or Métis communities, and consider community-based Alternative Dispute Resolution mechanisms as a priority.

Participants noted that all of these unique considerations must be acknowledged by LAO in policies, structures and strategic plans. Indigenous Peoples are not just clients LAO serves as part of its' larger mandate to promote access to justice throughout Ontario for low-income individuals; Indigenous Peoples are Nations whose perspectives must be respected, consulted, and acted upon. Participants explained that partnerships are important in respecting this relationship, as is the need to distinguish Indigenous Peoples in terms of organizational structure and service-delivery. Other justice stakeholders, such as the Department of Justice and the Ministry of the Attorney General have taken these steps (see below) and it is incumbent on LAO – a social justice agency – to remain at a minimum on par with their initiatives and commitments.

## 2. TOKENISM AND LACK OF ORGANIZATIONAL COMMITMENT:

*"You can't just put feathers and beads on every policy document."*

*"It is common knowledge that LAO utilizes a few token Indians to check their boxes and that there is significant institutional anti-Indigenous racism."*

*"The numbers (of overrepresentation in criminal and child protection matters) are only getting worse. The AJS can't just be a strategy. It has to be a permanent program at LAO that is evaluated regularly to make sure it's meeting the needs of the community it serves."*



*“There are different regions with different issues. LAO is too Toronto-centric. If they are serious about reconciliation, they’ll put more boots on the ground.”*

*“When you come here, it makes us think something is going to change. But then nothing does. It’s almost better you don’t give us hope.”*

One of the most prevalent issues raised by the Indigenous community and service providers during the consultations, was the opinion that LAO had failed to demonstrate real and significant commitment to Indigenous Peoples, which was demonstrated most clearly through actions that community identified as ‘tokenism’. This issue was raised specifically at 65% of the consultations.

#### Issue Identified by Participants

#### Solution Proposed by Participants

At every consultation, participants asked if this was another “checkbox exercise” and expressed sincere concern about (1) lack of prior engagement with Indigenous communities; and (2) lack of faith that any of the input will result in tangible changes to service delivery.

4. Communications protocol should be developed to ensure ongoing, informed input. Bi-annual or quarterly newsletters should be sent to Indigenous service providers and leadership.
5. LAO should take seriously the concerns raised about the ineffectiveness of certain services and develop new strategies and practices that address these concerns.
6. LAO should report back to those that participated in the consultations with a response to how they have addressed concerns that were identified.

Issue Identified by Participants	Solution Proposed by Participants
<p>LAO is believed to appropriate Indigenous symbols and approaches, but doing little to actually make services culturally relevant and meaningful for Indigenous clients and communities.</p>	<p>7. LAO should develop a Council of Elders to advise on issues of cultural safety in service-delivery and communications.</p>
<p>LAO should invest in its' AJS as a mechanism to be responsive to the needs of Indigenous communities, and not just a Public Relations tactic. Inequitable access to restorative justice and Gladue programs should be looked at as an access to justice issue for Indigenous Peoples and as part of the core mandate of LAO.</p>	<p>8. AO should evaluate program funding and work with other justice partners, including the IJD at MAG, and the IJP at DOJ to research and promote equitable funding of Gladue and preventative programs based in restorative principles that are more responsive to the needs of Indigenous Peoples</p>
<p>LAO doesn't consult Indigenous Peoples in a meaningful way.</p>	<p>9. LAO Executive should meet regularly with Indigenous leadership to provide information about the current status of LAO budgets, programs and policies</p>
<p>LAO's lack of commitment to Indigenous People is demonstrated in how few resources it puts into its' AJS. One lawyer is not sufficient given the many areas of law that have unique considerations for Indigenous Peoples.</p>	<p>10. LAO's lack of commitment to Indigenous People is demonstrated in how few resources it puts into its' AJS. One lawyer is not sufficient given the many areas of law that have unique considerations for Indigenous Peoples.</p> <p>11. Any new AJS or program at LAO should be advised by a representative advisory group and Council of Elders.</p>

Issue Identified by Participants	Solution Proposed by Participants
<p>LAO is Toronto-centric and out of touch with the needs of Indigenous clients and communities in Northern Ontario.</p>	<p>12. LAO should engage regionally, through local representatives, both community-based and staff. That staff person should have ongoing dialogue with the Director General responsible for each region.</p> <p>13. LAO should evaluate its' staffing levels and programs/service-delivery in Northern Ontario through further consultation with Indigenous leadership and service providers/ users</p>

LAO has work to do to improve its relationship with Indigenous Peoples, and to be understood as doing more than “checking a box”.

LAO provides services in four main areas: Criminal, Family, Immigration and Clinic Law. In addition, there are civil and constitutional law issues impacting Indigenous Peoples. There are unique provisions in the legislation and/or under the Indian Act for Indigenous Peoples living on-reserve (for example, wills and estates or matrimonial real property). Further, participants – and some Clinic staff – raised concerns that the advice their clients were being given by LAO staff and certificate lawyers did not have solid understanding of the nuances created by application of the law to Indigenous persons.

Participants stressed that legal services for Indigenous Peoples must be delivered in a different way than for clients represented through other Strategies where a group may be overrepresented, but there aren't the same specific legal considerations in almost every area of law that LAO provides services. They noted that any new Indigenous legal services program or division should still continue to work with the other Strategies to support each other in their work, particularly around raising awareness of systemic discrimination in the justice system.

LAO also has regional differences to consider when making policies about service-delivery. The organization recognizes this already in its structuring of senior management with the Director Generals. Many participants in the North felt that LAO was very Toronto-centric and didn't understand the needs of Indigenous Peoples living outside of southern Ontario. There was consensus that having Policy Counsel work from outside of Toronto (and in Northern Ontario) was a positive development.

Earlier attempts to develop an AJS Working Group with representatives from different areas was well-intentioned but most of the representatives interviewed felt that it was ineffective and didn't assist them in the front-line work they are doing for Indigenous clients. This model needs to be revisited to determine if interest is still there, and if it is the most effective way to trickle down information to LAO staff on AJS initiatives. Overall, most of the Working Group members didn't feel that they were given sufficient time or resources to do anything with the role. In order to attend telephone meetings, they had to either miss lunch or not see clients. They were also expected to act as liaisons with their local Indigenous communities but felt they were never trained on how to do this, what the protocol was, or even what they should be communicating. Further evaluation is needed.

Some LAO staff, Indigenous themselves, have been extremely successful at building relationships with local Indigenous communities and adapting service-delivery models to meet the needs of the communities. These will be highlighted in the section below, Service Delivery Model Issues and Proposals.

### 3. CONCERNS ABOUT QUALITY AND ACCESSIBILITY OF SERVICES

*"Success of services needs to be measured by the impact to the service user."*

*"The courtworker usually ends up translating what has happened because the lawyer hasn't explained it. The lawyers are just not taking the time with clients to make sure they are making informed decisions and understand the consequences of what happened in court. They leave confused and set up to breach conditions."*

*"For certificate lawyers, it's quantity over quality."*

*"The knowledge is just not there. They don't understand our history. They don't know what submissions to make. And no one is holding them accountable."*

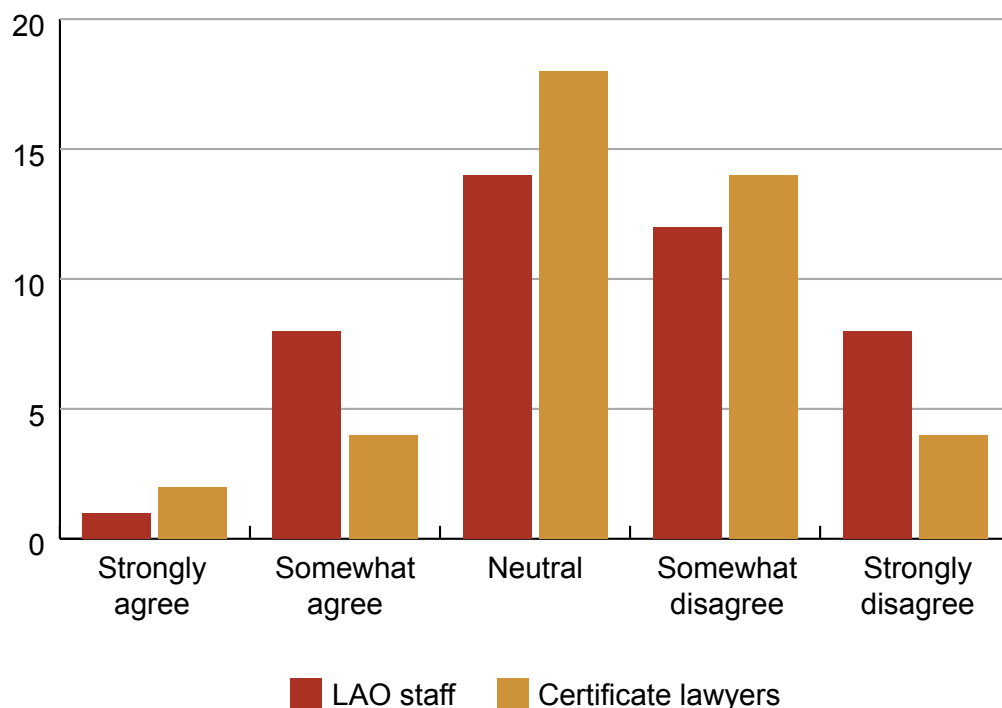
*"If Indigenous clients don't have a connection already in the community, either through a friend or service provider they access, they have a very difficult time navigating Legal Aid services."*

*“It takes 3-4 weeks just to get through a Legal Aid application. The crown and judge get mad at the client and Duty Counsel just stand there shrugging their shoulders. It should be LAO they get mad at for making the process so difficult and inaccessible.”*

*“Our community member’s experience with Legal Aid hasn’t been good. They don’t have – or take – time to explain things. We are always having to fill in Legal Aid’s gaps in service”*

Issues with quality of legal services and legal representation were the most common type of concern raised overall. Three quarters (75%) of participants who were surveyed indicated that they were neutral or somewhat dissatisfied with certificate lawyers and Duty Counsel. It should be noted however that participants were less strongly dissatisfied with Duty Counsel, and particularly Duty Counsel who worked in the Gladue/Indigenous Peoples Courts who overall were seen as more knowledgeable both of the remedial application of Gladue principles and of local resources. Issues related to quality accounted for 35% of all the issues raised during consultations.

#### Clients are satisfied with the services they receive from lawyers



**Issue Identified by Participants****Solution Proposed by Participants**

Accountability to Indigenous clients is needed to ensure quality services.

14. LAO should report to Indigenous communities on how it has prioritized ensuring quality and responsive services. This could be done in a newsletter distributed quarterly or bi-annually and must contain accessible options for providing responses/input
15. LAO should re-evaluate its complaints process to find more accessible ways for Indigenous clients and communities to provide feedback, including examining the viability of feedback mechanisms when a certificate lawyer has final billed.

There are not enough lawyers providing services in areas where there are large populations of Indigenous clients. Conflicts occur all the time and as a result, some clients go unrepresented. Clients do not have choices.

16. Staffing levels should be evaluated for adequacy, particularly in the North, to ensure quality representation. As in other areas, such as health care, LAO should examine the ways the organization incentivizes LAO staff work in the north for tax payer value and also to account for isolation and food/gas insecurity. This is consistent with responses from other publicly-funded services, and should be assessed for viability

With few exceptions, Counsel don't take calls, come to see their clients in the jail, or come to court consistently. Indigenous clients feel abandoned and are often confused about what is happening with their matter. No one takes the time to explain things and blame LAO for "not paying them enough" on a certificate to provide adequate services. LAO needs to hold lawyers who represent Indigenous clients accountable.

17. LAO should consider requiring lawyers to provide a final account of services to both LAO and the client, so the client can be clear on what work has been done and can make an informed complaint when it is not consistent with their experience.



**Issue Identified by Participants****Solution Proposed by Participants**

Indigenous clients feel that Duty Counsel are often disinterested and too rushed to provide quality assistance.

18. Training should be developed and delivered to Duty Counsel that outlines issues that contribute to Indigenous alienation from the justice system.

Indigenous service providers feel that Duty Counsel often offload work onto them and treat service providers like they are their assistants.

19. Complaints mechanisms should be developed to allow service providers to identify concerns about conduct that is perceived as disrespectful.

Examples include when Duty Counsel:

- Get service providers to obtain “Gladue factors” and then present it to the court. Duty Counsel make no further submissions on Gladue.
- Attempt to force service providers to doing things outside their job description like driving clients, and taking Legal Aid applications. All of this means that the service provider is unable to perform their actual job duties.

20. Managers should develop and review with their staff LAO policies and best practices that encourage better relationships with other justice stakeholders.

21. Staffing levels should be adequate, particularly in the North, to ensure quality representation.

22. If LAO wants to consider having service providers assist with LAO applications, they should be given proper training and remuneration. In the alternative, LAO should have a Legal Aid Worker attend at court for first appearances and Gladue/Indigenous Persons Court and at Indigenous service provider offices on a rotating basis to take in-person applications.

Gladue enhancements on block fees are seen to incentivize guilty pleas and there is a perception that lawyers put undue pressure on Indigenous clients to plea guilty.

23. Gladue enhancements on block fees should be re-evaluated for effectiveness and added value.

24. LAO should develop and implement criteria that lawyers need to complete demonstrating work done in order to bill on the Gladue Enhancement

25. LAO should dedicate resources to fully examine the data available on client outcomes for both block and tariff certificates.

**Issue Identified by Participants****Solution Proposed by Participants**

Private bar counsel are not living up to the expectations of the Gladue Panel standards, and the standards apply only to Criminal matters. Child protection is an area where LAO needs to do quality control.

26. LAO should evaluate the effectiveness and value of block fees with respect to Indigenous clients.

27. LAO should enforce training requirements set out in Gladue Panel Standards. Failure to participate in ongoing training, reported on an annual basis, should result in removal from the Gladue Panel.

28. Indigenous communities and service providers should be recognized for competencies to deliver training requirements set out in Gladue Panel. Forms should be developed that allow service providers to (a) outline nature of Continuing Professional Development or cultural safety training they are facilitating and (b) confirm lawyers' attendance and participation.

29. LAO should work with the Law Society of Ontario to allow cultural safety and resource training provided by Indigenous service providers in fulfillment of Gladue Panel Standards obligations to be accredited as Equality, Diversity and Inclusion hours. A policy should be developed to outline criteria for accreditation.

30. A similar Panel should be developed and enforced in the child protection context.

**Issue Identified by Participants****Solution Proposed by Participants**

Lawyers – both Duty Counsel and private bar – are not applying Gladue at bail. It is frequently not mentioned at all. Further, Duty Counsel are adding to net-widening when it comes to bail and increasing reliance on bail programs when they should be getting clients out on their own recognizance. Duty Counsel routinely agree to way too many adjournments, and to intrusive conditions that set clients up to fail. Private Counsel rarely, if ever, do bail hearings in the North. Duty Counsel in the Gladue/Indigenous Peoples Courts are providing better service in this regard.

31. Training should be developed and delivered to staff and private bar lawyers on the proper application of Gladue at bail and ladder principles. Emphasis should be put on the presumption of innocence and how implicit bias impacts professionals in their assessments and services.

Lawyers – both Duty Counsel and private bar – are not applying Gladue in the remedial way it was intended. They are either (a) simply handing up Gladue Reports and not making additional submissions or (b) traumatizing Indigenous clients through insensitive re-telling of lived trauma without providing context (i.e. colonialization) or supports. Lawyers should be asking for publication bans or to clear the courtroom when they go into graphic detail about a client's past trauma.

32. Training should be developed and delivered to staff and private bar lawyers on the proper application of Gladue principles.

33. Training should be developed and delivered in collaboration with Indigenous communities and service providers on providing trauma-informed services to Indigenous Peoples.

34. LAO should develop protocol or precedents for Gladue submissions, including how to use existing social sciences evidence like the Truth and Reconciliation Report, the RCAP and the Iacobucci Report.

35. Policies and practices should be developed to respect privacy interests of clients and their families.

Lawyers – both Duty Counsel and private bar – are frequently not recognizing the unique needs of Indigenous women.

36. LAO should, in collaboration with Indigenous communities and service providers, develop and deliver Public

Issue Identified by Participants	Solution Proposed by Participants
	<p>Legal Education and Continuing Professional Development on issues of domestic violence against Indigenous women, Missing and Murdered Indigenous women and girls, and Human Trafficking.</p> <p>37. LAO should work with Indigenous communities and service providers to develop and deliver Public Legal Education on topics including how to talk to police, what happens in a criminal trial when you are a victim, etc.</p> <p>38. LAO should work with Indigenous communities and service providers to promote and support justice programs for Indigenous women that are Indigenous-led including victims' services and Gladue Report services.</p>
<p>Participants reported that many Indigenous women do not feel safe accessing Legal Aid services.</p>	<p>39. LAO should examine its policies to ensure that complaints processes are accessible and that complaints of impropriety by either LAO staff or private bar lawyers are taken seriously and dealt with in an appropriate manner.</p>
<p>Lawyers – both Duty Counsel and private bar – are not recognizing the unique needs of Indigenous youth, particularly Indigenous youth who are in care.</p>	<p>40. PLE for Indigenous youth about criminal law and consequences of getting a criminal record as well as know your rights information is very important. This could be developed in partnership with Indigenous service providers delivered in schools or at service provider agencies who work with youth.</p>
<p>Telephone and web-based services are inaccessible, ineffective and culturally</p>	<p>41. LAO should have Legal Aid workers come to court or to Indigenous service</p>

**Issue Identified by Participants****Solution Proposed by Participants**

inappropriate. This service delivery model results in significant delays and undue stress on Indigenous clients.

provider agencies on a rotating basis to take applications in person.

42. LAO should consider a job-share where an Indigenous organization can have an employee do Legal Aid Worker services half-time, or as needed.

Service providers end up spending large amounts of time trying to help clients navigate Legal Aid application processes, taking away from their other roles and responsibilities.

43. LAO should evaluate the possibility of allowing service providers to take applications for clients but provide them with appropriate training and remuneration

Service providers explained that Duty Counsel are not always visible and are quite often unavailable to assist Indigenous clients. They don't have dedicated offices in some jurisdictions nor do they have relationships with external service providers, making it difficult for clients to identify them.

44. LAO should advocate for appropriate office space for Duty Counsel to allow for private and confidential discussions as well as visibility within the courthouse.

45. LAO should work on building better relationships with external service providers so proper referrals can be made.

As mentioned, the 2018 Auditor General's Report found that lawyers were providing services without meeting all of their professional requirements. While this spoke specifically about Member's Annual Reports, it is of concern that a population of lawyers are not doing the bare minimum to ensure competency. We heard consistently throughout the consultations that lawyers were also not participating in any cultural competency/cultural safety training, as required by the Gladue Panel Standards. This is occurring despite many attempts from Indigenous service providers and communities to make this training available and accessible. Some communities advised that they go so far as to offer it free of charge (i.e. at their own expense to host), send invitations to all staff and private bar lawyers,

offered it during the day, evenings and weekends, and still, there is no uptake. They expressed frustration in seeing the lawyers unable or unwilling to make fulsome Gladue submissions when they had worked so hard to make training available which would help them in that regard. Some lawyers claim they “do not need Gladue” and advise clients not to pursue Gladue Reports or restorative justice programs because they take longer than “a quick plea”.

Further, the Audit pointed out that private bar lawyers are not assessed for quality nor are they peer reviewed. This is especially worrisome when one considers that lawyers can claim an additional five hours on the Gladue Enhancement. Consistently we heard that LAO should be enforcing Panel Standards when it comes to lawyers representing Indigenous clients, and working in partnership with Indigenous communities and organizations, as well as the Law Society of Ontario to accomplish the desired goal of intercultural competence and quality legal services for low-income Indigenous Peoples living in Ontario. This was raised as particularly worrisome in the child protection context and participants noted that anti-Indigenous bias and stereotypes consistently infect legal processes and the services that Indigenous families receive. Of particular concern was hearing from LAO staff that other staff working within the organization allow this bias to impact their assessments of merit in the context of child protection proceedings, who as a result of this, do not get access to legally aided services to participate in child protection proceedings. This results in widening gaps in outcomes for Indigenous clients and may contribute to Indigenous overrepresentation of children in care.

Concerns were raised about accountability to the clients and communities regarding the quality of services that LAO provides and it was made clear that LAO has a lot of work to do to repair what is seen as a broken system of service-delivery. Clients are not happy with the services they receive, feel exploited in legal proceedings, and worse, feel that their outcomes were negatively affected by LAO processes and staff (both Duty Counsel and certificate lawyers). LAO should take Indigenous communities and organizations up on their offer to work together in partnership to improve services through training and relationship-building.

The most consistent thing that the AJS heard in the consultation meetings was that online and telephone-based services were not effective. 74% of groups that the AJS consulted with felt that LAO needed to address the complete inappropriateness, harmful nature, and impractical nature that the telephone application process presents to Indigenous clients. They also asked that LAO acknowledge the real lack of access to reliable technology for Indigenous clients and communities.

69% of all participants who were surveyed rated their experience neutral to strongly disagree that applying for legal aid was easy. In a time when “modernization” and “streamlining” in the face of decreased resources and external trends push the organization towards these models, it is important to keep in mind if the goal is to improve services for



Indigenous clients.

At best, we were told it creates distrust and frustration with the whole system contributing to Indigenous alienation. At its' worst, it creates perverse incentives to just "get it over with" by going unrepresented and entering guilty pleas. This brings the whole justice system into disrepute. Many participants questioned if it was set up this way for that very purpose. Service providers stated that it is even more frustrating when they see Legal Aid Workers, who could be taking applications, spending their time entering Service Integration worksheets for Duty Counsel. This was reported to be happening in multiple regions and is believed to be a huge waste of an important resource.

There are many reasons why, apart from lack of in-person LAO staff, this is a barrier to accessing services. Indigenous People experience significant poverty as a by-product of colonization. This means they do not have a cell phone or minutes, a computer or access to one. Trying to do their applications at a service provider's office means they do not have privacy which is viewed as a significant deterrent to proceeding.

In addition, the AJS was reminded that many Indigenous clients have literacy or mental health issues, including addictions which make the applications process extremely difficult. Some clients are First Language speakers and the interpretation is not provided, or, if offered, is described as wholly inadequate. The process was viewed as cumbersome, staff as rude and unhelpful, and the process itself humiliating and frustrating. The AJS was told that it can take anywhere from five to eight appearances (out of custody) for an accused to get their Legal Aid application submitted and that the delay works against them with regard to s.11(b) of the Charter. The AJS also heard that it appeared to work faster with NALSC taking applications for their membership.

Participants stressed that services for Indigenous Peoples need to be culturally appropriate and responsive. Indigenous participants noted that the telephone/online method of service-delivery is not an appropriate way to communicate about intimate, personal information. Clients, in turn, go to Indigenous organizations for help and emotional support, which takes the service providers away from their usual responsibilities. Service providers themselves expressed great frustration with how long and stressful the process is. On the other hand, in areas where pilot projects have allowed service providers to do applications in discrete matters, it was seen as very helpful in that it builds trust, takes the stress off of the clients, and gives them an immediate sense of relief. It also helps service providers to build relationships with the private lawyers, giving them added value to the clients. Since they are often the client's first point of contact, in many ways it makes sense. It was pointed out however, that if a client is denied because of LAO policies, that can jeopardize their relationship with the client and then they would be very much on their own.

Improving our applications process on an urgent basis is critical if the consultations are to be viewed as anything more than a checkbox exercise.

In addition to the need to improve these practices, examples were provided where it was felt that LAO policies and practices systematically excluded Indigenous Peoples from receiving services and needed evaluation and improvement.

One such example at the time of consultation, was the unclear policy of denying certificates for child protection matters if the applicant is in custody. It was reported that clients are denied Legal Aid services outright, as a matter of practice, if they are in custody – whether on remand or serving sentence – on any unrelated matter. This effectively prohibits them from making any submissions on a plan where their child could or should be placed to avoid them going into Crown wardship. Indigenous representation in foster care is disproportionately high. 52.2% of children in foster care are Indigenous, but account for only 7.7% of the child population according to Census 2016.<sup>21</sup> This means 14,970 out of 28,665 foster children in private homes under the age of 15 are Indigenous. A blanket policy, which the AJS had difficulty finding in writing, appears to allow personal judgments about an Indigenous person's ability to participate in proceedings trump their rights to make submissions in some format. The AJS was told it also fails to demonstrate an understanding of the factors that contribute to Indigenous over-incarceration. LAO needs to, at a minimum, review this policy and see where and what services can be made available to avoid contributing to this overrepresentation of children in care.

Almost half (48%) of participants also expressed concern about Financial Eligibility Testing and stated that true commitment to the TRC Calls to Action to eliminate overrepresentation in the criminal and correctional systems means operationalizing policies that ensure access to justice for Indigenous clients. This was raised as particularly concerning for single mothers who, at risk of having their children apprehended are expected to work, but then do not qualify for certificate coverage and end up not having counsel to assist them. Participants also proposed policies that would ensure Indigenous youth have access to certificates to ensure rights to trials are available since too many plead guilty not understanding the long term implications.

The Gladue Authorization was raised as a problematic LAO policy and, from participant's perspective, was not effective in improving services for Indigenous clients. In 2015-16, LAO's Audit and Compliance Unit launched a focused audit of all Gladue Authorizations that were billed in a month. They surveyed lawyers to provide detailed responses and documentation verifying the work done to prepare and make Gladue Submissions. The results that they found raised concerns about the quality, transparency and accountability of lawyers who are representing Indigenous clients.

- Throughout the audit 65% of lawyers who had billed for Gladue submissions failed to provide sufficient documentation to support additional work being done.

<sup>21</sup> Turner, A. 2016. "Living Arrangements of Aboriginal children aged 14 and under." Insights on Canadian Society. April. Statistics Canada Catalogue no. 75-006-X.

- 71% of lawyers who represented an Indigenous client but did not bill against the Gladue Authorization cited that Gladue submissions were not necessary.

This internal audit reinforced what participants in the consultations identified as a major concern: that lawyers were billing the Gladue Authorization without actually making meaningful submissions or improving justice outcomes.

Everyone who participated felt that LAO had a role to play in providing training and holding lawyers accountable, primarily through the Gladue Panel standards. Many were disappointed to hear this wasn't already being done and expressed concern about how this looks to Indigenous clients and communities who feel exploited by these systems for others' financial gain. LAO must consider evaluating mechanisms to ensure quality services, particularly regarding the block fee system of billing which was stated to incentivize guilty pleas for Indigenous clients.

A brief examination of LAO's current funding models does provide some evidence that aligns with the Indigenous communities' views and concerns. A cursory review of the data suggests that Indigenous clients are faced with more guilty pleas than non-Indigenous clients. Additionally they are less likely to have all charges withdrawn.

For example, a statistical test was performed on cases with "Breach of Probation" charge only, that were final billed in 2018-19. This was to test whether the percentage of "All Charges Guilty" is different for certificates issued for Indigenous clients as opposed to certificates issued to Non-Indigenous clients. The test found that there was a "statistically significant" difference (unlikely due to chance) for both "All Charges Withdrawn" and "All Charges Guilty". The outcome in both cases seems to suggest better justice outcomes for non-Indigenous clients. In this case the size of the difference was found to be "medium"

	Non-Indigenous Clients	Indigenous Clients
<b>All Charges Withdrawn</b>	22%	9%
<b>Some Guilty Some Withdrawn</b>	53%	61%
<b>All Charges Guilty</b>	19%	23%

More concerning is that clients whose lawyers received additional payments under the Gladue Authorization tended to have even less positive outcomes.

	<b>Gladue Issued AND Gladue Billed</b>	<b>Gladue Issued but NOT Gladue Billed</b>	<b>NEITHER Gladue Issued NOR Gladue Billed</b>
All Charges Withdrawn	9%	28%	21%
Some Guilty Some Withdrawn	61%	44%	54%
All Charges Guilty	23%	21%	19%
Other	2%	4%	3%
Other Comb	4%	2%	3%
Total	100%	100%	100%

This test found that there's a "statistically significant" (unlikely due to chance) difference between the percentage of "All Charges Guilty" certificates that were issued as Gladue and also billed as Gladue (23%) vs the percentage of "All Charges Guilty" certificates that were issued as Gladue but not billed as Gladue (21%). The size of this difference is "small". However, the difference with "Neither Issued Gladue Nor Gladue Billed" is "medium".

Internal data trend evaluations also suggest that lawyers who represent Indigenous clients in both family and criminal law consistently bill for less time than non-Indigenous clients across the province.

	<b>2010-11</b>	<b>2011-12</b>	<b>2012-13</b>	<b>2013-14</b>	<b>2014-15</b>	<b>2015-16</b>	<b>2016-17</b>	<b>2017-18</b>
Indigenous	133	126	140	138	138	132	153	182
Non-Indigenous	151	175	192	166	161	153	177	216

Given the organization's priority to improve legal services for Indigenous clients and that this preliminary investigation would appear to support the AJS consultation participants concerns about "lesser" quality of services, these funding models and service delivery options should be examined in a much more comprehensive way as part of any new Indigenous legal services program at LAO.

#### 4. CULTURAL SAFETY

*"Duty Counsel and front line staff need to understand the historical piece. They need to understand the ongoing impacts of colonization and intergenerational trauma. We are willing to work as partners to help with this to start making progress on the TRC Calls to Action."*

*"The certificate lawyers are not respectful nor do they practice in a way that is culturally safe for Indigenous women."*

*"LAO has a responsibility to ensure lawyers representing Indigenous people and families are trained in cultural safety."*

*"A successful Indigenous services program at Legal Aid would recognize that our culture is the center of our healing and must be at the center of all services."*

Participants felt that LAO needed to ensure access to culturally safe services including ensuring that staff and lawyers providing legal service be required to take cultural competency training, ensuring Indigenous representation among staff and service providers, and the ability to access services in a manner that Indigenous clients considered to be safe and meaningful. 69% of participant surveys somewhat or strongly disagreed that LAO provides services that are culturally relevant.

**Issue Identified by Participants****Solution Proposed by Participants**

Indigenous Peoples want to access services that are grounded in culture. The justice system is already too foreign to Indigenous worldviews and is oppressive.

- 46. LAO should work with Indigenous service providers to ensure that staff and certificate lawyers are well-versed on appropriate resources in the communities where they work. Managers should remain up-to-date on these resources and provide training on an annual basis to staff, and if possible, to certificate lawyers.
- 47. LAO should explore service-delivery options that would allow legal services to be embedded in Indigenous organizations.

Lawyers often do more harm when they practice in ways that undermine the resiliency of Indigenous Peoples. Constantly focusing on traumas and deficits is humiliating and debilitating for Indigenous Peoples. Many felt that this is done when Gladue submissions turn into voyeurism. A similar concern was raised in family law and child protection matters.

- 48. LAO should work with Indigenous service providers to develop and deliver anti-racism, decolonizing training that is strengths-based and doesn't set Indigenous clients up for embarrassment in the courtroom.
- 49. LAO's Board and senior management should be required to do anti-racism, decolonizing training to understand how organizational decisions impact the delivery of legal services to Indigenous clients.

There are not enough cultural supports for clients in court. Clients need help navigating the system because the lawyers are not helpful in this regard.

- 50. LAO should promote and support the use of Elders and Knowledge Keepers in court proceedings as essential front-line services.



**Issue Identified by Participants****Solution Proposed by Participants**

The AJS and LAO services are First Nations-centric. There needs to be more work done to ensure the unique histories and needs of all Indigenous Peoples are represented in written materials, public legal education, and legal services.

51. LAO should develop a Council of Elders that is representative of all Indigenous Peoples and regions to provide advice on policies and programs impacting service-delivery for Indigenous Peoples.

52. LAO should evaluate its' advisory mechanisms and ensure that there are appropriate and meaningful options for all Indigenous leadership to provide input.

LAO should be providing proactive, rather than reactive services, particularly those that are culturally relevant. Programs that prevent involvement are more effective. LAO certificates are often much too late.

53. LAO should support and promote Indigenous-led Alternative Dispute Resolution and Restorative Justice Programs that are designed to be preventative and are proven to contribute to community safety.

54. LAO should develop a policy for the respectful remuneration of Elders and Knowledge Keepers for the expertise and participation in court proceedings and client-facing services.

LAO services and public legal information are not available in First Languages and this is not inclusive or respectful.

55. LAO should do a needs assessment to determine how printed and online materials can be made more accessible to First Language speakers.

56. LAO should do a needs assessment for First Languages interpretation services in Northern Ontario.

Providing responsive services to Indigenous Peoples requires and in particular, proper Gladue submissions, require a nuanced understanding of the impacts of colonization and how it contributes to ways the justice system systematically discriminates against Indigenous Peoples. It was stressed that as the main provider of legal services to Indigenous Peoples, LAO has an obligation to ensure those services are not furthering harm or perpetuating negative stereotypes. Participants in the consultations noted a strong resistance from private counsel, and to a slightly lesser extent, Duty Counsel, to participate in training on Canada's colonial history and how to make submissions based in substantive equality. It was noted that the dedicated Gladue/IPC Duty Counsel did a very good job at accessing the appropriate resources to do this work in a culturally safe way.

There was a lot of discussion during the consultations about how the education system, including law school, has failed to teach this to lawyers and that many, including those who represent Indigenous Peoples, are not able to accept what the Supreme Court has already found as a notorious fact: that within Canada there is widespread anti-Indigenous racism which has translated into systemic discrimination in the criminal justice system. Specifically, the Supreme Court found that "(r)acism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity."<sup>22</sup> This unfortunately includes service providers funded by LAO, such as Duty Counsel, the Client Service Centre and private bar lawyers. There is opportunity in a proposal for improved Indigenous legal services to work with Indigenous communities and service providers to develop and deliver training for staff, certificate lawyers and Indigenous service providers and users about the legal issues that impact Indigenous Peoples, and participants showed a great deal of interest in doing so.

## 5. LACK OF ACCOUNTABILITY TO THE INDIGENOUS CLIENTS

*"Indigenous Legal Services need to be a separate entity and must be accountable to the Indigenous community as well as LAO, reporting back to Indigenous leadership about what they're doing to improve outcomes for our community members."*

*"We are now seeing the fifth generation of families in child protection. Your (western) system isn't working. There is so much indifference to what is happening to our communities. We're just 'business as usual' for LAO."*

<sup>22</sup> R v Williams, [1998] 1 SCR 1128.

*“Indigenous communities have every right to be involved in decision-making. Historically, we have been excluded and look where we are in terms of outcomes.”*

*“If done properly, in consultation and under the direction of Indigenous communities, you can change worldviews and the practice of the criminal justice system as a whole, for the better. You can make these systems – including Legal Aid – more accountable.”*

*“You always come at the eleventh hour and then do nothing.”*

*“LAO is always asking us to justify our services but never report back to us.”*

Inconsistent communication and lack of transparency was the second most important issue in the eyes of the community, with 65% of participants raising it a key issue. Participants stated that LAO had a responsibility to ensure that its funding decisions are accountable to community and do not encourage instability, diminish or undermine capacity, or perpetuate lateral violence among Indigenous communities and service providers.

Participants also felt that LAO needs to ensure that lawyers are more accountable to clients and communities. Of those surveyed, 57% outright disagreed that LAO had been effective in communicating with Indigenous communities and service providers.

#### **Issue Identified by Participants**

#### **Solution Proposed by Participants**

Short-term contracts don't work and do not support long term goals and relationship-building.

57. LAO should investigate ways to support longer term projects with Indigenous communities and refrain from using one year contracts wherever possible.

**Issue Identified by Participants****Solution Proposed by Participants**

LAO isn't doing proper environmental scans to identify regional differences and needs.

58. LAO should conduct proper review of services on an annual basis and report back to the communities they serve.

There is a lack of accountability in how things get funded.

59. All funding of projects should go through a transparent screening process with proper communication about Requests for Proposals to Indigenous communities sent out in a timely manner.

Lawyers have no accountability to their clients or to the communities in which they practice. LAO should be ensuring lawyers are providing appropriate services through Panel management. The current complaints mechanism is wholly ineffective and inaccessible to clients.

60. LAO should conduct regular audits of lawyers who are billing above normal amount to ensure it corresponds with actual services rendered.

61. LAO should create a feedback mechanism through Indigenous service providers that allows clients to file complaints.

LAO has poor communication with Indigenous communities and service providers before and after pilots and projects rolled out. There is no meaningful consultation.

62. LAO should develop consistent communications protocol for all project RFPs and reporting criteria.

63. LAO should develop and maintain a fulsome list of Indigenous communities, political organizations and service providers and ensure Indigenous communities are given equal priority in communications as other justice stakeholders.

LAO doesn't engage with community to determine effectiveness or appropriateness of services.

64. LAO managers and Directors General should offer to meet regularly with Indigenous leadership on issues of service delivery and funding.

**Issue Identified by Participants****Solution Proposed by Participants**

LAO's Advisory systems are not representative and as a result it is questionable how they can be effective in making real change in the way services are delivered.

65. LAO should re-evaluate its current Advisory Committee and ensure appointment processes are inclusive and transparent.

LAO has made public commitments to the Truth and Reconciliation Commission's Calls to Action but they don't appear to be doing anything specifically and are not communicating with Indigenous communities about how to work towards this goal. The over-representation in criminal justice, correctional and child welfare systems continues to grow and LAO needs to account for what it is doing to address this.

66. LAO should prepare annual reports on steps taken to address the Truth and Reconciliation Commission's Calls to Action and distribute them to Indigenous leadership, providing accessible mechanisms for them to report back.

Indigenous Peoples are experts in their own experience. LAO should defer to them about what services are needed and how they should be delivered.

67. LAO should report annually to Indigenous leadership with data about services and budgets. Mechanisms need to be put into place to ensure meaningful input is received and acted upon.

Participants were largely very impressed with our initiative to consult on what is working and what is not, but it was expressed that this happens too infrequently. For many, this was the first time LAO had reached out to them, despite their long involvement with the justice system. In particular, Inuit and Métis participants stressed that they had never been consulted in the past and that LAO had not followed proper protocol to solicit input. These conversations are an important first step to rebuilding these fractured relationships and participants agreed that it was important to have ongoing communication.

It was stressed that LAO needs to build their business plan around the needs of the clients and not the other way around. Many stated that LAO rolled out programs without first getting input from front line service providers and as a result, some did not succeed or have buy-in from local communities and clients. LAO should work with Indigenous communities and service providers to develop policies that will impact Indigenous clients. As a result, LAO's advisory mechanisms should be reviewed for effectiveness.

## LEGAL AID NEEDS TO BUILD BETTER RELATIONSHIPS WITH INDIGENOUS PEOPLE.

*“Relationships start from language. LAO don’t value our relationship hasn’t valued our language which means they don’t value us.”*

*“Reach out to leadership. If you show commitment to that communication, they’ll respond in kind.”*

*“Our clients don’t work with Legal Aid. They come to us. They won’t go where they don’t know people. LAO doesn’t have a presence in the indigenous community so clients wouldn’t know or be comfortable going to them. Partnerships could improve this.”*

*“The days of speaking for us are over. We speak for ourselves.”*

65% of participants expressed the lack of meaningful relationships with themselves and LAO, or inconsistency in relationships was a major concern. Participants stated that meant LAO must ensure that its advisory systems are representative of the diversity of Indigenous Peoples in Ontario and ensure that opportunities to provide meaningful input are respected and acted upon.

**Issue Identified by Participants****Solution Proposed by Participants**

The Aboriginal Issues Advisory Committee (AIAC) is not representative and not an effective way to make real, positive change in services for Indigenous Peoples.

68. LAO's AIAC nomination process needs to be more transparent

69. LAO should evaluate options for Indigenous leadership and service providers to provide input into policy and program decisions that impact Indigenous Peoples.

70. Any Indigenous legal services division, program or strategy at LAO should be guided by its' own advisory group that includes a representative Council of Elders.

LAO needs to work with Indigenous service providers to develop localized responses to justice needs of the clients they serve. Different communities have different needs.

71. LAO should continue to meet with Indigenous leadership and service providers to determine options for service-delivery that are responsive to the needs of their membership.

72. LAO should develop mechanisms for better dissemination of information about LAO policies, programs and services. Options proposed include bi-annual newsletters to Indigenous service providers, town hall meetings in Indigenous community or at Indigenous organizations, email list-serves.

Public legal education is an important service that Indigenous service providers want to help develop and deliver to increase their clients and their own understanding about legal rights and obligations. Working collaboratively would help Indigenous people to see LAO as a supportive agency.

73. LAO should work with Indigenous organizations and communities to develop and deliver PLE for their membership.



**Issue Identified by Participants**

LAO doesn't appreciate the unique needs and contributions of Indigenous youth.

**Solution Proposed by Participants**

74. LAO should consider establishing or including a Youth Council to advise any Indigenous legal services division or program at LAO.

Participants in the consultations were very clear that LAO has a responsibility to ensure decisions made about how to provide services to Indigenous clients and communities must reflect the justice-related needs and values of Indigenous Peoples. They explained there is willingness and capacity to have more involvement in the development of policies and the administration of services and that increased cooperation between LAO and Indigenous communities should be examined as an organizational priority. In order to address this concern, LAO should continue to consultative process to look specifically at service delivery models that will meet the needs of Indigenous clients and communities.

Participants expressed concern that often services are duplicated and, more troubling to participants, often services are off-loaded onto Indigenous service providers by LAO staff. That being said, participants were very interested in working together to make the services more accessible and more culturally relevant to Indigenous clients.

At all consultation meetings, participants indicated that these meetings were a very important first step to building relationships based on mutual respect and partnership between them and LAO, and wanted to hear from LAO about what other Indigenous communities and service providers had to say, and on what LAO will do to address the concerns raised in these consultations. LAO should be working to strengthen these partnerships and, as a first step, provide them with a copy of this Report to demonstrate the organization's transparency, accountability and commitment to making positive change while working in partnership with Indigenous communities.

## **6. REPRESENTATIVE SERVICES ARE ESSENTIAL AND SERVICE DELIVERY MODELS NEED REVISITING**

*"The lawyers who act on Legal Aid certificates do not practice in a way that is culturally-responsive. They assume one-size-fits-all. Clients would prefer legal services that are reflective of them and their worldviews."*

*“The lawyers who act on Legal Aid certificates do not practice in a way that is culturally-responsive. They assume one-size-fits-all. Clients would prefer legal services that are reflective of them and their worldviews.”*

*“Lawyers are doing Gladue in an inappropriate way. Families are humiliated and clients are re-traumatized. Indigenous lawyers would understand how to do this in a better way.”*

*“Legal services, like all services for Indigenous peoples, need to be rooted in culture and in Indigenous Knowledge. It is the only way to be effective in improving outcomes.”*

*“It does clients a disservice to make them go a million different places to get help. Clients want to access services that provide wrap-around care and that are grounded in culture.”*

*“There are no other choices. If there was, clients would opt for services provided by Indigenous organizations.”*

*“LAO needs to support processes that are preventative and proactive, rather than just reactive. At that point, it’s often too late.”*

*“LAO has too many silos in services. Hubs of services avoid service gaps and duplication of services. These should be based in Indigenous communities and agencies to ensure service delivery is informed by culture.”*

*“Having a NALSC up here helps. People in the cities up here experience culture shock so having representative staff and services helps.”*

Participants consistently reported concern over the lack of representative services at LAO. 65% of the Indigenous communities and service providers who provided feedback suggested that LAO recruit and retain more Indigenous staff and panel lawyers. They asked that service models and materials reflect the diversity of Indigenous Peoples and noted the lack of Indigenous representation at the leadership level. 77% of those surveyed felt strongly that LAO does not have adequate representation of Indigenous staff, and 90% strongly agreed that having Indigenous staff was important to clients.

### Issue Identified by Participants

### Solution Proposed by Participants

Staff and private bar lawyer do not understand the unique needs of Indigenous Peoples. As a result, Indigenous clients are not comfortable working with non-Indigenous service providers.

75. LAO should work with Indigenous communities and service providers to develop and deliver training for lawyers and staff on cultural safety, Canada's colonial history, and contemporary issues impacting Indigenous Peoples.

76. LAO should develop human resources policies aimed at the recruitment and retention of Indigenous staff.

Clients want services that are rooted in culture.

77. LAO should explore service delivery models that are culture-based, designed and delivered by Indigenous service providers.

**Issue Identified by Participants****Solution Proposed by Participants**

Performance measures don't fit. LAO cuts programs before they have time to develop. Numbers don't tell everything and LAO needs to understand that in Indigenous communities, it takes time to build goodwill and for people to know a service is available.

78. LAO should develop more effective protocols for communicating with Indigenous clients and communities about programs and service-delivery.

79. LAO should work with Indigenous organizations and communities to develop and implement performance measures that are appropriate and reflect the experience of Indigenous clients and communities.

Clients often have to be their own best advocate. LAO staff or certificate lawyers frequently don't know about culturally-relevant options for dealing with justice issues. This means Indigenous clients are denied opportunities to participate in justice processes that are more meaningful to them and their communities.

80. LAO management should meet regularly in each region with Indigenous communities and service providers to identify issues with local staff or private lawyers and investigate concerns. LAO should report back on the results of any investigation.

81. LAO should ensure staff receive ongoing training developed in collaboration with Indigenous communities and service providers on available resources, particularly community-based Restorative Justice, Alternative Dispute Resolution, and Gladue programming.

It is difficult to navigate these systems and clients want Indigenous service providers to help.

82. LAO should work with Indigenous communities and service providers to develop materials that are representative of the Indigenous communities they serve including First Nations, Inuit and Métis Peoples. These materials should be translated in First Languages to assist with information on where to get help and what they need to know before applying for Legal Aid or attending court.

**Issue Identified by Participants****Solution Proposed by Participants**

Capacity-building in community is very important.

83. LAO should promote and support Indigenous Justice Navigator programs which are helpful for clients trying to understand their rights and obligations.

84. LAO should support and promote community-driven Alternative Dispute Resolution and Restorative Justice Programs.

LAO needs to value skills and knowledge that are important to Indigenous Peoples.

85. LAO should develop a policy that allows Elders and Knowledge Keepers be remunerated for the important services they provide. This should include participation in in-court processes.

Policies that support decisions to exclude participation or coverage in legal proceedings need to be stopped immediately.

86. The unique history of colonization and the resulting circumstances that disproportionately impact Indigenous Peoples require policies that support participation

Regional differences are extremely important to identify and address. For example, travel and cost of living is different in the North.

87. LAO should work with Indigenous communities and service providers to identify how the organization can support the unique needs of clients who live in remote and Northern communities, including examining the viability of legal services being embedded in Indigenous organizations.

Indigenous organizations are the best place to have legal services. The clients go there for help and are more trusting of the services they receive because they are culturally relevant and clients feel less alienated.

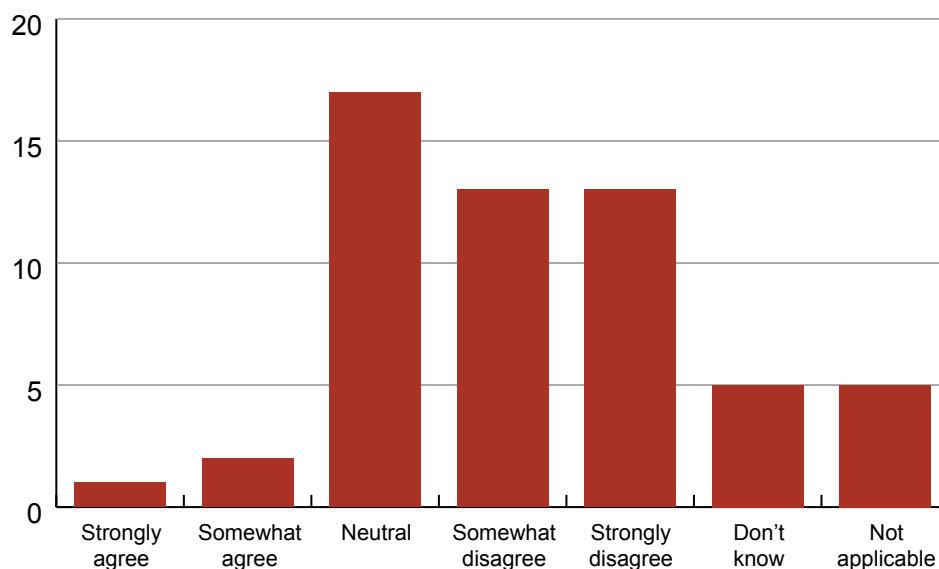
88. LAO should explore service delivery models which situate services within Indigenous organizations or communities.

**Issue Identified by Participants****Solution Proposed by Participants**

Some participants, particularly in Treaty 3 territory, wanted clarification on why the LASA's provisions for the funding of Indigenous legal services corporations has never been examined for viability outside of NAN territory.

89. LAO should work with Grand Council Treaty 3 on a viability study for authorization under s.14(1)(f) of the LASA to fund them as a legal services corporation.

Participants felt that LAO needs to revisit practices and policies to determine if they are, in fact, contributing to Indigenous alienation from justice processes. Of those surveyed on whether their experience applying for LAO was easy, 69% rated as ranging from "Neutral" to "Strongly Disagree". Respondents cited LAO's reliance on the client to understand the process, terminology and own legal needs as problematic. They felt this resulted in clients' reliance on other service providers or community members to help navigate the system. This work by service providers/community members often goes unnoticed and unvalued, is not resourced, and has even come to be expected by LAO staff.

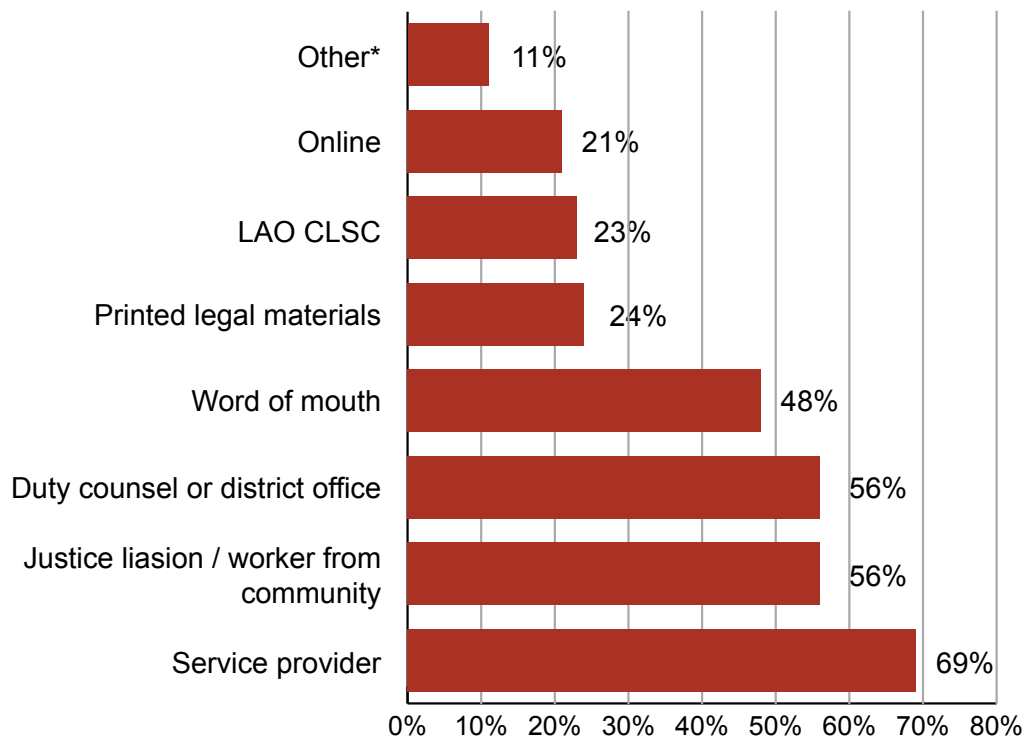
**Applying for Legal Aid was easy**

The feedback that Indigenous clients want services that are designed, delivered and designed by Indigenous People and had Indigenous staff or content. <sup>24</sup> Similarly, LAO's roll-out of Non-Litigation certificates in Child Protection matters have had very little uptake except through a pilot run out of Aboriginal Legal Services (ALS) that allowed ALS staff to

<sup>24</sup> Canada, Ministry of the Solicitor General, "Influences on Canadian correctional reform: working papers of the Correctional Law Review, 1986 to 1988" (Ottawa: Solicitor General Canada, 2002).

issue these particular certificates.

Consistent feedback was that Indigenous Peoples who are in conflict with the justice system go to Indigenous service providers first and last: first to get advice about options and last to have translated the service that was received from outside of the Indigenous community. Of those surveyed, 69% reported that they go to an Indigenous service provider to receive legal information and services.

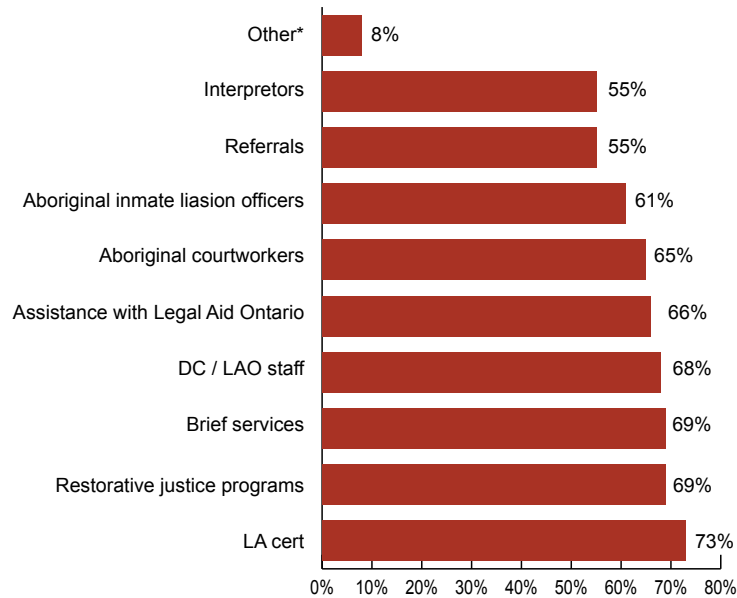


\*OTHER: Courtworkers x2, On site staff Lawyer, Private Bar Lawyer, Resource Workers, Youth, Restorative Justice Coordinator

Participants stressed that clients don't like "picking a name off a list" and that they would much prefer to go somewhere they already access for services that are culturally safe and where they have trusting work relationships. Overwhelmingly, participants wanted to see more cultural services offered and explained that this is a major gap.

Survey results highlight the gaps that AJS consultation participants identified, including interpreters, restorative justice programs, justice navigators and so on: (see the graph on the following page.)





\* OTHER: in person legal help, Gladue workers, Bail Supervision, Victim Services, Language Interpreter, Community/Family Support

As was stated in Iacobucci's Report, there is a profound mistrust of, and alienation from, the justice system, as it is "devoid" of Indigenous legal principles or cultural values. Survey responses with this observation, with respondents reporting that Indigenous Peoples feel a strong sense of distrust of LAO due to its perceived nature as a colonial institution, the lack of sustained funding or support for community justice programs and the lack of Indigenous representation within the ranks of LAO's staff.

While efforts have been made by way of Gladue/Indigenous Persons Courts (IPCs) to make the criminal justice system more culturally relevant, there are only 16 Gladue/IPCs in Ontario, five of which are in Toronto. Participants felt it was important for LAO to continue to support Gladue/IPCs by staffing them appropriately and working with other stakeholders on operations committees to ensure appropriate advocacy that addresses client's needs. This is especially true where Indigenous communities support the development of these specialized courts and/or they are located in those communities.<sup>25</sup> The feedback received was that the LAO staff working in these courts were more knowledgeable about community resources and effective in promoting Indigenous-driven justice programs such as Restorative Justice or Alternative Dispute Resolution.

61% of groups consulted recommended that LAO ensure adequate resources in courts and jails, including consistent duty counsel and LAWs. This was seen as lacking, yet of most importance in the North and within satellite courts.

The overwhelming sentiment was that Indigenous leadership want, in accordance with

<sup>25</sup> At the time of writing, only two Gladue/IPCs are located in a First Nations community: Bkejwanong (Walpole Island) First Nation and, as of July 2019, Wiikwemkoong Unceded Territory.

the UNDRIP, to assume more control over justice issues impacting their membership. In particular, some Indigenous Nations want to investigate the possibility of assuming control of legally-aided services. Section 14 of the LASA states:

14 (1) Subject to subsections (2) and (3), the Corporation shall provide legal aid services by any method that it considers appropriate, having regard to the needs of low-income individuals and of disadvantaged communities, the need to achieve an effective balance among the different methods of providing legal aid services, the costs of providing such services and the Corporation's financial resources, including...

(f) the funding of Aboriginal legal services corporations to provide legal aid services to Aboriginal individuals and communities.

That one Treaty territory/political organization (Nishnawbe-Aski Nation) was authorized under the Act and not others is seen as lacking transparency and contributing to lateral violence. Participants stated unreservedly that LAO needs to be proactive in developing a plan to assist in assessing the viability of additional Indigenous legal services corporations.

## INPUT OF INDIGENOUS STAFF AT LEGAL AID ONTARIO

*"Having representative staff is very important. We have insights into understanding the clients' needs and how they feel. We understand protocols and can deliver more culturally safe services. But LAO doesn't support its Indigenous staff. I was an LAO staff and I felt there was no support internally. I left."*

At the time of writing, LAO has not developed or adopted a recruitment or retention policy to improve representation of Indigenous staff. This has been a long-standing concern, first identified in the Development Paper in 2008.

The AJS Consultations including consultation with Indigenous staff, who were asked:

- How long have you worked at LAO?
- How has your experience been as an LAO employee?
- Do you feel that LAO supports your professional development?
- Do you feel that you are given sufficient cultural supports?
- Have you ever experienced discrimination in your workplace?
- Would you recommend LAO as an employer to other Indigenous Peoples?

- From your perspective, how important is it to service-delivery that there be Indigenous staff at LAO?
- How can LAO provide appropriate support to its staff who identify as Indigenous?
- Do you have any suggestions for how to improve service delivery for Indigenous clients and communities?

Consistently, LAO staff and former LAO staff who identify as Indigenous identified a lack of institutional awareness of the unique issues they experience as Indigenous Peoples. Staff felt that this failure to appreciate the unique history leads to assumptions about them as people and as staff.

Some staff communicated that they felt they had been exploited or used “as a token Indian” by the organization to promote a program or service, serve as a liaison, or otherwise. Frequently they are asked to write Land Recognitions, an exercise meant primarily for non-Indigenous Peoples in the spirit of reconciliation to educate themselves and acknowledge their place in the relationship as Treaty people. One staff explained the experience of walking with one foot in two worlds:

*“Working with vulnerable clients is already difficult work but when it is also attached to our own identity it makes the work even heavier. There is often a lot of pressure felt as an Indigenous LAO lawyer working within a colonial system that has done (and continues to do) so much harm to our communities. It is left up to us to try and walk in both worlds trying to satisfy both the colonial expectations of the system and organization and the needs of our Indigenous community members. Because of this, I feel as though I am forced to work twice as hard. My job doesn’t just stop when I walk out of the courtroom. I am constantly soft referring clients, fielding phone calls from the community service providers about their clients, providing outreach to multiple Indigenous service sites monthly, attending community events to meet people and ensure that I am recognizable to community members when they see me in the courts and passing on information to management and team members about Indigenous organized events that they should attend in the area. I am constantly keeping up to date on not only recent court decisions but keeping up on all of the local holistic initiatives that will help clients as well as consulting knowledge keepers, Elders and community leaders for advice in certain situations for and with clients. On top of all of that, at times there seems to be a lack of responsibility placed on non-indigenous staff to educate themselves and too much of a reliance on ‘the Indigenous lawyer’ to ensure that that piece of service is provided. I love working with my community but I understand that in my work, I am not only accountable to the courts and LAO but I am accountable to my community as well and this accountability is a privilege and a burden at the same time. Burnout is a very real thing for Indigenous staff for the above reasons.”*

Burnout was mentioned as a reason for leaving by many ex-LAO staff who took part in the consultations in other capacities. It seems that this concern increased in areas with high Indigenous populations being served. One staff commented that having other Indigenous staff at LAO, though they are few in number, is helpful to them. None of the respondents felt that LAO had given them sufficient cultural supports, though 55.6% felt that they were given some. One staff stated “I would love to work in a courthouse where I could smudge after a difficult case. I would love the opportunity to attend the periodic sweat on a work day without taking vacation.” Like Indigenous clients, Indigenous staff want supports that are based in culture to minimize the vicarious trauma they are exposed to in the course of their work. Supporting these identified needs is important to retaining Indigenous staff:

*“As an Indigenous person, I come with a lot of the same background factors that the clients do as a result of colonization. My mother, my aunts, my uncles all attended residential school. Working front line means that we are constantly exposed to things that trigger these “factors”. While it is good that LAO has HR programs in place for all staff, Indigenous staff want and need supports that are grounded in culture. I would like an Elder I can go to and a circle of support with other Indigenous staff who understand what I am experiencing.”*

Overwhelmingly, Indigenous staff and former staff at LAO felt that they had unique contributions to make as Indigenous Peoples and that Indigenous clients were more responsive to them as service providers because of their lived experience. 88.9% of Indigenous staff who completed a survey felt that it was “Very Important” to have representative staff at LAO. Some commented that clients will ask – and will not access the services – unless there is Indigenous staff, particularly in the family law context. One explained “Non-Aboriginal staff do not truly appreciate the plight of our people; they don’t understand what they’ve experienced, how to talk to them and Aboriginal clients do not trust non-Aboriginal staff”. This is consistent with what the AJS heard from Indigenous service providers.

At this time, there is no way for LAO to determine who among staff identifies as Indigenous, to connect Indigenous staff, or to provide appropriate supports to Indigenous staff, particularly those who work front-line with Indigenous clients. In addition, no formal recruitment or retention policies have been developed in order to increase Indigenous representation at the organization, particularly in the North where there are large Indigenous populations accessing LAO services. This was identified as a critical concern to the Indigenous communities, political organizations, service providers and users that the AJS met with as part of the 2019 consultations.

While some of those interviewed felt the organization was a great place to work, only 44.4% would recommend LAO as an employer to other Indigenous people. Those that commented thought this could be improved because the work itself is so meaningful. Much like the Indigenous service providers who participated, Indigenous staff expressed concern about

institutional commitment to the TRC or to improving services:

*“(LAO) is still a colonial organization that has a long way to go before I would consider it a truly safe space for Indigenous people both as a staff member and as a client. I understand that there are financial realities that are imposed by the province but we see from the experience of indigenous people in our system that the system doesn’t work for us. It is frustrating when we spend so much money delivering services the same way we always have without thinking of how effective we are actually being. LAO can be a very frustrating place to work. The inconsistency among management across the province is infuriating. If Indigenous services is a priority to the VP, DG or manager, we see it in the results and the relationship we have with the communities. When it’s not, the communities are left out and behind. From a provincial level...I don’t trust (the) organization to prioritize providing the necessary services to Indigenous communities over financial or political priorities.”*

Some of the staff who responded did not feel that their opinion mattered to management. They, like the Indigenous service providers, communicated that the issues were systemic in nature:

*“Invest our money in allowing communities to build their own sustainable justice systems rather than simply offering money for programs that we deliver in the mainstream system but on reserve. Invest in our communities long term!”*

Some staff, including ex-staff, indicated they did not feel comfortable participating in the consultations out of fear of repercussions. In some instances, former staff indicated that they had asked for exit interviews but stated they were dismissed or denied that opportunity. Indigenous staff wanted more opportunities to use this to provide input into policies and service-delivery and a vehicle to be established for doing so. One staff offered this insight:

*“As an organization, we need to stop, listen and make a real attempt to understand how we are continuing to affect the life of Indigenous Peoples in Canada today. We have a lot of work to do. It has to start from the top and it has to be a commitment.”*

Indigenous staff also wanted the organization to acknowledge their unique contribution by showing support in the form of observance of important cultural days (such as June 21st National Aboriginal Day/Indigenous Solidarity Day) and for a way to support each other, as Indigenous staff. Many participants the AJS spoke to agreed that an Indigenous Staff Council to provide input to the Executive Management as well as to bring them together for support would be a positive development.

Current and former Indigenous staff asserted that LAO must develop mechanisms for Indigenous staff to be supported in their work. Consideration should be made for professional and cultural growth, acknowledging that healthy staff provide better services to clients.

75% of staff surveyed in 2014-2015 indicated that they agreed that employing Indigenous staff would be beneficial to clients, colleagues and to the overall performance of the AJS and LAO.<sup>26</sup>

*The lack of trust in the legal system is the biggest challenge. Even if the client is thankful for your assistance they are always working in the framework that the legal system (and me by extension) is working against them. I would like more resources to assist from a legal perspective. (LAO staff, 2015)*

Overwhelmingly, staff felt that information and training provided from Indigenous communities and service providers was the most effective way to improve personal and organizational ability to serve Indigenous clients. Largely staff indicated that this happened through personal research, rather than through LAO related supports, tools or programs.

## REVIEW OF OTHER SIMILARLY SITUATED JUSTICE PROGRAMS

### INDIGENOUS JUSTICE DIVISION AT THE MINISTRY OF THE ATTORNEY GENERAL

As referenced earlier in this report, the Indigenous Justice Division (IJD) at the Ministry of the Attorney General (MAG) was a response to Justice Iacobucci's report, "First Nations Representation in Ontario Juries." Specifically, Recommendation 5 led to the creation of an Assistant Deputy Attorney General (ADAG) position responsible for justice issues impacting Indigenous Peoples, including the implementation of the Report.

Creation of this senior decision-making position required staffing that was hand-picked by the new ADAG, Kimberly Murray. Ms. Murray and her Division are guided by a 13-person representative Elder's Council who provide advice on all decision-making.

The ADAG and her Division would have ongoing responsibility for matters affecting First Nations and jury representation, as well as issues with the justice system, as deemed appropriate. In addition to overseeing the (Debwewin) Implementation Committee, the IJD:

- Provides strategic advice to the Attorney General on all justice matters impacting Indigenous Peoples.
- Assists in creating a culturally-relevant justice system by supporting and funding

<sup>26</sup> LAO 2013/14, 2014/15 Engagement Survey



Indigenous communities and organizations to provide justice services including:

- Restorative Justice Programs;
- Indigenous Bail Verification and Supervision Programs;
- Revitalization of Indigenous Legal Systems Programs; and,
- Indigenous Victims Services.
- Acts as Ontario's lead in the National Inquiry in Missing and Murdered Indigenous Women and Girls;
- Acts as co-counsel to the Coroner in Coroner's Inquests where the deceased is Indigenous;
- Provides Bimickaway (decolonizing/anti-racism) training to Ontario Public Services staff.
- Engages in research and studies as necessary to advance the interests of access to justice for Indigenous Peoples. Specifically, the report called for a study on legal representation that would involve Legal Aid Ontario, particularly in the north, that would cover a variety of topics, including the adequacy of existing legal representation, the location and schedule of court sittings, and related matters.

## **INDIGENOUS JUSTICE PROGRAM AT THE DEPARTMENT OF JUSTICE <sup>27</sup>**

The Department of Justice established an Aboriginal Justice Strategy in 1996 with a five-year mandate as part of the federal response to the recommendations of the Report of the Royal Commission on Aboriginal Peoples. The Aboriginal Justice Strategy consisted of community-based programs that are cost-shared with provincial and territorial governments and self-government negotiations in the administration of justice. The objectives of the Aboriginal Justice Strategy at that time were:

- To support Aboriginal communities as they take greater responsibility for the administration of justice;
- To help reduce crime and incarceration rates in the communities that administer justice programs; and
- To improve Canada's justice system to make it more responsive to the justice needs and aspirations of Aboriginal people.

The Aboriginal Justice Strategy was administered by regional co-ordinators in the Aboriginal Justice Directorate of the Department of Justice. It is a federally led, cost-shared program that has been supporting Indigenous community-based justice programs that use

<sup>27</sup> For more information, see: <https://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/index.html>



processes, grounded in the principles of restorative justice and Indigenous Legal Traditions for 25 years.

The programs supported by the Strategy are unique in that the services offered by each program are based on justice-related priorities and designed to reflect the culture and values of the communities in which they are situated. Although the primary focus for most community-based justice programs is diversion of offenders from the mainstream justice system, the programs also provide a range of other justice-related services from prevention to reintegration. The Aboriginal Justice Strategy was comprised of two funds: the Community-Based Justice Fund and the Capacity-Building Fund.

The federal Aboriginal Justice Strategy was renewed seven times: in 1996, 2002, 2007 (with enhanced funding), 2012, 2013, and most recently in 2014 extending its mandate until March 31, 2017.

The 2016 evaluation <sup>28</sup> found:

- The Aboriginal Justice Strategy had succeeded in supporting the establishment of community-based justice programs in many Indigenous communities;
- Community-based justice programs offer a range of types of alternative programming that are recognized as being culturally relevant to the people in those communities;
- For individuals accessing AJS-funded programs, recidivism rates are lower than for those not participating;
- These programs can help bring about transformational change in the lives of participants and in some cases improve community safety;
- Justice participants that have had experience working with the community-based justice programs indicated that they offer credible and effective alternatives.

Given the success of the Strategy, apart from lack of resources to support these programs more widely, and the overwhelming evidence that the crisis of Indigenous over-representation in the mainstream criminal justice and correctional systems is worsening, the federal government committed in 2017 to making the Aboriginal Justice Strategy a permanent program in the Department of Justice: the Indigenous Justice Program.

The mandate of the Indigenous Justice Program at DOJ remains substantially the same: To support Indigenous community-based justice programs that offer alternatives to mainstream justice processes in appropriate circumstances to further three objectives:

- To assist Indigenous people in assuming greater responsibility for the administration of justice in their communities;

<sup>28</sup> For more information, see: <https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/2016/ajs-sja/ajs-sja.pdf>

- To reflect and include Indigenous values within the justice system; and
- To contribute to a decrease in the rate of victimization, crime and incarceration among Indigenous people in communities with community-based justice programs funded by the IJP.

## SUMMARY

Similarly situated state agencies, including MAG and DOJ, have recognized the added value of Indigenous community-based programs as viable and effective ways to improve justice outcomes for Indigenous Peoples and provide funding for these initiatives. Significantly, both the provincial and federal governments have committed in a meaningful way to continue this work by creating permanent programs within their Ministries and Departments (respectively). This permanency signals organizational commitment to reduce barriers to meaningful input on policies and practices, and helps identify concrete ways to improve relationships between themselves – as actors in the justice systems – and Indigenous Peoples.

Support for the move towards permanent programs is found in improved relationships between the state and the Indigenous Peoples that both signals mutual respect and supports capacity-building.

## SYSTEMIC BARRIERS WITHIN LEGAL AID ONTARIO

*Indigenous Legal Services need to be a separate entity and must be accountable to the Indigenous community as well as Legal Aid, reporting back to Indigenous leadership about what they're doing to improve outcomes for our community members."*

### 1. STRATEGY VERSUS PROGRAM

Though the terms are sometimes used interchangeable, there are significant distinctions between a Strategy and a Program.

**Strategy****Program**

**Tend to be a time-sensitive/limited which lead people to understand them as “the flavour of the day”.**

Without fail, participants in the consultations identified this as very problematic and disrespectful. As one participant noted, “we are not the Indian problem for you to solve”.

**Permanent in nature, programs send the message that this is an important organizational commitment.**

Consistent feedback was given that LAO needed to demonstrate it is committed to improving justice outcomes for Indigenous People. Inherent in this is recognizing that Indigenous Peoples have unique status in Canada and this should be reflected in LAO’s governance structures. It is a step forward to improved relationships based on mutual respect and reconciliation

**Addresses discrete issues as they arise.**

Participants were deeply troubled by the “eleventh hour” nature of LAO consultations in the past. Many felt that they had never actually been consulted historically and that it would be preferable to have ongoing and sustainable communications protocols in place so they could continue to provide input about what is working and what improvements could be made.

**Identifies longer-term goals.**

When not forced to use all energy to address short-term proposal writing and evaluations to legitimize ongoing program support, programs can set longer term goals that address systemic problems rather than just symptoms. Programs have the ability to also address discrete issues as they arise.

**Usually developed as a response to an issue.**

Systemic discrimination in the justice system is a by-product of colonization. This is ongoing and requires approaches that look at things on a systemic level. Participants stated consistently that most LAO services are offered far too late to actually help Indigenous clients and

**Is pro-active rather than reactive and acknowledges that quick-fixes have unintended consequences.**

Participants advised that Band-Aid solutions and reactive decision-making have proven ineffective in improving justice outcomes for Indigenous Peoples or in improving community safety and wellness. Indigenous communities want to invest in

**Strategy**

communities. As participants pointed out, by the time a client qualifies for a LAO certificate, they are already living well below the poverty line and facing a jail sentence or having their children taken away. While these clients still need to be supported, energy should be invested into ensuring community members don't end up in this position.

**The short-tenure tends to create service gaps and poor communications through staff turnover.**

Participants stated that an approach that uses “quick fixes” actually undermine Indigenous communities’ ability to implement real solutions and often result in unintended consequences like dependencies and gaps in services.

**Program**

preventative and restorative processes that are grounded in culture as the way to eliminate overrepresentation. The statistics support their argument that the status quo isn't effective in this regard.

**Supports relationship-building.**

Participants consistently referred to LAO's commitment to reconciliation as requiring an immediate change away from short-term models built without Indigenous communities' input. LAO's failure to make meaningful organizational commitments to Indigenous people, as it has with the development of a permanent French Language Services program, is not only inappropriate, it is offensive to them as the original Peoples.

**Report to other departments or programs.**

Participants felt that this was a continuation of colonial mindsets and agendas. Participants pointed out that LAO has had “increasing Indigenous representation in decision-making and advisory capacities” as an institutional goal since the beginning of the AJS. The failure to change structures to ensure there is an ability for the AJS to do anything other than advise at a lower level was seen and communicated to AJS staff as blatantly racist.

**Have a measure of autonomy in decision-making.**

Restructuring the AJS into a permanent program with some measure of authority over Indigenous legal services was seen as an obvious answer to what is believed to be ineffective and inappropriate service-delivery. This program should then be accountable not only to the organization, but to the Indigenous clients and communities it serves.

**Strategy****Program****Smaller in scale.**

The small size and budget of the AJS was criticized as undermining the remedial purpose of singling out Indigenous People as a priority group. Given the disproportionate number of Indigenous clients LAO serves, the small scale raised concerns as to why the institutional commitment is not reflective. Participants stated unequivocally that this was tokenism.

**Demonstrate institutional commitment.**

Participants indicated that making Indigenous legal services a permanent program would signal a change in commitment and approach to achieving sustainable and meaningful change. Many felt the program should be resourced at a level representative of the clients we serve. At a minimum, it was flagged as problematic that one lawyer was expected to advise on all areas of law impacting Indigenous Peoples.

Participants in the AJS consultations felt strongly that the status quo could not continue and that LAO needed to adopt a permanent and more robust Indigenous legal services program or division.

*“Permanent, longer-term planning is necessary to grapple with the crisis of growing overrepresentation. The long term goal needs to eliminate that overrepresentation as the TRC Calls tell us to do. There should be evaluation at interim segments to determine progress and if there is need to adjust along the way.”*

Many were concerned to hear how little and in what manner the AJS budget was allocated and suggested:

- Dedicated funding for Indigenous services based out of LAO’s core budget but in an amount that is consistent and representative of the number of Indigenous clients LAO serves; or
- An LAO Indigenous services program be developed to manage the budget of services for all clients who self-identify as Indigenous, and that the budget be set annually in accordance with the numbers of Indigenous clients LAO serves.

Other suggestions included designated budgets for community engagement and Public Legal Education as part of an Indigenous legal services program's core mandate and budget. All participants felt that the AJS needed to be more robust than just a single Policy Counsel.

Some participants indicated that it was inappropriate for LAO to maintain its AJS under the Policy portfolio, and to fail to give it the same recognition as French Language Services. While participants recognized it is important that French language services, which are codified in ss.16-23 of the Canadian Charter of Rights and Freedoms and in the Official Languages Act<sup>29</sup>, be offered in a comprehensive way that demonstrates real commitment, it was stressed that LAO should similarly recognize the unique legal status and laws impacting Indigenous Peoples in its organizational composition.

*"It's extremely offensive that French Language Services is a permanent program and the AJS is not."*

Participants stated that LAO should strongly consider transforming the AJS to a permanent program with appropriate funding going forward.

## 2. REGIONAL DISPARITIES

Participants noted repeatedly that the AJS has always been Toronto-centric. While moving AJS Policy Counsel to Northern Ontario was stated to be an important first step, it was felt that is not sufficient to address the unique considerations of Indigenous Peoples living in the north, or in First Nations communities.

*"LAO is very urban-based. Individual communities – even when they are large like ours – are always overlooked."*

Many felt that the north was neglected and that there were very real barriers to appropriate and quality services. These stated barriers include:

- Recruitment of lawyers to practice in those areas of the Province;
- Retention of lawyers who often experience "culture shock" when they are hired for a position in the North;

<sup>29</sup> Official Languages Act, (R.S.C., 1985, c. 31 (4th Supp.)).

- Transportation issues including lack of public transportation and increased cost of gas/ increased distance that doesn't get factored in to an Indigenous Person's ability to attend court or programs, and for which no submissions are made by counsel;
- Isolation and lack of services in the North, particularly shelters and emergency housing;
- Food insecurity and increased cost of living not being factored into Financial Eligibility Test;
- Inadequate staffing: many participants felt that the staffing complement was not sufficient in Northern Ontario. It was felt that Duty Counsel are too busy and pulled in too many directions to provide assistance that leaves clients with an understanding of their rights and obligations, or consequences of court proceedings;
- Inadequate infrastructure: participants noted that some Duty Counsel do not have offices where a client can have a private conversation and clients are expected to get advice and give instructions in a crowded hallway. Duty Counsel in the North are not visible to Indigenous clients and service providers as a result; and
- Inequitable program funding for Restorative Justice and Alternative Dispute Resolution processes which are more meaningful for Indigenous clients and communities and are mandated by legislation (such as the CYFSA). It was felt that Toronto gets all the resources in this regard.

*"In the North, roughly 70% of the Indigenous clients are displaced and experience homelessness. Two people who we were assisting in the criminal courts recently died of exposure. A strategy or approach to service delivery that doesn't understand the unique needs of the clients it serves is useless."*

*"LAO should be advocating for proper space for communication between lawyers and their clients. It's totally inappropriate. This is why it would be better in Indigenous organizations."*

Overall, communities and organizations consulted in Northern Ontario felt that LAO didn't have a grasp on the ways the justice system systematically discriminates against Indigenous Peoples in their areas. For example, Indigenous clients from remote communities in Northern Ontario (Treaties 3, 5 and 9) are displaced from their communities and support systems when they are held for bail. A participant in Kenora pointed out that Indigenous People are flown down for a bail hearing but then told they are "Not Ordinarily Resident" pursuant to s.515 of the Criminal Code and therefore require a cash deposit to



secure bail. Participants wanted to see braver advocacy that challenged some of these practices. This is but one example of structural racism in the criminal justice system and LAO must develop and roll-out training to support their staff and certificate lawyers in using Gladue principles in the remedial fashion they were intended. Many wanted to see a staff model, based out of Indigenous organizations, be made available as an option for clients as opposed to just Duty Counsel and private bar lawyers.

Like the Auditor General, participants expressed concern about the Guaranteed Daily Rate (GDR). The AJS consultations revealed Indigenous communities' concerns that lawyers were using the GDR program improperly and that Indigenous clients and communities feel like they are "a cash cow" for these lawyers. This program should be re-evaluated in collaboration with Nishnawbe-Aski Legal Services Corp.

Significantly, it was noted that the remoteness of Indigenous communities makes Indigenous women vulnerable to violence and there was a plea to increase awareness of issues of violence against Indigenous women, Missing and Murdered Indigenous Women and Girls, and human trafficking through training developed in collaboration with Indigenous women's organizations. This would help ensure that LAO staff and certificate lawyers are more pro-active in assessing plans of release, conditions, etc., for potential risk.

Another pressing issue for participants in Northern Ontario included availability and appropriateness of interpretation services. Participants stated that often legal services and information is provided without an Interpreter, including advice about judicial interim release, and that often the only time an Interpreter is available is in court, when provided by MAG. Others expressed concerns about lawyers using family members to provide this service, which put people in uncomfortable situations, particularly in the child welfare context. LAO should review its policies around disbursements for Interpretation services for First Language speakers at all stages of legal proceedings.

### **3. ORGANIZATIONAL COMPLACENCY IN NEGATIVE JUSTICE OUTCOMES**

Much like Howard Sapers found in his report on federal corrections that Correctional Service Canada was inadvertently contributing to over-representation, participants found that LAO was complicit in negative justice outcomes for Indigenous Peoples through its policies and practices.

When asked if LAO was seen as an ally, the spectrum went from statements like *"it could be, with trust built over time"* and *"sometimes, depending who is hired in that area"* to *"LAO is not well respected or regarded in our area"* and *"Indigenous people don't respect LAO and you're seen as part of the same oppressive system"*. This complacency was identified in three main areas: incentivizing guilty pleas, contributing to lateral violence among Indigenous communities and organizations, and not taking a strong enough stand on violence and discrimination against Indigenous women and girls.

**WHAT WE HEARD****PROPOSED****Guilty Pleas**

Block Fees were admonished by participants in the consultations as they are believed to incentivize guilty pleas, particularly given lawyers are able to bill an extra five hours under the Gladue Enhancement.

90. LAO should develop a mechanism for auditing lawyers on block fee billings where clients have self-identified as Indigenous.

91. LAO should evaluate the block fee system for appropriateness and efficiencies when billed in relation to Indigenous clients.

Lawyers are not believed to be providing adequate services and are pressuring clients into pleading guilty.

92. LAO develop a policy that requires that lawyers representing Indigenous clients must get written instructions that outline whether a proper s.606 inquiry was conducted.

LAO is not enforcing Panel Standards.

93. LAO should create mechanisms for enforcing Gladue Panel Standards to make lawyers more accountable to the clients and communities they serve.

The Gladue Enhancement was identified as problematic since participants felt it was not actually resulting in increased or better work being done by certificate lawyers. Many felt it was a “money grab” for lawyers.

94. LAO should develop a policy that requires lawyers who are representing Indigenous clients to provide closing letters to clients and to LAO explaining what work was done.

95. LAO should develop a policy that lawyers must fill a Gladue worksheet out before they bill that requires them to identify from an enumerated list what steps they took to provide appropriate services entitling them to a Gladue Enhancement.

**WHAT WE HEARD****SOLUTION PROPOSED**

96. LAO should consider replacing the Gladue Enhancement with improved and informed discretionary billing, done through an Indigenous legal services program at LAO where staff understand the complexities of legal issues impacting Indigenous clients and can better make assessments of appropriateness of billing and value for tax payer dollar.

**Lateral Violence**

LAO funding of programs and services to individual Indigenous organizations has not been transparent.

97. LAO should require that all program funding go through a transparent process with adequate and inclusive notice.

Indigenous organizations receive short-term funding – usually annually – from LAO which means organizations have a difficult time training and keeping staff. When staff go from agency to agency, it creates tensions between organizations.

98. Longer-term or evergreen funding of community-based programs should be considered.

**Violence and Discrimination Against Indigenous Women and Girls**

LAO staff and certificate lawyers do not have sufficient understanding and training on issues of MMIWG or Human Trafficking and its impact on Indigenous Women and Girls in the justice system. This ignorance puts these women and girls at further risk by proposing plans at bail that are unsafe and in failing to make proper submissions to preserve their safety.

99. LAO should work with Indigenous communities and service providers to develop and deliver training on issues of MMIWG and Human Trafficking.

100. LAO should work with the Law Society of Ontario to get accreditation for this training.

**WHAT WE HEARD****SOLUTION PROPOSED**

Participants felt that the services offered were not relevant or helpful to Indigenous Women and Girls because they failed to take into account their unique crimeogenic factors and life circumstances. As a result, they will not access these services and instead go unrepresented.

101. LAO should consider service-delivery models that consider the unique needs of Indigenous Women and Girls, including housing services inside Indigenous Women's shelters, Ontario Native Women's Association offices and other Indigenous Women's organizations, or other Indigenous service provider agencies.

Some participants identified concerns about improprieties of lawyers working with Indigenous Women and Girls.

102. LAO should work with Indigenous service providers to develop complaints processes that will be utilized by Indigenous Women and Girls and to ensure concerns are addressed in way that demonstrates zero tolerance.

## SERVICE DELIVERY MODEL ISSUES

Many of the concerns about service delivery models have been discussed at length in this Report including:

- Inaccessibility and ineffectiveness of online and telephone services;
- Need for culturally safe and representative services; and
- Need for partnership and collaboration with Indigenous service providers.

The consultations revealed a number of best practices/successes where LAO was responsive to local needs.

### **Case Study #1: Indigenous Legal Services – Lambton County**

This unique service delivery model uses a staff lawyer model in innovative way to identify and ameliorate the systemic issues that contribute lack of Indigenous participation through meaningful partnerships that allow Indigenous communities to identify their legal needs. Legal services are provided in three ways: Duty Counsel, "Counsel of Record" matters and community outreach.

- **Duty Counsel:** The staff lawyer is assigned to Indigenous Persons Court in Sarnia, as well as the Walpole Island – OCJ satellite court in the areas of criminal, family and CAS matters. The staff lawyer conducts weekly full day Duty Counsel Clinics on Walpole Island First Nation, inside the Social Services building, and Aamjiwnaang First Nation, at the community center. Appointments are jointly scheduled by community partners and LAO, and clinics are advertised publically.
- **Counsel of record matters:** In order to provide more comprehensive services and improve and maintain credibility within the Indigenous community and with other justice system participants, the staff lawyer appears as counsel of record and conducts trials. This has helped to build trust with the clients and community because the staff lawyer is able to take on more complex matters and doesn't have to refer Indigenous clients out to other service providers. There is added discretion in the types of matters they can take on.
- **Community Outreach:** One unique aspect of Indigenous Legal Services program is the commitment to create and maintain a trusting relationship between the communities and LAO. Necessary to that relationship is maintaining a trusting relationship with all justice participants which is done through taking the lead on court committees, Public Legal Education sessions as directed by community need, and Community Clinics. Some of the clinics are embedded like Walpole Island and Aamjiwnaang, but others are organized by referrals with community partners including police, social services and politicians interested in understanding and mediating issues.

This program ensures access to justice by removing the structural barriers (geography, lack of transportation, unwillingness of private bar to travel to Walpole Island court, lack of reliable access to internet and cell phone service) and ensures culturally safe legal services. Ensuring Indigenous staff means that they are able to provide representative services in a way that fosters trust.

## Case Study #2: Aboriginal Legal Services

Formerly Aboriginal Legal Services of Toronto, Aboriginal Legal Services (ALS), was established in 1990 following a needs assessment by the Native Canadian Centre of Toronto in the mid-1980s. The Centre had been operating the Aboriginal Courtworker and an Inmate Liaison programs for Indigenous people in Toronto but concluded an agency dedicated to providing legal services to Indigenous people was needed. Governed by a Board of Directors, ALS' mandate is "to strengthen the capacity of the Aboriginal community and its citizens to deal with justice issues and provide Aboriginal controlled and culturally based justice alternatives."

ALS has innovative justice programs that are grounded in culture. For example, ALS offers a number of Indigenous justice programs. The Community Council was the first urban Indigenous justice (diversion) program in Canada, starting in 1992, and

is the busiest, dealing with over 200 cases per year. The Giiwedín Anang Council is a culturally-based Alternative Dispute Resolution program for families involved in the child welfare system. Their approach to dispute resolution comes from the philosophy that the Indigenous community knows best how to help a community member in crisis. The Giiwedín Anang Council – made up of volunteer Elders and community members from the Indigenous community in Toronto – allows parents, children, extended family, child welfare authorities and others with concerns for a child's future, to get together and develop a plan that will meet the needs of the child and creates the space for all parties to have a voice in a culturally relevant and integral way.

ALS was also the first organization in Canada to write Gladue Reports – they started this work in 2001. The ALS Gladue Report program, partially funded by LAO, provides Reports annually in cities across the province to ensure judges can fulfill their statutory responsibilities under s.718.2(e) of the Criminal Code when sentencing an Indigenous Person.

ALS offers Clinic Law services, but in an enriched environment that allows for cultural supports and wrap-around care. In addition to essential front line services, advocacy and representation in OW/ODSP, tenant rights, and human rights matters, ALS engages in law reform, community organizing, public legal education, and test case litigation. ALS has litigated a number of precedent-setting decisions, including *R v Gladue*, *R v Ipeelee*, *R v Kokopenance*, *R v Barton*, *Ewert v Canada*, and many others. ALS has also developed an expertise representing families at inquests into the deaths of their loved ones pursuant to the Coroners Act.

ALS also has an innovative Victims Services program. Court support, assistance and representation at the Criminal Injuries Compensation Board, and advocacy with police and other justice participants are core services. ALS also conducts community legal education and information sessions on the rights of Indigenous Persons experiencing violence.

ALS explains that the reason their model works is because Indigenous clients want embedded services in Indigenous service providers.

## CONCLUSION

*“LAO is self-legitimizing. Your legitimacy should come from the Indigenous Peoples who you serve.”*

It is concerning from a policy standpoint that the communities LAO serves not only communicated issues around the ineffectiveness of some of LAO services, but that our decision-making and structures are actually furthering Indigenous alienation from the justice system. This is a matter the Board will have to take on in the coming months and years as a priority. It is recommended that any Proposal for improving services for Indigenous clients and communities be read together with this Report to understand the systemic nature of the problems, as well as the practical and workable solutions that Indigenous communities and organizations proposed.

At each consultation meeting, participants were asked what a successful Aboriginal Justice Strategy would look like. The responses were consistent and clearly demanded increased participation and more accountability, and that culture must be at the heart of everything if LAO is to improve outcomes for Indigenous Peoples.

- “It wouldn’t exist. We wouldn’t need it because we are no longer entangled in the criminal justice or child protection systems.”
- “It would be informed by an Elder’s Council that reflects the needs of different regions.”
- “The role could be to facilitate training for front line staff, working with Indigenous service providers, Elders and Knowledge Keepers to increase cultural safety in legal services.”
- “It would stop trying to always get us to adjust to zhaaganosh (non-Indigenous / western) systems and values. It would start with us.”
- “It would remove barriers to accessing services, such as transportation and lack of trust.”
- “It would recognize that our culture is the centre of our healing and must be at the centre of all services.”
- “It would partner with Indigenous Peoples, organizations and lawyers for a united voice.”
- “More of this. More honest dialogues and relationships. This is how we need to work together.”
- “It would be a permanent program with a budget based on the number of Indigenous peoples trapped in this system and would be focused on preventative programs based in restorative practices. LAO would see this as an investment rather than an expense.”

It is clear from these and other responses, Indigenous communities did not want this consultation process and this resulting Report “to gather dust on a shelf” like so many others have. Nor did they want to see the status quo. They want to see positive change.

## **LEGAL AID ONTARIO HAS TO BE AN ACTIVE PARTNER IN RECONCILIATION**

The overwhelming message that came from the consultations was that LAO has significant



room to improve in the types and mechanisms of service-delivery for Indigenous clients and communities. Many of these changes would be easy and relatively inexpensive to do. Others will require more extensive consultation and thorough examination for viability. While there were many criticisms of LAO and its lack of accountability to Indigenous communities, there was a strong willingness to work together. Areas for collaboration include: providing input on policies, developing and delivering public legal education and cultural safety training, and service delivery.

In order to demonstrate organizational commitment to improve on what we heard was not working and to find cost-effective service delivery mechanisms that help LAO fulfil its mandate to promote access to justice throughout Ontario for low-income individuals, it is essential that LAO make symbolic and strategic commitments in the form of developing a permanent Indigenous legal services program or division to implement the recommendations that LAO received and developed through the consultation process. This is an essential step towards reconciliation by acknowledging an institutional understanding of the unique legal and constitutional status of Indigenous Peoples in Canada.

Clearly the recommendations listed below cannot all be implemented at the same time. It is also abundantly clear that resolving the issues raised about Indigenous alienation from LAO services is going to take time. Consequently, like the recommendations that came out of the Iacobucci Report, implementation of various recommendations will need to be “prioritized, and milestones and targets scheduled”.

## **OBJECTIVES OF AN INDIGENOUS LEGAL SERVICES PROGRAM/DIVISION AT LEGAL AID ONTARIO**

Indigenous Peoples in Canada – First Nations, Inuit, and Métis – are unique from other equity-seeking groups given their distinct constitutional and Treaty relationships with the State. In addition, the fact that Parliament has singled out Indigenous Peoples in remedial criminal, correctional and family legislation requires recognition of the distinct status in the form of explicit policies, programs and commitments that coincide with this legislation. LAO’s objectives in renewing or rebuilding a plan to improve services for Indigenous Peoples must respect this distinction. The four main objectives guiding the work of an Indigenous justice program at LAO must include:

- 1. Self-Determination:** to assist Indigenous People in assuming greater responsibility for the administration of justice services for their communities.
- 2. Justice:** to reflect and include Indigenous values within the justice system.
- 3. Equity:** to ameliorate gaps in services and improve justice outcomes for Indigenous Peoples in Ontario.
- 4. Dignity:** to provide culturally safe legal services that are strengths-based and trauma-informed, guided by the legal needs of the Indigenous clients and communities

LAO serves.

Indigenous Peoples remain overrepresented in the criminal justice, correctional and child protection systems at crisis levels. The need for innovative and responsive service delivery must remain an organizational priority, even in difficult financial times. As such, a timeline for the evaluation of specific service delivery issues must be developed that demonstrates commitment to seriously consider the feedback and suggestions raised by those who participated in the AJS Consultations.

LAO has had to make – and going forward, will continue to have to make – difficult decisions about how to utilize its funding. Cutting what isn't working and finding practical and cost-efficient ways of improving services is essential both for improving justice outcomes for Indigenous Peoples, and for ensuring an effective, efficient use of funding. A permanent Indigenous Legal Services Program (ILSP) is required to demonstrate symbolic and real commitment to remedy the overwhelmingly consistent feedback that the AJS received.

LAO has made public commitments to work in partnership with Indigenous Peoples, and federal and provincial governments to eliminate Indigenous overrepresentation in incarceration – both youth and adult – in accordance with the Calls to Action made by the Truth and Reconciliation Commission. The organization must, as part of this commitment, ensure that every policy being considered specifically addresses how the policy could impact Indigenous clients and communities. LAO should build on the relationships that have been born out of the consultation process to help answer those questions.

## SUMMARY OF RECOMMENDATIONS

The AJS consultations yielded a number of recommendations, some of them at the micro/direct service level and some at the macro/organizational level. The following 20 recommendations are based directly on the AJS consultation feedback, and in keeping with our commitment to the Truth and Reconciliation Commission's Calls to Action and to the consultation process that specifically stated any proposal for renewal must be informed by the input LAO gets. These recommendations will form the basis of that proposal.

**Recommendation #1:** LAO report back to AJS consultation participants within 3 months of the Board of Directors receiving this Report, on the results of the consultations. Participants should be provided with a copy of this Report.

**Recommendation #2:** LAO develop and maintain a list of Indigenous communities, political organizations and service providers for communications purposes.

**Recommendation #3:** LAO develop a mechanism for ongoing communications.

A bi-annual newsletter outlining LAO budgets, strategic plan, new or changing programs and policies should commence. This newsletter should provide clear guidance on how to provide further feedback based on what is communicated.

**Recommendation #4:** LAO should establish a permanent Indigenous Legal Services Program to provide strategic direction to LAO on all matters of policy and program development/delivery that impact Indigenous Peoples.

**Recommendation #5:** LAO should hire a Director or Vice-President (VP) to provide strategic direction to the organization and administer ILSP programs and services. The Director/VP would be responsible for:

- Developing a timetable for implementing the Recommendations with milestones to achieve measurable targets as appropriate;
- Establishing protocols for meetings, decision making, and related matters of the ILSP;
- Providing strategic direction on policies, programs and services that impact Indigenous clients and communities.
- Issuing annual reports to LAO's Board of Directors on ILSP activities, spending, consultation and community input, and emerging legal needs.
- Ensuring there is proper communication with other justice stakeholders, including the Indigenous Justice Division at the Ministry of the Attorney General and the Indigenous Justice Program at the Department of Justice in order to achieve a cooperative and collaborative working relationship;
- Ensuring there is proper communication and adherence to protocol with Indigenous communities and political organizations in order to build proper accountability and transparency;
- Developing responses to these recommendations to the Board of Directors for approval; and

**Recommendation #6:** An Indigenous Business Analyst and administrative team should be hired to support the ILSP Director/VP.

**Recommendation #7:** Enhanced Staff Lawyer/Area of Law Specialists models should be examined for viability where the data supports it. LAO should consider such models where 20% or more of the clients served in a particular area have self-identified as Indigenous. These lawyers could also:

- Provide strategic advice to the ILSP VP on emerging legal needs and caselaw; and
- Collaborate with Indigenous communities and service providers to develop and deliver Public Legal Education.

**Recommendation #8:** LAO should recognize Restorative Justice, Alternative Dispute Resolution, Gladue Report and Elder/Knowledge Keeper service as core services and support them through funding, staffing and training.

**Recommendation #9:** The budgets and expenses for Indigenous core services would be subject to approval from the Board of Directors and, where approved, resources administered directly out of a dedicated Indigenous Legal Services Program budget.

**Recommendation #10:** LAO's ILSP should be responsible for decision-making. This cannot be a token position and the Lead/VP should have the authority to provide advice, based on input from the Council, to the rest of the Executive.

**Recommendation #11:** LAO's ILSP should consult with Indigenous communities to develop performance measures that more accurately measure value to Indigenous service-users, and take steps to address pressing service-delivery concerns such as the ineffectiveness and inaccessibility of telephone and internet services.

**Recommendation #12:** LAO should develop a Community Council (Council) that consists of Elders/Knowledge Keepers, Youth, and representatives of different Indigenous Nations and Indigenous staff across districts to advise on all matters of policy and training.

**Recommendation #13:** LAO should develop a policy for the fair and appropriate remuneration of Elders/Knowledge Keepers.

**Recommendation #14:** LAO should work with the Council, and with Area of Law specialists to develop and deliver training on cultural safety and best practices when working with Indigenous clients.

**Recommendation #15:** LAO's Board of Directors and Executive Management should take anti-oppression, decolonizing training, in accordance with approved Proposal in 2018.

**Recommendation #16:** LAO should work with Human Resources and the Diversity Officer to develop recruitment and retention strategies to improve Indigenous representation at LAO. Particular attention should be paid to the North and the need to create incentives should be evaluated. Policies to promote the professional and cultural development of Indigenous staff should be explored.

**Recommendation #17:** LAO, through its ILSP, should work with the Law Society of Ontario to develop accreditation processes to allow Indigenous communities and service providers to provide training that will be considered for Equity Diversity and Inclusion hours.

**Recommendation #18:** LAO should, through its ILSP, re-evaluate the Gladue Enhancement for effectiveness. This evaluation must be done in collaboration with

Indigenous communities and service providers/users.

**Recommendation #19:** LAO should, through its ILSP, re-evaluate Gladue Panel Standards and do the following:

- Establish a policy for how Gladue Panel Standards will be evaluated and enforced;
- Establish a communications plan to advise the private bar about the new policy on Gladue Panel Standards;
- Develop Panel Standards for lawyers representing Indigenous clients in Child Protection matters; and
- Develop a communications plan to advise the private bar about the new Child Protection panel.
- In collaboration with Indigenous communities and service providers, develop service-user input mechanisms.

**Recommendation #20:** LAO, through its ILSP, should investigate and report to the Board of Directors service delivery options that improve services for Indigenous clients and communities while operating within LAO's fiscal allocation.

# APPENDIX

## APPENDIX A: CONSULTATION QUESTIONS

### LAO SERVICES

- Are you aware of the services LAO offers?
- Do you know how or who to recommend / ask for services offered through LAO?
- What is currently working in regards to LAO services for Indigenous clients?
- What is not working?
- Are there specific areas of law (i.e wills and estates) or types of legal services (i.e. restorative justice programs) that are not currently being offered but should be?
- If you have LAO funded programs, to what extent and in what ways do they contribute to increasing community safety and community wellness?
- How has your community member's experience with Duty Counsel been?
- Are community member's interactions with Duty Counsel or staff at courthouse:
- Respectful?
- Culturally relevant/safe?
- Competent?
- Do you have any feedback on the kinds of training should LAO staff be undertaking?
- Are telephone services an accessible way for your community members to receive services?
- Are web-based services helpful? Are they accessible?
- Are there ways LAO can make it easier for your community members to apply for Legal Aid?
- Do you have any feedback about how lawyers who accept LAO certificate representing Indigenous clients?
- Is there anything you think should be added/included to Gladue Panel standards?
- Should there be a specialized panel for lawyers representing Indigenous families in child protection matters?
- Were you aware of LAO's complaints policy? Is this an effective way for community members to let LAO know about a service they are unhappy with?
- Are you aware of any gaps in service?
- Do you have any feedback on lawyers who rep Indigenous clients and families in child



protection matters?

- How can LAO services in this area be more culturally safe/responsive?
- Do you have ideas to help the Aboriginal Justice Strategy shape policy in this regard?
- Are LAO lawyers sensitive to the issue of MMIWG and human trafficking?
- Do your community members have access to Gladue Reports?
- Are certificates being approved in a timely way?
- Is there anything that can be improved to meet the unique needs of Indigenous women being addressed? Indigenous youth?
- Are there any considerations LAO should keep in mind when assessing First Nations, Inuit or Métis clients for financial eligibility?
- Were you aware of the “loss of liberty” test? Any feedback?

## **RELATIONSHIP**

- Is LAO seen as an ally or supportive agency in your area?
- Is there a better way for LAO to share information about services and policies to your community members?
- How should LAO be consulting the community?
- Is there anything else LAO should be doing to ensure Indigenous representation and participation within the organization and its advisory systems?
- How important is it that LAO have representative staff?
- How important is it that LAO have Indigenous participation in Advisory and decision-making positions?
- “Relationships first, business later.” How can the Aboriginal Justice Strategy be better at building those relationships?

## **ABORIGINAL JUSTICE STRATEGY**

- Do you have any suggestions for the structure or work of the AJS that could improve accountability to the Indigenous communities that LAO serves?
- What role should Indigenous communities play in determining the direction of the AJS?
- Do you have any feedback on whether the Aboriginal Justice Strategy should continue as a Strategy with pre-determined timelines or become a permanent Program at Legal Aid? Why do you think so?
- What role does the Aboriginal Justice Strategy and Legal Aid have, if any, in being allies

for change?

- Is there a need for LAO to continue to be involved in justice issues impacting Indigenous peoples?
- Is there a continued need for an Aboriginal Justice Strategy in particular?
- Historically, LAO gauged need based on data and feedback from staff/its' Aboriginal Issues Advisory Committee. What role can/should community play in determining the priorities of the AJS?
- What would a successful Aboriginal Justice Strategy look like?

## Appendix B: List of communities/organizations consulted\*

- Aboriginal Legal Services
- Akwesasne First Nation
- Atikameksheng First Nation
- Barrie Native Friendship Centre
- Centre of Excellence for Matrimonial Real Property
- Cochrane
- Curve Lake First Nation
- Dufferin County Cultural Resource Circle
- Dryden Chamber of Commerce
- Enaahitig Healing Lodge
- First Nations Caring Society
- First Nations Technical Institute
- Fort Frances
- Ga Beh Shoo In Aboriginal Men's Shelter
- Georgian Bay Native Friendship Centre
- Grand Council Treaty 3
- Hamilton
- Independent First Nation Alliance
- Ininew Friendship Centre
- John Howard Society
- Kenora
- Kenora Métis Council
- Kingston Indigenous Patient Navigator South East Regional Cancer Program
- London
- Meno-Ya-Win Health Centre
- Métis Nation of Ontario
- Mohawk Council of Akwesasne
- Mohawks of Tyendinaga
- Nechee Friendship Centre
- N'Amerind Friendship Centre
- Napanee
- Nipissing Parry Sound District Children's Aid Society
- N'Swakamok Native Friendship Centre
- Nokiiwin Tribal Council
- Nishnawbe Gamik Friendship Centre
- Nogojiwanong Friendship Centre
- North Bay Indigenous Friendship Centre
- Odawa Friendship Centre
- Ontario Native Women's Association
- Ontario Métis and Aboriginal Association
- Onigaming First Nation
- Ottawa
- Peace Builders International
- Rainy Lake Chiefs Secretariat
- Red Lake Indian Friendship Centre
- Red Rock Indian Band
- Sarnia Lambton Native Friendship Centre

- Sault Ste. Marie Indian Friendship Centre
- Seventh Generations Midwives
- Six Nations of the Grand River
- Sudbury
- Thunder Bay
- Timmins
- Toronto
- Tungasuvvingat Inuit
- United Chiefs and Councils of Mnidoo Mnising
- United Native Friendship Centre
- Victim Witness Assistance Program (North Bay)
- Wabigoon First Nation
- Walpole Island First Nation
- Wiikwemkoong Unceded Territory

\*Note: Participants engaged in their personal capacity and their views are their own, and not necessarily the formal position of the political organization with whom they are affiliated.

## APPENDIX C: SURVEY RESULTS

### METHODOLOGY:

- 62 surveys were collected from 30 different meetings from across the province.
- 2/3 of the surveys were completed by Indigenous service providers and the rest by community members.
- While the vast majority of participants were Indigenous, the consultations also included service providers and individuals who were non-Indigenous,

### SUMMARY OF DATA CONCLUSIONS:

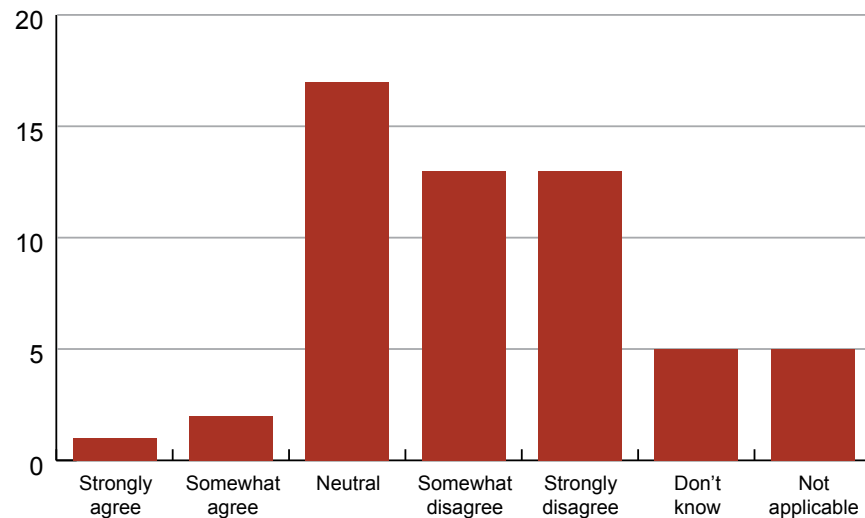
The following is a summary of the conclusions derived from the aggregate survey data.

- LAO services are not accessible, adequate, or culturally responsive to Indigenous clients and communities.
- Indigenous clients continue to prefer and rely heavily on Indigenous service providers, community workers and other legal professionals in the justice system to help them deal with their legal issues.
- Indigenous communities and service providers do not feel that LAO has fostered meaningful relationships, effective communication, or adequate participation of community in decision making or service development.
- Indigenous communities and service providers feel it is important that LAO continue to have an Aboriginal Justice Strategy and support community justice programs. Further commitments are required that recognize the unique legal status and needs of Indigenous Peoples.

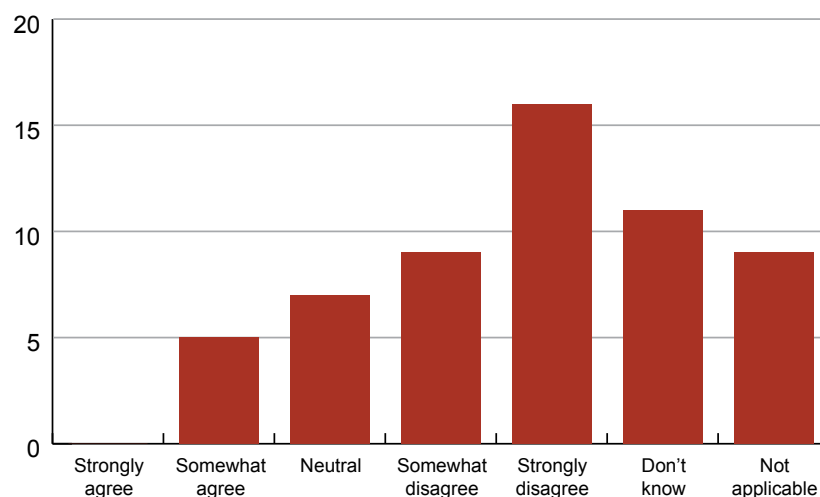
### SURVEY RESPONSES & DATA ANALYSIS

1. Please rate your clients experience in applying for Legal Aid and finding a lawyer. (92% response rate)

### Applying for Legal Aid was easy



### Finding a child protection lawyers was easy



#### Data Conclusions:

- The Legal Aid application process is not easy for Indigenous clients.
- This issue is exacerbated in the area of child protection

#### Trend in free-text comments:

- There are significant barriers to accessing LAO including:
  - Reliance on client to understand process, terminology and own legal needs, which results in client's reliance on other service providers/ community members to help navigate.

- Cultural inappropriateness and ineffectiveness of the 1-800# in addressing needs.
- Lack of available LAO staff in courts, including Indigenous Peoples Courts.

### Data Detail:

“Applying for Legal Aid was easy”

**69%** rated their experience neutral to strongly disagree that applying for Legal Aid was easy

“Finding a criminal law lawyer was easy”

The response was neutral for criminal lawyers, with slightly more people having a harder experience **(+2%)**

“Finding a family law lawyer was easy”

The response was neutral for criminal lawyers, with slightly more people having a harder experience **(+3%)**

“Finding a child protection lawyers was easy”

**66%** of responses indicated a neutral to harder time, with half of those responses being a strongly when finding a child protection lawyer

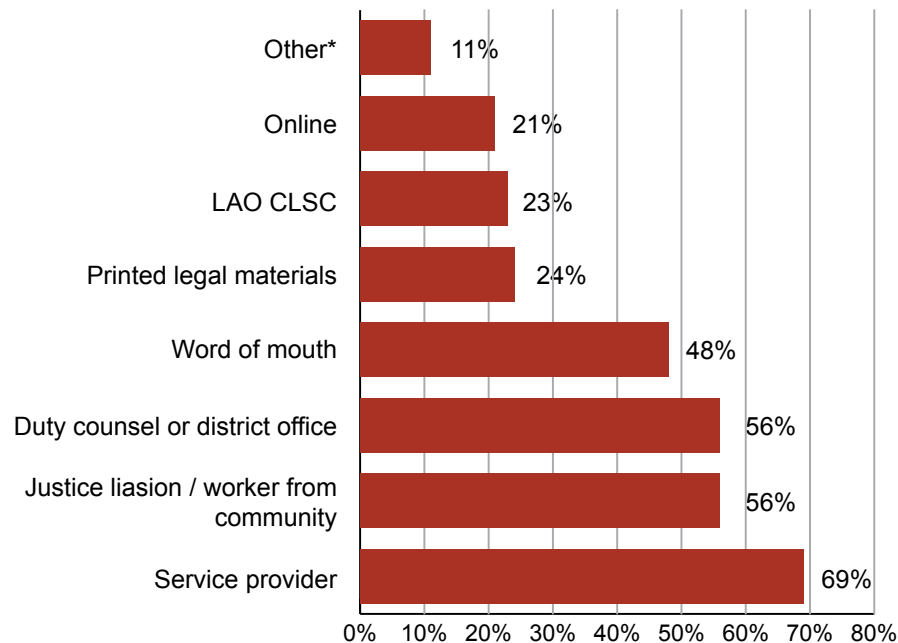
There was also more uncertainty, with a third of respondents indicated that they did not know of the questions wasn’t applicable

### Recommendations from Community:

- LAO should make the application process more accessible, and culturally and geographically appropriate.
- LAO needs to ensure clients are able to find appropriate lawyers in a reasonable amount of time.
- LAO needs to increase panel membership and support the development of lawyers, particularly in child protection.



## 2. When your clients need legal information, how do they get it? (90% response rate)



OTHER: Courtworkers x2, On site staff Lawyer, Private Bar Lawyer, Resource Workers, Youth, Restorative Justice Coordinator

### Data Conclusions:

- Indigenous clients frequently seek out information from Indigenous service providers, moreso than any other method for receiving legal information.
- The CLSC and online legal resources are the least effective means of distributing legal information for the Indigenous community.

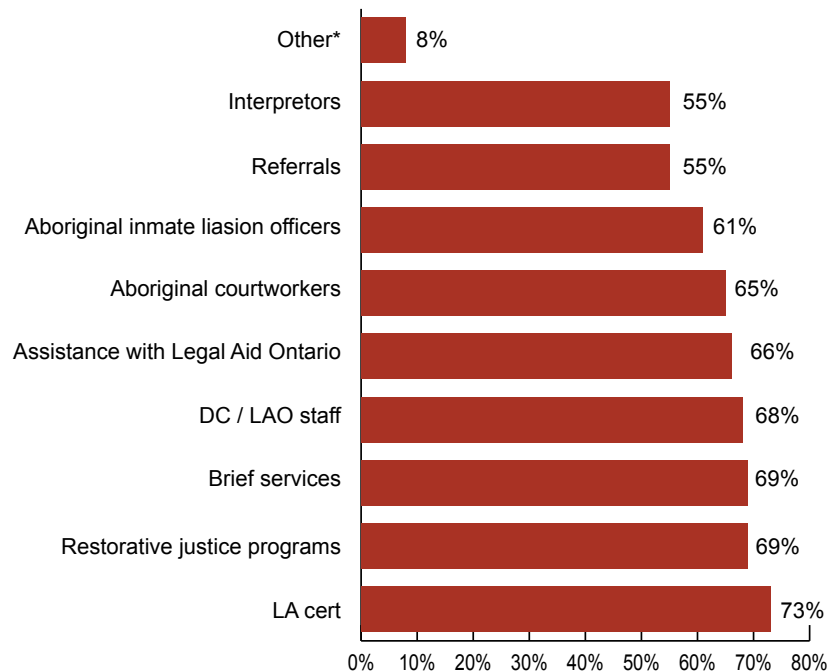
### Trend in free-text comments:

- Indigenous Peoples feel a strong sense of distrust of LAO due to:
  - LAO being regarded as a colonial institution.
  - Lack of sustained LAO funding or support for community justice programs.
  - Lack of Indigenous representation in LAO's staff.

### Recommendations from Community:

- LAO should restore and expand funding for community justice programs
- LAO needs to build trust with community through meaningful relationships and increased Indigenous representation within the organization.

### 3. What services do your clients need to help deal with the legal system? (90% Response Rate)



OTHER: in person legal help, Gladue workers, Bail Supervision, Victim Services, Language Interpreter Community/Family Support

#### Data Conclusions:

- Indigenous clients continue to rely heavily on support from professionals and service providers in the justice system to help them deal with their legal issues
- LAO certificate lawyers are a large part of this support.
- There is a strong preference to make use of other complementary Indigenous services that are more culturally appropriate.
- Language access issues affect over half the clients.

#### Trend in free-text comments:

- Several participants felt a strong emphasis should be put on the value of the Indigenous Courtwork Program and that more of these such positions were needed, especially to help apply for LAO.

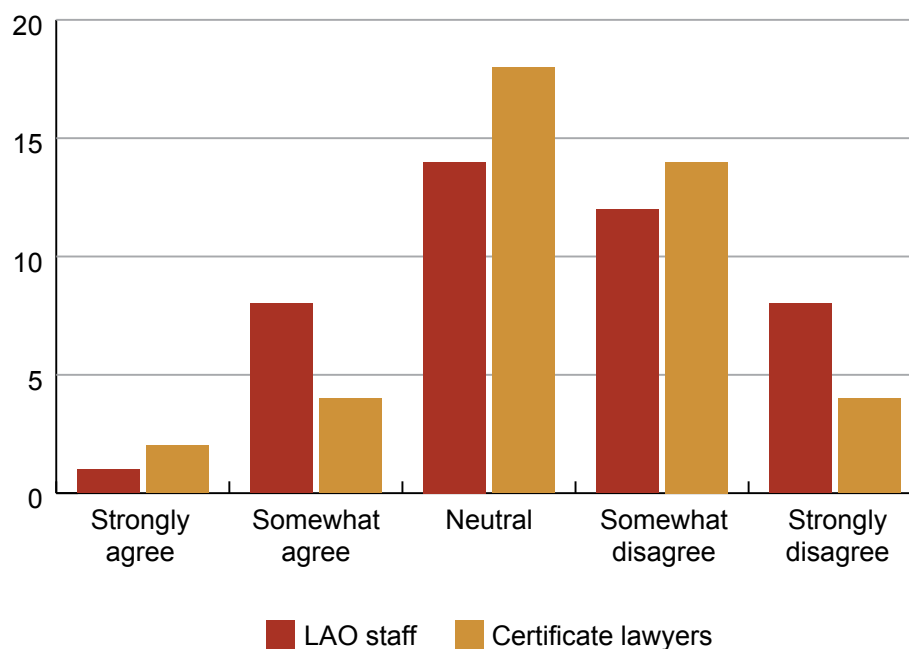
#### Recommendations from Community:

- LAO should provide one-stop, wrap-around legal services by and for Indigenous Peoples.

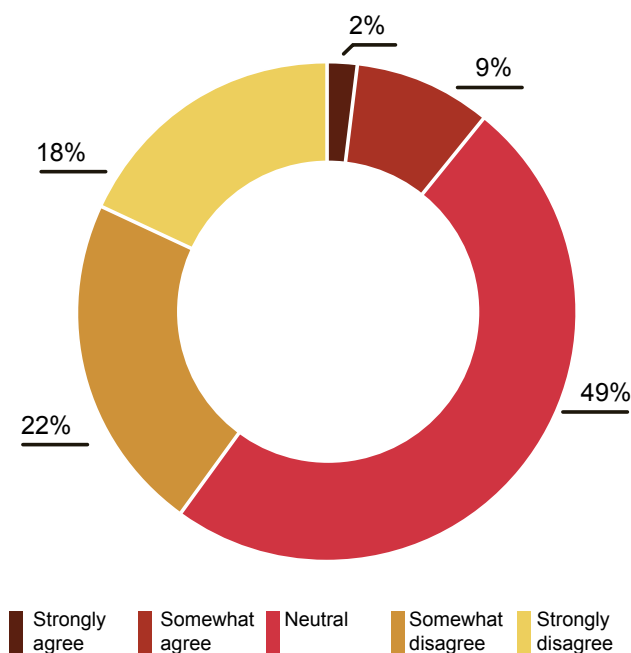
- LAO should support a mixed model approach, building capacity in communities to provide support for legal aid clients to navigate the system and also build capacity for legal professionals to provide better quality legal services.

#### 4. Please rate your clients' satisfaction with Legal Aid services. (87% response rate)

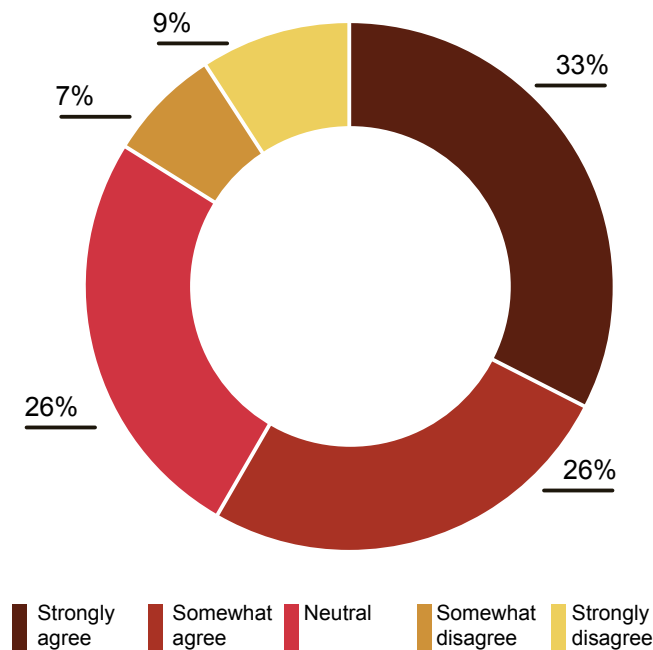
Clients are satisfied with the services they receive from lawyers



Legal Aid has adequate services in my area



### My clients have service needs that are not being met



#### Data Conclusions:

- Overall, Indigenous clients are dissatisfied with the services that they receive.
- Services are not accessible, timely, or adequate.
- There is disparity in satisfaction with Duty Counsel and Staff, with both strong satisfaction and strong dissatisfaction.
- LAO certificate lawyers are seen as neutral in terms of satisfaction with services. More training is required.

#### Trend in free-text comments:

- Indigenous clients need better quality legal services that address systemic barriers such as consistent and accountable communication between lawyers and clients about their matter:
  - Communicating with their lawyer more than once before their court date.
  - Having access to their file to see what work has been done and how legal aid hours were accounted for.
  - Access to legal services that addresses geographic, transit and socio-economic barriers.
  - Access to culturally appropriate forms of public legal information and education so that Indigenous clients can be properly informed of their rights and the consequences of certain legal actions and/or processes.

- More collaboration and communication with the Indigenous community and service providers to help a client make decisions and identify solutions
- Indigenous clients have unique legal needs such as:
  - Wills & Estates under the Indian Act
  - Hunting and Fishing rights and Provincial Offences Act
  - Matrimonial Real Property

### Recommendations from Community:

- LAO should strengthen Gladue Panel requirements and accountability for lawyers.
- LAO should build capacity in communities by sharing public legal information and providing legal education in culturally relevant ways.
- LAO should collaborate more with community and service providers.

### Data Detail:

“Legal Aid has adequate services in my area”

**89%** of participants felt LAO services were either just adequate or not at all adequate.

“My clients are satisfied with the services they receive from Legal Aid Duty Counsel and/or staff”

About **75%** of participants felt neutral or somewhat dissatisfied with LAO staff services, but staff also received the largest number of positive & negative responses.

“My clients are satisfied with the services they receive from their lawyer who accepts Legal Aid certificates”

**76%** of participants felt neutral or somewhat dissatisfied with certificate lawyers, but participants felt less strongly satisfied or dissatisfied than as with LAO staff

“My clients feel their legal matters are dealt with in a reasonable amount of time”

**79%** of all participants were either somewhat dissatisfied or strongly dissatisfied with the length of time it took to deal with legal matters.

“My clients have service needs that are not being met”

**85%** of participants felt that clients have service needs that are not being met.

## 5. Please rate your clients experience in accessing culturally relevant Legal Aid services. (90% Response Rate)

### Data Conclusions:

- Indigenous Peoples do not think LAO has adequate Indigenous representation or culturally relevant services.
- Indigenous communities and service providers think that appropriate Indigenous representation and culturally relevant services would be valuable.
- Trend in free-text comments:
- Language services and proper interpretation are needed.
- Public legal information and education is an important service to Indigenous clients, but must be providing in a culturally appropriate and relevant way.
- Indigenous justice programs are effective in the eyes of the community and should be supported by LAO.
- Cultural sensitivity and awareness training is required for staff and lawyers, but should be local and provided by community or service providers.
- LAO needs to recruit and retain more Indigenous staff and panel lawyers.
- Recommendations from Community:
- LAO needs to collaborate more with community and service providers to identify and provide culturally relevant service models.
- LAO needs to ensure language is a core component of legal services for Indigenous clients.
- LAO should prioritize and support community justice programming.

### Data Detail

“Legal Aid has adequate representation of Indigenous staff”

**77%** of respondents felt strongly that LAO does not have adequate representation of Indigenous staff, the large majority of the remaining responses indicated that they ‘didn’t know’.

“Having Indigenous Legal Aid staff is important to my clients”

**96%** of all participants either somewhat agreed or strongly agreed that having Indigenous staff at LAO was important to their clients. 90% of those positive responses were strongly agree.

“My clients would benefit from having Legal Aid staff who are Indigenous” **96%** of all participants either somewhat agreed or strongly agreed that having Indigenous staff at LAO would benefit their clients. **90%** of those positive responses were strongly agree.

“It is important to my clients that the legal services they receive are culturally relevant” **96%** of all participants either somewhat agreed or strongly agreed that was important to their clients to have access to culturally relevant services. **90%** of those positive responses were strongly agree.

“The services Legal Aid provides are culturally relevant” **69%** of participants somewhat or strongly disagreed that LAO

“My clients are receiving legal services in their language of choice” **82%** of participants felt neutral, somewhat dissatisfied or strongly dissatisfied that clients were receiving services in their language of choice. 63% of participants disagreed that clients were receiving services in their language of choice with 71% of those strongly disagreeing

“Public legal education is a service my clients find valuable” **81%** of participants agreed that PLE was a service clients find valuable, with 62% of those strongly agreeing.

“Printed or online legal information materials are beneficial to my clients” **87%** of participants felt neutral or agreed that printed or online legal information was beneficial to clients

“Indigenous Justice programs are effective at resolving justice issues” **89%** of participants agreed with this statement, with **69%** strongly agreeing. This was one of the highest responded to questions in the survey, with only 3 people abstaining.



“Legal Aid should be supporting Indigenous justice programs”

**98%** of participants agreed with this statement, with **96%** of those strongly agreeing. There were no negative responses to this question and it was one of the highest responded to questions in the survey, with only 3 people abstaining

“My clients would prefer to receive legal services in another way (please describe below)”

**66%** of participants did not have an answer for this question. The responses that were recorded were mostly neutral-positive

“My clients have experience with ways of dealing with justice and legal issues outside of the criminal justice system”

**77%** of participants responded neutral-positive to this question, but 36% did not provide a response to this question.

## **6. Please rate your experience with Legal Aid as an organization (89% response rate)**

### **Data Conclusions:**

- Indigenous Peoples feel it is important that they be provided a way to provide input into the services, procedures and policies that are developed to service their communities.
- Indigenous Peoples feel LAO has not had very strong communication about its’ strategic priorities and mandate.
- While Indigenous Peoples felt more familiar with the Aboriginal Justice Strategy than the organization as whole, there is still a significant gap in communication. Some did not know LAO had an AJS and felt this was problematic/demonstrative of poor communication and relationship-building.
- Indigenous Peoples overwhelmingly feel that LAO continue to have a Aboriginal Justice Strategy or Program.

### **Trend in free-text comments:**

- Lack of communication within LAO as an organization is apparent, as LAO staff are sometimes unable to provide up to date information.
- Participation should be mutual; lawyers and LAO staff should be involved in building capacity in communities and participating in community and cultural events.
- There is continued frustration with the perceived lack of commitment by LAO to address overrepresentation of Indigenous Peoples in the justice system in practical ways.

## Recommendations from Community:

- LAO needs to improve communication both within and out the organization, ensuring that communication is accessible and appropriate for communities.
- LAO needs to develop meaningful relationships with community and service providers by:
  - Involving community and service providers in decision making processes, service delivery design and content development.
  - Seeking to actively build capacity and engage in community and cultural events.
- LAO should continue to prioritize Indigenous clients and communities and demonstrate long term commitment by employing an operational strategy that:
  - Recognizes the distinct status of Indigenous Peoples in Canada.
  - Is resourced adequately and proportionate to the client base it serves and the issue it is meant to address (i.e., overrepresentation in criminal justice, correctional and child welfare systems).
  - Responds to the unique needs of the community.
  - Is reflective of Indigenous worldviews and models of governance and decision making.

## Data Detail:

“My clients and I would like to have a way to provide input into Legal Aid services” **100%** of responses indicated neutral to positive agreement with this statement, with **91%** in agreement and **67%** strongly agreeing.

“My clients and I would like to have a way to provide input into Legal Aid procedures and policies” **94%** of participants indicated neutral to positive agreement with this statement, with **76%** in agreement, and **58%** in strong agreement

“LAO has been effective in communicating its strategic priorities and mandate with Indigenous communities and service providers” **57%** disagreed with this statement, and **76%** indicated neutral to strong disagreement.

“I was aware that Legal Aid Ontario had an Aboriginal Justice Strategy” **46%** of participants indicated that they were not fully aware of the AJS

“I feel that it is important for Legal Aid Ontario to have an Aboriginal Justice Strategy”

**98%** indicated that they agreed it was important for LAO to have an AJS, and **96%** of those in agreement strongly agreed. There were no negative responses to this question

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## APPENDIX E: LEGAL AID ONTARIO'S COMMITMENT TO THE TRUTH AND RECONCILIATION COMMISSION CALLS TO ACTION

**Legal Aid Ontario's (LAO) President and CEO, David Field, issued the following statement regarding the final report of the Truth and Reconciliation Commission:**

As National Aboriginal Day approaches next week, on behalf of LAO, I want to thank the Truth and Reconciliation Commission, particularly the survivors who shared their stories. The report highlights the continued disenfranchisement of First Nation, Métis and Inuit, which has contributed to the overrepresentation of Aboriginal peoples in both the criminal justice and child welfare systems.

LAO also commends the Government of Ontario for its apology and commitment to closing gaps, removing barriers and creating a culturally relevant and responsive justice system. Like the Ontario government, LAO is committed to working with Aboriginal communities and the provincial and federal governments to implement the Commission's 94 Calls to Action, particularly those addressed to the justice community.

LAO will continue to build upon its Aboriginal Justice Strategy to address key elements in the report. Most recently, LAO has focused on providing additional and improved Gladue services, sustainable funding and support for community-driven alternatives to traditional court proceedings, and educational and cultural opportunities for staff.

True reconciliation can only happen through reflection, action, and partnership with First Nation, Métis and Inuit communities. LAO will continue to work in this manner, embracing the spirit of the report.

David Field  
President and CEO  
Legal Aid Ontario

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