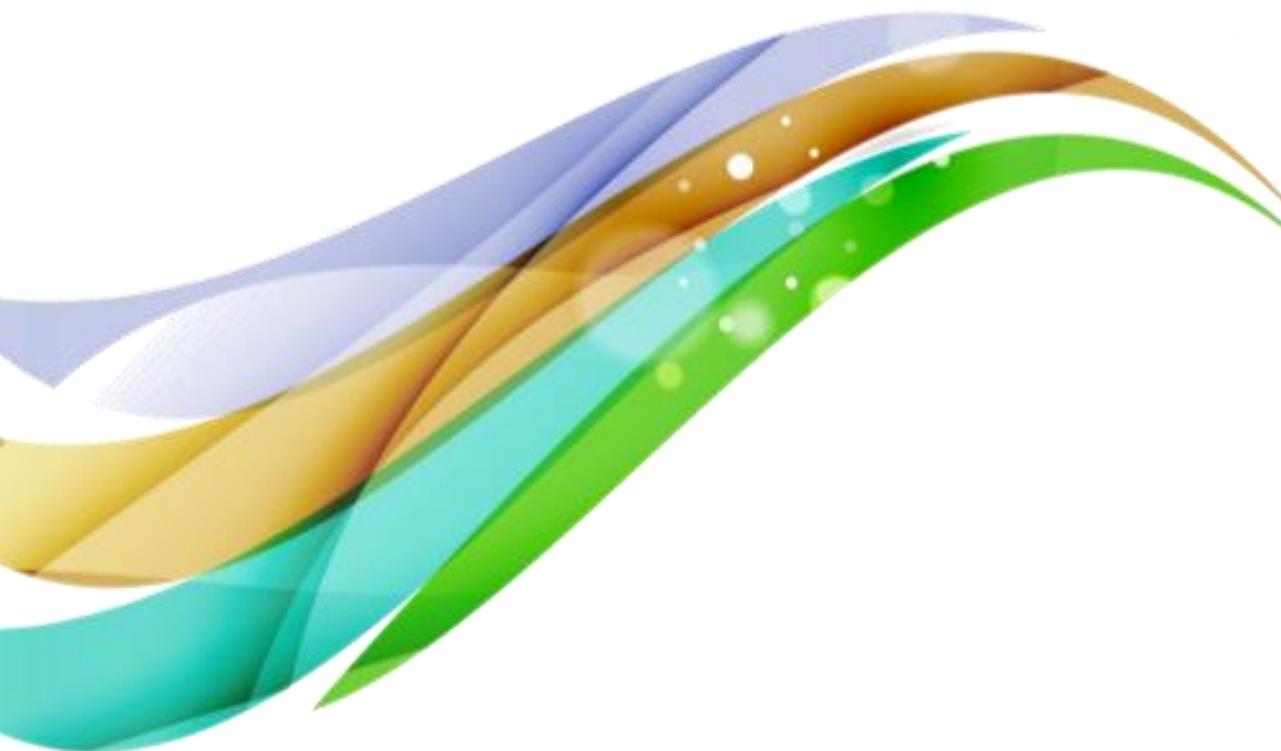


The incorporation of Indigenous peoples and systems in the legal profession: a summary of international approaches

A working paper

Prepared for the Independent Review of the Regulation of Lawyers and Legal Services in Aotearoa New Zealand

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Purpose

This paper provides an overview of how overseas legal professions are adapting to reflect and incorporate Indigenous peoples and reconciliation.

Introduction

This paper provides a brief overview of selected overseas legal profession landscapes in terms of adaptation to Indigenous peoples, predominantly in Canada. There are different focus areas that can help create a legal profession that is more balanced in terms of ethnicity, more inclusive in terms of culture, and more effective at serving Indigenous clients. Four of these focus areas are included in this paper:

- *the legislative level*, for example, legislation affirming Indigenous laws as part of decision-making
- *the education level*, for example, increasing the number of Indigenous law graduates through admission processes and teaching Indigenous laws as part of the degree (while outside the scope of the wider project, selected initiatives are included in this paper for interest)
- *the practice level*, for example, by requiring judges to take into account the experiences of Indigenous peoples in sentencing decisions
- *the regulator and representation level*, for example, by requiring member lawyers to undergo cultural competency training.

This is a high-level paper and is not intended to be exhaustive. This paper will not detail all law school, law firm, law society and other initiatives across the included countries; rather it highlights existing initiatives as illustrative examples of each focus area.¹ As an example, while most, if not all, law societies will have a work programme related to improving cultural competency, this paper will only set out a selected sample of these.

Both grey literature and peer-reviewed sources were included, and no assessments as to the robustness of any research was undertaken. There was no consideration undertaken as to the possible application to the Aotearoa New Zealand system.

¹ Note that some of these initiatives will also go towards improving diversity and inclusion in the legal profession as a whole, therefore this paper should be read in conjunction with the diversity and inclusion paper.



Findings

Legislative level

Canada's Truth and Reconciliation Commission

The Truth and Reconciliation Commission (TRC) was established to facilitate reconciliation among former students at residential schools, their families, their communities and all Canadians. In 2016, Action 27 was released:

"We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism."

Canada and the United Nations Declaration on the Rights of Indigenous Peoples

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is a universal human rights instrument that outlines the minimum standards for the survival, dignity and well-being of Indigenous peoples (BC Legislation on the Declaration on the Rights of Indigenous Peoples, n.d.).

Canada has affirmed UNDRIP as an instrument with application in Canadian law by enacting the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Act, which came into force in 2021. The Act:

"provides a roadmap for the Government of Canada and Indigenous peoples to work together to implement the Declaration based on lasting reconciliation, healing, and cooperative relations."

Earlier, British Columbia (BC) passed the Declaration on the Rights of Indigenous Peoples Act (2019), intended to harmonise BC laws with UNDRIP. BC also has an 89-point action plan over five years to advance the implementation of the UNDRIP (CBC News, 2022), and will establish an independent secretariat to help the Government ensure the legislation is consistent with the Declaration (CTV News, 2022). As part of this plan, one outcome is that:

"Indigenous Knowledge, laws and legal orders are affirmed and recognized as part of decision-making."



Education level

Initiatives aimed at increasing the number of Indigenous lawyers through the provision of places in law school

Law schools in Canada have Indigenous student admission processes that include setting aside places for Indigenous students to attend law school, for example, the University of Calgary (University of Calgary, n.d.). In terms of specific programmes, the table below sets out an initiative aimed at increasing Indigenous and black lawyers through places in a law school in Nova Scotia (Metallic, 2019).

Table 1: Indigenous Blacks and Mi'kmaq initiative

Component	Description
What	Indigenous Blacks & Mi'kmaq Initiative – a dedicated support and access programme for Black and Aboriginal law students at the Schulich School of Law at Dalhousie University, Nova Scotia.
When	Since 1989
Target group and aim	Internal – the initiative is aimed at increasing the number of African Nova Scotian and Mi'kmaq lawyers in the province.
How	<p>The initiative</p> <ul style="list-style-type: none"> - reserves 12 spots in each incoming first-year class of the Law School for six students from the Indigenous Black Nova Scotian community and six students from the Mi'kmaq community - takes a holistic approach to assessing applicants, considering factors like previous work history, family responsibilities, commitment to community, and individual experiences of overcoming adversity - provides students with various supports, including a four-week preparatory prelaw programme, mentoring and academic support (upon request) while in law school, as well as some financial support.
Results	<p>At the beginning of the initiative, of the almost 1,200 lawyers in Nova Scotia, none were Mi'kmaq and about a dozen were Black.</p> <p>As at autumn 2018, there are 2,961 lawyers, both practising and non-practising. Of these, there are:</p> <ul style="list-style-type: none"> - 64 members of the Nova Scotia Barristers Society who are Mi'kmaq or Aboriginal, representing 2.2% of total lawyers in the province - 79 lawyers in Nova Scotia who are African Nova Scotian or Black, representing 2.7% of the total lawyers in the province. <p>Note that not all these individuals are graduates of the initiative.</p>
Comment	The initiative has won numerous awards, including the CBA Touchstone Award (2010), the Canadian Race Relations Foundation Award of Excellence Education (2014), the CBA-NS Branch – Law Day Award (2015), and the Lexpert Zenith Award celebrating Diversity and Inclusion (2016).



Teaching about Indigenous laws in law school

Law schools in Canada are increasingly teaching about Indigenous laws as part of the core law degree (Coyle, 2017).. The University of Victoria offers a joint degree programme in Canadian Common Law and Indigenous Legal Orders. Students develop the skills required to practice with Indigenous legal orders, within Canadian common law and at the interface between them. Learning includes Indigenous community-led field schools (University of Victoria, n.d.)

Practice level

Federal Court practice guidelines for aboriginal law proceedings, Canada

The Federal Court published practice guidelines (last updated 2021) that aim to assist with the resolution of disputes by providing information about court procedure, options for resolution, and resources that may be available to assist in settlement discussions (Federal Court of Canada, 2021). These guidelines contain direction on matters such as elder testimony and oral history protocol and dispute resolution through dialogue; and also includes a checklist of matters to consider when preparing an Indigenous Law case (e.g. review and research the relevant community; identify the existing governance structures; identify the relevant evidence including oral and Elder evidence; consider the logistics of the evidence and hearing) (Federal Court of Canada, 2021).

First Nations/Indigenous Criminal Courts, Canada

In British Columbia (Canada), First Nations/Indigenous Courts are criminal sentencing courts that use restorative justice and traditional methods to reach balance, rehabilitation, accountability and healing. All parties work together (e.g. the defendant, lawyers, the judge, Crown Counsel, Elders and the community) to create a healing plan that aims to restore the defendant's mental, physical, spiritual and emotional health (Legal Aid BC, n.d.-a). The defendant must plead guilty, or be found guilty, to be eligible for sentencing in a First Nations Court.

The defendant may still go to jail, but the judge must consider the defendant's unique circumstances in their decision. This requirement is known as Gladue principles, where if someone who identifies as Indigenous is charged with a crime, the judge must consider the unique experiences of Indigenous individuals in sentencing. These unique experiences include the challenges of colonisation, including racism, loss of language, removal from land, residential schools, and foster care (Legal Aid BC, n.d.-b). This requirement is a result of a Supreme Court decision (*R v Gladue*) which stated that the criminal justice system failed Indigenous peoples and seeks to address these failures.

Koori Court, Victoria, Australia

People of Aboriginal or Torres Strait Islander descent, who are charged with a criminal offence and plead guilty, can have their case heard in a Koori Court (Magistrates Court of Victoria, 2020). Also known as circle sentencing, parties involved include the person, the magistrate, Aboriginal Elders, a Koori court officer, the prosecutor, community correction officer, the person's lawyer and the person's family.



An evaluation of the Koori Court looked at the operation over 2009 to 2011 (Dawkins et al., 2011), where 49 people went through the court process. The authors found:

- strong evidence that the court provided access to fair, culturally relevant and appropriate justice
- evidence of some impact on the outcome that the Koori accused do not have more serious contact with the justice system
- no evidence (too early to say) of the court having a long-term impact on whether someone reoffends.

Ontario Court of Appeal working group to improve equity, diversity and inclusion

This working group aims to improve court practices for Indigenous and LGBTQIAS2+ lawyers and serves as a forum for lawyers to communicate concerns with the Court. As an example of one of the developments, the working group has implemented a procedure allowing counsel to provide the court with a phonetic pronunciation of their names (Indigenous Bar Association, 2021).

Regulator and representation level

Law Society of British Columbia and Alberta (regulators) – mandatory cultural competency training for lawyers

Two Canadian provinces (BC and Alberta) have instituted mandatory cultural competency training for lawyers

As a result of the TRC Action 27, the Law Society of BC has mandated that lawyers in BC undergo cultural competency training to provide them with knowledge on the history of Aboriginal-Crown relations, the history and legacy of residential schools and how legislation regarding Indigenous peoples created the issues that reconciliation seeks to address (Law Society of British Columbia, n.d.).

Similarly, the Law Society of Alberta mandated that all active lawyers in Alberta have to undergo mandatory cultural competency training within 18 months from April 2021 (Law Society of Alberta, n.d.).

For other provinces, cultural competency training is available, but is not mandatory for practising law.

Law Society of Ontario (regulator) – complaints against lawyers, Indigenous considerations

The Law Society of Ontario has made adjustments to their complaints process to incorporate the specific needs of Indigenous peoples

The Law Society of Ontario as part of its response to Action 27 recommended that the Law Society should (Indigenous Watchdog, 2018):



- “take the necessary steps to ensure that anyone who investigates complaints at the Law Society involving Indigenous licensees or complainants, in addition to required investigatory experience and skills, is culturally competent to perform these investigations and has the necessary resources available to engage appropriately with members of the Indigenous communities in this process; and
- explore ways to incorporate principles of Indigenous Legal Systems into dispute resolution resources available to Law Society investigators, which may be applied in appropriate cases, and prosecutorial and dispute resolution resources available to Law Society prosecutors, which may be applied in appropriate cases.”

As a result, the Law Society has a specific process for complaints received by First Nations, Inuit and Métis peoples. When the complaint is made, the Law Society will ask the complainant for their views on how the Society can respond to the complaint in a way that best reflects the complainant’s Indigenous values and legal principles (eg, by arranging/participating in a circle) (Law Society of Ontario, n.d.-a). This may be in addition to other regulatory responses, or it may fully replace those responses.

If a regulatory hearing is required, the complaint goes to the Law Society Tribunal. The Law Society states that the Tribunal has adopted procedures that aim to meet the needs of Indigenous participants and that integrate Indigenous traditions and beliefs (Law Society of Ontario, n.d.-a). The Practice Direction on Accommodation issued by the Law Society Tribunal in 2021 states that (Law Society Tribunal, 2021):

“The Tribunal aims to adapt its processes to the needs and traditions of Indigenous participants. Indigenous participants have the option of affirming on an eagle feather at Tribunal hearings, and the Tribunal has an eagle feather available for this purpose. Interpreters to and from Indigenous languages will be provided on request. The Tribunal has adopted procedures to meet the needs of Indigenous participants and integrate Indigenous traditions and beliefs, including:

- conducting hearings close to local communities;
- having local Elders present at the hearing;
- including traditional ceremonies, such as smudging ceremonies, before and after hearings;
- modified seating, such as arranging the hearing room in a circle;
- staff and adjudicators wearing informal clothing during a hearing.”

Law Society of Alberta (regulator) – Indigenous Initiatives Counsel

The Law Society of Alberta has an Indigenous Initiatives Counsel in its education department, whose role it is to collaborate with key stakeholders to develop initiatives that (Indigenous Bar Association, n.d.-b):

- “advance the process of reconciliation within the justice system and the legal profession,



- provide supports for Indigenous members of the Alberta legal community and
- advance cultural competency development for lawyers and within the Law Society.

To accomplish these objectives, the Indigenous Initiatives Counsel will act as an educator and a bridge builder between the Indigenous community, the wider legal community, and the Law Society.”

Federation of Law Societies of Canada (national coordinating body for regulators) – guiding principles for fostering reconciliation

Commitment to truth and reconciliation

The Federation of Law Societies of Canada is the national coordinating body of the 14 law societies, which are mandated by provincial and territorial law to regulate Canada’s lawyers, Quebec’s notaries and Ontario’s licensed paralegals (Federation of Law Societies of Canada, n.d.). Every lawyer in Canada is required by law to be a member of a law society and to be governed by its rules.

The Federation of Law Societies of Canada committed to the broad goals of truth and reconciliation advocated by the TRC (Federation of Law Societies of Canada, 2022).

Guiding principles for fostering reconciliation

The Federation also published guiding principles for fostering reconciliation in 2021 (Federation of Law Societies of Canada, 2021). As part of these principles, the Federation states:

“Individual members of the legal profession have a responsibility to expand their knowledge and understanding of Indigenous perspectives and experiences and to take steps to ensure they are not contributing to the harms their Indigenous clients experience when engaging with the justice system.”

Law Society of Ontario (regulator) – guidelines for lawyers working with Indigenous peoples and an Indigenous advisory group

As an example of the types of materials issued by regulators, the Law Society of Ontario issued guidelines and a guide for lawyers working with Indigenous peoples in 2018 (Law Society of Ontario, 2018). These aim to provide lawyers with a better understanding of Indigenous peoples and laws, and provides practical tools and guidance to help lawyers represent their Indigenous clients effectively (Law Society of Ontario, 2018).

The Society also has an Indigenous Advisory Group, which adopted UNDRIP as the framework for operation (Law Society of Ontario, n.d.-b). This group has a number of mandates, including to:

- encourage partnerships and relationships between Indigenous Peoples, the Indigenous Bar Association in Canada and the Law Society
- initiate, inform, promote and advance reform of policies, procedures, rules and regulations for the benefit of Indigenous peoples
- promotes public awareness and educate members on issues related to Indigenous peoples.



Law Society of British Columbia (regulator) – reviewing legislation to reflect Indigenous law and experiences and appointment of Indigenous benchers

The Law Society of BC created a Futures Taskforce to consider potential upcoming changes in the delivery of legal services in the province, and the driving factors behind those changes (Ferris et al., 2020). The report recommended that:

“The Benchers, in consultation with Indigenous Peoples, should review the Law Society’s governing legislation, Rules and Code of Conduct to include and reflect Indigenous law and experiences.”

Going wider than the Society’s internal rules and regulation, the report also recommended that the Law Society assist with the wider legislation and regulation in the province:

“The Benchers, in consultation with Indigenous Peoples, should identify ways to provide assistance with the question of identifying how to include Indigenous laws and legal orders into the justice system.”

At the Law Society, 25 elected ‘benchers’ act collectively as directors of the law society and regulators of the legal profession. They also act individually as adjudicators, to promote and protect public interest (CBC News, 2021). In 2021, five Indigenous lawyers were elected to the society’s leadership. As one of the newly elected benchers stated:

“It’s an opportunity for the law society and us to break down the barriers of acceptance that may have existed, in some people’s minds, of the law society and how we can influence the legal profession as benchers, as lawyers, as judges from an Indigenous perspective.”

Canada Bar Association (representation) – call for action and CPD courses

The Canada Bar Association (CBA) represents lawyers, judges, notaries, law teachers and law students across Canada (Canada Bar Association, n.d.-a). The CBA issued a Call for Action to urge federal, provincial and territories to (Canada Bar Association, 2022):

1. negotiate a distinctions-based action plan with Indigenous groups within two years to provide:
 - a) well-resourced preventative community-based services; and
 - b) alternatives to incarceration of Indigenous peoples, with a goal of significantly reducing incarceration rates;
2. implement the action plan immediately, and monitor its progress annually, and amend it as necessary; and
3. shift funding from the Correctional Service of Canada and from provincial and territorial correctional services to Indigenous communities to implement the action plan.

The CBA has also created an accredited online course called ‘The Path’ for lawyers to complete as part of their CPD. The course was created as part of the CBA’s response to the TRC’s Calls to Action. The course was created by a majority Indigenous-owned company and developed in conjunction with First Nations, Inuit and Métis advisors and reviewers (Canada Bar Association, n.d.-b).



Canadian Indigenous Bar Association (representation) – promotion and protection of Indigenous lawyers

Canada has an Indigenous Bar Association, aimed at promoting the development of Indigenous law and advancing and protecting the interests of Indigenous peoples in the legal profession (Indigenous Bar Association, n.d.-a). The non-profit association consists of Indigenous lawyers, judges, academics and students.

Examples of work include (Indigenous Bar Association, 2021):

- An open letter to the Prime Minister regarding the appointment of Indigenous judges to the Supreme Court of Canada.
- Collaboration with the Canadian Association of Black lawyers, for example issuing two joint statements to the Minister of Justice and Attorney General of Canada on federal bench diversity and the current state of the federal human rights system and its failure to promote access to justice for Black, Indigenous, and other racialized communities.
- Collaboration with the Canadian Civil Liberties Association on a letter to the Law Society of Manitoba regarding the “good character” process, suggesting that the process was discriminatory, creating barriers to the legal profession that disproportionately affect Indigenous, Black and other marginalised groups as a result of over-policing, profiling, systemic discrimination, and colonialism.

National Native American Bar Association (representation) – research to create an evidence base and develop further initiatives

The National Native American Bar Association (NNABA) has nine chapters across United States of America, representing American Indians, Alaska Natives and native Hawaiians (National Native American Bar Association, n.d.-b). The NNABA aims to increase understanding of their communities’ unique cultural and legal issues and also considers its members to share a communal responsibility of protecting the governmental sovereignty of the more than 560 independent Native American Tribal governments in the US (National Native American Bar Association, n.d.-b).

In addition to issuing resolutions, letters of support and resources for members, the NNABA conducted an original comprehensive study entitled “The Pursuit of Inclusion: An In-Depth Exploration of the Experiences and Perspectives of Native American Attorneys in the Legal Profession”. The NNABA plans to use the findings to help develop educational resources and initiatives to help improve retention, recruitment and advancement of Native American lawyers (National Native American Bar Association, n.d.-a).

Law Society of New South Wales, Australia (regulator and representation) – strategic plan to improve cultural competency

The Law Society of New South Wales’ strategic plan for 2016-2019 aims to improve cultural competency and awareness within the Law Society and in the legal profession of Indigenous issues. The Society has developed resources for solicitors working with Indigenous clients and has established an Indigenous Issues Committee that represents the Society on legal policy and practice issues arising



in relation to Indigenous peoples of NSW (Law Society of NSW, n.d.). The Society provides a range of continuing professional development seminars on Indigenous issues.

Law Institute of Victoria, Australia (representation) – reconciliation action plan

The Law Institute of Victoria (LIV) has a Reconciliation Action Plan, overseen by the LIV Diversity Committee. The plan identifies three core areas – “Education to Qualification”, “Access to Justice” and “Recognition and Respect”. The Institute’s vision for reconciliation is (Law Institute of Victoria, n.d.):

“a legal profession that recognises, respects and values Indigenous culture and actively includes Aboriginal and Torres Strait Islander people in the ranks of the profession. Our vision recognises diversity to achieve ‘common unity’ between the legal and Aboriginal and Torres Strait Islander communities.”

The Institute appoints a Reconciliation Action Plan Oversight Committee. Members are appointed for a 12 month term and are responsible to:

- monitor and evaluate implementation of the LIV RAP and report on progress to LIV Council and Reconciliation Australia
- provide guidance on LIV’s reconciliation activities and dealings with members and partner organisations, to ensure that LIV is working with, and not for, the Victorian Indigenous community
- contribute to an annual review of the LIV RAP by providing feedback and facilitating information sharing between LIV departments, sections, committees and partner organisations
- foster community support for the LIV RAP to ensure the sustainability of LIV’s reconciliation activities.



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