Indigenous Law and Justice Hub
University of Melbourne

Legal Education Reforms for First Nations Justice

Submission to the Yoorrook Justice Commission

8 February 2024

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Acknowledgement of Country

We offer respect to the Wurundjeri peoples of the Kulin Nation, the Traditional Owners of the unceded lands on which our University building sits and on which we work. We also offer respect to Wadawurrung people, whose Country other parts of this work was produced.
We acknowledge the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people throughout colonisation and to continue to practice their legal traditions.

Artwork acknowledgement

The Indigenous Law and Justice Hub identifier artwork is by Kiara (Marla) George (Wurundjeri).

Who we are

The Indigenous Law and Justice Hub, Melbourne Law School

The Indigenous Law and Justice Hub (ILJH) brings together legal experts and community leaders to produce rigorous legal research that can be directly applied in Indigenous advocacy and self-governance.

We are educators who play a central role in developing our law students' understandings of Indigenous cultures, legal systems, and Indigenous experiences of settler law. This includes overseeing a review of the compulsory Juris Doctor curriculum to increase the representation of Indigenous knowledges and perspectives, as well as developing new subject offerings and learning opportunities.

The ILJH's research focus is two areas of law and policy that are of pressing importance for Indigenous peoples: Criminal In/justice and Treaty. Our aim is to support and amplify Indigenous voices in these fields by performing two chief functions:

> ***Research:*** *Production of high-quality, rigorous legal research; and*
>
> ***Access:*** *Improvement of community access to research and advice*

For more information about the ILJH visit our website.

Our contributions to Yoorrook

This submission accompanies and may be read in conjunction with evidence previously provided to the Yoorrook Justice Commission, relating to the experiences of Indigenous people in university law schools:

- The in-person evidence and statement of Dr Eddie Cubillo given at the Commission on 15 December 2022; and,
- Dr Eddie Cubillo 2023 public lecture on racism in law schools.

Contact us

This submission was prepared by Jaynaya Dwyer (Lecturer), Cassandra Seery (Legal Research Skills Advisor), Dr Eddie Cubillo (Director) and Elyse Keyser (Program Coordinator) of Melbourne Law School.

We welcome enquiries about this submission at mls-indigenous@unimelb.edu.au.

Introduction

Thank you for the opportunity to make a submission to the **Yoorrook Justice Commission** inquiry on education in Victoria**.**

This submission outlines a pathway forward to work towards a tertiary legal education environment in Australia which is equipped to support true justice outcomes for Aboriginal and Torres Strait Islander peoples.

The absence of adequate regard to First Nations experiences in legal education has real impacts on Aboriginal and Torres Strait Islander people's experiences of settler law, and in turn their life chances.

In the context of the crisis of persistent and increasing overrepresentation of Aboriginal and Torres Strait Islander people in mainstream legal institutions, outlined in depth in the *Yoorrook for Justice report* in relation to the criminal legal system and statutory child protections system, the legal profession must engage in an existential reflection on the role of the profession as central agents of colonisation, and develop pathways to decolonise our professional culture from this starting point. Tinkering across the surface of our practices will not suffice.

In *Yoorrook for Justice* the Commission addressed legal education, recommending that the Victorian Government 'ensure that there is comprehensive cultural awareness training of lawyers and the judiciary to support the implementation (of its recommendations relating to courts and sentencing).'[1]

We believe that given the stark lack of education about Indigenous legal experiences, perspectives, and orders at the tertiary level, that implementation of cultural awareness training in post-qualifications settings alone will not achieve the shift in professional culture and practice which is necessary; this can only provide an overlay to established harmful disciplinary practices, reproduced through tertiary education.

Further, we want to draw attention through this submission to how legal education reform may positively influence a broader range of domains than legal practice alone, spanning across public policy, research, education, and advocacy.

Recommendations

As a research and teaching organisation housed within a leading Australian law school based in Naarm, we believe we are well placed to bring the Commission's attention to the cultures and practices of Victorian legal education.

Effective legal education to support Indigenous justice outcomes requires more than an overlay of Indigenous content to existing education practices.

This submission highlights two key high-level recommendations to achieve more effective Indigenous legal education through reform of applicable legal education regulations:

1. Regulation of legal education should increase the baseline capabilities of all legal graduates to work alongside Indigenous people by centring and embedding Indigenous legal curriculum content, including Indigenous knowledges and perspectives on settler law, and respect for Indigenous legal orders, **from the very beginning of legal studies and throughout the entire professional development journey.**
2. This regulation should **articulate specific and measurable skills and knowledge requirements** relating to Indigenous legal content, rather than a banner statement about the presence of

[1] Yoorrook Justice Commission *Yoorrook for Justice* (2023) Recommendation 37 (d).

Indigenous content. For example, regulation could require graduates to attain knowledge of key aspects of Australian legal history relating to Aboriginal and Torres Strait Islander justice, understanding of international and domestic Indigenous rights frameworks, understanding of Indigenous sovereignty, awareness and respect for the diversity of Indigenous legal systems operating on this continent, key cultural capability skills for working with Aboriginal and Torres Strait Islander peoples and anti-racism education.

Note on terminology – What is Indigenous legal curriculum content?

Indigenous legal scholars have published a diversity of views on what the best language is to articulate aspirations around the transformation to a more just legal education for First Nations peoples. [2] Conversely, the terms 'decolonisation' and 'Indigenisation' of curriculum are often understood and used in an imprecise manner by mainstream education institutions, particularly in a manner which serves the Universities' interest in its own continued authority and power, rather than entailing deferring to that of First Nations peoples. Education institutions often use the language of 'decolonisation' and 'Indigenisation' without fully appreciating the scope of transformative change required to follow through on this commitment. Eve Tuck (Unangax) and Wayne K Yang have criticised the too-easy uptake of decolonisation discourse by education providers, explaining that 'the metaphorization of decolonization makes possible a set of evasions, or "settler moves to innocence", that problematically attempt to reconcile settler guilt and complicity, and rescue settler futurity.'[3]

When we speak about Indigenous content in legal education, we adopt the working definition which we utilise in our curriculum work – referring to 'content which exposes and explores experiences of Aboriginal and Torres Strait Islander peoples in settler legal systems, as well as content which highlights the pluralism of systems of law on Country. This content must by its nature challenge the premise that settler law is fair, just, objective and inclusive.'[4] These are interrelated aspirations, which Professor Carwyn Jones (Ngāti Kahungunu and Te Aitanga-a-Māhaki) has categorised under a useful pedagogical taxonomy of Indigenous legal issues of settler law, Indigenous authored perspectives on settler law and Indigenous legal knowledges.[5]

In addition, we include in our understanding of 'Indigenous legal content' curricula which supports legal graduates to develop interpersonal skills; to work with appropriate empathy and cultural capability within intercultural environments such that they may effectively work alongside Indigenous peoples and other marginalised communities in achieving their aspirations. Additionally, equipping students with the skills to bear witness to injustice experienced by First Nations people, supporting others sustainably while maintaining their own wellbeing. [6]

[2] Heron Loban, 'Decolonised law degrees: A misnomer' (2022) 74(4) *Alternative Law Journal*; Carwyn Jones, 'Indigenous Legal Issues, Indigenous Perspectives and Indigenous Law in the New Zealand LLB Curriculum' (2009) 19(2) *Legal Education Review* 257; Marcelle Bruns and Jenifer Nielsen 'Dealing with the 'Wicked' Problem of race and the law: A critical Journey for students (and academics)' (2019) 28(2) *Legal Education Review;* Joe Williams, 'Decolonising the Law in Aotearoa: Can we start with the law schools?' (2021)17 *Otago Law Review.*

[3] Eve Tuck and K. Wayne Yang, 'Decolonization is not a metaphor' (2012) 1(1) *Decolonization: Indigeneity, Education and Society,* 1.

[4] See Eddie Cubillo, 'Indigenous Programs in Law School' 2022 *Law Institute of Victoria Journal* 30, 31.

[5] Carwyn Jones, 'Indigenous Legal Issues, Indigenous Perspectives and Indigenous Law in the New Zealand LLB Curriculum' (2009) 19(2) *Legal Education Review* 257.

[6] Eddie Cubillo, 'Indigenous Programs in Law School' 2022 *Law Institute of Victoria Journal* 30, 31.

Do lawyers matter?

This question might be considered unwarranted or even impertinent by many of our peers across the legal profession, but as the authors of this submission we consider this an important starting point, to unpack why Yoorrook should devote some of its limited time and attention to considering what is going on in the curriculum practices of law faculties of Australian universities.

As legal educators we have asked ourselves this question and - perhaps unsurprisingly, as this is where our bias is situated - come to the conclusion that the answer is 'yes'; we do think legal education is of particular influence in producing social outcomes, albeit for a variety of reasons and with some qualifications. This submission, however, is not to justify our 'yes' but to shine a light on what has informed our response and contribute to a conversation about the failures and opportunities that exist for legal education to facilitate transformational change across legal institutions, and beyond.

Over the last four decades there have been a range of inquiries, reports and studies that have highlighted the inequities and injustices experienced by Indigenous peoples across the country.[7] The shortfall in access to legal assistance – whether it be in criminal justice, child protection, housing, financial matters or discrimination – has been repeatedly emphasised as part of the systemic barriers to justice for Indigenous peoples.[8]

Where Indigenous people do have access to legal assistance, the need for lawyers to develop cultural competency and communication skills is consistently identified as a key component to facilitating just outcomes for Indigenous peoples in Australia's colonial legal system.[9] Most recently, the Public Understanding of Law Survey by the Victorian Law Foundation reports that 'First Nations people exhibited greater awareness of the legal dimensions of everyday life, knowledge of law and legal confidence, but not equivalent practical legal literacy skills, and quite negative attitudes towards law and legal professionals.'[10]

Cultural competency and communication issues identified in the legal profession extends to the role of jurists in their interpretation of the law and the knowledges they privilege in decision-making.[11] In a Victorian context, for example, Yorta Yorta - Dja Dja Wurrung scholar, and former Yoorrook Justice Commissioner, Dr Wayne Atkinson outlines Justice Olney's Anglocentric approach in consideration of Dr Atkinson's own Native Title claim, which privileged 'European sources over the body of Indigenous

7 Royal Commission into Aboriginal Deaths in Custody (Final Report, 1991); Bringing them home Report: The National Inquiry into the separation of Aboriginal and Torres Strait Islander Children from their families (Final report, 1997); Australian Law Reform Commission, 'Pathways to Justice- Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (Report 133, 2017); Law Council of Australia, 'The Justice Project: Aboriginal and Torres Strait Islander People'(Consultation Paper, Law Council of Australia, August 2017); Productivity Commission, 'Access to Justice Arrangements' (No 72, 2014); Productivity Commission, 'Review of the National Agreement on Closing the Gap' (study report, 2024) vol 1; Yoorrook Justice Commission, 'Yoorrook for Justice' (2023); see also for discussion Marcelle Burns et al, ''The difficulties of communication encountered by indigenous peoples': Moving beyond indigenous deficit in the model admission rules for legal practitioners' (2018) 28(2) Legal Education Review 1.

8 Marcelle Burns et al, ''The difficulties of communication encountered by indigenous peoples': Moving beyond indigenous deficit in the model admission rules for legal practitioners' (2018) 28(2) *Legal Education Review* 1.

9 *Royal Commission into Aboriginal Deaths in Custody (*Final Report, 1991) vol 3, recommendation 96, 97; Australian Law Reform Commission *Pathways to justice – Inquiry into the Incarceration rate of Aboriginal and Torres Strait Islander Peoples*, (Report no 133, December 2017) 5.107-5.108; Findings of Coroner Simon McGregor in the Inquest into the passing of Veronica Marie Nelson (30 January 2023) [316]; Yoorrook Justice Commission *Yoorrook for Justice* (2023) Recommendation 37 (d).

10 Nigel J. Balmer, Pascoe Pleasence, Hugh M. McDonald and Rebecca L. Sandefur, *The Public Understanding of Law Survey (PULS) Volume 2: Understanding and Capability* (Victorian Law Foundation, 2024) 11. Due to relatively low number of Frist Nations people in overall sample results should be treated with caution.

11 See generally Nicole Watson and Heather Douglas, *Indigenous Legal Judgments* (2021), Routledge.

knowledge'[12] in the *Members of the Yorta Yorta Aboriginal Community v Victoria*[13] case.[14] Cobble Cobble scholar, Professor Megan Davis has described Australian public law as a psychological terra nullius, reflecting wilful blindness of settler legal institutions to First Nations sovereignty and polities.[15]

It should be noted, however that despite public debate about whether law degrees should be considered of generalist utility,[16] law schools continue to play a role in influencing those in Australian public and political life, well beyond the court room. The 2020 Melbourne Law School *Career Outcomes Survey* showed that approximately one in six Melbourne JD graduates were employed *outside* the legal profession;[17] nationally, that number has been as high as 64%.[18]

Law graduates are commonly found in a range of professions that can have a profound impact on Indigenous peoples, including (but not limited to): politicians, bureaucrats, policymakers and advisors, advocates, company directors, researchers and educators. Almost one third of Australian Prime Ministers were lawyers first.[19] The University of Melbourne's Law School alone has produced four Prime Ministers, eight Premiers of Victoria and thirteen Commonwealth Attorneys-General. [20] The responsibility for the failures of politicians, governments and bureaucracies in relation to Indigenous peoples in law and policy lies, to a certain degree, at the feet of tertiary institutions whose legal education has been largely silent on Indigenous peoples' rights and interests.

Legal education reform can play a critical role in addressing the inequalities and injustices that currently exist; through the work of the Yoorrook Justice Commission there is a unique opportunity to finally achieve meaningful regulatory standards to lift graduate capability in relation to First Nations justice.

Legal education in Australia

We live and work in places of legal pluralism, but this is rarely reflected in Australian legal education.

Birri-Gubba legal scholar Nicole Watson reflected on the racism in her own legal education at an Australian University[21], writing 'laws that had wrought devastation on Indigenous lives, such as the protectionist legislation, were never mentioned in any of my classes. Likewise, Indigenous legal traditions that were practiced for thousands of years before the arrival of the British received no acknowledgement.' [22]

Marcelle Burns (Gomeroi-Kamilaroi) and Jennifer Neilsen have observed from the perspective of legal educators that 'as a central feature of our political and social structure, the legal system reflects Australia's colonial impositions and is generally monocultural in its praxis and values. The pedagogy of the legal academy tends to reflect the law's liberal agenda, one that is secured by the hierarchy of knowledge

[12] Wayne Atkinson, 'Not One Iota' of Land Justice: Reflections on the Yorta Yorta Native Title Claim 1994 - 2001" (2001) 5(6) Indigenous Law Bulletin 19.
[13] [1998] FCA 1606.
[14] Wayne Atkinson, 'Balancing the scales of Indigenous Land Justice in Victoria' (2006) 3(5) *Land, Rights, Laws: Issues of Native Title*; Atkinson above n 6.
[15] Megan Davis, 'Chained to the Past: The Psychological Terra Nullius of Australia's Public Institutions in Jeffrey Goldsworthy, Tom Campbell and Adrienne Stone (eds) *Rights Without Bills of Rights* (Routledge, 2006).
[16] See e.g. Comments from former Prime Minister Malcolm Turnbull in Tom Mcilroy 'Too many kids are doing law': Malcolm Turnbull warns against law degrees' (*Financial Review,* 2 Feb 2018).
[17] https://law.unimelb.edu.au/students/career-services/career-outcomes
[18] 2012 Graduate Careers Australia Survey; https://www.theage.com.au/national/victoria/graduates-shun-legal-profession-20120519-1yxt0.html.
[19] Dr Joy McCann, 'Traits and trends of Australia's prime Ministers, 1901 to 2015: a quick guide' (Australian Parliamentary Library Research Papers, 3 February 2016).
[20] University of Melbourne, 'MLS Honour Board' < https://law.unimelb.edu.au/alumni/alumni-profiles-and-accomplishments/honour-board>.
[21] Nicole Watson, 'indigenous Legal Traditions and Australian Legal Education' in *The Cambridge Legal History of Australia* (Peter Cane, Lisa Ford and Mark McMillan (Eds) 2022, 721, 730.
[22] Ibid, 722.

contained in legal texts, the power of judicial authority, and the ability to define and control identities and behaviour.'[23]

In his 2021 F W Guest Memorial Lecture Justice Joe Williams of the Supreme Court of New Zealand highlighted that law schools are 'institutions that map and replicate the status quo. They ensure the ranks of the legal profession, the judiciary and the public service are populated by the ruling class and that the content of the law remains colonial'.[24]

Given the role of education and research as integral component of the colonial project, the Academy – as both educators and researchers - could also be included in the Judge's list.[25] In particular, the ability to control whose voices, narratives, methodologies and pedagogies are visible in both teaching and research reflects a history of colonial education positioned as being at 'the centre of legitimate knowledge' and 'the arbiter of what counts as knowledge.'[26]

In 2020 the Council of Australian Law Deans acknowledged the lack of Indigenous content across Australian legal curricula, including in its *Statement on Racial Discrimination* that:

> 'CALD urges all Australian law schools to work in partnership with First Nations peoples to give priority to the creation of culturally competent and culturally safe courses and programs. In so doing, CALD acknowledges the part that Australian legal education has played in supporting, either tacitly or openly, the law's systemic discrimination and structural bias against First Nations peoples.'[27i]

In its *Indigenous Strategy 2017–2020*, Universities Australia committed to all universities having 'processes that ensure all students will encounter and engage with Aboriginal and Torres Strait Islander cultural content as integral parts of their course of study.'[28] The present strategy calls for universities to have Indigenous content in curricula that is meaningful, appropriately developed and appropriately resourced.'[29] Yet, the authors' review of publicly available course learning outcomes of Australian law degrees reveals less than half of Australian law degrees have specifically incorporated a graduate attribute or learning outcome relating to Aboriginal and Torres Strait Islander peoples at the degree level.

What are lawyers required to know about First Nations justice needs in Victoria today?

The absence of Indigenous legal content in Australian law schools is a product of the professional standards which regulate Australian legal education – where a patchwork of standards provides insufficient assurance that Indigenous legal content is present in the formal curriculum, or taught consistently and to a high standard.

Tertiary education standards

The standards prescribing legal curriculum in Australian universities are contained in a number of different frameworks, with differing governance arrangements supporting them. There is a mismatch between the standards set and discourse adopted by the Council of Australian Law Deans (CALD) for education in Australian law schools, and the absence of Indigenous knowledges in the 'prescribed areas of knowledge'

[23] Marcelle Burns and Jennifer Nielsen, 'Dealing with the 'wicked' problem of race and the law: A critical journey for students (and Academics) (2018) 28 (2) *Legal Education Review* 5.
[24] Joe Williams, 'Decolonising the Law in Aotearoa: Can we start with Law Schools?' (2021) 17 Otago Law Review 11.
[25] Ibid; see also Linda Tuhiwai Smith, *Decolonizing Methodologies* (Third Edition 2021) Zed Publishing.
[26] Linda Tuhiwai Smith, *Decolonizing Methodologies* (Third Edition 2021) Zed Publishing, 72; Richard Delago, 'The Imperial Scholar: Reflections on a Review of Civil Rights Literature' (1984) 132(3) *University of Pennsylvania Law Review* 561.
[27] Council of Australian Law Deans, Statement on Racial Discrimination (2020).
[28] Universities Australia, *Indigenous Strategy 2017-2020* (2017) 14.
[29] Universities Australia, *Indigenous Strategy 2022-2025*(2022) 55.

to complete a Law Degree, known as the 'Priestley 11', set by the Law Admissions Consultative Committee (LACC) of the Legal Services Council.

The prescribed areas of knowledge for admission to legal practice in Australia, last revised in December 2016, do not contain any reference to Aboriginal and Torres Strait Islander peoples. Professor Sally Kift and Sana Nakano wrote in 2021 for a review of regulation of legal education commissioned by the CALD that today's legal education regulation bodies and the Priestley requirements were originally designed 'with the intent to emulate' the work of the 1971 Ormrod Report on legal professional education and core education areas required for lawyers in the United Kingdom.[30] On this basis the structure of our legal education bears obvious relationship to Australian colonialism.

The current Priestley 11 requirements articulate prescribed areas knowledge under each of the following subject areas:

1. Criminal Law and Procedure
2. Torts
3. Contract
4. Property
5. Equity and trusts
6. Corporations Law
7. Administrative Law
8. Constitutional Law
9. Civil Dispute Resolution
10. Evidence
11. Ethics and Professional Responsibility[31]

In 2019 the LACC released a paper proposing revising the descriptions of the eleven existing academic requirements for admission to the Australian legal profession, including proposing the requirement that property law courses cover the 'principles of Indigenous Australian law that form the basis of Aboriginal and Torres Strait Islander claims to land', and that Constitutional law courses cover 'the broad theoretical basis, and the social and historical context, of Australian constitutional law, including the relationship between Aboriginal and Torres Strait Islander peoples and the Australian constitution.'[32] We consider this proposal to be concerningly minimalist and authorising the continued marginalisation of Indigenous legal orders; differentiating the domains of property law and constitutional law implies that there is no sufficiently relevant knowledge requirement to be articulated in other subjects, including specific legal and critical knowledge around Aboriginal and Torres Strait Islander experiences of criminal law, corporations law, administrative law, and so on.

However, in September 2020, the LACC resolved to defer indefinitely the adoption of the new Prescribed Areas of Knowledge that were to be implemented on 1 January 2021, and they have not been adopted at the time of writing. Professor Sally Kift and Sana Nakano write, speaking about legal education reform generally rather than Indigenous pedagogy in particular, that 'the 'Priestley 11' articulation of the prescribed academic requirements for admission remains essentially unchanged from its initial

[30] Professor Sally Kift and Ms Kana Nakano, *Reimagining the Professional Regulation of Australian Legal Education* (2021, Council of Australian Law Deans Report) 12.
[31] Law Admissions Consultative Committee, 'Prescribed Areas of Knowledge' (2016, AUSTRALIA\SDCL\657475579.01).
[32] Law Admissions Consultative Committee, 'redrafting the academic requirements for admission (Australia\SDCL\253946289.09).

conceptualisation in 1982, despite a number of attempts at reform'[33], the writers perceiving 'stasis' in the Priestley requirements.[34]

Australian Law Schools also report against the CALD's Law School Standards,[35] and Threshold Learning Outcomes,[36] which include further areas of curriculum content to be covered in Australian law degrees, additional to the Priestley content. Adopted in 2020, Standard 2.3 of *Australian law school standards on curriculum content*, which provides further areas of knowledge to the Priestley 12. The CALD standard includes a First Nation content standard, that the curriculum seeks to develop 'knowledge and understanding of Aboriginal and Torres Strait Islander **perspectives on and intersections with the law**' (2.3.3). The explanatory note on this standard explains that it reflects the *Universities Australia Indigenous Strategy*.

The CALD First Nations content standard is extremely high-level, providing little guidance on specific knowledge domains and skills required to effectively work alongside Aboriginal and Torres Strait Islander clients. At worst, it supports the misconception that curriculum Indigenisation is 'easy' or requires minimal change from historical curriculum practices.

The breadth of the standard, and the lack of further guidance means that there is little ability to measure a law school's performance against this standard. For instance, it is unclear whether the presence of prominent court cases featuring Indigenous plaintiffs on a law school curriculum, written by settler judges with little knowledge of Indigenous peoples, presented without any supplementary material to bring Indigenous voice into the classroom, and without consideration of the cultural and social context of the case, would be considered to meet CALD standard 2.3.3. As Torres Strait Islander legal academic, Heron Loban has noted, there is a 'fundamental gap' in relation to a tool to measure embeddedness of Indigenous content in legal curricula. [37]

The standard is also notable in its centring of settler law as 'the law' to which Australian legal education is required to teach, without any explicit acknowledgement of the existence of Aboriginal and Torres Strait Islander legal orders. This standard is interested in Indigenous legal issues and perspectives on settler law.

Practical Legal Training regulation

Following the completion of a Bachelors or Juris Doctor level legal qualification in Australia, students are required to undertake a Practical Legal Training (PLT) graduate certificate in order to be eligible to practice law. PLT can either be completed privately or under the auspices of a legal employer, who would supervise the work experience component of the course.

The LACC prescribes standards for PLT under the *Practical Legal Training Competency Standards for Entry-Level Lawyers*.

These prescribe that lawyers' skills must include 'cross-cultural awareness', including that the lawyer has competently:

- identified and appropriately dealt with verbal and non-verbal aspects of cross-cultural communication.
- taken any follow-up action in accordance with good practice.

[33] Professor Sally Kift and Ms Kana Nakano, *Reimagining the Professional Regulation of Australian Legal Education* (2021, Council of Australian Law Deans Report) 17.
[34] Ibid.
[35] Council of Australian Law Deans, 'Australian Law School Standards with Guidance Notes v 1.3 (2020).
[36] Council of Australian Law Deans. 'Juris Doctor Threshold Learning Outcomes' (Marcy 2012); Learning and Teaching Academic Standards Project 'Bachelor of Laws: Learning and Teaching Academic Standards Statement' (December 2010).
[37] Heron Loban, 'Decolonised law degrees: A misnomer' (2022) 74(4) *Alternative Law Journal*.

> • demonstrated awareness of **difficulties of communication attributable to cultural differences; their possible effect on a client's dealings with lawyers**, the police, courts, government and legal agencies; and the desirability of cross-cultural communications training for all lawyers.[38]

The explanatory note for attaining cross-cultural awareness provides that "difficulties of communication attributable to cultural differences" includes difficulties of communication encountered by Indigenous people.' [39]

This standard is drafted from a deficit-base, and focuses on the difficulties encountered by Indigenous people in communication, rather than locating the shortcoming in communication skills and cultural incompetency of the legal practitioner or institutional setting.[40] As Marcelle Burns, Simon Young and Jennifer Nielsen have noted in relation to this standard 'relevant lawyer competencies and standards must be reframe- through a shift from a focus on Indigenous incapacity to a focus on legal professional responsibility.' [41]

The positioning of this standard within PLT means that if a student's legal education is aligned with minimum regulatory standards only, their first specific prescribed exposure to cultural capability skills would follow at least three years of substantive legal learning in a tertiary degree setting, where they have already adopted certain professional communication behaviours.

Legal Practice and Continuing Professional Development

People practicing law in Victoria are mandated to complete continuing professional development activities annually to maintain a legal practicing certificate.[42]

Education 'points' must be completed under the categories of:

- Ethics and professional responsibility;
- Practice management and business skills;
- Professional/ barristers' skills; and,
- Substantive law

There is no requirement that practicing lawyers complete ongoing professional education relating to Indigenous legal content to support culturally safe work with First Nations clients.

Additionally, while there are accredited specialist pathways available through the Law Institute of Victoria, there is no accreditation pathway specifically relating to working with First Nations people.[43] This is an area which is worthy of exploration, given the presence of legal roles which are designed to work exclusively or predominately with First Nations clients.

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[38] Law Admissions Consultative Committee, 'Practical Legal Training Competency Standards for Entry-Level Lawyers' (AUSTRALIA\SDc\224336988.10).
[39] Law Admissions Consultative Committee, 'Practical Legal Training Competency Standards for Entry-Level Lawyers' (AUSTRALIA\SDc\224336988.10) 20.
[40] Marcelle Burns, Simon Young, Jennifer Nielsen, 'The Difficulties of Communication Encountered by Indigenous Peoples: Moving beyond deficit in the model admission rules for legal practitioners' (2018) 28(2) *Legal Education Review.*
[41] Ibid 3.
[42] *Legal Profession Uniform Continuing Professional development (solicitors) Rules 2015* (NSW); *Legal Profession Uniform Law Application Act 2014* (Vic).
[43] See Law Institute of Victoria 'Accedited specialist' (website) <https://www.liv.asn.au/Web/Communities___Networks/Accredited_Specialisation/Web/Content/Communities---Networks/Accredited_Specialisation/Accredited_Specialisation.aspx?hkey=de7f2344-6702-4103-b17c-7e7095d95215>

Considering past inquires: recommendations for cultural overlay to settler legal education

There is a long history of recommendations of cultural awareness training for lawyers from inquiries concerning the ill-treatment of First Nations people in the in/justice system.

In 1991 the Royal Commission into Aboriginal Deaths in Custody recommended amongst its 339 recommendations that:

> Recommendation 96:
> 'The judicial officers and persons who work in the court service and in the probation and parole services whose duties ring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding.'
>
> Recommendation 97:
> That in devising and implementing courses referred to in Recommendation 96 the responsible authorities should ensure that consultation takes place with appropriate Aboriginal organisations, including, but not limited to, Aboriginal Legal Services. [44]

While the Australian Law Reform Commission's 2017 *Pathways to Justice* report did not make specific recommendations around legal education, in discussing the criminal in/justice system the report noted that a number of key stakeholders had discussed the additional training needs of the legal profession in their submissions:

> 'National Aboriginal and Torres Strait Islander Legal Services supported further training of judicial officers to give appropriate consideration to information regarding a person's culture and background. It suggested that training should be developed and led by Aboriginal and Torres Strait Islander organisations. The Law Council of Australia suggested that training and material should go beyond just 'cultural awareness' and should 'explore the modern manifestations of historical factors and highlight the social, political and economic position of Indigenous Australians in the context of offending behaviours'. The Australian Law Reform Commission considers training, especially when developed and delivered by Aboriginal and Torres Strait Islander organisations, to be essential to building the necessary understanding of Aboriginal history and culture, and to place some offending in context.' [45]

Following the death of Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman Veronica Marie Nelson in Dame Phillis Frost Centre in 2020 a coronial inquest considered the circumstances of her death. The Coroner, noting the actions of the barrister who received legal aid funding to assist Ms Nelson, wrote:

> 'It is incumbent upon the legal profession to ensure that lawyers who work with clients in Veronica's position are alert to the range of challenges faced by an Aboriginal woman with a drug dependency in the criminal justice system and equipped to manage the barriers that might impede her capacity to provide instructions. In my view, legal practitioners would be aided by relevant

[44] *Royal Commission into Aboriginal Deaths in Custody (*Final Report, 1991) vol 3, recommendation 96, 97.
[45] Australian Law Reform Commission *Pathways to justice – Inquiry into the Incarceration rate of Aboriginal and Torres Strait Islander Peoples*, (Report no 133, December 2017) 5.107-5.108.

> training when they commence legal practice and refresher training at regular intervals throughout their careers.' [46]

Accordingly, the coroner's recommendations in the inquest addressed legal education:

> 6. I recommend that the Victorian Legal Admissions Board consider requiring that Practical Legal Training course providers deliver compulsory Aboriginal and Torres Strait Islander cultural awareness training as part of the curriculum.
>
> 17. I recommend that the Legal Services Board and Commissioner and the Victorian Bar consider including Aboriginal and/or Torres Strait Islander cultural awareness training as a mandatory requirement of continuing professional development for practising legal practitioners[47]

In *Yoorrook for Justice*, the Commission recommended in relation to its consideration of courts, sentencing and classification of offences that the Victorian Government must:

> ensure that there is comprehensive cultural awareness training of lawyers and the judiciary to support the implementation of (the reforms recommended by the Commission) and the design and delivery of such training must be First Peoples led and include education about the systemic factors contributing to First Peoples over-imprisonment. [48]

Each of the enquiries we consider above have noted the lack of sufficient professional competencies in the legal profession relating to providing effective and appropriate legal services to Aboriginal and Torres Strait Islander people, but have tended towards recommending post-admission education rather than tertiary education reform.

We respectfully suggest that awareness of First Nations experience of law and cultural capability skillsets should be central to legal education from the outset. Without curriculum transformation from an early stage, PLT or post-qualification cultural awareness training programs are unlikely to be able to shift established learnings and patterns of behaviour in the profession.

Accordingly we have recommended that legal education regulation should be introduced to embed and centre Indigenous legal curriculum content from the outset of tertiary legal education.

Proposing substantial reform

Unsurprisingly, Australia is not the only settler state/ common law jurisdiction on a pathway towards legal education reform. Experiences from New Zealand and Canada provide lessons that can help us to improve outcomes for Indigenous peoples and communities through legal education.

Aotearoa – New Zealand

Legal Education in Aotearoa benefits from a longstanding tradition of teaching students about the interaction between the Māori and common law legal systems, grounded in the context of Te Tiriti o Waitangi (the Treaty of Waitangi) and treaty settlement law. These legal foundations have also informed and developed the common law in New Zealand and, as a consequence, both the New Zealand parliament and courts have continued to bring Māori legal concepts to the common law.[49] Notably, a 2012 decision by the New Zealand's highest court found that Māori custom according to tikanga is part of the values of the

[46] Findings of Coroner Simon McGregor in the Inquest into the passing of Veronica Marie Nelson (30 January 2023) [316].
[47] Ibid [16]-[17].
[48] Yoorrook Justice Commission *Yoorrook for Justice* (2023) Recommendation 37 (d).
[49] See, for example, cases such as *Re Edwards (Whakatohea)(No 2)* [2021] NZHC 1025 and N*gawaka v Ngāti Rehua-Ngātiwai Ki Aotea Trust Board [2018]* NZHC 3398 and the enactment of legislation such as the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) and *Te Urewera Act* 2014 (NZ).

New Zealand common law.[50] This, in turn, has led to an increasing demand from the judiciary for advice on Māori law,[51] which has also extended to a need for tikanga Māori, Māori law and Māori jurisprudence expertise across the legal profession.

In 2021, the New Zealand Council of Legal Education made the decision to amend the regulations proscribing the content of the undergraduate law degree (LLB) in New Zealand. The changes, which come into effect from 1 January 2025, requires the New Zealand legal education curriculum includes requirements for the teaching and assessment of Tikanga Māori, Māori Laws and philosophy. This includes a compulsory new law subject on Tikanga Māori and the inclusion of relevant content on Tikanga Māori across several compulsory law courses, including: The Legal System, Public Law, Contracts, Torts, Criminal Law, Property Law (or Land Law and Equity and Succession) and Legal Ethics.[52] These changes will introduce and integrate tikanga Māori with greater complexity, better equipping graduates to work with Indigenous peoples and contribute to the positive development of public law.

Turtle Island - Canada

In 2015 the Canadian Truth and Reconciliation Commission Report[53] published a number of calls to action relating to legal education, which recommended specific areas of education across a breadth of areas of Indigenous legal content and professional stages.

The Commission recommended that law school introduce a mandatory subject on Indigenous people and the law:

> 28. We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, 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.[54]

This recommendations have been implemented, to varying degrees, across a majority of Canadian Law Schools, including subjects centred on Indigenous laws and traditions independent of the 'state law paradigm'.[55]

Call to action 27 called on law societies to mandate appropriate cultural competency training:

> 27. 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.[56]

The Commission turned its eye to opportunities to support these efforts in legal practice through the establishment of Indigenous law institutes 'for the development, use and understanding of Indigenous law and access to justice in accordance with the unique culture of Aboriginal peoples in Canada'.[57]

[50] Takamore v Clarke [2012] NZSC 116.
[51] Professor Jacinta Ruru, quoted in New Zealand Law Society, 'Protecting and enhancing Tikanga for future generations' (7 June 2023) https://www.lawsociety.org.nz/news/publications/lawtalk/lawtalk-issue-954/protecting-and-enhancing-tikanga-for-future-generations/
[52] See New Zealand Council of Legal Education, 'New Tikanga Māori requirements' https://nzcle.org.nz/
[53] Canadian Truth and Reconciliation *Commission Calls to Action* (Winnipeg, Manitoba, 2015).
[54] Ibid.
[55] Council of Canadian Law Deans, 'Council of Canadian Law Deans TRC Report v2' (2018); Joe Williams above n 2, 14.
[56] Ibid.
[57] Canadian Truth and Reconciliation above n X, Recommendation 50.

Canada is also leading the way in the adoption of bijural legal education degrees, which acknowledge the coexistence of both the Indigenous and common law legal systems. In 2018 the University of Victoria Law School began offering the world's first joint degree program that allows students to graduate with both a common law Juris Doctor (JD) and a Juris Indigenarum Doctor (JID). Led by Professor John Borrows and Professor Val Napoleon, the program is designed to train law students to 'assist Indigenous communities with revitalising *their* law rather than dispossessing that law with the colonial version of the common law'.[58] The program 'decentres' the common law and creates space to 'address the legal issues or needs of the community using both the internal solutions of their Indigenous law and external settler law'.[59] This reflects arguments made by Professor Napoleon regarding the need to 'shift the discussions about Indigenous legal traditions from broad, generalized descriptive of philosophical accounts to discussions about specific principles and legal practices.'[60]

Considering developments in New Zealand and Canadian legal education, we recommend that the regulation of Australian legal education should seek to increase the baseline capabilities of all legal graduates to work alongside Indigenous people by articulating specific requirements for Indigenous legal education required to be admitted to practice in Australia across a range of relevant domains. For example, regulation could require graduates to attain knowledge of key aspects of Australian legal history relating to Aboriginal and Torres Strait Islander justice, understanding of International and domestic Indigenous rights frameworks, understanding of Indigenous sovereignty, awareness and respect for the diversity of Indigenous legal systems operating on this continent, key cultural capability skills for working with Aboriginal and Torres Strait Islander peoples, and anti-racism education.

Given the centrality of Aboriginal and Torres Strait Islander peoples to Australian public law, as well as the differential experience of individual justice outcomes of First Nations peoples, it is appropriate and pressing that this level of specificity is introduced in regulation.

Important considerations for this work

In submitting to the Commission that what is required is a complete transformation of Australian legal education, we are mindful of the complexities of what we are proposing, the important work that has been done in this space, and the important work still to be done to understand how legal education might be put in service of true justice for First Nations people.

We believe that regulation is only part of the picture, but an important tool for prompting change in institutions who are deeply invested in their current modes of operation.[61]

In framing conversations to support future work, we would like to briefly highlight two interconnected considerations that both inform, and are informed by, the current state of legal education, and by extension the opportunities achieve sustainable and effective education transformation; racism within the academy and University research practices. While we have not reached concluded recommendations on these dimensions of our submission, we highlight dynamics which must be kept front-of-mind in legal education reform work.

Racism within the academy

[58] University of Victoria, 'The Joint Indigenous Law/Common Law Degree (JID/JD) at the University of Victoria' (video, 15 January 2020).
[59] Joe Williams above n 2, 15.
[60] Val Napoleon and Hadley Friedland 'An Inside Job: Engaging with Indigenous Legal Traditions through stories' (2016) 61(4) *MacGill Law Journal* 725, 734.
[61] For discussion, see Marcelle Burns, Simon Young, Jennifer Nielsen, 'The Difficulties of Communication Encountered by Indigenous Peoples: Moving beyond deficit in the model admission rules for legal practitioners' (2018) 28(2) *Legal Education Review.*

Law schools have not been culturally safe places for Indigenous students, lawyers and legal scholars. A lot of harm has been caused and there is a lot of healing which needs to be enabled.

Professor Irene Watson (Tanganekald, Meintangk, and Boandik) shares her experiences of racism as a law student:

> 'Racism manifested in many forms, one of which came in the form of not fitting into the mould… Perhaps of more concern for myself was the torture of studying and interacting in an academic environment that was both clueless and disinterested in understanding that there are other ways of coming to know the world at its laws. To reiterate from my experience, the opportunity to explore Aboriginal worldviews, let alone Aboriginal issues, within my university education was itself a terra nullius or vacant space in my own personal learning experiences'.[62]

Nicole Watson recalls her experiences of racism as a student in her 2005 article 'Indigenous People in Legal Education: Staring into a Mirror without Reflection':

> 'I was one of a few hundred students attending an administrative law class at the TC Beirne School of Law, University of Queensland. Our lecturer was recounting the facts of *Tickner v Bropho* [1993] FCA 25; (1993) 40 FCR 165. He explained that the case arose from an application for a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), to protect an area of land in Western Australia.
>
> His face broke into a smile as he suggested that the land was sacred to Aboriginal people only because it once housed a brewery. At 19 years of age I lacked the confidence to confront a senior lecturer, so I recoiled in my seat and watched in horror as those around me descended into laughter.
>
> I don't remember any other event from that day. I have no recollection of the inevitable tears that would have burnt my face, or the sullen journey home, but I often reflect upon how that brief moment of powerlessness defined my legal education, and how it continues to find resonance in my experiences as an academic.'[63]

These issues persist for those Indigenous students that become legal educators and researchers. This is due, in part, to the 'minority status' of Indigenous peoples in the field of legal education,[64] and the cultural divide between non-Indigenous students and Indigenous educators which sees students emotionally reacting to having their own world view challenged, and adds to the already significant colonial load for educators.

Dr Eddie Cubillo, in reflecting on his own experiences of racism as an Indigenous legal academic in a law school writes that 'if law schools and universities truly want to engage with First Nations Peoples, their knowledges, and their laws, they must engage in a good faith process of decolonisation and anti-racism'. In speaking about his experiences Dr Cubillo went on to recommend that 'every university in this country needs a fully resourced anti-racism oversight body set up and staffed by First Nations Peoples with appropriate seniority and disciplinary powers'.[65] Dr Cubillo went on to say that anything short of this, would only likely benefit the institution through a positive story, but not create substantive change for Indigenous people.

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[62] Irene Watson, 'Some Reflections on Teaching Law: Whose Law, Yours or Mine?' (2005) 6(8) *Indigenous Law Bulletin* 23.
[63] Nicole Watson, Indigenous People in Legal Education: Staring into a Mirror without Reflection' (2005) 6(8) *Indigenous Law Bulletin* 4.
[64] Irene Watson, 'Some Reflections on Teaching Law: Whose Law, Yours or Mine?' (2005) 6(8) *Indigenous Law Bulletin* 23.
[65] Dr Eddie Cubillo*, One more broken silence: an Indigenous academic encounters racism in the law school* (Wingarra Djuraliyin Public Lecture, 2023).

This context means that relatively few people currently working as legal academics in Australia hold the skills and knowledges to support the sort of transformation towards meaningful teaching of Indigenous legal content we have described above. [66] In 2017 the Indigenous Cultural Competency for Legal Academics Program found that there were eleven Indigenous Australian academics working in nine law schools. [67] One in five law schools were unable to identify whether they employed any Indigenous academic staff.[68]

There is great risk that in working towards institutional change additional load is placed on the small numbers of First Nations people within law schools, and that experiences of racism are exacerbated within the period of contestation that comes with organisational cultural change. Much work is still to be done to consider how the work of transforming legal education to include Indigenous legal content can be appropriately and equitably shared amongst Indigenous and non-Indigenous educators. [69]

The inclusion and experience of Indigenous peoples in research

While this might initially appear to be removed from a discussion about legal education, it is important to consider the role of research in informing what is taught, how it is taught and who teaches it. University legal educators are generally encouraged to see themselves as researchers first. Research, as a tool of colonisation, plays an important role in supporting both the process of colonisation and legitimising colonial practices. [70] Dehumanising Indigenous peoples through 'othering' allows colonisers to control who can produce knowledge, what knowledge is valid and who can benefit from it. In his seminal work 'The Imperial Scholar', Richard Delgado highlights the systemic dominance of a coterie of 'white scholars' and the impact this has on knowledge production. By employing citation practices which privilege 'mainstream' voices - coupled with a 'failure to acknowledge minority scholarship'[71] legal scholarship is prone to a variety of distortions that are harmful and interfere with minority rights.[72] Western research becomes a gatekeeper that actively excludes Indigenous voices, perspectives and knowledge from being heard and considered by those who rely on legal scholarship, such as legislators, bureaucrats, judges and the media. Australian courts, for example, rarely cite Indigenous knowledges and scholars, privileging peer-reviewed legal scholarship and written historical sources.[73]

As educators we acknowledge that in the classroom, it begins with how law students are taught about undertaking legal research. It immediately sets the scene for what knowledges are considered valid and whose voices and perspectives are introduced. These foundational lessons underpin how (or indeed, whether) Indigenous voices, methodologies and pedagogies ever make their way into the room – whether it be a court room, political office, bureaucrats' policy design meeting, research project or the classroom. The outputs of these engagements – judgments, legislation and policies, service design, research findings – are then fed back to law students to reinforce the legitimacy of the status quo. This extends to the texts students are required to read and the assessments they are asked to complete.

[66] Marcelle Burns and Jennifer Nielsen, 'Dealing with the 'wicked' problem of race and the law: A critical journey for students (and Academics) Legal Education Review (2018) 28 (2) *Legal Education Review* 5.
[67] Indigenous Cultural Competency for Legal Academics Program, Law School Survey Report 2017 (Report, October 2017) 8.
[68] Ibid.
[69] For discussion see Karen Drake and A. Christian Airhart, 'Who should teach Indigenous law' in John Borrows and Kent McNeil (eds) *Voicing Identity: Cultural Appropriation and Indigenous Issues* (University of Toronto Press, 2022).
[70] Ibid 69.
[71] Richard Delago, 'The Imperial Scholar: Reflections on a Review of Civil Rights Literature' (1984) 132(3) *University of Pennsylvania Law Review* 561, 563
[72] Ibid 568.
[73] See Dr Wayne Atkinson above re the judgment of Olney J in Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Ors where the judge 'relied almost exclusively on the memoirs of a European land seeker' to the exclusion of Yorta Yorta oral knowledge presented.

Addressing the problematic nature of university research cultures and practices is intertwined with legal education practices, and an important component of transitioning from 'Indigenisation' as an overlay (which leaves the settler law untouched) to a discussion which decentres settler law.

Conclusion

The time for tinkering with the traditional legal curriculum to 'make room' for Indigenous content is over; it is time for transformation in the fundamental starting points and values law students are presented with. Embedding Indigenous legal content across legal education will not only impact what happens to First Nations people in Victorian courts and tribunals, but across areas of public life.

This submission has highlighted straight-forward regulatory mechanisms to enhance accountability of law schools to meet their responsibilities to First Nations peoples and communities, and to contribute to a justice system which lives up to its name. Standards must be specific and measurable, and require Indigenous legal content to be a prominent component of legal education from the commencement of tertiary study throughout ongoing professional education.

Drawing on international context, we see a strong role for the Commission in sustaining momentum towards long-overdue reform in regulation of Indigenous content standards across legal education.

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