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INTRODUCTION

Decolonising the Law School

Heather Douglas and Nicole Watson

Introduction

Law schools have an aura of power and exclusivity. Some graduates go on to become parliamentarians, senior public servants, titans of industry or judges. Many law schools are also dominated by students who went to private schools, with some having intergenerational ties to the legal profession. For those who were not born into such privilege, law school can be daunting. When one of us, Nicole, reflects on her experiences as a law student in the 1990s, she visualises a grandiose building with rooms named after powerful white men. Indigenous peoples were all but invisible (and still are in many law schools). It is implicitly understood that the story of Australian law began with the arrival of the First Fleet in Eora Country.

Much has changed over the past thirty years. Strides have been taken by the Council of Australian Law Deans (CALD), which has encouraged all law schools to 'work in partnership with First Nations peoples' to build cultural competence and safety into courses.[1] It is now common for Indigenous artworks to hang on the walls of law faculties, and meetings are routinely opened with an acknowledgement of Country. There are still too few Indigenous legal scholars and law students, but they are a burgeoning community.

Despite such positive developments, the meaningful inclusion of Indigenous peoples and their legal traditions is yet to be achieved. The goal of this edited collection is to provide fresh impetus to this essential transformation of legal education. By reflecting on their own teaching practices and drawing

1 Council of Australian Law Deans, 'CALD Statement on Racism and Law Schools', *Council of Australian Law Deans* (Web Page, 31 January 2024) <https://cald.asn.au/first-nations-peoples/>.

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upon tools from Indigenous studies and critical race theory, the authors show how to overcome obstacles to the incorporation of Indigenous perspectives in the curriculum.

Standpoint

One of the issues often raised by Indigenous scholars, including some of the contributors to this book, is the importance of one's standpoint. As stated by the Gomeroi/Kamilaroi academic Marcelle Burns in her chapter,

> our 'standpoint' is significant because it informs how we view the world and our place within it. Standpoint theory also recognises that all knowledges are historically, socially, and culturally contingent. Standpoint also sheds light on power relations and how knowledge is produced.[2]

Consequently, we share our standpoints, which seep into our work as academics and have shaped our approach to this collection:

Heather

Heather's heritage is Scottish and Irish, but she is yet to explore her heritage beyond the last three generations of her family. Heather's childhood in country Victoria and Melbourne/Naarm, living on the lands of the Wurundjeri people of the Kulin Nation people, was privileged. Formative for Heather, in the context of this collection, were performing volunteer roles at community legal centres and working as a criminal lawyer in Melbourne/Naarm and with the Aboriginal Legal Service in Alice Springs/Mparntwe on the lands of the Arrernte people. These experiences highlighted not only the injustices that the law could mete out but also its potential, and they have informed her scholarship.

Nicole

Nicole belongs to the Birri Gubba and Mununjali Peoples, whose lands lie within what is now known as the state of Queensland. Nicole was born into a family of activists during the reign of the despotic and deeply conservative Bjelke-Petersen Government. She grew up hearing stories about elders who were removed from their families as children to become domestic workers and Indigenous activists who were violently harassed by police officers.

2 Marcelle Burns, 'Relationality in Indigenous Teaching Praxis in Legal Education' in Nicole Watson and Heather Douglas (eds), *Legal Education through an Indigenous Lens: Decolonising the Law School* (Routledge, 2025) (citations omitted).

Those stories have had an indelible impact on her scholarship, which illuminates both the racism that pervades the legal system and the unconquerable resilience of Indigenous peoples.

This Collection

Just as standpoint is relevant to our scholarship, so, too, are the relationships that have nurtured this book. Heather and Nicole met in the late 1990s in Brisbane, the capital of Queensland. At the time, Heather was an academic in the Faculty of Law at Griffith University and was conducting research into the experiences of Indigenous law students. Nicole had recently completed her law studies at the University of Queensland and was interviewed for Heather's research. This was the first time Nicole was able to give voice to her experiences as one of the few Indigenous law students in her cohort. She felt empowered, and the seeds of a future academic career were planted.

Australia in the early 1990s was, in many respects, a time of great promise. In 1992, the High Court expunged the doctrine of terra nullius from Australian law in *Mabo v Queensland [No 2]*.[3] The Keating Government responded to this historic decision with a statutory recognition process, a land fund for Indigenous people who could not meet the requirements for recognition of their native title, and the promise of a social justice package.[4] In the country's law schools, however, a psychological terra nullius prevailed[5] that found resonance in Heather's research—Indigenous participants reported experiencing profound alienation and racism during their years in law school.[6] Some dropped out, and those who persevered grappled with isolation and disillusionment.[7] Over the ensuing years, a small but impactful community of academics whose work engaged with Indigenous people and the law emerged. Each one of us who has been involved in this book project is a proud member of that coalition of scholars. Some of the authors have been colleagues for decades. Others are new friends who have generously shared their time and insights with us.

Readers of this collection may, on occasion, be surprised by the tone of the writing, which often departs from the staid language of legal texts. They

3 (1992) HCA 23.

4 Bryan Keon-Cohen, 'From Euphoria to Extinguishment to Co-Existence' (2017) 23 *James Cook University Law Review* 9.

5 For an explanation of 'psychological terra nullius', see Larissa Behrendt, 'Mabo Ten Years On—A Psychological Terra Nullius Remains' (July 2002) *Impact* 1.

6 Heather Douglas, 'Indigenous Legal Education: Towards Indigenization' (2005) 6(8) *Indigenous Law Bulletin* 12.

7 Heather Douglas, 'This Is Not Just About Me': Indigenous Students' Insights About Law School Study' (1998) 20(2) *Adelaide Law Review* 315.

will also be confronted by a panoply of emotions—optimism, frustration and hurt—as the authors reflect on their experiences. The criticisms made by some of the authors in this book are not motivated by a desire to disparage our non-Indigenous colleagues or to make them feel guilty. Rather, they are made in the spirit of collegiality. Indigenous legal academics and law students do not want to languish at the margins of their respective institutions. They want to take their rightful place as members of the academy. They are also aware that all law students, irrespective of cultural background, can benefit from learning about the only legal traditions to have supported human beings to live sustainably in this place that all of us call 'home'.

This collection may be used as a standalone resource or as a companion text to *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making*.[8] The latter is a collection of 16 judgments of Australian courts that are reimagined from Aboriginal and Torres Strait Islander perspectives. The judgments, which are accompanied by commentaries that explain the original decision, span across a range of areas, encompassing criminal law, native title, family law and others. *Indigenous Legal Judgments* shows how the stories of Indigenous people can be written into judgments, whereas this book answers questions such as the following: How can concepts such as relationality inform pedagogy? Can settler law be decolonised? How can First Nations' perspectives be integrated into the teaching of core subjects such as torts, criminal law and public law?

This introductory chapter is presented in three parts. Part One discusses the history of Indigenous Australians in legal education and their entry into the legal profession. Part Two reviews the literature about policy interventions regarding changing curriculum in Australian law schools. In this part, we also review the literature about racism in Australian universities. The final part introduces readers to the structure of this book and its consecutive chapters.

At this point, we offer a clarification regarding the use of terminology. Throughout Australia, Indigenous peoples draw upon a range of terms to identify themselves and one another. Although some prefer 'First Nations', 'First Peoples', 'Aboriginal and Torres Strait Islander' or 'Blak', others identify by their membership in particular nations.[9] We recognise that such debates are complex and outside the scope of this collection. Throughout this book, all such language is used interchangeably.

8 Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021).

9 See the AIATSIS map of Indigenous Australia, which 'serves as a visual reminder of the richness and diversity of Aboriginal and Torres Strait Islander Australia': 'Map of Indigenous Australia', *AIATSIS* (Web Page) <https://aiatsis.gov.au/explore/map-indigenous-australia>.

Part One: Indigenous People in the Law

Historically, Australia's law schools were the embodiment of terra nullius. Indigenous peoples' affinity with their lands and age-old legal traditions were, for the most part, erased. Inequalities in state education systems meant that Indigenous people rarely finished high school, leaving few prepared for the rigours of law school. Unsurprisingly, Indigenous people did not begin to enter legal education until the 1970s. This development coincided with the emergence of the Black Power movement and the establishment of Aboriginal Legal Services.[10]

The first such service was created by activists and their supporters in the Sydney suburb of Redfern in 1970.[11] At the time, Indigenous people in Redfern were subject to unrelenting violence from police officers. Those who lived through this era have described random arrests in establishments frequented by Aboriginal patrons, such as the Empress Hotel.[12] There was also an unofficial curfew imposed on any Aboriginal person walking the streets after 10 o'clock at night.[13]

A core group of activists that included Gary Foley, Paul Coe and Gary Williams drew upon tactics used by the American Black Panthers, such as the 'pig patrols', in which courageous observers recorded incidents of police violence.[14] They also worked with Hal Wootten, Dean of the Law Faculty at the University of New South Wales, and volunteer solicitors to establish what would become 'Australia's first free, shop-front, legal aid centre'.[15] With access to legal representation, Blak people could finally challenge baseless charges that were designed to, in the words of Paul Coe, 'keep us in our place'.[16]

It is important to recognise the contributions made by Wootten and his colleagues at the University of New South Wales in the 1970s. Garth Nettheim was among the first legal scholars to challenge the invisibility of Indigenous people in legal education. In the 1970s, Nettheim became aware

10 For discussion about the nexus between the Black Power movement and the emergence of Aboriginal Legal Services, see Tanya Mitchell and Amanda Porter, '*Walker v New South Wales* [1994] HCA 64' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 2021) 54, 57.

11 '50+ Years of Resistance, Resilience and Solidarity', *Aboriginal Legal Service (NSW/ACT) Ltd* (Web Page) <www.alsnswact.org.au/history>.

12 Kathy Lothian, 'Seizing the Time: Australian Aborigines and the Influence of the Black Panther Party, 1969–1972' (2005) 35(4) *Journal of Black Studies* 179, 191.

13 Kathy Lothian, 'Seizing the Time: Australian Aborigines and the Influence of the Black Panther Party, 1969–1972' (2005) 35(4) *Journal of Black Studies* 179, 191.

14 Johanna Perheentupa, *Redfern: Aboriginal Activism in the 1970s* (Aboriginal Studies Press, 2020) 36.

15 Gary Foley, 'Black Power in Redfern 1968–1972', *VU Research Repository* (Web Page, 5 October 2001) <https://vuir.vu.edu.au/27009/1/Black%20power%20in%20Redfern%20 1968-1972.pdf>.

16 Perheentupa (n 14) 36.

of Queensland legislation that discriminated against Aboriginal and Torres Strait Islander people, an experience so shocking that the 'hairs stood up on the back of his neck'.[17] He went on to establish Australia's first course on Indigenous people and the law at the University of New South Wales in 1979.[18]

The University of New South Wales also created a special admissions scheme for Indigenous people who aspired to study law in 1971.[19] Among those to seize this opportunity was Kuku Yalanji woman Pat O'Shane. After graduating in 1976,[20] O'Shane would go on to work for Aboriginal Legal Services in Sydney and Alice Springs, head the New South Wales Department of Aboriginal Affairs, and become the first Aboriginal magistrate in 1981.[21]

Much has been achieved over the ensuing decades. More than six hundred Indigenous people have entered the legal profession since O'Shane and her contemporaries blazed their trails.[22] Lawyers such as Yawuru man Mick Dodson have played pivotal roles in processes that brought the stories of the Stolen Generations into the public consciousness.[23] Today, Indigenous lawyers represent the most disadvantaged members of our society in the criminal courts, they secure justice for the victims of historical wage theft by state governments[24] and lead community organisations.

Although bound by the rules and professional etiquette applicable to all lawyers, the Indigenous legal profession is unique because its members continue to draw upon the perspectives and experiential knowledge of their communities. Lawyers such as our colleague, Euahleyai and Kamillaroi woman Larissa Behrendt, are fusing age-old storytelling traditions with the mediums of fiction and documentary filmmaking to highlight systemic racism in the legal system.

17 Rosyln Cook, 'Garth Nettheim: A Profile: How It All Began . . .' (2006) 6(22) *Indigenous Law Bulletin* 10.

18 Marlene LeBrun, 'Book Review—Aboriginal Legal Issues' (1992) 1(54) *Aboriginal Law Bulletin* 16.

19 Perheentupa (n 14) 41.

20 'UNSW's 70th Anniversary', *University of New South Wales* (Web Page) <https://alumni.unsw.edu.au/70th-anniversary/1970s>.

21 Nikki Henningham, 'O'Shane, Pat', *The Encyclopedia of Women & Leadership in Twentieth-Century Australia* (Web Page) <www.womenaustralia.info/leaders/biogs/WLE0771b.htm>.

22 Kate Allman and Amy Dale, 'The State of the Profession 2021' *Law Society Journal* (online, 9 August 2021) <https://lsj.com.au/articles/the-state-of-the-profession-2021/>.

23 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home* (Report, 1997) <https://humanrights.gov.au/our-work/projects/bringing-them-home-report-1997>.

24 'Landmark Stolen Wages Case Settles for $190 Million', *Griffith Chambers* (Web Page, 10 July 2019) <www.griffithchambers.com.au/post/2019/07/10/landmark-stolen-wages-case-settles-for-190-million>.

Some are using their skills to illuminate the hypocrisy of a legal system that is premised on noble values, such as equality before the law, but overlooks the unjust invasion that underwrote the founding of Australia. Trawlwoolway and Pinterrairer lawyer Michael Mansell has been an indefatigable advocate for the rights of Indigenous peoples for over 50 years. He was instrumental to the creation of the Aboriginal Provisional Government in 1990, which asserts a continuing Aboriginal sovereignty in ways that include the issuing of Aboriginal passports.[25] Most recently, Mansell spoke out against the proposal for the constitutional entrenchment of an Aboriginal and Torres Strait Islander Voice to the Parliament, arguing that because it would have been advisory in nature, such a body could never have delivered self-determination.[26]

Countering such arguments and leading the 'Yes' campaign for an Aboriginal and Torres Strait Islander Voice were Indigenous lawyers such as Cobble Cobble woman Megan Davis and Noel Pearson, a member of the Guugu Yimithirr community of Hopevale. On 14 October 2023, Australians voted overwhelmingly against this reform.[27] Among other efforts, this demonstrates that although great strides have been made over the past five decades, there is still a long way to go.

Likewise, there is much to be achieved before Indigenous people gain parity in the legal profession. The lack of representation among the country's barristers is bleak. There are only 20 Indigenous barristers throughout Australia.[28] This paucity is mirrored in the legal academy. We are unaware of any recent surveys of Indigenous academics in Australia's law schools, but we estimate that the size of this community is comparable to that of the Indigenous Bar. Clearly, change is necessary, and such reform must begin in Australia's law schools. In the following, we discuss the work that has been undertaken over recent decades to challenge racism in higher education, and specifically, legal education.

Part Two: Challenging Racism in Higher Education

Over the past 20 years, there has been significant policy activity in relation to both access to and outcomes for Aboriginal and Torres Strait Islander people in higher education. A 2012 review led by Larissa Behrendt

25 'About the Aboriginal Provisional Government', *Aboriginal Provisional Government* (Web Page) <http://apg.org.au/about.php>.

26 Michael Mansell, 'We Have a Voice: It's Not Listened to', *Arena* (September 2023) <https://arena.org.au/we-have-a-voice-its-not-listened-to/>.

27 'Referendum on Aboriginal and Torres Strait Islander Voice', *National Indigenous Australians Agency* (Web Page) <www.niaa.gov.au/indigenous-affairs/referendum-aboriginal-and-torres-strait-islander-voice>.

28 Michael Pelly, 'Bar Vote on Voice a "Complete Mess": Indigenous Barrister', *Australian Financial Review* (online, 11 May 2023) <www.afr.com/companies/professional-services/bar-vote-on-voice-a-complete-mess-indigenous-barrister-20230509-p5d6wn>.

('the Behrendt Review')[29] identified that Aboriginal and Torres Strait Islander people are significantly underrepresented in higher education and that this contributes to the high levels of social and economic disadvantage that they often experience. To begin with, the Behrendt Review set an aim for parity of Aboriginal and Torres Strait Islander students and staff in higher education in terms of enrolment, completion/recruitment and retention.[30] The Behrendt Review highlighted the success of approaches that ensure that universities 'grow their own' graduate research enrolment and workforce through flexible pathways and mentoring activities.[31] The Behrendt Review acknowledged that

> [t]he legitimacy and acceptance of this embedding of Aboriginal and Torres Strait Islander perspectives within Australian universities is a matter of ongoing and current debate, with divergent viewpoints being expressed among both Aboriginal and Torres Strait Islander and non-Indigenous academics, particularly regarding curriculums.[32]

The Behrendt Review noted that a paper, prepared by Ngarrindjeri scholar Daryle Rigney,[33] stated there were three categories of commitment by Australian universities to teaching Indigenous knowledges:

Category 1: Indigenous peoples are invisible, marginalised, limited, non-existent;
Category 2: Indigenous studies are a single, separate and discrete unit of work focusing on Indigenous peoples; and
Category 3: Indigenous perspectives are embedded in relevant degrees and topics, for example, science, environmental studies, law, education, medicine, psychology and art.

29 Larissa Behrendt et al., *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* (Final Report, 2012) 9 ('the Behrendt Review') <https://www.education.gov.au/aboriginal-and-torres-strait-islander-higher-education/review-higher-education-access-and-outcomes-aboriginal-and-torres-strait-islander-people>.

30 Larissa Behrendt et al., *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* (Final Report, 2012) 29.

31 Larissa Behrendt et al., *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* (Final Report, 2012) 138.

32 Larissa Behrendt et al., *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* (Final Report, 2012) 95.

33 Larissa Behrendt et al., *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* (Final Report, 2012) 9; Daryle Rigney, 'Indigenous Higher Education Reform and Indigenous Knowledges' (Report, *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People*, Department of Education, Employment and Workplace Relations, 2011).

Prepared five years after the Behrendt Review, Universities Australia's Indigenous Strategy 2017–2020 ('the Strategy')[34] again drew attention to the low enrolment and high attrition rates of Aboriginal and Torres Strait Islander students and the few Indigenous staff in the higher education sector. The Strategy was committed to achieving similar actions to the Behrendt Review—grow the rate of Aboriginal and Torres Strait Islander students enrolled in and completing higher degrees, increase the number of Aboriginal and Torres Strait Islander people employed in universities and ensure that all students engage with Aboriginal and Torres Strait Islander cultural content as an integral part of their course of study by 2020.[35]

More specific reports focusing on law schools have followed. Many of these were produced as part of the Indigenous Cultural Competency for Legal Academics Program ('ICCLAP') led by Marcelle Burns,[36] which was recommended as part of the Behrendt Review. The ICCLAP identified a need to improve the inclusion of Indigenous cultural competency in law school curricula but recognised that this required strong leadership and ongoing commitment from law schools.[37] To this end, and similarly to previous reports, the ICCLAP recommended that priority should be given to the recruitment and retention of Indigenous legal academics to support the embedding of Indigenous cultural competency in the curriculum and that law schools should take measures to ensure the cultural safety of Indigenous academics and students.[38]

In 2020, the Council of Australian Law Deans (CALD) clearly identified in the Australian Law School Standards that the content of the law course should seek to develop 'Aboriginal and Torres Strait Islander perspectives on and intersections with the law'.[39] Furthermore, law school curricula 'should be designed with a view to fostering Indigenous cultural competency' and be able to show how this has occurred.[40] The standards also note that it is desirable

34 Universities Australia, 'Indigenous Strategy 2017–2020' (Universities, 2017) <https://universitiesaustralia.edu.au/wp-content/uploads/2019/06/Indigenous-Strategy-2019.pdf>.

35 Universities Australia, 'Indigenous Strategy 2017–2020' (Universities, 2017) 14.

36 Marcelle Burns, Anita Lee Hong and Asmi Wood, *Indigenous Cultural Competency for Legal Academics Program* (Final Report, 2019) vi, 49 <https://universitiesaustralia.edu.au/wp-content/uploads/2019/06/Indigenous-Strategy-2019.pdf>.

37 Marcelle Burns, Anita Lee Hong and Asmi Wood, *Indigenous Cultural Competency for Legal Academics Program* (Final Report, 2019) vii.

38 Marcelle Burns, Anita Lee Hong and Asmi Wood, *Indigenous Cultural Competency for Legal Academics Program* (Final Report, 2019) vi, 49 <https://universitiesaustralia.edu.au/wp-content/uploads/2019/06/Indigenous-Strategy-2019.pdf>.

39 Council of Australian Law Deans, 'Australian Law School Standards with Guidance Notes' (30 July 2020) [2.3.3] (a) <https://cald.asn.au/wp-content/uploads/2020/07/Australian-Law-School-Standards-v1.3-30-Jul-2020.pdf.>.

40 Council of Australian Law Deans, 'Australian Law School Standards with Guidance Notes' (30 July 2020) [2.3.3] 17.

that Aboriginal or Torres Strait Islander Australians teach in subjects that require Indigenous knowledge.[41] Consistent with these standards, law schools would need to give priority to the appointment and promotion of Aboriginal and Torres Strait Islander staff.[42]

The ICCLAP reviewed the critiques regarding the inclusion of Indigenous cultural competency in the curriculum. Such critiques include that it may perpetuate stereotypes of Aboriginal and Torres Strait Islander people; it may 'other' Indigenous people, leading to new forms of racism; it might re-centre whiteness as the normative standard; it could suggest that simply learning a group's history (without focusing on addressing social injustices) may be enough; or it might fail to grapple with racism and colonialism.[43] For example, Sámi scholar Rauna Koukkanen has warned of the dangers of 'mere inclusion' of Indigenous issues in the curriculum, commenting that this approach will often lead to the content being interpreted through a non-Indigenous lens and is a form of 'epistemic violence'.[44] This 'ad hoc embedding phenomenon'[45] risks appearing tokenistic and could actually serve to undercut Indigenous knowledges and increase inequalities.[46]

Despite these critiques, scholars have identified clear arguments to 'decolonise' the legal curriculum. Asmi Wood, a lawyer with ancestors from the western Torres Strait, and Nicole Watson compellingly argue that

> Firstly, it is illogical to confine legal education to a system of laws that has operated on Australian soil for a mere 230 years, while utterly ignoring laws that have been practised here for thousands of years. Secondly, Indigenous laws have intrinsic value because they are the only bodies of law that have enabled human beings to live here sustainably. Finally, Indigenous laws should be incorporated out of recognition that settler law has consistently proven to be inept in keeping Indigenous communities safe from violence.[47]

41 Council of Australian Law Deans, 'Australian Law School Standards with Guidance Notes' (30 July 2020) [2.3.3] 27.

42 Council of Australian Law Deans, 'Australian Law School Standards with Guidance Notes' (30 July 2020) [2.3.3] 28.

43 See the discussion and literature review in Burns, Lee Hong and Wood (n 36); Heron Loban, 'Decolonised Law Degrees: A Misnomer' (2022) 47(4) *Alternative Law Journal* 296, 297.

44 Rauna Kuokkanen, 'Toward a New Relation of Hospitality in the Academy' (2003) 27(1/2) *American Indian Quarterly* 267, 297. See also Marcelle Burns, 'Towards Growing Indigenous Culturally Competent Legal Professionals in Australia' (2013) 12(1) *International Education Journal: Comparative Perspectives* 230.

45 Loban (n 43) 297.

46 Kevin Lowe, Nikki Moodie and Sara Weuffen, 'Refusing Reconciliation in Indigenous Curriculum' in Bill Green, Mary Roberts and Marie Brennan (eds), *Curriculum Challenges and Opportunities in a Changing World* (Springer, 2021) 71, 79.

47 Asmi Wood and Nicole Watson, 'Mirror, Mirror on the Wall, Who Is the Fairest of Them All?' (2018) 28 *Legal Education Review* 1, 12. See also Loban (n 43).

However, although there is arguably an increasingly supportive policy setting and clear arguments for the inclusion of Aboriginal and Torres Strait Islander peoples and their knowledge in law schools, change has been slow and arduous.

Continuing Exclusion

Why is inclusion in the law school curriculum taking such a long time? Racism is one explanation for the slow pace of change, and one that we will return to, but other explanations have also been proffered. Academic laziness—with academics not being willing to divert time and attention away from their specialist academic interests—may be another reason.[48] This 'laziness' may also be connected to the massively increased pressures on academics to teach, research, contribute to both university and community service activities and engage in writing and communicating with non-academic audiences, all within the window of a 38-hour week.[49] In such gruelling conditions, 'Indigenising the curriculum' might be seen as yet another 'task' in an ever-growing list.

Added to these pressures on academics is the twofold setback of expanding class sizes and increasing pressure from students who are paying increasingly more for their degrees and therefore expect their teachers to provide greater levels of service (time, feedback, etc.). The challenges for academics to manage artificial intelligence in teaching and assessment are also real and growing.[50] Torres Strait Islander lawyer Heron Loban has highlighted similar concerns about the impacts of inadequate resourcing and the rise of managerialism in universities in relation to properly embedding Indigenous knowledge in the law school curriculum.[51]

Academic work conditions are on the national agenda. Notably, after successful wage theft claims at some of Australia's most prestigious educational institutions,[52] universities are now striking for better wages and conditions, particularly for casual sessional and contract staff.[53] Sessional and contract

48 Kuokkanen (n 44) 272.

49 Craig Whitsed and Antonia Girardi, 'Where Has the Joy of Working in Australian Universities Gone?', *The Conversation* (online, 7 June 2022) <https://theconversation.com/where-has-the-joy-of-working-in-australian-universities-gone-184251>.

50 Australian Government, *Australian Universities Accord* (Discussion Paper, February 2023) 32 <www.education.gov.au/australian-universities-accord/resources/australian-universities-accord-panel-discussion-paper>.

51 Loban (n 43) 297.

52 National Tertiary Education Union, *NTEU Wage Theft Report* (2023) <https://apo.org.au/sites/default/files/resource-files/2023-02/apo-nid321580.pdf>.

53 John Ross, 'Australian Universities Face a New Wave of Strikes', *Times Higher Education* (online, 7 April 2023) <www.timeshighereducation.com/news/australian-universities-face-new-wave-strikes>.

staff have always been an important part of the teaching support in Australian universities, with 50–80 per cent of undergraduate teaching in universities delivered by sessional staff.[54] The numbers of casual staff have continued to grow,[55] and some law courses rely almost entirely on sessional staff. Sessional staff are paid relatively poor hourly rates, they do not have the certainty of ongoing roles, and they may not know their employer's aspirations in relation to the inclusion of Indigenous content. Even if they know, their hourly rates support limited time for preparation and they receive minimal support when grappling with the Indigenous content of the subject(s) that they teach. Furthermore, sessional academics, such as full-time and permanent academic staff, often face complex pressures—many are juggling PhD study, teaching across multiple courses and managing other employment at the same time.

Some law teachers, whether sessional or not, do not feel supported to teach Indigenous issues and expect that this task will be accomplished, or supported, by their Indigenous colleagues.[56] As observed earlier, the ICCLAP recognised the importance of Indigenous academic support for curriculum development and recommended that Indigenous legal academics be recruited to support the embedding of Indigenous cultural competency in the curriculum.[57] However, this aspiration creates further issues. First, there may not be Indigenous law graduates available (or interested) to work in the university environment. Second, as Kuokkanen observes,

> relying on Indigenous scholars to educate primarily non-Indigenous students . . . poses a problem of the politics of distraction—diverting the attention of Indigenous people from their own priorities to the priorities of the dominant society.[58]

The politics of treaty and truth-telling processes, support for inquests, and other key issues are almost certainly always greater priorities for the small group of Indigenous law experts in Australia. Furthermore, the recruitment of Aboriginal staff to support the broader curriculum project also risks them being viewed by academic colleagues as a 'resource' or 'object to be used' by the 'dominant structure' (the law school).[59] In such circumstances, Indigenous academics may feel tokenised, and colonialism can be reinscribed.

54 Australian Government (n 50) 29.
55 Australian Government (n 50) 28.
56 Susan Page and Christine Asmar, 'Sources of Satisfaction and Stress among Indigenous Academic Teachers' (2009) 29(3) *Asia Pacific Journal of Education* 387.
57 Burns, Lee Hong and Wood (n 36) vii.
58 Kuokkanen (n 44) 273.
59 Marcelle Marie Gareau, 'Colonization within the University System' (2003) 27(1/2) *American Indian Quarterly* 196, 197–99.

An argument that might be made by some academics to justify their refusal to introduce more Aboriginal and Torres Strait Islander content into the curriculum appeals to the protection of their freedom of speech or academic freedom. Intrinsic to this argument is the view that academics should always be able to use their professional judgement to determine what and how 'their' subject is taught. The culture of the institution, the insulation of disciplines, the siloing of subjects and the managerial context of universities all help to protect the status quo.[60]

Academic freedom, however, is not just about the teacher; it also extends to the student. At least part of the aim of law school is to enable students to become critical thinkers.[61] In her work, Nicole Watson has said that if she could talk with her lecturer who told the administrative law class with a smile that specific land was sacred to Aboriginal people only because it once held a brewery,

> I would remind him of his responsibility to nurture all of the young minds in his class, not only those who shared his privilege. After all, equality in legal education is not a charitable gesture from the establishment, but a right that we demand.[62]

One final argument that might be used to justify the exclusion of Indigenous-authored research from the curriculum is that the research methodology is not reliable, recognised or 'rigorous'.[63] However, as Koukkanen argues,

> the privileged group whose epistemes are taken for granted in the academy feel threatened when faced with perspectives and information that challenges their earlier knowledge and ingrained views of the world.[64]

This is a concern taken up by many of the chapters in this collection.

Although these practical issues and ideological arguments may operate to some extent to slow the pace of inclusion of Indigenous content in Australian law schools, we argue that racism—both institutional and individual—lies at

60 Polly Walker, 'Colonising Research: Academia's Structural Violence Towards Indigenous Peoples' (2003) 22(3) *Social Alternatives* 37, 38.

61 Bruce McFarlane, 'Re-Framing Student Academic Freedom: A Capability Framework' (2012) 63 *Higher Education* 719, 720.

62 Nicole Watson, 'Indigenous People in Legal Education: Staring into a Mirror without Reflection' (2005) 6 *Indigenous Law Bulletin* 4, 5.

63 Walker (n 60) 38.

64 Kuokkanen (n 44) 272.

the centre of such exclusion. When we use the term 'racism', we refer to the definition provided by the Australian Human Rights Commission:

> Racism is a process by which systems and policies, actions and attitudes create inequitable opportunities and outcomes for people based on perceived [racial difference]. Racism is more than just prejudice in thought or action. Racism—whether individual or institutional—includes the power to discriminate against, oppress or limit the rights of others.[65]

Numerous studies have identified the obstacles that Aboriginal and Torres Strait Islander students face in law school, including disrespect.[66] A survey of current and former Indigenous University of New South Wales law students raised several key themes: experiences of alienation, imposter syndrome and lack of cultural safety; limited institutional understanding of the complex lives of many Indigenous students, including issues involving mental health and family/parenting responsibilities; the need for academic and non-academic support (and the interrelatedness of the two); and financial hardship and accommodation needs.[67]

The experiences of Aboriginal and Torres Strait Islander academics have been reported to be equally painful.[68] Phillip Falk describes the experience as an 'on-going struggle against colonial domination'.[69] Similarly traumatic experiences are reported by Indigenous academics in other colonised countries. Native American scholar of Esselen and Chumash descent Deborah Miranda describes the experience of working in a university setting as 'heartbreaking'.[70] In New Zealand, Māori academic Tara McAllister lists 50 reasons why there are no Māori people in the science department where she undertook postdoctoral work.[71] These reasons, which are too numerous to repeat here, include the following:

> . . . because we are tired.
> Tired of trying.
> Tired of fighting.

65 'What Is Racism?', *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/our-work/race-discrimination/what-racism>.

66 Burns (n 44) 230.

67 Melanie Schwartz, 'Retaining Our Best: Imposter Syndrome, Cultural Safety, Complex Lives and Indigenous Student Experiences of Law School' (2018) 28(2) *Legal Education Review* 1, 5.

68 Bronwyn Fredericks, 'The Epistemology that Maintains White Race Privilege, Power and Control of Indigenous Studies and Indigenous Peoples' Participation in Universities' (2009) 5(1) *Critical Race and Whiteness Studies* 1, 5.

69 Quoted in Jean Phillips, 'Guest Editor's Introduction: Decolonising the Centre' (2003) 22(3) *Social Alternatives* 3.

70 Deborah Miranda, 'What's Wrong with a Little Fancy? Storytelling from the (Still) Ivory Tower' (2003) 27(1/2) *American Indian Quarterly* 333, 344.

71 Tara McAllister, '50 Reasons There Are No Māori in Your Science Department', *E-Tangata* (online, 28 May 2023) <https://e-tangata.co.nz/>.

> Tired of Indigenising.
> Tired of banging our heads against brick walls.
> Tired of being overlooked, underpaid, and undervalued.
> Tired of being labelled the angry Māori for doing anything other than smiling and nodding to appease the Great White Sharks.[72]

Racism lies at the core of these experiences. In her analysis of racism against Aboriginal academics in an Indigenous studies program, Indigenous scholar Bronwyn Fredericks points out that contemporary racism is 'less bloody than in earlier Australian history but it is still perpetuated by non-Indigenous people with privilege and power'.[73] Like other forms of violence, racism 'is not stagnant; it morphs, shifts, and has an intrinsic relationship to its historical context'.[74] Racism can be 'subtle', 'covert', banal and 'everyday'.[75] In their discussion of the banality of racism, George Sefa Dei and colleagues observe that racism is

> [m]ore than linguistic in nature, such social alienations are expressed through multiple sign systems and symbolic gestures like a rejected handshake, an empty seat on a bus or a smile-turned-down when you enter a room. Ultimately, they are all part of a complex interplay between meanings and socially constructed boundaries.[76]

Thus, although we tend to think about racism as working 'primarily through volume and violence',[77] in general, this is not how it is perpetrated in the university context. For many non-Indigenous people working in any given institution, the everyday incidents of racism may go unnoticed.[78] However, for victims, the effects can be highly corrosive. The place itself begins to feel unsafe.[79] To survive racism, a person may self-censor and silence themselves, limit their exposure to certain people and places that may lead to a racist

72 Tara McAllister, '50 Reasons There Are No Māori in Your Science Department', *E-Tangata* (online, 28 May 2023) <https://e-tangata.co.nz/>.

73 Fredericks (n 68) 5.

74 Samuel Mattson, 'A Report on the Banality of Racism' (Honours Thesis, Rhodes College, 2015) 7.

75 Watson (n 62) 5.

76 George Sefa Dei, Leeno Karumanchery and Nisha Karumanchery-Luik, 'The Banality of Racism: Living "within" the Traumatic' (2004) 244 *Counterpoints* 127, 131. See also Richard Brooks, 'The Banality of Racial Inequality' (2015) 124 *The Yale Law Journal* 2627.

77 Ta-Nehisi Coates, 'The Banality of Racism', *The Atlantic* (4 January 2012) <https://www.theatlantic.com/national/archive/2012/01/the-banality-of-racism/250779/>.

78 Mattson (n 74) 8. See also Tricia McGuire-Adams, 'Settler Allies Are Made, Not Self-Proclaimed: Unsettling Conversations for Non-Indigenous Researchers and Educators Involved in Indigenous Health' (2021) 80(7) *Health Education Journal* 761, 764 discussing 'everyday microaggression' and the 'normalisation of whiteness'.

79 Fredericks (n 68).

encounter[80] or leave.[81] As Nicole Watson puts it, 'All too often, the price of survival is silencing the voice inside one's psyche.'[82] When a person is expected to be comforting and protective but instead shatters this sense of security through racism, the consequences for the victim can be particularly traumatic.[83] In the final part of this chapter, we reveal how the authors of this book have experienced racism in legal education, developed strategies to introduce cultural safety into their classrooms and laid foundations for all students to learn about the extraordinary histories and wisdom of Indigenous peoples.

Part Three: The Structure of This Book

Part I: Recognising That Terra Nullius Never Left and Reimagining Law and Legal Education to Achieve Our Own Ends

This book is divided into three interlinked parts. Part I begins with three chapters written by authors who have come face-to-face with the violence of a post-*Mabo* legal system that simultaneously disavows the doctrine of terra nullius while constantly reinforcing its influence. This poses the question: Is the settler legal system even capable of reform?

Guugu Yimithirr lawyer and academic Osca Monaghan begins with poignant reflections on being an Indigenous lawyer immersed in a criminal justice system that harms Indigenous adults and children with such regularity that violence has become normalised (Chapter Two). Even on their best days, Indigenous lawyers may do 'little more than facilitate the system's operation'. Monaghan goes on to interrogate current forms of Indigenous political agitation, particularly rights and recognition-based approaches and Indigenous nation-building endeavours, and ultimately advocates for a more critical engagement with political power.

Eddie Cubillo, who is a descendant of the Larrakia, Wadjigan and Central Arrente peoples in the Northern Territory, and Jaynaya Dwyer draw upon the former's evidence to the Yoorrook Justice Commission (Chapter Three) to cast light on the racism endured by Indigenous actors within the legal system and legal education. Cubillo's experiences have included indignities such as being mistaken for being a defendant by court staff and being treated as the cleaner by students at an elite law school. The pressures on individuals are compounded by their responsibilities to their families and communities. As Cubillo and Dwyer write, 'this is not a game for us'.

Terri Libesman, Wiradjuri man Paul Gray, and Muruwari-Yuwaalaraay lawyer Kirsten Gray, speak back to the state child protection system, a

80 Sefa Dei, Karumanchery and Karumanchery-Luik (n 76) 137.
81 McAllister (n 71); Gareau (n 59) 199.
82 Watson (n 62) 4.
83 Sefa Dei, Karumanchery and Karumanchery-Luik (n 76) 139.

system that is imbued with whiteness and unyielding to meaningful reform (Chapter Four). They argue that if we are to move beyond the pervasive terra nullius within the state child protection system, the self-determination of First Nations peoples must be realised. Rather than piecemeal reforms that achieve minimal progress, First Nations peoples must be empowered to make decisions that are grounded in their expectations in relation to child rearing and long-term aspirations for their children.

The two final chapters in Part I show how existing structures within universities and professional bodies can be harnessed by Indigenous peoples to pursue their goals. Simon Young and Mununjali-Yugembeh lawyer Kirstie Smith reflect on tools that are being used in a young regional law school to pull down institutional fences and create space for the meaningful inclusion of Indigenous people and their legal traditions (Chapter Five). Building partnerships with Indigenous colleagues across the university and cultivating relationships with local communities are some of the steps that prepare law schools to become spaces in which Indigenous students feel safe, and all students can learn about legal traditions that nurtured life in this beautiful land for thousands of years. Wiradyuri/Wiradjuri legal scholar Annette Gainsford, Alison Gerard and Emma Colvin argue that when decolonising the legal curriculum, it is imperative that law schools ensure that Indigenous staff and stakeholders are culturally safe (Chapter Six). They suggest mechanisms for achieving this goal that include university-wide Indigenous graduate attributes and professional accreditation standards.

Part II: Changing Thinking through Theory

The chapters in this section explore how Indigenous approaches to knowledge, such as standpoint, relationality and storytelling, make a difference to how settler law is understood and taught. Euahleyai and Kamillaroi lawyer and scholar Larissa Behrendt discusses how the Indigenous methodology of storytelling is a powerful means of deconstructing colonial narratives while empowering Indigenous victims of the law's violence (Chapter Seven). When Indigenous voices are brought to the centre through the medium of storytelling, Indigenous agency and continuing connections to Country are powerfully illuminated.

Suvendi Perera argues that the storytelling of Bundjalung writer Ruby Langford Ginibi is an exemplar of Aboriginal women's outlaw culture (Chapter Eight).[84] Perera focuses on Ginibi's book *Haunted by the Past*,[85] which was largely concerned with Ginibi's reflections of the experiences of her son, Nobby, in the criminal justice system. Ginibi connected Nobby's

84 For an explanation of Aboriginal women's outlaw culture, see Nicole Watson, *Aboriginal Women, Law and Critical Race Theory: Storytelling from the Margins* (Springer, 2021).

85 Ruby Langford Ginibi, *Haunted by the Past* (Allen & Unwin, 1999).

incarceration to the historical and ongoing use of the law as a tool of colonisation and thus spoke back to a system that perpetuates violence. The continuing relevance of Ginibi's work is brought into stark relief in Perera's conclusion, which informs us that between 1991 and 2024, over 500 Indigenous people died in custody. Tragically, Ginibi's sentiment that the 'killing times are still with us'[86] has lost none of its currency.

When Gomeroi/Kamilaroi scholar Marcelle Burns left legal practice for the Academy, she arrived with a 'mission' to ensure that law graduates were better prepared to work with Indigenous people (Chapter Nine). She carried out that mission through a pedagogy that drew upon Indigenous concepts of relationality and reciprocity. These approaches were woven into assessments that included discussion forums and reflective journals. In their chapter, Goenpul woman Pekeri Ruska and Jennifer Nielsen critically explore how the common law struggles not only to translate the relational, spiritual and interdependent philosophy inherent in Aboriginal relationships to Country but also convey the deep responsibilities to care for Country and protect cultural integrity for future generations (Chapter Ten). To give context to their discussion, the authors share their insight into how cultural heritage legislation such as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) can be decolonised.

This part concludes with a chapter by Narelle Bedford, a legal scholar whose mum is Jackie Bedford from the Yuin people of the South Coast of New South Wales (Chapter Eleven). Bedford considers how to include Indigenous teaching and learning methodologies in legal education, including storytelling/yarning, deep listening and lived experience. Her chapter highlights the importance of these methodologies on the path towards legal pluralism in Australia and the decolonisation of legal education. Bedford also makes comparisons with developments in Canada, Aotearoa/New Zealand and South Africa. These comparisons serve to highlight how far behind Australia lags in recognising the continuing significance of Indigenous legal traditions.

Part III: Applying an Indigenous Lens to Law School Curricula

In this final part, the authors grapple with how critical Indigenous perspectives can be incorporated into the teaching of traditional law subjects. In her chapter, Nicole Watson argues that judgments in intentional torts cases brought by Indigenous plaintiffs against police officers tend to lack any serious engagement with the plaintiff's race (Chapter Twelve). This marginalisation of race supports a narrative in which the plaintiffs are the random victims of flawed individuals within the police force. Watson shows how an

86 Ruby Langford Ginibi, *Haunted by the Past* (Allen & Unwin, 1999) 142.

alternative reading practice that engages with the experiential knowledge of Indigenous communities reveals another narrative, one in which such violence is a structural and everyday occurrence.

Mary Spiers Williams, who is descended from the first peoples of the sandstone Country (from what is known as Sydney and stretching north to Dyarrabbin) and whose father is Darkeñung, considers how conventional approaches to teaching criminal law contribute to systemic bias against First Peoples (Chapter Thirteen). As students are taught to focus narrowly on the elements of offences, they are trained to overlook social context. Materials that First Peoples may consider to be relevant to the question of guilt, such as transgenerational trauma, are automatically diverted to sentencing, if they are considered at all. Spiers Williams proposes steps that can be taken to address systemic racism, beginning with reflective practice. She concludes that individuals should always reflect on their own standing and role in the criminal justice system.

Aurora Milroy, a Palyku legal scholar, and Karinda Burns, a Wajarri Yamaji and Yued Noongar legal scholar, advocate for the inclusion of Indigenous content and perspectives in the curriculum by emphasising the importance of working with local Indigenous knowledge holders, centring Indigenous voices, and ensuring teacher readiness to teach Indigenous content. Specifically, their chapter (Chapter Fourteen) proposes a more holistic and comprehensive approach to public law curriculum and legal education more broadly to enrich students' understanding of governance and shift the embedded narratives of Australian law curricula.

Koori academic of Aboriginal (Yuin) and settler (Scottish and Greek) descent Amanda Porter and Eddie Cubillo argue that because clinical legal education has long been presumed to be progressive, it has avoided sustained decolonial critique (Chapter Fifteen). However, clinical legal education suffers from the same flaws that befall other traditional law subjects, namely, the erasure of settler colonialism and Indigenous peoples' continuing sovereignty and agency. The authors share their approach to teaching clinical legal education that involves partnering with Aboriginal community-controlled organisations, championing the work of Indigenous scholars, and imparting the stories of grass roots campaigns. In the final chapter (Chapter Sixteen), Lee Godden draws upon her decades-long experience of teaching native title to address critical questions, beginning with what is native title? Although potentially transformative, native title is a creature of the common law and, as such, remains to be decolonised. Godden also considers where native title should be included in the curriculum, such as introductory subjects, for example, property law, or a wider range of courses, for example, environmental and energy law.

Conclusion

For much of our/their shared history, law students have been taught that prior to the arrival of the British, what is now called 'Australia' was a legal vacuum. According to such mythology, Indigenous peoples had no pre-existing rights to their lands and waters because they were so uncivilised that they did not have laws of their own. It was not until the momentous decision of *Mabo v State of Queensland [No 2]* that this racist narrative was finally dispelled. For Indigenous peoples, the *Mabo* decision was a great testament to the strength and courage of the plaintiffs, who were led by the indefatigable Eddie Koiki Mabo. But the notion that they should have legal rights and interests based on age-old connections to Country was hardly a revelation. If anything, it was a first step towards atonement for an unjust invasion. For those within Australia's law schools, however, the decision raised questions that many continue to wrestle with three decades later. These questions include whether Indigenous legal orders should be included in legal curricula and if so, how?

In this chapter, we have acknowledged the advances towards the meaningful inclusion of Indigenous peoples' legal traditions and experiential knowledge that have been made to date. We applaud interventions by the CALD and the groundbreaking work undertaken by the Behrendt Review and the ICCLAP. Nonetheless, progress has been painfully slow and impeded by ballooning workloads, the growing casualisation of the academic workforce and racism.

In the chapters that follow, the authors share insights that have been gained from working in spaces that have often felt unsafe. They also share their imagined futures for Australian legal education. In such spaces, all students will thrive from curricula that will be inclusive of both settler law and Indigenous legal orders that are rooted in the soil. As practitioners, they will draw upon not only a knowledge of legal doctrine that was cultivated during law school but also skills developed through engagement with Indigenous pedagogies, such as deep listening, that can enhance their communication with those in need of their counsel.