

# ‘THE DIFFICULTIES OF COMMUNICATION ENCOUNTERED BY INDIGENOUS PEOPLES’: MOVING BEYOND INDIGENOUS DEFICIT IN THE MODEL ADMISSION RULES FOR LEGAL PRACTITIONERS

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## I INTRODUCTION

Since the 1990s, numerous reports and studies have identified the serious inequity experienced by First Peoples in their dealings with the Anglo-Australian Legal system, including the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC) National Report,<sup>1</sup> the Human Rights Commission’s 1997 *Bringing Them Home Report*<sup>2</sup> and, more recently, the 2014 Bowraville Report.<sup>3</sup> These reports have consistently called for changes in the way lawyers are educated and trained as part of the systemic reforms needed to improve the capacity of the legal system to produce just outcomes for First Peoples. A key feature of the change called for is that lawyers need to develop cross-cultural competency and communication skills.

Significant action is already underway within the Australian higher education sector to promote Indigenous cultural competency (ICC) across the disciplines, as a step towards supporting Indigenous student success and to ensure that university graduates have the ability to provide culturally appropriate services to First Peoples in their future

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<sup>1</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) (‘RCIADIC’).

<sup>2</sup> Ronald Wilson, ‘Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families’ (Report, Human Rights and Equal Opportunity Commission, 1997).

<sup>3</sup> Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *The Family Response to the Murders in Bowraville* (2014) <<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5659/Bowraville%20-%20Final%20report.pdf>>.

careers.<sup>4</sup> Universities Australia has been driving these initiatives — recommending that Indigenous knowledges and perspectives be embedded in all university curricula ‘to provide students with the knowledge, skills and understanding which form the foundations of ICC’, and that ICC be included as a formal graduate attribute or quality.<sup>5</sup> The definition of ICC adopted by Universities Australia provides a clear reference point for evaluating existing legal academic and professional standards:

knowledge and understanding of Indigenous Australian cultures, histories and contemporary realities and awareness of Indigenous protocols, combined with the proficiency to engage and work effectively in Indigenous contexts congruent to the expectations of Indigenous Australian peoples ... Cultural competence includes the ability to critically reflect on one’s own culture and professional paradigms in order to understand its cultural limitations and effect positive change.<sup>6</sup>

Though there are some law-specific initiatives underway in Australia — in both legal education and practical training — to support Indigenous law students and lawyers and build ICC in the profession,<sup>7</sup> the available evidence suggests that such initiatives have not been widely adopted by law schools.<sup>8</sup>

This article argues that the education and admission standards applied to Australian lawyers should include a core requirement of ICC. While we acknowledge that regulatory change of itself is not the complete solution, we argue it is an important part of the combination of strategies needed to effect change in this space. In our view, there is now a clear case for the existing momentum to be underwritten with a careful revision of legal admission and educational standards in order to support the positive and collaborative nature of the reforms, build consistency, and ensure that they are sustained. And we argue (as will be seen) that to achieve a meaningful shift in justice outcomes for First Peoples, these standards and their implementation must be disentangled from the deficit discourse narratives of the past. The discussion of

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<sup>4</sup> Larissa Behrendt et al, ‘Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People: Final Report’ (Report, Department of Education and Training, 2012) recommendation 32, xxi (‘Behrendt Review’).

<sup>5</sup> Universities Australia, *Guiding Principles for Developing Indigenous Cultural Competency in Australian Universities* (October 2011) 9, recommendations 1, 2, 4.

<sup>6</sup> *Ibid* 3.

<sup>7</sup> See Indigenous Cultural Competency for Legal Academics Program, *Consultation Workshop Report* (Indigenous Cultural Competency for Legal Academics Program, 2016) 5–6; Heather Douglas, ‘The Participation of Indigenous Australians in Legal Education 1991–2000’ (2001) 24 *University of New South Wales Law Journal* 485; Phillip Rodgers-Falk, ‘Growing the Number of Aboriginal and Torres Strait Islander Law Graduates: Barriers to the Profession’ (Report, Department of Education and Training, 2011); Carolyn Penfold, ‘Indigenous Students’ Perceptions of Factors Contributing to Successful Law Studies’ (1996) 7 *Legal Education Review* 155.

<sup>8</sup> Indigenous Cultural Competency for Legal Academics Program, *Law School Survey Report* (Indigenous Cultural Competency for Legal Academics Program, 2017) 2 <[http://www.icclap.edu.au/rw\\_common/plugins/stacks/armadillo/media/ICCLAPLawSchoolSurveyReportOctober2017.pdf](http://www.icclap.edu.au/rw_common/plugins/stacks/armadillo/media/ICCLAPLawSchoolSurveyReportOctober2017.pdf)> indicates that while the majority of law schools support the inclusion of ICC in curriculum, only ten law schools reported that ICC was included in their core curriculum.

relevant lawyer competencies and standards must be reframed — through a shift from a focus on Indigenous incapacity to a focus on legal professional responsibility.

To make our case, this study first outlines the findings of key reports that demonstrate how First Peoples are currently experiencing inequity in service provision within the Anglo-Australian legal system. Next, it examines the lawyer/client relationship to argue that ICC is in fact an inherent aspect of lawyers' professional responsibilities for communication. Thirdly, it explains and evaluates the regulatory system and standards currently applied to the education and admission of Australian lawyers, and the deficit discourse they tend to promote, to illustrate why reform in this context should be a priority. Finally, the paper reviews some of the current international developments and debates. Efforts to tackle these issues are well underway in other jurisdictions, each working with a deepening understanding of the legacies of colonialism, of Indigenous legal traditions, and of contemporary Indigenous needs and priorities.<sup>9</sup> We focus here on Canada, exploring some valuable international context for the emerging Australian initiatives and hopefully enriching the Australian discussion of the significant possibilities and challenges ahead.

## II JUSTICE FOR FIRST PEOPLES: REPEATED CALLS FOR PROFESSIONAL REFORM

The RCIADIC (1987–1991) was a watershed inquiry in Australian legal history as it revealed the profound and systemic racial inequity experienced by Aboriginal peoples in their dealings with the Anglo-Australian criminal justice system. Amongst the 339 recommendations in the national report were several calling for judicial officers, court staff and relevant public sector professionals to receive 'appropriate training ... designed to explain contemporary Aboriginal society, customs and traditions'.<sup>10</sup> It was said this training should also emphasise the 'historical and social factors which contribute to the disadvantaged position' of Aboriginal peoples 'and to the nature of relations between Aboriginal and non-Aboriginal communities'.<sup>11</sup>

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<sup>9</sup> See, eg, as regards New Zealand — Peter Devonshire, 'Indigenous Students at Law School: Comparative Perspectives' (2014) 35 *Adelaide Law Review* 309; Carwyn Jones, 'Indigenous Legal Issues, Indigenous Perspectives and Indigenous Law in the New Zealand LLB Curriculum' (2009) 19 *Legal Education Review* 257; and in the context of the US — Anastasia M Boles, 'Seeking Inclusion from the Inside Out: Towards a Paradigm of Culturally Proficient Legal Education' (2017) 11 *Charleston Law Review* 209; Christina A Zawisza, 'Teaching Cross-Cultural Competence to Law Students: Understanding the "Self" as "Other"' (2016) 17 *Florida Coastal Law Review* 185; Andrew King-Ries, 'Just What the Doctor Ordered: The Need for Cross-Cultural Education in Law Schools' (2009) 5 *Tennessee Journal of Law and Policy* 27.

<sup>10</sup> Commonwealth, RCIADIC, above n 1, recommendation 96.

<sup>11</sup> Ibid. 'The Commission further recommends that [these programs be devised in consultation] ... with appropriate Aboriginal organisations, including, but not limited to, Aboriginal Legal Services': ibid recommendation 97; and 'in negotiation with local Aboriginal communities and organisations': ibid recommendation 210.

The Australian Human Rights Commission's inquiry into the experience of the stolen generations (1995–1997) led to similar recommendations. In its final report the Commission called for the core curriculum for the education of relevant professionals (such as lawyers) to include the history and effects of forcible child removal practices.<sup>12</sup>

In the decades since, there have been more inquiries and reports with further calls for change to educational programs to achieve vitally needed improvements in the provision of culturally appropriate professional services to First Peoples. Important examples are found in the 2009 Senate report on *Access to Justice*,<sup>13</sup> the Productivity Commission's 2014 report on *Access to Justice Arrangements*,<sup>14</sup> the 2016 Senate report on *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services*,<sup>15</sup> and most recently the Australian Law Reform Commission's 2017 *Pathways to Justice* report on Indigenous incarceration.<sup>16</sup> The persistence of these calls reflects the enduring barriers faced by First Peoples trying to access legal assistance and justice. As the 2016 Senate inquiry indicates, these barriers include a lack of awareness of legal matters, geographical isolation, a lack of interpreters, conflicts of interests, the lack of culturally appropriate legal services, and differences between traditional laws and the Australian legal system.<sup>17</sup> Research also shows there are significant unmet legal needs in Indigenous communities, especially in relation to civil matters in the fields of family law and child protection, social security and credit/debt management, tenancies, discrimination, and wills and estates.<sup>18</sup> The gaps in legal service provision and consequent unmet legal needs of Indigenous communities can create a 'snowballing' effect whereby legal disputes are pushed into more formal and costly legal processes.<sup>19</sup> These unmet legal needs can also escalate civil matters to criminal behaviour,<sup>20</sup> thus contributing to Indigenous criminalisation and incarceration. Against the background of the stolen generations and the current over-representation of Indigenous children in child protection regimes, significantly in its 2012 report the Productivity Commission emphasised that:

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<sup>12</sup> Wilson, above n 2, 254–5: 'Recommendation 9a — that all professionals who work with Indigenous children, families and communities receive in-service training about the history and effects of forcible removal'; 'Recommendation 9b — that all undergraduates and trainees in relevant professions receive, as part of their core curriculum, education about the history and effects of forcible removal'.

<sup>13</sup> Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Access to Justice* (2009) 8.2.

<sup>14</sup> Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72, (2014) vol 2, 781–2.

<sup>15</sup> Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 25.

<sup>16</sup> Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017) 10.19.

<sup>17</sup> Senate Finance and Public Administration References Committee, above n 15, 28.

<sup>18</sup> Ibid 25–7.

<sup>19</sup> Productivity Commission, above n 14, 781.

<sup>20</sup> Ibid 782.

A range of reports have found that inadequate provision of culturally suited services in relation to the protection and removal of children can have profound consequences for the wellbeing of Indigenous children, families and communities ... [and] highlighted the substantial, adverse impacts on Aboriginal and Torres Strait Islander individuals, families and communities from inappropriate service provisions.<sup>21</sup>

The 'profound consequences' of not meeting the needs of Indigenous peoples for access to culturally appropriate legal services include family breakdown, removal of children and incarceration.<sup>22</sup>

The Indigenous Legal Needs Project (ILNP), a national research study of the civil and family law needs of Indigenous Australians, highlighted that Indigenous peoples are unlikely to access private legal practitioners due to a perceived lack of cultural competency.<sup>23</sup> The ILNP concluded that non-Indigenous legal services 'need to have better capacity to assist Indigenous clients' and need to develop more 'culturally appropriate ways of working with Indigenous clients', including through some form of (compulsory) relevant legal training.<sup>24</sup> Consequently Indigenous Australians are more likely to rely on Aboriginal controlled community legal services<sup>25</sup> due to a 'distrust of the legal system',<sup>26</sup> previous experiences of racism and discrimination,<sup>27</sup> and/or a perception that general legal services are not culturally competent.<sup>28</sup> Thus, it is particularly alarming that these preferred services are often severely underfunded and unable to meet existing demand, with the consequence that they can typically focus only on criminal and family violence matters.<sup>29</sup> Other problems may also affect the client experience in these settings. For example, while Aboriginal community controlled legal services are generally considered to be more culturally competent, there is evidence to suggest that lawyers within these services may also experience difficulties communicating effectively with Indigenous clients.<sup>30</sup>

<sup>21</sup> Ibid 781 (citations omitted).

<sup>22</sup> Senate Finance and Public Administration References Committee, above n 15, 28.

<sup>23</sup> Indigenous Legal Needs Project, Submission No 19 to the Senate Finance and Public Administration References Committee, *Inquiry into Access to Legal Assistance Services*, 2015, 7.

<sup>24</sup> Indigenous Legal Needs Project, Submission No 105 to Productivity Commission, *Inquiry into Access to Justice Arrangements*, 2013, 7–8.

<sup>25</sup> For example, Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS).

<sup>26</sup> Productivity Commission, above n 14, vol 2, 781–2; Senate Legal and Constitutional Affairs References Committee, above n 13, 8.3.

<sup>27</sup> Senate Legal and Constitutional Affairs References Committee, above n 13, 6.61.

<sup>28</sup> Productivity Commission, above n 14; Senate Finance and Public Administration References Committee, above n 15, 28–9, 39.

<sup>29</sup> Productivity Commission, above n 14, 766.

<sup>30</sup> Ibid. See also Melanie Schwartz and Chris Cunneen, 'Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services' (2009) 7(10) *Indigenous Law Bulletin* 19, who report that 13 per cent of lawyers employed with Aboriginal and Torres Strait Islander Legal Services experience difficulties communicating with their clients 'very often/often' and a further 50 per cent reported these difficulties 'sometimes' (citing a 2002 Survey conducted by the Office of Evaluation and Audit).

For various reasons then, Indigenous clients also represent a significant proportion of the clients accessing general services such as Legal Aid and Community Legal Centres.<sup>31</sup> While there is some merit in a ‘mixed delivery approach’ for services to Indigenous communities, this approach is hampered by ‘recruitment challenges’ in attracting Indigenous staff with relevant skills and also the challenge of developing/improving the cultural competency of non-Indigenous staff.<sup>32</sup>

A series of recent reports have specifically stressed the need to develop/improve the cultural competency of non-Indigenous lawyers. In 2014, the NSW Parliamentary Standing Committee on Law and Justice inquired into the investigation of the murders of three young Aboriginal people in the regional town of Bowraville. The final report, *The Family Response to the Murders in Bowraville*, makes several recommendations for training to be implemented for law and justice professionals.<sup>33</sup> Endorsing these recommendations, the NSW Government specifically tasked the NSW Department of Justice to review the recommendation that lawyers, judicial officers and court officials ‘be required to undergo Aboriginal cultural awareness training’, and to liaise with relevant stakeholders ‘regarding the possibility of Aboriginal cultural awareness training being included as a *compulsory element* of legal education and training’.<sup>34</sup> In June 2016, the Department released its report *Aboriginal Cultural Awareness: Departmental Review of the Delivery of Aboriginal Cultural Awareness Training to Law Students, Practitioners and Judicial Officers* which recommended that the NSW Attorney-General liaise with the Council of Australian Law Deans and NSW Law Schools to seek the inclusion of ICC in law curriculum.<sup>35</sup> The Department also recommended that the Attorney-General request that relevant legal admission bodies pursue amendments to the Legal Profession Uniform Admission Rules 2015 to

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<sup>31</sup> Productivity Commission, above n 14, 767.

<sup>32</sup> Ibid 790.

<sup>33</sup> Legislative Council Standing Committee on Law and Justice, above n 3. These included recommendation 4 — That the NSW Department of Justice consider and report on the merit of requiring lawyers who practise primarily in criminal law, as well as judicial officers and court officers, to undergo Aboriginal cultural awareness training; recommendation 5 — That the NSW Government liaise with the Legal Profession Admission Board of New South Wales, the New South Wales Bar Association and all accredited universities offering legal training in New South Wales to request that Aboriginal cultural awareness training be included as a compulsory element in their legal training and accreditation.

<sup>34</sup> New South Wales, *New South Wales Government Response to the Legislative Council Standing Committee on Law and Justice Inquiry into the Family Response to the Murders in Bowraville* (2015), (emphasis added).

<sup>35</sup> New South Wales Department of Justice, *Aboriginal Cultural Awareness: Departmental Review of the Delivery of Aboriginal Cultural Awareness Training to Law Students, Practitioners and Judicial Officers* (May 2016) recommendation 1 — The Attorney General write to the Council of Australian Law Deans to seek support for all Australian Law Schools to implement minimum standards for the teaching of cultural competency for law students; and recommendation 2 — The Attorney General write to Deans of NSW Law Schools to seek support for all NSW Law Schools to implement minimum Aboriginal cultural competency graduate attributes for law students (copy on file with authors).

include Aboriginal cultural awareness training as a compulsory admission requirement.<sup>36</sup> At the time of writing the NSW Department of Justice advises that following consultations with relevant stakeholders it has concluded that mandatory cultural awareness training should be introduced for major government legal agencies providing family and criminal law advice, however that for most current lawyers and judicial officers training should remain voluntary.<sup>37</sup> It also advises that the Legal Services Council is investigating a new admission requirement for compulsory cultural awareness training for lawyers, in response to departmental representations.<sup>38</sup> The Department has also confirmed that 11 of 14 law course providers in NSW have indicated that they will introduce a relevant graduate attribute.<sup>39</sup> These initiatives in NSW show that there is growing support for ICC to become a core requirement of legal education and accreditation.

The Australian Law Reform Commission (ALRC) recently offered similar recommendations in its 2017 report on Indigenous incarceration, *Pathways to Justice*, which found that access to legal representation and advice was a key factor in addressing Aboriginal and Torres Strait Islander incarceration,<sup>40</sup> and consequently recommended that ‘training covering cross cultural communication, cultural awareness’ was needed ‘in order to improve effective communication’.<sup>41</sup> Notably the ALRC defined ‘culturally appropriate’, ‘culturally competent’ and ‘culturally safe’ services as being ones that are ‘developed, organised and implemented with Aboriginal and Torres Strait Islander communities, and, where possible, facilitated and owned by these communities’.<sup>42</sup> The report also highlighted the need for co-operation between Aboriginal and non-Aboriginal legal services providers to address Aboriginal and Torres Strait Islander peoples’ reluctance to use general services due to the history of racism and culturally insensitive service provision.<sup>43</sup>

Likewise, as part of its Justice Project, the Law Council of Australia has recommended that:

Services for Aboriginal and Torres Strait Islander people must be designed to be culturally competent. Training for members of the judiciary, lawyers

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<sup>36</sup> Ibid recommendation 4.

<sup>37</sup> Email correspondence between the authors and NSW Department of Justice, 1 April 2019. To date NSW Department of Justice and The Crown Solicitor’s Office have confirmed they are implementing mandatory training.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Australian Law Reform Commission, above n 16.

<sup>41</sup> Ibid. In this context, the ALRC noted that ‘cross cultural communication includes matters such as “gratuitous concurrence” (which means agreeing to any and every proposition) and the possibility of being misunderstood because important body language cues are missed or not given their full significance by the listener. Cultural awareness includes an understanding of kinship, the role of individuals within the community, the historical and ongoing impact of colonisation, intergenerational trauma, and ongoing contemporary experiences of Aboriginal and Torres Strait Islander peoples and communities’.

<sup>42</sup> Ibid 1.54.

<sup>43</sup> Ibid 10.23.

and other service providers is essential to developing cultural competency.<sup>44</sup>

As this demonstrates, there is a significant groundswell of support in Australia for the idea that the legal profession needs to develop ICC. Yet how we conceptualise the challenge and implement responses is critical. We argue that ICC should be understood as a core professional responsibility of Australian lawyers, and that this is vital to dismantling the deficit discourse mindset that presents the current lack of culturally appropriate legal services as an ‘Indigenous problem’ requiring no more than optional professional altruism as a response.

### III INDIGENOUS CULTURAL COMPETENCY — A CORE PROFESSIONAL RESPONSIBILITY

The ability to communicate clearly and accurately is critical to the lawyer’s professional responsibilities. Lawyers are not only required to translate complex legal information for a range of client groups, but the fiduciary character of the lawyer/client relationship also requires them to ensure clients ‘can make informed decisions about the [legal and other] choices available to them’.<sup>45</sup> This anticipates that a lawyer can ascertain and understand the client’s interests (as framed and determined by the client) and priorities (both in the short and longer term), as well as the client’s concerns and obligations.<sup>46</sup> It also anticipates that the lawyer can appreciate these matters within the client’s ‘situational context’ — that is, against the backdrop of the factors affecting ‘people’s lives and patterns of behaviour’ and for some clients, the ‘complicated web’ that may produce difficulties in their lives.<sup>47</sup> If a lawyer is not able to do this, their clients may not be able to engage as informed and capable actors in the legal system.

Perhaps obviously, of course clients will demonstrate a range of languages, cultures and communication styles that may influence communication with their lawyer. These clients should not be viewed as ‘problematic’ and an exception, but rather as an ordinary and conventional part of a lawyer’s work — for which lawyers should be appropriately equipped. Yet discussions about the lawyer’s responsibility to communicate tend to speak to various deficiencies that may be demonstrated by the client that impede their ability to communicate, suggesting an inherent deficit narrative or discourse. Speaking on how this is applied to and impacts upon First Peoples, Scott Gorringer describes a ‘deficit discourse’ as a:

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<sup>44</sup> Law Council of Australia, ‘The Justice Project: Aboriginal and Torres Strait Islander People’ (Consultation Paper, Law Council of Australia, August 2017) 4.

<sup>45</sup> Law Society of the Northern Territory, *Indigenous Protocols for Lawyers* (Law Society Northern Territory, 2<sup>nd</sup> ed, 2015) 29, (the ‘NT Protocol’).

<sup>46</sup> Westlaw, *Lawyers’ Practice Manual Queensland* (at 1 March 2017) A Legal Practice, ‘Interviewing’ [A.20].

<sup>47</sup> Liz Curran, ‘Making Connections: The Benefits of Working Holistically to Resolve People’s Legal Problems’ [2005] *Murdoch University Electronic Journal of Law* 5, [1]–[2], [35].



mode of thinking that frames and represents Aboriginal identity in a narrative of negativity, deficiency, disempowerment. When all the thinking, all the conversations and all the approaches are framed in a discourse that sees Aboriginality as a problem, very little positive movement is possible.<sup>48</sup>

Gorringe asks us to shift from asking questions about what makes it difficult for Aboriginal peoples to engage with the legal system, to questions about what capacities lawyers need to make Aboriginal clients feel empowered in that engagement. Put simply, we need to move beyond seeing Aboriginal clients as problems that need to be fixed — to a position where lawyers accept First Peoples as a natural and important inclusion within client groups, acknowledge their aspirations and perspectives as valid and unique, and work with them to achieve best outcomes. This shift in discussion and perception is not just an abstract exercise. It has been noted in prominent research that ‘the prevalence and social impact of deficit discourse indicates a significant link between discourse surrounding indigeneity and outcomes for Indigenous peoples’.<sup>49</sup>

In the legal context the consequences of leaving the challenges framed as an *Indigenous problem*, and thereby obstructing the reform so clearly called for by the reports cited above, are profound. The impact of the legal system’s ‘default’ position, underwritten for so long by the deficit narrative, is graphically illustrated by the experience of Robyn Kina. In 1988, Ms Kina was convicted by a jury of the murder of her partner because she stabbed him during a violent confrontation. Prior to the stabbing, her partner had subjected Ms Kina to years of physical and emotional abuse, and on the day of the killing had threatened to rape her niece. In the early 1990s, the Queensland Attorney-General took the unusual step of intervening in Ms Kina’s case due to evidence revealed by two TV documentaries, but not raised at her original trial, that Ms Kina had acted in self-defence and under provocation. Noted linguist, Professor Diana Eades, gave evidence in support of Ms Kina’s appeal, which established that her lawyers did not raise the defence on her behalf at trial (in part) because:

[Robyn Kina] was communicating in an Aboriginal way. The lawyers who interviewed her were not able to communicate in this way, and they were not aware that their difficulties in communicating with her involved serious cultural differences. Also at this time she did not have the ability to communicate in a non-Aboriginal way. Thus the communication difficulties were not about personalities but about cultural differences in language usage ... The way that lawyers are trained and the way that they

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<sup>48</sup> Scott Gorringe, ‘Aboriginal Culture Is Not a Problem. The Way We Talk About It Is’, *The Guardian* (online), 15 May 2015 <<https://www.theguardian.com/commentisfree/2015/may/15/aboriginal-culture-is-not-a-problem-the-way-we-talk-about-it-is>>.

<sup>49</sup> Cressida Fforde et al, ‘Discourse, Deficit and Identity: Aboriginality, the Race Paradigm and the Language of Representation in Contemporary Australia’ (2013) 149 *Media International Australia* 162, 163.

generally interview clients is not conducive to Aboriginal ways of communicating.<sup>50</sup>

Ms Kina's conviction was subsequently quashed by the Queensland Court of Criminal Appeal in 1993, and due to the particular circumstances of her case, the Attorney-General exercised prerogative to not proceed with a retrial. By the time of her appeal, Ms Kina had served five years in prison.<sup>51</sup> As this case illustrates, there are potentially severe consequences for First Peoples when their lawyers are not capable of communicating with them in accordance with their cultural and linguistic needs.

The challenge then of contemporary legal practice is to disentangle it from the incapacity and deficit discourse of the past. It is abundantly clear, in contemporary terms, that to work effectively with clients lawyers must be able to appreciate that a person's worldview, culture and personal experiences will influence how they experience the Anglo-Australian legal system, its dispute resolution processes, and their satisfaction with the outcomes achieved.<sup>52</sup> It is important, then, for lawyers to develop 'multicultural competence'<sup>53</sup> to enhance their capability of working 'with *all* clientele',<sup>54</sup> and more specifically, for present purposes, that they develop ICC so that they are capable of working effectively with and for First Peoples.

As is evident from the intensifying calls for reform discussed above, the standards currently applied to the Australian legal profession are failing to ensure that lawyers are capable and competent in their dealings with First Peoples as clients and as members of the profession itself. Thus, we argue that to secure meaningful and lasting change in the legal profession, it is necessary to reform the profession's critical regulatory standards. These regulatory standards act as key drivers for the law curriculum applied (and the knowledge and skills pursued) at all stages of the lawyer's career. Education and admission requirements shape the curriculum implemented within the Bachelor of Laws and Juris Doctor degrees and the requirements defined within Practical Legal Training programs; and professional standards shape continuing professional development requirements and consequently the profession's values and conception of itself.

Our primary focus here is educational and practice admission standards. We now turn to an examination of the relevant regulatory frameworks in that context, and the opportunities and pressing need for reform in light of the issues explored above.

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<sup>50</sup> Diana Eades, 'Legal Recognition of Cultural Differences in Communication: The Case of Robyn Kina' (1996) 16 *Language and Communication* 215, 217.

<sup>51</sup> Ibid 225; *R v Kina* [1993] QCA 480.

<sup>52</sup> See Jennifer Nielsen, 'Working With Clients and Diverse Communities' in Trish Mundy, Amanda Kennedy and Jennifer Nielsen (eds), *The Place of Practice: Lawyering in Rural and Regional Australia* (Federation Press, 2017) 146.

<sup>53</sup> Marjorie A Silver, 'The Professional Responsibility of Lawyers: Emotional Competence, Multiculturalism and Ethics' (2006) 13 *Journal of Law and Medicine* 431, 435.

<sup>54</sup> Ellen Grote, 'Principles and Practices of Cultural Competency: A Review of the Literature' (Literature Review, Indigenous Higher Education Advisory Council, August 2008) 5 (emphasis added).

## IV AUSTRALIAN LAWYERS — RELEVANT REGULATION AND STANDARDS

### *A Overview*

The Australian legal profession operates across the federated system of states and territories with each jurisdiction setting its own requirements for the admission of legal practitioners, commonly requiring applicants for admission to meet both academic and professional legal training (PLT) standards and to apply for admission through a statutory body created for this purpose.<sup>55</sup> Since 2002, there has been a concerted effort to articulate national standards for the admission of legal practitioners — which are currently reflected in the Law Admissions Consultative Committee’s (LACC) *Model Admission Rules 2015* (‘model rules’).<sup>56</sup> The model rules ‘set out the principles now generally reflected in the regulatory arrangements in each Australian jurisdiction, in the expectation that this may contribute to achieving and retaining common principles and practices relating to admission to the Australian legal profession’.<sup>57</sup> Though there remain variations, broadly speaking, each jurisdiction has adopted the substantive content of the model rules as it relates to the ‘prescribed areas of knowledge’ for academic qualifications leading to admission as a lawyer (the ‘Priestley 11’), and the PLT competency standards for entry level lawyers.<sup>58</sup>

The academic qualifications needed for admission as a legal practitioner are primarily regulated at two separate policy levels: first by the national Australian Qualifications Framework (AQF);<sup>59</sup> and secondly by the Priestley 11 noted above, the legal profession’s statement of the prescribed areas of academic legal knowledge.<sup>60</sup> At law school level, the design of the law curriculum is also influenced by the Council of Australian Law Deans’ (CALD) *Standards for Australian Law Schools* (2009) (the ‘CALD Standards’) and the Australian Learning and Teaching Council’s (ALTC) *Bachelor of Laws: Learning and Teaching Academic Standards Statement* (2010) (the ‘ALTC Statement’). Though neither are mandatory, most Australian law schools have adopted both.

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<sup>55</sup> For example, *New South Wales Admission Board Rules 2015* (NSW); *Legal Practitioners Education and Admission Council Rules 2004* (SA).

<sup>56</sup> Law Admissions Consultative Committee, *Model Admission Rules 2015* <<https://www.lawcouncil.asn.au/resources/law-admissions-consultative-committee/documents-about-present-admission-policies>>.

<sup>57</sup> *Ibid* 1.

<sup>58</sup> *Ibid* sch 1 — Prescribed Areas of Knowledge: commonly known as the ‘Priestley 11’, and sch 2 — PLT Competency Standards for Entry Level Lawyers.

<sup>59</sup> Australian Qualifications Framework <<https://www.aqf.edu.au/>>.

<sup>60</sup> Law Admissions Consultative Committee, above n 56, sch 1. The prescribed areas of knowledge are: criminal law and procedure, torts, contracts, property, equity, company law, administrative law, federal and state constitutional law, civil dispute resolution, evidence, and ethics and professional responsibility.

The ALTC Statement sets out the minimum standards for undergraduate degrees in law and establishes threshold learning outcomes (TLOs) for law degrees organised around the themes of knowledge; ethics and professional responsibility; thinking skills; research skills; communication and collaboration; self-management.<sup>61</sup> Many law schools have responded by using the statement to inform the vision, values and objectives of their degree programs. The CALD Standards augment these details by describing the minimum law school standards to support the attainment of academic qualifications in law. The CALD Standards prescribe that curriculum content includes ‘coverage of all the academic requirements specified for the purposes of admission to practice as a legal practitioner in Australia’.<sup>62</sup> In November 2010, CALD specifically endorsed the ALTC Statement,<sup>63</sup> and in 2012 developed a further set of TLOs that apply to the Juris Doctor degree.<sup>64</sup>

These various components of the regulatory framework are each to some extent a product of the priorities and thinking of their time, drawn to distil a complex body of legal pedagogy and to reflect a negotiated set of common purposes and interests. However, in light of the accumulating calls for reform (discussed above), the current understanding of First Peoples’ experiences with the legal system, and initiatives emerging on the ground in higher education and training, the lack of regulatory attention to ICC is now conspicuous and clearly in need of correction. And we would argue that the correction must begin with a constructive re-framing of the purpose and underlying narrative — that is, changing the conversation from one about overcoming Indigenous disadvantage and deficiency, to one about building better lawyers.

### B *Core Knowledge, Competency and Skills*

As noted, the *Model Admission Rules 2015* set out the principles which ‘generally reflect the regulatory arrangements in each jurisdiction’.<sup>65</sup> The prescribed academic areas of knowledge included in the rules are limited to the core areas of legal ‘knowledge’ set out in the Priestley 11.<sup>66</sup> Notably, the knowledge needed to gain a law degree does not include any form of engagement with Indigenous knowledges, histories and laws. On this, it is sobering to reflect on the statement by US First Nations’ scholar Robert Williams Jr that, while law has been

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<sup>61</sup> Sally Kift, Mark Israel and Rachael Field, ‘Bachelor of Laws: Learning and Teaching Academics Standards Statement’ (Report, Australian Learning and Teaching Council, December 2010).

<sup>62</sup> Council of Australian Law Deans, *CALD Standards for Australian Law Schools* (March 2013) 2.3.1 <<https://cald.asn.au/wp-content/uploads/2017/11/CALD-Standards-As-adopted-17-November-2009-and-Amended-to-March-2013-1.pdf>>.

<sup>63</sup> Kift, Israel and Field, above n 61, 1.

<sup>64</sup> Council of Australian Law Deans, *Juris Doctor Threshold Learning Outcomes* (March 2012) <<https://cald.asn.au/wp-content/uploads/2017/11/Threshold-Learning-Outcomes-JD.pdf>>.

<sup>65</sup> Law Admissions Consultative Committee, above n 57, 1.

<sup>66</sup> *Ibid*; see above n 61.

‘regarded by the West as its most respected and cherished instrument of civilization’, it was also ‘the West’s most vital and effective instrument of empire’.<sup>67</sup> These words, in this context, remind us that ‘[t]he content and structure of the education system — law schools included — was an imperial project’.<sup>68</sup>

The requirements for PLT in the model rules also outline key elements, competencies and performance criteria in relation to relevant skills, practice areas and values for entry-level lawyers.<sup>69</sup> Relevant for present purposes, the model rules define a number of Lawyer’s Skills at 5.10 which include ‘communicating effectively’ and ‘cross-cultural awareness’ — with the main performance criteria for the latter being:

*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.<sup>70</sup>

We find it significant that this rule requires only ‘demonstrated awareness’ of potential difficulties of communication attributable to cultural difference, and frames cross-cultural training as a desirable rather than mandatory requirement. It is also significant that the text of the explanatory note accompanying the Model Rules makes specific reference to the ‘difficulties of communication *encountered by Indigenous people*’ (as opposed to the ‘difficulties of communication attributable to cultural differences’ in the main provision).<sup>71</sup> While it is positive that the need for better communication with First Peoples is recognised, the framing of the issue remains troublesome because it positions the *difficulties of communication* as an Indigenous problem, rather than one turning on a competency that lawyers need to attain. Moreover, this characterises First Peoples as lacking in communication skills — ignoring their rich cultural and linguistic diversity and irretrievably centring Anglo-Australian English and communication style as the normative standard by which First Peoples are measured. So despite the acknowledgement of the impact of communication difficulties upon First Peoples, the true character of the difficulties remains obscured — that is, the cultural *incompetency* of lawyers

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<sup>67</sup> Robert A Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford University Press, 1990) 6. See also Sonia Lawrence and Signa Daum Shanks, ‘Indigenous Lawyers in Canada: Identity, Professionalization, Law’ (2015) 38 *Dalhousie Law Journal* 503; Val Napoleon and Hadley Friedland, ‘An Inside Job: Engaging with Indigenous Legal Traditions Through Stories’ (2016) 61 *McGill Law Journal* 725, 727.

<sup>68</sup> Jeffery G Hewitt, ‘Decolonizing and Indigenizing: Some Considerations for Law Schools’ (2016) 33(1) *Windsor Yearbook of Access to Justice* 65, 71. See also James (Sakej) Youngblood Henderson, ‘Postcolonial Indigenous Legal Consciousness’ (2002) 1 *Indigenous Law Journal* 1; Lorie M Graham and Amy Van Zyl-Chavarro, ‘A Human Rights Perspective on Education and Indigenous Peoples: Unpacking the Meaning of Articles 14 and 15 of the UN Declaration on the Rights of Indigenous Peoples’ (2016) 8 *Northeastern University Law Journal* 135.

<sup>69</sup> Law Admissions Consultative Committee, above n 56, 2.2, 14.

<sup>70</sup> *Ibid* 5.10, 30 (emphasis added).

<sup>71</sup> *Ibid* 43.

working in a cross-cultural context — and the cultural hegemony of white Australian laws (and lawyers) is reinscribed.

Turning to the ALTC Statement, the TLOs for law courses include knowledge; ethics and professional responsibility; thinking skills; research skills; communication and collaboration; and self-management.<sup>72</sup> The ‘knowledge’ outcome includes ‘the fundamental areas of legal knowledge, the Australian legal system, and underlying principles and concepts, including international and comparative contexts; the broader contexts within which legal issues arise; and the principles and values of justice and of ethical practice in lawyers’ roles’.<sup>73</sup> The accompanying statement on the nature and extent of law and legal education recognises that ‘[as] a discipline, law is informed by many perspectives (including Indigenous perspectives) and is shaped by the broader contexts in which legal issues arise’ (which includes *inter alia* ‘cultural’ contexts).<sup>74</sup> The Explanatory Notes to the TLOs also acknowledge that the broader contexts within which legal issues arise (as referred to the CALD standards discussed below) can extend to contexts that reflect (*inter alia*) ‘Indigenous perspectives’ and ‘cultural and linguistic diversity’.<sup>75</sup>

However, a difficulty here is that Indigenous issues and perspectives are positioned solely as part of the broader ‘context’ of law — thereby marginalising Indigenous knowledges and laws, obscuring Indigenous perspectives in an indeterminate list of ‘other’ considerations, and reinforcing the dominance and unilateralism of the Anglo-Australian legal system.<sup>76</sup> Arguably the TLOs are sufficiently broad in their scope to incorporate Indigenous knowledges and ICC. However, unless we implement a specific focus on Indigenous issues, the risk is that we may perpetuate what Watson and Burns describe as the ‘virtual *terra nullius*’ in legal education.<sup>77</sup>

Indeed, the TLOs situate the problems of Indigenous engagement within a deficit discourse because the ‘real’ problem — lawyers’ lack of ICC — is not acknowledged. And perhaps more problematically, engagement with Indigenous knowledges, laws and ICC is left to the discretion of law schools. Yet the reported and profound consequences of inaction for First Peoples (as explained above) indicate that the choice to include ICC should not be left to chance — that is, to temporary preferences, priorities and capacities — but that this in fact requires a considered and targeted response from the legal profession as a whole. Therefore, ICC needs to be explicitly included in both education and practice admission standards to properly address this deficit in legal education.

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<sup>72</sup> Kift, Israel and Field, above n 61.

<sup>73</sup> *Ibid* 10.

<sup>74</sup> *Ibid* 8.

<sup>75</sup> *Ibid* 12–13.

<sup>76</sup> See generally Irene Watson and Marcelle Burns, ‘Indigenous Knowledges: A Strategy for First Nations Peoples Engagement in Higher Education’ in Sally Varnham, Patty Kamvounias and Joan Squelch (eds), *Higher Education and the Law* (Federation Press, 2015) 41.

<sup>77</sup> See further *ibid*.

Thus far, ICC also remains largely absent from the CALD Standards.<sup>78</sup> However, at the time of writing a review of these standards is soon to begin, and CALD is actively investigating the ICC initiatives emerging in and across law schools. It is hoped and anticipated that CALD, as the peak legal academic body, will engage fully with the accumulating reports and commentary on First Peoples' experiences with the legal system, and in legal education,<sup>79</sup> and play an important role in promoting the necessary regulatory reform in this field — including through its own standards for law schools.

For completeness, as regards broader and ongoing professional initiatives, it should be noted that the Law Council of Australia's *Policy Statement: Indigenous Australians and the Legal Profession* expressly promotes participation by members of the legal profession in Indigenous cultural education and training.<sup>80</sup> While this statement is not mandatory, it gives prominent recognition to the issues under examination here, and helps build the momentum for change. Of course most state and territory law societies offer continuing professional development (CPD) opportunities for lawyers — which may include cultural awareness or ICC and/or the provision of relevant resources for practitioners. While these specific initiatives are beyond the scope of this article, a preliminary review reveals that there is considerable scope to broaden the efforts in this context and make them mandatory — which in turn underlines the need for broad regulatory reform.

There is also a growing awareness in government that lawyers need to have skills in ICC to fulfil their ethical and professional responsibilities. For instance, the federal *Indigenous Legal Assistance Program Funding Guidelines 2015–2016* give priority to **services organisations** that are able to deliver services in a 'culturally accessible' manner.<sup>81</sup> A number of public and private legal service providers have adopted Reconciliation Action Plans (RAPs), which invariably include actions to provide professional development opportunities to increase the cultural competency of staff.<sup>82</sup> Many employers also require job applicants to demonstrate the ability to work effectively with Aboriginal peoples and communities.<sup>83</sup> These examples confirm that there is a clear case for the inclusion of ICC as a core professional requirement.

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<sup>78</sup> Council of Australian Law Deans, above n 62.

<sup>79</sup> See above n 7.

<sup>80</sup> Law Council of Australia, 'Indigenous Australians and the Legal Profession' (Policy Statement, Law Council of Australia, February 2010) 3.

<sup>81</sup> Australian Government, Attorney-General's Department, *Programme Guidelines: Indigenous Legal Assistance Program From 2015–16* (2015) 5 <<https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/Indigenous-Legal-Assistance-Program.aspx>>.

<sup>82</sup> See, eg, Legal Aid New South Wales, *Reconciliation Action Plan 2013–2015* <<https://www.legalaid.nsw.gov.au/publications/annual-report/annual-report-2012-2013/collaborating-with-our-partners/aboriginal-community-partnerships>>.

<sup>83</sup> For example, the Queensland Department of Justice requires applicants to provide a letter from an Aboriginal community member testifying to their ability to work with Aboriginal people and communities.

The examination above reveals that the current education and practice admission standards for lawyers are too limited in their attention to and constructive engagement with the needs of First Peoples. Where First Peoples are mentioned, they tend to be depicted as people with ‘communication difficulties’,<sup>84</sup> and/or people whose knowledge and perspectives are peripheral to the areas of legal knowledge needed to practice as a lawyer.<sup>85</sup> The evidence is now clear that such inattention, marginalisation, and positioning of the issue within a deficit narrative must inevitably contribute to unequal relationships, access to justice problems, and poor legal outcomes. There is currently a great need, and a great opportunity, for regulatory reform in Australia.

## V THE EXPERIENCE IN CANADA

This final section of our study broadens our Australian analysis with a brief mapping of relevant Canadian developments (with some wider international context in places). Canada is a federation with a similar heritage and trajectory to Australia in law and government, a comparable Indigenous under-representation in legal education and practice,<sup>86</sup> and an array of analogous legal and social challenges including Indigenous over-representation in the criminal justice system.<sup>87</sup> Viewed in this light, the comparison is a valuable one. More practically, however, it is now clear that law schools are training professionals who will be working and/or engaging across jurisdictions — as pedagogy in the field already acknowledges.<sup>88</sup>

Beyond these broad justifications for comparison, something very significant is underway in Canada. The 2015 release of ‘Calls to Action’ by the Truth and Reconciliation Commission (TRC)<sup>89</sup> has focused and amplified a number of important discussions in that country. Though critical change can be slow, it is widely thought that Canada has reached a pivotal moment in the evolution of legal education.<sup>90</sup> Our discussion here descends to some quite specific debates and initiatives on the ground as they provide valuable context for the regulatory developments in Canada. We also note that while our focus here is on

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<sup>84</sup> Law Admissions Consultative Committee, above n 56.

<sup>85</sup> Kift, Israel and Field, above n 61.

<sup>86</sup> See Devonshire, above n 9, 311ff.

<sup>87</sup> See, eg, Thalia Anthony, Lorana Bartels and Anthony Hopkins, ‘Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice’ (2015) 39 *Melbourne University Law Review* 47.

<sup>88</sup> See, eg, Margaret Stephenson et al, ‘International and Comparative Indigenous Rights Via Video Conferencing’ (2009) 19 *Legal Education Review* 237.

<sup>89</sup> Truth and Reconciliation Commission of Canada, ‘Calls to Action’ (Report, Truth and Reconciliation Commission of Canada, 2015).

<sup>90</sup> See, eg, Hannah Askew, ‘Learning from Bear-Walker: Indigenous Legal Orders and Intercultural Legal Education in Canadian Law Schools’ (2016) 33(1) *Windsor Yearbook of Access to Justice* 29, 45. Notably, soon after the TRC recommendations were released, a group of legal academics established an online alliance to work towards what has been termed a ‘reconciliation syllabus’ – drawing on the experiences, materials and engagements of each: see [reconciliationsyllabus, About <https://reconciliationsyllabus.wordpress.com/about/>](https://reconciliationsyllabus.wordpress.com/about/).



national education and practice admission standards (and associated matters of curriculum and competency), further comparative study would be valuable on matters such as Indigenous student support, relevant clinical education, and reform of university decision-making structures.<sup>91</sup>

As will be seen, a significant component of the discussion in Canada has focused on the actual teaching of Indigenous laws (or Indigenous legal traditions).<sup>92</sup> This has also been one thread in the Australian discussion.<sup>93</sup> This strong emphasis in Canada is very consistent with a key theme of this article — namely that we must move beyond the narrative of Indigenous disadvantage, deficiency and trauma in reconceptualising legal education. While it remains essential to relate and acknowledge the negative past (and present) Indigenous experiences with the legal system, it is also vital to recount the sophistication, resilience and profound value of Indigenous histories and traditions, and to engage with Indigenous *futures* alongside the essential stories of the past.

#### *A The Canadian Regulatory Landscape and the TRC ‘Calls to Action’*

The Canadian legal profession remains essentially self-regulated — subject to some broad delineation of local law society powers by provincial or territorial legislation (and usually some government representation on society boards). The Federation of Law Societies of Canada takes on a coordinating role with respect to the various local societies, and in recent years has driven a number of national initiatives. Whilst these have not come without debate, they are building some uniformity across the country.<sup>94</sup>

One significant recent initiative of the Federation was the production of a ‘National Entry to Practice Competency Profile for Lawyers and Quebec Notaries’ (2012)<sup>95</sup> — which covers various areas

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<sup>91</sup> See, eg, Gemma McKinnon, ‘Supporting the Next Generation of Indigenous Law Students’ (2014) 8(11) *Indigenous Law Bulletin* 3; Michelle Pidgeon, Jo-Ann Archibald and Colleen Hawkey, ‘Relationships Matter: Supporting Aboriginal Graduate Students in British Columbia, Canada’ (2014) 44(1) *Canadian Journal of Higher Education* 1; Hewitt, above n 68.

<sup>92</sup> As to the emerging preference for the latter term in Canada, to encompass various legal orders and laws within them (and avoid the western-law derived connotations of other terms), see, eg, Askew, above n 90, 33.

<sup>93</sup> See, eg, Ambelin Kwaymullina and Blaze Kwaymullina, ‘Learning to Read the Signs: Law in an Indigenous Reality’ (2010) 34 *Journal of Australian Studies* 195; Kirsten Anker, ‘Teaching “Indigenous Peoples and the Law”: Whose Law?’ (2008) 33 *Alternative Law Journal* 132; Irene Watson, ‘Some Reflections on Teaching Law: Whose Law, Yours or Mine?’ (2005) 6(8) *Indigenous Law Bulletin* 23-.

<sup>94</sup> Alain Roussy, ‘Lawyer Regulation in Canada: Towards Greater Uniformity’ (2017) 50 *International Lawyer* 409, 410, 414. See also Laurel S Terry, ‘Trends in Global and Canadian Lawyer Regulation’ (2013) 76 *Saskatchewan Law Review* 145.

<sup>95</sup> Federation of Law Societies of Canada, *National Admission Standards Project: National Entry to Practice Competency Profile for Lawyers and Quebec Notaries* (September 2012) <<https://flsc.ca/wp-content/uploads/2014/10/admission4.pdf>>. Note also the Federation’s development of a ‘Model Code of Professional Conduct’

of substantive legal knowledge, ‘skills’ and associated ‘tasks’. Notably for present purposes, the section requiring substantive legal knowledge of the Canadian legal system refers explicitly to ‘human rights principles and the rights of Aboriginal peoples of Canada’.<sup>96</sup> The communication skills requirement mandates language and legal explanation that is appropriate for the intended audience, and the required client relationship skills include attention to diversity and cultural context in the formulation of legal strategy and giving of advice.<sup>97</sup> The Competency Profile has met with some difficulties at the assessment stage,<sup>98</sup> however it remains an important statement of standards and marker of relevant reform in Canada.

The Federation’s subsequent ‘National Requirement’ (2015/2018)<sup>99</sup> deals with entry into law society admission programs — and hence is focussed more directly on the competencies to be acquired and demonstrated at law school. Within the prescribed list of competencies, the communication competency requires language suitable to audience, and the requirement of substantive legal knowledge includes reference (again) to human rights principles and the rights of Aboriginal peoples of Canada.<sup>100</sup> In this instance the reference is contained under the subheading of Constitutional Law, reflecting the expanding legal prominence of the ‘recognition and affirmation’ of Aboriginal and Treaty rights in s 35 of the *Constitution Act 1982*. Law schools are regularly reviewed for compliance with the National Requirement and accredited by the Federation.<sup>101</sup>

The recent focus on curriculum reform and cultural competency in Canada has been driven particularly by the 2015 release of ‘Calls to Action’ by the TRC. This Commission was established by the Indian Residential Schools Settlement Agreement and spent six years hearing testimony from residential school survivors across Canada. The ‘Calls to Action’ emerged in its final report, which has been received as a broad and highly significant contribution to reconciliation in Canada.

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to synchronise somewhat the conduct standards applicable to the legal profession. The Model Code was first developed in 2009, is reviewed on an ongoing basis, and has been adopted by the majority of the provincial and territorial law societies. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (14 March 2017) <<https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf>>; see generally, Roussy, *ibid*, 420.

<sup>96</sup> Federation of Law Societies of Canada, *National Admission Standards Project*, above n 9695, 1.1(c).

<sup>97</sup> *Ibid* 2.2(d), (f), 2.5(b)–(c).

<sup>98</sup> The National Competency Profile was adopted by 13 law societies (subject to the development and approval of an implementation plan), however work on a national assessment tool was halted in June 2016 — with individual law societies remaining responsible for assessment of practice entry competencies and retaining a discretion as to their degree of continuing reliance on the National Competency Profile. Federation of Law Societies of Canada, *National Admission Standards* <<https://flsc.ca/national-initiatives/national-admission-standards/>>.

<sup>99</sup> Federation of Law Societies of Canada, *National Requirement* (1 January 2018) <<https://flsc.ca/wp-content/uploads/2018/01/National-Requirement-Jan-2018-FIN.pdf>>.

<sup>100</sup> *Ibid* 1.3(c), 3.2(a).

<sup>101</sup> Federation of Law Societies of Canada, *Canadian Law School Programs* <<https://flsc.ca/law-schools/>>.

There are 94 specific TRC Calls to Action relating to a broad range of important contemporary issues.<sup>102</sup> Three are of particular importance to the present discussion, with two specifically relating to legal education. These two were prefaced by the following poignant explanation in the TRC's summary report:

### **Educating Lawyers**

The criminal prosecution of abusers in residential schools and the subsequent civil lawsuits were a difficult experience for Survivors. The courtroom experience was made worse by the fact that many lawyers did not have adequate cultural, historical, or psychological knowledge to deal with the painful memories that the Survivors were forced to reveal. The lack of sensitivity that lawyers often demonstrated in dealing with residential school Survivors resulted, in some cases, in the Survivors' not receiving appropriate legal service. These experiences prove the need for lawyers to develop a greater understanding of Aboriginal history and culture as well as the multi-faceted legacy of residential schools.

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.

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.<sup>103</sup>

Noting that 'new frameworks and commitments' will not succeed without more understanding and sensitivity amongst administrators, the TRC added a similarly-worded call relating to the education of public servants.<sup>104</sup>

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<sup>102</sup> These include child welfare issues; education content and opportunity; languages and culture; health; access to justice, Aboriginal justice systems and over-representation in custody; implementation of UNDRIP; future reconciliation frameworks; church apologies and constructive redress; museums and archives; missing children research and commemoration; heritage and commemoration; media diversity and training; sports commemoration, development and inclusivity; economic development frameworks and corporate sector education; and citizenship obligations.

<sup>103</sup> Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada' (Report, Truth and Reconciliation Commission of Canada, 2015) 168.

<sup>104</sup> Ibid 219 and recommendation 57: 'We call upon federal, provincial, territorial, and municipal governments to provide education to public servants on the history of Aboriginal peoples, including 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.'

Initial institutional responses to the TRC report were swift. The Federation of Canadian Law Societies established an advisory committee in 2016 to develop a national response to the Calls to Action, with articles 27 and 28 being the priority. That committee is working with others to consider possible amendments to the National Requirement (discussed above) and supporting initiatives.<sup>105</sup> Provincial law societies have similarly been working on strategies to respond to the TRC Calls,<sup>106</sup> in addition to their various earlier and existing initiatives on these issues (which range across training, resources, specialist certification, and review of local admission processes etc).<sup>107</sup>

The Canadian Bar Association, which plays an important role in continuing legal education and professional development, also responded to the TRC Calls to Action in 2016.<sup>108</sup> It confirmed its commitment to continue and extend its efforts in organising relevant conferences, seminars and workshops (and skills-based training), and supported the cultural competency training conducted by many law societies. It also supported the TRC call to make law school courses on Indigenous Peoples and the Law mandatory, and noted the possibility of more integration of relevant content through curricula more generally. The Bar Association also emphasised the particular need for cultural competency education and training to address Indigenous women's perspectives, and incorporate education about relevant international standards (including the United Nations *Declaration on the Rights of Indigenous Peoples* — UNDRIP). Other relevant efforts of the Association include its 2013 resolution to recognise and advance Indigenous legal traditions,<sup>109</sup> and (more broadly) its Legal Futures Initiative<sup>110</sup> and Equal Justice Initiative.<sup>111</sup> Notably, the Indigenous Bar Association, in conjunction with the Advocates Society and the Law Society of Ontario, responded to the TRC Calls to Action with the launch of its 'Guide for Lawyers working with Indigenous Peoples' in May 2018. The Guide is designed as a resource to assist lawyers to learn about historical and cultural context for contemporary Indigenous experiences and relationships in the justice system, and provide

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<sup>105</sup> Law Society of Upper Canada, 'Report on the Federation of Law Societies of Canada Council and Related Meetings, Victoria BC, October 18–20, 2017' (Report, Law Society of Upper Canada, 1 December 2017).

<sup>106</sup> Canadian Bar Association, Alberta Branch, *Law Society of Alberta Responds to Truth and Reconciliation Calls to Action* <<https://www.cba-alberta.org/Publications-Resources/Resources/Law-Matters/Law-Matters-Fall-2017/Law-Society-of-Alberta-Responds-to-Truth-Reconcili->>.

<sup>107</sup> As to related efforts in ongoing legal education for judges and government, see, eg, Napoleon and Friedland, above n 67.

<sup>108</sup> Canadian Bar Association, *Responding to the Truth and Reconciliation Commission's Calls to Action* (March 2016).

<sup>109</sup> Canadian Bar Association, *Indigenous Legal Traditions* (16 February 2013) <<https://www.cba.org/Our-Work/Resolutions/Resolutions/2013/Indigenous-Legal-Traditions>>.

<sup>110</sup> Canadian Bar Association, *About* <<https://www.cba.org/CBA-Legal-Futures-Initiative/About>>.

<sup>111</sup> Canadian Bar Association, *Equal Justice* <<https://www.cba.org/CBA-Equal-Justice/Home>>.

practical tools to facilitate effective representation of Indigenous clients.<sup>112</sup>

### B *Broader Responses to the TRC*

Beyond these broad institutional initiatives, the TRC recommendations have focused and amplified significant conversations in Canada — particularly in and between law schools. They have been the ‘call for change’, among many over recent decades, that has most captured attention.<sup>113</sup> And they have intersected with other important discussions underway in Canada — on the changing nature of legal practice and the legal ‘population’<sup>114</sup> and the need for law schools to better reflect the diversity of society;<sup>115</sup> on the philosophical and practical underpinnings of Indigenous legal traditions (and their relationship with western laws);<sup>116</sup> and on the education-related articles of UNDRIP<sup>117</sup> and international concepts of self-determination.<sup>118</sup>

Given the parallel nature of TRC recommendations 27 and 28, there has inevitably been some immediate attention to the division of responsibilities between law societies and law schools.<sup>119</sup> However, some commentators have also warned against a descent into the conversation about ‘who’ determines the shape of this necessary evolution in legal education — pressing the need to ‘[hold] open space for the more substantive conversations’.<sup>120</sup> There can be little doubt that creating the necessary change must be a shared and ongoing responsibility.

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<sup>112</sup> See Advocates’ Society, Indigenous Bar Association and the Law Society of Ontario, *Guide for Lawyers Working With Indigenous Peoples* (8 May 2018) <[https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Guide\\_for\\_Lawyers\\_Working\\_with\\_Indigenous\\_Peoples\\_may16.pdf](https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Guide_for_Lawyers_Working_with_Indigenous_Peoples_may16.pdf)>; Nova Scotia Barristers’ Society, *Guide for Lawyers Working with Indigenous Peoples: Invitation to Launch Reception* <<http://nsbs.org/guide-lawyers-working-indigenous-peoples-invitation-launch-reception/>>.

<sup>113</sup> Hewitt, above n 68, 66.

<sup>114</sup> See, eg, Larry Chartrand et al, ‘Law Students, Law Schools, and their Graduates’ (2001) 20 *Windsor Yearbook of Access to Justice* 211; Lawrence and Daum Shanks, above n 67.

<sup>115</sup> See, eg, Faisal Bhabha, ‘Towards a Pedagogy of Diversity in Legal Education’ (2014) 52 *Osgoode Hall Law Journal* 59; Adelle Blackett, ‘Follow the Drinking Gourd: Our Road to Teaching Critical Race Theory and Slavery and the Law, Contemplatively, at McGill’ (2017) 62 *McGill Law Journal* 1251.

<sup>116</sup> See the summary and references provided in Napoleon and Friedland, above n 67, 727.

<sup>117</sup> See especially arts 14 and 15 and see, eg, Graham and Van Zyl-Chavarro, above n 68.

<sup>118</sup> Napoleon and Friedland, above n 67, 727.

<sup>119</sup> See, eg, Amy Salzyn, ‘Cultural Competence and the Next Generation of Lawyers and Lawyer Regulation’, *Slaw* (online), 16 February 2017 <<http://www.slaw.ca/2017/02/16/cultural-competence-and-the-next-generation-of-lawyers-and-lawyer-regulation/>>.

<sup>120</sup> Gillian Calder and Rebecca Johnson, ‘TRC Offers a Window of Opportunity for Legal Education’, *Canadian Lawyer* (online), 15 June 2015 <<https://www.canadianlawyermag.com/article/trc-offers-a-window-of-opportunity-for-legal-education-2922/>>.

The Canadian commentary broadly acknowledges that the TRC Calls to Action, most immediately, ‘tell us there are substantive elements of the story of indigenous-settler relations that are essential for understanding what it means to be a legal advocate, law student, or lawyer today, and that gaps in existing knowledge have caused harm’.<sup>121</sup> Moreover it has been emphasised that these recommendations, drawn from the storytelling of witnesses, are a strong contemporary reminder ‘that inter-cultural competency, conflict resolution, fluency in human rights, and anti-racism *are legal skills*’.<sup>122</sup>

Lawyer competencies, and cultural competencies in particular, have been a key focus of contemporary debate in Canada. There has been some critique of the approach taken to the development of the Federation’s national standards — pointing particularly to the diversity of contemporary legal practice and the changing nature of laws and legal processes.<sup>123</sup> Framed by this critique, it has been argued that legal competency demands more than ‘disaggregated technical skills and knowledge’ — it also requires commitment to relationship building, deep communication, critical reflection on laws and critical reflexivity, deep attention to context, and cultural humility.<sup>124</sup> Some have particularly pressed, based on the imperatives of improving access to justice, for more experiential and clinical learning practices with a blend of hands-on experience and structured critical reflection.<sup>125</sup> This has been accompanied by calls for a re-examination of legal ethics to better accommodate Indigenous legal values and principles.<sup>126</sup>

There has been a steady resistance in Canada, at least in the key academic dialogues, to any immersion of these reform initiatives in ‘deficit discourse’.<sup>127</sup> One visible manifestation of the resistance to deficit discourse in Canada is the concerted attention to the teaching of actual Indigenous legal traditions. The inclusion in TRC recommendations 27 and 28 of ‘Indigenous law’ in the educational aspiration has drawn greater attention and debate to these efforts.

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<sup>121</sup> Ibid.

<sup>122</sup> Ibid (emphasis added).

<sup>123</sup> See Sarah Marsden and Sarah Buhler, ‘Lawyer Competencies for Access to Justice: Two Empirical Studies’ (2017) 34(2) *Windsor Yearbook of Access to Justice* 186, 190–2; Harry Arthurs, ‘“Valour Rather Than Prudence”: Hard Times and Hard Choices for Canada’s Legal Academy’ (2013) 76 *Saskatchewan Law Review* 73; Nathalie des Rosiers, ‘Legal Competencies for the World We Live In’, *Slaw* (online), 9 June 2016 <<http://www.slaw.ca/2016/06/09/legal-competencies-for-the-world-we-live-in/>>.

<sup>124</sup> Marsden and Buhler, *ibid*, 187, 189. See also Sarah Buhler, ‘Reading Law and Imagining Justice in the Wahkohtowin Classroom’ (2017) 34(1) *Windsor Yearbook of Access to Justice* 175.

<sup>125</sup> See, eg, Bhabha, above n 115.

<sup>126</sup> See, eg, Paul Jonathan Saguil, ‘Ethical Lawyering Across Canada’s Legal Traditions’ (2010) 9 *Indigenous Law Journal* 167.

<sup>127</sup> The resistance has perhaps been more explicit in New Zealand, where key commentators have noted that an adherence to deficit discourse (perhaps partly driven in recent years by the language of critical theorists) erroneously leaves the ‘coloniser ... at the centre of attention’: Alison Jones, ‘Dangerous Liaisons: Pākehā, Kaupapa Māori, and Educational Research’ (2012) 47(2) *New Zealand Journal of Educational Studies* 100, 112.

Pursuing this last point, perhaps the most significant recent development in this field in Canada is the ground-breaking establishment of a dual degree (Canadian Common Law and Indigenous Legal Orders) at the University of Victoria in British Columbia — involving classroom learning and community-based field studies.<sup>128</sup> After many years in planning and discussion, this program commenced in September 2018. Consistent with the discussions in Australia (including through the ICCLAP project that prompted this journal issue),<sup>129</sup> various attending questions and challenges are now being keenly explored in the Canadian commentary.<sup>130</sup> How is ‘Indigenous law’ best taught, and what is the appropriate balance between law school and community-based learning (integration and collaboration being seen as essential)? How is ‘Indigenous law’ to be defined? Which Indigenous peoples’ specific laws should be the focus and can Indigenous law be broadly theorised within a single framework? Who can and who should teach such a course? Are universities appropriately committed to the necessary recruitment and to supporting existing Indigenous staff and students? Is the broader community ready for these reforms? The key designers of the University of Victoria initiatives are actively engaging with these and other questions<sup>131</sup> in commentary. They (and others) are openly sharing methodologies<sup>132</sup> — attempting to build ‘pedagogical bridges’ and ‘translate from the theoretical and the philosophical to the practical and the concrete’.<sup>133</sup>

It should also be emphasised here that a number of other law schools in Canada have been exploring and implementing some teaching of Indigenous legal traditions on a lesser scale — for example, in semester

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<sup>128</sup> University of Victoria, *Joint Degree Program in Canadian Law and Indigenous Legal Orders JD/JID* (2018).

<sup>129</sup> See Indigenous Cultural Competency for Legal Academics Program, *Indigenous Cultural Competency in Law: Deliberating Future Directions Workshop – Final Participant Report* (Indigenous Cultural Competency for Legal Academics Program, 2017); Indigenous Cultural Competency for Legal Academics Program, *Consultation Workshop Report* (Indigenous Cultural Competency for Legal Academics Program, 2016).

<sup>130</sup> See, eg. Hewitt, above n 68; Askew, above n 90 (and the various references cited there); Aaron Mills, ‘The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today’ (2016) 61 *McGill Law Journal* 847.

<sup>131</sup> Other questions being explored include: Can ‘Indigenous law’ be categorised and organised in an accessible way and taught in English, or is there some risk of ‘filtering’ through or disarticulation in western frameworks and conceptions? Is there a risk of Indigenous law being ‘over-intellectualised’ or unduly detached from its holistic foundations? What effects might this all have on the integrity of Indigenous legal traditions, on efforts to revitalise them, on communities, or on Indigenous students (vis-a-vis their communities and their future job prospects)? Does this involve some undue assimilation, appropriation or violation of intellectual property? Are the costs too high? And to what extent does this address the challenges laid out in the TRC report? See the references noted in the preceding footnote.

<sup>132</sup> See, eg. John Borrows, ‘Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education’ (2016) 61 *McGill Law Journal* 795; John Borrows, ‘Outsider Education: Indigenous Law and Land-Based Learning’ (2016) 33(1) *Windsor Yearbook of Access to Justice* 1; Napoleon and Friedland, above n 67.

<sup>133</sup> Napoleon and Friedland, above n 67, 733–4.

courses, certificate programs and/or awareness camps.<sup>134</sup> Such programs can broaden students' understanding of what constitutes 'law', open new conversations between different legal systems, build valuable relationships between law schools and communities, and empower community members to 'claim more space for their own legal orders and engage with state legal systems from a position of greater confidence and knowledge'.<sup>135</sup> Another very notable Canadian development has been the establishment of culturally and regionally-specific law programs in Nunavut — in partnership initially with the University of Victoria and more recently the University of Saskatchewan.<sup>136</sup>

Law school engagement with the teaching of Indigenous legal traditions per se is at an earlier stage in Australia. While there are additional factors to be considered in the Australian context, the Canadian initiatives clearly warrant close examination and discussion. The Hon Lance Finch (formerly of the British Columbia Court of Appeal) has clearly pinpointed the essence of the challenge for lawyers and legal educators as they first approach this particular engagement:<sup>137</sup>

How can we make space within the legal landscape for Indigenous legal orders? The answer depends, at least in part, on an inversion of the question: a crucial part of this process must be to find space for ourselves, as strangers and newcomers, within the Indigenous legal orders themselves.

While there are many challenges on this journey it has been noted in Canada that a suitable and compelling place to start is 'cultivating respect and appreciation' in our law schools for 'the complexity and sophistication of Indigenous legal orders'.<sup>138</sup> This is a vital step in Australia — for all of the paths that lie ahead.

To briefly widen the comparative lens, some Canadian commentators have adopted and emphasised a broad reading of the TRC Calls to Action, with particular focus on the separate call (in recommendation 50) for the establishment of 'Indigenous Law Institutes'.<sup>139</sup> It has been suggested that these may be considered the

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<sup>134</sup> For example, Lakehead University, University of British Columbia, McGill University, University of Ottawa, Osgoode Hall, University of Toronto, University of Victoria, University of Windsor.

<sup>135</sup> Askew, above n 90, 42–3.

<sup>136</sup> For the history, see Kelly Gallagher-Mackay, 'Affirmative Action and Aboriginal Government: The Case for Legal Education in Nunavut' (1999) 14(2) *Canadian Journal of Law and Society* 21; Serena Ableson, 'Bringing Legal Education to the Canadian Arctic: The Development of the Akitsiraq Law School and the Challenges for Providing Library Services to a Non-Traditional Law School' (2006) 34 *International Journal of Legal Information* 1. And see more recently Nunavut Arctic College, *Nunavut Law Degree Program* <<https://www.arcticcollege.ca/law-program-item>>.

<sup>137</sup> Lance S G Finch, 'The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice' (Paper presented at the Continuing Legal Education Society of British Columbia Indigenous Legal Orders and the Common Law Conference, Vancouver, 15–16 November 2012), cited in Askew, above n 90.

<sup>138</sup> Askew, above n 90, 32.

<sup>139</sup> Recommendation 50 reads: 'In keeping with the United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes



responsibility of law schools, and indeed important to the ongoing relevance of law schools in the future.<sup>140</sup> More generally it has been argued that ‘Indigenizing’ curriculums must be coupled with (and not distract from) the wider ‘decolonisation’ of legal education — namely, the re-conceptualisation of the very institution of law schools and examination of barriers impeding the proper inclusion of Indigenous legal content and legal orders, Indigenous scholars, and Indigenous research methodologies.<sup>141</sup> This broader process can and should involve the building of partnerships, greater inclusion and collaboration (especially with Indigenous elders), listening, reflection, patience, land-based and possibly seasonal learning, and more relevantly-focussed research priority-setting and funding — all tended with continual effort and reassessment.<sup>142</sup> The need to discard the deficit discourse has been emphasised in this context also: ‘law schools must engage with Indigenous Peoples as part of the solution and not the problem’.<sup>143</sup>

## VI CONCLUSION

There is now a significant body of research indicating that legal services in Australia are not yet culturally competent. Our review of the current regulatory framework demonstrates that the most constructive and prominent attention to ICC is found in the *Model Admission Rules 2015*, which require some level of cultural awareness within the PLT directives. However, analysis reveals that this regulatory attention to the issues is confined to only a brief (and optional) part of a lawyer’s training, falling well short of the ICC framework advocated here to effect meaningful change. Legal education clearly has a critical role to play in laying the foundation for the ongoing journey of ICC, however there is currently very little regulatory encouragement for it to play that role. Reform to the ALTC and CALD standards would contribute significantly to the momentum that must be built. Yet ultimately the practice admission standards are the key drivers of law curriculum and training, and so the most urgent and important need is for deeper engagement with these issues in the Model Rules — which would send a strong message that ICC is a lawyering skill that is indispensable to the ethical and professional responsibilities of the legal profession towards First Peoples.

Since the watershed RCIADIC and *Bringing Them Home* reports, a number of inquiries have continued to highlight First Peoples’ acute need for more culturally appropriate, sensitive, and competent legal services. It should be of great concern to the legal profession (and the

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for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.’

<sup>140</sup> Hewitt, above n 68, including at 71. See also the discussion of the Indigenous Law Research Unit at the University of Victoria in Borrows, ‘Outsider Education’, above n 132, 27.

<sup>141</sup> Hewitt, above n 68, 70.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid 83.

nation) that these calls for change have persisted and have remained essentially unanswered for over twenty years — in the face of what the United Nations Special Rapporteur on the Rights of Indigenous Peoples calls a ‘tsunami’ of Indigenous imprisonment, and escalating numbers of Indigenous children in child protection systems.<sup>144</sup> These findings suggest that our regulatory frameworks and educational priorities for legal professionals are still inadvertently failing First Peoples.

Building a stronger focus in legal education and training on Indigenous knowledges and perspectives, and ICC, is essential to improving access to justice and legal outcomes, and to de-colonising legal education more broadly. As has been recognised in Canada, this action must be seen as a crucial component of the contemporary responsibility of law schools and professional associations — to the broader community (including Indigenous communities facing various challenges and seeking to revitalise),<sup>145</sup> to aspiring Indigenous lawyers who will ‘negotiate the boundaries’<sup>146</sup> of Indigenous futures and must appreciate the uniqueness of their perspective and contribution,<sup>147</sup> and to non-Indigenous lawyers who will otherwise be grievously ‘short-changed’.<sup>148</sup> Moreover, it must not be forgotten in setting academic and vocational curriculum that Indigenous experiences in the shadow of colonialism hold some of our most important lessons — compelling for all — about the potential fallibility and deep consequences of laws and legal process. And it must be acknowledged that Indigenous legal traditions themselves contain ‘vast resources’ for individual and community problem-solving and are ‘vibrant sources’ of knowledge and principle for all.<sup>149</sup> This last point reiterates that a very necessary step here is to challenge the deficit discourse — to shift the focus from Indigenous deficiency, disadvantage and trauma towards a fuller respect for Indigenous knowledges and perspectives, and to start asking how *lawyers* can improve *their* interactions with First Peoples. The ‘deficit discourse’ has for too long allowed these important discussions to languish — itself offering only a vehicle for abstract academic regret and an excuse for professional inaction. This has prevented a true engagement with Indigenous knowledges, histories and futures — and we must move beyond this one-sided conversation.

The Canadian developments and debates explored in this article, even extracted from broader international advances, are important to the arguments raised at several levels. Existing Canadian regulation and accompanying grass roots reform illustrate what basic but explicit regulatory standards might look like — and might facilitate — in

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<sup>144</sup> United Nations Office of the Higher Commissioner for Human Rights, ‘Australia’s Aboriginal Peoples Face “Tsunami” of Imprisonment, UN Expert Finds’ (Media Release, 4 April 2017).

<sup>145</sup> Napoleon and Friedland, above n 67.

<sup>146</sup> Youngblood Henderson, above n 68, 15.

<sup>147</sup> See Tracey Lindberg, ‘Critical Indigenous Legal Theory Part 1: The Dialogue Within’ (2015) 27 *Canadian Journal of Women and the Law* 224.

<sup>148</sup> *Ibid* 225.

<sup>149</sup> Borrows, ‘Heroes, Tricksters, Monsters, and Caretakers’, above n 132, 797. See also the early significant work of Youngblood Henderson, above n 68. See also Anker, above n 93.

Australia. Moreover, the momentum now accumulating around the TRC Calls to Action is producing significant advances and invaluable discussion (on various issues) for closer study in the Australian context. The accompanying debates and dilemmas in Canada can only enrich our own understanding and implementation efforts. Perhaps most importantly, while critical change in Canada has not come easily, the Canadian story shows that this challenging journey *can* be embarked upon, and in a concerted and sustainable manner. There is clearly a deepening awareness across nations that law schools (in particular) can in various ways contribute to ‘ongoing colonisation’ — through the perpetuation of legal assumptions and outdated legal histories; through the prioritisation of western laws and minimisation or isolation of ‘Indigenous legal issues’; through imbalanced institutional structures and decision-making; and indeed through undue focus upon Indigenous disadvantage, deficiency and trauma.<sup>150</sup> Curriculum and research silence — and Indigenous invisibility in planning, decision-making, teaching and learning — must all be identified and addressed. Perhaps at the core of the Canadian momentum is a growing acknowledgement of the simple important point, as explained by Professor John Borrows, that ‘Law Professors both *reflect* and *generate* law in conveying legal traditions... [and in] another context, judges and lawyers do the same’.<sup>151</sup>

Returning to the central purposes of this article, it is clear that educating lawyers — and for that matter challenging ‘hidden’ systems of bias and leading lawyers and the legal profession to think differently about what makes competent lawyers — is a high stakes challenge. Reform to legal education standards and practice admission rules to incorporate ICC as a mandatory requirement for lawyers will be a vital part of positive, collaborative, consistent and sustainable reform.

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<sup>150</sup> Hewitt, above 68, 66–7.

<sup>151</sup> Borrows, ‘Heroes, Tricksters, Monsters, and Caretakers’, above n 132, 799 (referring to broader work by Duncan Kennedy, Patricia J Williams and Jeremy Webber).