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USING LEGISLATION TO TEACH INDIGENOUS CULTURAL COMPETENCE IN AN INTRODUCTORY LAW SUBJECT

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I INTRODUCTION

Embedding Indigenous cultural competence into law curriculum at universities is an important project that recognises the place of Aboriginal and Torres Strait Islander peoples as the custodians of one of the oldest continuing cultural traditions in the world.[1] It is a critical responsibility of higher education institutions, particularly law schools, to lead social change in this area for several reasons. First, it pays respect to Elders as the guardians of Indigenous knowledges and fosters collaboration between Aboriginal and Torres Strait Islander staff, students and communities. Second, incorporating Indigenous cultures, histories and contemporary social realities into law curriculum necessitates critical reflection on the role of the legal profession and the law in driving policies and practices of colonisation, many of them harmful, that continue to resonate widely in a contemporary setting. Third, producing law graduates who are culturally competent fulfils the overarching mission of law schools in Australia that are committed to the 'rule of law, and the promotion of the highest standards of ethical conduct, professional responsibility, and community service'.[2] This mission ought to extend to being committed to enhancing cultural safety for staff and students, and to valuing the richness of cultural diversity. Finally, embedding cultural competence provides opportunities for students to benefit from authentic learning experiences that recognise and celebrate the unique nature of Indigenous knowledges and the strength and resilience of Aboriginal and Torres Strait Islander peoples.

The requirement to build the knowledge of university graduates surrounding Indigenous cultures, histories and contemporary social

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1 Universities Australia, *National Best Practice Framework for Indigenous Cultural Competency in Australian Universities* (October 2011) 4 <https://www.universitiesaustralia.edu.au/uni-participation-quality/Indigenous-Higher-Education/Indigenous-Cultural-Compet#.XGXB-OJKgb0>.

2 Council of Australian Law Deans, *CALD Standards for Australian Law Schools* (2013) 1.3 <https://cald.asn.au/wp-content/uploads/2017/11/CALD-Standards-As-adopted-17-November-2009-and-Amended-to-March-2013-1.pdf>.

realities calls for teaching innovation in law curriculum. Our previous research illustrated the incorporation of Indigenous cultural competence into a Law of Torts subject focusing on litigation by members of the Stolen Generations.[3] This article outlines how principles of statutory interpretation can be introduced alongside the teaching of Indigenous cultural competence. The central place of statutory interpretation in the curriculum of law schools is summarised by Justice Mark Weinberg from the Victorian Court of Appeal as follows: 'Statutory interpretation is now the first port of call in so much of what we do, and our students need to understand its importance'.[4] Statutory interpretation should not be thought of as just a legal skill but deserves recognition as a 'distinct body of law'.[5] Statutory interpretation involves deciphering the meaning of text, by recognising and engaging interpretative techniques according to statutory and common law as part of a multifactorial assessment.[6] Statutory interpretation does not involve adopting one approach or the other. Rather, statutory interpretation requires taking into account all relevant interpretative factors in attributing meaning to a provision or provisions.

Statutory interpretation is fundamental to the relationship between Aboriginal and Torres Strait Islander people and the law given the role of legislation, and the impact of the legislative process, on many aspects of lived experience.[7] Statutory interpretation has received increasing attention from accrediting bodies in recent years. Universities are facing mounting pressure to demonstrate to the legal profession how they are supporting students to develop knowledge in statutory interpretation. This article showcases how the dual aims of building knowledge and skills in statutory interpretation and Indigenous cultural competence, may be advanced by examining the legislative framework that led to the

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3 Alison Gerard, Annette Gainsford and Kim Bailey, 'Embedding Indigenous Cultural Competence: A Case Study' in Kevin Lindgren, Francois Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Lawbook Co, 2018) ch 20.

4 Mark Weinberg, 'Evidence-Based Law: Its Place in the Criminal Justice System' (2014) 11 *Judicial Review* 415, 418.

5 J J Spigelman, 'The Poet's Rich Resource: Issues in Statutory Interpretation' (2001) 21 *Australian Bar Review* 224, 224

6 John Middleton, 'Statutory Interpretation: Mostly Common Sense?' (2017) 40 *Melbourne University Law Review* 626, 629.

7 See, for instance, the discussion on the challenges of statutory interpretation in registering an Indigenous Land Use Agreement under the *Native Title Act 1993* (Cth) in John Basten, 'Statutory Interpretation: Choosing Principles of Interpretation' (2017) 91 *Australian Law Journal* 881; the need for courts to undertake a purposive approach to interpreting legislation passed prior to the enactment of the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth), in evaluating the objectives attached to the implementation of native title rights and interests, is examined in Samantha Hepburn, 'Statutory Interpretation and Native Title Extinguishment: Expanding Constructional Choices' (2015) 38 *University of New South Wales Law Journal* 587; see analysis of the interpretation of the 'race power' in s 51(xxvi) of the *Australian Constitution* in Anne Twomey, 'The Race Power: Its Replacement and Interpretation' (2012) 40 *Federal Law Review* 413, 416–42; see the discussion of the impact of the Stolen Generations and the barriers to compensation in Randall Kune, 'The Stolen Generations in Court: Explaining the Lack of Widespread Successful Litigation by Members of the Stolen Generations' (2011) 30(1) *University of Tasmania Law Review* 32.

Stolen Generations in New South Wales (NSW). The term Stolen Generations refers to the Aboriginal and Torres Strait Islander children who were forcibly removed from their families as a direct result of government policies throughout the past two centuries.[8] The Charles Sturt University (CSU) Bachelor of Laws (LLB) recognises that statutory interpretation can be taught in a combination of subjects. Thus, this first subject in the LLB introduces the guiding principles relevant to a developing understanding of statutory interpretation that is subsequently built upon in later subjects.

This paper begins with an introduction to the institutional environment at CSU which has enabled the development of an LLB that contains the specific knowledges, skills and practices relevant to the development of Indigenous cultural competence. The catalysts for incorporating statutory interpretation into law curriculum and the role of the legal profession in agitating for its inclusion are then examined. Drawing on previous research on embedding Indigenous perspectives in foundation law subjects,[9] this article then considers an innovative assessment in a first-year foundation law subject — 'Introduction to the Australian Legal System' — that incorporates introductory elements of statutory interpretation and builds the Indigenous cultural competence of first year law students. Reflecting on this teaching strategy, the final part of this paper discusses some of the challenges encountered in embedding Indigenous cultural competence using legislation, and the limitations. Whilst historical legislative artefacts provide the 'hook' to aid critical examination of the legal profession's role in the removal of Aboriginal and Torres Strait Islander children from their families, they also pose unique complexities for the teaching of statutory interpretation that need to be thoughtfully examined. To avoid a deficit model that reinforces stereotypes,[10] the strength and resilience of Aboriginal and Torres Strait Islander peoples and cultures need to be reinforced alongside analysis of structural and historically legal forms of racial discrimination.

II INDIGENOUS CULTURAL COMPETENCE: AN INSTITUTIONAL FRAMEWORK

This section introduces the institutional framework for Indigenous cultural competence at CSU in the knowledge that other articles in this Special Issue of *Legal Education Review* will outline the national policy

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[8] Peter Read, *The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883 to 1969* (New South Wales Department of Aboriginal Affairs, 6th ed, 2007). See also 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).

[9] Gary D Meyers, 'Two Examples of Incorporating Indigenous Issues in Law School Curricula: Foundation Year Courses and Electives in Environmental/Natural Resources Law' (2008) 7(9) *Indigenous Law Bulletin* 6, 7.

[10] Caroline McLoughlin and Ron Oliver, 'Designing Learning Environments for Cultural Inclusivity: A Case Study of Indigenous Online Learning at Tertiary Level' (2000) 16 *Australasian Journal of Educational Technology* 58, 65.

context. CSU has adopted the *Universities Australia* definition of Indigenous cultural competence:

> Student and staff knowledge and understanding of Indigenous Australian cultures, histories and contemporary realities and awareness of Indigenous protocols, combined with proficiency to engage and work effectively in Indigenous contexts congruent to the expectations of Indigenous Australian peoples.[11]

Indigenous cultural competence spans more than just curriculum and includes the mandating of Indigenous employment strategies, and the involvement of Indigenous people in the corporate governance of the university and the promotion of cultural safety for Aboriginal and Torres Strait Islander staff and students.[12] This article however will focus on teaching practice and curriculum.

CSU has adopted a Graduate Learning Outcome (GLO) based around Indigenous cultural competence. The GLO states that students will be able to:

> Practise in ways that show a commitment to social justice and the processes of reconciliation based on understanding the culture, experiences, histories and contemporary issues of Indigenous Australian communities.[13]

In this regard, CSU has adopted the Wiradyuri phrase *Yindyamarra Winhanga-nha*, meaning 'the wisdom of respectfully knowing how to live well in a world worth living in'.[14] This phrase represents Wiradyuri cultural values pertaining to the relational development of knowledge, specifically knowledge that is put to work for the benefit of others to foster a strong community of practice.

In addition to the GLO, CSU has unique institutional structures in place to oversee the incorporation of Indigenous cultural competence into curriculum. The embedding of Indigenous cultural competence is supported by a policy framework that includes the *Indigenous Education Policy*[15] and the *Indigenous Australian Content in Courses Policy*[16] which provides for strategic targets, guidelines and quality assurance mechanisms around educating Indigenous and non-Indigenous students in a culturally safe learning environment for staff and students. An Indigenous Board of Studies has been established at

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[11] Universities Australia, *Guiding Principles for Developing Indigenous Cultural Competency in Australian Universities* (October 2011) 3 <https://www.universitiesaustralia.edu.au/uni-participation-quality/Indigenous-Higher-Education/Indigenous-Cultural-Compet#.XGXQ5-JKgb1>.

[12] Ibid 11.

[13] Charles Sturt University, *Graduate Learning Outcomes* (2018) <https://www.csu.edu.au/division/learning-and-teaching/home/csu-curriculum/graduate-learning-outcomes>.

[14] Charles Sturt University, *Yindyamarra Winhanganha* (1 June 2015) <https://www.csu.edu.au/csu-live/csu-live/category/my-csu-experience/videos/yindyamarra-winhanganha>.

[15] Charles Sturt University, *Indigenous Curriculum* (2018) <https://www.csu.edu.au/division/learning-and-teaching/indigenous-curriculum/guidelines>.

[16] Charles Sturt University, *Indigenous Australian Content in Courses Policy* (2017) <https://policy.csu.edu.au/view.current.php?id=00385>.

CSU to oversee the incorporation of Indigenous cultural competence into curriculum.[17] The Board is an acknowledgement of Article 3 of the *Declaration on the Rights of Indigenous Peoples* to self-determination and the Presiding Officer is the Head of the School of Indigenous Australian Studies. The Board approves and classifies all Indigenous Australian studies content and discipline-specific content. These institutional policies and directives are underpinned by the current *Universities Australia Indigenous Strategy 2017–2020*.[18]

The pedagogical framework informing the LLB aims to normalise Indigenous content throughout the degree such that Indigenous cultures, histories and contemporary social realities are embedded and not simply 'add-ons' in the subjects in which they appear. This approach is endorsed by Martin Nakata, who writes that:

> [T]he Australian Curriculum is asking us to normalise the presence of Indigenous content. It is not an oddity, a novelty, a token or an add-on. The continuing Indigenous presence has expression in the national language, in the national literature, in the national art and culture, in the national geography and demography, in the national history, in Australian law, and in the national heritage and environment.[19]

The Indigenous Board of Studies at CSU undertakes the critical task of making sure that Indigenous cultural competence is not taught in isolation. A key role for the Board is overseeing content development such that Indigenous cultural competence is taught in context and forms part of the assessment regime in the subject. The content cannot be a module on its own without being in some way assessed, which ensures that Indigenous cultural competence is legitimised as part of core content.

Within CSU's Bachelor of Laws and Bachelor of Criminal Justice, Indigenous cultural competence has been mapped to the pedagogical framework set out by Ranzijn et al.[20] This ensures that throughout the degree students cover 160 hours of content. Students begin with a general background on Indigenous cultures, histories and contemporary social realities, and progress to critical reflection on the nature of the legal and criminal justice professions. Students analyse how Aboriginal and Torres Strait Islander people have been affected by legal processes and practices. The curriculum also includes a component on building the skills and knowledge to work effectively, and respectfully, with Aboriginal and Torres Strait Islander people. Each of these content areas inform the modules within the subject and are assessed as part of a rigorous assessment regime approved by the Indigenous Board of Studies. Embedding Indigenous cultural competence entails educating

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[17] Ibid.

[18] Universities Australia, *Universities Australia Indigenous Strategy 2017–2020* (2017) <https://socialsciences.arts.unsw.edu.au/media/SOSSFile/FINAL_Indigenous_Strategy.pdf>.

[19] Martin Nakata, 'Pathways for Indigenous Education in the Australian Curriculum Framework' (2011) 40 *Australian Journal of Indigenous Education* 1, 5–6.

[20] Rob Ranzijn et al, 'Towards Cultural Competence: Australian Indigenous Content in Undergraduate Psychology' (2008) 43 *Australian Psychologist* 132.

law students on the richness of Indigenous cultures, the impact of history and contemporary social realities, and fostering critical reflexivity around the impact of the law and the legal profession.

This pedagogical framework is underpinned by three essential and interrelated elements. The first is the work of Indigenous leaders and educators in academic collaborations focused on designing curriculum.[21] The pedagogical framework has been successfully applied to incorporate Indigenous cultures, histories and contemporary social realities across the curriculum as a result of the leadership exercised by Aboriginal and Torres Strait Islander leaders and educators at the University and further afield. Second, and on a related point, has been the development and maintenance of strong and reciprocal relationships with Aboriginal and Torres Strait Islander staff, Elders and legal consultants. This has been essential to designing, delivering and reflecting on the appropriateness of Indigenous cultural competence in curriculum.

The final essential element is the notion of 'place-based' learning.[22] Learning about Indigenous cultures, histories and knowledges from the traditional owners of the place where individuals are situated is considered best practice. Place-based knowledge in Indigenous education has long been recognised as a rich source of knowledge and the most appropriate way to engage with local Indigenous people, customs and knowledges in an educative environment.[23] Here in Australia it is acknowledged that Indigenous communities have their own distinct traditions with diverse social and economic requirements. The acceptance of multiple wisdoms starts with place-based knowledge and learning. Place-based education can assist in highlighting historical and contemporary realities specific to certain societal settings. This practice has been adopted in CSU's LLB to enable significant scope to engage local Indigenous Elders, community and industry experts and thereby privilege Indigenous voices in the design, development and delivery of Indigenous content across the curriculum. This two-way teaching and learning process offers authentic learning experiences for

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[21] Annette Gainsford and Michelle M Evans, 'Indigenising Curriculum in Business Education' (2017) 20(1) *Journal of Australian Indigenous Issues* 57.

[22] Annette Gainsford, 'Connection to Country — Place-Based Learning Initiatives Embedded in the Charles Sturt University Bachelor of Law' 28(2) *Legal Education Review* <https://ler.scholasticahq.com/article/7682>; see also Gerard, Gainsford and Bailey, above n 3.

[23] Jo-Ann Archibald, *Indigenous Storywork: Educating the Heart, Mind, Body, and Spirit* (UBC Press, 2009); Australian Institute of Aboriginal and Torres Strait Islander Studies, *Guidelines for Ethical Research in Indigenous Studies* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2nd ed, 2012); Konai Helu Thaman, 'Decolonizing Pacific Studies: Indigenous Perspectives, Knowledge, and Wisdom in Higher Education' (2003) 15 *Contemporary Pacific* 1; Jeff Lambe, 'Indigenous Education, Mainstream Education, and Native Studies: Some Considerations When Incorporating Indigenous Pedagogy into Native Studies' (2003) 27 *American Indian Quarterly* 308; Ray Barnhardt and Angayuqaq Oscar Kawagley, 'Indigenous Knowledge Systems and Alaska Native Ways of Knowing' (2005) 36 *Anthropology and Education Quarterly* 8; Gregory A Cajete, 'American Indian Epistemologies' (2005) 109 *New Directions for Student Services* 69; Angayuqaq Oscar Kawagley and Ray Barnhardt, 'Education Indigenous to Place: Western Science Meets Native Reality' (Opinion Paper, University of Alaska, 1998).

Indigenous and non-Indigenous students alike and provides space for Indigenous knowledges and cultural experience to become a rich source of learning.[24] Place-based learning also promotes cultural safety for staff and students, ensuring that Indigenous knowledges are carefully contextualised within the law curriculum to make the learning more relevant and applicable to specific cultural situations. This form of learning positions Indigenous knowledges to reflect both individual and collective considerations, simultaneously enhancing both cultural and discipline specific knowledge.[25] This process is multifaceted and provides cultural mentoring and support structures to assist non-Indigenous academics to develop their capability and confidence in relation to developing and delivering Indigenous content across the law curriculum.

Research-led teaching has been critical to the incorporation of Indigenous cultural competence into curriculum. Best practice research is informed by a commitment to Indigenous research that applies the principles of the Australian Institute of Aboriginal and Torres Strait Islander Studies's (AIATSIS) *Guidelines for Ethical Research in Australian Indigenous Studies*.[26] This forms the basis of the approach adopted to document, analyse and reflect on curriculum. Research and curriculum design is thus led by and with Aboriginal and Torres Strait Islander people. Depending on the context, this might mean Indigenous staff, Elders-in-Residence or Indigenous legal or community consultants. The AIATSIS Guidelines specify that:

> It is essential that Indigenous people are full participants in research projects that concern them, share an understanding of the aims and methods of the research, and share the results of this work. At every stage, research with and about Indigenous peoples must be founded on a process of meaningful engagement and reciprocity between the researcher and Indigenous people.[27]

The AIATSIS Guidelines consist of 14 principles that can be grouped around the six broad themes of:

- rights, respect and recognition;
- negotiation, consultation, agreement and mutual understanding;
- participation, collaboration and partnership;
- benefits, outcomes and giving back;
- managing research: use, storage and access; and
- reporting and compliance.[28]

Staff regularly consult with Aboriginal and Torres Strait Islander peoples and these consultation processes are built on respect, cultural

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[24] Robyn Ober, 'Both-Ways: Learning from Yesterday, Celebrating Today, Strengthening Tomorrow' (2009) 38(S1) *Australian Journal of Indigenous Education* 34.

[25] Heather Douglas, 'Indigenous Legal Education: Towards Indigenisation' (2005) 6(8) *Indigenous Law Bulletin* 12.

[26] Australian Institute of Aboriginal and Torres Strait Islander Studies, above n 23.

[27] Ibid 4.

[28] Ibid.

protocols, reciprocity and mutual understanding, thereby supporting the AIATSIS principles.[29] There is a strong emphasis on Indigenous research, led by an Indigenous Academic Fellow. The Indigenous research agenda is central to cultivating Indigenous leadership and informing future practice.[30]

The AIATSIS Guidelines were used to develop the assessment for the first-year law subject, entitled 'Introduction to the Australian Legal System'. Before setting out this assessment, the next section outlines the framework for incorporating the skills and knowledge relating to statutory interpretation for law schools in Australia, which this assessment seeks to advance alongside the embedding of Indigenous cultural competence.

III Statutory Interpretation

The Hon Chief Justice Spigelman, formerly of the Supreme Court of New South Wales, states that:

> The law of statutory interpretation has become the most important single aspect of legal practice. Significant areas of the law are determined entirely by statute. No area of the law has escaped statutory modification.[31]

Historically, judges and legal practitioners in common law countries would turn to precedent to find the law.[32] The modern legislature has proved so industrious that in the present moment, the law is more likely to be found in Acts of Parliament than in judge-made law.[33] This has enhanced the place of statutory interpretation in courts, legal practice and in law school curriculum. Given its prominence, it is perhaps unusual that statutory interpretation is not strictly part of the Priestley 11 that forms the basis of the curriculum for Australian law schools. Its importance, however, has been reinforced by those within the highest echelons of legal practice, as the next section explores.

A *The LACC Statement on Statutory Interpretation*

The Law Admissions Consultative Committee (LACC) has taken a lead role in articulating the skills and knowledge of statutory interpretation that law graduates are required to possess. LACC was formerly the Consultative Committee of State and Territorial Law Admitting Authorities until 1989, when it was expanded to include membership from the Law Council of Australia, the Council of Australian Law Deans (CALD) and the Australasian Professional Legal Education Council. Its current Chairperson characterises its function as

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29 Ibid.

30 Michelle M Evans and Amanda Sinclair, 'Navigating the Territories of Indigenous Leadership: Exploring the Experiences and Practices of Australian Indigenous Arts Leaders' (2015) 12 *Leadership* 470; see also Gainsford and Evans, above n 21, 61.

31 Spigelman, above n 5.

32 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 2.

33 Ibid 1–3.

'to endeavour to forge consensus on issues relating to admission and to advise the Council of Chief Justices'.[34] Whilst LACC is not a committee of the Law Council of Chief Justices of Australia, its Charter is approved by that Council.[35]

In 2007, Chief Justice Warren and President Maxwell of the Supreme Court of Victoria wrote to the LACC to invite it to review the academic requirements in law schools, in order to ensure that:

> [T]he teaching of statutory interpretation is given the prominence and priority which its daily importance to modern legal practice warrants.[36]

Based on a survey undertaken by 20 out of 29 law schools at the time and administered by CALD, LACC concluded that most law schools teach statutory interpretation via an introductory law subject, and then later subjects teach statutory interpretation indirectly through substantive law. LACC established a Working Group to develop:

> [A]n outline of the relevant understandings and competence relevant to interpretation which might reasonably be expected of a graduate in law; and a general description of the matters which ought to be dealt with in the process of developing that understanding and competence.[37]

Based on the discussion paper *Approaches to Interpretation*,[38] LACC prepared a statement that lists the knowledge and skills required for a graduate seeking admission to the legal profession. This is referred to as the *LACC Statement on Statutory Interpretation*,[39] which has now been embedded into accreditation processes in NSW and Victoria. Law schools are required to comment on how they are meeting the standards across the entire LLB. The Statement sets out the following five skills or standards that law students are required to demonstrate:

1. Locating and using Legislation;
2. Aids to interpretation;
3. Deploying Interpretive Techniques;
4. Special Interpretative Issues; and
5. Written Advice.

The first involves law graduates being able to locate and 'make appropriate use of a legislative provision relevant to a legal problem'.[40] The application of this standard forms the focus of this article. The second standard stipulates that law graduates should understand and be able to utilise intrinsic aids within legislation, extrinsic materials and

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34 Sandford D Clark, 'Regulating Admissions: Are We There Yet?' (2017) 91 *Australian Law Journal* 907, 908.

35 See Law Admissions Consultative Committee, *Statement on Statutory Interpretation* <https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/StatementonStatutoryInterpretation.pdf>.

36 See the letter dated 31 August 2007 in Law Admissions Consultative Committee, *Approaches to Interpretation* 8 <https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/ApproachestoInterpretationLawSchools.pdf>.

37 Clark, above n 34, 16.

38 Ibid.

39 Australian Institute of Aboriginal and Torres Strait Islander Studies, above n 23.

40 Law Admissions Consultative Committee, above n 35.

the common law and statutes that govern their use, common law principles and presumptions, interpretation legislation from the relevant jurisdiction and other 'contextual factors authorized by the law'.[41] The third requirement involves the dynamic process of applying several techniques to a problem of statutory interpretation. This requires an assessment of the availability of alternative constructions and mediating between these competing constructions. It also involves evaluating whether the constructions align with the legislative text and being able to produce a well-argued opinion on the legal meaning of a legislative provision over which there is doubt. Fourth, special interpretative issues include but are not limited to questions around the validity of statutory power (including for delegated legislation); retrospectivity; the existence of an intent requirement that must be proved (that is, mens rea); and the relevance of any charter of human rights. These constitute examples of special interpretative issues and are not an exhaustive list. The final requirement involves graduates being able to put together a well-argued submission as to the interpretation of a provision that demonstrates their understanding of the laws of statutory interpretation. This develops the ability of students in drafting succinct and accurate written legal advice on statutory interpretation.

LACC invited CALD to advise on how best to meet the requirements of the statement and, as part of its response, in 2015 CALD developed and published the *Good Practice Guide to Teaching Statutory Interpretation*.[42] The Guide is based on the five standards of the LACC Statement listed above and expands them to form learning outcomes. Essentially, the first standard in the LACC Statement is absorbed into two learning outcomes, resulting in their being a total of six learning outcomes in the Guide. The first expanded learning outcome is 'understanding the legislative process and identifying applicable legislation' and refers to the need for insight into the legislative process and the structure of legislation, and to conduct legal research to find the relevant legislation. The second, 'general principles of interpretation', involves law graduates understanding concepts such as the separation of powers, amendment, the historical context behind the modern approach and its effects.[43] The other learning outcomes in the Guide, correspond directly with standards 2–5 of the LACC Statement set out in Part A above and are therefore not elaborated upon here. The Guide encourages law schools to adopt assessments based on the learning outcomes that provide an introduction to the principles of statutory interpretation.[44]

In applying for accreditation, NSW law schools are obliged to set out how they are meeting the LACC Statement in their curriculum. In CSU's first year law subject, the CALD *Good Practice Guide to*

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[41] Ibid.

[42] Jeffrey Barnes et al, *Council of Australian Law Deans Good Practice Guide to Teaching Statutory Interpretation* (Council of Australian Law Deans, 2015) <https://cald.asn.au/wp-content/uploads/2017/11/Council-of-Australian-Law-Deans-Good-Practice-Guide-to-Teaching-Statutory-Interpretation.pdf>.

[43] Ibid 12.

[44] Ibid. See specifically the discussion on 6.1.

Teaching Statutory Interpretation is applied to lay the groundwork for law students' understanding of statutory interpretation. Teaching statutory interpretation in curriculum involves building a solid foundation. Most usefully, the Guide sets out how to provide law students with a solid foundation to learning statutory interpretation and how to build on that through an iterative approach as students progress in their law studies. The foundation is identified as consisting of 'the general principles of statutory interpretation and statute law, the general method of statutory interpretation, and the central interpretative criteria of the law of statutory interpretation'.[45] This article now turns to examine an approach to developing an assessment that uses legislation to acquire knowledge about statutory interpretation principles at a general level appropriate for an introductory law subject, and advance complementary aims of embedding Indigenous cultural competence in learning and assessment.

IV Using Legislation to Interpret the 'Stolen Generations' Legislative Framework

The Stolen Generations legislative framework in NSW provides opportunities for educators to teach Indigenous cultural competence alongside an appreciation of the general principles of statutory interpretation. This section sets out the teaching strategy that uses legislation to teach Indigenous cultural competence. It starts by outlining how the strategy was developed and provides an analysis of several challenges encountered and overcome. The final section examines the limitations of this teaching strategy.

A *Introducing the Guiding Principles of Statutory Interpretation and Indigenous Cultural Competence in an Introductory Law Subject*

In this foundation law subject, the concept of Indigenous cultural competence is introduced as comprising knowledge and skills around Indigenous cultures, histories and contemporary social realities. Many students will be familiar with the expression 'cultural awareness', but few will have heard of 'cultural competence'. At the beginning of the subject, the Indigenous cultural competence GLO for the LLB is outlined in conjunction with an explanation of how the current subject contributes to this framework. Differences between cultural competence and cultural awareness are identified, with students invited to reflect on the role of the legal profession in contributing to the policies of colonisation.[46] Students are also informed of the embedded nature of Indigenous cultures, histories and contemporary social realities throughout the LLB curriculum. The relevance of Indigenous

[45] Ibid 14.

[46] Marcelle Burns, 'Towards Growing Indigenous Culturally Competent Legal Professionals in Australia' (2014) 12(1) *International Education Journal: Comparative Perspectives* 226, 230.

cultural competence to the employability of graduates is emphasised.[47] Finally, the responsibilities of universities in leading social change, as recognised by the Royal Commission into Aboriginal Deaths in Custody, are foregrounded.[48]

In this introductory subject, guiding principles of statutory interpretation are covered in curriculum prior to the Stolen Generations assessment. Students are asked to complete a case analysis, an assessment based on an example in the CALD *Good Practice Guide to Teaching Statutory Interpretation*. The assessment requires students to analyse *Independent Commission Against Corruption v Cunneen*,[49] a High Court case which analysed the interpretation of 'corrupt conduct' in s 8 of the *Independent Commission Against Corruption Act 1988* (NSW). Students are asked to analyse the case and determine what elements of the central interpretative criteria of the law of statutory interpretation were deployed in the judgment and what elements were absent. They are asked to summarise the result and whether or not they agree with the judgment. Finally, they are asked to argue whether or not the original statute requires amendment. This assessment provides an early opportunity for students to become familiar with the challenging task of statutory interpretation and how judges work to resolve confusion over the meaning of certain legislative provisions through a multifactorial assessment. The case analysis works alongside the Stolen Generations assessment to build introductory knowledge of statutory interpretation.

B *The Stolen Generations Assessment*

The assessment in this introductory unit is an essay that combines students' developing knowledge of statutory interpretation with learning how the law played a key role in shaping practices that led to the Stolen Generations. In this assessment, the first standard of the LACC Statement is targeted, with students required to make use of the legislation that brought about the Stolen Generations to understand introductory elements of statutory interpretation.

A commitment to consulting on curriculum led to the development of this first-year assessment item. Mapping the curriculum involved bringing together local Elders, Aboriginal lawyers and educators to gather insights as to how the curriculum might best embed the knowledges, skills and practices associated with the development of Indigenous cultural competence. Specific subject content areas were discussed as well as how assessments might best embed relevant Indigenous content and perspectives to achieve this outcome.

Based on this consultation, it was decided that the assessment question within this foundation subject should be along the lines of

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[47] Raymond Smith, 'Epistemological Agency and the New Employee' (2005) 45 *Australian Journal of Adult Learning* 29.

[48] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, 295.

[49] (2015) 256 CLR 1.

'How has the legislation that introduced the Stolen Generations impacted upon the relationship between Aboriginal and Torres Strait Islander people and the law?' In responding to the question, students are required to locate and use legislation and refer to both intrinsic and extrinsic aids to understand the legislative purpose(s) of both Acts. The assessment question is provided in full in the text box below.

Essay:

Critically analyse how the *Aborigines Protection Act 1909* (NSW) and the *Aborigines Protection Amending Act 1915* (NSW) has impacted Aboriginal and Torres Strait Islander people's relationship with the law?

In your response:

a. Outline the purposes of the legislation and include reference to both intrinsic and extrinsic sources;

b. Explain the impact of this legislation on Aboriginal and Torres Strait Islander people's access to justice;

c. Explain the significance of international human rights law for Aboriginal and Torres Strait Islander people; and

d. Critically analyse how this knowledge and understanding is relevant to advancing reconciliation between Indigenous and non-Indigenous Australians.

This assessment provides students with an opportunity to understand the legislative framework and processes in NSW that led to the Stolen Generations.[50] Students undertake research into the Stolen Generations utilising both primary and secondary sources. Students identify and locate historical legislation and interpret parliamentary debates of the time. It was decided it was best to let students find the historical legislation themselves, alongside scaffolded support from the law librarian. Finding and locating the legislation is part of the first LACC Standard. It is important for students to understand how to access historical legislation and know how to find the law of the relevant period. The expanded learning outcomes arising from the CALD Guide that relate to this first LACC Standard are also achieved. Students develop a conceptual understanding of the separation of powers and amendment, alongside an understanding of legal research and legislative processes.

To situate the task in context, the learning materials provided to students clarify that the Stolen Generations legislative framework continued practices of forced removal. An excellent source of information on this topic is the 'Bringing them Home Report', the *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*.[51] As the Report explores in detail, Aboriginal and Torres Strait Islander people had been forcibly separated from their families and communities since the beginning of European occupation of Australia through violent

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[50] Above n 8.

[51] Wilson, above n 8, 22.

conflict.[52] However, the *Aborigines Protection Act 1909* (NSW) and the *Aborigines Protection Amending Act 1915* (NSW) legislated for the removal of children and this helpfully crystallises for students the role of the law in practices of colonisation.

In answering the question, students explore how frontier conflict was an impetus for the protectionist policies that informed the Stolen Generations legislative framework. Indeed, it was reports of massacres and other atrocities that led the British Government to establish a Senate Committee to examine the situation of Aboriginal people in Australia.[53] The notion of a protectorate system had its origins in the Senate Committee's proposals. The system was based on the assumption that Aboriginal people would readily establish self-sufficient agricultural communities like those of an English village if provided with the opportunity.[54] However, as this policy approach failed, and the government was faced with the destitution experienced by Aboriginal and Torres Strait people forced off their traditional lands and prevented from accessing traditional resources, it came to question the survival of Aboriginal and Torres Strait Islander people. The government responded by establishing 'protectionist legislation' in all jurisdictions except Tasmania by 1911, which gave near-total control over the lives of Indigenous people to state governments and their delegates.[55] At the time, there was a preoccupation with the increase in the 'mixed descent' population and a desire to mobilise this population to fill existing labour needs.[56] Separation from Indigenous families and communities was seen as essential to ensure the extinction of 'pure' Aboriginal people and the absorption of 'half-caste' people.[57]

The Stolen Generations assessment enables students to study how legislative processes were initiated to enhance powers to remove Aboriginal children from their families. For NSW, a 'Protector of Aborigines' was appointed in 1881, who recommended that reserves be created throughout NSW to house Aboriginal people.[58] The NSW Aborigines Protection Board was subsequently established in 1883 and was charged with controlling the lives of Aboriginal people in NSW and managing the reserves.[59] Whilst the Board did not possess the legal power to remove children, it contributed to this outcome in indirect ways. The Board set up a facility to house children at Warangesda (near Griffith) but relied on unofficial means such as enticements and 'bullying' to fill it with children.[60] For example, the parents who allowed their children to stay at the dormitory were able to stay on the reserve; free rail passes were offered to the parents who left their children at the dormitory and returned home; and families were warned

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52 Ibid.
53 Ibid pt 2.
54 Ibid.
55 Ibid.
56 Ibid.
57 Ibid 24.
58 Ibid pts 2, 3.
59 Ibid 33.
60 Peter Read, 'Reflecting on the Stolen Generations' (2014) 8(13) *Indigenous Law Bulletin* 3.

that they may face prosecution under the *Neglected Children and Juvenile Offenders Act 1905* (NSW) if they removed their children from the dormitory. The Board advocated for Parliament to legislate to furnish it with the powers to remove children permanently.[61] Thus, lobbying by the Aborigines Protection Board secured the *Aborigines Protection Act 1909* (NSW) and the *Aborigines Protection Amending Act 1915* (NSW).

Students are invited to read the Acts to decipher the legislative purposes from intrinsic aids. They reflect on how the first Act is framed in humanitarian terms: 'An Act to provide for the protection and care of aborigines (sic)'.[62] The legislation enabled the Board to apprentice young children aged between 14 and 18 years.[63] However, the Act required the Board to seek the consent of the courts before removal occurred.[64] This proved to be an obstacle to the removal of Aboriginal and Torres Strait Islander children from their families. The Board also faced difficulties associated with proving that a child was neglected.[65] As a result, the Board campaigned for expanded powers which were delivered by the *Aborigines Protection Amending Act 1915* (NSW). This amending legislation gave the Board the power to 'assume full control and custody of the children of any aborigine (sic)' without having to establish neglect in a court hearing.[66] Moreover, the age threshold was abolished, meaning that there was no minimum age for apprenticeship.[67]

Research based on secondary sources such as journal articles provides a useful context for expanding students' understanding of the impact of this legislation on Aboriginal and Torres Strait Islander peoples' access to justice. The term 'access to justice' is admittedly broad, but students are invited to define this terminology in reference to credible secondary sources. In doing so, students will often draw on the literature on intergenerational or transgenerational trauma and its impacts, which is useful to understanding access to justice in context.[68] Understanding access to justice is a learning outcome attached to the subject.

A component of the Stolen Generations assessment invites students to reflect on the utility of the international human rights framework in the current context, and thereby fosters a critical understanding of the benefits and limitations of this framework for First Nations peoples. This requires students to look beyond the Stolen Generations legislation under discussion, to examine the specific recognition of Indigenous peoples under international treaties. As this is a first-year subject, the level of understanding expected remains general. However, the

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[61] Wilson, above n 8, pts 2, 3.

[62] *Aborigines Protection Act 1909* (NSW).

[63] Ibid s 11.

[64] Wilson, above n 8, 3.

[65] Ibid.

[66] *Aborigines Protection Amending Act 1915* (NSW) s 4.

[67] Ibid s 2(2).

[68] Judy Atkinson, *Trauma Trails, Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia* (Spinifex Press, 2002).

question enables students to develop an appreciation of the way in which international law recognises the collective rights of Indigenous peoples with respect to self-determination and social, political and cultural rights.[69] The *United Nations Declaration on the Rights of Indigenous Peoples*[70] is a useful framework and one that many Aboriginal and Torres Strait Islander Australians helped develop.[71] It was adopted by the United Nations General Assembly in 2007 but Australia was one of four countries that voted against it at the time, alongside Canada, New Zealand and the United States of America.[72] Australia did later endorse the Declaration in April 2009. In their responses, students will often acknowledge the symbolic value of international law, and its limitations. International law is notoriously difficult to enforce due to the absence of 'centralised enforcement machinery'.[73] The assessment question requires students to discuss the nature of international law as a source of law, and that treaty law cannot be automatically adopted but requires enactment into domestic law.[74]

In the final part of the assessment, a leading question is posed that invites students to reflect on the relevance of the Stolen Generations legislative framework to their legal studies. In addressing the question of the relationship between the Stolen Generations legislation and reconciliation, many students will refer to the *Uluru Statement from the Heart*, drafted at the First Nations National Constitutional Convention held in 2017.[75] The Statement is the outcome of the deliberations and discussions among the 250 delegates at the Convention, which called for the establishment of a Makarrata Commission to oversee a process of agreement-making and truth-telling between governments and First Nations people about Australia's history. Provoking reflection on the overall aims of the reconciliation project is a useful line of inquiry in a first-year law subject. As their studies progress, students will be able to build on this framework and connect this knowledge to more, and deeper, layers of understanding.

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[69] See *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 3; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27.

[70] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) annex.

[71] Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 439.

[72] Ibid.

[73] Stephen Hall, *Principles of International Law* (LexisNexis Butterworths, 5th ed, 2016) 24.

[74] See *Victoria v Commonwealth* (1996) 187 CLR 416, 480.

[75] Referendum Council, *Uluru Statement from the Heart* (2017) <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF>.

V FOSTERING CRITICAL REFLEXIVITY AND MOVING PAST THE DEFICIT MODEL: CHALLENGES LIMITATIONS AND INSIGHTS

In many respects, getting students to closely examine legislation from the early parts of last century should be a challenging task. Delivering the assessment in this first-year foundation law subject has been an overwhelmingly positive experience. This is evidenced by the high level of classroom discussion, student engagement and relational connections built between students and the local Aboriginal Elders engaged to deliver subject content. The assessment requires students to connect the legislative framework with the contemporary setting and understand how Aboriginal and Torres Strait Islander peoples' relationship with the law may be impacted by this framework. Students thus come to understand law in context and how these practices have affected the lives of many Aboriginal and Torres Strait Islander people and their families.

Embedding Indigenous cultural competence in law curriculum requires foregrounding the legal skills and knowledge that relate to Indigenous content. In this assessment, legislation is used to understand how Aboriginal and Torres Strait Islander people were treated and referred to in parliamentary debates and in specific Acts. In our experience, the embedded nature of the Indigenous content is a protective factor against resistance from students. Where the content is contextualised and clearly part of core curriculum, its relevance is better understood and acknowledged. In the past, on the rare occasion when students contested the relevance of Indigenous content, the content was considered out of context such that students felt that its relevance to 'law' curriculum was opaque. The law is used as the 'hook' to teach specific knowledges, skills and practices relevant to the development of Indigenous cultural competence.[76]

The Stolen Generations assessment encourages students to think about the power of language and how Aboriginal and Torres Strait Islander people were talked about and treated historically and contemporaneously. Considering the appropriateness of language that refers to biological composition is instructive and invites students to reflect on aids such as the *Guide to Communicating Positively*.[77] Students are required to write their assessment using appropriate terminology, a foundation skill in developing Indigenous cultural competence. The historical context of the Stolen Generations legislation and the affirmative or dissenting views of it among various Members of Parliament are on display through the debates surrounding its Second Reading in NSW Parliament. In linking the assessment to

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[76] Martin Nakata, 'Indigenous Knowledge and the Cultural Interface: Underlying Issues at the Intersection of Knowledge and Information Systems' (2002) 28 *IFLA Journal* 281.

[77] New South Wales Department of Health, *Communicating Positively: A Guide to Appropriate Aboriginal Terminology* (New South Wales Department of Health, 2004).

reconciliation, students' learning is focused on why these historical practices are relevant to their contemporary law studies.

In piloting and developing this assessment, a number of complementary teaching strategies have contributed to its effectiveness. First, students' preparation for the assessment is facilitated by attending a session with the CSU Law Librarian on how to find commentary on the two pieces of legislation examined, the legislation itself, and second reading speeches. This helps students to prepare their legal research strategy for the assessment and make sure that they are accurately locating the primary and secondary sources.

Second, the Elders-in-Residence at CSU are invited to attend the residential school for this introductory law subject to talk about the place of Indigenous cultural competence in students' learning, ensuring that students are able to meet with and learn from Elders in the community. The Elders-in-Residence deliver guest lectures that enable students to engage in direct dialogue. During these interactions, students hear the personal narratives and reflections of these Elders about the impact of historical and contemporary policies on Aboriginal and Torres Strait Islander people. Topics such as transgenerational trauma, current practices of self-determination and reconciliation processes are explored and analysed, with open discussion and questions from students encouraged. These lectures are seen as an authentic learning experience where firsthand narratives shared by Elders can be drawn on by students to critically reflect on the individual and collective impact of legislation. In addition, teaching students about the positive stories of Indigenous communities avoids the deficit model that has dominated teaching and research about Aboriginal and Torres Strait Islander people, which reinforces negative stereotypes instead of promoting the strength and resilience of these communities.[78]

More could be done to enhance the interpretative element of this assessment. For example, in this assessment students are not asked to compare the intrinsic sources with the extrinsic sources. The assessment could therefore have invited students to discuss how the legislative purposes identified in the intrinsic sources are consistent with the legislative purpose as set out in extrinsic sources. This would also invite students to research when interpretation legislation was enacted. An extension question may ask 'if the intrinsic and extrinsic sources contradict each other, which would prevail and why?' The assessment could also have required students to discuss interpretative issues relevant to more contemporary legislation. An extension of the assessment could include a requirement that students research the NSW Stolen Generations Reparations Scheme and Funeral Assistance Fund, a compensation scheme set up by the NSW Government in 2017.[79] This may also include analysis of the legislative processes around the

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[78] McLoughlin and Oliver, above n 10, 65.

[79] New South Wales Department of Education, Aboriginal Affairs, *New South Wales Stolen Generations Reparations Scheme and Funeral Assistance Fund* (2017) <https://www.aboriginalaffairs.nsw.gov.au/pdfs/stolen-generations/FACT-SHEET-1-Stolen-Generations-Reparations-Scheme-and-Funeral-Assistance-Fund-Overview.pdf>.

Aborigines Act 1969 (NSW) that repealed the *Aborigines Protection Act 1909* (NSW) and the *Aborigines Protection Amending Act 1915* (NSW). The teaching strategy analysed in this article did not adopt these approaches and focused instead on historical legislation to achieve competence in the first LACC standard, and the introductory elements relevant to the further study of statutory interpretation.

VI CONCLUSION

It is not possible to teach Indigenous cultural competence without reference to the legislation that contributed to contemporary social realities. This article showcases a teaching strategy suitable to first-year introductory units that combines a knowledge of the general principles of statutory interpretation with the teaching of Indigenous cultural competence. This assessment enables students to build insights around identifying and using legislation, understanding the legislative process, and concepts such as the separation of powers and amendment.

Utilising the law as the 'hook' for teaching Indigenous cultural competence must be the priority in curriculum design. The pretence of a diluted curriculum will alienate students and foster resistance. It is also critical that a deficit model is not taught and that the curriculum is balanced in order to highlight the strength and resilience of Aboriginal and Torres Strait Islander people and communities as well as the trauma and harm caused by the policies and practices of colonisation and their contemporary impact.

This paper has outlined how an introductory law subject can privilege Indigenous voices through the embedding of Indigenous cultural competence within the study of statutory interpretation. This assessment emerged from a curriculum design workshop conducted with Indigenous Educational Designers and Elders-in-Residence at CSU. Relationships developed with Aboriginal and Torres Strait Islander staff, Elders and legal consultants enable the delivery of content that is appropriate and avoid reproducing the sorts of colonising practices that persist in the legal profession and the law. The relationships built with Aboriginal and Torres Strait Islander people have been essential to the design and delivery of this assessment. Reflexive and consultative processes will be engaged to build on this design into the future.