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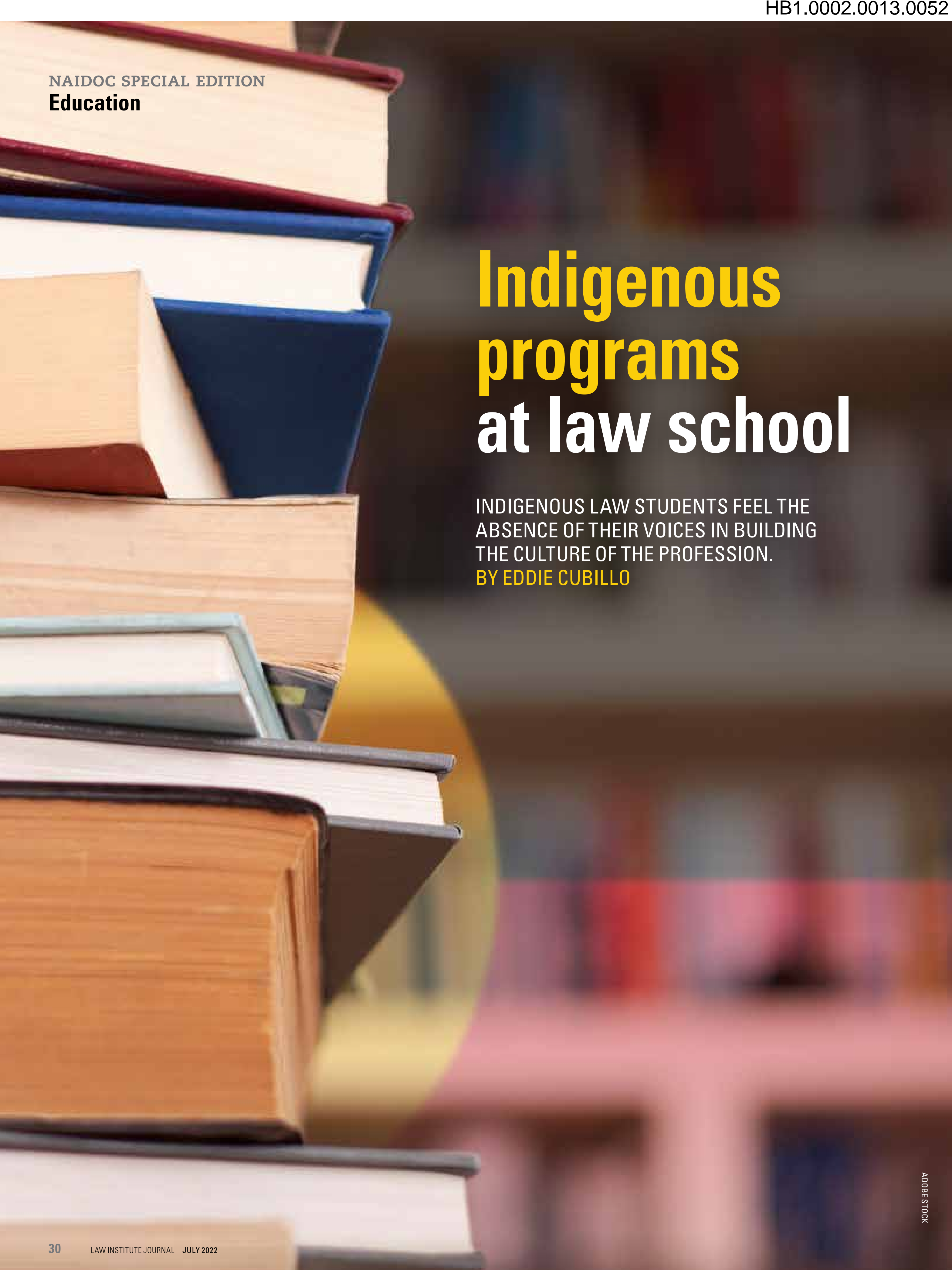

Indigenous programs at law school

INDIGENOUS LAW STUDENTS FEEL THE ABSENCE OF THEIR VOICES IN BUILDING THE CULTURE OF THE PROFESSION.

BY EDDIE CUBILLO

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It's been some four years since I had coffee with the dean of Melbourne Law School (MLS). I had never met or heard of Pip Nicholson before, and I assumed that she had never heard of me. However, due to the workings of the black grapevine[1] the dean asked if I would like to join her for coffee. This meeting eventually led to my appointment as associate dean (Indigenous Programs) at MLS and my establishment of an Indigenous Law and Justice Hub within the law school, of which I am the co-director.

SNAPSHOT

- Indigenous law students join institutions which long excluded them – and they feel the absence of their voices in building the culture of the profession.
- Indigenous law is the foundation of the land our students will practise on. It should be a core subject taught to the new generation of lawyers.
- A review of our curriculum to embed Indigenous content has taught many lessons about building cultures of empathy, humanity and respect.

Melbourne Law School

My arrival at MLS was unexpected, as I had no intentions of working at that particular juncture. I had recently finished working on the Royal Commission into the Protection and Detention of Children in the Northern Territory (Royal Commission); I was impacted by the young people I met and the stories I heard. I was self-medicating by immersing myself in my PhD research on the history and function of Australia's strong Aboriginal and Torres Strait Islander legal services. But not only that – I felt I had no business with an institution as elite and privileged as MLS.

MLS is currently ranked the number one law school in Australia[2] and number five in the world.[3] This type of institution has never appealed to me. My Bachelor of Laws is from a university not rated in even the top 20 in the country. My logic in enrolling in studies up to my PhD was never about status, class or prestige – it was more about necessities of studying while supporting my family, shared social justice values and opportunities to study under particular teachers along my journey. I agreed to come to MLS because I saw an opportunity, due in part to the people in key leadership positions, to push for change and shape the thinking of future leaders in the profession.

Aboriginal and Torres Strait Islander peoples, as well as women, people of colour and other marginalised populations studying law join institutions which long excluded them – and the absence of their voices in building the cultures of these places is felt by students today.

In 1902, Ada Evans was the first woman to graduate from an Australian law school, at the University of Sydney. The next year Grata Flos Greig was the first woman to graduate from MLS.[4] More than 70 years later, Pat O'Shane was the first Aboriginal woman to graduate from an Australian law school, having completed her law degree in 1976 at the University of New South Wales.

To put things into perspective, the first Aboriginal person we know of to graduate from MLS did so in the next decade.[5] Sandra Bailey, a Yorta Yorta woman, graduated with a Bachelor of Laws from the University of Melbourne on 31 July 1982.[6] The first Indigenous person on faculty at MLS was Professor Mark McMillan in 2011.

I'm not being hyperbolic in saying this history shapes interactions at law schools today. Despite my experience as a practising lawyer and working in various senior positions in the justice sector – as Discrimination Commissioner of the Northern Territory at the time of the Northern Territory Emergency Response (the "Intervention"), executive officer of the National Aboriginal Torres Strait Islander Legal Services, and director of Community Engagement on the Royal Commission – I find the experience of working at MLS very foreign.

I feel it as an academic when sharing knowledge which relies on my status as an Indigenous man fairly connected with his people and culture. For example, when I provided advice on curriculum content relating to how Indigenous people perceive their relationship to land and its significance in our laws, I was advised to refer this to non-Indigenous colleagues with property law expertise for review. Nobody, including allies on faculty, understood why I found this inappropriate and offensive. Things like this isolate Indigenous people, reinforcing the lack of respect for us and our legal authority.

I felt it recently when I was relocating offices, moving my boxes to the newly established Hub. On my third and final trip a young man came up to me and assumed I was a member of cleaning staff who he chose to instruct, "when you have finished delivering the boxes can you come back and clean up a coffee spillage over here". I was stunned and hurt and didn't bother responding.

I regularly reflect that if I feel the heavy weight of this institution's history and cultures so strongly at this point in my personal and professional development, what impact does it have on students who are Indigenous, members of other racial minorities or who otherwise feel unrepresented in legal institutions on the basis of some aspect(s) of their identities?

Indigenous content in legal curricula

I am currently overseeing a curriculum review whereby we are working to embed Indigenous content across the MLS Juris Doctor program. Such content is lacking and, where it is included, efforts to date have been fragmented and sometimes tokenistic. Indigenous law is the foundation of the land which our students learn and will practise on, which colonisation has tried to erase. This should be a core subject taught to the new generation of lawyers.

When I say Indigenous content, I refer to content which exposes and explores experiences of Aboriginal and Torres Strait Islander peoples in settler legal systems, as well as content which highlights the pluralism of systems of law on country. This content must by its nature challenge the premise that settler law is fair, just, objective and inclusive.

I also speak often of the need to develop curricula which supports legal graduates to develop interpersonal skills; to work with appropriate empathy and cultural awareness within intercultural environments such that they may effectively work alongside Indigenous peoples and other marginalised communities in achieving their aspirations. Additionally, equipping students with the skills to bear witness to the types of stories

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I heard on the Royal Commission, surviving within settler legal institutions, and supporting others while maintaining their own wellbeing. These are interrelated aspirations for legal curricula which I cannot address in full in this article.

The Council of Australian Law Deans (CALD) acknowledged the lack of Indigenous content across Australian legal curricula in 2020, including in its statement on racial discrimination that:

"CALD urges all Australian law schools to work in partnership with First Nations peoples to give priority to the creation of culturally competent and culturally safe courses and programs. In so doing, CALD acknowledges the part that Australian legal education has played in supporting, either tacitly or openly, the law's systemic discrimination and structural bias against First Nations peoples".[7]

A key driver of the lack of Indigenous content in curricula is that there is no requirement for law schools to teach this content to gain accreditation of a Bachelor of Laws or Juris Doctor degree. Australian legal education is regulated by what is known as the "Priestley 11" knowledge areas, overseen by the Law Admissions Consultative Committee (LACC) of the Legal Services Council. At present, Aboriginal and Torres Strait Islander laws and jurisprudence is excluded from the Priestley 11.[8] Why does the Priestley 11 disrespect the original custodians of the land, by prescribing content concerning the uncritical preservation of settler law?

The MLS learning outcomes and graduate attributes do not refer to Indigenous content. The learning outcomes speak broadly about graduates' "leadership capacity, including a willingness to engage in constructive public discourse, to accept social and civic responsibilities and to speak out against prejudice, injustice and the abuse of power". I wonder about our student's ability to do this when they are not supported through their education to speak confidently to the discrimination faced by Indigenous people in the settler legal system.

As such, Indigenous students in law schools face erasure of both their laws and their peoples' experiences under settler legal systems. Narungga, Kaurna, and Ngarrindjeri Professor Lester Irrabinna Rigney coined the term, "intellectual *nullius*" in 1999, to describe the feeling of erasure of Indigenous knowledge from curricula, research, pedagogy and citation practices generally. This silence compounds the isolation of being a minority in these institutions.

Through early attempts to include "Indigenous perspectives" in curriculum, many students are confronted with stereotypical and prejudiced understandings of Indigenous issues embedded in legal judgments. Teaching stories of Indigenous hardship through materials authored by settler judges without a critical lens does little to support students' capacity to work alongside Indigenous people in their struggles for justice.

I unpack some of the early mechanisms we are using to develop critical consciousness in the classroom below.

The MLS curriculum review project

As part of the organisation's response to a 2019 review of MLS's Indigenous Studies Programs,[9] MLS has established a working group to increase representation of Indigenous knowledge and perspectives in the compulsory JD curriculum. The working group seeks to develop materials and teaching methods that showcase and support Indigenous law and knowledge.

The Melbourne Juris Doctor commences with a two-week intensive subject on Legal Methods and Reasoning (LMR). This is the first subject which we addressed as part of the working group's ongoing, and necessarily iterative process. This subject shapes students' initial impressions of the law and the law school's values. Students are taught in relatively smaller classes than their later courses, with greater time for relationship building and discussion.[10]

The LMR course comprises 10 teaching days. Prior to our review, students were briefly introduced to Aboriginal and Torres Strait Islander laws, and the concept of pluralism, in their first seminar. The course also included a guest-lecture on Indigenous experiences of law, which I delivered in 2021. Following review, three of the 10 teaching days – almost one-third of reading material and classroom time – are now devoted to Indigenous/settler law matters.

One issue prior to the review was that the Indigenous content had not been integrated into the rest of the curriculum – it could easily be ignored by seminar leaders who did not feel comfortable touching on the subject, as it would make no difference to whether learning outcomes were met. In 2022 the subject coordinator drafted preambles for the first seminar on Indigenous-settler relations to encourage students to openly and critically evaluate the legitimacy of the legal system they were learning to navigate. This theme draws the content together, picked up in seminars where Indigenous/settler matters were not the central focus.

Assessment

Throughout this work I have noted the trend to include Indigenous content in curriculum by well-meaning academics in a limited fashion, which finds Indigenous authors buried in "additional readings", classroom asides and optional guest lectures which are not included as part of the formal assessment of the course. This is an implicit value statement by the organisation about the importance of the content and its relationship to future professional responsibilities of students. It says, "read this important material – but only if you have time after you have done your 'real' work".

By including assessment on Indigenous content, we battle the perceptions by students and faculty that this content is somehow too personal, political or inaccessible to be assessed. We also need to navigate perceptions by non-Indigenous academics that they are not appropriately qualified to assess responses, particularly those of Indigenous students.

There are 3000 words allocated to assessment tasks in LMR. Following our review, 900 of those words – almost one-third of assessment – comprise a reflective essay on the Indigenous/colonial component of the course and the central theme of settler law's legitimacy. Students are asked to respond to my reflections on the 30th anniversary of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), requiring them to reflect deeply and consolidate their understandings of the assigned materials and class discussions.

Supporting teaching and learning

A key challenge of reaching our aspirations to produce graduates with deep understanding of Indigenous legal content relates to the confidence and capability of non-Indigenous legal academics

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to teach and facilitate discussions on these matters. While the number of Indigenous legal academics is growing, it is not presently feasible that all classes on Indigenous content are taught by Indigenous people. I believe that it is appropriate to expect that all academics teaching in Australian law schools are confident teaching Indigenous content. There should be support for teaching staff to facilitate this content, and clarification of expectations for non-Indigenous teachers to seek to include Indigenous voices in their classrooms, including through paid guest lecturers.

We recently had some of these shortcomings come to our attention when we added an article of mine to the curriculum as a basis for classroom discussion, focusing on deaths in custody.[11] Students reported that some teachers lacked confidence leading a discussion on my arguments for the inherent racism of the legal system, sometimes reporting that teaching staff steered the conversation to contentious issues impacting Indigenous people within their core research areas with very tangential and distant relationships with the article. We need to support these teachers to build their skills and confidence.

Indigenous students also report experiences of being called on to contribute to the classroom discussion, including the entirely unacceptable practice of being asked whether they might prefer to take up a role in teaching specific classes to their peers where the curriculum covers Indigenous content. Assuming that Indigenous students are equipped to teach the content just because they are Indigenous is a sign of disrespect by lecturers, who are not only getting paid to teach but have a duty of care to provide a culturally safe learning environment for students. These and other examples of racism in Australian legal education have long been acknowledged by Aboriginal activist academics in the academy.[12]

As part of the curriculum review, we ran a workshop for teaching staff on teaching the Indigenous content introduced to LMR. This included a panel discussing ways to respectfully present and discuss Indigenous issues in the classroom. The forum provided teaching staff with a panel of individuals, both Indigenous and non-Indigenous teaching staff, who were available to share their experiences and provide support to the teaching staff as they prepared their classes. We considered questions such as how to work in ways that respect Indigenous sovereignty, while acknowledging that settler law has failed to find a way to properly recognise the reality of this sovereignty, and how to appropriately introduce the plurality of Indigenous perspectives on such matters. We also considered questions of student engagement, such as how to support Indigenous students in classroom conversations where painful issues may be raised, and how to encourage settler students to be receptive to the new materials. We encouraged teachers to share their worries and build confidence teaching these materials with a humility that acknowledges the limits of their own expertise.

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Building culture to de-centre settler law

As part of our communication of our valuing of Indigenous peoples and laws to our students, I have commenced a White Noise of Settler Law lecture series, inviting leading Indigenous thinkers to share their perspectives and excellence with our students.

We also provided each first-year student with a copy of *Indigenous Legal Judgements: Bringing Indigenous Voices into Judicial Decision Making*,[13] printing the book with a personalised foreword which spoke to our hopes that these students would listen to Indigenous voices and join movements towards justice. Building on the traditions of feminist legal judgments projects, this is a collection of rewritten and reimagined judgments of cases of key concern to Indigenous peoples. As judgment writers were given the option of working within legal doctrine or inventing new method, some judgments also highlighted the choices available to jurists within the constraints of settler legal reasoning to make decisions towards better or worse outcomes. In the words of the editors, it "allowed for the exploration of the possibilities, limits, and implications of introducing an Indigenous voice to judging and the potential for a new and distinct perspective to reimagine justice through an Indigenous lens".[14] I hope that reading these works, unavailable to the young lawyers coming before them, will encourage our students to approach their studies with a healthy scepticism of settler institutions and a hunger for justice.

Conclusion

MLS says on its honour board website:

"Here you'll find a list of MLS alumni who have been recognised for making a difference, for achieving their best and for their service to others . . ."

The honour list boasts three governors-general of Australia, four prime ministers, four governors of Victoria, eight premiers of Victoria, 14 federal attorneys-general, 14 justices of the High Court of Australia, six chief justices of the Supreme Court of Victoria and a plethora of other legal dignitaries.

I wonder how many used their position to truly be of service to Indigenous Australians?

I hope our next generation of lawyers truly listen to how each of us experiences law. Lawyer Nyadol Nyuon recently shared a similar vision for our way forward through listening:

"Perhaps if we're really serious about moving forward collectively as a country, perhaps . . . perhaps sit down and actually listen to the pain that you're hearing here, to truly take it in, and to realise that, sometimes, we might live in the same country, but experience completely different realities. And we cannot insist on sort of mystical ideas of fairness and equality and justice, which actually doesn't exist equally among all of us".[15]

Settler colonialism is a system of power that continues to perpetuate the genocide and repression of Indigenous peoples and cultures, which it was originally installed to do. The situation is urgent. Curriculum changes are one important measure to enable this listening – to build the empathy, humility, humanity and respect which needs to be instilled in our graduates. ■

Eddie Cubillo is associate dean of Indigenous Programs at Melbourne Law School, on the lands of the Wurundjeri People of the Kulin Nations, Traditional Owners of the land on which we learn. **Jaynaya Dwyer** (research fellow, Indigenous Law and Justice Hub) is acknowledged and thanked for her contribution to this article.

1. The black grapevine means, hearing something through Indigenous people. On this occasion, my son had mentioned to his immediate boss, Shaun Ewen (an Aboriginal man who at the time was the professor, the pro vice-chancellor (Indigenous) and director, Poche Centre of Indigenous Health, Faculty of Medicine, Dentistry and Health Sciences) that I was relocating to Melbourne and could be looking for some part-time work while I tried to conquer a PhD. This information managed to make its way to the dean of Law.
2. Australian and World ranking (at bottom of article) https://www.timeshighereducation.com/student/best-universities/best-universities-law-degrees-australia.
3. World ranking: https://www.timeshighereducation.com/world-university-rankings/2022/subject-ranking/law#!/page/0/length/25/sort_by/rank/sort_order/asc/cols/stats.
4. Waugh, J, 2007, *First Principles: The Melbourne Law School, 1857-2007*, Melbourne University Publishing, p69.
5. Note 4 above, p271.
6. Personal communications with Sandra Bailey, on file with the author. I note that due to limitations in record keeping, as well as the ongoing discrimination which discourages some Aboriginal and Torres strait Islander peoples from identifying within white institutions, we may not know the identities of all Aboriginal and Torres Strait Islander people who studied law.
7. Council of Australian Law Deans, "CALD Statement on Australian Law's Systemic Discrimination and Structural Bias Against First Nations Peoples" (3 December 2020), https://cald.asn.au/blog/2020/12/03/cald-statement-on-australian-laws-systemic-discrimination-and-structural-bias-against-first-nations-peoples/.
8. In 2019 the LACC released a paper proposing revising the descriptions of the 11 existing academic requirements for admissions to the Australian legal profession, including proposing the requirement that property courses cover the "principles of Indigenous Australian law that form the basis of Aboriginal and Torres Strait Islander Claims to Land" and that Constitutional law courses cover "the broad theoretical basis, and the social and historical context, of Australian constitutional law, including the relationship between Aboriginal and Torres Strait Islander Peoples and the Australian constitutions". In September 2020, the LACC resolved to defer indefinitely the adoption of the Prescribed Areas of Knowledge that were to be implemented on 1 January 2021, and they have not been adopted at the time of writing.
9. This work responds to the recommendations of the 2019 Review of MLS Indigenous Studies Programs (Tehan and Ewen) and to MLS' Strategic Priorities on Indigenous Programs.
10. Sharmera Kesavan is acknowledged and thanked. It was invaluable to have a former student and a woman of colour's perspective here.
11. Cubillo, E, 2021,. 30th Anniversary of the RCIADIC and the "white noise" of the justice system is loud and clear, *Alternative Law Journal*.
12. Watson, N, 2004, Indigenous people in legal education: staring into a mirror without reflection, *Indigenous Law Bulletin*, 6(8), pp4-7. See: http://classic.austlii.edu.au/au/journals/IndigLawB/2005/1.html; Burns, M, Behrendt, L, Hong, AL, McMillan, M, Wood, A, Vidler, R, Murray, F, Trelford, P and Kirk, B, 2019. Indigenous Cultural Competency for Legal Academics Program data, pp17-25.
13. Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgements: Bringing Indigenous Voices into Judicial Decision Making* (Routledge 2021).
14. Note 13 above, Introduction, p1.
15. *Q&A*, The Hard Truths, ABC, 8 June 2020 <Hard Truths - Q+A (abc.net.au)>.

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