

INCORPORATING INDIGENOUS CULTURAL COMPETENCY THROUGH THE BROADER LAW CURRICULUM

A J WOOD

I INTRODUCTION

It might appear self-evident that Australian law schools should teach Indigenous Cultural Competencies (ICC) and perspectives as part of their curriculum.¹ If it is not, then the Universities Australia (UA) 2011 Cultural Competency Framework Report² reiterates the importance of an inclusive curriculum.³ However, UA recognises that to be done effectively, there needs to be provision in such a curriculum for Indigenous cultural competency,⁴ If this premise is correct then, in addition to the appropriate pedagogical considerations that underlie good teaching generally, developing ICC among a cohort of students necessitates the addition of structured and targeted but safe 'Indigenous space' within the curriculum⁵ — one that provides an opportunity for constructive engagement.

* ANU College of Law and Senior Research Fellow and Higher Degree Research (HDR) Programme Manager, National Centre for Indigenous Studies at the ANU. He is a member of the National Indigenous Researchers and Knowledges Network (NIRAKN). The author would like to acknowledge Dr Cressida Forde's comments on the early draft.

¹ Many countries recognise their First Nations Peoples and it would seem reasonable to improve the broader community's understanding of these peoples. Further Australia endorsed the United Nations Declaration on the Rights of Indigenous Peoples ('DRIP'): United Nations Declaration on the Rights of Indigenous Peoples GA/RES/61/295, UNGAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295, UNGAOR (13 September 2007); and ANU law students, as future lawyers and leaders, will be expected to have some familiarity with DRIP. Hence some formal study of these areas would greatly assist law students while simultaneously improving the level of cultural competence generally.

² Universities Australia, *National Best Practice Framework for Indigenous Cultural Competency in Australian Universities* (Canberra, 2011) 52; Denise Bradley et al, *Review of Australian Higher Education: Final Report* (Department of Education, Employment and Workplace Relations, 2008) [Referred to as the UACC Report hereafter].

³ UACC Report, above n 2, 52; UACC Report xxvi, also recommended the incorporation of Indigenous knowledges in the broader curriculum.

⁴ Universities Australia, *Guiding Principles for the Development of Indigenous Cultural Competency in Australian Universities*, (Canberra, October 2011) 3. [Referred to as the UACC Guiding Principles hereafter]

⁵ See discussion at n 26 below.

This 'space' should be characterised by an opportunity for students to engage with fellow Indigenous students, who in turn should feel safe for the sometimes confronting nature of the material, which often originates in their communities or sometimes even has links to their families. Engagement takes place at both an individual and group level, and introduces a broad range of subjective, informed Indigenous perspectives.

While a great deal of lip service is often paid to these goals of inclusion in higher education, there is a paucity of good practice. There is also a dearth of knowledge, research and information on Indigenous knowledges and perspectives. The Australian Research Council (ARC) arguably has recognised this gap and has funded an extensive network of several Indigenous researchers from a range of disciplines under the leadership of the internationally renowned professor Aileen Moreton-Robinson,⁶ the National Indigenous Researchers and Knowledges Network (NIRAKN). The network could significantly contribute to the volume of Indigenous knowledge and hence to improve ICC.⁷

There are many important reasons for incorporating Indigenous knowledges into the broader curriculum and a full discussion of this issue is outside the scope of this paper. However, a society that believes and characterises itself as a 'knowledge nation'⁸ must give some consideration to the custodians of knowledge of the land and its waters even if only for its practical benefits. On a more ordinary level, Prime Minister Abbott, then Leader of the Opposition, aptly put this as '[Australia] is the envy of the earth, except for one thing — we have never fully made peace with the First Australians'.⁹

⁶ <<http://www.arc.gov.au/negp/sri/atsirn.htm>>.

⁷ Other law schools with electives on Indigenous Australians and the Law include University of Canberra, Southern Cross University, University of New England, University of New South Wales, University of Newcastle, University of Technology Sydney, University of Western Sydney, University of Wollongong, Charles Darwin University, James Cook University, Queensland University of Technology, University of Queensland, Flinders University, University of Adelaide, La Trobe University, Edith Cowan University, Murdoch University, University of Western Australia and Curtin University. For unit outlines/content of these programs please refer to the institution's web site. While, as noted above, there are several universities with programs similar to the ANU unit, there did not appear to be a single text that was suitable for this unit. The cost of texts is a significant consideration at the ANU when the issue of a 'prescribed text' for any unit is considered. While the ANU teachers of this unit have been approached by publishers to create a suitable text, this is still a matter that is in train. On the other hand, as has been evident with the handing down of judgment in the *Akiba Case* this year by the HCA, the unit strategy of depending principally on primary materials, available as online resources which do not have to be purchased and which may be printed, appears to be sound both pedagogically and economically.

⁸ <<http://www.australianpolitics.com/parties/alp/policy/01-01-24knowledge-generation.shtml>>.

⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2013, 1123.

Knowing and understanding Indigenous perspectives is a good first step towards a peaceful co-existence. Further, recognition at law that the continent was not ‘empty’ exposes contradictions in both the law and the Constitution, and brings into the law considerations of a once ‘invisible’ and neglected people. This can be a confronting issue for students. But addressing these contradictions openly and in an honest manner will help to reconcile social attitudes with the law as it evolves and moves to accommodate issues such as the recognition of Indigenous people in the Constitution.

This article is in seven parts. Part II explains the concept of ICC and Part III identifies some pedagogical considerations. Part IV outlines the approach to development of ICC at the Australian National University’s College of Law (‘ANU Law School’), and Part V considers how the ANU law school unit, Indigenous Australians and the Law (‘unit’) is evaluated. Part VI examines what mutual lessons there might be for law schools and institutions, some of which have already begun their own attempts at incorporating ICC. Part VII contains concluding remarks.

II DEFINING INDIGENOUS CULTURAL COMPETENCY

There is no universally accepted definition of ICC, but UA’s definition has been endorsed by senior Indigenous bodies and carries the imprimatur of the UA,¹⁰ and is therefore adopted here.

The UACC Report defines ICC as:¹¹

Student and staff 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.

¹⁰ UACC Guiding Principles, above n 4, 5–29. The 5 principles are also summarised at page 8 of the UACC Report, namely that:

- (1) Indigenous people should be actively involved in university governance and management
- (2) All graduates of Australian universities will have the knowledge and skills necessary to interact in a culturally competent way with Indigenous communities
- (3) University research will be carried out in a culturally competent way in partnership with Indigenous participants
- (4) Indigenous staffing will be increased at all appointment levels and, for academic staff, across a wider variety of academic fields and
- (5) Universities will operate in partnership with their Indigenous communities and will help disseminate culturally competent practices to the wider community.

¹¹ UACC Report, 171 (emphasis added). The UACC Report is comprehensive and covers a range of ICC-related issues such as a national stocktake, identifying best practice, developing Indigenous research capacity. It advocates inclusion of Indigenous perspectives at all levels of university governance. These aspects are not repeated here.

The definition has two broad limbs. The first limb consists of a two-part cognitive aspect specifying what a person ought to know and understand, and the second limb is a skills element that requires the possessor of the knowledge and understanding (in the first limb), to bring this to bear on practical exigencies and to do so in a particular way.

A Knowledge, Understanding and Awareness

The aim, from a pedagogical perspective, and without being prescriptive, is to make the scope of learning required in the first limb manageable within the resource constraints of a university teaching framework. That is, to enable students to gain an adequate knowledge and understanding through an undergraduate university course — or, in higher degree research courses, a deeper, more detailed knowledge and understanding.

The second part of the first limb requires an ‘ of Indigenous protocols’. At a functional level this is a modest requirement. For example this could mean being aware of the various ethical clearance protocols that institutions including universities have in place for undertaking research with Indigenous subjects as both the institution and the Indigenous communities require. While lawyers are not bound by these protocols *per se* in practice, requiring lawyers to have an awareness at least of these protocols is perhaps a very modest requirement. There is much more to Indigenous protocols than is indicated briefly here other than to note that such awareness should be seen as a first step only.

The UACC definition is not a legal definition. Nonetheless, it adequately captures the broad elements and provides a reasonable basis for adaption. Thus for example in practice, for a ‘working definition’ the scope UACC definition could be read down to mean a ‘(reasonable or adequate) knowledge’ and perhaps also a ‘(reasonable or adequate) understanding’, ‘of (one or more) Indigenous Australian cultures’. The term ‘cultures’ should be read quite broadly to include what His Honour Justice Finn referred to as ‘a plain English definition of the different possible societies’, which include localised regional (Indigenous) groups and broader regional (Indigenous) groups, which could encompass variations such as distinct groups of languages.¹²

B The Skills Element

The second limb consists of the development of practical skills and experience to apply the theoretical knowledge gained through formal study. In law schools this is usually achieved to some basic

¹² *Akiba v Queensland (No 2)* [2010] FCA 663 [175].

extent through clinical programs and after graduation through practical legal training programs such as the ANU’s Graduate Diploma in Legal Practice (GDLP). This is offered under different names by many law schools and other institutions. At the ANU neither the clinical nor the GDLP program has a specific ICC development component; this is a gap that needs to be addressed in the future. To this end the ANU is undertaking an audit of its law units with the aim of identifying how ICC can be strengthened within the framework of the current constraints.

It is unlikely that law students will be truly culturally competent even to deal with a local Indigenous community at the end of their degrees. At minimum, however, their knowledge and awareness should sensitise them to the vast gap that could exist in practice between the communities. There are many relevant issues, a few of which are raised here for illustration. The Law Council of South Australia, for example, has created a helpful document for lawyers dealing directly with local Aboriginal clients.¹³ The protocols capture the frustration of an Aboriginal client who said ‘Dealing with the whitefella law is like playing football when the other team and the umpire are applying basketball rules’.¹⁴ Acquiring the necessary skills to deal with these frustrations, including the difficulty of tackling the complex issues facing Indigenous women in rural towns, is also a key ‘access to justice’ issue for governments.¹⁵ The High Court has recognised that ‘Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices’, which may in cases have an enduring effect with attendant legal consequences.¹⁶ Gray et al refer to the range of equitable issues that must be considered when dealing with disadvantaged communities generally, but specifically addressing their case study in Indigenous communities.¹⁷ Physical barriers such as a high level of hearing loss among Aboriginal peoples make court processes difficult and compound inadequate English language competency issues.¹⁸ Ideally the university sector will be able to provide appropriate clinical programs that address these types of issues not only for graduates who will practice law but also for other who will work in legal policy areas — for example those who work closely with the Aboriginal Legal Services (if they survive the

¹³ Law Society of South Australia, *Lawyers’ Protocols for Dealing with Aboriginal Clients in South Australia* (1st ed, 23 August 2010).

¹⁴ *Ibid.*, 4.

¹⁵ Judy Putt and Kate Crowley, *Working with adolescents to prevent domestic violence: rural town model* (Canberra, Attorney General’s Department (Cth) 1998), 10.

¹⁶ *Bugmy v The Queen* [2013] HCA 37 (2 October 2013).

¹⁷ M C Gray, B H Hunter and J Taylor, *Health expenditure, Income and Health Status Among Indigenous and Other Australians* (Centre for Aboriginal Economic Policy Research 2002) 5.

¹⁸ Law Society of South Australia, above n 13, 19.

current changes in government policy), the community legal sector, NGOs and the many other public and private organisations such as the Office of the Registrar of Indigenous Corporations (ORIC).¹⁹

Indigenous people have a civilisation and culture which is significantly different from the majority Anglo-European culture. These differences clearly necessitate specific and appropriate approaches if problems and issues are to be addressed sensibly and to the satisfaction that is expected in a first world economy. Positive statements by governments and leaders in the broader community create some expectations on the part of the Indigenous community that their needs, including legal services, will be addressed by measures that are appropriate, targeted and of the same standard and quality enjoyed by the mainstream. The mass media such as the Australian Broadcasting Corporation or NITV, the Indigenous TV Chanel, have begun to educate viewers about the majority of Indigenous protocols and customary norms that apply widely, although perhaps not universally, among Indigenous communities. The need for holistic and comprehensive programs that address Indigenous communities, however, remains undiminished. That there is an implicit requirement that legal service providers be competent to deliver such programs has been recognised widely.²⁰ These broader attributes include the skill needed to address the feeling of impotence among Indigenous men and the associated issues of alcohol and violence that put many men in an adversarial situation vis-à-vis the law.²¹ Lawyers should also know and understand the support mechanisms that are in place within Indigenous communities to deal with historical issues and to acquire the necessary skills to work with, and in concert with, these mechanisms so that this cooperation will bring about the optimal social benefits to Indigenous communities while remaining true to their obligations as officers of the Court.²² These are aspirational targets being considered by Indigenous law academics at conferences and seminars with a view to realising such change in the not too distant future. But the clock is ticking on these issues. Aspirations of Indigenous communities being served by a legal profession that understands them was proposed in 1993²³ — an aspiration that remains unfulfilled 20 years on.

¹⁹ <<http://www.oric.gov.au/>>.

²⁰ Paul Memmott, Rachael Stacy, Catherine Chambers and Catherine Keys, *Violence in Indigenous Communities* (Attorney General's Department (Cth) 2001), 87.

²¹ *Ibid.*, 26, 29, 96.

²² *Ibid.*, 97.

²³ Royal Commission Government Response Monitoring Unit, *Implementation of the Commonwealth Government Responses to the Recommendations of the Royal Commission to Aboriginal Deaths in Custody*, First Annual Report, vol 1 (1992-93), 175.

III SOME PEDAGOGICAL CONSIDERATIONS

Improving ICC generally will require universities to deliver substantive legal content in a manner that is acceptable to the broader academy and simultaneously culturally appropriate and sensitive. The substantive content would also have to meet the standards of the law school and the profession, and arguably for best learning outcomes, complement the broader law program.

In Lizzo et al's terminology, the unit should aim to improve both 'hard' learning (academic achievement) as well as 'soft' learning (satisfactory development of key skill) outcomes that are, in this context, suitable for the profession.²⁴ In many instances, subjects on Indigenous Peoples and the Law appear as later-year law electives, enabling teachers to build upon previously acquired knowledge and skills in a scaffolding process that fosters independent learning, promotes a broader view of law and society, and encourages students to appreciate that the study of law is more than simply a means to obtaining professional credentials.

The inclusion of Indigenous teachers and students in ICC programs is likely generally to enhance the student experience, particularly if the programs are integrated into the broader curriculum. The inclusion of Indigenous participants can sometimes bring into the unit people with first-hand experiences of traumatic events such as removal from families, racism, alienation by both the law and the mainstream community and other possible adverse circumstances and situations as experienced by the individual, their family or community.

The inclusion of Indigenous participants therefore creates a concomitant obligation on institutions, and arguably extends its normal duty of care, to create culturally safe environments for Indigenous students — an issue which has not, according to Bin-Sallik, received adequate recognition.²⁵ Indigenous students and teachers in the academy come from a range of backgrounds including urban, rural and remote, bringing with them a range of experiences that when openly shared are greatly beneficial to the mainstream cohort. The concept of what a culturally safe space could mean is now discussed below.

The concept of a 'safe cultural space' is a critical issue, particularly if the law school would like non-Indigenous students to participate in a constructive and all-round beneficial manner with Indigenous students and teachers. The concept, as used in practice at the ANU,

²⁴ Alf Lizzo, Keithia Wilson and Roland Simmons, 'University Students' Perceptions of the Learning Environment and Academic Outcomes: implications for theory and practice' (2002) 27(1) *Studies in Higher Education* 27

²⁵ M Bin-Sallik, 'Cultural Safety: Lets Name It!' (2003) 32 *Australian Journal of Indigenous Education* 21

is best characterised by Aboriginal elder Richard Frankland, who describes a culturally safe 'Indigenous space' as:²⁶

A place where you [that is, an Indigenous person] can practice your own culture without fear of being ridiculed or being put down or bullied or harassed about it; where it is celebrated; where there is an exchange of ideas and cultures; it is a meeting place of cultures; it is a place where you can take what is great from every culture and build a framework of a place where you are safe and secure.

The negative indicators raised by this definition — such as establishing protocols for preventing ridicule, harassment or put-downs in class — are relatively easy to name and address, particularly through negotiation and mutual agreement. Moving beyond merely addressing the negative elements, and on to issues such as identifying, taking and appreciating what is best from each culture and celebrating such cultural aspects, in addition to being quite subjective, are a bit more difficult to achieve in a short time or in a class environment. This is likely to be the case even if agreement has been reached on issues such as what constitutes a celebratory aspect of culture. The desire by students to 'celebrate culture' or 'appreciate Indigenous ways' more broadly in the longer term is sometimes evident through their reflective postings. Students elect whether or not to post more than a mandatory minimum of these 'personal reflections' and many do so, particularly when they think that they have something particularly insightful or useful to share with the cohort. The often positive feedback they receive, sometimes almost instantaneously, reinforces the practice of sharing ideas in this safe space. Some students are, however, reluctant to participate online, and they express this in the unit feedback.

Interaction which is open and engaged with the substantive issues of the day is generally positive for the cohort, particularly for the non-Indigenous students, some of who have never knowingly met or interacted with an Indigenous person. In this context all students are exposed to a range of subjective Indigenous perspectives — albeit somewhat unpredictable — together with a set of more 'objective' legal materials. While it is conceded that not every Indigenous person will bring a fully informed cultural perspective, the absence of Indigenous input through teachers or students can mean that mainstream students are not exposed to a range of live and engaged Indigenous perspectives, and this can diminish their learning experience.

On the other hand, it might not be possible or practical always to ensure Indigenous engagement on every topic. Alternative strategies

²⁶ Daniel Browning, Interview with Richard J Frankland, *AWAYE!*, ABC Radio National, 1 June 2013 <<http://www.abc.net.au/radionational/programs/awaye/renaissance-man3a-richard-j-frankland/4720378>>.

such as the delivery of Indigenous perspectives and content via film, music, role plays and art is necessary. These extrinsic elements can complement face-to-face teaching. The content of this material can be used to show links to the common law for purposes such as saving evidence (under the *Uniform Evidence Act*),²⁷ and can simultaneously be used to teach aspects both of the common law as well as Indigenous ‘law and culture’.²⁸

For strong cultural reasons, which are practised in the teaching of the classes, lectures are not recorded and footage is only used in class (as opposed to being available on the class website) and only when the permission of the traditional owners has been obtained for the use of this material as a teaching aide. It is also used within the cultural protocol limits of each separate community. For simplicity and consistency, other cultural protocols are extended even when not strictly necessary. For example, not all Indigenous cultures avoid the use of the name of a recently deceased person, but this cultural norm is practised in class as far as possible — for example using popular case names to refer to cases that in the official record bear the name of a deceased Indigenous party.

IV THE ANU APPROACH TO PROMOTING ICC

In 2010, as part of its 50th year celebrations, then Dean Coper invited an international panel of eminent lawyers and legal educators (‘the panel’) to audit the Law School.²⁹ The panel, while recognising the College’s ‘valuable initiatives’ with respect to Indigenous matters, such as the retention and successful graduation of Indigenous law students,³⁰ highlighted the absence of a law unit on ‘Indigenous peoples and the law’ as ‘troubling’, particularly given the ANU’s position as the national university and the Law School’s own deep commitment social justice issues.³¹ This specific recommendation, coupled with calls for the broader inclusion of Indigenous knowledges in the professions by figures such as Professor Larissa Behrendt, a renowned Indigenous lawyer and legal academic, prompted the Law School to respond positively and introduce the *Indigenous Australians and the Law* as a unit in the Bachelor of Laws.

The ANU’s policy of research-led teaching means that subjects are taught by staff researching in the field. Thus, incorporating

²⁷ *Native Title Act (1998)* (Cth) s 82 (1); *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [81].

²⁸ *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 Gleeson CJ, Gummow and Hayne JJ [42], where their Honours considered the terms in s 223(1)(a) of the *Native title Act* ‘as a whole’.

²⁹ *Report of the International Review Panel, Dean’s Review of the ANU College of Law 2011* (ANU, 2011), 1.

³⁰ *Ibid.*, 14.

³¹ *Ibid.*

Indigenous law classes in the curriculum was not straightforward, as there is a dearth of active research in this area generally, and a reliance on research-led teaching can limit the range of available Indigenous related electives. Additionally, in teaching ICC, there can be tension between the opportunity to engage in deep learning in a small number of topics and the temptation to provide a broad survey of Indigenous peoples and their interactions with the law. At present there is insufficient data, or collective experience, to gauge which is the better pedagogic approach in this context, or to identify an ICC strand which would find favour with students and work within resource constraints and the requirements of the broader pedagogy in the wide range of disciplines that cover all university courses, vocational or otherwise. The ANU Law School approved a unit of study that included the study of a limited number of legal areas in some depth, reinforced through research-based assessment items and reflective exercises. This reflected an appropriate compromise in developing ICC using research-led teaching.

A Aim in Improving ICC

The broader aim of the Law School is to promote ICC through independent learning in areas of law affecting Indigenous peoples. As with other elective units, the aim the unit is to achieve a deeper coverage of subject matter, building on the material covered in the Priestley 11 and compulsory units. The coverage of Indigenous materials in Priestley 11 units is either largely incidental or quite small. Available information generally appears to reinforce the perception that Indigenous people are statistically underrepresented in education, employment and good health statistics and are over-represented in areas of petty crime, poor mental health, unemployment, sexual offences and homelessness.³² However, for a development of the understanding in the first limb of the ICC definition, students must internalise the fact that many of these issues are intergenerational and a result of circumstances which have their genesis in Indigenous history. These detrimental conditions are not intrinsically permanent but nonetheless will require imaginative solutions to address in the shortest possible time. Unless student understanding of the deeper issues is well-developed, their knowledge of Indigenous issues is likely to remain quite unsophisticated and shallow, and hence their proposed solutions likely to be limited — a symptom clearly visible in the broader polity. Understanding these underlying issues is crucial in developing sustainable and fair solutions. This understanding helps to contextualise the current situation for Indigenous peoples, which in turn will help students to develop their competence in the skills limb of the ICC definition.

³² UACC Report, above n 2, 32.

Although not the only avenue for non-Indigenous people, ICC generally develops with an appreciation of why and how Indigenous people can feel alienated in an otherwise open, democratic and free society. The study of Indigenous alienation can be linked to forced removal from traditional lands and removal of children from parents — and consequently from traditional language and culture. In making the link with law, the unit examines circumscribed, abstract Western legal concepts such as ‘alienable interests in land’ or the English Crown’s acquisition and desire to acquire sovereignty in a land 12,000 miles from its homeland, and to do so for purely economic and hegemonic purposes that nevertheless resulted in removal of Indigenous people from both their traditional lands and their families — a dispossession that is compounded by the simultaneous denigration and rejection of Indigenous peoples and their ontologies. Understanding the associated dissonance that is often caused for Indigenous peoples by ‘isolated’, non-contextualised discussions of such legal concepts, including the legal fictions that are constructed to allow otherwise intelligent and caring Europeans to accept these notions as ‘right’ and ‘just’, is also an important part of developing knowledge and understanding within the meaning of the first limb of the ICC definition.

The ethic of the class is to acquire the knowledge and understanding required for reasonable levels of ICC and then knowingly to promote the creation of substantive equality for Indigenous peoples by learning to accept Indigenous people and ways peoples as ‘truly equal’, and not because they have been assimilated.

What is evident is that a small cohort studying a limited number of units cannot satisfy UA’s aim of a general acquisition of ICC. It is however important to assess whether the limited number of students exposed to the unit will gain an adequate depth of understanding. What will constitute ‘adequate’ will depend upon the aims of the various programs. For UA, it is that students are able to follow its guidelines;³³ for the ANU unit it is to enable students to accept Indigenous ontologies ‘as they find them’ and to work towards the creation of true equality including in the Constitution.

The broader separate question is: how will these methods be adjusted to cover a large cohort of law students, and eventually to all university students? Or do newer more appropriate units need to be developed to achieve ICC at a general level? There is insufficient data at the ANU to answer these questions definitively but it appears evident that ICC must be included in all or at least the majority of the Priestley 11 units and some clinical units if all law students are to acquire this skill and attribute.

³³ UACC Guiding Principles, above n 4, 6 8

B *Substantive Content: Indigenous Australians and the Law Unit*

The ANU Law School's approach to selection of unit material is only one such approach to content determination and is subject to the many constraints mentioned above. The unit commences with a general and broad introduction covering some groundwork by examining the history of contact, Indigenous identity and the development of the nation. Indigenous perspectives are introduced to complement the current written Australian legal history, which at present is significantly empty of Indigenous content, but is slowly evolving to include such content. The three other major components of the unit are now examined, along with a rationale for inclusion.

Firstly, for the law, and the teaching of law, arguably a key area is to examine how, why and more importantly whether it is true that the law permitted the exclusion of Indigenous people from the earliest days of English settlement and then through Federation. Thus the study of the Australian Constitution and its evolution, particularly the aspects that permitted such exclusion are useful components of study. Further, that part of Constitutional law which covers the constitutional provisions which directly and indirectly affect or touch upon the lives of Indigenous people are thus included in the curriculum.

Secondly, while colonisation appears to have had a devastating impact on many lands and civilisations, the treatment of Australian Indigenous people was unique. This is probably because the colonists did not recognise or understand the complexities of Indigenous connections with their lands and its waters, and recognition of such connections did not occur at law until relatively recently.³⁴

Thus the law, as it stood for more than 200 years, held that the Australian Continent was 'almost uninhabited'³⁵ and that the few humanoids who were present and — being genetically inadequate and intellectually inferior³⁶ — were 'barely civilised'³⁷ at English settlement. Further, it was not until 1992 that the High Court, in its seminal case, acknowledged the falsity of this notion of an empty land.³⁸ Justice

³⁴ *Milirrupum v Nabalco Co Ltd* (1971) 17 FLR 141 ('Gove Land Rights Case').

³⁵ *Cooper v Stuart* (1889) 14 App Cas 286, 291

³⁶ Mary Ann Bin-Sallik, 'Racist Language', Charles Darwin University Public Lecture Series, Charles Darwin University, 6 May 2008 <<http://ext.cdu.edu.au/newsroom/a/2008/Pages/2665.aspx>>.

³⁷ *R v Cobby* (1883) 4 LR (NSW) 355, 356, Martin CJ: 'We may recognise a marriage in a civilized country but we can hardly do the same in the case of [...] these Aborigines, who have no laws of which we can take cognisance.'

³⁸ *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1, 42 ('Murray Island Case'). This case, for example, bears the name of one of the plaintiffs who has passed on. For cultural reasons in parts of Australia, the continued use of the name held by a now-deceased person is avoided, and where possible, a convention is adopted to call it the *Murray Island Case*

Brennan described the status quo ante as ‘the fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent [and consequently that it] has no place in the contemporary law of this country’.³⁹ The legal consequences of *terra nullius* however still persist in the law and it will take time to expunge these deleterious effects. Thus it is important that students gain some understanding of how Australian property law and its theories of tenure and ownership of estate in property have interacted, affected and contrasted with Indigenous notions of custodianship. Such custodianship and rights that derived from it, such as the rights to enjoyment or to exclude,⁴⁰ even today are not recognised as ‘rights’ *per se* at common law but only as rights acquired under another normative system.⁴¹ These rights and interests are recognised⁴² but subject to extinguishment⁴³ for the English law’s superior status.

It is not that Indigenous people did not demarcate their territories or boundaries between groups or sometimes even between individuals. They did so, but in a manner that did not appear formally to match English notions of the power to alienate interests in the land while radical title perpetually vests in the Crown.⁴⁴ How these English notions were transported to Australia is shrouded in the mysteries of the trick the Englishman has of carrying with him some English law wherever he goes⁴⁵ — in this case to the utter detriment of ‘aboriginal natives’.

Justice Finn held that the ‘varieties of sharing [territory]’ in certain instances equated with ‘ownership’ in the English legal tradition.⁴⁶ The coastal dwellers of Botany Bay in 1788 did not take the colonisers on a boat ride pointing out the traditional areas of use by various families and groups, as the Torres Strait Islanders did with Justice Finn. Such an omission is perhaps a tragedy of history which cannot be reversed, but its effects can be mitigated through education and cultural understanding, which are important aims, and the reason for incorporating ICC in the curriculum. Property law and its effect on Indigenous land use and custom is therefore a reasonable addition to the unit content.

Thirdly, it was decided that it was important for students to understand the history of the impetuses for change in race relations in Australia. From Federation to the early 1960s there was little

³⁹ *Murray Island Case*, 71.

⁴⁰ *Milirrupum v Nabalco Co Ltd* (1971) 17 FLR 141, 272.

⁴¹ *Members of Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [43].

⁴² *Native Title Act* (1993) (Cth) s 223(1)(c); Lisa Strelina, *Compromised Jurisdiction: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2006) 5, 7.

⁴³ *Native Title Act* (1993) (Cth) Div 2B.

⁴⁴ Edward Jenks, *Modern Land Law* (Scientia, 1979) 7.

⁴⁵ Catriona Cook et al, *Laying Down the Law* (LexisNexis, 8th ed, 2012) 39.

⁴⁶ *Akiba v Queensland (No 2)* [2010] FCA 663, [262].

domestic pressure or appetite for change in the racial politics of Australia.⁴⁷ Gardiner-Garden refers to Australia's 'poor international image' and other pressures on the government in the early 1960s in relation to its treatment of Indigenous people.⁴⁸ This international image had some effect on the bureaucracy with respect to Indigenous affairs.⁴⁹

The major impetus for change in the 1960s was a result of international factors.⁵⁰ While Gardiner-Garden does not elaborate on these international factors, they probably included the formal defeat of Nazism and the rise of the notions of universal human rights, independent of race, creed or colour.⁵¹ Chesterman specifically notes Australia's official desire to criticise South Africa's practice of apartheid.⁵² Recall that notwithstanding the defeat of fascism in Europe, the White Australia policy was still officially in place. Thus, the domestic apartheid regime would have made Australia look hypocritical, and arguably quite foolish, as Aboriginal peoples in Australia were by this stage never going to constitute other than a very small minority and, unlike black South Africans, to be in the numerical position to end White rule. There was therefore a sense of urgency in the Executive to dismantle the race based laws of Australia.⁵³ Thus an examination of international law and custom and the incorporation of some of these norms into domestic law is a useful third limb for the unit content.

Many other areas of law could have been included in a broader subject in the nature of a survey of a relevant topic. These include the impact of the criminal law on Indigenous people; intellectual property issues for the protection of Indigenous peoples' biological resources and artistic and cultural works;⁵⁴ the study of Indigenous companies, businesses, and corporate entities and Native Title Representative Bodies (NTRBs);⁵⁵ family law issues and considerations of the kinship aspects of Indigenous custom;⁵⁶ administrative law, which

⁴⁷ John Summers, 'The Parliament of the Commonwealth of Australia and indigenous Peoples 1901–1967', Research paper No. 10 2000-01 (Department of the Parliamentary Library, 2000) 6.

⁴⁸ John Gardiner-Garden, 'The 1967 referendum: history and myths' (Australian Parliamentary Library Research brief 2006-0, no. 11, 2 May 2007) 7.

⁴⁹ Ibid.

⁵⁰ Summers, above n 47, 6.

⁵¹ *Universal Declaration of Human Rights*, G.A. Res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810, (10 December 1948).

⁵² John Chesterman, *Civil Rights: How Indigenous Australians Won Formal Equality* (UQP, 2005) 72–3.

⁵³ Gardiner-Garden, above n 48, 8.

⁵⁴ <<http://www.artslaw.com.au/articles/entry/wipos-capacity-building-tools-for-indigenous-cultural-heritage/>>.

⁵⁵ *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

⁵⁶ *Family Law Act 1975* (Cth), s 61F.

affects the rights and entitlements of many Indigenous people;⁵⁷ the study and use of media law for Indigenous communities broadcasting in both English and their own languages; sports law for the large numbers of Indigenous people seeking a way out of poverty through sport; or anti-discrimination laws for self-evident reasons. These would all, but for time and space, have made equally useful additions to the unit. As more law schools consider the question of content with respect to ICC, it is likely that a useful body of knowledge and experience will develop. This experience will assist future unit convenors and help them to navigate the difficult issue of balancing the tension between breadth and depth of the substantive content.

C How the Substantive Unit Content Was Determined

Unit content at the ANU is determined by a range of factors including the research interests of teachers, prerequisite units available to prepare students, and faculty research priorities. The availability of Indigenous lawyers with research or practice interests in the area, and their availability to teach, is also a relevant factor. The current unit has had significant Indigenous input both in its design and delivery, and satisfies a broader aspirational criterion at the ANU Law School. As a general statement, however, the question of design and delivery of this, or any other unit, is subject to the availability of suitable teaching staff. The actual percentage of Indigenous academic or teaching staff in the Law School at the ANU is not dissimilar to other universities, which, with its attendant downstream consequences, is significantly below population parity.⁵⁸

Several factors were relevant in determining the contents of this unit. As mentioned, the ANU has a broader policy of research-led teaching.⁵⁹ Further, issues of contemporary interest form a criterion and serve as a vehicle in delivering content to the class. With these factors in mind, the current unit content includes: a property law section on native title, including the issue of commercial exploitation of resources of the water column within the Exclusive Economic Zone;⁶⁰ examination of constitutional recognition of Indigenous peoples⁶¹ in the context of their historical treatment at law; a comparative section

⁵⁷ Alexander Reilly, 'Finding an Indigenous Perspective in Administrative Law' (2009) 19(2) *Legal Education Review* 27

⁵⁸ A Wood, 'Law Studies and Indigenous Students' Wellbeing: Closing the (Many) Gap(s)' (2011) 21 *Legal Education Review* 251, 252–3.

⁵⁹ See also the discussion around n 31.

⁶⁰ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33 (7 August 2013).

⁶¹ See generally: *The Report of the Expert Panel, 'Recognising Aboriginal and Torres Strait Islander People in the Constitution'*, January 2012; Peter Mares, 'Stolen Generations: beyond the apology', *National Interest*, ABC Radio National, 13 February 2009.

examining Indigenous issues in colonised common law jurisdictions similar to Australia; and a brief examination of Indigenous people at international law including an examination of the UN *Declaration on the Rights of Indigenous People* (UN DRIP).⁶² The class aims a depth of coverage in preference to a more comprehensive survey or broader coverage of material.

Some of the omitted content includes: examination in detail of the legislation and case law of the effects on the Aboriginal community of the operation of the *Corporations (Aboriginal And Torres Strait Islander) Act 2006 (CATSI Act)*; examination of Aboriginal cultural heritage protection; broader human rights; international law; family law; child protection; and general criminal law issues. It would be difficult to sensibly cover the range of issues and areas of law that affect Indigenous people in any significant depth, and exclusion of important topics is necessary and thus inevitable, but can nonetheless be a subject of critique. It is therefore necessary to leave out content (or in some cases encourage incorporation of Indigenous content in other law units). The unit also cannot be characterised as focused on critical race theory.⁶³

Further, the unit does not include Indigenous laws — as opposed to Western laws that impact upon Indigenous Australians. Such a law unit is still some way in the future, both at the ANU and in Australia in general.⁶⁴ As a point of comparison, in the Canadian experience Victoria Law School provides a full program in Indigenous law, some details of which can be gleaned from its publicity material.⁶⁵

However, ideally, ICC content would incorporate such Indigenous perspectives, laws, knowledge, tangible and intangible heritage,

⁶² *United Nations Declaration on the Rights of Indigenous Peoples* GA/RES/61/295, UNGAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295, UNGAOR (13 September 2007); Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures on Indigenous Peoples' Claims in International and Comparative Law' (2001) 34 *New York University Journal of International Law and Politics* 189; Benedict Kingsbury, 'Claims by non-State Groups in International Law' (1992) 25 *Cornell International Law Journal* 481

⁶³ See Richard Delgado and Jean Stefancic, *Critical Race Theory: The Cutting Edge* (Temple University Press, 2nd ed, 2000).

⁶⁴ Kirsten Anker, 'Teaching "Indigenous Peoples and the Law" Whose Law?' (2008) 33(3) *Alternative Law Journal* 132

⁶⁵ See generally John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, 2010) which argues for the recognition of Aboriginal law as a third source of law (after English common law and French civil law); Jeremy Webber, 'Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples' (1995) 33 *Osgoode Hall Law Journal* 623. The position on use of customary Aboriginal law in Australia is that Federal government laws 'prevent judges taking account of customary law when passing sentence' — a position opposed (among others) by the Law Council of Australia: Chris Merritt, 'End ban on customary law in sentencing, urges law council', *The Australian*, 18 February, 2010. Such prohibitions would make the discussion on the teaching of Aboriginal laws at Australian universities somewhat premature.

and skills ('Indigenous knowledge'),⁶⁶ in the general university curriculum. This ultimate aim then would seek not only to increase the level of ICC 'about Indigenous people' among non-Indigenous students but to help enrich their lives through knowing, feeling, seeing through Indigenous eyes, ears, hearts and minds — in a sense becoming one with their Indigenous compatriots in experiencing the sacredness of the Dreamtime vision of this timeless land. This body of knowledge is still largely not accessible through traditional Western educational avenues, but is, and will, become increasingly accessible through innovative programs such as NIRAKN mentioned above, which intend to help accelerate the process of Indigenous engagement and knowledge creation with the academy.

D *Teaching and Learning Considerations*

The primary pedagogical approach to the unit is student-centred, with assessment aligned to learning outcomes which demonstrate in-depth understanding. Class sizes are relatively small by design, which is potentially inconsistent with the aim of making ICC a generic attribute or skill. Indigenous students are a minority in all law classes. Further, a self-selecting group of later year students forms the class cohort, which limits the number of students gaining ICC.⁶⁷

In class, the method of delivery is basically a standard lecture and tutorial model. However, to increase student engagement, lectures and tutorials are interactive, with a mark attached to active class participation. The substantive legal content concentrates on primary sources: legislation and case law for domestic law, and primary international law materials.⁶⁸

The unit employs what is broadly referred to as the Socratic Method, a teaching method used in the Law School. Students are quizzed semi-randomly on the readings to gauge their understanding of the broader legal implications of the law. Law students generally face a high level of stress,⁶⁹ and thus it is necessary to take reasonable

⁶⁶ It is conceded that the use of the term 'Indigenous knowledge', sometimes referred to as 'Indigenous knowledges', does not enjoy universal acceptance. It is used in this context to highlight the complexity that may arise from a plurality of perspectives and knowledge-producing research that stems from such diversity as is currently present in the Australian Indigenous community.

⁶⁷ For a critique of this phenomenon of self-selection and its adverse impact on legal education see Prue E Vines, 'Putting Indigenous Issues into the Curriculum: Succession and Equity' (2012) 4 *Ngiya: Talk the Law* 1

⁶⁸ *Statute of The International Court of Justice* art 38(1)

⁶⁹ Massimiliano Tani and Prue Vines, 'Pointers to Depression in the Legal Academy and the Profession?' (2009) 19 *Legal Education Review* 3, 6. Teachers spoke regularly to the class on this issue to help alleviate students' concerns and help them to 'relax' a little. Student feedback on stress, including stress introduced by the Socratic Method (after their initial apprehension), confirmed that taking a more relaxed approach to *assessing participation* helped reduce stress levels.

steps to help allay student concerns and reduce stress levels in an interactive environment that can sometimes include confronting materials.

Students are assured that it is not so much about getting the ‘right answer’: the object of the exercise is to promote informed and respectful debate on some very complex human issues and that in any event, there seldom is a ‘right answer’. The student feedback on the ‘relaxed delivery and teaching style’, an intentional element of teaching method, is arguably working to help overcome some of the stressors and to help promote active thinking on the issues and therefore deeper learning outcomes.

The Socratic Method of interaction also loosely aligns with the traditions and cultural practice of oral traditions of teaching and learning in Indigenous cultures, which helps the perception that this method is more authentic, encourages participation and helps overcome student reticence. Interactive learning also helps students to tease out the complexities of the material while maintaining a livelier but ‘safe’ class learning environment. Student engagement is also enhanced through performativity such as role plays, scenario-based learning and practice moots in conjunction with general legal argument, based on pre-set ‘facts’ and reading. The aim here is for students to ‘feel’ what practical engagement with Indigenous people might mean in a legal setting in their future practice of law.

Taking an experiential approach,⁷⁰ or providing ongoing practical opportunities ‘individually to engage’⁷¹ by encouraging students to participate as volunteers or observers at Indigenous conferences, symposia and workshops organised by the ANU, further reinforces Indigenous pedagogy and teaching methods. Such opportunities allow students to hear from and interact with Indigenous lawyers, elders, and others working on Indigenous issues and to do so in a direct, face-to-face or first-hand manner.

The second limb of the ICC definition requires students to recognise that ‘Indigenous clients’ are as diverse as any other group, and to develop students’ own communications skills in a way that would enable them to act with a degree of empathy based on a deeper level of knowledge and experience. Students are encouraged to identify relevant distinctions by asking: ‘What does “law” mean to a particular Indigenous community?’ and ‘How and what is the appropriate language that most effectively and accurately communicates “my reflection of Indigenous perspective”, whatever that might mean, to the client, the tribunal or the court?’

The Law School also works closely with the National Centre for Indigenous Studies (NCIS), headed by Professor Mick Dodson, a

⁷⁰ For a Canadian application of this method at a law school see: <<http://ring.uvic.ca/news/experiential-learning>>.

⁷¹ UACC Guiding Principles, above n 4, 4.

prominent Indigenous legal academic. The NCIS is co-located with the Law School, where law students can and are encouraged to deepen their engagement with Indigenous staff and with a range of practical Indigenous issues and research interests. Such engagement includes undertaking short research projects for credit, possibly creating options in the longer term for internships, or being supervised for their honours or higher degree research programs by Indigenous academics. The programs conducted at the NCIS can also provide students with the option of direct experience with such research and projects.

The resource intensive nature of broad experiential learning does not, however, help to broaden the base of the number of students acquiring ICC. On the other hand, all of these teaching methods would reasonably help to improve students' ICC as defined in the UACC Report.

E Assessment Regime

The theoretical framework and methodology applied to the unit assessment regime is a form of that articulated by Miller, employed here as it is used generally at the ANU. It is described below.⁷²

The first limb of the ICC definition requires the acquisition of requisite knowledge and understanding. Knowledge of the set readings and case law is assessed in many ways, including by questioning students in class throughout the semester. To promote engagement, marks are allocated for students' active participation.⁷³ Students' level of sophistication of analysis is often academically rigorous and insightful. Evidence of deeper learning and understanding are assessed through research papers, which include set topics and related issues nominated by students. There is no final exam in this unit; assessment is continuous to encourage on-going engagement with the material and to best assess the students' growth throughout the unit.

The second limb of the ICC definition requires the skilful application of the knowledge and understanding acquired in the first limb. Students' ability to apply the law is assessed through case studies and online writing as well as by the submission of several short pieces selected from among a range of scenarios. Role-plays give students the opportunity to demonstrate their appreciation of the various stakeholders' interests, perspectives and positions. Students are not expected to 'own' a perspective, only to be able to articulate

⁷² George E Miller, 'The Assessment of Clinical Skills/Competence/Performance' *Academic Medicine*, ('Invited Reviews' September, 1990), 65(9):S63-7.

⁷³ Allocation of marks to an activity including bonus marks appears generally to be the single most effective motivating factor for students to engage.

and present a client's position as best they can, and for which a grade is awarded.

According to the feedback, the exercises and debriefing were both described as informative and 'fun' — an indication that an atmosphere conducive to deep learning was likely to be taking place.⁷⁴ It is also a clear marker of students' productive engagement with the unit material. The 'student shows how' aspects are also assessed in plain English statements. For example in one case a submission was made to a 'live' on-going enquiry, and in another a letter was sent to the editor of a local newspaper on an Indigenous issue.

Finally, while not a direct element of Miller's methodology, building empathy with Indigenous peoples as clients, stakeholders or citizens is an implied element of the second limb of the ICC definition. Empathy is about understanding another's perspective and demonstrating this understanding. Empathy is assessed through reflective posts submitted online, if necessary privately, where students can be open and honest, expressing true-to-character views, as long as the work is well researched, thought out and considered.

V EVALUATION OF TEACHING AND LEARNING

ANU evaluation of units is carried out by the Student Evaluation of Teaching and Learning (SELT), an administrative section of the university that is independent of the faculties. Standardised unit evaluations are administered, collated, and anonymised by SELT. Results are provided to teachers in a standardised format. Unless otherwise indicated 'student feedback' in this paper refers to quotes taken from anonymous feedback.

Since evaluations changed from paper to a computer-based system, the response rates generally have dropped dramatically. Since 2010 much of the data collected by the computer-based systems, particularly for smaller classes, is too limited to be statistically significant. However, they are still indicative.

The general feedback for the unit was that the enthusiasm for teaching, the relaxed non-judgmental atmosphere of the class, and the use of film, music and humour stimulated and increased the students' own interest and love for the subject. Many students commented that this was their favourite law unit so far, and this arguably creates a desire for further learning and engagement with the Indigenous community — at least for these students. Ideally, university students will acquire a love for lifelong learning, including for Indigenous legal issues.

⁷⁴ For a discussion of deep as opposed to shallow learning see: Michael Head, 'Deep Learning and "Topical Issues" in Teaching Administrative Law' (2008) 17(1&2) *Legal Education Review* 159

This paper employ's Biggs's taxonomy⁷⁵ to examine the operation of the teaching approach taken in the unit and whether it achieves its stated (and aspirational) aims, broadly speaking, of increasing ICC. The unit is considered as a law elective and counts as part of the students' law program. All written work and essays are marked according to Law School standards.

A Presage Learning Environment and Student Characteristics

The important broader issue with respect to evaluating the penetration of such a unit is to use student evaluations to help develop strategies to appeal to those who do not at present engage with Indigenous legal issues through their law program. To be effective in its current format the class size has to be relatively small, and is a distinct disadvantage in achieving a broader ICC.

The Priestley 11 and the compulsory law units already give mainstream students some familiarity with important Indigenous issues. This general exposure however, in the opinion of the Panel, did not go far enough.⁷⁶ The need for incorporating ICC in the compulsory units has been widely recognised⁷⁷ and is endorsed in this article.⁷⁸

SELT feedback generally is positive. However, the requirement for public postings of their views has been criticised at times. Some students indicated that they would prefer to post privately only *but* without being negatively perceived as not engaging with the rest of the class. In response to the critique students now engage with hypothetical problem questions which allow students to represent a putative client's views and therefore to explore a range of legal and policy options available to the hypothetical lawyer or stakeholder without having to express their personal views, other than on the substantive law which applies.

In the same vein, in the role playing opportunities, students are encouraged to act 'true to type' (including 'the extremes' for good pedagogical reasons). Students appear to be much more comfortable with expressing a range of views through a 'role' than they are with expressing a personal opinion and student feedback on role play

⁷⁵ John Burville Biggs and Kevin Francis Collis, *Evaluating the quality of learning: the SOLO taxonomy (structure of the observed learning outcome)* (Academic Press, 1982).

⁷⁶ See above n 29, 1.

⁷⁷ UACC Report, above n 2.

⁷⁸ The incorporation of Indigenous perspectives in the Priestley 11 has been considered by scholars, for example see above n 57. The systematic incorporation and penetration of ICC into the Priestly 11 is likely to take some time and will arguably depend on the success and popularity to some extent among students of units such as the indigenous Australian and law type electives: see above n 7.

aspects of assessment are generally positive with respect to the acquisition of ICC.

Finally the exercise of engaging with public fora such as conferences, workshops and symposia on Indigenous issues is generally regarded positively although the student response is that these events are sometimes too close to the exam period or that the allocated marks do not always fairly reflect the time and effort expended on these activities. These are reasonable critiques, but they are difficult to address due to the Law School assessment regime and the permissible quanta for marks distribution or the scheduling by others of conferences and symposia over which teachers have little control.

B Developing a Body of Indigenous knowledges

As mentioned, there is a paucity of information on Indigenous knowledges, particularly from Indigenous perspectives, in a form acceptable to the mainstream academy. While Europeans have studied Indigenous ways, languages, laws and spiritualities, there must be some questions as to the level or depth of scholarship, as it took nearly 200 years for these scholars to establish as a matter of legal fact that the continent was not empty, or that Indigenous people were civilised, or that Indigenous people should be counted in the census. This is clearly a very superficial and shallow argument and the complexities of these issues need much better information bases and depth of analysis. But the point is that unless Indigenous voices are heard in the mix, the perception that this body of scholarship is 'colonial' is likely to persist.

Yet it could not be coincidental that there is a correlation between the absence of Indigenous researchers in the academy in the past and the paucity of research in the area. It is true that Indigenous people are greatly underrepresented in the academy, but on the other hand, it must be acknowledged that Kumantjayi Perkins, perhaps the first university graduate, was permitted to enter the academy as a student only very recently, historically speaking.⁷⁹ On this yardstick Indigenous people have done remarkably well to show high rates of growth in their participation rate in universities to date. The absolute numbers are clearly very low,⁸⁰ and must be improved if a significant body of knowledge is to be built and which reflects Indigenous views.

⁷⁹ See Australian Broadcasting Corporation (ABC), *Fire Talker: The Life and Times of Charlie Perkins* (2011) <<http://www.abc.net.au/programsales/s2850343.htm>>. *Kumantjayi* is a name used to refer to a deceased. He was known in life as Mr C Perkins.

⁸⁰ M Trudgett, 'Western places, academic spaces and Indigenous faces: Supervising Indigenous Australian postgraduate students' (2011) 16(4) *Teaching in Higher Education* 389, 394.

The Australian Research Council has arguably recognised this gap — or at any rate supported⁸¹ the creation of the National Indigenous Researchers and Knowledges Network (NIRAKN):⁸²

NIRAKN will comprise 44 Indigenous academic network participants from 21 universities, the Australian Institute of Aboriginal and Torres Strait Islander Studies and five Indigenous partner organisations. It is intended that the Network will have a dispersed presence, administered from a central 'hub' at QUT under the leadership of Professor Aileen Moreton-Robinson. The Network will work with collaborative 'spokes' of Aboriginal and Torres Strait Islander researchers throughout Australia.

The research output of such a group is likely to be significant, and bodes well for the development of Indigenous knowledges in the medium term. Their research output in several fields will mean that the knowledge component of ICC is likely to benefit, and can form the basis of future units on Indigenous law itself.

VI SUGGESTIONS FOR LAW SCHOOLS SEEKING TO EMBED ICC IN LAW UNITS

While it would be good to be able to provide a comprehensive guide to other law schools embarking the ICC journey, it is clearly much too early for the ANU unit to provide any definitive pearls of wisdom. As an elective unit, its reach is quite limited and the aim of achieving universal coverage is not met. Reaching all law students can perhaps only be achieved by inclusion of ICC elements in the Priestly 11 or some other mandatory law-school-wide program. Although the authors of the Learning and Teaching Academic Standards Statement recognise that law is 'informed by many perspectives (including Indigenous perspectives)', the Teaching and Learning Outcomes for the LLB do not include ICC as a specific educational outcome.⁸³ What can be said is that taking up the UACC Report's challenge is itself a positive exercise.

The subject content is limited by the areas in which researchers are actually working. Therefore the rationale given above for limiting unit content to constitutional law, property law and international law might be a justification of the inevitable, given researchers' areas of interest, rather than a true objective and rational choice. Undertaking the process of rationalisation is nonetheless useful, as it creates opportunities for critique. In any event, it is necessary to have limited

⁸¹ *Special Research Initiative for an Aboriginal and Torres Strait Islander Researchers' Network* (05/11/12) <<http://www.arc.gov.au/ncgp/sri/atsim.htm>>.

⁸² Jane Kentmann, *New Indigenous Research Network* (16th November 2012) Indigenous Scholarships <<http://www.indigenousscholarships.com.au/resources/news/new-indigenous-research-network>>.

⁸³ Sally Kift, Mark Israel, Rachael Field, *Bachelor of Laws Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, 2010).

topics in order to get depth and not merely breadth. An enormous range of topics could be used, and it makes sense for teachers to choose ones they are researching in, can share their expertise about, and will be able to present to students in engaging ways by virtue of their own interest in and passion for the topic.

A shortcoming of the pedagogical method is that it is only likely to work with a small cohort because of its resource-intensive nature. As the unit matures and a body of critique and experience grows, perhaps novel means of expanding student numbers can be examined. The outputs of networks such as NIRAKN, which are producing books and journal articles, are also resources upon which ICC proponents can draw.

Finally, it is perhaps the collective knowledge of the experiences of the many law schools that will provide the substantive body of knowledge, experience and student responses which, when interrogated as a combined data-set, will provide better answers to the range of questions that need to be answered. In the meantime, articles such as this will hopefully find a critical audience to provide critique and feedback for improvement and help to develop both the content and the delivery of the ICC, at least to law students. UA aims for all disciplines to engage in ICC, and law students — many of whom are in joint programs across faculties — could provide a useful bridge and insight as to how the delivery of ICC can be expanded. The UACC Report gives examples of pilot projects in non-law areas and does provide general guidance for areas in the social sciences.⁸⁴

VII CONCLUSION

There is no agreed definition for ICC, but the UACC definition is a useful base which can be refined and adapted over time. One of the key objects of the ANU unit described in this article, and part of the development of students' ICC overall, is to give them an appreciation for the complexity of Indigenous ontologies, communities, laws and history. This is a broad and complex outcome and the assessment, as discussed above, was designed to elicit understanding of this body of learning.

Some of the cognitive outcomes are assessed by way of a research essay through which students can demonstrate a deeper understanding. In a period of just over a century Australia went from considering Indigenous people as 'fauna', to considering them full citizens, generally enjoying equal formal rights. Students, through their essays, ably demonstrate the implications of such change while recognising that achieving substantive equality is still some way in the future.

⁸⁴ UACC Guiding Principles, above n 4, 29.

The greatest drawback from the perspective of achieving ICC is that only a limited number of students can take up the unit. Broader coverage can only be achieved by incorporating ICC elements into the compulsory units. This is, however, a significant step and the faculty will require much more data from a range of universities' programs before it is seriously considered.

On the other hand, it comes a surprise to many mainstream students that there *is* a world outside the Constitutional liberalism which so shapes their lives — particularly with respect to the 'legal limbo' in which some Indigenous people live, a Constitutional twilight zone that permits drastic 'lawful' intrusion into their lives and communities, as occurred in the Northern Territory Intervention.⁸⁵ For some students it is the first realisation that legal and constitutional hurdles of the past *still* lie in the path of Indigenous peoples, say in achieving formal constitutional equality, let alone substantive equality. In her feedback one student described her 'Aaah moment', after which she found it easier to be either critical or sympathetic on Indigenous issues as necessary. The ultimate aim of the unit therefore, to cite this student, is to enable each student to reach their own 'Aaah' moment in this area. However, to expect an institution, or even one generation to do all that, it is necessary (to use the words of Olney J in another context) to 'wash away'⁸⁶ the historical tide of oppression — something that is probably quite unrealistic.

Yet there is reason for optimism, as students taking the unit are largely self-selecting, self-motivated, self-directed and eager to make a difference. In most cases, they are naïve enough to believe that they can individually make a difference, and probably clever and motivated enough to actually change their world through their legal careers. Therefore, harnessing this goodwill, youthful exuberance and desire for justice, and giving them the confidence and skills to engage with our open political system, is not an unrealistic aim. A greater level of confidence to deal positively and affirmatively with Indigenous peoples will further enhance their abilities and skills, already developed to high degree by an excellent law program. Not only arming students with knowledge and skills, but also fostering empathy and inspiring the desire and passion for change, is an important role that all universities can and must play in healing the lingering symptoms of the historic sore of Indigenous dispossession and discrimination.

⁸⁵ Jon Altman and Susie Russell, 'Too much 'Dreaming': Evaluations of the Northern Territory National Emergency Response Intervention 2007–2012', (2012) 3 *Evidence Base* <journal.anzsog.edu.au>.

⁸⁶ *Members of the Yorta Yorta Aboriginal Community v Victoria & Ors* [1998] FCA 1606 (18 December 1998), [129], (Olney J).