

# INDIGENOUS PEOPLE IN LEGAL EDUCATION

## STARING INTO A MIRROR WITHOUT REFLECTION

by Nicole Watson

Even though the experience a decade ago lasted for little more than a minute, it remains indelibly etched on my mind.

I was one of a few hundred students attending an administrative law class at the TC Beirne School of Law, University of Queensland. Our lecturer was recounting the facts of *Tickner v Bropho* (1993) 40 FCR 165. He explained that the case arose from an application for a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), to protect an area of land in Western Australia.

His face broke into a smile as he suggested that the land was sacred to Aboriginal people only because it once housed a brewery. At 19 years of age I lacked the confidence to confront a senior lecturer, so I recoiled in my seat and watched in horror as those around me descended into laughter.

I don't remember any other event from that day. I have no recollection of the inevitable tears that would have burnt my face, or the sullen journey home, but I often reflect upon how that brief moment of powerlessness defined my legal education, and how it continues to find resonance in my experiences as an academic.

Being a teacher of the legal system that facilitated the invasion of one's people, and remaining sane, is no easy feat. With each attempt to expose the law's façade of neutrality comes the risk of being dismissed as emotional and unprofessional. All too often, the price of survival is silencing the voice inside one's psyche.

In struggling to find expression for that tortured voice, I have drawn great strength from critical race theory ('CRT'). Engaging with powerful arguments from CRT scholars that the law is racially based has enabled me to view the legal academy through new lenses - those of a confident black woman.

In this paper I will draw on CRT to argue that racism is organic to the Australian legal system. Consequently,

legal education that consists almost entirely of black-letter law unavoidably propagates racism. It is manifest in the erasure of Indigenous voices from both the makeup of law faculties and the curriculum.

This paper will be divided into three parts. Part One will discuss the basic tenets of CRT and its relevance to Australia; Part Two will apply the principles of CRT to my previous employer, the QUT School of Law and Part Three will provide arguments in favour of reform.

### PART ONE: CRITICAL RACE THEORY

Critical race theory emerged in the 1970s from the embers of the civil rights movement. Founders such as Derrick Bell and Richard Delgado were concerned that gains of the previous decade were being eroded in the courts. Furthermore, 'colour-blind' justice, one of the hallmarks of the civil rights movement, was inept to respond to covert racism.

Drawing from the pioneering work of critical legal studies and feminist scholars, CRT argues that racism is not aberrant but pervasive.<sup>1</sup> Consequently the law always reflects the values of the dominant culture. Minority groups can only cause a ripple to the status quo when their interests converge with those of white society.

Bell has forwarded the thesis that the centrepiece of civil rights litigation, *Brown v Board of Education*,<sup>2</sup> was an example of 'interest convergence'.<sup>3</sup> Although celebrated for bringing about school desegregation, the decision also served the interests of American foreign policy. International attention on racial segregation was a liability for the United States during the Cold War.<sup>4</sup> According to Bell, this convergence of black and white interests was critical to the outcome of *Brown*.<sup>5</sup>

Another tenet of CRT is the use of narratives. Storytelling empowers minority academics by enabling them to inject their perspectives into legal scholarship. Predictably, the academy's response to CRT has largely been defensive. Narrative, in particular, has been accused of replacing 'emotion for logic' and 'perspective for the truth'.<sup>6</sup>

It is beyond the scope of this paper to debate the merits of recent criticisms of CRT. Rather, I propose to draw from CRT's intellectual toolbox in order to expose covert racism within Australian legal education. We will begin at the foundation of CRT, that is, the maxim that racism is pervasive.

## THE PIVOTAL ROLE OF RACE IN AUSTRALIAN LAW

Since the earliest days of the invasion, racism has fertilised the growth of Australian law. The racist distortion of the doctrine of terra nullius simultaneously justified the invasion and provided the roots for our land law. Race also determined when the rule of law was observed in the colonies and when it was suspended. Whereas white subjects received the protection of the rule of law, black subjects were murdered with impunity<sup>7</sup> and their lands seized without compensation.

Likewise, the absence of any definition of citizenship from the constitution was born not only out of reverence for parliamentary government, but a strong desire to preserve the State's power to deny citizenship rights to particular races.<sup>8</sup> The fledgling Commonwealth Parliament quickly flexed its exclusionary muscle by legislating to deprive Aborigines of the franchise in 1902.<sup>9</sup>

Racism continued to permeate the law throughout the twentieth century, in the form of apartheid legislation. The archetype of Australian apartheid legislation was the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld). Section 9 of the Act enabled the Minister for Native Affairs to detain any Aboriginal person on any reserve indefinitely.

Reserve inmates were not only forcibly removed from their traditional lands and condemned to a perpetual existence as refugees. They were also robbed of any semblance of personal autonomy. In its various guises the legislation deprived reserve inmates of the guardianship of their children,<sup>10</sup> the management of their income,<sup>11</sup> and the freedom to practice their religion.<sup>12</sup>

The Queensland Parliament consistently suffocated Aboriginal families with oppressive legislation until the early 1970s, when it began to formally disband apartheid. For example, the *Aborigines Act 1971* (Qld) finally provided an avenue for reserve inmates to seek the termination of the State's management of their property.<sup>13</sup>

As Australia became more precious of its international reputation in the 1970s, a series of Acts were passed to prohibit racial discrimination. In particular, the enlightened Whitlam Government implemented the International Convention for the Elimination of All Forms of Racial Discrimination, through the enactment of the *Racial Discrimination Act 1975* (Cth).

Have such measures however, purged the law's DNA of its racist genes? Most black people are intuitively aware that the answer is no. After all, it is our families who suffer the brunt of racially motivated exercises of police discretion, and the ever-shifting goal posts of the *Native Title Act 1993* (Cth).

Racism of today is subtler than the old days of apartheid. One means of illuminating racism in institutions such as law faculties is to ask whose cultural values find reflection and whose are invisible. I propose to answer both questions in relation to my former employer, the QUT School of Law. I have chosen to critique QUT because I believe that its disregard for cultural diversity is typical of Australian law schools.

## PART TWO: THE QUT SCHOOL OF LAW – A LAW SCHOOL FOR THE 'REAL WORLD'?

The QUT School of Law was established in 1977 in response to the perceived need for legal education that struck an even balance between the theoretical and practical.<sup>14</sup> It describes itself as 'a contemporary law school dedicated to providing students with the most current teaching and learning methods.'<sup>15</sup>

The Faculty's 2002 - 2003 annual report<sup>16</sup> attests to links with prosperous law firms.<sup>17</sup> Yet there is no recorded contact with the local Aboriginal Legal Service. Likewise, the Law Faculty Advisory Committee has strong representation from conservative elements of the profession, but not one Indigenous member.<sup>18</sup>

Despite its professed commitment to 'equity', the Law School does not currently employ any Indigenous staff. To the best of my knowledge it has only ever appointed one Indigenous academic since its inception. In June 2003 I received a fractional appointment as an associate lecturer that was of six months duration.

The experience of being the first Indigenous academic in the School, albeit brief, left an indelible impression on me. While I never experienced blatant racism, I constantly faced covert racism. Whenever I attempted to raise issues such as the University's Indigenous

Employment Strategy or cross-cultural awareness training for staff, colleagues rarely engaged. I could even tell when some of my more conservative peers had learnt of my Indigenous heritage: from thereon they spoke to me in staggered sentences, much like the manner in which adults chastise infant children.

Just as Indigenous people are largely invisible within the faculty, our voices are also excluded from the curriculum. To the best of my knowledge, the School has only ever offered one subject with substantive Indigenous content. The elective, *Indigenous People and the Law*, was taught for one semester in 1996.

That is not to say that Indigenous people make no appearance whatsoever in the curriculum. Drawing from Derrick Bell's theory of interest convergence, black people do emerge, but only when our meagre rights can be melded to the interests of the colonisers. For example, native title is taught to both undergraduate (LWB236 Real Property A) and postgraduate students (LWN095 Native Title Law and Policy). The emphasis of both courses is on providing students with a working knowledge of the *Native Title Act 1993* (Cth), presumably because such content is deemed to be useful to non-Indigenous land managers.

However, the historical forces that operate to deny the recognition of native title are of only peripheral relevance. Neither study guide, for example, refers to Queensland's former apartheid legislation. Consequently, students remain ignorant of one of the major reasons why so many Indigenous families cannot meet the onerous requirements of the *Native Title Act 1993* (Cth). Likewise, the human rights abuses perpetrated by the Bjelke-Petersen Government against Aboriginal communities do not warrant any mention. This is a huge omission given that such atrocities were an important catalyst for David and Goliath battles such as *Mabo*<sup>19</sup> and *Koowarta*.<sup>20</sup>

Although Indigenous culture is briefly discussed, it is predominantly through the voices of Europeans. As an example, the study guide for LWB236 Real Property A describes Aboriginal land relationships by largely drawing from the work of white anthropologists,<sup>21</sup> suggesting that 'genuine' Indigenous culture is static and confined to remote communities. Such exotic portrayals of Indigenous culture are not only offensive, they can also alienate Indigenous students from urban communities that have been spared the intrusive gaze of anthropology.

The above criticisms are not meant to suggest that those employed within the QUT School of Law are a pack of hateful racists, who deserve to be condemned to the pits of academic purgatory. However, they do counter any claims of objective legal education. Decisions to exclude Indigenous voices from both the makeup of the faculty and the curriculum are deliberate and political.

### PART 3: ARGUMENTS IN FAVOUR OF REFORM

Why should Indigenous perspectives be incorporated into the core curriculum? Why should law schools recruit Indigenous academics? Some of us believe that the immorality of academic racism in itself is a sufficient reason. Apart from immorality however, there are a number of arguments in favour of reform.

The first is that law schools will never be level playing fields until Indigenous students can see themselves reflected in their education. Harping back on my own experiences, law school offered few spaces in which I could survive. In order to protect my cultural values I had to bury them deep inside my psyche, and create a new persona that breathed only black-letter law. While I enjoyed the intellectual stimulation of law school, having to live with a split personality destroyed my self-esteem and hindered me from realising my full potential.

A second argument in favour of reform springs from the public responsibility of law schools. With their virtual monopoly over legal education, law schools have a profound obligation to ensure that the future profession can accommodate the legal needs of our entire society, including Indigenous communities. This important goal will never be achieved while the law school environment continues to alienate Indigenous students.

Furthermore, Indigenous legal scholarship has a great deal to offer to the academy. With graduates increasingly opting out of practice, there is a growing demand for new skills outside of the blunt instruments of black-letter law. New voices and perspectives may sharpen the analytical skills of our students. We may also produce graduates who are better citizens as a result of their legal education.

### CONCLUSION

I have decided to leave this article where I began - that fateful moment in my administrative law class. I no longer harbour bitterness towards my former lecturer, but I do feel pity. I feel pity for an individual who held

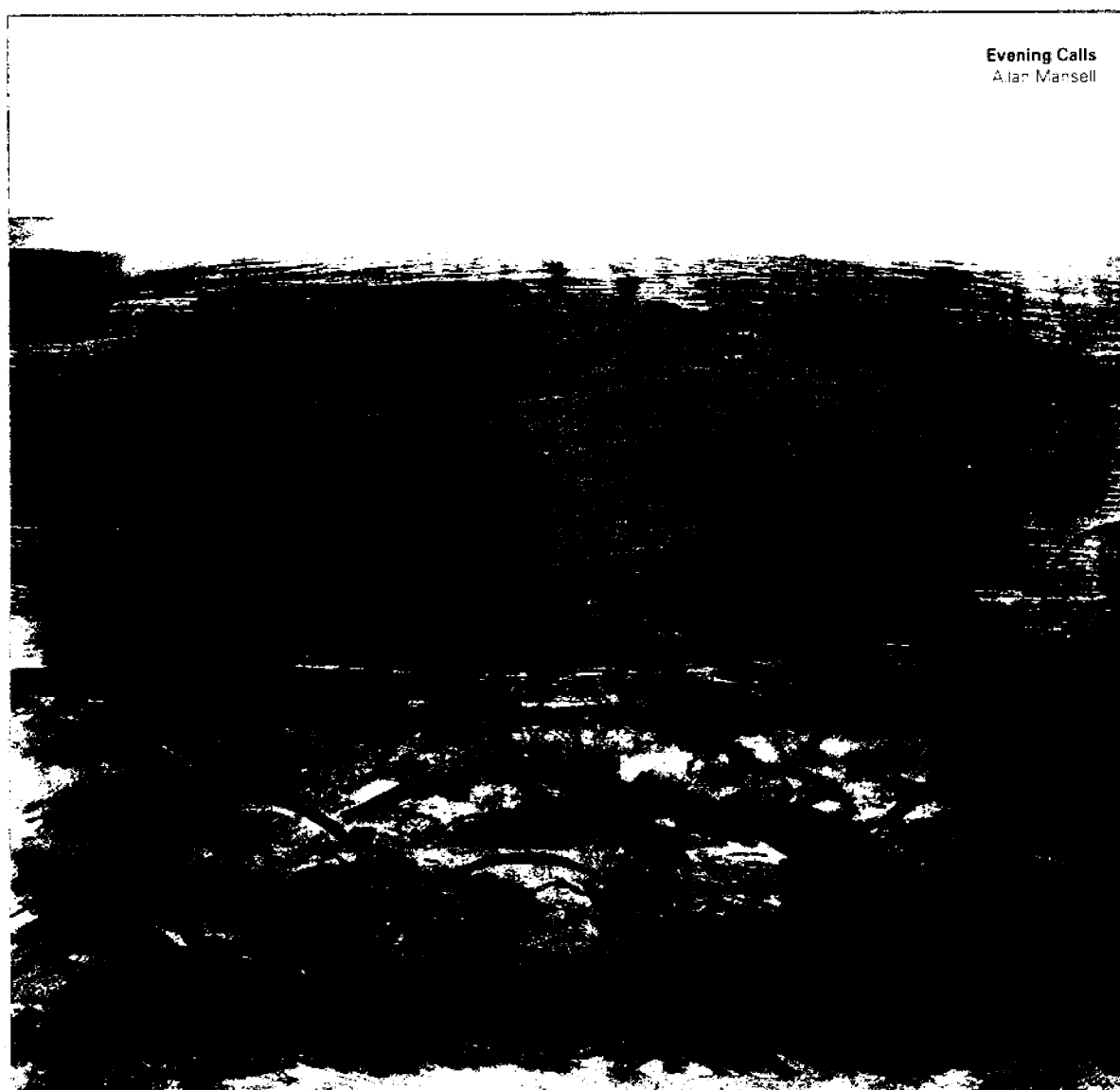
so much power and influence, yet was so fearful of difference and so careless in projecting that fear to his students.

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

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- 1 Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (2001) 7.
- 2 349 US 294 (1955).

- 3 Delgado and Stefancic, above n 1, 18.
- 4 Mary Dudziak, 'Desegregation as a Cold War Imperative' in Richard Delgado (ed), *Critical Race Theory: The Cutting Edge* (1995) 110.
- 5 *ibid* 111.
- 6 Robert L. Hayman Jr, 'Race and reason: The assault on critical race theory and the truth about inequality' (1998) 16 (11) *National Black Law Journal*.
- 7 Chris Cunneen, *Conflict, politics and crime* (1990) 60.
- 8 John Chesterman and Brian Gargan, *Citizens without rights* (1997) 79.
- 9 *Commonwealth Franchise Act 1902* (Cth) s 4 provided that 'No aboriginal native of Australia... shall be entitled to have his name placed on an Electoral Role unless so entitled under section forty-one of the Constitution'.
- 10 *Aboriginals Preservation and Protection Act 1939* (Qld) s 18(1).
- 11 *ibid* s 14(6).
- 12 *ibid* s 23.
- 13 *Aborigines Act 1971* (Qld) s 45(1).
- 14 QUT Faculty of Law Website, [www.law.qut.edu.au/about/index.jsp](http://www.law.qut.edu.au/about/index.jsp), accessed 3 September 2004.
- 15 QUT Faculty of Law Website, [www.law.qut.edu.au/about/benefits/](http://www.law.qut.edu.au/about/benefits/), accessed 3 September 2004.
- 16 Queensland University of Technology, Faculty of Law, *Annual Report* (2002).
- 17 *ibid* 28.
- 18 *ibid* 11.
- 19 *Mabo and others v Queensland (No 2)* (1992) 175 CLR 1.
- 20 *Koozearts v Combaradar* (2001) QSC 166.
- 21 QUT School of Law, *LNB236 Real Property A Study Guide* (2004) 69-73.



**Evening Calls**  
Alan Mansell

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## Contribute

The ILB welcomes articles from all interested contributors for any section of the magazine. In particular, Indigenous lawyers, paralegals and visual artists are encouraged to contribute their work for publication. Electronic submission is preferred.

## Articles

Language: To ensure accessibility to a broad readership, technical and jargonistic language must be simplified into plain English. Aboriginal English is an exception to this rule but where necessary, translations will be provided in addition to the original expression.

Style: Australian Guide to Legal Citation,  
<http://mulr.law.unimelb.edu.au/aglcdf.asp>

Word lengths (including footnotes): 1 page article 600; 2 page article 1300-1400; 3 page article 2000-2200; feature articles (maximum of 4 pages) 3000.

Articles may be subject to anonymous peer review.

## Art

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## EDITORIAL

Thirty years ago Indigenous people finally managed to penetrate that great bastion of colonial privilege, the practise of law. Students often flock to law school in search of wealth and status. While some Indigenous students are driven by the same motivations, most of us pursue legal careers so that we may be better equipped to fight for the rights of our people. Our early lawyers helped to build the Aboriginal and Torres Strait Islander Legal Services in the 1970s. Some were later elevated to the judiciary. Others are at the vanguard of the Howard Government's assault on Indigenous rights.

Despite the incredible achievements of the Indigenous legal fraternity, we remain largely invisible to the legal academy. Most Australian law schools are yet to employ an Indigenous academic. Our perspectives of the law are either excluded from the curriculum or marginalised in elective subjects.

In this special issue of the *Indigenous Law Bulletin*, we consider racism in legal education. In doing so, we have been fortunate to receive valuable contributions from a number of talented Indigenous academics. Dr Irene Watson reminds us of the crucial need for all law students to be exposed to Aboriginal knowledge. Loretta Kelly argues that law schools should recognise the expertise of Indigenous law academics, through opportunities to teach and publish on our unique perspectives of the law.

Hannah McGlade poignantly informs us that getting a guernsey is only the beginning of the battle to emancipate Indigenous people in legal education. Indigenous academics are frequently subject to both blatant and covert racism. We may also be discouraged from and in some cases even punished, for fulfilling our cultural obligations. While such pressures are incredibly challenging for Indigenous academics, they can be devastating for our students. In this vein, Phil Falk illuminates the multifaceted disadvantage that many Indigenous students strive to overcome in achieving academic success.

In this special issue we have also received valuable contributions from our non-Indigenous peers. Heather Douglas gives a frank and honest account of her experiences as a support person for Indigenous students and her transition from problematising the students to problematising the system. Sean Brennan and others from the University of New South Wales Law School reflect on different measures that have been taken in order to make legal education more accessible to Indigenous people. They also make the important point that such measures can be

highly effective when pursued in collaboration with Indigenous student support centres.

Finally, we have not attempted to provide a recipe book for creating spaces for the inclusion of Indigenous knowledge in legal education. Nor do we pretend that one exists. But the first step in any transformation is to begin a dialogue with our peers. Let the debate begin.

**Nicole Watson**

*Guest Editor*

## ARTIST'S NOTE

### Alan Mansell

Cover Art

#### Returning At Sunset

Allan Mansell was born on 7 May 1957. He lived in many parts of Tasmania, including the island communities of the Furneaux group in the Bass Strait. As a child, he and his family moved around Tasmania a great deal, following seasonal work such as mutton-birding, small fruit harvesting and various agricultural work. This was a common experience for Aboriginal children in Tasmania during the 1960s. Allan has lived on Bruny Island for the past 14 years where he has developed his artistic skills as a means of expressing his Aboriginality and love of the natural world. Before taking up study at the University of Tasmania, Allan was employed by Parks and Wildlife Service, Tasmania. He is currently studying for a Bachelor of Fine Arts where he is majoring in print making and studying painting. During this time he has exhibited extensively in both collaborative and solo exhibitions. His images have been used to promote cultural awareness within the wider community.

Allan says of his work:

*The artwork that I produce is unique in that the Tasmanian Aboriginal art culture has been lost in a short period of time. Consequently, the images that I create are my own. Because the culture which we had was stolen and discarded, I have to create my own symbols. I use my art to tell stories about my past, stories from my family and Elders. This artwork reflects my knowledge of the Tasmanian bush. Within my work a political context has emerged.*

Currently Allan exhibits full time at Art Mob in Hobart. His works are found in a number of key institutions and private collections, locally and overseas.

*Thanks to Art Mob for their assistance in obtaining artwork for this edition. For further information on Art Mob, see [www.artmob.com.au](http://www.artmob.com.au).*

## CONTENTS

### SPECIAL FOCUS EDITION:

#### RACISM IN LEGAL EDUCATION

Indigenous People in Legal Education:  
Staring into a Mirror without Reflection  
*by Nicole Watson* 4

Law School and the Indigenous Student Experience  
*by Phil Falk* 8

Indigenous Legal Education:  
Towards Indigenisation  
*by Heather Douglas* 12

The Day of the Minstrel Show  
*by Hannah McGlade* 16

A Personal Reflection on being an Indigenous Law Academic  
*by Loretta Kelly* 19

Some Reflections on Teaching Law:  
Whose Law, Yours or Mine?  
*by Dr Irene Watson* 23

Indigenous Legal Education at UNSW  
*by Sean Brennan, Deborah Healey, Jill Hunter,  
Dani Johnson, Mehera San Roque and Leon Wolff* 26

### REGULAR

News, Reviews and Events 30

Recent Happenings December 2004 31

Recent Happenings January 2005 32

### SPECIAL NOTE

*The Indigenous Law Centre extends their greatest sympathies to the family and friends of Gabrielle Pizzi who died in December 2004. Gabrielle 'was one of the driving forces behind a broader acceptance of Indigenous art. From the early 1980s, Pizzi argued that Aboriginal art was an integral part of the modern movement.'*

1 Obituary, Stylish Dealer Took Aboriginal Art to the World (Sydney Morning Herald (Sydney), 18 December 2004)

### THANK YOU

*Thanks to Roy Baker*