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INDIGENOUS STUDENTS AT LAW SCHOOL: COMPARATIVE PERSPECTIVES

ABSTRACT

Indigenous students face significant challenges in gaining admission to law school. General entry standards are exclusionary to the extent that they sustain historical stereotypes and fail to reflect the unique profile of indigenous students. It is argued that traditional equity initiatives should be supplanted with access programs that provide orientation for the study of law and formative assessment of both generic and discipline-specific skills such as literacy, comprehension, case analysis and research techniques. The latter stage of the program would be dedicated to applying acquired skills to certain key areas of substantive law. This model would provide greater predictive accuracy for successful transition to law school while affirming the distinct cultural identity of indigenous students.

I INTRODUCTION

This article considers the unique challenges facing law schools in certain post-colonial jurisdictions in respect of their policies regarding indigenous students.¹ This will principally focus on tertiary legal education in Australia, New Zealand and Canada.

Many indigenous students in these countries share similar backgrounds: poor socio-economic conditions, limited literacy skills, distinct world-views, an emphasis on oral traditions and exposure to a Eurocentric education system at variance with their own culture. For some, attending university is an alienating experience. All too often there are adverse consequences such as academic underachievement and poor retention rates.

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¹ See text at footnotes 12–17 for reference to the ethnic composition and definition of indigenous people in Australia, New Zealand and Canada.

These problems are compounded in law school. For indigenous students, learning to think like a lawyer represents an immersion in an institution that epitomises the dominant society and the values that maintain it. There is an inevitable tension between indigenous knowledge systems and the western intellectual tradition.² For such students, there is an ‘authenticity gap’ with fundamental legal constructs. For example, for indigenous peoples, the concept of property is often dissociated from notions of individual ownership and perceived holistically by reference to ideas that are not recognised by statute or common law. Similarly, the tenets of criminal law are understood from a different perspective. For instance, some Canadian First Nations cultures³ do not have a literal translation of the word ‘guilt’.⁴ And as a social phenomenon, criminal law may represent a negative factor in the lives of the students and their community.

Indigenous students may cynically regard formal legal education as an exercise in rationalising injustices. International law may be seen as a foundation for claims of sovereignty; constitutional law as legitimising the exclusion of indigenous peoples from full participation in civil society. In a similar vein, land law may be identified as the system that formalises the dispossession of their forebears.

In the last 30 years, much has been done to address historical grievances. Looking to the future, there are fundamental shifts in attitudes towards the role of indigenous students at law school. Tertiary education policies demonstrate a growing commitment to attract and retain indigenous students while affirming their distinct cultural identities.⁵ This article argues that the outcome of these initiatives depends on the way in which barriers to education are perceived and addressed by

² Some enlightening work on indigenous knowledge has been written by Portuguese legal sociologist Boaventura de Sousa Santos. See, eg, Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (Cambridge University Press, 2nd ed, 2002). See also, Enrique Díaz Álvarez, *Interview with Boaventura de Sousa Santos* (April–June 2011) Barcelona Metropolis <<http://w2.bcn.cat/bcnmetropolis/arxiu/en/page0b1a.html?id=22&ui=518>>.

³ “First Nations cultures” refers to Status and non-status “Indian” peoples in Canada. See, eg, <www.aadnc-aandc.gc.ca/eng>.

⁴ Patricia Monture, ‘Now that the Door is Open: First Nations and the Law School Experience’ (1990) 15 *Queen’s Law Journal* 179, 202–3.

⁵ For example, Maori student support initiatives at the Faculty of Law, University of Auckland, which affirm Maori identity and aspirations as an integral feature of the law degree programme. These initiatives include a Maori Law Students Association, a Maori Support Coordinator, Scholarships and awards for Maori students and information about Maori academics and successful career role models. Maori students receive ongoing academic support throughout their degree. See, eg, University of Auckland, *Maori Student Support* <<http://www.law.auckland.ac.nz/uoa/home/for-current-students/current-undergraduate-students/cs-maori-student-support>>. See also The University of New South Wales’ Pre-Law Program, which offers cultural and academic support to indigenous students prior to their undergraduate study in law. See Nura Gili, *Pre-Programs* (29 May 2014) University of New South Wales <<http://www.nuragili.unsw.edu.au/pre-programs-0>>.

tertiary institutions. Interventions are often well intentioned but limited. There is a need to look beyond a deficit model, which focuses on personal deficiencies of indigenous students, and to see the challenge in terms of an institutional response to the individual.

The orientation to the problem matters. From one perspective it can be said that special admissions policies denote a lowering of standards. Conversely, such policies can be characterised as expanding the selection criteria while supplanting measures that have limited predictive accuracy and reflect cultural bias. Much depends on the objectives to be achieved and framing the enquiry accordingly. If indigenous students are to enter law school with due recognition of their individual abilities, particular consideration must be given to access programs. These will be assessed and a model based on a nationally accredited program will be proposed in respect of law schools in Australia and New Zealand.⁶

II COMMON THEMES

Some statistics are sufficiently stark as to speak for themselves. Prior to 1990, only twenty-one LLB graduates were of Indigenous origin Australia-wide.⁷ Twenty years later, there were only three indigenous barristers on the bar roll in Victoria.⁸ In a similar vein, when the pre-law program at the University of Saskatchewan commenced in 1973, there were only four indigenous lawyers and five indigenous law students in Canada.⁹ In New Zealand, Maori comprise approximately 15 per cent of the population, but represent only 5.5 per cent of the legal profession.¹⁰ Similarly, when statistics were collected in 2010 from all New Zealand law schools,¹¹ Maori constituted eight per cent of the 2010 law graduates.

Such statistics reveal shared systemic problems. Indigenous students are significantly under-represented in law schools and only a limited number enter the legal

⁶ While Law Schools have a central role in developing these programs, such initiatives should be undertaken in conjunction with tertiary Indigenous Centres and Schools. This partnership is necessary to ensure that Indigenous perspectives on law and justice are appropriately addressed.

⁷ Heather Douglas, 'The Participation of Indigenous Australians in Legal Education 1991–2000' (2001) 24 *University of New South Wales Law Journal* 485, 488.

⁸ Michael Pelly, 'Victoria's Push for Indigenous Barristers', *The Australian* (online), 11 September 2009 <<http://www.theaustralian.com.au/business/legal-affairs/victorias-push-for-indigenous-barristers/story-e6frg97x-1225771722323>>.

⁹ University of Saskatchewan, *Program of Legal Studies for Native People: Quick Facts* <www.usask.ca/plsnp/plsnp-course/quick-facts.php>.

¹⁰ Rachael Breckon, 'Maori Under-Represented in Legal Profession' (2011) 781 *Lawtalk: Newsletter of The New Zealand Law Society* 1. According to the 2013 Census, 598,605 people identified as being part of the Maori ethnic group, accounting for 14.9% of the New Zealand population, while 668,724 people (17.5%) claimed Maori descent.

¹¹ Except Auckland University of Technology, which had not produced a graduating class at that stage.

profession. Indigenous students in Australia, New Zealand and Canada are disadvantaged in higher education. The same may be said of students from regional and remote locations, as well as those from low socio-economic backgrounds. Of course the connection can readily be made that indigenous students often fall into these categories as well.¹²

The term ‘indigenous’ requires elaboration because it is not necessarily descriptive of a distinct and homogenous ethnic group although there may be degrees of connection within that group. In Australia, an Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as being of Aboriginal or Torres Strait Islander origin and who is accepted as such by the community with which the person associates.¹³ This definition is widely accepted by Commonwealth and other government agencies for determining eligibility for certain programs and benefits.¹⁴ The Aboriginal and Torres Strait Islander population is approximately 669,900 (or three per cent of the total population).¹⁵

In New Zealand, according to the 2013 Census, 598,605 people identify as being part of the Maori ethnic group, accounting for 14.9 per cent of the New Zealand population, while 668,724 people, representing 17.5 per cent of the population claim Maori descent.¹⁶ This highlights the distinction between descent, as a biological concept, and ethnicity, which has a social and cultural base. In Canada, the term ‘Aboriginal Peoples’ embraces three groups: Indian (First Nations), Inuit and Metis,¹⁷ comprising 1,400,685 people or 4.3 per cent of the national population.

The task of identifying a target group requiring assistance in accessing tertiary education is overlain with subtle social and economic factors that are not readily quantifiable. For example, some members of identifiable ethnic groups may have assimilated in mainstream education at primary and secondary school and experienced no difficulties gaining admission to university and law school. Thus, the identification of membership of a particular ethnic group does not necessarily

¹² Ekaterina Pechenkina and Bradley Anderson, Department of Education, Employment and Workplace Relations, *Consultation Paper on Indigenous Australian Higher Education: Trends, Initiatives and Policy Implications* (September 2011) 5.

¹³ See, eg, Aboriginality or Torres Strait Islander Descent form issued by Indigenous Business Australia <www.iba.gov.au>.

¹⁴ See, eg, Aboriginality or Torres Strait Islander Descent form, *ibid.* See also, Australian Institute of Aboriginal and Torres Strait Islander Studies <www.aiatsis.gov.au/fhu/aboriginality.html>, and ‘What Works. The Work Program’ <www.whatworks.edu.au/1_1_1.htm>.

¹⁵ See Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Population Nearing 700,000* (30 August 2013) <<http://abs.gov.au/ausstats/abs@.nsf/latestProducts/3238.0.55.001Media%20Release1June%202011>>.

¹⁶ Statistics New Zealand, *2013 Census QuickStats About Maori* (3 December 2013) <<http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-maori-english/population.aspx>>.

¹⁷ *Constitution Act 1982* (Canada), s 35.

correspond with need for assistance. In the context of Maori, it has aptly been said that:

The issue of how to define Maori is inextricably linked to the issue of which Maori ought to benefit from public policy measures ... Maori is an ethnic group, not a socio-economic class ... an effective strategy, it seems, ought to take account of both ethnicity and need.¹⁸

Determining how, and on what basis, indigenous applicants from low-decile schools can be admitted to law school¹⁹ requires careful consideration, but it is evident that admission policy and wider access is only part of the issue. Once enrolled, indigenous completion rates are comparatively lower than those of non-indigenous students.²⁰ Strategies are therefore required to reinforce and enhance the academic experience. Ensuring a quality student experience and providing adequate support networks factor greatly in indigenous students' success in higher education. In short, the situation must be assessed holistically in terms of admission, retention and completion.

By way of illustration, in 2011, the retention rate in New Zealand universities for Maori and Pacific Island students was 71 per cent and 73 per cent respectively, compared with 79 per cent for other students. Further, the completion of tertiary qualifications by Maori and Pacific Island students was 62 per cent and 52 per cent respectively, compared to a general completion rate of 75 per cent.²¹ Mirroring these results, the retention rates for Australian Indigenous students are lower than their non-indigenous counterparts.²² The disparity in completion rates is dramatic. Over a five-year period (2005–10), 40.8 per cent of Aboriginal and Torres Strait Islander students enrolled in tertiary education completed a bachelors course. This compares with 68.6 per cent for non-Indigenous students over the same period.²³

¹⁸ Tahu Kukutai, 'Who Ought to Benefit? : From Defining Maori to Entitling Maori' in 'The Problem of Defining an Ethnic Group for Public Policy: Who is Maori and Why Does it Matter?' (23 December 2004) *Social Policy Journal of New Zealand Te Puna Whakaaro* <<https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj23/23problem-of-defining-an-ethnic-group-for-public-policy-who-is-maori-and-why-does-it-matter-p86-108.html>>.

¹⁹ See text to footnote 71 onwards for discussion of different pathways to Law School.

²⁰ See text above to footnotes 16–18.

²¹ Tertiary Education Commission (NZ), *About Universities* (6 September 2012) <www.tec.govt.nz>

²² In 2010, 63.4 per cent of Australian indigenous students who were studying at university in 2009 were still enrolled. This retention rate compares with 79.8 per cent for non-indigenous students. See Larissa Behrendt et al, Department of Industry, Innovation, Science, Research and Tertiary Education, *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People Final Report* (July 2012) 8.

²³ *Ibid.* Similarly, for discussion of completion rates for Canadian indigenous students, see, eg, Kerry Peacock, 'Setting a New Course for Aboriginal Education', *National Post* (Canada), 1 June 2012, 2.

The case for greater representation of indigenous students at tertiary institutions is a common refrain. In its *Tertiary Education Strategy 2010–2015*,²⁴ the New Zealand Ministry of Education acknowledged that the tertiary education sector should respond to the diverse needs of all groups. The ministry stated that this may require targeted services to create an inclusive environment for those who might otherwise languish on the margins.²⁵ Certain cohorts with low completion rates, such as Maori and Pacific Island students,²⁶ are likely to need tailored support to reverse these outcomes.²⁷ The Australian Department of Industry, Innovation, Science, Research and Tertiary Education has also expressed the view that under-representation of Indigenous Australians in higher education means that their significant and unique perspectives are not shared in lecture theatres or reflected in research output.²⁸ The point has been forcefully put that diversity in law schools fulfils a need for non-European insights in legal education.²⁹ This provides a valuable comparative perspective and tests established understandings from a different social and cultural reference point. More broadly, successful performance by all sectors of the community is conducive to better economic outcomes for the whole of society. The Canadian Centre for the Study of Living Standards estimates that more than CAD\$170 billion could be added to Canada's economy by 2026 if Indigenous Canadians achieved the same education levels as the wider community.³⁰ Countries with educated populations are the most productive and competitive in the international marketplace where, increasingly, tertiary qualifications are prerequisites for participation in the 'knowledge economy'. From a negative perspective, there are obvious economic and fiscal costs associated with lower outcomes for Indigenous people in higher education, as evidenced by disproportionate levels of dependency on government support.³¹

III TENSION BETWEEN INDIGENOUS KNOWLEDGE SYSTEMS AND WESTERN INTELLECTUAL TRADITION

A common feature of public education in Australia, New Zealand and Canada is a tension between indigenous knowledge systems and western intellectual tradition. The former may be shrouded in secrecy and only conveyed within the narrow

²⁴ Ministry of Education, *Tertiary Education Strategy 2010–2015* (22 December 2009) <<http://www.minedu.govt.nz/NZEducation/EducationPolicies/TertiaryEducation/PolicyAndStrategy/TertiaryEducationStrategy.aspx>>.

²⁵ *Ibid* 6.

²⁶ "Pacific Island students" refers to students identifying with the indigenous peoples of the Pacific Islands.

²⁷ Ministry of Education, above n 24, 6–7.

²⁸ Behrendt et al, above n 22, 4.

²⁹ Hugh MacAulay, 'Improving Access to Legal Education for Native People in Canada: Dalhousie Law School's IBM Program in Context' (1991–92) 14 *Dalhousie Law Journal* 133, 137.

³⁰ D'arcy Levesque, 'Why Aboriginal Education is Our Business', *The Globe and Mail* (online) (Canada), 21 June 2011 < <http://www.theglobeandmail.com/globe-debate/why-aboriginal-education-is-our-business/article583799/>>.

³¹ Behrendt et al, above n 22, 4.

confines of kinship or family relationship. Knowledge may be expressed as an oral tradition, transmitted through specific elders, in language and syntax that is unique to that particular culture.³² The cyclical and holistic philosophy of most native communities contrasts with the linear philosophy of western society. When indigenous students are taught the fundamentals of the legal system, they confront values that are at variance with their own beliefs and systems. This requires adaption. It takes time and a refocusing of thoughts by the academy as well as by Indigenous students, to recognise that in studying law, Indigenous students are learning another language and another code.³³

Concepts of property law, for example, can present challenges that are not immediately apparent to the wider community. It may be difficult for indigenous students to reconcile their personal understandings with the formalised concepts of estates, title and interests in land. For Canadian First Nation People, land belongs not only to those presently living but also to past and future generations. In some value systems, the land also belongs not only to humans but also to other living beings.³⁴ Thus, fundamental beliefs as to the nature of property may be a source of conflict with Western political and legal traditions. This is evident in respect of claims to native title and recognition of indigenous customary law.³⁵ Again, for Maori students, discussion of the New Zealand Constitution and the Crown's relationship to the Treaty of Waitangi³⁶ can be a highly charged and politicised issue.³⁷

With this background in mind, the task of learning the fundamentals of a legal system is certainly more difficult if law teachers assume that all students have a shared set of values and cultural experiences.³⁸ Even traditional competency-based learning with prescribed minimum pass grades may require explanation to some indigenous groups for whom complete mastery is required before further levels of learning can be undertaken. Here, indigenous students may need reassurance that 50 per cent is a sufficient basis to continue studies in a law degree.³⁹ It is commonly reported that success in tertiary studies is linked to experiences in which tertiary educators create

³² Asmi Wood, 'Law Studies and Indigenous Students' Wellbeing: Closing the (Many) Gap(s)' (2011) 21 *Legal Education Review* 251, 256.

³³ Even the primary written and spoken language of indigenous students may have a bearing on their transition to the discipline of law. A review of native legal education conducted by the Canadian Department of Justice in 1977 revealed that students who spoke a native language as a first language were less likely to succeed. See also MacAulay, above n 29, 139–40.

³⁴ Donald Purich, 'Affirmative Action in Canadian Law Schools: The Native Student in Law School' (1986–1987) 51 *Saskatchewan Law Review* 79, 83–4.

³⁵ Phil Falk, 'Racism in Legal Education Special — Law School and the Indigenous Student Experience' (2005) 6(8) *Indigenous Law Bulletin* 8, 10.

³⁶ Treaty of Waitangi, New Zealand, 6 February 1840.

³⁷ Stephanie Milroy, 'Part 1: Biculturalism and the Founding of Waikato Law School' (2005) 8(2) *Yearbook of New Zealand Jurisprudence* 173, 192–3.

³⁸ *Ibid* 192.

³⁹ Wood, above n 32, 256.

effective links between university studies and the cultural background of minority groups.⁴⁰ The *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People Final Report* (2012) identifies cultural recognition as a pivotal factor in achieving favourable outcomes for indigenous tertiary students.⁴¹ If indigenous people feel that they are in a culturally safe environment, they are likely to remain at university and aspire to the ideals of that institution.

IV LAW AND INDIGENOUS SOCIETIES

It is not uncommon for indigenous people to have negative perceptions of law and the administration of justice. For successive generations, the legal system may seem foreign and inaccessible, while lawyers are regarded as representatives of the dominant society and its values. With few native judges, lawyers or police officers, the justice system in all its manifestations seems an essentially non-native institution.⁴² The absence of role models or accessible representation compounds this sense of alienation.

Clearly, law schools are pivotal in influencing this state of affairs. Law schools are the gatekeepers of legal education and ultimately, the legal profession itself.⁴³ Law schools are the breeding ground for future leaders in many fields,⁴⁴ and the success of Indigenous graduates has positive outcomes, not least because they serve as exemplars to their particular communities. With increasing enrolment of indigenous students and programs that acknowledge their cultural perspectives,⁴⁵ indigenous people are beginning to regard law as a tool for protecting and enforcing their rights. Similarly, increased representation of indigenous people in the legal system engenders greater respect for both the system and its place in society. For example, where indigenous people hold judicial office there is greater acceptance by their community of the role of courts and their decisions.⁴⁶ Until indigenous people are proportionately represented in the legal profession, it cannot be said that the

⁴⁰ Airini et al, 'Success For All: Improving Maori and Pasifika Student Success in Degree-Level Studies' (Milestone Report 8, Auckland Uniservices Ltd, 21 December 2009) 17.

⁴¹ Behrendt et al, above n 22, 143.

⁴² Ibid. See also Purich, above n 34, 84.

⁴³ Charles Smith, 'Who is Afraid of the Big Bad Social Constructions? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession' (2008) 45 *Alberta Law Review* 55, 63.

⁴⁴ MacAulay, above n 29, 135. MacAulay observes that the close relationship between the legal profession and political office is clearly apparent in Canada where lawyers are strongly represented in the ranks of Members of Parliament, Cabinet Ministers and Provincial Premiers.

⁴⁵ For example, in March 2013 the University of Western Australia announced a new indigenous law pathway to the JD program through an Advanced Diploma in Indigenous Legal Studies. See, eg, University of Western Australia, *New Indigenous Law Pathway Launched* (4 March 2013) <<http://www.news.uwa.edu.au/201303045456/events/new-indigenous-law-pathway-launched>>.

⁴⁶ MacAulay, above n 29, 136.

profession is properly representative of the people it serves.⁴⁷ Thus, the availability of more indigenous lawyers could be conducive to assisting the disproportionate number of indigenous people who are in conflict with the criminal justice system.

V FORMAL BASIS FOR MODERN OBLIGATIONS TO INDIGENOUS STUDENTS IN TERTIARY EDUCATION

Australia, New Zealand and Canada are committed to furthering the academic success of indigenous students in tertiary education. This is sometimes expressed as a formal obligation of the state and affirmed as institution-specific goals. In New Zealand, the Treaty of Waitangi provides a formal basis for obligations to indigenous students.⁴⁸ In the last decade or so, these obligations have become more expansive. In the process, public dialogue on the fulfilment of educational aspirations has become more focused.

For many years the Treaty was applied only to physical resources. However, following the Royal Commission on Social Policy in 1988,⁴⁹ a case was made for the Treaty to be recognised in social, environmental and economic policies. From this perspective, developments in tertiary education can be seen as part of a wider set of reforms.⁵⁰ Article 3 of the English version of the Treaty states that ‘in consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her Royal protection and imparts to them all the Rights and Privileges of British subjects’. This raises the question as to whether this language encompasses social rights. Modern theories of citizenship suggest such a link.⁵¹ While the scope of art 3 is susceptible to varied interpretations, it has been argued that the provision contemplates the enjoyment of social benefits and that there should be equitable access to such benefits for all members of society. Extending this argument, it has been asserted that the Treaty was an instrument for positive development of the Maori community. It was not envisaged that Maori would become an underclass in their own land and therefore policies should be developed which assist legitimate social aspirations. Central to this thesis is equality of educational opportunities.⁵²

This is affirmed in the *Education Act 1989* (NZ), which imposes a duty on the council of tertiary institutions to acknowledge the principles of the Treaty of Waitangi. The obligation falls within a broader gamut of fostering the educational potential of all sectors of society, with particular emphasis on groups that are under-represented.⁵³

⁴⁷ Pelly, above n 8.

⁴⁸ As some commentators observe, irrespective of Treaty obligations, government policies and programs that target Maori can also be understood from a social justice perspective. See Mason Durie, ‘Indigenous Higher Education: Maori Experience in New Zealand’ (Address to the Australian Indigenous Higher Education Advisory Council, Canberra, 1 November 2005) 5–6.

⁴⁹ *Report of the Royal Commission on Social Policy* (1988) (NZ).

⁵⁰ Durie, above n 48, 6.

⁵¹ Mark Barrett and Kim Connolly-Stone, ‘The Treaty of Waitangi and Social Policy’ (1998) 11 *Social Policy Journal of New Zealand* 29, 32.

⁵² *Ibid.*

⁵³ *Education Act 1989* (NZ) s 181(b)–(d).

In addition to Indigenous rights derived from the Treaty of Waitangi, the *New Zealand Bill of Rights Act 1990* (NZ) (*‘Bill of Rights Act’*) and the *Human Rights Act 1993* (NZ) (*‘Human Rights Act’*) seek to redress social disparities. Both Acts are informed by principles of international law and provide for affirmative action to assist marginalised groups.⁵⁴

In Australia, federal government policy reflects a similar commitment to indigenous students. The National Aboriginal and Torres Strait Island Education Policy espouses equality of access to education services and equity of educational participation to Aboriginal and Torres Strait Islander people.⁵⁵ This extends to post-secondary schooling, including higher education.⁵⁶ These goals lay the foundation for the aspirational objective of achieving equitable educational outcomes whilst affirming the value of indigenous cultures. The objective of Major Goal 4 is to:

enable Aboriginal and Torres Strait Islander students to attain the same graduate rates from award courses in ... higher education, as for other Australians and also to provide all Australian students with an understanding of and respect for Aboriginal and Torres Strait Islander and contemporary cultures.⁵⁷

The Higher Education Participation and Partnerships Program (Australia) (*‘HEPPP’*) promotes these objectives by providing financial incentives to tertiary institutions to develop strategies that improve access to undergraduate courses for people from low socio-economic backgrounds. The key aim is to increase enrolment to accredited courses and support the retention and success of the students.⁵⁸ Within this framework, funding is provided to assist universities, in partnership with other organisations, to raise the aspirations of particular groups with respect to higher education.⁵⁹ The program encourages a coordinated approach by the participating institutions and the concentration of resources to most effectively target communities where matriculation to universities has historically been low. To further these objectives, the 2012–13 federal budget allocated AUD\$50 million to the HEPPP to support innovative approaches for fostering success in tertiary education for disadvantaged students, with particular emphasis on Aboriginal and Torres Strait Islanders.⁶⁰

The *Canada Act 1982 (UK)* c 11, sch B pt I (*‘Canadian Charter of Rights and Freedoms’*) proclaims a similar intent in respect of affirmative action programs⁶¹

⁵⁴ *Human Rights Act 1993* (NZ) s 73. *New Zealand Bill of Rights Act 1990* (NZ) s 19(2).

⁵⁵ Department of Education, Employment and Workplace Relations, *National Aboriginal and Torres Strait Islander Education Policy* <<http://deewr.gov.au/Indigenous/Schooling/Policyguidelines/Pages/aep.aspx>>

⁵⁶ *Ibid* Major Goal 2.

⁵⁷ *Ibid* Major Goal 4.

⁵⁸ *Ibid* Component A.

⁵⁹ *Ibid* Component B.

⁶⁰ Department of Industry, Innovation, Science, Research and Tertiary Education, *Higher Education Participation and Partnership Program* <www.innovation.gov.au>.

⁶¹ See discussion in text below under ‘Special Admission Schemes’, regarding the legal status of affirmative action programs.

for disadvantaged individuals or groups.⁶² The Charter is interpreted in a manner consistent with the multicultural heritage of Canadians.⁶³ It does not specify indigenous peoples as such, although they may fall in the category of disadvantaged groups. By extension, it has been argued that the Charter should be construed as making access to education a basic human right.⁶⁴

Finally, the statutory and policy initiatives adopted in Australia, New Zealand and Canada are consistent with, and generally reflect, the United Nations Declaration on the Rights of Indigenous Peoples.⁶⁵ Article 21(1) declares that ‘Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education’.⁶⁶

VI SPECIAL ADMISSION SCHEMES

Law schools in New Zealand, Australia and Canada have almost universally adopted equity initiatives for indigenous applicants. Although controversial, it is unlikely that the legality of this form of affirmative action can be impugned as offending anti-discrimination or equality legislation. For example, the Canadian *Charter of Rights and Freedoms* states that equality provisions do ‘not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin’.⁶⁷ Again, s 8(1) of the *Racial Discrimination Act 1975* (Cth) permits special measures taken for the sole purpose of securing the adequate advancement of Indigenous people.⁶⁸ Similarly, s 73 of the *Human Rights Act 1993* (NZ) provides that anything done or omitted which would otherwise constitute a breach of the Act shall not constitute a breach if it is done or omitted in good faith for the purpose of assisting or advancing persons or groups who need assistance or advancement in order to achieve an equal place with other members of the community.⁶⁹

It has been recognised that equity initiatives are necessary to counteract the social exclusion of minorities from professional schools.⁷⁰ Proponents cite public policy

⁶² *Canadian Charter of Rights and Freedoms*, s 15(2).

⁶³ *Ibid* s 27.

⁶⁴ MacAulay, above n 29, 138–9.

⁶⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007). See <un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

⁶⁶ *Ibid*.

⁶⁷ *Canadian Charter of Rights and Freedoms*, s 15 (2).

⁶⁸ *Gerhardy v Brown* (1985) 159 CLR 70. For a recent discussion, see *Maloney v The Queen* [2013] HCA 28.

⁶⁹ *Human Rights Act 1993* (NZ), s 73 (1) (a) and (b). See also *New Zealand Bill of Rights Act 1990*, s 19 (2).

⁷⁰ Jennifer Reid, ‘Barriers to Maori Student Success at the University of Canterbury’ (MA thesis, University of Canterbury, 2006) 117.

objectives that define successful educational outcomes in broader social terms. For example, it may be equally meritorious to admit students who will help institutions to achieve their public goals in providing future societal leaders from across a spectrum that reflects a nation's ethnic composition.⁷¹ It can also be argued that traditional entry standards preserve historical stereotypes that are typically European and male. Insofar as such standards define the norms for admission, they perpetuate an exclusionary model in respect of indigenous students.⁷²

While special admission schemes may be perceived as lowering traditional assessment standards, from another perspective, such policies serve to expand the evaluation criteria. With reference to Canadian law schools, traditional measures, such as the Law School Admission Test ('LSAT'), may have limited predictive accuracy with respect to students from a minority background. Most Canadian law schools have both general and discretionary admission categories. Academic performance and LSAT scores are the primary determinants for the general category, while other factors such as work experience or community service may be relevant to the discretionary category. The latter acknowledges that the social and educational experiences of indigenous students may differ significantly from the majority of applicants. Quotas introduced in the last 30 years or so reflect the demography of a changing society.⁷³ For example, in 1989, Dalhousie University established the Indigenous Blacks and Mi'kmaq Initiative ('IB&M program') to address perceived structural and systemic discrimination in respect of the named groups.⁷⁴ The IB&M program amended the admission category for disadvantaged applicants by including a number of places for native and black people in proportions broadly reflective of their population. Such initiatives reinforce the desire for equality in a pluralistic and multicultural society. A wide range of information is considered in order to gain an understanding of an applicant's potential. This affirms the need for a more tailored assessment of ability to succeed in academic study.⁷⁵

⁷¹ Durie, above n 48, 8–9.

⁷² Monture, above n 4, 193. In the years since this article was published, it is undoubtedly the case that most Law Schools have ceased to perpetuate the male myth in respect of law and the legal profession, and a gender balance in Law Schools is now the norm.

⁷³ The legality of equity schemes, such as quotas, as a vehicle for affirmative action is discussed above in the text to footnotes 52–69. It must also be acknowledged that this is a highly charged political issue. See, eg, Sara Hudson, 'Better Schooling, Not Uni Quotas', *The Australian* (online), 2 October 2012 <<http://www.theaustralian.com.au/opinion/better-schooling-not-uni-quotas/story-e6frg6zo-1226486129813#>>.

⁷⁴ Dalhousie University Schulich School of Law, *The Indigenous Blacks & Mi'kmaq Initiative* <http://www.dal.ca/academics/programs/professional/law/how_do_I_apply/the-indigenous-blacks---mi-kmaq-initiative.html>.

⁷⁵ For example, the University of Waikato's Admissions Committee assesses academic qualifications, relevant work experience and non-tertiary qualifications where there are no formal tertiary qualifications. See University of Waikato, *Maori @ Te Piringa-Faculty of Law* (7 January 2013) <www.waikato.ac.nz/law/maori>. For discussion of the early years of the program see Margaret Wilson, 'The Making of a New Legal Education in New Zealand: Waikato Law School' (1993) 1 *Waikato Law Review* 1.

Special admission schemes have also proliferated in Australia. The extent of such schemes is evidenced by the fact that in 2010, only 47 per cent of Aboriginal and Torres Strait Islander students entered university on the basis of prior educational attainment, compared with 83 per cent of non-Indigenous students. Thus, over half of the indigenous students gained entry through enabling or special entry programs.⁷⁶ New Zealand Law Schools offer targeted admission schemes for Maori and Pacific Island students. For example, the University of Auckland Law School admits 32 eligible Maori students to Law Part II under this scheme⁷⁷ and Victoria University of Wellington Law Faculty allocates up to 10 per cent Maori students into 200-level law courses under the Maori Admissions Process.⁷⁸

VII ACCESS PROGRAMS

A criticism of special admission schemes is that they tend to supplant traditional academic criteria with standards that are more general and impressionistic. Access programs⁷⁹ are a preferable means for determining the basis of entry to Law School. Opinions are divided as to the primary purpose of such programs. On one model, access programs assist indigenous students to develop skills necessary to undertake tertiary studies in law. Prospective students gain familiarity with the unique academic and pedagogical orientation of law school, thereby easing the transition to the first year of a law program.⁸⁰ An alternative view is that the function of access programs is to assess and screen applicants for admission to law school. Clearly, the objectives of each differ. One law academic, who clearly subscribed to the former, complained:

the problems I see with the programme arise from its nature as a screening programme. I had envisaged it as a headstart programme designed to help

See also discussion of admission programs at The University of New South Wales: Sean Brennan et al, 'Indigenous Legal education at UNSW: A Work in Progress' (2005) 6 *Indigenous Law Bulletin* 26, 27.

⁷⁶ Behrendt et al, above n 22, 7–8.

⁷⁷ University of Auckland, Faculty of Law, *Targeted Admission Scheme (Maori)* <<http://www.law.auckland.ac.nz/uoahome/for/current-students/current-undergraduate-students/cs-maori-student-support/targetedadmissionschememori>>.

⁷⁸ Victoria University of Wellington, *Faculty of Law Undergraduate Prospectus 2013* (9 January 2014), 17 <<http://www.victoria.ac.nz/law/study/undergraduate/selection-criteria#maori>>.

⁷⁹ Special Admission Schemes permit entry to degree programs with lower formal academic standards. In contrast, access programs as discussed in this article, are achieved by means of a dedicated course. Alternative models for access programs are discussed below.

⁸⁰ The University of New South Wales Nura Gili Pre-Program in Law is a good example of this model. This is an intensive 4-week residential preparatory course that provides an introduction to university life and the study of law within that environment. The course content includes an introduction to legal process, Aboriginal legal issues, Criminal Law, Legal Writing and Academic Skills. See further Nura Gili, above n 5.

people who would be entering law school at a competitive disadvantage to overcome that disadvantage. I know that the programme attempts to carry out both functions, but I think they are incompatible and the screening function comes to predominate. It results in the students being overworked and over-examined and therefore confused rather than gradually introduced to the concepts they will be using in law school.⁸¹

The function of access programs was strongly contested between different interest groups in the early days of the Dalhousie IB&M program. The Mi'kmaq community advocated that the program should be a vehicle for screening and evaluation, while the African Nova Scotian community considered that it should provide an orientation and preparation for law school. The latter argued that the program should not present a further hurdle to admission.⁸²

In addition to defining the purpose of access programs, there is also the issue of appropriate course content. The main options are either to focus on the elements of legal method and the inculcation of discipline-specific skills, or to provide a basic grounding in substantive law. Opinions are divided as to the merits of a content-based model focused on the national legal system and basic areas of law as opposed to a skills-based model directed to legal research and writing, interpreting primary legal materials, problem solving and critical thinking.⁸³ The latter model in particular encourages students to think and express themselves like lawyers.⁸⁴ These considerations will be developed in the next section where it is proposed that existing access programs should be reappraised and extended in scope and objective.

VIII PROPOSED MODEL

There is divergence in the form and content of access programs for indigenous students. Some are directed to skills preparation while others introduce one or more areas of substantive law. Most offer both. For example, the University of New South Wales pre-law program teaches both skills (academic skills and legal writing) and substantive law (through the courses Introduction to Legal Process, Aboriginal Legal Issues and Criminal Law). The University of Western Australia's Advanced Diploma in Indigenous Legal Studies combines both introductory law units taught

⁸¹ Purich, above n 34, 96.

⁸² Richard Devlin and Wayne MacKay, 'An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Program at Dalhousie Law School' (1991–1992) 14 *Dalhousie Law Journal* 296, 316–17. The article records that a compromise was struck whereby the primary focus was orientation to law, but with an assessment on a pass/fail basis.

⁸³ Brennan et al, above n 75, 27. See also the University of Saskatchewan's program for Native students as discussed below. See University of Saskatchewan, *Program of Legal Studies for Native People* <www.usask.ca/plsnp/>.

⁸⁴ Mel Thomas and Brett Farmer, 'Indigenous Law Students at the University of Western Australia' (2005) 6 *Indigenous Law Bulletin* 16, 17.

by the Faculty of Law, and Indigenous Knowledge, History and Heritage units taught by the School of Indigenous Studies.⁸⁵

There are two basic aspects to the overall objectives of such programs. Some are primarily intended to prepare students for law school by providing orientation, support and assistance with the techniques of study. Other programs serve the additional function of assessing and quantifying abilities for the purpose of admission to law school. Some programs are institution-specific, with students being offered a place at a particular law school. In limited cases, successful completion of an access program is recognised more widely, enabling students to enter a number of other law schools. The University of Saskatchewan Program of Legal Studies for Native People is notable in this regard.⁸⁶ The program was the first formal development of legal education for First Nations People in Canada. One of its proclaimed goals is to assess the capacity of native students to perform successfully in Canadian law schools.⁸⁷ Teaching is centred on methodology and skill development rather than substantive law and includes training in fundamentals such as reading and writing.⁸⁸

Features of this program should be expanded to create an access scheme that serves all national law schools. Realistically, with respect to the jurisdictions under review, this would mean one scheme applicable to Canada and another that would serve Australia and New Zealand. It may be too ambitious to propose an Australasian-wide scheme, but a separate program for each of Australia and New Zealand may be a realistic goal. This will now be explored.

A nationally accredited access program would provide a number of advantages over the present, disparate, systems. It would foster student mobility by providing transferability within the country, enabling students to attend their local, or nearest university and to undertake their law studies while enjoying the same access privileges to law schools further afield. The advent of a nationally-recognised access program with uniform standards would support that transferability. Moreover, in view of the duration of the course and the element of summative assessment, it would be appropriate to award a Certificate of Proficiency in law to those who

⁸⁵ See also Murdoch University Pre-Law Alternative Entry Course, which includes an intensive library tutorial session and substantive law (introduction to the Australian Legal System and Law of Contract). Pre-law programs may teach skills required for the study of Law through a particular law course or courses. See, for example, the University of Saskatchewan Program of Legal Studies for Native People, which teaches legal reading, writing and analysis using first-year property law as subject material.

⁸⁶ The program is conducted by the Native Law Centre, which is a department of the College of Law.

⁸⁷ The program is available to Native students who have been conditionally accepted in a Canadian Law School, with acceptance subject to successful completion of the program.

⁸⁸ See also University of Saskatchewan Program of Legal Studies for Native People, above n 83.

attain a prescribed minimum standard. This would provide a qualification for those who do not proceed to law school and may assist entry into the legal profession at an administrative level, for example, as a legal assistant. The program would require the suggested period of three months full-time study because it would not be limited to an orientation of law as an academic discipline. An essential component, as discussed below, would be skills testing through formal summative assessment. By replicating conditions and challenges of law school, the program would provide a measure of predictive accuracy for future undergraduate law studies. The simple and undeniable fact is that law school is a competitive environment and the syllabus is defined by examinations as well as formative evaluations. It is therefore appropriate to confront these realities and factor them into an assessment of aptitude for studying a law degree.

The proposed model would consist of a nationally accredited program conducted by specified law schools. The development and implementation of these programs should be undertaken in partnership with tertiary Indigenous Centres and Schools, which have particular insight into the diversity of indigenous students' educational and cultural backgrounds and their needs. Given the geographical size and number of law schools in Australia, it would be necessary for a core of law schools to offer the program, with perhaps one participating institution in Western Australia and a minimum of one in each of Queensland, New South Wales, Victoria and South Australia.⁸⁹ The objective would be to provide an accredited course for indigenous students that would be recognised by all Australian law schools. The same would apply in New Zealand. There are six law schools in New Zealand, with four in the North Island and two in the South Island. Ideally, the North Island and the South Island would each host at least one participating law school. Students who attain a specified standard would have a transferable qualification that is recognised in all law schools.

It is proposed that a nationally accredited program would be an intensive, full-time, three-month course comprising two stages. The first, lasting two months, would be exclusively skill based, directed to literacy skills, essay writing, comprehension exercises, introduction to legal method, case analysis, research techniques and interpretation of legal materials. Teaching and learning should be reinforced by regular formative assessment and progress should be monitored by summative tests, ideally every two or three weeks. It is important that those experiencing difficulties are identified at the earliest possible stage so that additional assistance can be provided. Each student's performance throughout the program should be assessed by members of the teaching group on a weekly or fortnightly basis.

⁸⁹ Inevitably, there are related social, cultural and financial issues. Such matters are beyond the scope of this article, but it may be noted that many disadvantaged Indigenous students reside in rural or remote areas and attendance at university often necessitates separation from family members and cultural groups. In addition, on a practical level, financial assistance may be required for transportation and accommodation. Some institutions, such as the University of New South Wales, provide residence on campus.

During the final month of the program, students should advance to the second phase, where acquired skills would be applied in relation to certain key areas of substantive law. It must be emphasised that the program is not directed to imparting a detailed knowledge of law. To a large extent that is secondary. The key objective is to acquaint students with the methodology of the discipline and the skills necessary to undertake formal study. The second phase is therefore concerned with applying skills in context. It is simply a progression of the first two months of learning. This phase in particular should be characterised by regular summative assessment. It is appropriate here to adopt the conventional examination format. It is not suggested that there should be a battery of final examinations. A preferable approach is to set regular short tests that are assessed and graded.

In Australia, there are a considerable number of preparatory and enabling programs to facilitate the transition to tertiary education generally and law specifically.⁹⁰ There are shared features between these programs and the proposed access scheme. These include tutorials, mentoring, introduction to substantive law, and complementary perspectives on indigenous intellectual and cultural traditions. Moreover, preparatory and enabling programs (including diploma courses), can result in admission to law school. An example of the latter is the University of Western Australia Advanced Diploma in Legal Studies, which, if completed to a satisfactory level, confers eligibility to enroll in the three year Juris Doctor (JD).⁹¹

These programs vary in content, duration and outcome. They can be distinguished from the proposed access scheme ('Model Access Scheme'). The Model Access Scheme is a structured course with a strong summative element through formal tests and examinations. Grades are awarded and the students are ranked. Whilst providing an orientation to Law School, the Model Access Scheme is intended to rigorously test and quantify academic ability. A course of three months duration is required to achieve these objectives. Although it may be thought that this is unduly long, the blunt fact is that if students cannot stay the course for three months, they are unlikely to last three-plus years. Students who achieve the required standard would be eligible for a place at law school, either at the university where they undertook the access program or elsewhere.⁹²

This regime would undoubtedly be daunting for some — perhaps many. The rigour and pace of the Model Access Scheme would of course have to be carefully assessed. It should not, for example, completely replicate the intensity of regular

⁹⁰ See, for example, the Nura Gili Pre-Program in Law at the University of New South Wales.

⁹¹ See also Murdoch University Pre-Law Alternative Entry course. Students who complete the program with at a Credit average (60 per cent or above) are offered direct entry into the Murdoch LLB program.

⁹² In terms of formal tertiary education, where the law degree is an LLB, applicants would either be accepted directly from secondary school or after completing another undergraduate course. With respect to the JD, which, in Australia, is a graduate degree, the access program would be a further pathway to Law School if their undergraduate results were insufficient.

law degree studies. For reasons discussed earlier, students would be confronting a host of challenges that are not exclusively confined to academic learning. Close and ongoing support would be required. It is here that there is a critical role for student mentors. Mentors could be drawn from the ranks of senior students in the LLB program.⁹³ Their role would be to assist in specific areas such as problem solving and provide support in certain modules such as writing workshops. Perhaps of equal importance would be the insider information and pastoral support, which puts a human face to an institutional setting. It should not be overlooked that many students will not only have had limited exposure to tertiary education, but more fundamentally the milieu in which they find themselves may be unfamiliar and intimidating. It would therefore be beneficial if a significant portion of indigenous law students were recruited to serve as mentors. This would go some way towards promoting a cultural environment where problems can be understood from an empathetic and personal perspective.⁹⁴

Cultural awareness and the visibility of Indigenous values will undoubtedly enhance the student experience. This is critical to avoid any perception that the Model Access Scheme is intended to assimilate Indigenous students. Whilst Indigenous students must of course gain familiarity with different cultural norms, this is not intended to supplant their distinct worldview. This balance is evident in existing Australian preparatory and enabling programs, which incorporate Indigenous philosophical and legal perspectives. The integration of these perspectives demonstrates how legal studies can be taught while preserving cultural identity. Such programs are designed to empower, not assimilate, the identity of Indigenous students. The Model Access Scheme should be informed with similar ideals. Its implementation will usually be best achieved by collaboration with the relevant university's department of Indigenous Studies.

The concern regarding assimilation of cultural identity can of course be expanded to wider discourse on the politics of education. In particular, it raises the argument

⁹³ There are many practical matters to be considered with respect to the Model Access Scheme. It would likely be offered during the summer. This is also the time when law students seek work experience with law firms. Thus, it may be difficult to employ top senior law students when seeking student mentors.

⁹⁴ Some institutions provide continuing support throughout an indigenous student's time at Law School. For instance, the School of Indigenous Studies at the University of Western Australia has a team of senior law students who provide ongoing mentoring and support. In addition, regular tutorials are conducted both individually and in groups. This regime continues throughout the JD program. The University of Auckland offers general mentorship, starting from enrolment, through the Uniguide scheme: University of Auckland, *UniGuide Programme* <<https://www.auckland.ac.nz/en/for/current-students/cs-student-support-and-services/cs-academic-and-learning-support/cs-uniguide.html>>. More specifically, the Auckland Law School provides targeted programs for particular groups of LLB students, such as Pasifika Academic Support Strategies (PASS), which includes tutorials and workshops. See also Susan Farruggia et al, 'The Effectiveness of Youth Mentoring Programmes in New Zealand' (2011) 40 *New Zealand Journal of Psychology* 52.

that sending the most promising Indigenous students to university will hasten the demise of alternative indigenous intellectual and cultural traditions. This must be weighed against the fact that exposure to tertiary education does not by definition harm such traditions. If anything, they may become more robust, because the brightest indigenous students can showcase their culture from an enhanced perspective, speaking to indigenous traditions whilst understanding the challenges of developing this perspective to a western mindset.

To be effective on a national level, the Model Access Scheme must be recognised by all law schools.⁹⁵ Consensus will be required to establish a uniform admission scheme for those who successfully complete the access program. Building on existing models, it would be realistic for each law school to adopt a quota, with the number of students accepted by each law school expressed as a percentage of total general student admissions. This would ensure that the number of indigenous students admitted under the scheme is proportionate to the capacity and resources of each law school.⁹⁶

The principal criterion for admission to law school would be the grades awarded during the program, with particular weighting on the tests administered during the final month. However, in addition to this basic data, a narrative report should be prepared by the instructors, which provides a critique of every student's progress throughout the program. Such reports would encourage law schools to increase the number of admissions above the minimum quota in respect of promising students who might otherwise be excluded on the basis of their test scores.

In New Zealand, there is some pressure on law schools to allocate places for Maori and Pacific Island students. It would therefore be appropriate to quantify and rank the students' performance in the proposed access program. In Australia the number of Aboriginal and Torres Strait Islander applicants to law school is comparatively low and there is no need to limit the number of available places for students in this category. It can be argued that it is unnecessary to rank students on completion of an access program in Australia because competition for places at law school is not particularly intense. However, there are benefits to formally identifying and categorising academic and skill-based accomplishments. First, this provides an important introduction to the dynamics of law school, where there is an emphasis on high academic achievement.⁹⁷ Second, an access program identifies those who are suitable for immediate admission to law school and those whose applications should be deferred. Students in the latter category would typically be diverted to a pre-law

⁹⁵ As noted in the article, in view of the program's duration and assessment regime, a formal qualification should be awarded for successful completion. A recognised qualification may also assist those who do not proceed to Law School in gaining employment as a paralegal.

⁹⁶ As stated above, admission under an access scheme should be aligned with ongoing post-admission support.

⁹⁷ Not least because the legal profession cannot accommodate every aspiring law graduate and competition for employment is therefore fierce.

bridging program offered by a number of Australian universities.⁹⁸ The ranking and grading of academic performance in the Model Access Scheme would assist that determination and also establish a benchmark for admission to law school.

There are different pathways to law school, and increasingly law degrees have different formats. In Canada students are typically admitted to law school having completed a bachelors degree, although this is not an invariable rule. Students with two years of an undergraduate degree are eligible for entry at the University of Saskatchewan, whereas three years is required at the University of British Columbia and University of Toronto. In Australia, some law schools offer a Juris Doctor, which is taught as a professional graduate degree,⁹⁹ while others offer the traditional LLB, which offers admission from secondary school as well as graduate entry. Moreover, there are variations in course structures. For example, students may choose to study the LLB alone or as a combined degree.¹⁰⁰ In New Zealand, students are admitted to Part I of the law degree,¹⁰¹ where they study one or more introductory law papers, with the balance drawn from non-law courses. This is followed by limited entry into Part II, which is the first year of the substantive law degree.

Despite these variations, it is submitted that a universal access scheme is tenable. For some, such as those gaining direct entry from secondary school, there is a particular need for orientation to the challenges of tertiary education, as well as the specific demands of a law degree. Whilst those who have studied or completed an undergraduate degree will be familiar with the university environment, the Model Access Scheme would provide a valuable orientation to the signature pedagogy of law. For undergraduate students who have not attained the requisite standard for direct admission to law school, the access scheme would perform the essential function of recognising and quantifying their aptitude for the study of law. It would of course be necessary for appropriate weightings to reflect the different educational experiences of the students. This will not be an easy task. Moreover, account must also be taken of the fact that law degrees may be perceived differently. For example, the Australian Quality Framework ranks the JD as a higher level of attainment than the LLB: an undergraduate degree is AQF level 7 whereas a postgraduate professional masters degree such as a JD is an AQF level 9.¹⁰² The content and emphasis

⁹⁸ The Aspiration Initiative, *Preparatory and Enabling Programs* <<http://www.indigenousscholarships.com.au/resources/how-do-i-get-uni/preparatory-and-enabling-programs>>. Some programs are oriented to a student's intended degree and foster the relevant skills and perspectives of that discipline. See, eg, the Wirltu Yarlu University Preparatory Program at the University of Adelaide.

⁹⁹ For example, The Australian National University, The University of Melbourne, The University of Western Australia, The University of Sydney and Monash University.

¹⁰⁰ For example, The University of Queensland, The University of Sydney, Monash University and The University of Adelaide.

¹⁰¹ Except the University of Waikato.

¹⁰² Jemina Roe, *A School Divided: Issues with JD & LLB Split System*, Australian Law Students Association <<http://www.alsa.net.au/uploads/Education2013/JD%20&%20LLB%20Factsheet%20FINAL.pdf>>.

of an access scheme will undoubtedly require adjustment to reflect these and other factors.

IX CONCLUSION

Tertiary education policies demonstrate an increasing commitment to attracting and retaining indigenous students. It has been recognised that traditional entry standards may be exclusionary to the extent that they sustain historical stereotypes and fail to reflect the unique profile of indigenous students. Special admission schemes have been adopted to promote the enrolment of indigenous students in professional schools. There is less insistence on formal educational qualifications and instead discretionary admission categories take account of diverse factors in assessing the potential to succeed. In some cases the pendulum has swung too far in favour of ad hominem assessments.

The Model Access Scheme is a preferable method for determining entry for indigenous students to law school. This program has greater predictive value than special admission schemes. Moreover, the form of instruction in the Model Access Scheme replicates the conditions and challenges of law school. The primary purpose of the program should be the assessment and screening of applicants by means of an intensive skills-based course. This should be developed as a nationally accredited program that is recognised by all law schools.

In proposing a three-month access program, it must be acknowledged that there is a financial cost that cannot easily be borne by indigenous students from low socio-economic backgrounds. There is a compelling case for government funding to put this program within reach of those who would otherwise be excluded.¹⁰³ Earlier in this article it was suggested that participation in tertiary education by all sectors of the community is beneficial to society as a whole. Failure to assist

¹⁰³ In Australia, the Department of Industry is 'committed to the Australian Government's target of reducing Indigenous disadvantage. This includes improving Indigenous higher education outcomes, and enhancing Indigenous culture and knowledge in Australian higher education.' See Australian Government Department of Industry, *Indigenous Higher Education* <<http://www.industry.gov.au/highereducation/IndigenousHigherEducation/Pages/default.asp>>. In Canada, the Department of Aboriginal Affairs and Northern Development provides Band Support funding. See Aboriginal Affairs and Northern Development Canada, *Band Support Funding* (13 June 2014) <<http://www.aadncaandc.gc.ca/eng/1100100013825/1100100013826>>. In addition, the Department of Justice's Legal Studies for Aboriginal People Program promotes the equitable representation of Aboriginal people in the legal profession by providing bursaries to Metis and non-status Indians who are enrolled in a pre-law course recognised and delivered by a Canadian university. In New Zealand funding assistance is available for educational purposes from the Ministry of Maori Development. See Te Puni Kokiri *Services and Funding* (10 December 2012) <<http://www.tpk.govt.nz/en/services/>>. The Ministry of Pacific Island Affairs has a narrower mandate, which is largely confined to policy matters. See Ministry of Pacific Island Affairs, *About Us* <<http://www.mpia.govt.nz/about-us-2/>>.

indigenous students must be offset against wider social costs. If central, state and provincial governments are unable to provide financial support for the aspirations of indigenous peoples, they must necessarily confront the social and economic costs of State dependency.

Indigenous students seeking admission to law school often face significant cultural and educational challenges. It is essential that the admission process is sensitive to the personal background of such applicants while being sufficiently robust in the assessment of their core skills and aptitude. A nationally accredited access program would be a positive initiative in this regard and the stature of the program would cause perceptions of the admission process to be reconceptualised from a concession to an achievement.