

THE PARTICIPATION OF INDIGENOUS AUSTRALIANS IN LEGAL EDUCATION 1991-2000

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I INTRODUCTION

Many program initiatives designed to assist Indigenous people involved in tertiary education have been introduced in Australia in the past 10 years. In recognition of this development, this article examines the methods adopted by Australian law schools to facilitate Indigenous students' access to – and success at – law school in the period from 1991 to 2000. The article considers the programs and mechanisms in place in light of the numbers of Indigenous students and graduates, examines how current programs and mechanisms in Australian law schools assist Indigenous students, and assesses which methods work best. The article also makes suggestions for further research in this area. A similar research project was undertaken in 1990 by Daniel Lavery. His article offers a useful point of comparison, which helps to illustrate the changes that have taken place over the past 10 years.¹

The research presented in this paper is derived from a survey conducted by the author. Law schools² were asked to report on numbers of enrolled Indigenous students and Indigenous graduates over the last 10 years, and to report on what kinds of access mechanisms and support programs these institutions have had in

* Lecturer, Law School, Griffith University. Thanks to the Griffith University Law School for providing funding for this project, to Frances Ng for her assistance, to the editors and to the anonymous reviewer. Thank you also to all the staff at law schools and Indigenous centres around Australia who assisted with this research. I note that I write this paper as a white woman with all the privileges and biases that this position entails. For a discussion of the relevance of my being white to the way I, as a white woman, may approach the subject of this paper, see especially Aileen Moreton-Robinson, *Talkin' up to the White Woman: Indigenous Women and Feminism* (2000) xviii, 61, 133.

1 See Daniel Lavery, 'The Participation of Indigenous Australians in Legal Education' (1993) 4 *Legal Education Review* 177. My article does not set out to emphasise or examine in detail the factors which assist or discourage Indigenous students' participation in mainstream law schools. There is some research available that has examined these issues. See, eg, Colin J Bourke *et al*, *Factors Affecting Performance of Aboriginal and Torres Strait Islander Students at Australian Universities: A Case Study* (1996); Heather Douglas, "'It's Not Just About Me': Indigenous Students Insights About Law School Study' (1998) 20 *Adelaide Law Review* 315; and Carolyn Penfold, 'Indigenous Perceptions of Factors Contributing to Successful Law Studies' (1996) 7 *Legal Education Review* 155.

2 Law schools were the first to be contacted about the survey, but on many occasions surveys were forwarded to Indigenous centres, which then became involved in completing them.

place. All the information recorded in this article about current university practices is sourced from the survey responses unless otherwise noted. This article is written in the spirit of reconciliation, in the sense that law schools, as primarily non-Indigenous institutions, need to move forward and (continue to) examine and change their cultures and improve their responses to the needs of Indigenous peoples.

II THE SURVEY

A questionnaire was developed and posted to all law schools at Australian universities offering the qualification of Bachelor of Laws ('LLB'). The surveys were posted in June 2000 and from the 26 surveys dispatched, 25 were returned.³ Unfortunately, over the past 10 years universities have rarely kept accurate statistics of the sort targeted by the questions in the survey. Many of those who completed surveys relied on their personal recollections of numbers of Indigenous students in each year and made estimations based on those recollections. This possible source of error in the calculation of Indigenous student numbers is compounded by the fact that not all Indigenous students who go to law school formally identify as Indigenous students and therefore may neither be recorded in formal statistical data bases as being Indigenous, nor come to the attention of those who assist Indigenous students in law schools or Indigenous centres. Consequently, Indigenous student numbers may either be exaggerated in some cases (where respondents have sought to take these two factors into account) or actually be higher than those reported in the survey responses.

III ACCESS TO WORK IN LAW SCHOOLS

Although some of those who responded to the survey were Indigenous, none of the Indigenous survey respondents were employed within law schools; they were employed within Indigenous centres. The overwhelming majority of survey respondents were non-Indigenous people and, interestingly, they were most frequently women.

Survey respondents were asked whether their law school employed any Indigenous people and, if so, the roles these employees played in their respective institutions. Many respondents advised that they have sought assistance from Indigenous individuals in a variety of ways for the programs and equity-oriented mechanisms they administer. The Northern Territory University and the University of Western Australia reported employing Indigenous graduates and

³ A survey response was not received from James Cook University. A draft of this article was also circulated to all university law schools in January 2001 and comments and responses to the draft have been included in the final article. In 1990 Lavery sent out 20 surveys and 18 were returned: see Lavery, above n 1, 178.

students to teach in their pre-law programs. Griffith University and the Queensland University of Technology reported employing later year Indigenous students to assist earlier year Indigenous students and act as mentors during their pre-law programs.

Some law schools reported that they employ Indigenous academics outside of working in the pre-law program.⁴ The Australian National University Law School employs two Indigenous academics, one as a full-time lecturer and the other as a part-time academic adviser and tutor for Indigenous students in the law school. The University of Technology, Sydney reported that one Indigenous lecturer is employed on a part-time basis.⁵ The Law School at the University of Melbourne employs one Indigenous staff member on a sessional basis to teach tax and family law and the Law School at the University of New South Wales employs a full time academic advisor to Indigenous students. The Southern Cross University Law School reported that it has employed Indigenous academic staff from time to time. Murdoch University Law School employs an Indigenous Master of Laws student to assist with Indigenous issues and in the teaching of mainstream subjects in the Law School. Deakin University employs an Indigenous lecturer, who also teaches units in the LLB program, in the law program at the Institute of Koorie Education.⁶ Two universities reported that they planned to employ Indigenous academics within their law faculty in the near future.⁷

It has been argued that where there are no Indigenous academics on law school staff, there are no role models for Indigenous students.⁸ It should therefore be seen as generally positive that increasing numbers of Indigenous people are taking up academic positions in law schools. Their very presence is likely to encourage Indigenous students to continue with their studies. However, it should be noted that some Indigenous academics may prefer to work in Indigenous centres or outside universities.⁹ Where Indigenous academics do choose to work within a university law school, they are likely to lead culturally lonely lives. Generally speaking, Indigenous academics are the sole Indigenous

4 Flinders University Law School reported employing a casual tutor to assist Indigenous students within the faculty and that usually this person has been an Indigenous person. Flinders University also reported that some Indigenous graduates and students are employed by the Indigenous centre as Aboriginal and Torres Strait Islander Assistance Scheme ('ATAS') (see below n 113) and peer tutors. Southern Cross University and Monash University reported that both of their law schools employed two Indigenous administrative staff.

5 Since that time, the Law School of the University of Technology, Sydney has appointed an Indigenous academic to the position of Professor.

6 This program is discussed in more detail below 495.

7 Queensland University of Technology advised that a target of their Law School's Faculty Equity Plan is to employ an Indigenous academic by 2002. Griffith University employed an 'Indigenous Law Lecturer' in 2001. Unfortunately, this person is employed on a part time basis at the Associate Lecturer level.

8 Carol Aylward, 'Adding Colour – A Critique of "An Essay on Institutional Responsibility: The Indigenous, Blacks and Micmac Programme at Dalhousie Law School"' (1999) 14 (2) *Canadian Journal of Law and Society* 470, 478. See also Douglas, above n 1, 336-7.

9 Martin Nakata argues that '[f]or some Indigenous academics, opposition means separation. Such agendas urge the development of knowledge and ways of learning as something quite distinct from Western Knowledge': Martin Nakata, 'Cross-cultural Consideration: Indigenous Academics are on Foreign Ground in Their Own Land', *The Australian* (Sydney), 21 February 2001, 41.

voice on a law school's staff. Often they are – or at least are in danger of being – marginalised, not only as Indigenous Australians but also by means of their status as casual, part time or lower level lecturers in the academic hierarchy.¹⁰ While these staff are likely to get much needed support from Indigenous centres, they should also receive active support from other academics in law schools. Currently, the low numbers of Indigenous law school staff reported in the survey suggest that very few of those directly involved in the decision-making process about law school directions – including curriculum, administration and ongoing law school programs affecting Indigenous students – are actually Indigenous people.

IV ACCESS TO AND GRADUATION FROM LAW SCHOOLS

Table 1 sets out the numbers of first year Indigenous students attending Australian law schools in each year from 1991 to 2000. The table illustrates that overall the numbers of Indigenous students starting first year at law school are increasing. In 1991 there were 35 first year students, in 1995 there were 74 first year students and in 2000 there were 89 first year students.

TABLE 1: NUMBER OF INDIGENOUS FIRST YEAR LLB STUDENTS (ALL AUSTRALIAN LAW SCHOOLS)

Year	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
Number of first year students	35	39	30	43	74	84	81	78	83	89

TABLE 2: NUMBER OF INDIGENOUS LLB GRADUATES AND UNDERGRADUATES (ALL AUSTRALIAN LAW SCHOOLS)

	Pre-1990	Post-1990
Number of LLB graduates	21 (up to and including 1990)	118 (1991-2000)
Number of undergraduates currently studying law	50 (in 1990)	256 (in 2000)

¹⁰ Ibid.

Overall the survey responses reported that there were 256 undergraduate Indigenous law students studying law in 2000. This compares very favourably to Lavery's research: in 1990, universities reported that 50 Indigenous students were studying law.¹¹ The 2000 data demonstrates a significant and positive increase in Indigenous law student numbers over the past 10 years. However, these new figures should also be regarded with caution due to the fact that about one third of the Indigenous students currently studying at law schools in Australia are first year students. The survey did not obtain information about the length of the study program in which students were enrolled. However, generally speaking, law degrees are of at least three years' duration and, where taken in conjunction with another degree, are often of five years' duration. Lavery quoted a 75 per cent attrition rate as being common among this group in 1990.¹² The 2000 survey did not ask respondents to estimate attrition rates. However, the 2000 data suggests that there is still an alarming level of attrition amongst Indigenous law students, but that the attrition rate is probably now much lower than 75 per cent. The response of the Australian National University stated that the 'withdrawal rate' of Indigenous students from its Law School had fallen from 72 per cent in 1991 to 28 per cent in 1999.¹³ The survey also did not ask respondents to comment on when students are likely to withdraw from study; however, research has indicated that the first year of study is a transitional 'make or break' year for all students,¹⁴ and is a particularly pivotal year for Indigenous students.¹⁵

Another aspect of concern, supporting the view that the attrition rate among Indigenous law students remains disturbingly high, is that between 1991 and 2000 there were 118 graduates recorded by the survey respondents (see Table 2 and Table 3).¹⁶ Lavery's research reported that across Australian law schools, there had only been 21 Indigenous law graduates before 1991.¹⁷ Clearly numbers of graduates have increased dramatically in the past 10 years, but the 2000 figure demonstrates – considering the number of first year students over this period – that a large number of Indigenous students are starting courses of legal study and not completing them. There may be a number of positive reasons for this: for example, students may decide that they do not wish to study any more; they may transfer to courses they find more appropriate to their needs; or they may decide

11 Lavery, above n 1, 179.

12 Ibid 182.

13 See Lisa Briscoe and Elizabeth Baxter, *Report on the Aboriginal and Torres Strait Islander Alternative Entry and Support Scheme in the Law School 1999* (1999) 5. Available from Lisa Briscoe, Law School, Australian National University (copy on file with author).

14 Gloria Latham and Pam Green, 'The Journey to University: A Study of "the First Year Experience"' (Interim Report, Royal Melbourne Institute of Technology, 1998).

15 Timothy Spencer, 'First Year Students Face Unique Problems' (1995) 5 *Campus Review: Indigenous Education Special* 12; Neil Baumgart and Christina Halse, *Meeting The Needs of Indigenous Students: Evaluation of Bachelor College* (1995) 133.

16 Using the information in Table 1, even if we assume that all students in first year from 1991 to 1995 enrolled in a five year course of study, there should have been 295 graduates by 2000. Instead less than half this number had graduated by 2000.

17 Lavery, above n 1, 179.

to take up paid employment.¹⁸ Indigenous students report that another reason for high attrition rates in some circumstances is related to the exceptional demands of extended family upon most Indigenous students,¹⁹ which detract from the individualised focus required by law school study.

However, the high level of alienation that many Indigenous students report experiencing at law school is another important factor influencing the decisions of some of these students to leave law school before completing their courses of study.²⁰ Cathryn McConaghy comments that 'racism continues to be expressed in innumerable ways in many educational sites within Australia'.²¹ A number of the respondents to the 2000 survey alluded to this problem. The majority of Indigenous students at the Northern Territory University Law School who were surveyed in 1999 reported that they felt marginalised in the university setting and that they found life at university strange or intimidating.²² Indigenous law students at universities in Brisbane who were interviewed in 1997 and 1998 reported that feelings of alienation were the main reason why Indigenous students did not complete law school studies. These students reported that as Indigenous students at law school they felt 'disorientated by the system', 'under siege' and that they were 'in an alien environment'.²³

Indigenous people have suggested that there are a number of ways to help change the alienating nature of law school. As mentioned previously, this goal might be achieved by employing more Indigenous staff in law schools. Other ways to make the law school environment less alienating include changing the way that the law school curriculum is taught so that it addresses Indigenous issues and perspectives in appropriate ways, and developing assessment regimes which can accommodate Indigenous students' needs.²⁴ The positive effects of

18 University of Sydney, *Participation of Indigenous Students in Legal Education – Survey Response* (2000): it was noted that 'life crises and family obligations [and] ... the temptation to take up employment before finishing a degree' were the major reasons for Indigenous students not completing degrees. It is also recognised that the distinction between withdrawal because of academic failure and voluntary withdrawal is difficult to make. See also Vincent Tinto, 'Dropout from Higher Education: A Theoretical Synthesis of Recent Research' (1975) 45 *Review of Educational Research* 89.

19 See Douglas, above n 1, 333-6.

20 Fiona Hussin, *Killing off Captain Cook – Indigenous Law Students at Northern Territory University* (1999) 1. Copy available from Fiona Hussin, Law School, Northern Territory University (copy on file with author). See also Douglas, above n 1, 321-5.

21 Cathryn McConaghy, *Rethinking Indigenous Education* (2000) 255. In a similar vein, Henrietta Fourmile points out that 'Aboriginal people feel ill-at-ease and self conscious when entering white institutions which emanate an entirely alien cultural presence': Henrietta Fourmile, 'Who owns the past? Aborigines as Captives of the Archives' (1989) 13 *Aboriginal History* 2.

22 Hussin above n 20, 1-2, where Hussin also notes that Indigenous students at Northern Territory University often comment that history materials at high school glorified 'Captain Cook and the colonisation process, including the "settlement" of Australia and overland expeditions by so called explorers'.

23 Douglas, above n 1, 319-20.

24 Such changes were reported to be taking place in some law schools: see, eg, Australian National University, *Participation of Indigenous Students in Legal Education – Survey Response* (2000) (copy on file with author) and University of New South Wales, *Participation of Indigenous Students in Legal Education – Survey Response* (2000) (copy on file with author).

these kinds of changes have been examined in previous research,²⁵ but respondents to the survey did not particularly advocate these types of transformations.

A further way of reducing alienation is through increasing the numbers of Indigenous students by actively encouraging more Indigenous individuals to participate in legal education. This has been happening over the past 10 years through alternative entry programs and other efforts. The more Indigenous students studying at law school, the more likely each individual is to graduate.²⁶ This is at least partly because the more Indigenous students there are studying at law schools, the less alienation is likely to be experienced by each individual student. The 2000 survey figures support this. Universities that have high levels of graduate numbers, such as the University of Western Australia and the University of New South Wales, have correspondingly high numbers of undergraduate Indigenous students. Although specialist law schools may require students to travel more and live away from their communities, it is arguable that by encouraging Indigenous students to attend specific universities so that numbers can be concentrated, alienation will be reduced and graduate numbers will be increased. It is unlikely that this kind of process would ever be formalised but it would seem that, to a certain extent, it is already happening informally in some States. One survey respondent recognised this in their complaint that some universities have a 'monopoly' on Indigenous students.²⁷ Perhaps in the context of encouraging graduate numbers this may be a positive development.

However, any formal process which designates some law schools as specialist law schools for Indigenous students, and thus provides these law schools with a greater level of funding for this purpose, is likely to be strongly resisted. We can consider the similar Australian experience, in which attempts to set up a regionalised pre-law program failed completely.²⁸ Several survey respondents pointed out that law schools currently compete for Indigenous students. In any event, Indigenous students should be able to freely choose which law school they attend. They should also be able to assume that they will have adequate support regardless of where they choose to study.

It would be useful to conduct further research into these issues. Matters to be dealt with should include an examination of the rate and stage at which Indigenous students tend to leave law school.

25 See Penfold, above n 1, 172-5; Douglas, above n 1, 343-4; Peter Christensen and Ian Lilley, *The Road Forward? Alternative Assessment for Aboriginal and Torres Strait Islander Students at Tertiary Level* (1997).

26 Research supports this view: see Northern Territory University, *Participation of Indigenous Students in Legal Education – Survey Response* (2000) (copy on file with author); Carolyn Penfold, *Support for Indigenous Students in the Faculty of Law, University of New South Wales, 1989-1995* (Unpublished, 1996) 8 (copy on file with author); Donald Purich, 'Affirmative Action in Canadian Law Schools: The Native Student in Law School' (1986) 51 *Saskatchewan Law Review* 79, 82; Douglas, above n 1, 345-6.

27 Survey respondent wished not to be identified.

28 See below pp 502-3.

TABLE 3: NUMBER OF INDIGENOUS LLB GRADUATES FROM AUSTRALIAN LAW SCHOOLS FROM 1991-2000²⁹

University ³⁰	ANU	BND	DEA	FLI	GTH	LAT	MAC	MEL	MON
Year LLB program commenced	1961	1989	1993	1992	1992	1972	1975	1880	1985
Number of LLB graduates 1991-2000	11	1	5	6	1	0	0	14	2

University	MUR	NEW	NOT	NTU	QUT	SCU	SYD	TAS
Year LLB program commenced	1990	1993	1997	1987	1977	1993	1890	1890
Number of LLB graduates 1991-2000	4	2	0	7	5	5	3	Unknown

University	UAD	UNE	UNSW	UQ	UTS	UWA	UWS	WOL
Year LLB program commenced	1883	1992	1972	1935	1975	1913	1989	1991
Number of LLB graduates 1991-2000	No response	1	25	5	Unknown	16	0	5

²⁹ It should be noted that some universities have only recently begun to offer an LLB course, so it is not always meaningful to compare graduate numbers across universities. However, it is interesting to note the large numbers of graduates from Western Australian universities, particularly the University of Western Australia. The University of New South Wales also reports an especially high number of Indigenous graduates.

³⁰ List of Abbreviations: Australian National University ('ANU'); Bond University ('BND'); Deakin University ('DEA'); Flinders University ('FLI'); Griffith University ('GTH'); Latrobe University ('LAT'); Macquarie University ('MAC'); University of Melbourne ('MEL'); Monash University ('MON'); Murdoch University ('MUR'); Newcastle University ('NEW'); Notre Dame University ('NOT'); Northern Territory University ('NTU'); Queensland University of Technology ('QUT'); Southern Cross University ('SCU'); University of Sydney ('SYD'); University of Tasmania ('TAS'); University of Adelaide ('UAD'); University of New England ('UNE'); University of New South Wales ('UNSW'); University of Queensland ('UQ'); University of Technology, Sydney ('UTS'); University of Western Australia ('UWA'); University of Western Sydney ('UWS'); University of Wollongong ('WOL').

The increased numbers of Indigenous law students and graduates over the past 10 years is related to a range of factors. One of the over-arching factors which has caused this increase is the development of a body of research³¹ which has drawn attention to the low level of education among Indigenous Australians and the responses of various governments to such research. Such responses have included the development of Indigenous teacher aide programs and of Indigenous student allowance schemes, such as Abstudy. Other interrelated law school initiatives, which this article will examine, include the implementation of more flexible law school admission programs (ie, alternative entry schemes) and the provision of support programs such as pre-law programs and specialised tutorial support.

V ALTERNATIVE ENTRY SCHEMES

A The Survey

All but one of the 25 law schools that returned responses to the surveys advised that they had an alternative entry scheme for Indigenous students in place.³² However, many of the schemes outlined were not specifically designed for Indigenous students; for example, some of the schemes also operate for non-English-speaking background students and mature age students. Lavery's research found that 11 out of 18 law schools that responded to his 1990 survey indicated that they had some form of alternative access scheme in place.³³ The 2000 figures therefore show that access to law school has become more flexible since 1990. This new attitude towards access may account to a large extent for the increased number of Indigenous students being admitted to first year law studies. It should be noted that, in addition, the increase in student numbers may be explained as being partly a result of the increased number of law schools and the consequent increased availability of places for students at law schools.³⁴

The 2000 survey asked for details of the alternative entry schemes in operation, some of which are described below. Most respondents reported that alternative entry processes were administered by their university's Indigenous centres but that the decision-making process involved staff from both the law

31 See Mandawuy Yunupingu *et al*, *National Review of Education for Aboriginal and Torres Strait Islander Peoples: Final Report* (1994) 144-5.

32 Notre Dame University, based in Fremantle in Western Australia, is the only university that reported having no alternative entry scheme for Indigenous students: Notre Dame University, *Participation of Indigenous Students in Legal Education – Survey Response* (2000) (copy on file with author). However a later comment from the University did note that general entry to the Law School is based on interview and is flexible with respect to past academic results. The response also noted that Notre Dame University operates a campus in Broome in Western Australia which is dedicated to Indigenous people, and although no Indigenous students had commenced law by 2000 the Broome program is a gateway program for Indigenous students to the programs (such as law) which are offered at the Fremantle campus: Notre Dame University, *Participation of Indigenous Students in Legal Education – Later Comment on Survey Response* (2000) (copy on file with author).

33 Lavery, above n 1, 180.

34 Eight new law schools have been established since Lavery conducted his research.

school and from the Indigenous centre. Some alternative entry schemes also involved members of the broader Indigenous community. For example, at Flinders University, potential students complete a fairly extensive application form, which asks for information about personal interests, family history of tertiary education, interest in specific subjects and types of future employment, and general community involvement. Applicants are then interviewed by a representative from the Law School, the Yunggorendi First Nations Centre³⁵ and from the local Nunga community. Together the three members of the panel make a decision about whether granting access to the student is appropriate in the circumstances. The Flinders University survey response stated that they had moved away from academic performance as an entry criterion and assessed students' motivations and planning abilities as indicators of future performance.

Newcastle University has a special interview process specifically for Indigenous students applying for alternative entry. The interview is primarily focused on the academic merit of the applicant. Ideally, applicants will have a formal academic qualification, either from high school or another institution, but this is not always the case. Letters of support from the applicant's community can be taken into account if levels of qualification are unclear or informal. During this process the panel often recommends that applicants complete a year of study in another degree. The law school then observes the student over that year and invites them to study law if they are successful in the first year of their other degree. Newcastle University has found that success in another degree is a very good indicator of success at law school.

The Sydney University Cadigal Program has an alternative entry scheme in place. High school entrants are assessed on the basis of an application form and their high school academic results. No interview is 'necessary'.³⁶ The University of Sydney response noted that their research suggests that Year 12 candidates consider an interview to be 'an excessive imposition given that they have just sat the HSC [Higher School Certificate]'.³⁷ Mature age students complete an application form, undertake literacy based assessment tasks and are also interviewed. Students who commence law school through the Cadigal Program may take on a reduced study load but will still be eligible for full Abstudy. All entry assessment is conducted by the staff of the Koori Centre with a majority of Indigenous people on the panel. Some of the issues the panel addresses are: whether the course the student is applying for is consistent with the student's goals and ambitions; whether the student understands the implications of the choices they make; and whether the student has the resources available to them to make a reasonable attempt at the course they choose. The Sydney University survey response pointed out that the process was 'quite comprehensive and individualised'.

35 The centre's full name is Yunggorendi First Nations Centre for Higher Education and Research; it is the Flinders University Indigenous centre.

36 University of Sydney, *The University of Sydney – Koori Centre: Cadigal Program* (1992) <<http://www.koori.usyd.edu.au/centre/cadig.html>> at 13 September 2001.

37 University of Sydney, above n 18.

Prospective Indigenous law students at Wollongong University are required to complete an entrance examination that is administered by the Wollongong University Aboriginal Education Centre. The prospective student is also interviewed by staff from the Indigenous centre and the Law School. Based on the interview and the results of the examination, a recommendation is made as to whether or not the applicant should be admitted.

Deakin University has one of the most flexible admission policies for Indigenous law students. The University runs a special law program out of its Institute of Koorie Education. The program is an 'equity program based on the lack of educational opportunities provided in the past for Koories'.³⁸ A panel from the Institute of Koorie Education interviews prospective students about their life experience and commitment to studying law (among other issues). No formal education is required. Although the program is attractive to Indigenous students and there are currently 10 first year students enrolled in it, the program is very new³⁹ and thus relatively untested.

B Discussion

A need to maintain 'academic standards' is a background concern that appears to inform many of the decisions to admit or not to admit Indigenous students to law school study. An assessment of the individual's academic ability is often based on previous success in formal study or success in exams specifically created for law entrance purposes. There are two problems with this approach. The first problem is one based on equity concerns. Kelly Gallagher-McKay suggests that from the perspective of historically disadvantaged groups, these kinds of academic standard indicators have the effect of 'justifying exclusion'.⁴⁰ Gallagher-McKay goes on to say that 'academic standards – with all their putative objectivity – are linked to a political rationality that justifies the continuing monopoly of elite institutions'.⁴¹ Historically, Indigenous people have been excluded from mainstream education⁴² and they continue to experience educational disadvantage.⁴³ Lisa Briscoe and Elizabeth Baxter from the Australian National University commented that the object of entry (and support) schemes is 'to give opportunities to Indigenous people which they may have missed through the disadvantages they have suffered as members of a

38 Deakin University, Institute of Koorie Education, *Participation of Indigenous Students in Legal Education – Survey Response* (2000) (copy on file with author). The policy underlying the establishment of the program evolved through the agreement process which took place between representatives of the Indigenous community and Deakin University.

39 Deakin Law School commenced operation in 1993 and the program discussed here commenced in 1999.

40 Kelly Gallagher-McKay, 'Affirmative Action and Aboriginal Government: The Case for Legal Education in Nunavut' (1999) 8(2) *Canadian Journal of Women and the Law* 21, 26.

41 Ibid.

42 See Mary Ann Bin-Sallick, *Aboriginal Tertiary Education in Australia: How Well is it Serving the Needs of Aborigines?* (1990) 4-14, for an historical overview of Indigenous involvement in mainstream education.

43 Mandawuy Yunupingu *et al*, *National Review of Education for Aboriginal and Torres Strait Islander Peoples Summary and Recommendations* (1994) 18-19.

dispossessed people'.⁴⁴ If the purpose of alternative entry schemes is to remedy the educational inequity that exists for many Indigenous students, then it is hardly appropriate that success in previous study (at a high school or in a tertiary institution) be the deciding factor in entry decisions.

The second problem with basing admission on previous academic success is that many factors can be important in influencing students' performance at high school. Studies of university student populations have repeatedly shown that high school academic achievement is not an absolute indicator, especially for degrees outside pure science (ie, degrees such as law).⁴⁵ Indeed, some studies have shown that high school scores can be extremely limited indicators of future university success.⁴⁶ Universities such as the University of New South Wales and the Australian National University report that many of the Indigenous students studying in their law schools are now attaining credit and distinction results in spite of the fact that they entered university through an alternative entry scheme.⁴⁷ Recognition of historical educational inequities faced by Indigenous people, and the limited value of high school scores as predictors of success, supports the kind of alternative entry scheme in place at universities like Deakin, and a more sustained move away from academic achievement as the deciding factor for admission.

It may in fact be appropriate for law schools to consider the implementation of alternative entry schemes for law school students more generally. In Canada, the Windsor University Faculty of Law responded to concerns that it did not have a desirable degree of diversity among its student body by implementing a 'non-traditional' or subjective admission policy in 1981.⁴⁸ At Windsor each applicant for law school study is now individually evaluated, taking into account a range of criteria including work experience, community involvement, personal accomplishments (including sport and hobbies), career objectives, personal factors (such as illness and unusual family responsibilities) and university programs undertaken.⁴⁹ This access program has now been operating for over 10 years. These criteria are applied to *all* students seeking admission. The conclusions of a recent study of the access program found that attrition rates were lower and that students admitted to study via the expanded criteria were

44 Briscoe and Baxter, above n 13, 5. The Deakin University survey response made a similar point: Deakin University, above n 38.

45 Roy Killen, 'Differences between Students' and Lecturers' Perceptions of Factors Influencing Students' Academic Success at University' (1994) 13 *Higher Education, Research and Development* 199, 200.

46 See Donald E Lewis, *The Performance at University of Equity Groups and Students Admitted via Alternative Modes of Entry* (1994) 8, where the author reviews a number of studies which have examined the reliability of final year high school scores as a predictor of performance at university. Few of the studies he mentions demonstrate a strong correlation between HSC scores and performance in humanities courses.

47 See Briscoe and Baxter, above n 13; Penfold, above n 26.

48 Dolores Blonde *et al*, 'The Impact of Law School Admission Criteria: Evaluating the Broad-based Admission Policy at the University of Windsor Faculty of Law' (1998) 61 *Saskatchewan School of Law* 529, 534.

49 *Ibid* 560. The Flinders University alternative entry scheme is also of note, given its focus on planning abilities as an alternative to academic achievement.

successful at law school and in their career choices.⁵⁰ The study also found that a much more diverse student profile that better reflected the overall community was attained through this non-traditional admission policy.⁵¹ Indeed, the Windsor experience suggests that an admission scheme narrowly based on academic performance is not the best way to assess the appropriateness of *any* student for law school.

The experience of alternative entry schemes in Australian universities and the Windsor experience just outlined offer valuable insights, in a general sense, for Australian law schools. A good example of the successful implementation of an entry program where applicants are subjectively assessed is the Bachelor of Medicine degree at Newcastle University. This program was developed as a response to calls for improvements in student selection, medical education and practice. The entrance requirements for that degree are based on an interview and academic assessment via a special test. The program has been well received.⁵² Narrow entry schemes may not allow the most well-suited students to study law and they will tend to reduce the diversity of the student population; further, an inappropriate choice of study by the individual student and the inappropriate selection of students by the university will ultimately impact not only on the individual students but also on the workplace and university.

It is important that the requirements which need to be satisfied for entry through alternative entry schemes are related to the support available to Indigenous students at the particular law school. Indigenous students have reported that it is often too easy to get into law schools and once there, there is not enough support for them to succeed.⁵³ For example, if Indigenous students who have problems with literacy are accepted into law schools, then law schools and Indigenous centres should assume responsibility for assisting that student with the issue. This may be quite resource intensive. As early as possible the specific needs of students entering through alternative entry schemes should be discussed and plans made about how to deal with those needs.⁵⁴ After such a discussion it may be decided that it is more appropriate to direct some students to complete other courses (such as literacy) in another faculty or institution rather than starting immediately at law school. The alternative entry process needs to be carefully planned so that universities can tailor their alternative entry schemes in recognition of the support resources available, the levels of which will probably vary between universities. Depending on the available support, academic achievement may well be relevant, although it is inappropriate that it be the deciding factor for the reasons suggested above.

50 Ibid 557.

51 Ibid.

52 See University of Newcastle, *Bachelor of Medicine* (2001) <http://jumbuck.newcastle.edu.au/production/sfc/buildpage.cfm?tpww_url=10379> at 28 May 2001.

53 Douglas, above n 1, 346.

54 This has been recognised by some law schools such as the Australian National University. See Briscoe and Baxter, above n 13, 2.

VI PRE-LAW PROGRAMS

A The Survey

In his 1991 research Lavery noted that there were no pre-law programs operating in Australia.⁵⁵ There are now 11⁵⁶ pre-law (or alternative study programs) currently operating and two law schools refer Indigenous students to the University of New South Wales' pre-law program.⁵⁷ This demonstrates a significant shift over the past 10 years.

Lavery's examination of the Canadian situation with respect to pre-law programs led him to trumpet their importance as a way of facilitating the success of Indigenous students.⁵⁸ The pre-law course that Lavery examined in detail and found so impressive was a full time skills-focused course of six weeks duration, that was based at the University of Saskatchewan but serving a number of law schools in the region.⁵⁹ That course has been written about elsewhere⁶⁰ and has formed the basis for pre-law programs that currently operate in many Australian law schools.⁶¹

There are a number of reasons why law schools and Indigenous centres may decide to offer a pre-law course. These include: assisting students to develop social networks; assisting students to develop academic skills; as a head start on the first year program; or to assess students' readiness for law school.⁶² The structure and content of the course is likely to vary between universities depending on the reason for offering the course. Table 4 notes which universities offer pre-law programs or alternative law programs, the length of those programs, and sets out the number of first year students at each university surveyed.

55 Lavery, above n 1, 182.

56 Ten of the survey respondents reported that their law school operated a pre-law program or an alternative law program. However the author is aware that James Cook University also operates a pre-law program.

57 See Table 4.

58 Lavery, above n 1, 182.

59 Ibid.

60 See Hugh McAulay, 'Improving Access to Legal Education for Native People in Canada' (1991) 14 *Dalhousie Law Journal* 133.

61 For example, at the University of Western Australia and University of New South Wales. See Carolyn Penfold, *Supporting Aboriginal Students Through Transition to University – A Law School Experience* (Unpublished, 1995) 5 (copy on file with author). Also available from Carolyn Penfold, Law School, University of New South Wales.

62 The reasons noted here are drawn from the publicity material and course outlines from a number of programs surveyed.

TABLE 4: AVAILABILITY AND DURATION OF PRE-LAW OR ALTERNATIVE PROGRAMS OFFERED AT AUSTRALIAN UNIVERSITIES

University ⁶³	ANU	BND	DEA	FLI	GTH	LAT	MAC	MEL	MON
Pre-law program	No – refer to UNSW program	No	Alternative system ⁶⁴	No ⁶⁵	Yes	No	No	No	Yes
Length in weeks				1	1				1
Number of first year students in 2000	4	0	10	5	4	0	0	2	2

University	MUR	NEW	NOT	NTU	QUT	SCU	SYD	TAS
Pre-law program	Yes	No	No	Yes	Yes	Alternative options ⁶⁶	No	No
Length in weeks	4			5	1			
Number of first year students in 2000	6	0	0	8	5	1	1	2

University	UAD	UNE	UNSW	UQ	UTS	UWA	UWS	WOL
Pre-law program	No	Yes	Yes	No	No	Yes	No	No – but refer to UNSW program
Length in weeks		1	3			6		
Number of first year students in 2000	2	5	10	Unknown	12	6	0	4

63 For an explanation of abbreviations, see above n 30.

64 See below pp 500-1.

65 Flinders University has no specific pre-law program but the Law School has input into the general orientation program offered by the Yunggoorendi First Nations Centre.

66 See below pp 500-1.

The length of pre-law programs available varies enormously. Several universities currently run a one week program;⁶⁷ the University of New South Wales runs a three week program; Murdoch University runs a four week program; the Northern Territory University runs a five week program; and the University of Western Australia offers a six week program. Some universities have reduced the length of their programs in recent years in response to availability of resources⁶⁸ and other universities also noted that the running of programs was dependent on the availability of resources from year to year.⁶⁹ Each Australian program has its own approach, some of which are described below.

The University of New England Law School, in conjunction with the Oorala Aboriginal Centre, offers a one week pre-law program. During the week the students are introduced to a number of legal subject areas including torts, contract, property and criminal law. The course aims to provide an introduction to legal concepts and basic study skills for law students, a network of contacts and a continuing forum to address concerns relating to cultural issues.⁷⁰ The promotional material for this course states that '[a] trip to the local court and a tour of areas of cultural significance to the local Indigenous Nations are highlights of the program'.⁷¹ Although other programs incorporate various visits into their programs, this is the only program that reported visiting Indigenous sights of cultural significance. This type of activity is likely to provide students with a strong statement of support for Indigenous cultural values.

The University of Western Australia operates a six week, intensive pre-law program over the summer period. Indigenous students are encouraged to attend the pre-law program if they:

- (a) are seeking entry to the Law School;
- (b) want a head start in the Law School where they are already accepted; or
- (c) want to decide if law is the right choice for them.

The course has three units: Contract Law (because this is a case law oriented subject), Criminal Law (because this is a code oriented subject) and Legal Systems, which focuses on Indigenous peoples and the Australian legal system. The course involves a significant amount of assessment and if group (a) and (c) students meet the academic requirements and assessment criteria of the program, they will be offered a place in the Law School.⁷² The respondents to the survey from the University stated that the 'key to the program is that it is jointly

67 For example, Griffith University, Queensland University of Technology, Monash University and the University of New England.

68 For example, the length of the University of New South Wales and the Griffith University pre-law courses have fluctuated. The number of weeks the UNSW program has been run for has changed markedly: from five weeks in 1995-97, to four weeks in 1998, to three weeks in 1999.

69 For example, Monash University and the University of Western Australia.

70 University of New England, *Indigenous Nations Pre-Law Program* (2000).

71 *Ibid* 3.

72 University of Western Australia, *The Aboriginal Pre-Law Programme: Western Australia* (2000). The program is run with full collaboration between the Law School and the Centre for Aboriginal Programs. The co-director from the Law School is Neil Morgan and the co-director from the Centre for Aboriginal Programs is Jill Milroy.

administered and conducted by the Law School and the Centre for Aboriginal Programs'.⁷³

The Southern Cross University offers several courses that are specially designed for Indigenous students.⁷⁴ Many Indigenous students undertake one of these courses, effectively as a preparation course, before commencing a law degree. The University response reported that the College of Indigenous Australian Peoples and the Gungil Jindibah Centre provide a great deal of support to Indigenous students throughout their law degrees and other studies.⁷⁵

The survey response from Deakin University argued that the relationship of pre-law programs (as operated in Australia) to increased academic success remains an undecided issue.⁷⁶ In response to a perception that pre-law programs do not actually facilitate success in law studies, the Deakin University Institute of Koorie Education has developed an alternative law program. Effectively, the Deakin University course attempts to provide extra time to complete first year and to provide full and dedicated academic support to students as they progress through the degree. The first year of study is extended by an extra two months (compared with other students), which is used for 'one-to-one' tutorials and group skills teaching. The students study as off-campus students⁷⁷ attending the institute three times a semester for study blocks of one week with telephone tutorials in between. Two academics are employed full time solely to teach the program and work with the Indigenous students. The program operates with agreement between the Indigenous community and Deakin University. The University attracts a high number of Indigenous students.⁷⁸

B Discussion

The lack of real consistency between pre-law programs no doubt reflects the diverse backgrounds of the students attending them and the lack of consistency between first year law programs more generally. However, it also suggests a somewhat ad hoc approach based more on the personalities involved rather than any systematic, pedagogical examination or program evaluation. The University of Sydney survey response suggested that some pre-law programs may actually mislead their participants, causing students to believe that when they start their law degree they will be in 'enclave classes doing subjects with high Indigenous

73 University of Western Australia, *Participation of Indigenous Students in Legal Education – Survey Response* (2000) (copy on file with author).

74 Including an Associate Degree in Law (Paralegal), a Bachelor of Legal and Justice Studies and Certificate in Completion in Indigenous Legal Practice, run by the School of Law and Justice, and an Associate Degree in Law (Aboriginal Paralegal), run by the College of Indigenous Australian Peoples.

75 Southern Cross University, *Participation of Indigenous Students in Legal Education – Survey Response* (2000) (copy on file with author).

76 Another survey respondent suggested this as well but did not wish to be identified.

77 Research has noted that Indigenous students are more likely to complete their education if they study off-campus: Madeleine Coorey, 'Indigenous Pupils Prefer External Courses', *The Australian* (Sydney), 9 April 1997, 35, referring to the study reported by Bourke *et al.*, above n 1.

78 See generally Deakin University, above n 38.

content. But neither turns out to be true'.⁷⁹ Questions remain about whether pre-law programs are useful and – if they are useful – which models work best. The Deakin University survey response indicated that the University is not convinced of the value of pre-law programs. The response cited two major concerns about pre-law programs. The first was that they are too short and thus insufficient to assist students academically or to promote success at law school. In the alternative, the Deakin survey response suggested that some programs are too long, up to a year in duration, and provide the participating student with no credit towards a law degree, thus adding time to completion and no result if a law course is not pursued.

Pre-law programs are perhaps the one area where law schools expend the most on Indigenous education in terms of concentrated time, money and staff resources. However, it is not clear that pre-law programs are useful in terms of developing academic skills or providing an academic introduction to law school. It may be that the resources currently expended in this area would be better spent on programs which assist individual students through the entire period of their study (like the program at Deakin University). Pre-law programs *may* be useful in an academic sense; none of the research currently available disproves this.⁸⁰ Few universities were either prepared or able to provide evidence or details of course evaluations. To this end, it would be useful to systematically evaluate existing programs and to find out from students who have attended pre-law programs if and how they were assisted by such programs. This would ideally be done through interviewing students who have completed at least a year of law study after attending a pre-law program.

In his research, Lavery suggested that a regional pre-law program should be established in Australia, that is, a single, national pre-law program that could provide Indigenous students with a pre-law program from which they could access all universities around Australia.⁸¹ The Saskatchewan program in Canada has serviced a number of universities successfully for some time. The closest that Australian universities have come to implementing this type of approach was the joint pre-law program run by Murdoch University and the Universities of Western Australia and the Northern Territory between 1993 and 1996.⁸² These universities now operate separate programs.⁸³ Although the Australian National University (based in Canberra) and Wollongong University do not operate pre-law programs, they encourage students to attend the University of New South

79 University of Sydney, *Participation of Indigenous Students in Legal Education – Survey Response* (2000) (copy on file with author).

80 There may be other reasons to run pre-law programs: see below 503-4.

81 Lavery, above n 1, 183.

82 Richard Bartlett, 'Legal Education: The Aboriginal Pre-law Program (WA and NT)' (1994) 19 *Alternative Law Journal* 141.

83 See Hussin, above n 20, 7.

Wales pre-law program.⁸⁴ This also reflects the kind of joint program that Lavery had in mind and suggests a practical use of resources within the region.⁸⁵

However, unlike students in countries such as Canada, Australian students in general do not tend to travel very far afield to attend university and this cultural attitude may explain why so many institution-specific programs currently operate in Australia. A regionalised program has not been attempted in Australia so we do not know if this presumption of locality is a cultural attitude shared by Indigenous people with respect to tertiary education or an attitude effectively imposed upon them by the institutions. In any event, given the recent history of attempts in the last 10 years to set up a regional program in Australia,⁸⁶ this seems unlikely to happen, and other options need to be examined.

Even though none of the survey responses suggested that pre-law programs are offered specifically to attract Indigenous students, pre-law programs, as they generally tend to be operated in Australia, do have a strong relationship to access. The 2000 survey suggests that universities with pre-law programs (or alternative study programs) in place (or those law schools who access other pre-law programs) are likely to attract more Indigenous students to study than those universities that do not, as demonstrated by the figures set out in Table 4.⁸⁷ The increased enrolments at law schools that operate pre-law or alternative programs may occur because potential Indigenous students perceive that the existence of such programs demonstrates a commitment by the universities to Indigenous students. As Fiona Hussin from the Northern Territory University commented, the 'Indigenous pre-law program [that] commenced in 1997 (in Darwin)⁸⁸ has had a marked effect on intake; chances of success and most importantly the increase in student numbers has [*sic*] increased "cultural safety"'.⁸⁹

Since the implementation of a pre-law program at the Northern Territory University, the numbers of Indigenous students enrolled in law have more than quadrupled from 11 students in 1996 to 46 in 1999.⁹⁰ Interestingly, the University of Technology, Sydney also reported a high number of Indigenous students but offers no pre-law program. When asked why they believed students

84 A couple of survey respondents (who did not wish to be identified) suggested that they did not recommend their students attend the pre-law programs at other universities because they are often 'de facto recruitment channels' and because they questioned their quality.

85 One survey respondent (who did not wish to be named) pointed out that once a pre-law program is operating in a city it tends to make setting up an alternative not economically viable.

86 See Heather Douglas, 'Indigenous Australians and Legal Education: Looking to the Future' (1996) 7 *Legal Education Review* 225, 243-4.

87 The survey response from the University of Western Australia also pointed out that the pre-law program there has triggered the development of 'pre-medicine' and 'pre-dentistry' programs: University of Western Australia, above n 73. These programs have also seen a significant increase in the number of Indigenous students admitted to dentistry and medicine courses. A special program for Indigenous medical students also exists at Newcastle University. For a discussion of that program: see Sophie Morris, 'Aborigines Urged to Gain Medical Degrees', *The Weekend Australian* (Sydney), July 8-9 2000, 7.

88 Previously this program was run in conjunction with the University of Western Australia and Murdoch University, taking place in Western Australia.

89 Northern Territory University, above n 26.

90 Hussin, above n 20, 7.

were attracted to the Law School, one of their survey respondents commented that many students were aware of the Indigenous law subjects that are available through the Law School's curriculum.⁹¹ The commitment of the University of Technology, Sydney to Indigenous students and issues, like that of the Northern Territory University, is being communicated to students.

One of the primary merits of pre-law programs is that they attract Indigenous students to study and, to that extent, serve a valuable purpose. The suggestion from this research is that there is a kind of 'snowball effect' – the more Indigenous law students there are at a law school, the more Indigenous students the law school will attract. Other research supports this proposition.⁹² This is not surprising in the context of the concerns expressed by Indigenous students about feeling alienated at law school. The existence of a pre-law program in a law school sends a positive message to students: it suggests that the law school community values Indigenous students and is prepared to put resources into assisting them. Ultimately, by assisting in increasing Indigenous student numbers, such programs may help to reduce feelings of alienation and marginalisation. Thus, if the main value of a pre-law program is that it encourages Indigenous students to study law because it increases 'cultural safety' (rather than providing academic assistance), law schools may want to reconsider the content and length of programs. The resources that such a move might save could be used elsewhere, such as in the provision of more ongoing support.

It may be that where pre-law programs are used as a device to assess suitability of students to study law they operate to screen out potentially unsuccessful students.⁹³ If pre-law programs operate in this way they become de facto alternative entry schemes. There may be a role for pre-law programs to operate in this way given reports that Indigenous students often find it too easy to get into law schools. Yet during their studies, there is not enough support for them to succeed and they are effectively 'set up to fail'.⁹⁴ Using pre-law programs in this way may be a useful means of making a proper assessment of students' readiness for law school. Again, as for alternative entry schemes, there needs to be a balance between pre-law assessment schemes which, on the one hand, take account of educational inequities and, on the other hand, do not inadequately prepare students where there are insufficient resources at the particular institution to assist them through law school. Potentially, there may be conflicts where a program aims both to address educational inequity and to assess law school readiness.

Overall, the survey results suggest that pre-law programs are valuable as a tool to encourage Indigenous students to commence legal studies. Law schools that

91 Interview with Mary Heath, University of Technology, Sydney (Sydney, 19 April 2001).

92 See Purich, above n 26, 82; and Penfold, above n 1, 8, where she notes that where students had access to larger groups of Indigenous students they were able to rely on each other for assistance and motivation.

93 For example, the University of Western Australia and Murdoch University.

94 Douglas, above n 1, 346.

offer pre-law programs⁹⁵ appear to attract higher numbers of Indigenous first year students to study and to result in higher numbers of graduates.⁹⁶ The higher rate of graduation is likely to be a result of the culture of inclusion created by pre-law programs rather than the direct academic benefits that they may bring. Ideally existing programs should be systematically evaluated and further research undertaken to assess the pedagogical value of pre-law programs and alternative law programs.

The results of such research may impact on decisions about the preferable structure and content of pre-law programs. If their academic value is low, it would be better to offer short (ie, one week) programs that focus on creating social and support networks, improving 'cultural safety', and assessing student needs. Resources saved could be reassigned to longer-term academic support. Alternative access regimes that elicit information from students in one interview and/or an exam or test give law schools very little opportunity to assess student needs. Pre-law programs offer a useful method of assessing such potential needs, and thus a way of allowing law schools and Indigenous centres to properly decide whether they can offer the assistance needed by the particular student or whether that student should be encouraged to complete other courses⁹⁷ or attend other law schools where the support available is more appropriate to their needs.

VII UNDERGRADUATE STUDENT QUOTAS

Many universities surveyed had student quotas in place with respect to the alternative entry of Indigenous students. The University of Adelaide and Griffith University provide for 10 special entry places for Indigenous students who apply through alternative entry. These quotas are never filled, thus they tend to offer a supportive message rather than any practical value. Both universities noted that the quota reflected an understanding that students admitted through this process may require greater support than other students, and the quota reflects the level of resources available. The Sydney University survey response reported having a 'notional quota of 3 per cent of all places at the University of Sydney to be taken up by Indigenous students. But this is viewed as a target to be met and exceeded, not a limit'.

The University of Tasmania has a quota of 130 'general' student places in three main admission categories, being 'standard', 'graduate', and 'other'. The category of 'other' takes academic performance into account as a 'substantial

95 Association with a pre-law program may have a similar effect, as it has at the Australian National University. The offering of alternative law programs may also have this effect, as is the case at Deakin University.

96 Their existence also seems to assist in reducing attrition rates (eg, at the University of New South Wales, University of Western Australia and Northern Territory University), although this issue was not directly examined by this study.

97 Note the Newcastle University alternative entry scheme which often recommends that students complete attend other courses before law.

consideration'.⁹⁸ The University of Tasmania Admission Rules state that '[t]wo places over quota may be offered to [Indigenous] students who have applied for entry under Categories A, B or C and have failed to gain selection within the quota'.⁹⁹ Other universities reported that there are quotas in place that are rarely an issue given the number of Indigenous applicants.¹⁰⁰

The imposition of quotas has caused problems in the United States. For example, in *Hopwood v State of Texas*¹⁰¹ the court held that preferential admission to university for African and Mexican Americans was contrary to the constitutional protection of equality before the law. However, due to provisions in the *Racial Discrimination Act 1975* (Cth),¹⁰² the imposition of quotas in relation to Indigenous students at Australian universities is unlikely to create a legal problem, as long as they are justified on the basis of positive discrimination.¹⁰³ Some universities in Canada (eg, Dalhousie Law School) impose quotas based on minority proportions in the population. Aylward points out that a 'true "education-equity" program would not be quota based but would admit as many qualified students as applied'.¹⁰⁴

Only Deakin University reported that the demand for their course exceeded places available and their survey response noted that course numbers are constrained and also fluctuate depending on the resources available. Most universities reported that they do not currently fill their quotas. The survey did not ask respondents to explain why quotas were not filled. It may be because insufficient numbers of students are applying for available places or that students who are applying are not sufficiently 'qualified' to be admitted. Quotas should relate to the support available for students. Given that the needs of individual Indigenous students are different, it is arguable that the number of Indigenous students who can be accepted in any year will depend on the skills and abilities of those applicants and the needs of the continuing undergraduates in the law school. The level and type of extra support available from the law school in question should inform any decision about which students and how many to take on through alternative entry schemes rather than any reliance on quotas.

98 University of Tasmania, *Admission to the University – Admission Rules* (2000) [4(c)].

99 University of Tasmania, *Law Faculty – Admission Rules* (2000) [5].

100 For example, the University of Western Australia.

101 *Hopwood v State of Texas* 95 F2d 53 (5th Cir, 1996). For an examination of this case and a discussion of why Hand believes that it is difficult to justify using race at the college admission stage, see W Brevard Hand, 'Affirmative Action: La Mort de la Republique? A Second Cry From the Wilderness' (1997) 48 *Alabama Law Review* 799, 827-8.

102 *Racial Discrimination Act 1975* (Cth) s 8. See also my previous comments on this issue: Douglas, above n 86, 235.

103 Positive discrimination which supports Indigenous people is likely to be justifiable as a special measure under the *Racial Discrimination Act 1975* (Cth) s 8, whereas discrimination which does not support Indigenous people is likely to be unjustifiable: see the *Racial Discrimination Act 1975* (Cth) s 10.

104 Aylward, above n 8, 472.

VIII POSTGRADUATE STUDENTS

In his 1990 survey, Lavery reported that there was one Indigenous postgraduate student. In 2000, survey respondents reported that there are currently 18 Indigenous post-graduate students studying at law schools. Table 5 below sets out postgraduate Indigenous law student numbers at Australian universities in 2000.

TABLE 5: NUMBERS OF INDIGENOUS STUDENTS ENROLLED IN POSTGRADUATE STUDY IN AUSTRALIAN LAW SCHOOLS

University ¹⁰⁵	ANU	BND	DEA	FLI	GTH	LAT	MAC	MEL	MON
Number of students	1	0	0	1	0	0	0	1	Unknown

University	MUR	NEW	NOT	NTU	QUT	SCU	SYD	TAS
Number of students	1	0	0	0	3	1	2	No response

University	UAD	UNE	UNSW	UQ	UTS	UWA	UWS	WOL
Number of students	0	0	0	Unknown	6	Unknown	1	1

Table 5 shows that there has been a significant increase in the number of Indigenous postgraduate students studying at law schools since 1990. However, the number remains very low. Like Indigenous staff, many Indigenous postgraduate students must occupy very lonely positions within law schools. Indeed, the fact that so few Indigenous students are employed in law schools may account to some degree for the correspondingly low numbers of postgraduate law students. Again, this may relate to a perceived lack of role models.¹⁰⁶ Most law schools reported having very few, if any, Indigenous postgraduate students. Given that overall numbers of postgraduate students are increasing (among both Indigenous and non-Indigenous people) across disciplines,¹⁰⁷ it is troubling that most law schools reported having very few, if any, Indigenous postgraduate students. The University of Sydney survey response reported actively recruiting postgraduate students, but in spite of this received few inquiries or applications. The door is not yet properly open to

¹⁰⁵ For an explanation of abbreviations, see above n 30.

¹⁰⁶ Graeme LaMaccia, 'Empowerment or Otherwise? Indigenous Australians Within the University Sector' (1996) July *NTEU Advocate* 15.

¹⁰⁷ Department of Education, Training and Youth Affairs, Higher Education Division, *Higher Education: Indigenous Education Strategies 1999-2001* (1999) 2.

Indigenous postgraduate students. Access mechanisms and support programs need to be examined and developed at this level.¹⁰⁸

As survey respondents were not asked about support and access programs for postgraduate law students, any assessment of such mechanisms is not possible in this article. However, it would appear that any access procedures or support mechanisms that currently exist at this level must be failing. The emphasis over the past 10 years has been on access and support programs for undergraduate students. This is not surprising, given the low Indigenous law graduate numbers reported in 1990.¹⁰⁹ However, now that there is an increasing number of law graduates in the community, it is important to address the poor levels of Indigenous participation in postgraduate legal education. It would be useful to research this area further. Given the success of the University of Technology, Sydney in attracting Indigenous postgraduate law students, it would be particularly interesting to talk to the staff involved and the students enrolled there. They may be able to explain the particular attraction of their program.¹¹⁰ Indeed, further information about available programs to assist Indigenous postgraduate students should be obtained from law schools, along with information on the experiences of students and law schools with existing programs, if a better understanding of the role of such programs is to be achieved.

IX ADVERTISING AND PROMOTING INDIGENOUS PROGRAMS

The 2000 survey asked law schools how they promoted and advertised the programs they operated for Indigenous students. Most of the respondent law schools favoured grass roots style advertising and promotion. The University of New South Wales reported that travelling to Indigenous communities and speaking to interested students on a one-to-one basis to offer encouragement is the best way to attract students. Other suggestions included advertising in the *Koori Mail*, visiting local high schools and community groups. Other law schools suggested approaching Indigenous land councils and legal aid organisations. Many of the respondents reported that they used existing community networks to spread information. Only one law school reported that it relied solely on standard university publicity to attract Indigenous students.¹¹¹ The same law school stated that it relied on the success of its Indigenous graduates to attract others. Several respondents said that word of mouth was

108 See Patricia A Monture, 'Now that the Door is Open: First Nations and The Law School Experience' (1990) 15 *Queens Law Journal* 179.

109 Lavery, above n 1, 179.

110 One staff member from University of Technology, Sydney suggested that the emphasis on the Indigenous studies program made post graduate study more attractive: Interview with Mary Heath, University of Technology, Sydney (Sydney, 20 April 2001).

111 The University of Queensland.

particularly successful in attracting Indigenous students.¹¹² Most law school respondents noted that promotion was a task usually undertaken by the Indigenous student centre.

X ONGOING LAW SCHOOL SUPPORT

A Law School Tutors, Mentors and Liaison Officers

Most law schools reported that the Aboriginal and Torres Strait Islander Assistance Scheme ('ATAS')¹¹³ scheme was used to employ tutors for students. Respondents were also asked to report on whether their law school offered special tutorial support to Indigenous students apart from ATAS tutors. This special tutorial support was explained in detail by some of the respondents. The Northern Territory University employs an 'Indigenous students support lecturer' who works on an almost full time basis and tailors their availability to students' needs.¹¹⁴

The University of Tasmania reported that 'the Law School conducts separate tutorials for overseas students and Indigenous students are encouraged to attend'. The University also noted that 'some tutors from the Law School are employed by the Riawunna Aboriginal Study Centre especially to conduct tutorials for Indigenous students but most of the staff of the Law School will make themselves available for consultation to any student experiencing difficulties'.¹¹⁵ Respondents reported that Flinders University had employed a part time tutor to work with Nunga students in the past, and that two out of three of the tutors had been Indigenous academics. The University of Sydney stressed that a senior law staff member (at associate professor level) was appointed as the liaison staff member for all the Indigenous students in the law school.

The Australian National University reported that the kind of flexible and individualised program of tutoring offered at that Law School had been successful. The University's response stressed the individualised nature of tutoring which could be tailored to students' needs. Their annual report suggested that it was important that the tutor was situated physically in the Law School because:

Firstly it gives the students a 'base' in the Law School so that it does not seem such an alien place ... Secondly the academic advisors have a relationship with the Law Faculty and staff and can build up a positive attitude to the scheme in the school which would be very difficult if they were located elsewhere.¹¹⁶

112 Including, for example, the Northern Territory University, Monash University, the University of Western Sydney, the Australian National University and Deakin University.

113 ATAS is usually administered by the university's Indigenous centre. The unit pairs appropriate tutors with students.

114 The Australian National University reported a similar program.

115 For example, University of Tasmania, *Participation of Indigenous Students in Legal Education – Survey Response* (2000) (copy on file with author).

116 Briscoe and Baxter, above n 13, 4.

The survey responses about ATAS tutors and other tutorial support are summarised below in Table 6.

TABLE 6: THE PROVISION OF TUTORS, MENTORS AND LIASON OFFICERS TO INDIGENOUS LAW STUDENTS

University ¹¹⁷	ANU	BND	DEA	FLI	GTH	LAT ¹¹⁸	MAC	MEL	MON
ATAS	Yes	No	Yes	Yes	Yes	n/a	No	Yes	No
Law school tutor/mentor/liason officer	Yes	No	Alternative system	Yes	Yes	n/a	No	Yes	Yes

University	MUR	NEW	NOT	NTU	QUT	SCU	SYD	TAS
ATAS	Yes	Yes	No	Yes	No	Yes	Yes	Yes
Law school tutor/mentor/liason officer	No	Yes	No	Yes	Yes	No	Yes	Yes

University	UAD	UNE	UNSW	UQ	UTS	UWA	UWS	WOL
ATAS	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Law school tutor/mentor/liason officer	Yes	Yes	Yes	No	Yes	Yes	No	No

To some extent the data gathered in response to the question relating to the law schools' provision of special tutorial support is misleading. Although some universities responded that they provide no formal tutorial program within their law school, they noted later in their responses that the Indigenous centres with which they were associated offered good tutorial support.¹¹⁹ In some universities, the provision of extra academic support for Indigenous students was primarily the responsibility of the Indigenous centres.¹²⁰ Other law schools responded that there were academics employed within the faculty who did not conduct formal tutorials but acted as student mentors and responded as necessary to the

¹¹⁷ For an explanation of abbreviations, see above n 30.

¹¹⁸ There are no Indigenous students at Latrobe University.

¹¹⁹ For example, Newcastle University and Southern Cross University.

¹²⁰ For example, Wollongong University and Murdoch University.

individual needs of the Indigenous students enrolled.¹²¹ The University of Queensland Law School responded that their staff members were always available for students and that all the 'usual' student support mechanisms existed for Indigenous students as well as for other students.

As discussed above, many of the law schools surveyed did not, in their selection processes prioritise previous academic achievement of law students who entered through alternative access avenues. It would be irresponsible of law schools to provide highly flexible admission schemes which do not depend upon academic readiness (because they take into account the inequitable educational opportunities offered to Indigenous people at the primary and secondary levels of formal education), and then to expect Indigenous students who enter law schools through these schemes to be able to cope with mainstream first year studies. Depending on the alternative access schemes offered by universities, different levels and types of academic preparation can be assumed of Indigenous law students by law school teachers. Flexible admission mechanisms are important, and a key aspect of improving access, but they obviously need to be supported by other forms of catch-up and ongoing support.

Most law schools reported having some form of ongoing support in place, but the types of support offered seem, like the various pre-law programs, to be rather ad hoc. It appears that in a number of law schools, although there are academics who are willing to offer assistance to Indigenous students, there are often no staff within the law school who are formally employed to take on this role. Many survey respondents commented on the need for flexibility in the provision of support to Indigenous students.¹²² Although flexibility would seem to be important, so too is the need for formal recognition by law schools of the role of a member or members of academic staff to liaise and assist Indigenous students. Such a role can take up a lot of time and this should be reflected in the staff member's workload. It should also be borne in mind that research has consistently demonstrated that Indigenous students prefer to be tutored by Indigenous people.¹²³

Although some of the law schools that took part in this survey have formally funded support mechanisms, many law schools do not. It is not enough for law schools to provide alternative access and then assume firstly that generous academics will be in a position to offer the necessary support, and secondly that Indigenous students, who often feel alienated by the law school system, will independently seek support from such academics. Thus, other types of support mechanisms need to be institutionalised. This means that staff should be allocated a support role and their formal teaching load should reflect this.

Compared to alternative entry programs and pre-law programs, ongoing support at law schools appears to be unplanned and informal. The law schools who have reported recent success in terms of graduate numbers and reduced

121 For example, the Queensland University of Technology and Monash University.

122 For example, the Australian National University and the Northern Territory University.

123 Douglas, above n 1, 340, 344-5; Penfold, above n 1, 189.

attrition rates all employ a staff member to work with Indigenous students.¹²⁴ Although that staff member has other roles within the law school, their primary role is to arrange support programs for Indigenous law students. The need for support to be flexible and individualised was also stressed in the survey responses from these universities.

B Other Types of Law School Support

Apart from academic support, respondents suggested that other types of assistance were available to students. Some forms of assistance recognised the financial issues confronting many Indigenous students. These types of assistance included the law school purchasing Indigenous students' course materials¹²⁵ or some law schools providing scholarships to pay for books.¹²⁶ The University of Adelaide has set up a room in the law school especially for Indigenous students, which is equipped with books, desks and computers.¹²⁷ Murdoch University is currently trying to set up an 'Indigenous students' society similar to the law society'.¹²⁸ Many law schools commented that they held regular lunches and morning teas for Indigenous students.¹²⁹ Some universities advised that they arrange guest speakers, or visits to hear speakers, to keep up students' interest and motivation.¹³⁰ In response to the survey question about support some law schools commented which running subjects that include Indigenous peoples' perspectives may offer another form of support.¹³¹

With few exceptions, respondents reported that there was a close relationship between Indigenous centres and law schools on university campuses. Many of the support initiatives reported by law schools were stated to be run either in conjunction with Indigenous centres or with their support. The close working relationship between law schools and Indigenous centres is clearly very important if law schools are to have any chance of responding appropriately to the needs of the Indigenous students enrolled in their courses.

XI CONCLUSION: WHERE TO IN THE NEXT 10 YEARS?

Over the last 10 years, the majority of law schools have recognised that more Indigenous students should be graduating from law school. To this end, nearly all Australian law schools now have alternative entry schemes in place; these seem entrenched in the administrative landscape. Pre-law programs or alternative

124 For example, the Northern Territory University, the Australian National University and the University of New South Wales.

125 For example, the Queensland University of Technology.

126 For example, Griffith University.

127 The Australian National University also provides a tutorial room.

128 Murdoch University, *Participation of Indigenous Students in Legal Education – Survey Response* (2000) (copy on file with author).

129 For example, the Queensland University of Technology.

130 For example, Griffith University.

131 For example, the University of New England.

law programs, and special tutorial programs designed to support Indigenous students, are now also common in many Australian universities. The coordination of these three mechanisms needs to be more carefully considered. Alternative entry schemes cannot be isolated from other support mechanisms: each needs to be built into the other. Pre-law programs remain a site of contention: although they appear to assist students in a social-cultural sense, whether they assist Indigenous students academically is debatable. Ongoing support, in the form of flexible and individualised tutorials, should be formally and specifically resourced by law schools and, ideally, should be provided by an Indigenous person.

The alarmingly low numbers of Indigenous postgraduate students studying in law schools and the associated low numbers of Indigenous people working in law schools deserve special focus and are both issues which need to be further researched and addressed. It is likely that, for the reasons outlined in this article, higher numbers of Indigenous postgraduate students and employees will have a further positive impact on rates of graduation of Indigenous law students. Thus, a broadening of focus which moves towards examining and improving university employment and postgraduate law study programs and conditions will not detract from the work that has been done in the undergraduate area.

A concern raised by some survey respondents was that if resources are shifted towards law schools, this must not lead to a weakening of Indigenous centres. This type of resource and focus shifting was suggested to be 'a tactic frequently employed [and one that can] undermine a strong autonomous Indigenous centre'.¹³² It may be argued that it is the Indigenous centres that should be responsible for Indigenous law student support, and that law schools should be concentrating on more systemic change so that they can better cope with the cultural needs of Indigenous students.¹³³ Although it is extremely important that any support implemented by law schools does not shift resources away from Indigenous centres, there is a valuable role for law schools to play in supporting Indigenous students and academics. Law schools should be guided by Indigenous centres in the execution of their responsibility to provide support to Indigenous students. As some survey respondents pointed out, there is a strong relationship between their law schools and Indigenous centres, and it is in such universities that the numbers of Indigenous law students are strongest.¹³⁴ McConaghy notes that cultural diversity is often celebrated in a 'superficial way, such that the basic structures and cultural logic of social injustice and exploitation remain unchallenged'.¹³⁵ Strong links between law schools and Indigenous centres are likely to promote cultural diversity in a way that is positive for all concerned.

132 Sydney University, above n 18. The Deakin University survey response pointed out that the Institute of Koorie Education provides full and independent infrastructure for the funding and direction of Indigenous tertiary education: Deakin University, above n 38.

133 How this may be done was not explored by the survey but examples may include changes to curriculum content and changes in assessment regimes.

134 For example, the University of New South Wales and the University of Western Australia.

135 McConaghy, above n 21, 187. See also Moreton-Robinson, n *, 132.

Law and education remain, for Indigenous people, bastions of a cultural tradition outside of their own, from which they continue to be marginalised.¹³⁶ However, on a positive note, in the 10 years since Lavery's report there have been continuing improvements in the opportunities for and success of Indigenous people in these alienating areas. Greater change is possible. Now is the time to systematically examine the types of programs that law schools have been experimenting with over the past 10 years, so that programs that best reflect the needs and circumstances of Indigenous students can be implemented.

¹³⁶ Lavery, above n 1, 200. See also Douglas, above n 1, 321-2.