**The Spectre of Racial Discrimination in *Bugmy v The Queen*: An analysis of s 718.2(e) of the Canadian *Criminal Code***

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**Terminology**

This thesis will refer to the principles that apply to sentencing Aboriginal persons in Canada and Australia. The term ‘Aboriginal’ will be used throughout this thesis in order to ensure consistency, because that is the term that has been used by the courts in the cases referred to and in the majority of the secondary sources that have been used. This is not to say that similar principles do not, or should not, also apply to Torres Strait Islander people.

The term ‘Indigenous’ will be used when referring to statistics that include both Australian Aboriginal and Torres Strait Islander people and when directly quoting sources that have used that term.

The statistics on the proportion of Aboriginal people in prison as a percentage of the total prison population from 1991, referred to in Chapter I, reflect the number of Aboriginal people in prison, whereas the statistics from 2015 include both Aboriginal and Torres Strait Islander people.

1. Introduction

Twenty-five years on from the landmark report of the *Royal Commission into Aboriginal Deaths in Custody,* which found that the over-representation of Aboriginal people in police and prison custody was grossly disproportionate,[[1]](#footnote-1) the proportion of Aboriginal people in custody has significantly increased. When the report was tabled in Parliament in 1991, the proportion of Aboriginal people in prison as a percentage of the prison population was 14.4 per cent.[[2]](#footnote-2) Despite the Keating government’s acceptance of all but one of the report’s 339 recommendations, many of which focused on reducing the number of Aboriginal people in custody, the proportion of Indigenous people in prison as a percentage of the prison population had increased to 27.4 per cent by 2015 even though Indigenous people make up only 3 per cent of the total population of Australia.[[3]](#footnote-3)

The causes of both high rates of criminal offending by Aboriginal people and the over-representation of Aboriginal people in the criminal justice system are complex, varied and contested.[[4]](#footnote-4) While there is debate about the best policy approach to addressing these issues,[[5]](#footnote-5) it is nevertheless accepted that both are linked to contemporary Aboriginal disadvantage, which itself is a consequence of colonisation, dispossession and past government policies.[[6]](#footnote-6) The over-representation of Aboriginal people in the criminal justice system and the ongoing effects of colonisation provide the context for understanding how Aboriginal offenders are, and should be, sentenced by the courts. As Bagaric and Edney have argued:

Dispossession… is not simply a historical construct but is formative in constructing the lived experience of contemporary Aboriginal communities. Thus, contemporary sentencing practices in respect of Indigenous offenders are embedded within a historical continuum that operates through the social, political and economic marginalisation of Indigenous communities and the relative deprivation of those communities.[[7]](#footnote-7)

As such ‘a proper and principled approach to the sentencing of Indigenous offenders… requires recognition of that history and the developmental pathways that cause Indigenous offending’.[[8]](#footnote-8)

In Australia, however, the distinctiveness of Aboriginal people’s history, and the impact of Aboriginal people’s collective experiences on individual’s circumstances and offending behaviours have generally not been well recognised by the courts,[[9]](#footnote-9) notwithstanding some notable exceptions.[[10]](#footnote-10) The relevance of the social and economic disadvantage often associated with being a member of the Aboriginal community has been acknowledged by the High Court, but is not treated differently to disadvantage experienced by non-Aboriginal offenders.[[11]](#footnote-11) Nor has there been any direction by the High Court to the effect that sentencing courts should pay particular attention to the background and circumstances of Aboriginal offenders because of the likely connection between an Aboriginal offender’s circumstances and the experience of the wider Aboriginal community.

This position stands in contrast to the approach of the Canadian courts. As a consequence of s 718.2(e) of the *Criminal Code*,[[12]](#footnote-12) which will be referred to as the ‘sentencing direction’, Canadian courts are required to undertake two additional steps when sentencing an Aboriginal Canadian. First, the court must take judicial notice of the experience of Aboriginal people as a group.[[13]](#footnote-13) Second, the court must consider ‘the extent to which the offender’s individual circumstances can be understood by reference to this group experience’.[[14]](#footnote-14) The court is supported in this process by the provision of a pre-sentence ‘*Gladue* report’, written by an Aboriginal caseworker, which contains information about the offender and his or her community, including information specific to that offender’s Aboriginal background.[[15]](#footnote-15)

The sentencing direction was introduced in response to the over-representation of Aboriginal people in the Canadian criminal justice system and the recognition that the courts had inadequately engaged with the underlying causes of Aboriginal offending.[[16]](#footnote-16) Addressing the issue of over-representation clearly requires more than the introduction of the sentencing direction. Nevertheless, as the Supreme Court of Canada has recognised:

Sentencing judges are among those decision‑makers who have the power to influence the treatment of aboriginal offenders in the justice system.  They determine most directly whether an [A]boriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.[[17]](#footnote-17)

The sentencing direction therefore aims to reduce the over-reliance on incarceration as a response to Aboriginal offending by ensuring equal justice for Aboriginal offenders. It does this by remedying the systemic failure by the courts to properly identify and take into account relevant sentencing considerations that are connected to an offender’s Aboriginality.

In its 2013 decision in *Bugmy* the High Court had the opportunity to consider whether the Canadian approach to sentencing Aboriginal offenders should be followed in Australia, even in the absence of a legislated direction to pay particular attention to an offender’s Aboriginal background and circumstance.[[18]](#footnote-18) The Court rejected such an approach, stating that taking judicial notice of systemic and background factors would be ‘antithetical to individualised justice’.[[19]](#footnote-19) It held that the principles based on the sentencing direction, which were developed by the Supreme Court of Canada in the cases of *R v Gladue*[[20]](#footnote-20)(‘*Gladue*’) and *R v Ipeelee*[[21]](#footnote-21) (‘*Ipeelee*’), were not applicable to sentencing Aboriginal offenders in NSW.[[22]](#footnote-22) In addition, as Anthony, Bartels and Hopkins have noted, the Court ‘raised the spectre that an equivalent provision in Australia might be racially discriminatory’[[23]](#footnote-23) and implied that such a provision might be invalid as a consequence of inconsistency with s 10(1) of the *Racial Discrimination Act 1975* (Cth) (‘RDA’) if enacted by the NSW Parliament.[[24]](#footnote-24)

Although some arguments in favour of the introduction of the sentencing direction in Australia will be discussed, this thesis will largely assume the desirability of enacting an equivalent to the sentencing direction in Australia.[[25]](#footnote-25) The focus will be on two separate but related questions implied by the High Court in *Bugmy*. First, it will consider whether the sentencing direction is racially discriminatory by applying the accepted definition of the term in common usage in international law to the sentencing direction. Second, it will consider whether the sentencing direction, if enacted by a state Parliament, would be invalid as a consequence of inconsistency with s 10(1) of the RDA, which provides a guarantee of equal and enjoyment of human rights and fundamental freedoms. This question will be addressed by considering first whether or not the sentencing direction is consistent with s 10(1) and then whether it could be saved by the operation of s 8, which provides an exception to the operation of s 10(1) for laws that are ‘special measures’ designed to secure the ‘adequate advancement’ of a racial group and discussing how the High Court might determine these issues. This thesis will argue that the sentencing direction is not racially discriminatory and most likely would not be invalid as a consequence of inconsistency with s 10(1) of the RDA. This is either because it does not engage the operation of s 10(1) or because it can be characterised as a special measure under s 8. The better view is that the sentencing direction is consistent with s 10(1), because this position more accurately reflects the purpose and effect of the sentencing direction and because there are potential problems associated with characterising it as a special measure.

Chapter II will begin by describing the sentencing direction. Next it will discuss the High Court’s consideration of it in *Bugmy* and Anthony, Bartels and Hopkins critique of the decision. It will then briefly outline the approaches taken by Australian courts to sentencing Aboriginal offenders. The principles of proportionality and equal justice and the notion of sentencing as an individualised process will be explored in further detail because they are central to understanding both Australian sentencing law and the purpose and effect of the sentencing direction. Finally, some arguments in favour of introducing the sentencing direction into Australian sentencing legislation will be summarised.

Chapter III will consider whether the sentencing direction is racially discriminatory within the meaning of that term in international law. It will focus on the nature of the distinction the sentencing direction makes between Aboriginal and non-Aboriginal offenders and argue that the sentencing direction is not racially discriminatory, drawing on the Supreme Court’s discussion of the issue in *Gladue* and *Ipeelee*.

Chapter IV will consider whether the sentencing direction is prima facie inconsistent with s 10(1) of the RDA. It will argue that the conclusion would depend on how the effect of the sentencing direction on the fundamental duty of the sentencing court is characterised. There is some overlap between the discussion of whether the sentencing direction is racially discriminatory and whether it is consistent with s 10(1) because, although the High Court’s interpretation of s 10(1) has meant that these are separate questions, there are similar arguments and considerations that are relevant to both.

There are some limitations on the analysis in Chapter IV that should be noted at the outset. First, there has been a lack of consensus among members of the High Court in construing and applying s 10(1) of the RDA. For example, the Court’s most recent decision involving alleged inconsistency between a state law and s 10(1) resulted in seven separate judgments even though all judges reached the same conclusion.[[26]](#footnote-26) Second, the actual wording of any equivalent sentencing direction is likely to have a significant impact upon how the issue of consistency with s 10(1) is resolved. Lastly, this thesis does not attempt to identify and assess every argument that could be used to challenge the constitutional validity of the sentencing direction. It focuses on the issue of inconsistency with s 10(1) of the RDA adverted to by the Court in *Bugmy*, and specifically on whether the sentencing direction limits non-Aboriginal offenders right to equality before the courts.

Finally, Chapter V will consider whether the sentencing direction could be saved as a special measure if the High Court held it was prima facie inconsistent with s 10(1) of the RDA. It will apply the five indicia of a special measure outlined by Brennan J in *Gerhardy v Brown*[[27]](#footnote-27)(‘*Gerhardy*’*)* and argue that the sentencing direction could be characterised as a special measure under s 8. However, it will also note some problems with characterising the sentencing direction in this way. Specifically: it would require the category of special measures to be stretched beyond its proper scope; it would potentially undermine the purpose of the sentencing direction; and it may negatively impact upon how it is perceived by the community.

1. The direction to pay particular attention to the circumstances of aboriginal offenders
2. *The Sentencing Direction*

1. *The decision in Gladue*

The sentencing direction in s 718.2(e) of the *Criminal Code* provides that:

All available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders* [emphasis added].[[28]](#footnote-28)

The operation and effect of the provision, which was inserted in 1996, was first considered by the Supreme Court in the case of *Gladue*, where the Court held it was remedial in nature and went beyond a codification of the existing common law.[[29]](#footnote-29) It stated that the sentencing direction requires the court to ‘undertake the process of sentencing Aboriginal offenders differently in order to achieve a truly fit and proper sentence’.[[30]](#footnote-30) To fulfil his or her duty the sentencing judge must consider:

1. the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the court, and
2. the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal culture or connection.[[31]](#footnote-31)

In taking these factors into account the sentencing judge is required to take judicial notice of the broad systemic and background factors affecting Aboriginal people and the priority given in Aboriginal cultures to a restorative approach to punishment.[[32]](#footnote-32) The Court noted that case specific information about those factors will come both from counsel for the offender and from a pre-sentence report.[[33]](#footnote-33) Importantly for the analysis in Chapter III, the Court emphasised that the sentencing direction does not alter the fundamental duty to impose a sentence that is fit for the offence and the offender, and should not be taken as requiring an automatic sentence discount for an Aboriginal offender.[[34]](#footnote-34) This point has been stressed by the Court in later cases applying the sentencing direction, such as *R v Wells*.[[35]](#footnote-35) On the issue of ‘reverse discrimination’ the Court in *Gladue* noted that the fact a sentencing judge is required to take into consideration the unique circumstances of Aboriginal offenders ‘is not unfair to non-Aboriginal people’.[[36]](#footnote-36) Rather, the purpose of the sentencing direction is ‘to treat Aboriginal offenders fairly by taking into account their difference’.[[37]](#footnote-37)

2. *The use of ‘Gladue reports’*

Following the decision in *Gladue*, there was some initial confusion within the judiciary about how to consistently apply s 718(e) of the Criminal Code and the principles articulated by the Supreme Court.[[38]](#footnote-38) To address this uncertainty a specialised Gladue Court was created in Toronto and within that court a ‘Gladue Caseworker’ position was created to provide reports containing detailed information about Aboriginal offenders’ backgrounds.[[39]](#footnote-39) The practice of providing the court with ‘Gladue reports’ to inform the sentencing process was subsequently expanded beyond specialised Aboriginal sentencing courts and has been recognised by the Supreme Court as ‘indispensable’ to the application of the sentencing direction.[[40]](#footnote-40) Gladue reports are prepared by an Aboriginal caseworker and incorporate information that is unique to the Aboriginal experience.[[41]](#footnote-41) For example, they may include information about historical and systemic factors that may have acted as antecedents to the person’s offending behaviour, information about work and education opportunities in the offender’s community and suggestions for alternative sanctions that could meet the needs of the offender.[[42]](#footnote-42) Australian academics such as Hopkins have argued strongly in favour of the introduction of *Gladue* reports in Australian jurisdictions to support the courts in sentencing Aboriginal offenders.[[43]](#footnote-43)

3. *The decision in Ipeelee*

Despite the development of the Aboriginal sentencing courts and the utilisation of *Gladue* reports, case law over the decade that followed the decision in *Gladue* narrowed the application of the principles developed in that case and tended to emphasise the importance of the sentencing objectives of denunciation and deterrence over the weight given to factors related to an offender’s Aboriginality.[[44]](#footnote-44) However, the decision of the majority of the Supreme Court in the 2012 case of *Ipeelee* reiterated the need for the courts to apply the principles developed in *Gladue* in every case involving an Aboriginal offender and clarified the purpose and effect of the sentencing direction.

The Court in *Ipeelee* held that sentencing judges must undertake a different approach when sentencing an Aboriginal offender and avoid a formalistic approach to the ‘parity principle’ that would see Aboriginal offenders treated in effectively the same way as non-Aboriginal offenders.[[45]](#footnote-45) The Court made clear that a failure to take into account the factors identified in *Gladue* would amount to a violation of the fundamental principle that a sentence must reflect both the gravity of the offence and the culpability of the offender.[[46]](#footnote-46) Furthermore, the Court explicitly highlighted the relevance of Aboriginal people’s unique collective and personal experiences of colonisation and the impact of past government policies to understanding offending behaviours and the over-representation of Aboriginal people in the criminal justice system.[[47]](#footnote-47) These unique experiences must be taken into consideration in sentencing in addition to other matters that bear on the offender’s culpability.[[48]](#footnote-48)

The Court again confronted the question of whether the sentencing direction amounts to a form of ‘reverse discrimination’ andreiterated the view it expressed in *Gladue* that the sentencing direction is non-discriminatory.[[49]](#footnote-49) The Court stated that taking into account the factors identified in *Gladue* is consistent with the principle of proportionality and the notion of sentencing as an individualised process because systemic and background factors bear on both the moral blameworthiness of the offender and the types of sanction that are appropriate in the circumstances.[[50]](#footnote-50) Furthermore, it held that the sentencing direction is not a ‘race-based sentence discount’ and does not require the court to automatically impose a more lenient sentence.[[51]](#footnote-51) Rather, systemic and background factors and the appropriateness of alternative sanctions must be considered in addition to, and weighed against, other relevant factors.[[52]](#footnote-52) The Court also specifically addressed the criticism that the sentencing direction and the decision in *Gladue* create unjustified distinctions between Aboriginal and non-Aboriginal offenders who are otherwise similar.[[53]](#footnote-53) The Court stated that such a criticism reflects a failure to recognise the *distinct* history of Aboriginal people in Canada and incorrectly assumes that sentencing judges may not consider systemic and background factors effecting non-Aboriginal offenders.[[54]](#footnote-54) The Court was also clear that the sentencing direction must be followed in sentencing *all* Aboriginal offenders regardless of the seriousness of the offence.[[55]](#footnote-55)

1. *The High Court’s comments on the sentencing direction in Bugmy*

In 2013 the High Court decided the case of *Bugmy,* which raised important questions about the relevance of an offender’s Aboriginality to sentencing in Australia and presented an opportunity for the Court to consider the Canadian approach. Mr Bugmy, an Aboriginal man, was granted special leave to appeal the decision of the NSW Court of Criminal Appeal to increase his sentence for two counts of assaulting a correctional officer and one count of intentionally causing grievous bodily harm to another while on remand.[[56]](#footnote-56) Mr Bugmy had grown up in a remote community in far western NSW in circumstances of extreme social disadvantage and had been exposed to high levels of violence and alcohol abuse from an early age.[[57]](#footnote-57) In sentencing Mr Bugmy, Lerve ADCJ of the District Court of NSW had applied the principles developed in the case of *R v Fernando* and taken into account Mr Bugmy’s reduced culpability as a consequence of his deprived social background, his mental illness and his need for substance abuse rehabilitation.[[58]](#footnote-58) However, the NSW Court of Criminal Appeal held that Lerve ADCJ had given too much weight to Mr Bugmy’s personal circumstances given the objective seriousness of his offences, and increased his sentence accordingly.[[59]](#footnote-59)

Before the High Court counsel for Mr Bugmy argued that, when sentencing an Aboriginal offender, the court must take into account the unique systemic or background factors which may have played a part in bringing the individual Aboriginal offender before the court in order to ensure equality before the law and proportionate sentencing.[[60]](#footnote-60) Counsel for Mr Bugmy argued in favour of the application of the principles developed in *Gladue* and *Ipeelee* to Aboriginal offenders in Australia, citing the broad equivalence between s 718.2(e) of the *Criminal Code* and s 3A of the *Crimes (Sentencing and Procedure) Act 1999* (NSW) and arguing that the principles developed in those cases go beyond simply interpreting s 718.2(e) of the Criminal Code in that they demonstrate what is required of the court in order to achieve individualised and equal justice for Aboriginal offenders in sentencing.[[61]](#footnote-61) It was submitted that taking judicial notice of Aboriginal offenders’ unique experiences of dispossession and colonization:

[L]ead[s] to a fuller appreciation of the impact of those factors on an offender’s life… operate as a check before a sentence of imprisonment… assist in informing the type, length and structure of the sentence… mean that individual factors are not assessed in a vacuum but… in their relevant historical and contextual framework… can shed light on the reasons for the offending behaviour and may assist in the assessment of moral culpability, or… may be relevant to considerations of deterrence and other purposes of punishment.[[62]](#footnote-62)

However, the majority of the Court rejected this argument, emphasizing the different statutory context and the lack of an equivalent to s 718.2(e) of the Criminal Code in the *Crimes (Sentencing Procedure) Act 1999* (NSW).[[63]](#footnote-63) The Court held that ‘there is no warrant’ to apply a different method of analysis when sentencing an Aboriginal offender or for the court to take into account the high rate of incarceration of Aboriginal people in the sentencing process.[[64]](#footnote-64) The Court stated taking such an approach would be ‘antithetical to individualised justice’, because recognizing the fact that Aboriginal people are ‘subject to social and economic disadvantage measured across a range of indices’ says ‘nothing about an individual offender’.[[65]](#footnote-65)

This aspect of the High Court’s reasoning has been critiqued by Anthony, Bartels and Hopkins, who have argued that ‘sentencing courts can account for Indigenous systemic disadvantage while also promoting individualised justice’.[[66]](#footnote-66) This is because by taking judicial notice of systemic and background factors the court is able to understand the individual offender within the context of Aboriginal people’s collective experiences.[[67]](#footnote-67) The systemic and background factors must still be linked to the particular offender and offence and will not influence the ultimate sentence unless they bear on either the offender’s culpability or appropriateness of a particular sanction.[[68]](#footnote-68) The sentencing direction, as Anthony, Bartels and Hopkins have argued, ‘was designed to remedy a judicial failure to take proper account of the unique circumstances of *individual* Aboriginal offenders coming before the court’.[[69]](#footnote-69) Rather than making discriminatory assumptions, the Canadian approach focuses ‘attention on the link between the group and individual experience’.[[70]](#footnote-70) It is ‘facilitative’ in the sense that it does not impose a burden on the Aboriginal offender to prove a ‘direct causal link’ between systemic and background factors and their circumstances and offence.[[71]](#footnote-71)

In addition to rejecting the application of the principles developed in *Gladue* and *Ipeelee* to sentencing Aboriginal offenders in NSW, the High Court raised a further issue that provides the foundation for this thesis. After highlighting the absence of an equivalent to s 718.2(e) the Court stated that ‘the power of the Parliament of NSW to enact a direction of that kind does not arise for consideration here’ and referred in a footnote to s 10(1) of the *RDA*.[[72]](#footnote-72) This implies that the sentencing direction, if enacted by a state Parliament, might be inconsistent with s 10(1) of the RDA, which provides a guarantee of equality before the law, and therefore invalid as a consequence of s 109 of the Commonwealth Constitution. This thesis will examine whether the sentencing direction, if enacted by a state Parliament, would be invalid on the basis of inconsistency with s 10(1) of the RDA. However, before considering how the High Court might determine that question, it will first discuss the approaches of Australian courts to sentencing Aboriginal offenders, outline the case in favour of introducing the sentencing direction into Australian sentencing legislation and explore the broader issue of whether or not the sentencing direction is racially discriminatory.

1. *Australian approaches to sentencing Aboriginal offenders*

1. *Background*

In Australia, sentencing legislation in three jurisdictions refers specifically to an offender’s cultural background.[[73]](#footnote-73) It is also well established as a common law principle and in the sentencing legislation of some Australian jurisdictions[[74]](#footnote-74) that imprisonment is a sanction of last resort.[[75]](#footnote-75) As Edney and Bagaric have noted, the court should only impose a term of imprisonment ‘after having ‘exhausted’ the possibilities of less serious sanctions’.[[76]](#footnote-76) Precedent has also emerged in case law for the recognition of some factors related to an offender’s Aboriginality in sentencing,[[77]](#footnote-77) with the courts typically focusing on social and economic disadvantage.[[78]](#footnote-78) In addition a number of specialized Aboriginal sentencing courts have been established.[[79]](#footnote-79) However, there is no equivalent to the sentencing direction in any Australian sentencing legislation that requires the court to take a different approach to sentencing in the case of an Aboriginal offender. Instead, the guiding principle, which was stated by Brennan J in the case of *Neal v The Queen[[80]](#footnote-80)* (‘*Neal*’) and reaffirmed by a majority of the Court in *Bugmy,[[81]](#footnote-81)* is that the sentencing judge must apply the same sentencing principles irrespective of the offender’s identity, but in doing so must take into account ‘all material facts including those facts which exist only by reason of the offender’s membership of an ethnic or other group’.[[82]](#footnote-82)

2. *The proportionality principle, equal justice and individualised justice*

Along with Brennan J’s statement of principle in *Neal* there are two further concepts that are central to understanding the approaches Australian courts have taken to sentencing Aboriginal offenders and the arguments in favour of the introduction of the sentencing direction into Australian sentencing legislation. These are the proportionality principle and the principle of equal justice, both of which require sentencing to be an individualised process (except where mandatory sentences apply). The proportionality principle has been recognized by the High Court as one of the primary objectives of sentencing[[83]](#footnote-83) and has been given statutory recognition in most Australian jurisdictions.[[84]](#footnote-84) Broadly, it reflects the notion that ‘the punishment should fit the crime’.[[85]](#footnote-85) That is, the sentence must correspond to the seriousness of the offence and the circumstances and culpability of the offender. The principle of equal justice, on the other hand, requires equals to be treated equally and unequals to be treated unequally. As Gaudron, Gummow and Hayne JJ stated in *Wong v The Queen*: ‘equal justice requires identity of outcome in cases that are relevantly identical. It requires different outcomes in cases that are different in some relevant respect’.[[86]](#footnote-86) The NSW Court of Criminal Appeal has stated that consistency in sentencing is a reflection of the notion of equal justice, which finds expression in the ‘parity principle’.[[87]](#footnote-87)

The principles of proportionality and equal justice require sentencing to be an individualised process ‘tailored to the particular offence, the particular offender and the particular facts of the case’.[[88]](#footnote-88) As well as providing background to understanding the approaches of Australian courts to sentencing Aboriginal offenders, the principle of equal justice provides the philosophical foundation for discrimination law both domestically and internationally and is relevant to the discussion of the meaning of racial discrimination in Chapter III. The principles of both proportionality and equal justice are also crucial to determining whether the sentencing direction has the effect of limiting non-Aboriginal offender’s right to equality before the courts.

3. *Aboriginality and sentencing in Australia*

Although the guiding principle articulated by Brennan J in *Neal* is well established, the courts have applied it inconsistently when sentencing Aboriginal offenders. In some cases the courts have demonstrated a willingness to seriously engage with an offender’s Aboriginal identity when determining both the level of the offender’s culpability and the appropriateness of alternative sanctions. In other cases, however, courts have given relatively little attention to an offender’s Aboriginality, or explicitly disclaimed the relevance of an offender’s Aboriginality.

One of the most influential decisions since *Neal* was *R v Fernando* (‘*Fernando*’), where Wood J of the Supreme Court of NSW reviewed a number of earlier authorities and articulated eight propositions about the relationship between Aboriginality and sentencing.[[89]](#footnote-89) His Honour took into account the social and economic deprivation the particular Aboriginal offender had experienced, the problems of substance abuse in the community he came from and acknowledged that a term of imprisonment could be a particularly harsh and alienating punishment for an Aboriginal person from a remote community.[[90]](#footnote-90) In sentencing Mr Fernando, Wood J stated that the relationship between violence and alcohol abuse in Aboriginal communities requires ‘more subtle remedies than imprisonment’.[[91]](#footnote-91) Another example of a sentencing decision involving close consideration of an offender’s Aboriginality was the dissent of Eames JA in *R v Fuller-Cust* (‘*Fuller-Cust*’).[[92]](#footnote-92) In that case Eames JA explored the complex nexus between aspects of childhood development, colonialism, cultural identity and criminal offending.[[93]](#footnote-93) His Honour held that a failure to take into account the ‘emotional stress’ caused by the offender’s removal from his parents as a child and the subsequent cultural dislocation he experienced would be to sentence him as ‘someone other than himself’.[[94]](#footnote-94) Arguably the most important aspect of Eames JA’s judgment, which has been described by the Victorian Court of Appeal as ‘seminal’,[[95]](#footnote-95) is that His Honour moved beyond the focus on social and economic disadvantage that characterised earlier sentencing decisions involving Aboriginal offenders and toward a more sophisticated understanding of Aboriginal experiences with an emphasis on how the practices of the dominant non-Aboriginal communities have harmed Aboriginal communities.[[96]](#footnote-96) As Edney and Bagaric have noted, Eames JA recognized the ‘psychic and cultural harm’ of colonisation and dispossession, in addition to its legacy of social and economic disadvantage.[[97]](#footnote-97)

By contrast, there is also a line of cases in which the courts have de-emphasised the relevance of an offender’s Aboriginality to sentencing. Following the decision in *Fernando*, for example*,* the courts in NSW and other jurisdictions narrowed the application of the principles developed in that case by focusing instead on factors like the seriousness of the offence, the importance of deterrence and the need to protect victims.[[98]](#footnote-98) The relevance of Aboriginality to sentencing has also been limited by the courts in other ways. For example, in *R v Ceissman*[[99]](#footnote-99) Wood J, who had previously expressed the principles in *Fernando*, downplayed the significance of the offender’s Aboriginality because he was ‘part-Aboriginal’ and not from a remote community.[[100]](#footnote-100) Furthermore, in *R v Pitt* Wood J held that ‘there was nothing of an exceptional kind, in the Aboriginality or upbringing of the applicant, that called for any particular mitigation of sentencing’.[[101]](#footnote-101)As Anthony has noted, the courts in Queensland and the Northern Territory have also endeavoured to ‘send special messages of deterrence through lengthy prison terms’ for Aboriginal offenders,[[102]](#footnote-102) as in the case of *R v Wurramarra*.[[103]](#footnote-103) These sentences reflect a judicial view that the crimes of Aboriginal offenders living in disadvantaged communities are particularly serious because of the exceptional vulnerability of victims of crime in those communities.[[104]](#footnote-104)

What this brief overview illustrates is a lack of coherence in the approaches the courts have taken to sentencing Aboriginal offenders and a lack of clarity about the ‘facts which exist only by reason of the offender’s membership of an ethnic or other group’[[105]](#footnote-105) the courts should take into account. To an extent this reflects the discretionary nature of the sentencing exercise and evolving judicial understandings of the impact of Aboriginal people’s unique history and collective experiences on individual offenders. However, it can also be contrasted with the Canadian approach, which requires the court in every case to take judicial notice of background factors, such as colonialism and dispossession. In Australia, the law permits the courts to take such an approach but it does not mandate or facilitate them doing so.

D. *The case for introducing the sentencing direction into Australian sentencing legislation*

It should be noted at the outset that the Canadian experience with the sentencing direction has been somewhat mixed. For instance, some commentators have criticised the way in which the courts applied the direction in the decade following the decision of the Supreme Court in *Gladue*,[[106]](#footnote-106) while others have shown that the sentencing direction has had little if any effect on addressing the over-representation of Aboriginal people in the Canadian criminal justice system.[[107]](#footnote-107) However, there are several persuasive arguments in favour of the introduction of an equivalent to the sentencing direction in Australian sentencing legislation.

First, as Hopkins has argued, there are myriad different ways in which an offender’s Aboriginality might bear upon the appropriateness of a particular sentence.[[108]](#footnote-108) Recognition of the causal connection between the impacts of colonisation and high rates of Aboriginal offending might support a claim that the offender is less deserving of punishment.[[109]](#footnote-109) For example, there may be a link between the psychological trauma of child removal and the offender’s subsequent offending behaviour, as Eames JA identified in *Fuller-Cust*,[[110]](#footnote-110) which makes a lesser sentence appropriate in light of the offender’s reduced culpability. Alternatively, as Hopkins has argued, an offender’s Aboriginality ‘may tell upon the appropriateness of certain punishment, presenting options where strength of community, reintegration and pride can be harnessed to achieve individual reform and deterrence’.[[111]](#footnote-111) Introducing the sentencing direction into Australian sentencing legislation would focus the attention of the courts on the link between the individual and collective experiences of Aboriginal people and increase the likelihood that all the material facts are identified and taken into account by the court, including those that exist as a consequence of an offender’s Aboriginality. This accords with the principle expressed by Brennan J in *Neal[[112]](#footnote-112)* and would promote the objectives of equal and individualised justice. As noted above, the sentencing direction was designed to rectify the failure of the Canadian courts to provide substantive equality to Aboriginal offenders.[[113]](#footnote-113) The inconsistent approaches of Australian courts to considering an offender’s Aboriginality would indicate a similar failure, which could be addressed by adopting the Canadian model.

Second, the sentencing direction could support the utilisation of existing and new strategies for assisting the courts to understand the circumstances of Aboriginal offenders. For example, the introduction of the sentencing direction may lead to the development of similar initiatives to *Gladue* reports, which are already being considered by the ACT Government.[[114]](#footnote-114) In addition, the sentencing direction would provide guidance to sentencing judges as to how they should use the information they receive about an Aboriginal offender and strengthen the requirement to have regard to that information. For instance, under s 9(2)(o) of the *Penalties and Sentencing Act 1992* (Qld) the court must have regard to any submissions made by the community justice group in an Aboriginal offender’s community that are relevant to sentencing the offender. Introducing the sentencing direction in Queensland would ensure that the court has regard to similar information in sentencing *all* Aboriginal offenders, not just those about whom a community justice group has been able to make submissions, and would potentially expand the scope of the information contained in those reports.

Third, adopting the sentencing direction in legislation would provide a safeguard against a relapse into an approach whereby the courts downplay the significance and relevance of factors related to an offender’s Aboriginality by emphasising the importance of deterrence and the objective seriousness of the offence. As Anthony has argued in critiquing the *Bugmy* decision

[B]y failing to give substantial weight to Indigenous circumstances, the courts will continue to fall back on an imprisonment response when deterrence and community protection could be better served through non-custodial sentencing options.[[115]](#footnote-115)

The sentencing direction would create a positive obligation on the courts to give proper consideration to Aboriginal offenders’ circumstances. A failure by the court to consider background factors and appropriate sanctions would be an appellable error of law, which is likely to prevent the courts from narrowing the relevance of Aboriginal circumstances in future.

1. The issue of racial discrimination

This thesis accepts the desirability of taking judicial notice of systemic and background factors when sentencing Aboriginal offenders and asks two further questions: whether such a direction would be racially discriminatory; and whether it would be inconsistent with s 10(1) of the RDA. The High Court’s interpretation of s 10(1), which has focused closely on the text of the provision, is such that these are effectively separate issues. This is because the Court has taken a formalistic approach that treats all differential treatment on the basis of race as prima facie inconsistent with s 10(1),[[116]](#footnote-116) whereas international law allows scope for non-discriminatory differential treatment (outside the exception for special measures).[[117]](#footnote-117) This Chapter will address the broader issue of whether the sentencing direction is racially discriminatory, applying the definition of racial discrimination contained in the *Convention on the Elimination of All Forms of Racial Discrimination* (‘the Convention’) and accepted as part of international customary law. The discussion will provide context for the analysis in Chapter IV and will inform the discussion in Chapter V.

A. *The definition of racial discrimination in international law*

Article 1(1) of the Convention provides that the term racial discrimination:

[S]hall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Article 1(4) of the Convention then states that ‘special measures’ which are necessary for securing the advancement of a racial group are ‘deemed not to be racial discrimination’. Article 1(4) ensures the validity of ‘positive discrimination’ or ‘affirmative action’ – measures which confer benefits or preferential treatment upon a disadvantaged group in order to promote substantive equality.[[118]](#footnote-118) Article 1(4) supports Article 2(2), which imposes an obligation upon States to take special measures ‘where the circumstances so warrant’ to ensure full and equal enjoyment of human rights and fundamental freedom for disadvantaged racial groups.

Pritchard has noted that the provisions of the Convention are informed by understandings of the concepts of equality and non-discrimination that have emerged and developed since the adoption of a system of treaties for the protection of minority groups at the conclusion of the First World War.[[119]](#footnote-119) As Brownlie has highlighted, it is also generally accepted that the fundamental principles of human rights, including the principle of protection from racial discrimination, form part of customary international law.[[120]](#footnote-120) In 1970 the International Court in the *Barcelona Traction* case referred to ‘protection from racial discrimination’ as included in the category of ‘obligations *erga omnes*’ – a right owed by states to the community of states as a whole because of the universal interest in their being upheld.[[121]](#footnote-121)

From a review of the international texts, decisions and instruments that have been influential in international law on racial discrimination, Pritchard has concluded that:

In international legal usage, as exemplified by the practice of the Committee on the Elimination of Racial Discrimination and the Human Rights Committee, ‘racial discrimination’ refers not to any distinction or differential treatment, but only to that which is arbitrary, invidious or unjustified. References to race become discriminatory only where they lack an objective and reasonable basis or a legitimate purpose.[[122]](#footnote-122)

Brownlie has expressed a similar view[[123]](#footnote-123) and the Australian Law Reform Commission in its 1986 report on *Recognition of Aboriginal Customary Law* stated that such a position is consistent with ‘the drafting history of the Convention, the pre-existing and widely accepted meaning of discrimination in international law, and the apparent consensus of writers’.[[124]](#footnote-124) It is clear that, in international law, non-discrimination does not require uniform treatment and that a law may treat persons differently on the basis of race without being racially discriminatory, provided the differentiation is benign and proportionate to a legitimate objective.[[125]](#footnote-125) This is because, Sadurski has put it, racial discrimination ‘refers to more than merely a distinction: it carries with it some amount of disregard for the legitimate interests of the group discriminated against’.[[126]](#footnote-126) A law may give rise to differential treatment on the basis of race without being racially discriminatory, even if it is not a ‘special measure’. The category of ‘special measures’ is only one example of justifiable, non-discriminatory, differential treatment.

B. *Application to the sentencing direction and the views of the Supreme Court of Canada*

The sentencing direction makes a distinction between offenders on the basis of race and results in differential treatment of different racial groups in the sentencing process because, as the Supreme Court of Canada held in *Gladue* and *Ipeelee*, it requires the court to adopt a ‘different methodology’ when sentencing an Aboriginal offender.[[127]](#footnote-127) The issue, then, is whether this distinction is ‘arbitrary, invidious or unjustified’ and whether it is proportionate to a legitimate objective.

On the first point, the distinction and differentiation between Aboriginal and non-Aboriginal offenders is not arbitrary because it is based on Aboriginal people’s *unique* experience of colonisation, the understanding that ‘current levels of criminality are intimately tied to the legacy of colonialism’ and the failure of the courts to adequately consider the relevance of an offender’s Aboriginality to the sentencing process.[[128]](#footnote-128) Thus the distinction between Aboriginal and non-Aboriginal offenders is based on a *relevant difference* between those groups, consistently with the principle of equal justice which provides the foundation of both sentencing and discrimination law. Furthermore, the distinction is not malign or invidious because the sentencing direction does not disadvantage the racial group that it targets. The application of the sentencing direction in a given case will either reveal mitigating factors that may justify a reduced sentence, lead to the identification of an appropriate alternative punishment or have no impact on the final outcome. None of these results puts the offender in a worse position than they would have been otherwise. Lastly, the distinction is justified because, as the Supreme Court has emphasised, it is necessary in order to remedy a failure by the courts to provide substantive justice for Aboriginal offenders.[[129]](#footnote-129) The Supreme Court’s conclusion in this respect is supported by evidence of the extremely high levels of incarceration of Aboriginal people and the findings of numerous governmental and Law Reform Commission inquiries.[[130]](#footnote-130)

The next point to consider is whether the sentencing direction is proportionate to a legitimate objective. The objectives of the sentencing direction, alluded to above, are to remedy the failure of the courts to ensure equal justice for Aboriginal offenders, to reduce the overrepresentation of Aboriginal people in the criminal justice system and to address the courts’ over-reliance on incarceration as a response to Aboriginal offending behaviour. The Supreme Court effectively answered the question of whether the sentencing direction is proportionate to these objectives in its discussion of whether the sentencing direction constitutes a form of ‘reverse discrimination’ in both *Gladue* and *Ipeelee*. First, the Court explained in *Ipeelee* that where application of the sentencing direction leads to different sanctions for an Aboriginal offender ‘those sanctions will be justified based on their unique circumstances – circumstances which are rationally related to the sentencing process’.[[131]](#footnote-131) Second, the Court emphasised that the sentencing direction does not mandate a particular outcome and does not amount to a race based discount.[[132]](#footnote-132) This is because systemic and background factors must still be linked to the circumstances of the offender and the offence if they are to influence the ultimate sentence,[[133]](#footnote-133) and because these factors must still be weighed against all the other relevant considerations including, for example, the seriousness of the offence.[[134]](#footnote-134) Third, the sentencing direction does not prevent the court from taking systemic and background factors into account or considering the appropriateness of alternative sanctions when sentencing a non-Aboriginal offender.[[135]](#footnote-135) The sentencing direction, as the Supreme Court has explained, does not result in ‘unfairness’ for non-Aboriginal offenders or preferential treatment for Aboriginal offenders.[[136]](#footnote-136) It follows from this analysis that it is proportionate to the objectives it is designed to achieve because it does not go beyond what is necessary to achieve equal justice for Aboriginal offenders and does not impose a burden or disadvantage on non-Aboriginal offenders.

1. The sentencing direction and s 10(1) of the RDA
2. *Background*

The RDA was Australia’s first federal discrimination law and was enacted to give effect to Australia’s obligations under the Convention. Broadly, the RDA makes it unlawful to discriminate against people on the basis of race in public life.[[137]](#footnote-137) Section 10(1) of the RDA is unusual in that it is directed towards Commonwealth, state and territory legislation, rather than the actions of individuals or the activities of the executive arm of government.[[138]](#footnote-138) It is effectively an ‘equal protection’ clause which operates on Commonwealth, State and Territory legislation by ‘re-writing any law which denies or limits rights on the grounds of race in order to confer those legal rights upon the people who have been denied them’.[[139]](#footnote-139)

Section 10(1) states that:

If, by reason of, or a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first‑mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

As a consequence of s 109 of the Commonwealth Constitution, where a state law is inconsistent with s 10(1) of the RDA, the RDA will prevail to the extent of the inconsistency. As Mason J explained in *Gerhardy*, where the state law is inconsistent with s 10(1) because it creates a right that is not conferred on a particular group the effect of s 10(1) is to supply and confer that right on the neglected group.[[140]](#footnote-140) Alternatively, where the state law forbids people of a particular race from enjoying a human right or deprives them of a right they previously enjoyed there is a direct inconsistency with s 10(1) and the state law is invalidated and rendered inoperative to the extent of the inconsistency.[[141]](#footnote-141) As the manner in which s 10 affects territory laws is constitutionally complex,[[142]](#footnote-142) this thesis will focus on the issues that would arise if a state Parliament enacted the sentencing direction.

Section 8(1) of the RDA creates an exception to the operation of s 10(1) for laws that are ‘special measures’ within the meaning of Article 1(4) of the Convention. Section 8(1) states that the relevant part of the RDA ‘does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies’. Article 1(4) of the RDA, provides that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

This thesis will adopt the structure that has been favoured by the High Court in determining challenges to the validity of state legislation on the basis of inconsistency with s 10(1) of the RDA. That is, it will consider first whether or not the sentencing direction is prima facie inconsistent with the s 10(1) and then whether or not the sentencing direction is a special measure that would be ‘saved’ by the operation of s 8(1).[[143]](#footnote-143)

1. *Application to the sentencing direction*

Section 10(1) of the RDA is engaged where there is unequal enjoyment of rights between racial groups.[[144]](#footnote-144) As the Australian Human Rights Commission has noted, for a claim that a law is inconsistent with s 10(1) to be successful it must be shown that:

1. by reason of the law or a provision of the law;
2. persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race; *or*
3. persons of a particular race, colour or national or ethnic origin enjoy a right to a more limited extent than persons of another race.[[145]](#footnote-145)

The affected right must be a ‘human right or fundamental freedom’, of which a non-exhaustive list is contained in Article 5 of the Convention.[[146]](#footnote-146) If the above conditions are satisfied the law will engage s 10(1) of the RDA regardless of whether or not the differential enjoyment of the right or freedom is proportionate to a legitimate objective.[[147]](#footnote-147) This is because the High Court in its interpretation of s 10(1) has treated laws that result in the differential enjoyment of rights between racial groups as discriminatory *per se*, and only valid if they are saved by s 8.[[148]](#footnote-148) In determining whether a law results in the differential enjoyment of a right the court will focus on its practical effect and is concerned ‘not merely with matters of form but with matters of substance’.[[149]](#footnote-149)

Applying these principles, the crucial issue is whether the sentencing direction in fact results in the differential enjoyment of a right between racial groups. Specifically, whether it limits the right of non-Aboriginal offenders to equality before the courts. The content of the right to equality before the courts, which is referred to in Article 5(a) of the Convention, was discussed by Bell and Kiefel JJ in *Maloney,* who stated that it amounts to a guarantee of access to the courts, procedural equality and the equal application of the law.[[150]](#footnote-150) The sentencing direction will therefore result in the differential enjoyment of the right to equality before the courts if it requires the law to be applied differently in sentencing Aboriginal offenders as compared to non-Aboriginal offenders. The key question, then, is whether the sentencing direction alters the fundamental duty of the court to ‘take account of *all* relevant factors’[[151]](#footnote-151) and impose a sentence that is consistent with the proportionality principle[[152]](#footnote-152) and the parity principle.[[153]](#footnote-153)

The High Court’s statements about s 718.2(e) of the *Criminal Code[[154]](#footnote-154)* in *Bugmy*, discussed in Chapter II,indicate that it did not consider the sentencing direction to be consistent with the principles of equal justice and proportionality in that case. This is because the Court held that taking judicial notice of systemic and background factors, including social and economic disadvantage and over-incarceration, ‘says nothing’ about particular Aboriginal offender and would therefore be ‘antithetical to indvidualised justice’.[[155]](#footnote-155) If sentencing ceased to be an individualised process for Aboriginal offenders, this would be contrary to the guarantee of equal application of the law and thus the right to equality before the courts that is contained in Article 5(a) of the Convention and protected by s 10(1) of the RDA. The Court, as Anthony, Bartels and Hopkins have noted, indicated a concern that the sentencing direction might establish a sentencing consideration based only on race and amount to a ‘race-based discount’.[[156]](#footnote-156) If the sentencing direction is understood in this way, it is likely that the Court would hold that it is inconsistent with s 10(1).

However, as outlined in Chapter II, the Supreme Court of Canada has taken a more nuanced approach to characterizing the sentencing direction and it would be open to the High Court to adopt a similar line of reasoning. According to the Supreme Court, the sentencing direction is consistent with individualised justice because systemic and background factors will only affect the sentence outcome if they bear upon the circumstances of the individual offender and the offence or the appropriateness of particular sanctions.[[157]](#footnote-157) Taking judicial notice of these considerations remedies the systemic failure of the courts to properly examine the connections between Aboriginal people’s unique collective experiences and individual’s offending behaviour. Rather than being contrary to equal justice, by addressing this failure the sentencing direction actually ensures equal justice for Aboriginal offenders to whom it had previously been denied. Furthermore, the Supreme Court has emphasized that the sentencing direction is not a race-based discount because it does not mandate a particular outcome and any reduction in sentence will be rationally related to a relevant sentencing factor.[[158]](#footnote-158) Nor does it prevent the court from having regard to systemic and background factors when sentencing a non-Aboriginal offender.[[159]](#footnote-159) On the Supreme Court’s interpretation, the sentencing direction does not alter the fundamental duty of the court to impose a sentence that is indvidualised, proportionate and consistent with equal justice and therefore does not offend the right to equal application of the law. What it does is alter the method by which the court must discharge this duty when sentencing an Aboriginal offender, in recognition of the fact that existing approaches were perpetuating injustices. It follows from this understanding that the sentencing direction, though it makes a distinction between Aboriginal and non-Aboriginal offenders, does not actually result in any differential enjoyment of rights. As such, it would be consistent with s 10(1) and there would be no need to inquire into whether or not it is a special measure.

Whether or not the High Court would conclude that the sentencing direction is consistent with s 10(1) of the RDA is likely to depend on how it characterises the operation and effect of the sentencing direction. The Court’s statements in *Bugmy* suggest it is probable that the Court would conclude that the sentencing direction limits non-Aboriginal offenders’ right to equal application of the law and therefore their right to equality before the courts. However, the better approach would be for the Court to apply the Supreme Court of Canada’s reasoning, which recognizes that the sentencing direction requires the court to adopt a different method when sentencing Aboriginal offenders without resulting in any differential enjoyment of the right to equality before the courts.

1. The exception for special measures

If the High Court concluded that the sentencing direction was prima facie inconsistent with s 10(1), its validity would depend on whether or not it is a special measure under s 8 of the RDA. Section 8 was first considered by the High Court in *Gerhardy,* where the Court held that the impugned South Australian laws were a ‘special measure’.[[160]](#footnote-160) In that case Brennan J identified five indicia of a special measure, which ‘have served as an authoritative and persuasive point of reference for determining whether a particular measure is a ‘special measure’’.[[161]](#footnote-161) In considering whether the sentencing direction could be characterised as a special measure this Chapter will apply Brennan J’s five indicia as modified by the High Court in *Maloney*.[[162]](#footnote-162) It should be noted that determining whether a legislative provision is a special measure involves the establishment of a number of factual matters, and that the Court will approach this fact-finding in a way that is analogous to the process of establishing a constitutional fact.[[163]](#footnote-163) As such, there is no onus of proof involved in the characterisation of a legislative provision as a special measure.[[164]](#footnote-164)

1. *The indicia of a special measure*

1. *Conferral of a benefit*

The first of Brennan J’s five indicia is that the law claimed to be a special measure must confer a ‘benefit’ on some or all members of a class.[[165]](#footnote-165) This requirement is problematic when applied to the sentencing direction. As Chapters II, III and IV have argued, the purpose and effect of the sentencing direction is to direct the attention of the sentencing court to relevant considerations that bear upon the culpability of the offender and the appropriateness of possible sanctions. The sentencing direction, therefore, cannot be readily characterised as conferring a ‘benefit’, in the sense that it is intended to ensure individualised and equal justice rather than affording Aboriginal offenders some kind of ‘special’ treatment.

However, the issue of whether the sentencing direction is a special measure only becomes relevant if it is a law that engages the operation of s 10(1) of the RDA. In turn, it is only likely that the High Court would decide that the sentencing direction engages s 10(1) if it found that the sentencing direction has the practical effect that Aboriginal offenders are treated more favourably during the sentencing process than non-Aboriginal offenders. As such, if the sentencing direction were held to be inconsistent with s 10(1) it would be likely that the Court would find that it conferred a benefit on Aboriginal offenders.

2. *Membership based on race*

The second indicium is that membership of the class is based on race,[[166]](#footnote-166) which is clearly satisfied because the application of the sentencing direction is explicitly tied to an offender’s Aboriginality.

3. *Sole purpose of securing adequate advancement*

The third indicium is that the special measure must be for the ‘sole purpose’ of ‘securing the adequate advancement’ of the beneficiaries of the special measure, in order that they may enjoy and exercise human rights and fundamental freedoms equally with others.[[167]](#footnote-167) In formulating this indicium Brennan J noted that the purpose of a legislative measure can be understood from its terms, operation and the circumstances in which it applies.[[168]](#footnote-168) His Honour also suggested that ‘the wishes of the beneficiaries are of great importance in determining whether the measure for their advancement’.[[169]](#footnote-169) However, the High Court in *Maloney* expressed the view that consultation, though it may be relevant to determining the purpose and adequacy of the law, is not a separate requirement for a law to be characterised as a special measure.[[170]](#footnote-170) It also accepted that proportionality reasoning may be relevant to determining whether a legislative measure is for the sole purpose of securing the adequate advancement of a racial group.[[171]](#footnote-171) That is, the measure must be reasonably capable of being considered appropriate and adapted to achieving its purpose, but this does not extend to a requirement for the Court to consider alternative measures that could achieve the same purpose.[[172]](#footnote-172)

The third indicium would be fairly easily satisfied by the sentencing direction, the purpose of which is to secure the advancement of Aboriginal people by addressing the overrepresentation of Aboriginal people in the criminal justice system and the systemic failure by the courts to properly engage with the aspects of an offender’s Aboriginality that bear upon his or her culpability and the appropriateness of particular sanctions. The sentencing direction does not impose a burden on Aboriginal people, has minimal, if any, impact on non-Aboriginal people, and does not mandate anything beyond ‘consideration’ of relevant factors by a sentencing court. The sentencing direction does not have a collateral purpose, and is directly and not ‘fancifully’ referable to the objective of reducing Aboriginal overrepresentation in the criminal justice system and ensuring just sentencing outcomes for Aboriginal offenders.[[173]](#footnote-173) There may well be other measures that could be equally, or more effective in addressing these same issues, but their existence is not relevant to determining whether the sentencing direction is a special measure.[[174]](#footnote-174)

4. *Necessity of the special measure*

The fourth indicium is that the protection given to the beneficiaries of the special measure must be necessary so that they may equally enjoy and exercise their human rights and fundamental freedom.[[175]](#footnote-175) The High Court has acknowledged that this is, to a significant extent, a political question.[[176]](#footnote-176) The legal requirement will be satisfied if it was reasonably open to Parliament to decide that the protection granted to the beneficiaries by the special measure was necessary.[[177]](#footnote-177) With the sentencing direction there is a wealth of evidence available to support the conclusion that the sentencing direction is necessary to ensure justice for Aboriginal offenders in sentencing. For instance, the Court may have regard to statistics highlighting the extent of the overrepresentation of Aboriginal people in the criminal justice system and the recommendations of reports like the Royal Commission into Aboriginal Deaths in Custody, both of which highlight the existence of the problems the sentencing direction aims to address.

5. *Separate rights must not be maintained indefinitely*

The fifth indicium is that the measure must not have already achieved its objectives.[[178]](#footnote-178) This requirement goes to the intention stated in the Convention that special measures should not ‘lead to the maintenance of separate rights’ and ‘shall not be continued after the objectives for which they are taken have been achieved’.[[179]](#footnote-179) Clearly, the purposes of the sentencing direction have not been achieved at this stage and therefore the fifth indicium would be satisfied. For as long as Aboriginal people are overrepresented in the criminal justice system and for as long as Aboriginal people’s unique experiences of colonisation remain relevant to individual’s offending behaviour the sentencing direction would continue to be a special measure.

1. Issues with characterising the sentencing direction as a special measure

1. *The purpose and effect of the sentencing direction*

As noted above, there is some conceptual difficulty in characterising the sentencing direction as a ‘special measure’ because it does not necessarily confer a benefit on Aboriginal people. It requires different, but not preferential, treatment during the sentencing process. Section 8(1) of the RDA is more appropriately applied to measures that constitute ‘affirmative action’ than a measure that requires different treatment in order to ensure equal justice.[[180]](#footnote-180) The term affirmative action usually refers to preferential treatment on the basis of some characteristic of a person – for the purposes of this discussion the person’s race. An example is the provision of ABSTUDY rental assistance benefits specifically to Indigenous people in order improve the rate of Indigenous participation in tertiary education, which was upheld as a special measure when challenged by a non-Indigenous person.[[181]](#footnote-181)

Section 8(1) is well adapted to apply to affirmative action because it ensures that such measures are only valid when, and for as long as, they are necessary and proportionate. As Pritchard has argued, ‘the concept of special measures is a defensive one, offering a defence to challenges to interventions in the interests of racial groups’.[[182]](#footnote-182) While this may be appropriate for measures that constitute affirmative action, it sits less comfortably with the purpose of measures that designed to ensure equal treatment through the recognition of relevant difference. Indeed, as Nettheim has argued in the context of Aboriginal rights more broadly, characterising different treatment that is based on the distinctiveness of Aboriginal peoples’ collective experiences as a special measure requires the category to be distorted beyond its essential concerns.[[183]](#footnote-183) This distortion is particularly clear in relation to the temporariness of special measures, which is emphasised in the text of the Convention. While there are good reasons why affirmative action measures should be temporary, these do not necessarily apply to the sentencing direction. The sentencing direction is a long term measure which is likely to be necessary for as long as the collective experiences of Aboriginal people continue to influence individual offending behaviours and the over-representation of Aboriginal people in the criminal justice system.

A second key issue is that the sentencing direction, if introduced, would be likely to be controversial, at least in part because of the potential for it to be misunderstood as a ‘race-based discount’. The probability for controversy is exacerbated by the context of ‘popular punitivism’[[184]](#footnote-184) and the pervasive view that Aboriginal people get ‘lots of [government] benefits’, which is held by a significant number non-Aboriginal Australians.[[185]](#footnote-185) With this in mind, the characterisation of the sentencing in relation to the RDA would be likely to have an important influence on how it is perceived by the community. Characterising the sentencing direction as a special measure would suggest that it constitutes a deviation from the norm of equal treatment. This would, in turn, potentially support the view that it represents a form of ‘reverse discrimination’ and possibly generate opposition to the sentencing direction. Characterising the sentencing direction as consistent with s 10(1) would instead emphasise that it imposes a duty on the courts to grapple with the effects of past and present injustices during the sentencing process. As Chartrand has argued, an essential goal of the sentencing direction is to require judges to ‘do no further harm and to repair the damage caused by colonisation to the extent possible within the limitations of sentencing’.[[186]](#footnote-186) Recognising the sentencing direction as consistent with s 10(1) would mean acknowledging that the seemingly neutral criminal justice system in practice ‘discriminates against current generations of Aboriginal people’.[[187]](#footnote-187) This would support the purpose of the sentencing direction and focus public attention on the need for the courts to ensure fairness for Aboriginal offenders.

2. *Special measures as an affirmative act of recognition*

In addition to the issues discussed above, characterising the sentencing direction as a special measure would perpetuate some of the problems associated with recognition of Aboriginality as an ‘affirmative act’. Anthony has applied Fraser’s ‘status model of recognition’ to the sentencing of Aboriginal offenders by NSW and Northern Territory courts to critique the courts’ recognition of Aboriginality as an ‘affirmative act’ and argue for ‘transformative remedies’ that would ensure that Aboriginal people have a stake in the justice process.[[188]](#footnote-188)

Affirmative acts of recognition rest on the goodwill of the dominant group and ‘provide the disadvantaged with provisional measures that are embedded in structures that foster marginalisation’.[[189]](#footnote-189) Transformative remedies, on the other hand, place ‘the recognised status group on a par with the recogniser, improving the status of the marginalised groups and dismantling ‘white’ claims to dominance’.[[190]](#footnote-190) Recognition of Aboriginality in sentencing has occurred as an affirmative act because, although the courts have at times shown greater leniency on the basis of an offender’s Aboriginality, there is no ‘assured inlet for the engagement of Indigenous perspectives in sentencing’.[[191]](#footnote-191) As such, Anthony has argued, the courts can recognise, misrecognise or not recognise an offender’s Aboriginality.[[192]](#footnote-192) Misrecognition, in this sense, involves the identity of the ‘other’ group being ‘maligned or disparagingly stereotyped’, while ‘non-recognition’ occurs where ‘the identity of the other is rendered invisible by falsifying the universality of dominant groups’.[[193]](#footnote-193)

The sentencing direction, like the practice of ‘circle sentencing’, stops short of providing transformative justice for Aboriginal people. This is because the final determination of the offender’s sentence is still made by a (usually) non-Aboriginal judge or magistrate, control of the sentencing process is not vested in Aboriginal people, and the court may only impose a sentence prescribed by the legislation. However, the sentencing direction would address some of the problems associated with the recognition of Aboriginality in sentencing as an affirmative act because it would mandate consideration of an offender’s Aboriginal identity on a principled, rather than an ad hoc, basis. This would, to some extent, avoid the problem of non-recognition and reduce the likelihood of misrecognition. Non-recognition would be avoided because the court would be required, in every case, to have regard to the offender’s Aboriginal background. Misrecognition would be reduced because, through supporting mechanisms like *Gladue* reports, there would be a greater opportunities for Aboriginal voices to be heard in the courtroom. In addition, by removing the need to prove a direct causal link between the offender’s Aboriginality and the offence and by widening the court’s focus from the individual circumstances of the offender to the contextual background of colonisation, the sentencing direction may reduce judicial reliance on stock stories of alcoholism and Aboriginal disadvantage when recognising an offender’s Aboriginal identity. It should be noted, however, that the offender’s experiences are still filtered through a ‘white lens’, which leaves significant scope for misrecognition to continue to occur.

The problem with characterising the sentencing direction as a special measure within the meaning of s 8(1) of the RDA is that it would perpetuate other problems that arise out of recognition Aboriginality as an affirmative act. As Fraser has argued, affirmative acts are subject to constant scrutiny and have the effect of marking the beneficiaries out as ‘different’ and ‘lesser’.[[194]](#footnote-194) Characterising the sentencing direction as a special measure would mean construing it as a form of temporary concessional treatment for Aboriginal offenders, and would be likely to have the negative consequences of continual scrutiny and stigmatisation referred to by Fraser.[[195]](#footnote-195) This would, in turn, limit the capacity of the sentencing direction to reshape the way that Aboriginal offending behaviour is understood by the courts and the community.

1. Conclusion

Given the overrepresentation of Aboriginal people within the criminal justice system and the absence of a consistent approach to engaging with an offender’s Aboriginality during sentencing, new approaches are required. The sentencing direction, if adopted in Australian sentencing legislation, has the potential to promote individualised and equal justice for Aboriginal offenders. This thesis has argued that, contrary to what the High Court implied in *Bugmy*, the sentencing direction is not racially discriminatory and, if enacted by a state Parliament, would not be invalid as a consequence of inconsistency with s 10(1) of the RDA. In a challenge to the validity of the sentencing direction it would be open to the High Court to conclude either that the sentencing direction is consistent with s 10(1) of the RDA, or that it is a special measure within the meaning of s 8. The better view is that the sentencing direction is consistent with s 10(1), because this would more accurately reflect the purpose and intended effect of the sentencing direction and avoids the potential problems associated with characterising it as a special measure. Nevertheless, the essential point is that the RDA is unlikely to act as a barrier to the introduction of the sentencing direction into state law. The benefits of the Canadian approach to sentencing Aboriginal offenders have been clearly articulated by number of academics. Three years on from the High Court’s decision in *Bugmy*, it is up to the Commonwealth, state and territory Parliaments to take the next step.

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