Introduction

1. The author[1] welcomes the Australian Law Reform Commission's inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples ("the Inquiry").

2. This submission addresses question 3-1 of the Discussion Paper 84 ("DP 84") and the following interrelated questions invited by the inquiry:

> **Question 3–1 Noting the decision in Bugmy v The Queen [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders? If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?**
>
> (a) Why should state and territory legislate expressly require courts to consider the unique background and systemic factors affecting Aboriginal and Torres Strait Islander people when sentencing offenders from those backgrounds; and
>
> (b) How could state and territory legislate expressly require courts to consider the unique background and systemic factors affecting Aboriginal and Torres Strait Islander people when sentencing offenders from those backgrounds[2]

3. In *Bugmy v The Queen*,[3] a majority[4] of the High Court raised the prospect (in *obiter dicta*) that an equivalent provision to s 718.2(e) of the *Canadian Criminal Code*[5] - which expressly requires sentencing judges to give particular attention to the circumstances of Aboriginal offenders ("the proposed direction or s 718.2(e)") - if inserted into a relevant statute in any Australian jurisdiction[6] may be inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth) ("RDA") ("the unexplored question").[7] Section 10 of the RDA generally provides that statutory rights, which purportedly apply to members of a particular race or ethnic group, are to be read as applying to all races and ethnic groups.

4. The plurality in *Bugmy* simply raised s 10 of the RDA as a potential legal impediment to a statutory equivalent of s 718.2(e) being enacted in Australia and made no reference to authorities on this point, or the potential application of the exception contained in s 8 of the RDA. This is certainly no criticism of the High Court's decision in *Bugmy* because, as the plurality observed,[8] it did not arise for their consideration.

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[2] DP 94, paragraphs [3.74] and [3.75].
[3] (2013) 249 CLR 571 ("*Bugmy*").
[4] French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; Gageler J separate reasons.
[5] Criminal Code, RSC 1985, c C-46.
[6] In *Bugmy*, the jurisdiction was New South Wales
[7] *Bugmy*, at 592 [36] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ. Specifically, footnote 99.
[8] *Bugmy*, at 592 [36].

5. The proposed direction has been identified by state law reform commissions[9] and even recommended,[10] but the interplay of ss 10 and 8 and the proposed direction is novel.

6. The Canadian model was first recommended in 2005 by the Western Australian Law Reform Commission in relation to possible solutions to reduce the level of over-representation of Aboriginal people in custody that 'one of the possible solutions is legislative reform similar to the Canadian provision which would have the effect of directing judicial officers to 'exhaust in practice all sentencing options other than imprisonment'.[11] Relevantly, the commission concluded:

> "…one argument against a legislative direction to courts to pay particular attention to the circumstances of Aboriginal offenders when considering whether to impose imprisonment is that it would be discriminatory. However, the Commission considers that such a provision would fall within the meaning of a special measure under s 8 of the Racial Discrimination Act 1975 (Cth). As discussed in Part IV on international law, affirmative action or special measures are permitted in order to achieve substantive equality."[12]

7. The inquiry is a timely opportunity to investigate the unexplored question raised in *Bugmy*, and critically analyse (for the first time) the validity of a legislative direction to courts to pay particular attention to the circumstances of Aboriginal and Torres Strait Islander People ("Aboriginal offenders") when considering whether to impose imprisonment with a view to possibly identifying state legislative reform.

8. This submission investigates their Honours' unexplored question[13] and seeks to allay their Honours' concerns that an equivalent s 718.2(e) is not inconsistent with the RDA, by asserting and defending the positions that the proposed direction is consistent with the RDA because:

   i. Section 10 of the RDA is engaged but it does not give rise to an inconsistency within the meaning of s 109 of the Commonwealth Constitution;

   ii. Alternatively, the proposed direction is not inconsistent with the RDA because it is a "special measure" as defined in s 8 of the RDA and exempt.

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[9] Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39(1) *Melbourne University Law Review*, at p. 71. The authors cite the Legislative Assembly Standing Committee on Justice and Community Safety, Parliament of the Australian Capital Territory, Inquiry into Sentencing (2015) and the Northern Territory Law Reform Committee, Report on Aboriginal Customary Law (2003).

[10] Standing Committee on Justice and Community Safety, 'Inquiry into Sentencing', March 2015, Report No. 4, recommendations 18-21; The Legislative Assembly for the Australian Capital Territory, Government Response to the Standing Committee on Justice and Community Safety Report on the Inquiry into Sentencing, tabled 10 March 2016, presented by Simon Corbell MJA, Attorney-General, p.3 and 13.

[11] Law Reform Commission of Western Australia, 'Aboriginal Customary Laws', The interaction of Western Australian law with Aboriginal law and culture', Final Report, Project 94, September 2006, p. 176.

[12] Law Reform Commission of Western Australia, 'Aboriginal Customary Laws', Project 94, Discussion Paper (December 2005), p. 211 and cited by the Law Reform Commission of Western Australia, 'Aboriginal Customary Laws', The interaction of Western Australian law with Aboriginal law and culture', Final Report, Project 94, September 2006, p. 173.

[13] To adopt the language from *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10 and more recently in *South Australia v Totani* (2010) 242 CLR 1 at 28-29 [31] per French CJ.

(a) Why should state and territory legislate expressly require courts to consider the unique background and systemic factors affecting Aboriginal and Torres Strait Islander people when sentencing offenders from those backgrounds

9. **First**, the proposed direction should be legislated in Australia because a different method of analysis is warranted for indigenous offenders. In Canada, a different method of analysis is applied to indigenous offenders because of the proposed direction.

10. Section 718.2(e) makes Canada unique among common law countries[14] with no other country requiring a court that imposes a sentence to take into consideration the principle that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." [15]

11. The proposed direction calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders.[16] That is, it directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders.[17] Therefore, pursuant to the proposed direction and its interpretation by virtue of *Gladue*, a judge sentencing an aboriginal offender in Canada must consider:

> "… (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
>
> (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection…"[18]

12. *Gladue* was the first occasion the Supreme Court of Canada ("SCC") had the opportunity to construe and apply s 718.2(e). The SCC found that the first phrase of s 718.2(e) codifies an established sentencing aim that imprisonment be imposed as a last resort.[19] However, and importantly, the second phrase "with particular attention to the circumstances of aboriginal offenders" was found to be more than a re-affirmation of existing sentencing principles. It is a change in the law.[20]

13. The special reference suggests there is something different about Aboriginal offenders and that judges should pay particular attention because the circumstances are unique and different from non-Aboriginal offenders.[21] It, therefore, directs judges to undertake the process of sentencing Aboriginal offenders differently.[22]

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[14] Jonathan Rudin, 'Aboriginal Over-representation and R v Gladue: Where We Were, Where We Are and Where We Might Be Going' (2008), 40 SC.L.R (2d), p 1.
[15] *Criminal Code*, R.SC. 1985, c.46, s 718.2(e).
[16] *R v Ipeelee* [2012] 1 SCR 433 at 468 [59] per LeBel J ("*Ipeelee*").
[17] *R v Gladue* [1999] 1 SCR 688, 707-708 [37] per Cory and Iacobucci JJ ("*Gladue*").
[18] *Gladue*, at 723-724 [66] per Cory and Iacobucci JJ.
[19] *Gladue*, at 707 [36] per Cory and Iacobucci JJ
[20] *Gladue*, at 705-709 [31]-[39] per Cory and Iacobucci JJ
[21] *Gladue*, at 707-708 [37] per Cory and Iacobucci JJ.
[22] *Gladue*, at 690, 707 [36] per Cory and Iacobucci JJ.

14. The High Court recently had opportunity, for the first time since 1982,[23] to reconsider the relevance of 'aboriginality' in sentencing, when two decisions[24] were granted special leave to appeal. Both decisions were delivered on the same day. Importantly, the High Court was presented with an opportunity - in *Bugmy* and *Munda* - to alter the method of analysis for indigenous offenders in Australia.

15. It was argued in *Bugmy* that s 718.(2)(e) was equivalent to s 3A of the *Crimes* (*Sentencing Procedure*) *Act 1999*. The two provisions share the well-established rule,[25] or the first phrase of the proposed direction, that imprisonment should be a last resort. It is clear, however, that the two provisions are plainly distinguishable. Section 3A does not direct a sentencing judge to pay attention to the particular circumstances of aboriginal offenders. Those words are simply not there. Therefore, the plurality in *Bugmy*, was correct in rejecting that argument, as a matter of construction,[26] that:

> "There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice."[27]

16. Moreover, in *Munda*,[28] the plurality adverted to the absence of a specific legislative direction of the kind in Canada – means without legislative intervention – the starting point for discussion of circumstances of social disadvantage is the statement of Brennan J in *Neal*. *Bugmy* and its companion decision of *Munda* were, therefore, a re-affirmation of existing sentencing principles *viz*., the statement of sentencing principle[29] by Brennan J in *Neal*, which had been consistently approved by intermediate courts.[30] That is, "the same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group".[31]

17. The statement of Brennan J in *Neal* is the governing principle[32] in respect of sentencing aboriginal offenders in Australia. Because of Brennan J's statement of sentencing principle, the method of sentencing analysis does not change for aboriginal offenders. In other words, this line of authority, in the author's view, has generated a sentencing principle of non-discrimination.[33]

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[23] *Neal v The Queen* (1982) 149 CLR 306 was the first time the High Court considered Aboriginality ("*Neal*").
[24] *Bugmy* and *Munda v Western Australia* (2013) 249 CLR 600 ("*Munda*"). Special leave was refused in *Fuller-Cust v The Queen* [2003] HCATrans 394 (3 October 2003), a decision which also considered the relevance of aboriginality. See: Richard Edney, 'Opportunity Lost?: The High Court Of Australia And The Sentencing Of Indigenous Offenders', International Journal of Punishment and Sentencing, The, Vol. 2, No. 3, 2006: 99-120.
[25] Australia, Royal Commission into Aboriginal Deaths in Custody, Overview and Recommendations (1991), recommendation 92. See also: Richard Edney "Imprisonment as a Last Resort for indigenous Offenders Some lessons from Canada?" [2005] Indig Law B 39, p 4.
[26] See for instance, *Higgins v Comans* (2005) 153 A Crim R 565, 568 [7] per McPherson JA.
[27] *Bugmy*, at 592 [36].
[28] *Munda*, at 618 [50] per French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ; Bell J dissenting.
[29] *Bugmy*, at 593 [39].
[30] *Munda*, at 619 [51] and the cases cited therein.
[31] *Neal*, at 326 per Brennan J.
[32] *Fuller-Cust v The Queen* [2003] HCATrans 394 (3 October 2003) per Gummow J.
[33] *R v Fernando* (1992) 76 A Crim R 58 at [62]-[63], the 8 oft-cited principles, specifically (A) and [F] per Wood J; R v *Fuller-Cust* (2002) 6 VR 496 at [60] per Batt JA with whom O'Bryan AJA agreed and [78] per

18. The consequence is that Aboriginality is irrelevant[34] or not a mitigating factor itself.[35] However, Aboriginality may mitigate in the same way that the deprived background of a non-aboriginal may.[36]

19. Thus, the method of analysis, at common law, is to apply the same sentencing principles irrespective of the offender's ethnic membership,[37] meaning that the "instinctive synthesis"[38] requires:

> "[T]he method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence."[39]

20. The (current) jurisprudential approach in Australia is consistent with formal equality because of the emphasis impressed on individual justice.[40]

21. Moreover, the High Court in *Elias v The Queen*,[41] in diminishing the importance of the maximum penalty to sentence, stated:

> "As this Court has explained on more than one occasion, the factors bearing on the determination of sentence will frequently pull in different directions. It is the duty of the judge to balance often incommensurable factors and to arrive at a sentence that is just in all of the circumstances. The administration of the criminal law involves individualised justice, the attainment of which is acknowledged to involve the exercise of a wide sentencing discretion."[42]

22. Thus, individual justice requires all of the wide variations of circumstances of the offender are taken into account,[43] including the defendant's background.[44] As Anthony, Bartels and Hopkin observe, the sentencing process is an individualised one, tailored to the particular offence, the particular offender and the particular facts of the case.[45]

Eames JA dissenting; *R v Fernando* [2002] NSWCCA 28 at [67] per Spigelman CJ with whom Wood CJ at CL and Kirby J agreed; *Western Australia v Richards* (2008) 185 A Crim 413 at 416 [5]-[7] per Martin CJ; *DPP (Vic) v Terrick; Marks; Stewart* (2009) 24 VR 457 at [45]-[46] per Maxwell P, Redlich JA and Robson AJA.

[34] The Hon Chief Justice Wayne Martin AC, Judicial Council on Cultural Diversity (AIJA and the Migration Council of Australia Conference, Cultural Diversity and the Law: Access to Justice in Multicultural Australia, 13-14 March 2015), p 216.

[35] The Hon Chief Justice Robert French AC, Equal Justice and Cultural Diversity: The General Meets the Particular (AIJA and the Migration Council of Australia Conference, Cultural Diversity and the Law: Access to Justice in Multicultural Australia, 13-14 March 2015), p 203.

[36] *Bugmy*, at 592 [37].

[37] *Neal*, at 326 per Brennan J.

[38] *Wong v The Queen* (2001) 207 CLR 584 at 611 [75] per Gaurdon, Gummow and Hayne JJ.

[39] *Markarian v The Queen* (2005) 228 CLR 357 at 378 [51] per McHugh J.

[40] *Bugmy*, at 592 [36], 594 [41] French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ; at 598 [56] per Gageler J; *Munda*, at 619 [52]-[53] per French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ; *R v Grose* [2014] 119 SASR 92 at 103 [38] per Gray J with whom Sulan and Nicholson JJ agreed ("*Grose*").

[41] (2013) 248 CLR 483 ("*Elias*").

[42] *Elias*, at 494–5 [27].

[43] *Regina v Whyte* [2002] NSWCCA 343 at [147] per Spigelman CJ.

[44] *Wong v The Queen* (2001) 207 CLR 584 at 612 [77] per Gaudron, Gummow and Hayne JJ.

[45] Above n 9, p. 5.

23. The SCC has also grappled with individual justice, importantly, with the interplay of the proposed direction. The SCC has confirmed that s 718.2(e) does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders.[46] The difference is that s 718.2(e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders.

24. However, the SCC made patently clear that the role of the judge who sentences an aboriginal offender is, as for every offender, to determine a fit sentence taking into account all the circumstances of the offence, the offender, the victims and the community.[47] The court held that nothing in the landmark packages of sentencing reforms to the Canadian criminal code alters the fundamental duty of a sentencing judge to determine a fit sentence by taking into account all the relevant circumstances.[48]

25. Nevertheless, and importantly, the court found that the effect of s 718. 2(e), when viewed in the context of the reforms as a whole, is to alter the method of analysis which sentencing judges must use in determining a fit sentence for Aboriginal offenders.[49] That is, s 718.2(e) requires that sentencing determinations take into account the unique circumstances of aboriginal peoples. This is entirely consistent with a proportionate or just sentence.[50]

26. In *Gladue*, the Court approved the passage[51] of Lamer CJ in *R v M* (*CA*)[52] where his Honour re-stated the long-standing principle of Canadian sentencing law that the appropriateness of a sentence will depend on the particular circumstances of the offence, the offender and the community in which the offence took place, namely:

> "It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime ... Sentencing is an inherently individualised process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions of this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred."[53]

27. Therefore, and in contrast to the comments by the plurality in *Bugmy*, the SCC has confirmed – on two occasions in *Gladue*[54] and *Ipeelee*[55] - that the proposed direction is consistent with the concept of individualised justice. That is, the proposed direction ensures sentencing determinations take into account all relevant circumstances including the unique circumstances of aboriginal peoples.

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[46] *Ipeelee*, at 463 [59] per LeBel J.
[47] *Gladue*, at 728 [75] per Cory and Iacobucci JJ.
[48] *Gladue*, at 728 [75] per Cory and Iacobucci JJ.
[49] *Gladue*, at 728 [75] per Cory and Iacobucci JJ.
[50] See Criminal Code, RSC 1985, c C-46, s 718.1; *Ipeelee*, at 435-436 per LeBel J and *Veen v The Queen* (1979) 143 CLR 458 at 467 per Stephen J; *Veen v The Queen* (*No 2*) (1988) 164 CLR 465 at 472, 476 per Mason CJ, Brennan, Dawson and Toohey JJ; *Hoare v The Queen* (1989) 167 CLR 348 at 452; *Elias*, 494–5 [27].
[51] *Gladue*, at 728-729 [76] per Cory and Iacobucci JJ.
[52] [1996] 1 SCR 500.
[53] *R v M* (*CA*), at 567.
[54] *Gladue*, at 728-729 [76]-[77] per Cory and Iacobucci JJ.
[55] *Ipeelee*, at 436, 479 [75] per LeBel J.

28. In the author's view, contrary to the comments of the plurality in *Bugmy*[56] and *Munda*,[57] this is plainly consistent with Brennan J's statement of sentencing principle because the unique circumstances of aboriginal peoples are "material facts including those facts which exists only by reason of the offender's membership of an ethnic or other group".

29. **Second,** the proposed direction should be legislated in Australia because the Canadian equivalent was an attempt by the Canadian legislature to ameliorate the problem of indigenous over-representation[58] and to provide a remedy to the extent that it could, in the sentencing process.[59] It is remedial in nature.[60] At the time, aboriginal peoples in Canada represented only 2-3 percent of the adult population, but account for 15 percent of admission to custody at a provincial/territory level and slightly more at the federal level.[61] The attempt occurred after tomes of material.[62]

30. The Ontario Court of Appeal in *United States of America v Leonard*[63] said that in the context of criminal law:

> "Gladue stands for the proposition that insisting Aboriginal defendants be treated as if they were exactly the same as non-Aboriginal defendants will only perpetuate the historical patterns of discrimination and neglect that have produced the crisis of criminality and over-representation of Aboriginals in prisons… Gladue factors must be considered in order to avoid the discrimination to which Aboriginal offenders are too often subjected and that so often flows from the failure of the justice system to address their special circumstances Treating Gladue in this manner resonates with the principle of substantive equality grounded in the recognition that "equality does not necessarily mean identical treatment and that the formal 'like treatment' model of discrimination may in fact produce inequality."[64]

31. The historical patterns of discrimination and neglect quoted in *Leonard* and found to be an underlying cause of indigenous over-representation in *Gladue* include:

> "…dislocation, discrimination, child removal, socioeconomic disadvantage, substance abuse and community fragmentation that all too often lead to incarceration at grossly disproportionate rates…[65]

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[56] *Bugmy*, at 592 [37].
[57] *Munda*, at 619 [52]-[53].
[58] *Gladue*, at 737 [93] per Cory and Iacobucci JJ.
[59] The Hon Justice Harry S Laforme, 'The Justice System in Canada: Does it Work for Aboriginal People?' (2005) 4 INDIGL 1 (Aboriginal Awareness Week, University of Toronto, 7 February 2005), p 10.
[60] *Ipeelee*, at 468 [59] citing *Gladue*, at 736 [93].
[61] Canadian Centre for Justice Statistics, The Juristat Reader: A Statistical Overview of the Canadian Criminal Justice (1999), p 45.
[62] See for instance, M. Jackson, Locking Up Natives in Canada, Report of the Canadian Bar Association Committee on Imprisonment and Release (1988); reprinted in (1988-89) 23 U.B.C.L. Rev. 215; A.C. Hamilton & C.M Sinclair, Report of the Aboriginal Justice Inquiry of Manitoba, Vol. 1, The Justice System and Aboriginal People (Winnipeg, Queen's Printer, 1991); Royal Commission on Aboriginal Peoples of 1992; Royal Commission of Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada (Ottawa: The Commission, 1996). See also the authors cited in Gladue, at 692-694.
[63] [2012] ONCA 622 ("*Leonard*").
[64] *Leonard*, at [60].
[65] *Gladue*, at 719 [58], 724-5 [67]-[68] per Cory and Iacobucci JJ.

32. The factors are equally applicable to Aboriginal Australians. As Norrish QC DCJ states, extra-curially, in terms of Indigenous disadvantage in Australia 'the parallels with the Canadian situation are significant, perhaps remarkable'.[66] The creation of this inquiry is another[67] illustration that indigenous people are over-represented in the Australian Criminal Justice System. It is uncontroverted. The recent High Court decision of *Bugmy* and *Munda*, evidences that, like Australia, Canada, disproportionately imprisons Indigenous persons. Despite comparable tomes of work,[68] no equivalent remedial[69] provision currently exists in Australia.

33. The attempt by the Canadian legislature was at the federal level.[70] However, state legislative reform is more appropriate in Australia because the administration of criminal justice is substantially, but not exclusively, a matter for states,[71] and state legislative reform is also consistent with the High Court's unexplored question in *Bugmy*.[72]

34. It is accepted, however, that sentencing reform of itself will not significantly reduce Aboriginal offending rates or the alienation felt by Aboriginal people from the criminal justice system.[73] Moreover, it is also acknowledged that s 718.2(e) has not decreased the rate of indigenous imprisonment in Canada.[74]Any significant reduction in the high rates of Aboriginal imprisonment and detention will only be achieved through a comprehensive reform agenda: to address underlying factors that contribute to offending rates; to improve the way in which the criminal justice system operates for Aboriginal people; and to recognise and strengthen Aboriginal law and culture.[75] However sentencing reform – to the extent that a remedy is possible - is still significant. This much was confirmed in *Gladue* when the SCC considered s 718(2)(e) and concluded:

> "It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary solution to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process."[76]

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[66] Judge Stephen Norrish QC, 'Sentencing Indigenous Offenders "Not Enough 'Judicial Notice'?" (Judicial Conference of Australia Colloquium, 13 October 2013), p 35.
[67] See for example: Commonwealth, Royal Commission into the Aboriginal Deaths in Custody, National Report, (1991); Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing Them Home Report (April 1997); Steering Committee for the Review of Government Service Provision, Overcoming Indigenous Disadvantage: Key Indicators 2011 (25 August 2011) Australian Government Productivity Commission.
[68] *Ibid* and see n 177 for more examples.
[69] See for instance, *Khoury v Government Insurance Office* (*NSW*) 1984 165 CLR 622.
[70] In the Federal context, s 16A(2)(m) of the *Crimes Act 1914* (*Cth*) previously referred to "cultural background" which Judges were required to take into account when sentencing aboriginal offenders but those words were removed when the provision was amended by *Crimes Amendment* (*Bail and Sentencing*) *Act 2006*, No. 171 of 2006, in force from 13 December 2006.
[71] Arie Frieberg and Sarah Murray, Constitutional Perspectives on Sentences: Some Challenging Issues (Paper presented at Federal Crime and Sentencing Conference, 11 and 12 February 2012, Canberra page 5.
[72] *Bugmy*, at 592 [36],
[73] Law Reform Commission of Western Australia, 'Aboriginal Customary Laws', The interaction of Western Australian law with Aboriginal law and culture', Final Report, Project 94, September 2006, p. 174.
[74] Jonathan Rudin, 'Aboriginal Over-representation and R v Gladue: Where We Were, Where We Are and Where We Might Be Going' (2008), 40 SC.L.R (2d), p 701.
[75] *Ibid*.
[76] *Gladue*, at 722 [64] per Cory and Iacobucci JJ.

35. **Third**, a different method of analysis is warranted for indigenous offenders in Australia because the proposed direction promotes substantive equality in order to ensure they are treated equally with non-aboriginal offenders. In the absence of a different method of analysis, like the proposed direction, aboriginal offenders will continue to be treated equally with non-aboriginal offenders, when they are in fact, unequal.[77]

36. Section 718.2(e) and its interpretation in *Gladue*, is more akin to substantive equality[78] as opposed to formal equality.[79] The latter has been emphasised by the current Australian jurisprudence.[80] However, substantive equality should be the goal when sentencing aboriginal offenders in Australia.

37. In the absence of 'equality legislation' - like the proposed direction in Australia - the sentencing method of analysis is not altered for aboriginal offenders. The SCC has repeatedly pointed out in section 15 jurisprudence, the goal of equality legislation is not to achieve formal equality, but rather substantive equality.[81]

38. Substantive equality is not a foreign concept to Australian jurisprudence. Brennan J observed in *Gerhardy v Brown*:-[82]

> "But it has long been recognized that formal equality before the law is insufficient to eliminate all forms of racial discrimination. In its Advisory Opinion on Minority Schools in Albania (34), the Permanent Court of International Justice noted the need for equality in fact as well as in law, saying:
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> > **"Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations** It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact...."
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> As Mathew J. said in the Supreme Court of India in Kerala v.Thomas (35), quoting from a joint judgment of Chandrachud J. and himself:
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> > "It is obvious that equality in law precludes discrimination of any kind; whereas **equality in fact may involve the necessity of differential treatment in order**

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[77] 'It was a wise man who said there is no greater inequality than the equal treatment of unequals': *Dennis v United States* 339 US 162 at 184 per Frankfurter J.

[78] Above n 9, p. 73.

[79] Rothman J in *Jimmy v R* (2010) 77 NSWLR 540 at [256] traced the notion of equal justice to the Aristotelian principle of formal equality. Cf *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462, 472 [28] where French CJ, Crennan and Kiefel JJ traced the notion to Solon's "isonomia" and said that equal justice "embodies the norm expressed in the term "equality before the law" … it finds the expression in the "parity principle" which requires that like offenders should be treated in a like manner"

[80] As above n 42 and see generally, Sarah Krasnostein, 'Too Much Individualisation, Not Enough Justice: Bugmy v The Queen' (2014) Alternative Law Journal 12.

[81] See for example, *Eldridge v British Columbia* (Attorney-General) [1997] 3 SCR 624 at [77].

[82] (1985) 159 CLR 70 ("*Gerhardy*"). See also: *Leeth v Commonwealth* (1992) 174 CLR 455 at [8] per Deane and Toohey JJ, usefully cited by Sarah Krasnostein, 'Too Much Individualisation, Not Enough Justice: Bugmy v The Queen' (2014) Alternative Law Journal 12, p 14.

> **to attain a result which establishes an equilibrium between different situations**"

"In the same case, Ray c.J. pithily observed (36):

> "Equality of opportunity for unequals can only mean aggravation of inequality."

"Formal equality must yield on occasions to achieve what the Permanent Court in the Minority Schools of Albania Opinion (38) called "effective, genuine equality".

A means by which the injustice or unreasonableness of formal equality can be diminished or avoided is the taking of special measures **A special measure is, ex hypothesis, discriminatory in character; it denies formal equality before the law in order to achieve effective and genuine equality**. As Vierdag in The Concept of Discrimination in International Law (1973), p. 136 says:

> "The seeming, formal equality that in a way may appear from equal treatment is replaced by an apparent inequality of treatment that is aimed at achieving 'real', material equality somewhere in the future. And this inequality of treatment is accorded precisely on the basis of the characteristics that made it necessary to grant it: race, religion, social origin, and so on."[83] (Emphasis added)

39. Brennan J quoted, relevantly, the famous dissenting judgment[84] of Judge Tanaka wrote in the *South West Africa Cases* (*Second Phase*):

> "We can say accordingly that the principle of equality before the law does not mean the absolute equality, **namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle' to treat equally what are equal and unequally what are unequal**.
>
> The question is, in what case equal treatment or different treatment should exist. If we attach importance to the fact that no man is strictly equal to another and he may have some particularities, the principle of equal treatment could be easily evaded by referring to any factual and legal differences and the existence of this principle would be virtually denied. A different treatment comes into question only when and to the extent that it corresponds to the nature of the difference. **To treat unequal matters differently according to their inequality is not only permitted but required. The issue is whether the difference exists Accordingly, not every different treatment can be justified by the existence of differences, but only such as corresponds to the differences themselves, namely that which is called for by the idea of justice - 'the principle to treat equal equally and unequal according to its inequality, constitutes an essential content of the idea of justice'** (Goetz Hueck, Der Grundsatz der Gleichmtissigen Behandlung in Privatrecht, 1958, p. 106) [translation].
>
> **Briefly, a different treatment is permitted when it can be justified by the criterion of justice**. One may replace justice by the concept of reasonableness generally referred

[83] *Gerhardy*, at 129-130 per Brennan J.
[84] *Maloney*, at 295-296 [340] per Gageler J.

> to by the Anglo-American school of law. Justice or reasonableness as a criterion for the different treatment logically excludes arbitrariness"[85] (Emphasis added)

40. Separately, Toohey J has said, extra-curially, that:-

> "The relevance: of aboriginality as a factor in sentencing is readily understood and should be readily accepted. The suggestion, sometimes made, that Aboriginality should be included among mitigating factors to be given some formal recognition is more suspect. It carries overtones of patronage and superiority. The relevance of Aboriginality is not necessarily to mitigate; rather is to explain or throw light on the circumstances of an offender. In so doing, it may point the way to an appropriate penalty.
>
> "Aboriginality may in some cases mean little more than the conditions in which the offender lives. In other cases, it may be the very reason why the offence was committed. It is demeaning to Aborigines to suggest that somehow their Aboriginality is necessarily a mitigating consideration. **Rather it is, to echo the words Professor Rowley, "a matter of justice"…**
>
> Aboriginality may sometimes appear to be a circumstance of aggravation in the sense that an Aboriginal community may regard an offence as more serious than would a non-Aboriginality community. Bringing liquor into the community is an example. (references omitted)[86] (Emphasis added)

41. Legislating to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders is a matter of justice to ensure the even administration of criminal justice.[87]

42. The even administration of justice is achieved by the proposed direction. In the author's view, it is a 'special measure'; it denies formal equality before the law in order to achieve substantive equality or equality in fact, and it should be legislated in Australia to establish an equilibrium[88] between aboriginal and non-aboriginal offenders. The proposed direction is justified by the criterion of justice.

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[85] (1966) ICJR at pp. 305-306.

[86] "Sentencing Aboriginal Offenders", paper delivered by the Hon. Justice John Toohey to the Second International Law Congress, 19–24 June 1988, Surfers Paradise, Queensland, p. 21-22 and usefully cited by Eames JA in *R v Fuller-Cust* (2002) 6 VR 496, 522 [86]-[87]. See similar comments: *Weininger v The Queen* (2003) 212 CLR 292 at 637-638 [22]-[24].

[87] To adopt the language from Brennan J in *Neal*, at 326.

[88] *Gerhardy*, at 129-130 per Brennan J, citing Mathew J in *Kerala v Thomas* [1976] 1 SCR 906 at 951.

(b) How could state and territory legislate expressly require courts to consider the unique background and systemic factors affecting Aboriginal and Torres Strait Islander people when sentencing offenders from those backgrounds

43. Legislative interference – in the form of the proposed direction - is necessary, because of the common law position. However, it must be consistent with the RDA, otherwise, an inconsistency will arise between the proposed direction [a state law] and the RDA [the federal law] to which s 109 of the Commonwealth Constitution will apply to the extent of the inconsistency.[89] As Kiefel J (as her Honour then was) noted in *Maloney*, it may be expected that the inconsistency will be resolved in favour of s 10.[90]

44. However, an Australian state or territory could legislate expressly to require courts to consider the unique background and systemic factors of indigenous offenders because, in the author's view, the proposed direction is consistent with the RDA for the following reasons:

    i. Section 10 of the RDA is engaged but it does not give rise to an inconsistency within the meaning of s 109 of the Commonwealth Constitution;

    ii. Alternatively, the proposed direction is not inconsistent with the RDA because it is a "special measure" as defined in s 8 of the RDA and exempt.

45. This submission will adopt the methodology of Brennan J in *Gerhardy* by conveniently addressing the application of s 10 first and then considering s 8.[91] However, a preliminary issue arises as to whether the enactment of the proposed direction is a matter within the legislative competence of the State or territory. The administration of criminal justice is substantially, but not exclusively, a matter for states,[92] and plainly includes state sentencing laws, subject to the Commonwealth Constitution and any express or implied restriction on state power arising from that source.[93]

46. In the absence of any restriction, the States enjoy general legislative power[94] to make laws for the 'peace, welfare and good government', or, peace, order and good government'.[95] It is a plenary power.[96] However, the principle of legality[97] has constructed an additional restriction on the plenary power of the states. That is, the states plenary power is (potentially) restrained by reference to rights deeply rooted in our democratic system of government and common law.[98]

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[89] *Carter v Egg and Egg Pulp Marketing Board (Vic*) (1942) 66 CLR 557 at 573 per Latham CJ.
[90] *Maloney*, at 227 [147].
[91] *Gerhardy*, at 119.
[92] Arie Frieberg and Sarah Murray, Constitutional Perspectives on Sentences: Some Challenging Issues (Paper presented at Federal Crime and Sentencing Conference, 11 and 12 February 2012, Canberra page 5.
[93] Patrick Keyzer, 'Principles of Australian Constitutional Law', Third Edition, Lexis Nexis Butterworths Australia, 2010, 67-68 [4.4]-[4.5].
[94] *Ibid*.
[95] *Ibid*.
[96] *Union Steamship Co & Ashalian Pty Ltd v King* (1988) 166 CLR 1, at 9.
[97] See for instance, *United States v Fisher* 6 US 358 at 390 (1805); *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153 [158] per Kiefel J.
[98] *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10 and more recently in *South Australia v Totani* (2010) 242 CLR 1 at 28-29 [31] per French CJ.

47. The proposed direction denies formal equality before the law. Prior high court authority confirms that the rights to which s 10(1) refers – including subsection (a) which is the guarantee of procedural equality - are human rights or fundamental freedoms.[99] Separately, Gummow J has opined, extra-curially, that equality before the law has been declared a fundamental common law principle.[100] Therefore, the principle of legality may restrict the competence of a state or territory to enact the proposed direction because it denies the (formal) equality before the law, which is a right deeply rooted in the common law.

48. French CJ[101] considered whether the principle of legality could be so constrained, observing:

> "… that courts will construe statutes, where constructional choices are open, so as to minimise their impact upon common law rights and freedoms That principle, well known, to the drafters of legislation, seeks to give effect to the presumed intention of the enacting Parliament not to interfere with our rights and freedoms except by clear and unequivocal language for which the Parliament may be accountable to the electorate. French CJ stated for the imposition of formal requirements of clear statutory language, the principle does not constrain legislative power. Importantly, his Honour said that whether, beyond that imposition, State legislative power is constrained by rights deeply rooted in the democratic system of government and the common law was a question referred to but not explored in Union Steamship. French CJ said whether the answer to the unexplored question, it is self-evident beyond the power of the courts to maintain unimpaired common law freedoms which the Commonwealth Parliament or a State Parliament with its constitutional power, has by clear statutory language, abrogated, or restricted or qualified".[102]

49. It is outside the ambit of this submission to resolve the (above) unexplored question, but it suffices to note, that it has been observed that the common law privilege against self-incrimination - which has been also declared a human right - could be removed by clear and unequivocal legislative previsions.[103]

50. It is at least arguable, therefore, that in the premise of irresistible clearness[104] in the drafting process of the proposed direction, the enactment of the proposed direction would not be restricted by the extension of the principle of legality to the deeply rooted common law right of equality before the law.

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[99] *Gerhardy*, at 86 per Gibbs CJ, 101 per Mason J; *Mabo v Queensland* (No 2) (1992) 175 CLR 1 at 229; *Western Australia v Commonwealth* (1993) 183 CLR 373 at 437.
[100] Justice W. Gummow 'The Constitution: United Foundation of Australia Law? (2005) 79 Australian Law Journal 176, 167-7.
[101] *South Australia v Totani* (2010) 242 CLR at 28-29 [31] per French CJ, specifically, footnote [55] ("*Totani*").
[102] *Ibid.*
[103] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 543-548 per Brennan J and recently cited by McMurdo P in *X v Callanan & Anor* [2016] QCA 335 at [26].
[104] *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153 [158] per Kiefel J.

i. Section 10 of the RDA is engaged but it does not give rise to an inconsistency within the meaning of s 109 of the Commonwealth Constitution

51. The High Court in *Bugmy* has correctly raised s 10 of *RDA* as the relevant federal law. In other words, s 10 could operate as a potential source of impediment to racially discriminatory state sentencing laws because the state law [the proposed direction] would be inconsistent with s 10 [the federal law] and by virtue of s 109 of the Commonwealth Constitution, the proposed direction would be invalid to the extent of any inconsistency.[105]

52. It suffices to note, that it has been advanced at common law that s 9 of the *RDA* would make it unlawful for race itself to be a permissible ground of discrimination in the sentencing process.[106] Although, Malcom CJ's dicta is, with respect, not consistent with the weight of authority. That is, the writer prefers the approaches taken by Gibbs CJ,[107] Mason[108] and Brennan JJ,[109] in *Gerhardy* with regards to the construction of ss 9 and 10. Their Honours confirmed that s 9 applies to an act that is prescribed to be racial discrimination,[110] and explained, by virtue of s107 of the Australian Constitution, that the act [that s 9 applies to] cannot be the act of a state legislature passing a law [111] because 'the enactment of a State law on a matter within its competence cannot be an "act" which the Commonwealth Parliament can make it unlawful for a person to do'.[112]

53. Moreover, the approaches taken by their Honours to the construction of s 10[113] confirms, that it is the most germane provision. Mason J (as his Honour then was) pithily states that the operation of s 9 is confined to making unlawful the acts which it describes;[114] and rather, s 10 is directed to the operation of laws whether Commonwealth, State or Territory laws, which discriminate by reference to race, colour or national or ethnic origin.[115]

54. This submission will proceed on the footing that s 10 is the relevant provision, as identified, but not explored[116] in *Bugmy*[117] in respect of the ability of a state legislature to enact such a proposed direction. Irrespective, if either s 9 or s 10 applies, then the *RDA* is engaged, and a potential inconsistency with s 109 arises; but of course, the inevitable exercise[118] then follows as to whether s 8 applies to save the operation of the proposed direction.

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[105] *Maloney*, at 227 [147] per Kiefel J.
[106] *Rogers & Murray* (1989) 44 A Crim R 301 at 307 (Malcolm CJ); quoted with apparent approval in *R v Minor* (1992) 79 NTR 1, p 12 per Mildren J*; Colbung v The Queen* [1999] WASCA 138 at [12] per Heenan J*; Western Australia v Richards* (2008) 185 A Crim 413 at [6] per Malcolm CJ*;* see also the Australian Law Reform Commission's Report 'Same Crime, Same Time: Sentencing of Federal Offenders Report No. 103, 720 [29.43].
[107] *Gerhardy*, at 82 per Gibbs CJ.
[108] *Gerhardy*, at 94, 98-99, 103 per Mason J.
[109] *Gerhardy*, at 123 per Brennan J.
[110] *Gerhardy*, at 81 per Gibbs CJ.
[111] *Gerhardy*, at 81 per Gibbs CJ; at 121 per Brennan J.
[112] *Gerhardy*, at 82 per Gibbs CJ; at 94, 98-99, 103 per Mason J; at 123 per Brennan J.
[113] *Gerhardy*, at 82 per Gibbs CJ; at 94, 98-99, 103 per Mason J; at 123 per Brennan J.
[114] *Gerhardy*, at 92 per Mason J.
[115] *Gerhardy*, at 92 per Mason J.
[116] To adopt the language from *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10; and most recently, in *South Australia v Totani* (2010) 242 CLR 1 at 28-29 [31] per French CJ.
[117] *Bugmy*, at 592 [36].
[118] *Maloney*, at 218 [126] per Crennan J.

55. In respect of the application of s 10, despite having no binding ratio in relation to the validity of s 10, unlike s 9,[119]for the purpose of this submission, the validity of s 10 will be assumed.[120] Section 10 is directed to the discriminatory operation and effect of the legislation.[121] *Prima facie*, the operation and effect of the proposed direction is discriminatory. That is, the operation and effect of proposed direction will alter the method of analysis to be applied when sentencing an Aboriginal offender.

56. The threshold issue with respect to the potential application of s 10, however, is whether there may be identified a right which the proposed direction affects and to which s 10 refers.[122] Article 5 prescribes civil rights which are human rights or fundamental freedoms.[123] Section 10(2) ensures that those rights are not limited to those in Article 5 but requires that they be of that kind.[124] Prior high court authority confirms that the rights to which s 10(1) refers are human rights or fundamental freedoms.[125]

57. The apparent right is Article 5(a) which provides, relevantly, "the right to equal treatment before the tribunals and all other organs administering justice" ("the identified right"). Keane JA (as his Honour then was) provides a detailed and instructive analysis of the exercise of identifying the right proposed under Article 5(a).[126] Keane JA found that s 10 creates, as its heading suggests "Rights to equality before the law". Section 10 is the statement as to how under Australian law the right of equal protection before the law is to be vindicated. That vindication requires the identification of a right in respect of which equal enjoyment is denied by "by reason of a … law".[127] Importantly, it is not a sufficient statement of the content of the right protected by s 10 of the RDA to say that there is a human right and fundamental freedom to enjoy equal treatment before the law, regardless of race.[128]

58. Likewise, in relation to the identified right, her Honour Kiefel J (as her Honour then was) explained in *Maloney* that:

> "The terms of Art 5(a) are apt to refer to a right of a person to be treated by a tribunal or other adjudicative body, which is dealing with a matter affecting that person, as that body would treat any other person. Article 5(a) concerns a guarantee of procedural equality and gives effect to the principle of equality in legal proceedings (197). Procedural equality, as the respondent submits, may be taken to extend to equality in the application of the law. Article 5(a) is not apposite to the right or freedom here in question."[129] (references omitted)

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[119] Section 9 of the RDA was held by majority in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 to be a valid law with respect to the external affairs power within the meaning of s 51(xxix).
[120] The previous decisions have proceeded with such an assumption, see for instance, *Maloney*, at 280 [299] per Gageler J and the cases cited therein.
[121] *Gerhardy*, at 97, 99 per Mason J; *Mabo v Queensland* [No 1] (1988) 166 CLR 186 at 198-199 per Mason CJ; at 216-219 per Brennan, Toohey and Gaudron JJ; at 231-232 per Deane J ("*Mabo*"); *Western Australia* v *Ward* (2002) 213 CLR 1 at 103 [115] ("*Ward*"); *Maloney*, at 226 [148] per Kiefel J.
[122] *Gerhardy*, at 86, 125-126; *Mabo*, at 198, 216, 229; *Ward* at 99-100 [106]-[107]; *Maloney* at 143 per Kiefel J;
[123] *Maloney*, at 145 per Kiefel J.
[124] *Maloney*, at 101 per Kiefel J.
[125] *Gerhardy*, at 86 per Gibbs CJ, 101 per Mason J; *Mabo v Queensland* (No 2) (1992) 175 CLR 1 at 229; *Western Australia v Commonwealth* (1993) 183 CLR 373 at 437.
[126] *Aurukun Shire Council & Anor v CEO Office of Liquor* [2012] 1 Qd R 1at 65 [139] (Keane JA) ("*Aurukun*").
[127] *Aurukun*, at 65 [139] per Keane JA.
[128] *Aurukun*, at 65 [140] per Keane JA.
[129] *Maloney*, at 227 [151] per Kiefel J.

59. In the same decision, Bell and Gageler JJ provided further guidance. Bell J similarly characterised the right in Article 5(a) as akin to right declared in Article 14 of the International Covenant of Civil and Political Rights ("ICPR") and is to be understood as a right to equality of access to courts and other adjudicative bodies and in the application of the law by them.[130] Although, Bell J effectively left open the possibility that the right was similar to the right in Article 26 by noting that Australia's acceptance was on the basis it confirmed the right of each person to equal treatment in the application of the law.[131]

60. Gageler J similarly said it was narrower than the right to equality before the law and to equal protection of Article 7 and Article 26 and that the right is closer to the right to equality before courts and tribunals in Article 14 of the ICPR.[132] Further his Honour said the right is not properly equated to a right of equal protection of the law in Article 7 and Article 26 of the ICCPR; instead, like Article 14, it is more narrowly focused on the administration and enforcement of laws made by courts and tribunals rather than on the content of laws more generally.[133]

61. Kiefel J's observation, when viewed in conjunction with Bell and Gageler JJ, confirms that the right – the principle of procedural equality - extends to the application and enforcement of laws by courts and tribunals, not the content, or the right to equality in the substantive provisions of the law.[134] In *Grose* (which is addressed later), Gray J referred to the above passage of Kiefel J and in relation to s 9C concluded:

> "Section 9C of the Sentencing Act confers a right to have a sentencing court adopt a different process in the conduct of the inquiry necessary to determining sentence, including by modifying the persons from whom evidence or material may be received and at whose instigation that may occur. Section 9C falls within the scope of Art 5(a) as it is a procedural provision relating to treatment by a criminal court. Section 9C confers a "right" which is protected under s 10 of the Racial Discrimination Act ."[135]

62. It was adverted to in the judgment of *Grose* that the impugned provision does not include a direction to the courts to give particular attention to the circumstances of Aboriginal offenders.[136] It follows that s 9C and the proposed direction are relevantly distinguishable. However, Gray J, earlier in his judgment, anaylsed s 9C and observed that 'while s 9C may be described as procedural, its purpose and effect is substantive'.[137] That is also an apt description of the proposed direction because it alters the sentencing procedure which sentencing judges must use in determining a sentence for Aboriginal offenders and effects substantive change.[138] Therefore, on balance and for the purpose of this submission, the proposed direction is likely to fall within the ambit of Art 5(a) – the principle of procedural equality - as it is a procedural provision relating to treatment by a criminal court and therefore affects the identified right to which s 10 refers.

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[130] *Maloney*, at 248 [215].
[131] *Maloney*, at 250-251 [222].
[132] *Maloney*, at 275 [287].
[133] *Maloney*, at 294-295 [336].
[134] Travaux preparatoires of the ICPR, Annotation on the Text of the Draft International Covenant on Human Rights, 10 UN GOAR, Annexes (Agenda item 28, pt. II) I, 61, UN Doc A/2929 (1955), usefully cited in the respondent's written submissions at [51] in *Maloney*.
[135] *Grose*, at 114 [74] per Gray J.
[136] *Grose*, at 110 [60] citing *Bugmy*, at [36].
[137] *Grose*, at 109 [56].
[138] *Gladue*, at 706 [33].

63. Although, it is arguable that s 10 may not be engaged because the Canadian experience has evidenced that it is not an aboriginal specific provision,[139] and a similar argument was advanced in *Grose*.[140] This argument incorporated concepts of justified differentiation and is supported by the approach of *Gageler* J in *Maloney*.[141] However, as Gray J correctly observed in *Grose*, that approach does not carry the weight of authority.[142]

64. Support can be found for Gageler J's view,[143] and in *Aurukun.*[144] That is, an equivalent s 718.2(e) applies equally to non-aboriginal offenders and therefore could apply equally to all offenders throughout a state or territory, without differential treatment on the basis of race.[145]

65. If the matter was free of authority, then the author would adopt the approach taken by Gageler J and argue s 10 is not engaged. However, the weight of authority does not support that view. In those circumstances, and because the proposed direction affects procedural equality and thus the right identified in Article 5(a) is engaged, s 10 is likely to apply.

66. The second issue, if s 10 applies, is the effect of s 10. Two important applications (the first of which is relevant) of s 10(1) were identified by Mason J in *Gerhardy*, specifically:

> • If a state law creates a right which is not universal because it is not conferred on people of a particular race, then s 10 will supply the right the subject of that omission and confer that right upon persons of that race. The right conferred by s 10 will be complementary to the rights conferred by the state law and the Commonwealth and state laws can stand together.[146]

67. Thus, s 10 will supply the right the subject of that omission and confer that right upon persons of that race.[147] The right conferred by s 10 will be complementary to the rights conferred by the state law and the Commonwealth and state laws can stand together.[148]

68. That is, and as Gray J noted in *Grose*, there would not involve the finding of an inconsistency within the meaning of s 109 of Commonwealth Constitution.[149]

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[139] Jonathan Rudin, 'Aboriginal Over-representation and R v Gladue: Where We Were, Where We Are and Where We Might Be Going' (2008), 40 SC.L.R (2d), p 702.
[140] *Grose*, at 111 [64]-[65].
[141] *Maloney*, 295-296 [340]-[342] per Gageler J).
[142] *Grose*, at 114 [78].
[143] Parliamentary Joint Committee on Human Rights, Parliament of Australia, Stronger Futures in the Northern Territory Act 2015 and related Legislation (2013), 18-19 [1.70]-[1.71], 30 [1.109], 31 [1.115], 44 [1.59]; see also the Racial Discrimination Committee's *General Recommendation XIV* and 32.
[144] [2012] 1 Qd R 1.
[145] As identified as one of the three main reasons why in the majority of cases where a party has alleged that a state or territory law is inconsistent with the *RDA*, the argument has failed: George Williams and Daniel Reynolds, 'The Racial Discrimination Act and Inconsistency under the Australian Constitution (2015) 36 Adelaide Law Review, p 248.
[146] *Gerhardy*, at 98-99.
[147] See similar comments: *Gerhardy*, at 82 and 85 per Gibbs CJ; cf at 123 per Brennan J.
[148] *Gerhardy*, at 98-99 per Mason J.
[149] *Grose*, at 113 [71].

69. The approach taken by Mason J in *Gerhardy* and recently applied by Gray J in *Grose,*[150] was previously approved by the plurality in *Western Australia v Ward*[151] and by French CJ,[152] Hayne,[153] Kiefel [154] and Gageler JJ[155] in *Maloney.* It is well buttressed.

70. Therefore, if the above analysis is correct, even if s 10 is engaged, the right is complementary to non-aboriginal offenders, which means the proposed direction and s 10 can stand together i.e. there is no inconsistency with s 109 of the Commonwealth Constitution. As such, the enactment of the proposed direction by a state or territory is valid.

ii. Alternatively, the proposed direction is not inconsistent with the RDA because it is a "special measure" as defined in s 8 of the RDA and exempt

71. The authorities evidence[156] that s 8 provides for an exception to the prohibition of racial discrimination if the impugned law is characterised as a 'special measures'. It follows if an equivalent s 718.2(e) was to be enacted by a state or territory and is found to be a special measure within the meaning of s 8 then it is a valid sentencing law irrespective of whether s 9 or 10 applies.

72. Special measures are well-established at international law and under human rights treaties as "granting the benefit or preference to members of a disadvantaged group on the basis of membership of that group, where differential treatment on that ground is generally prohibited as discrimination"[157] and have included "the right to life, health, education, social security and an adequate standard of living".[158] Special measures do not involve discrimination because they are "an example of differential treatment of people that is justified as based on relevant differences for example, the continuing the effects of historical disadvantage".[159]

73. It should be noted the position at International Human Rights Law is not as constrained[160] as the common law approach in Australia. The decision of *Gerhardy* has been criticised for taking such an approach,[161] yet it remains the prevailing authority, particularly in conjunction with the contemporary authority of *Maloney*.

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[150] *Grose*, at 113 [71].
[151] (2002) 213 CLR 1 at 99-100 [106]-[107] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.
[152] *Maloney*, at 178-179 [10].
[153] *Maloney*, at 200 [64].
[154] *Maloney*, at 227 [149].
[155] *Maloney*, at 281-282 [303]-[304] .
[156] See for instance, *Gerhardy*, at 87 per Gibbs CJ, at 107 per Murphy J; at 112 per Wilson J; at 144 per Brennan J, at 147 per Deane J); *Maloney*, at 180 [13] per French CJ and [84]-[85] per Hayne J.
[157] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Stronger Futures in the* Northern Territory Act 2012 *and related Legislation* (2013), p 21, [1.78].
[158] *Ibid.*, pp 51-52 [1.184].
[159] *Ibid*., p 21 [1.79]. Identified as one of the three main reasons why in the majority of cases where a party has alleged that a state or territory law is inconsistent with the RDA, the argument has failed: George Williams and Daniel Reynolds, 'The Racial Discrimination Act and Inconsistency under the Australian Constitution (2015) 36 Adelaide Law Review, p 248.
[160] *Ibid*., at p 30 [1.109] where the Parliamentary Joint Committee recognises that Legitimate Differential Treatment is permissible if the racial based distinction, which may still be lawful even if the laws are not held to be special measures should they be "reasonable and proportionate in achieving the legitimate outcome".
[161] Wojciech Sadurski, 'Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark that wasn't' Sydney Law Review, Volume 11 5, March 1986, p 7, 31, 3-33.

74. A similar[162] aboriginal specific sentencing provision has recently been characterised as a "special measure". In *Grose,* the Full Court of South Australia had to determine the validity of s 9C of the *Criminal Law (Sentencing) Act 1988 (SA),* which allows for the convening of a sentencing conference before an Aboriginal defendant is sentenced.[163]

75. Specifically, the Court had to consider whether firstly, s 9C engages s 10[164] of the *RDA* and, if so, whether, s 9C is a special measure within the meaning of s 8 of the RDA. In the leading judgment, Gray J answered yes to both questions. In relation to the first question, his Honour Gray J referred to French CJ in *Maloney* to identify the two effects of s 10[165] and concluded that s 9C falls within the scope of Art 5(a) as it is a procedural provision relating to treatment by a criminal court and confers a "right" which is protected under s 10 of the RDA.[166]

76. Gray J then found that s 9C was plainly a special measure, because each approach identified by the High Court in *Maloney* was satisfied.[167] At the heart of his Honour's reasoning was:

> "The earlier referred to material demonstrates a greater likelihood of Aboriginal defendants being disengaged from the criminal justice system than non-Aboriginal defendants This suggests a systemic inadequacy in the sentencing process as normally conducted. The material further demonstrates that risk factors relevant to criminal offending are far more prevalent in relation to Aboriginal people in Australia, and that Aboriginal people are far more likely to be in custody than non-Aboriginal Australians This suggests that the inadequacy is capable of adversely affecting a particular ethnic group in that the courts are not fully informed of all factors relevant to the determination of the appropriate penalty. These matters demonstrate a need for measures to be taken in relation to Aboriginal people in order to ensure their equal enjoyment of human rights and fundamental freedoms, in particular, the right to equal treatment before organs administering justice."[168]

77. The decision of *Grose* is not binding ratio nor does it explore whether an equivalent s 718.2(e) is a "special measure", which as stated above, is relevantly distinguishable. It is, however, instructive because of the application of the two leading authorities, *Gerhardy* and *Maloney*, by Gray J to an aboriginal specific sentencing law. Therefore, Question 3-1 of DP 84, is novel in Australia. Although, the Canadian experience provides some guidance with respect to the validity of s 718.2(e).

78. In *Gladue,* the appellant argued that s 718.2(e) was "affirmative action" justified under s 15(2) of the *Canadian Charter of Rights* (*Constitution Act 1982*) ("CCR"). It was argued that it produced an automatic reduction of imprisonment. The CSC, however, rejected that it would lead to an automatic reduction of sentences, because s 718.2(e) does not alter the fundamental duty to impose a sentence that is fit for the offence and the offender.[169]

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[162] cf *Crimes* (*Sentencing*) *Act 2005* (ACT), s 33(1)(m); *Criminal Procedure Act 1986* (NSW), s 348; *Sentencing Act 1995* (NT), s 104A; *Penalties and Sentences Act (1992),* s 9(2)(p).
[163] *Criminal Law (Sentencing) Act 1988 (SA),* s 9C.
[164] *Grose*, at 110 [59].
[165] *Gerhardy*, at 98-99 per Mason J.
[166] *Grose*, at 114 [74].
[167] *Grose*, at 119 [93].
[168] *Grose*, at 119 [94].
[169] *Gladue*, at 706 [31].

79. The CSC did not provide any further guidance on this topic because the constitutional issue did not arise for their consideration.[170] As such, the decision of *Gladue* does not provide persuasive assistance because the SCC did not consider whether s 718.2(e) satisfies s 15(2).

80. Section 15 is, in the author's opinion, an amalgamated construct of s 10 and s 8 of the *Racial Discrimination Act 1975* (Cth). Section 10 generally provides that statutory rights, which purportedly apply to members of a particular race or ethnic group, are to be read as applying to all races and ethnic groups and is equivalent to s 15(1) of the CCR which provides that "every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

81. Section 8 of the RDA provides for an exception to the prohibition on racial discrimination in Part II (which includes s 10) of the RDA when the impugned law is characterised as a 'special measure'. Similarly, s 15(2) of the CCR excludes the operation of s 15(1) to affirmative action programs which "includes any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

82. Despite not considering the question in *Gladue* or *Ipeelee*, as stated above, it appears beyond question, that the Canadian experience and the resulting jurisprudence has confirmed s 718.2(e) is 'equality legislation' with the aim of achieving substantive equality.

83. For the reasons at [36]-[42], the proposed direction promotes substantive equality. As Bell J observed in *Maloney*, s 8 "…has as its sole purpose the attainment of substantive equality…" and "…is the means by which laws may validly provide for the differential enjoyment of Convention rights based on race in order to secure substantive equality..." [171]

84. *Gerhardy* and the contemporary authority of *Maloney* confirms that the High Court has not settled upon a single approach to determine whether a law is a "special measure". However, the following is settled:

    i. Legislative action constitutes a "special measure";[172]

    ii. The Court's role is to determine whether the political assessment inherent in the measure could reasonably be made?[173] That is, if the political assessment could not have been made reasonably, the measure does not bear the character of a special measure and the court must so hold; and[174]

[170] *Gladue*, at 733-734 [86]-[88].
[171] *Maloney*, at 247 [213]-[214] per Bell J.
[172] *Gerhardy*, at 104 per Mason J, at 112 per Wilson J.
[173] *Gerhardy*, at 139 per Brennan J.
[174] *Gerhardy*, at 139 per Brennan J; 149 per Deane J; *Maloney*, at 183-184 [20] and 184-185 [21] (French CJ); 299 [353]; 300 [356] per Gageler J.

iii. The court will determine the characterisation of a measure as a special measure depends upon matters of fact the court is to ascertain the facts "as best it can" [175] and involves taking judicial notice of notorious facts and otherwise relying upon materials which need not be tendered according to ordinary rules of evidence. The sources from which the court may inform itself may, but need not be "official" or "public or authoritative. "[176]

85. In relation to the fact-finding role, indigenous over-representation in Australia is uncontroverted. There is a preponderance of material[177] that a state or territory could seek to rely on in terms of the supporting material and drafting the terms and purpose of the proposed direction to support the view that the political assessment is reasonably made. In *Grose,* Gray J accepted such a proposition.[178]

86. In relation to the construction of s 8, it relevantly provides:

8 Exceptions

(1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

87. Article 1 of the Convention relevantly provides that: "

"1. In this Convention, the term 'racial discrimination' shall 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.
…

4. 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

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[175] *Gerhardy*, at 87-88 per Gibbs CJ; at 142 per Brennan J; *Maloney*, at 260 [248] per Bell J, at 280-281 [302] per Gageler J; Grose, at 119 [92].
[176] *Grose*, at 119 [92] citing *Gerhardy* at 87-88 per Gibbs CJ, 141-142 per Brennan J; *Maloney*, at 184-185 [21], 93 [45] per French CJ, 260 [248] per Bell J, 298-299 [351]-[353] per Gageler J ; cf 209 [95] (Hayne J, expressly not deciding).
[177] See for example: Commonwealth, Royal Commission into the Aboriginal Deaths in Custody, National Report, (1991); Human Rights and Equal Opportunity Commission, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing Them Home Report (April 1997) 559; 2005 Social Justice Report; Northern Territory, Ampe Akelyernemane Meke Mekarle "Little Children are Sacred": Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007), pp 223-226; Australia, House of Representatives, Parliamentary Debates (Hansard), "Apology to Australia's Indigenous Peoples", 13 February 2008, pp 167-173; Steering Committee for the Review of Government Service Provision, Overcoming Indigenous Disadvantage: Key Indicators 2011 (25 August 2011) Australian Government Productivity Commission; Australian Institute of Criminology, Deaths in Custody in Australia to 30 June 2011, AIC Reports Monitoring Reports No 20 (2013), p 5; Steering Committee for the Review of Government Service Provision, Overcoming Indigenous Disadvantage (2011); Pricewaterhouse Cooper, Indigenous Incarceration: unlocking the facts, May 2017, Figure 11: Sample of national, state and territory reports relating to Indigenous incarceration, 1991 to 2016; Australian Bureau of Statistics, Prisoners in Australia, 2017: Aboriginal and Torres Strait Islander Prisoners (March 2017) Australian Bureau of Statistics: http://www.absgov.au/ausstats/abs@.nsf/mf/4512.0
[178] *Grose*, at 119 [94].

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."

88. In relation to the approaches taken in *Gerhardy*, Brennan J (as his Honour then was) conducted the most extensive analysis, which was approved by Crennan,[179] Kiefel[180] and Gageler JJ[181] in *Maloney*. Brennan J construed the following indicia:

    i. confers a benefit on some or all members of a class;

    ii. the membership of which is based on race, colour, descent, or national or ethnic origin;

    iii. for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms; and

    iv. in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.[182]

89. Brennan J usefully expanded on each indicium.[183]

90. Similar to Brennan J's fourth indicia, in Maloney, French CJ identified the circumstances required for a "special measure" to be taken namely:

    - the existence within a State Party of certain racial or ethnic groups or individuals; and
    - the existence of a requirement for the protection of those groups or individuals in order to ensure their equal enjoyment or exercise of human rights and fundamental freedoms[184]

91. French CJ observed that the characterisation of a law as a special measure, may similarly:

    - determine whether the law evidences or rests upon a legislative finding that there is a requirement for the protection of a racial or ethnic group or individuals in order to ensure their equal enjoyment or exercise of human rights and fundamental freedoms;
    - determine whether that finding was reasonably open;
    - determine whether the sole purpose of the law is to secure the adequate advancement of the relevant racial or ethnic group or individuals to ensure their equal enjoyment or exercise of human rights and fundamental freedoms; and

[179] *Maloney*, at 219-220 [130].
[180] *Maloney*, at 235-236 [178]-[180]; 236-237 [182]-[183].
[181] *Maloney*, at 280 [302] and 300 [356].
[182] *Gerhardy*, at 133.
[183] *Gerhardy*, at 133-138.
[184] *Maloney*, at 183 [18].

- determine whether the law is reasonably capable of being appropriate and adapted to that sole purpose.[185]

92. Hayne J noted that:

> "The text of Art 1(4) suggests that a "special measure" has two characteristics First, the measure must be for a group described in the Article in the following way: "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". Secondly, the measure must be one "taken for the sole purpose of securing adequate advancement" of those groups What is "adequate advancement" can sensibly be understood only in the sense of "ensur[ing] such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms". This understanding is reinforced by reference to Art 2(2), which refers to "measures to ensure the adequate development and protection of [the relevant group] for the purpose of guaranteeing [the relevant group] the full and equal enjoyment of human rights and fundamental freedoms" (emphasis added)."[186]

93. His Honour then usefully distils the following statutory criteria:

> "The first criterion directs attention to the existence of a racial or ethnic group (or individuals of a group of those kinds) members of which are not enjoying or exercising human rights or fundamental freedoms to the same extent as persons of another racial or ethnic group. In cases where s 8(1) is in issue because s 10 will otherwise be engaged, this question can often, perhaps usually, be answered by reference to the particular group (or individuals) which is (or who are) enjoying or exercising human rights or fundamental freedoms to a more limited extent than another group (or other individuals).
>
> The second criterion directs attention to the connection between the measure and its sole purpose, which must be the advancement of the particular racial or ethnic group (or individuals) in need of that protection. No doubt that connection must be discerned by reference to the legal and practical operation of the measure in question. But, as has already been explained, it is to be doubted whether s 8(1) requires any proportionality analysis of the kind that has found favour in certain other jurisdictions The text of s 8(1) (and through it Art 1(4)) provides more specific guidance about the content of the connection which is required."[187]

94. Separately, but importantly, his Honour says:

> "It will be recalled that the definition of "special measures" in Art 1(4) provides that the measure must be taken for the sole purpose of "securing adequate advancement" of the relevant group or individuals, which must be understood in the sense of "ensur[ing] such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms". Some content to the relevant connection to be considered can be derived from the term "securing". That term suggests that a court applying s 8(1)

[185] *Maloney*, at 184-185 [21].
[186] *Maloney*, at 208 [90].
[187] *Maloney*, at 210-211 [99]-[100].

> must consider whether the relevant law is conducive to ensuring the relevant groups or individuals equal enjoyment or exercise of their rights and freedoms The same idea is captured in the first element of a special measure identified by Brennan J, which was (143) that it confer "a benefit on some or all members of a class"."[188]
>
> "Further, and much more substantial, content can be derived from the term "adequate". The term "adequate" does not direct a court to consider whether a goal could be achieved in any better way. What the term "adequate" naturally directs attention to is whether the same goal can be achieved to the same extent by an alternative that would restrict the rights and freedoms of the relevant group or individuals to a lesser extent. If an alternative of that kind exists, it could readily be concluded that the law said to be a special measure is not "adequate". It would not be adequate because the same result could be achieved in a way that is less restrictive of the rights and freedoms of the group or individuals in question. It is in this way, and to this extent, that proportionality analysis is relevant to s 8(1) (144)."[189]

95. The relevant questions, therefore, for Hayne J were:

> "Against this background, it is possible to summarise the questions that are presented by s 8(1) in this appeal as follows First, is there a racial group members of which are not enjoying or exercising human rights or fundamental freedoms to the same extent as persons of another race? Secondly, do the impugned provisions have a sole purpose which is conducive to the equal enjoyment and exercise of rights and freedoms by the relevant racial group and could the same goals be achieved to the same extent by some alternative means? The balance of these reasons will show that the impugned provisions are a "special measure"."[190]

96. Like French CJ, Bell J, identified three indicia that characterise a special measure subject to the application of the proviso:

> "…a law is a special measure if: (i) it applies to a racial or ethnic group or individuals; (ii) who are in need of protection in order to ensure their equal enjoyment or exercise of human rights and fundamental freedoms; and (iii) the sole purpose of the measure is the attainment of the object stated in (ii)…"[191]

97. In *Gerhardy*, it was confirmed that the proviso in Art 1(4) in light of Art 2(2) should be read together,[192] and that despite the impugned law having an 'air of permanency' or operating indefinitely, that is a matter for the future. [193] That is, a measure which satisfies the four indicia is not a special measure if the provisos in the latter part of Art. 1(4) apply. The measure must not "lead to the maintenance of separate rights for different racial groups" nor "be continued after the objectives for which [it was] taken have been achieved".[194] Similar reasoning was applied by some of the justices in *Maloney*.[195]

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[188] *Maloney*, at 211 [101].
[189] *Maloney*, at 211 [102].
[190] *Maloney*, at 212 [104].
[191] *Maloney*, at 259 [244].
[192] *Gerhardy*, at 88-89 per Gibbs CJ; at 106 per Mason J; at 113 per Wilson J; at 139-140 and 154.
[193] *Gerhardy*, at 88-89 (Gibbs CJ); at 106 (Mason J); at 113 (Wilson J); at 139-140 per Brennan J and 153-154 per Deane J.
[194] *Gerhardy*, at 139 per Brennan J.
[195] *Maloney*, at 238 [186] per Kiefel J.

98. Brennan J said that 'the proviso relating to the maintenance of separate rights, like the proviso relating to the continuation of special measures, is intended to limit the period during which formal discrimination may be permitted' and importantly:

> … [the impugned law] does not contain a "sunset" clause automatically bringing it to an end at some future time. What the provisos are concerned to avoid, however, is the maintenance of separate rights after the objectives have been achieved and the continuation of special measures after that time. The provisos are satisfied if, when that time arrives, separate rights are repealed and special measures are discontinued. As it is impossible to determine in advance when the objectives of a special measure will be achieved, the better construction of the provisos is that they contemplate that a State Party will keep its special measure under review, and that the measure will lose the character of a special measure at the time when its objectives have been achieved. But the provisos do not require the time for the operation of the special measure to be defined before the Objectives of the special measure have been achieved. With the passage of time, circumstances may no longer warrant the continuation of some or all of those provisions of the Land Rights Act which provide for formal discrimination. If that time comes, a provision which creates an unsustainable formal discrimination will fall because Pt II of the Racial Discrimination Act will then apply to it."[196]

99. The final matter with respect to the construction of s 8 derives from the contemporary authority of *Maloney*, which considers whether the approaches in *Gerhardy*, import a test of reasonable necessity or proportionality.

100. As Hayne J observes "in *Gerhardy*, some members of the Court[197] identified the relevant question as whether the law in question is "capable of being reasonably considered to be appropriate and adapted to achieving"[198] the sole purpose described in Art 1(4)."[199]

101. However, Hayne J said that that formulation [of s 8] would appear not to admit of any proportionality analysis[200] His Honour explained:

> "Secondly, the respondent and the Commonwealth were right to submit that the reference in Art 1(4) to such protection "as may be necessary in order to ensure" qualifies the category of persons for whom special measures may be taken. The expression does not qualify, and become a condition for, the measure itself. This conclusion follows from the English text of the Convention set out in the schedule to the RDA. It may also be noted, however, that it is a conclusion which follows even more clearly from the French text of the Convention, where the words "ayant besoin de la protection qui peut être nécessaire" attach to "certains groupes raciaux ou ethniques ou d'individus" and not to "[l]es mesures spéciales"."[201]

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[196] *Gerhardy*, at 140-141 per Brennan J.
[197] *Gerhardy*, at 149 per Deane J; see also at 113 per Wilson J; at 137-139 per Brennan J; at 161-162 per Dawson J; cf at 105 per Mason J.
[198] *Gerhardy*, at 149 per Deane J; see also at 113 per Wilson J; at 137-139 per Brennan J; at 161-162 per Dawson J; cf at 105 per Mason J.
[199] *Maloney*, at 209 [96].
[200] *Maloney*, at 209-210 [96].
[201] *Maloney*, at 208-209 [91]-[92].

> … Once it is understood, however, that the idea introduced by the word "necessary" qualifies the group affected by the purported "special measure", and not the measure itself, its use provides no foundation for proportionality analysis[202]

102. Bell J also considered the argument observing:

> "Ms Maloney's submission that a test of reasonable necessity applies to the determination of whether a measure is a special measure is suggested to have support in the statements of some Justices in Gerhardy . She notes that Mason J spoke of the measure as being one that was "appropriate and adapted to a regime of the kind which is necessary" (310). Deane J asked whether the measure is "capable of being reasonably considered to be appropriate and adapted to achieving that purpose" (311). Brennan J asked "could the political assessment inherent in the measure reasonably be made?" (312) She submits that each formulation is directed to considerations of proportionality of the kind later to be applied in Castlemaine Tooheys Ltd v South Australia (313) and Betfair Pty Ltd v Western Australia (314). With the possible exception of Mason J, none of the members of the Court approached the characterisation of the impugned law by reference to a test of proportionality of the kind that Ms Maloney proposes In my opinion, the determination of whether a law is within the statutory criteria of special measures does not import such a test."[203]

103. Bell J. likewise, rejected the submission concluding:

> "…In the statutory context of this case, attention is upon the criteria stated in Art 1(4). Those criteria do not require the court to consider, as Ms Maloney submits, whether there are "reasonably available alternatives to respond to the problem which are less restrictive of the protected interest. Provided that a measure can be characterised as having as its sole purpose the adequate advancement of a racial group or individuals who are in need of protection in order to attain equality in the enjoyment of rights, the measure will qualify as a special measure (subject to the provisos in Art 1(4)). The determination of whether the measure can be characterised as having that sole purpose does not import a test of reasonable necessity."[204]

104. However, Crennan, Kiefel and Gageler JJ did import a test of reasonable necessity or proportionality.

105. Crennan J identified the test of whether a law is a "special measure" as posited by Art 1(4) of the Convention directs attention to the expression "such protection as may be necessary", which was dealt with most explicitly in Gerhardy v Brown by Brennan J, in his fourth indicium (168).[205] Here Honour then found that that language in the text of Art 1(4), to which effect is given in domestic law by s 8(1) of the RDA, directs attention to the test of reasonable necessity, which has been identified and explained by this Court as a test of the legitimacy and proportionality of a legislative restriction of a freedom or right which is constitutionally, or ordinarily, protected (169).[206]

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[202] *Maloney*, at 209 [93].
[203] *Maloney*, at 258 [243].
[204] *Maloney*, at 259-260 [246].
[205] *Maloney*, at 219 [130].
[206] *Maloney*, at 219-220 [130].

106. Kiefel J confirmed that proportionality analysis is engaged by s 8 in the consideration of whether a law is a special measure. It is engaged because s 8 applies Art 1(4) of the Convention, the terms of which refer, in relevant part, to:

> "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"[207]

> "The test implied by the reference in Art 1(4) to measures "as may be necessary" for the permitted purpose is that of reasonable necessity. The test was accepted as a doctrine of this Court in Betfair Pty Ltd v Western Australia (225) and has subsequently been discussed and applied in judgments of members of the Court (226). The test as expounded is not inconsistent with the test of proportionality to which the Convention refers No party to the appeal suggested otherwise."[208]

> "The test is applied by the Court to determine the limits of legislative power exercised to effect a prohibition or restriction of a freedom which is made the subject of protection by the Constitution or, as here, by statute."[209]

> "The test of reasonable necessity looks to whether there are reasonable practicable alternative measures available which are less restrictive in their effect than the measures in question (231). If there are such alternatives, a law cannot be said to be reasonably necessary."[210]

107. Importantly, in relation to the final point, her Honour added:

> "The existence of any possible alternative is not sufficient to show that the measure chosen was not reasonably necessary according to the test. An alternative measure needs to be equally as effective, before a court can conclude that the measure is a disproportionate response (232). Moreover, in Monis v The Queen (233), Crennan and Bell JJ and I said that the alternative means must be obvious and compelling, having regard to the role of the courts in undertaking proportionality analysis"[211]

108. Gageler J said in relation to the fourth indicia identified by Brennan J[212] that:

> "The fourth criterion identified by Brennan J is about the necessity for the criteria adopted by the law in pursuit of its aim. Shortly stated, it is that the protection the law gives to the beneficiaries be necessary in order that they may enjoy and exercise a human right equally with persons of other races Consistent with the general concept of absence of discrimination or equality before the law as understood in international law, the Racial Discrimination Committee explains special measures in terms of

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[207] Maloney, at 235 [177].
[208] *Maloney*, at 236 [180].
[209] *Maloney*, at 236 [181].
[210] *Maloney*, at 237 [182].
[211] *Maloney*, at 237 [183].
[212] *Gerhardy*, at 133-138.

> proportionality. The explanation by members of the Court in Gerhardy in terms of reasonableness reflected the then prevailing usage within what Judge Tanaka in the South West Africa Cases (Second Phase) had referred to as "the Anglo-American school of law". Special measures are now better explained for the purposes of Australian law in terms of reasonable necessity."[213]

109. Therefore, the first stage is to apply the four indicia identified by Brennan J in *Gerhardy* and subsequently approved by several members in *Maloney*[214] and the other approaches of Hayne, Bell and Gageler JJ to the proposed direction. The second stage is to consider the proportionality analysis and the third stage is to consider the application of the proviso.

110. In relation to the first stage, the proposed direction is, in the author's view, plainly a special measure.

111. It is the best-known attempt, in common law countries, at ameliorating indigenous over-representation. A different method of sentencing analysis - because of the proposed direction - considers the unique systemic or background factors and culturally appropriate sentences and sanctions of Aboriginal offender and secures substantive equality.

112. The sole purpose of the proposed direction is to achieve substantive equality when sentencing aboriginal offenders.[215] As Bell J observed in *Maloney*, s 8 "…has as its sole purpose the attainment of substantive equality…" and "…is the means by which laws may validly provide for the differential enjoyment of Convention rights based on race in order to secure substantive equality..." [216]

113. Moreover, the reasoning enunciated by Gray J in *Grose* is a useful starting point:

> "The earlier referred to material demonstrates a greater likelihood of Aboriginal defendants being disengaged from the criminal justice system than non-Aboriginal defendants This suggests a systemic inadequacy in the sentencing process as normally conducted. The material further demonstrates that risk factors relevant to criminal offending are far more prevalent in relation to Aboriginal people in Australia, and that Aboriginal people are far more likely to be in custody than non-Aboriginal Australians This suggests that the inadequacy is capable of adversely affecting a particular ethnic group in that the courts are not fully informed of all factors relevant to the determination of the appropriate penalty. These matters demonstrate a need for measures to be taken in relation to Aboriginal people in order to ensure their equal enjoyment of human rights and fundamental freedoms, in particular, the right to equal treatment before organs administering justice."[217]

114. The systemic inadequacy in the sentencing process as normally conducted, which according to Gray J, capable of adversely affecting Aboriginal people in that the courts are not fully informed of all factors relevant to the determination of the appropriate penalty demonstrate a need for measures to be taken in relation to Aboriginal people.

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[213] *Maloney*, at 301 [358].
[214] *Maloney*, at 219-220 [130]; at 235-236 [178]-[180]; 236-237 [182]-[183]. per Kiefel J; at at 280 [302] and 300 [356]. per Gageler J.
[215] See paragraphs [36]-[42].
[216] *Maloney*, at 247 [213]-[214] per Bell J.
[217] *Grose*, at 119 [94].

115. That is, the 'terms of s 9C, as well as its legislative history, demonstrate a finding by the legislature of the existence of an ethnic group and their need for special treatment in order to ensure their equal participation in the criminal justice system,'[218] all of which are equally applicable to the proposed direction.

116. The decision of *Grose* confirms that s 9C does not include a direction to the courts to give particular attention to the circumstances of Aboriginal offenders. Gray J cited the unexplored question from *Bugmy* as authority for that proposition.[219]

117. Therefore, the decision of *Grose* does not provide guidance as to the definitional issue for the proposed direction. However, in the author's view, the proposed direction satisfies Brennan J's indicia of a special measure because it:

a. confers a benefit **[a different method of sentencing analysis considering the unique systemic or background factors and culturally appropriate sentences and sanctions]** on some or all members of a class **[indigenous offenders]**;

b. the membership of which is based on race, colour, descent, or national or ethnic origin **[Aboriginal and Torres Strait Islander offenders]**;

c. for the sole purpose of securing adequate advancement **[the sole purpose is to deny formal equality before the law in order to achieve substantive equality or effective and genuine equality]** of the beneficiaries **[Aboriginal and Torres Strait Islander offenders]** in order that they may enjoy and exercise equally with others human rights and fundamental freedoms **[right to equality before the law]**

d. in circumstances **[where there is a systemic inadequacy in the sentencing process as normally conducted which adversely affects Aboriginal people in that the courts are not fully informed of all factors relevant to the determination of the appropriate penalty creating disengagement and indigenous over-representation]** where the protection given to the beneficiaries by the special measure is necessary [**to establish an equilibrium between aboriginal and non-aboriginal offenders and to ensure the even administration of criminal justice through substantive equality]** in order that they may enjoy and exercise equally **[the right to equal treatment for Aboriginal offenders before organs administering justice can only be achieved by substantive equality]** with others human rights and fundamental freedom.

118. There is significant overlap in relation to the approaches of French CJ and Bell CJ, which the proposed direction also satisfies. That is, the racial group **[aboriginal offenders]** are in need of protection **[there is a systemic inadequacy in the sentencing process as normally conducted which adversely affects Aboriginal people]** in order to ensure their equal enjoyment of human rights and fundamental freedoms **[the right to equal treatment through substantive equality]** and that the sole purpose of the measure **[the proposed direction]** is the attainment of the object of equal enjoyment or exercise of human rights and fundamental freedoms.

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[218] *Grose*, at 119 [95].
[219] *Grose*, at 110 [60].

119. In respect of the two relevant questions posed by Hayne J in relation to the characterisation stage, subject to any alternatives, in the author's view, they are also satisfied. That is, there is a racial group **[aboriginal offenders]** members of which are not enjoying or exercising human rights or fundamental freedoms **[the right to equal treatment through substantive equality]** to the same extent as persons of another race **[non-aboriginal offenders]** and the proposed direction's sole purpose **[the attainment of substantive equality]** is conducive to the equal enjoyment and exercise of rights and freedoms by the relevant racial group.

120. It is unclear whether the proportionality analysis is required, given the differing approaches taken in *Gerhardy* and *Maloney*. The writer prefers the construction of Hayne J in *Maloney*. That is, the word "necessary" in Art 1(4) qualifies the group, not the measure.[220] Thus, proportionality analysis is not required in respect of the purported measure.

121. However, given the other approaches, the analysis is relevant. As Kiefel J (as her Honour then was) observed in *Maloney*:

> "The test of reasonable necessity looks to whether there are reasonable practicable alternative measures available which are less restrictive in their effect than the measures in question (231). If there are such alternatives, a law cannot be said to be reasonably necessary."[221]
>
> …
>
> "The existence of any possible alternative is not sufficient to show that the measure chosen was not reasonably necessary according to the test. An alternative measure needs to be equally as effective, before a court can conclude that the measure is a disproportionate response (232). Moreover, in Monis v The Queen (233), Crennan and Bell JJ and I said that the alternative means must be obvious and compelling, having regard to the role of the courts in undertaking proportionality analysis"[222]

122. The proposed direction is not restrictive because even though the sentencing judge undertakes the process of sentencing aboriginal offenders differently, the fundamental duty of a sentencing judge to determine a fit sentence by taking into account all the relevant circumstances is unaltered. Thus, the well-established aims of sentencing are still achieved. That is, a fit, just or proportionate sentence.[223] Like the impugned provision in *Grose*, the proposed direction does not preclude the application to non-aboriginal offenders and it also has a facilitative aspect.[224]

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[220] *Maloney*, at 208-209 [91]-[92].
[221] *Maloney*, at 237 [182].
[222] *Maloney*, at 237 [183].
[223] See Criminal Code, RSC 1985, c C-46, s 718.1; see also *Ipeelee*, at 435-436 per LeBel J and *Veen v The Queen* (1979) 143 CLR 458, 467 per Stephen J; *Veen v The Queen* (*No 2*) (1988) 164 CLR 465, at 472, 476 per Mason CJ, Brennan, Dawson and Toohey JJ; *Hoare v The Queen* (1989) 167 CLR 348. 452; *Elias*, 494–5 [27].
[224] *Grose*, at 120 [99].

123. The existence of the current aboriginal sentencing provisions ("current provisions")[225] or Aboriginal sentencing courts[226] - is insufficient to show that the proposed direction is not reasonably necessary. The "effectiveness" of the current sentencing provisions must be obvious and compelling. The establishment of the inquiry is suggestive that the current provisions are ineffective, or at the very least, indicative that the effectiveness is not obvious or compelling. The increasing rate of indigenous over-representation is another indicator, so is the reasoning of Gray J in *Grose*.

124. Moreover, the current aboriginal sentencing provisions are largely discretionary;[227] whereas, the proposed direction is mandatory. Importantly, they are relevantly distinguishable. That is, they do not alter the method of sentencing analysis for aboriginal offenders and, in the author's view, are ineffective at securing substantive equality for aboriginal offenders; whereas, the sole purpose of the proposed direction is the attainment of substantive equality.

125. In the author's view, the proposed satisfies the import of proportionality analysis as required by the approaches of Crennan, Kiefel and Gageler JJ in *Maloney*.

126. Separately, French CJ[228] and Bell J[229] said that the measure must be capable of being reasonably considered to be appropriate and adapted to achieving that purpose. As Gray J said in *Grose*, this test requires that the provision be really, and not colourably or fancifully, referable to and explicable by the suggested purpose in securing advancement of Aboriginal people.[230] The purpose of the proposed direction is to ameliorate indigenous over-representation by altering the method of analysis through substantive equality. The proposed direction is not required to be the appropriate purpose or the one in fact to ameliorate indigenous over-representation.[231] The purpose of altering the method of analysis is to ensure that the unique systemic or background factors and culturally appropriate sentences and sanctions of Aboriginal offenders are considered when sentencing an aboriginal offender. The proposed direction promotes substantive equality which is required to alter the method of analysis. The proposed direction is reasonably considered to be appropriate and adapted to the purpose of ameliorating indigenous over-representation and satisfies the test of French CJ and Bell J.

127. Finally, Hayne J[232] posited a test that involves considering whether the same goals can be achieved to the same extent by some alternative means Thus, if the above analysis in relation to the approaches taken by Crennan, Kiefel and Gageler JJ is correct, then the approach taken by Hayne is also satisfied.

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[225] *Crimes* (*Sentencing*) *Act 2005* (ACT), s 33(1)(m); *Criminal Procedure Act 1986* (NSW), s 348; *Sentencing Act 1995* (NT), s 104A; *Penalties and Sentences Act (1992)*, s 9(2)(p); *Criminal Law (Sentencing) Act 1988 (SA), s 9C.*

[226] See generally, Elena Marchetti, Indigenous Sentencing Courts, Indigenous Justice Clearinghouse, Brief 5, December 2009.

[227] See for example, Carolyn Holdom, 'Sentencing Aboriginal Offenders in Queensland: Toward Recognising Disadvantage and the Intergenerational impacts of colonisation during the Sentencing Process, QUT Law Review, [S.l.], v. 15, n. 2,p 68.

[228] *Maloney*, at 184-185 [21].

[229] *Maloney*, at 260-261 [249].

[230] *Grose*, at 120-121 [100].

[231] *Grose*, at 120-121 [100].

[232] *Maloney*, at 211-212 [104]-[105].

128. In respect of the proviso, it is clear that the authorities require no temporal limitation[233] for a measure to be special, and only that a measure not continue after its objectives have been achieved. It would be prudent, as Brennan J noted in Gerhardy[234] to review[235] the proposed direction. The proviso is unlikely to affect the ability of a state or territory to enact the proposed direction.

Conclusion

129. A state or territory should enact the prosed direction because:

i. A different method of analysis is warranted for indigenous offenders in Australia;

ii. Sentencing reform – to the extent that a remedy is possible - is a significant attempt to ameliorate the problem of indigenous over-representation; and

iii. The proposed direction promotes substantive equality in order to ensure Aboriginal offenders are treated equally with non-aboriginal offenders.

130. A state or territory could enact the proposed direction because:

i. The application of s 10 of the RDA would not involve the finding of an inconsistency within the meaning of s 109 of Commonwealth Constitution; and

ii. Otherwise, the proposed direction is plainly a "special measure" which satisfies the respective judicial approaches and is therefore exempt from the operation of the RDA and the enactment is within the legislative competence of a state or territory and is valid.

Matt Jackson
5 September 2017

[233] *Maloney*, at 238 [186].
[234] *Gerhardy*, at 140-141 per Brennan J.
[235] *Gerhardy*, at 140-141 per Brennan J.