'TWO SYSTEMS OF LAW SIDE BY SIDE': THE ROLE OF INDIGENOUS CUSTOMARY LAW IN SENTENCING

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> The existence of two systems of law side by side, the prevailing one and aboriginal customary law, with their very different attitudes to guilt and responsibility creates serious problems and the question of how far our laws should apply to aboriginals and how far their law should be allowed to apply to them is controversial.
>
> Justice Murphy, *Ngatayi v The Queen*[1]

I Introduction

Customary law is an integral part of the lives and identities of Indigenous people across contemporary Australia.[2] But its existence alongside Australian criminal law raises complex questions of law and political morality. It seems difficult to reconcile these two systems of law with the principle that all Australians stand equal before the law, and the intuition that people should not be subjected to different criminal sanctions on the basis of race or ethnicity.[3]

In this paper, I argue that, despite this apparent tension, the values and purposes of criminal punishment require sentencing courts to consider customary law where relevant. The Federal Government's exclusion of customary law from sentencing is inconsistent with the guarantee of equality before the law under the *Racial Discrimination Act 1975* (Cth).[4]

In Part II, I begin by introducing the state of the law in Australia. For many years, Australian courts have considered relevant customary law when sentencing Indigenous offenders. However, the Federal Government has recently legislated to exclude customary law from sentencing at the Commonwealth level and in the Northern Territory.

In Part III, I analyse the normative question of whether sentencing courts should take customary law into account. Courts must have regard to all relevant factors when sentencing an offender. This is the principle of individualised justice. Whether a factor is relevant depends on the purposes and values of criminal law. It is a question of what criminal law is *for*. Customary law is relevant to sentencing because it influences whether, and to what extent, criminal punishment realises these purposes and values in the particular case. The blanket exclusion of customary law denies certain Indigenous offenders individualised justice. This normative reasoning is reflected in the way Australian courts have traditionally considered customary law when sentencing Indigenous offenders.

In Part IV, I examine two criticisms of the courts' use of customary law in sentencing. The first criticism is that Aboriginal men distort customary law to justify their violence against women and children. The second criticism is that this sentencing practice makes Indigenous people and their law objects of the white, settler legal system.

Finally, in Part V, I evaluate the legal question of whether the Federal Government's exclusion of customary law contravenes the *Racial Discrimination Act*.[5] Drawing on the analysis in Part III, I argue that the exclusion denies certain Indigenous offenders individualised justice. The Federal Government claims that the exclusion helps to protect Indigenous women and children from violence, but the empirical evidence suggests the opposite. It is the loss and destruction of customary law that has contributed to violence in Indigenous communities. The exclusion of customary law from sentencing is thus inconsistent with the *Racial Discrimination Act*.

II The State of the Law in Australia

A Indigenous Customary Law and Sentencing

Australian courts, particularly in the Northern Territory, have a long standing practice of considering customary law when sentencing Indigenous offenders. In *Neal v The Queen*, Brennan J set out the common law rationale for this practice.[6] The notion of equality before the law dictates that the 'same sentencing principles are to be applied, of course, in every case', irrespective of the race or ethnicity of the offender.[7] The notion of individualised justice requires, however, that all 'material facts' be taken into account, including 'those facts which exist only by reason of the offender's membership of an ethnic or other group.'[8] This is 'essential to the even administration of criminal justice.'[9]

In several Australian jurisdictions, these principles have received statutory backing. In the Australian Capital Territory, a sentencing court must consider the offender's cultural background if relevant.[10] In Queensland, if the offender is an Aboriginal or Torres Strait Islander person, a court must have regard to any relevant submissions made by a community justice group in the offender's community, including 'any cultural considerations'.[11]

There are two ways in which customary law might be relevant to an offence committed by an Indigenous person.[12] First, the person might have done an act which was unlawful under the criminal law, but which was permitted—or even required—by the customary law of their community.[13] Second, the person might have done an act that was contrary to both the criminal law and customary law, thereby exposing them to a risk of traditional punishment for their breach of customary law.[14]

In *Walker*, Mason CJ rejected the claim that the criminal law and Indigenous customary law co-existed as parallel systems of law.[15] Indigenous Australians were bound by the criminal law, not customary law.[16] Even if customary law had survived European settlement, 'it was extinguished by the passage of criminal statutes of general application.'[17] The criminal law was 'inherently universal in its operation'.[18]

Despite Mason CJ's formal rejection of legal pluralism, courts since *Walker* have continued to consider customary law when sentencing Indigenous offenders. According to Heather Douglas, this has produced a 'weak legal pluralism'.[19] Sentencing has provided space for Indigenous customary law to operate as an alternative normative order, albeit under the control of the 'white legal authority'.[20]

B The Federal Government's Exclusion of Customary Law

Customary law is now formally excluded from the sentencing process at the Commonwealth level and in the Northern Territory. This occurred in three main steps.

On 12 December 2006, the Howard Government inserted s 16A(2A) into the *Crimes Act 1914* (Cth).[21] This change emerged from the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities in June 2006, which expressed 'concerns about the relatively high level of violence and abuse in Indigenous communities'.[22] Section 16A(2A) prohibits courts sentencing federal offenders from taking into account 'any form of customary law or cultural practice' as a reason for either 'excusing, justifying, authorising, requiring or lessening', or 'aggravating', the seriousness of the criminal behaviour to which an offence relates.[23] 'Criminal behaviour' includes both the physical and fault elements of an offence.[24] The Howard Government also repealed s 16A(2)(m) of the *Crimes Act*, which required courts sentencing federal offenders to have regard to the offender's 'cultural background'.[25]

On 18 August 2007, the Howard Government launched its Northern Territory Emergency Response, commonly known as 'the NT Intervention'.[26] Section 91 of the *Northern Territory National Emergency Response Act 2007* (Cth) extended the prohibition on consideration of customary law to courts sentencing people for Northern Territory offences.[27]

Finally, on 16 July 2012, the Gillard Government replaced the Northern Territory Emergency Response with its Stronger Futures policy. The *NTNER Act* was repealed in its entirety.[28] Section 91 of the *NTNER Act* was re-enacted, however, as s 16AA(1) of the *Crimes Act*.[29]

As a consequence, ss 16A(2A) and 16AA(1) of the *Crimes Act* ('the Federal Provisions') prohibit federal and Northern Territory courts, respectively, from having regard to customary law either to lessen or to aggravate the seriousness of criminal behaviour.

III Determining the Proper Role for Customary Law

A A Philosophical Approach

These prohibitions raise the question of whether, and why, customary law should be taken into account in the sentencing of Indigenous offenders. This is a normative question. It cannot be answered by a purely descriptive inquiry into Australian criminal law.

As Nicola Lacey notes, 'cultural arguments bearing on criminal exculpation always call for evaluation in terms of the fundamental values and objects of the criminal process'.[30] It is necessary to look beyond the law 'to the political-moral values on which it depends',[31] in order to make normative sense of the role of customary law within the practice of criminal law and punishment.

This is a task for the philosophy of criminal law, which aims to 'discern a normative structure that expresses coherent principles and values, and that is adapted to the pursuit of identifiable ends'.[32] Particular laws and doctrines can then be evaluated by reference to those principles, values and ends, to determine whether they are, in the law's own terms, defensible.[33]

In addressing this normative question, I first identify several distinct conceptions of the values and purposes of criminal punishment: respectively, the utilitarian, communicative and restorative conceptions. This is meant to be an illustrative, rather than an exhaustive, typology. It represents several mainstream conceptions of criminal punishment, which are reflected in the common law and statutory principles that govern sentencing.[34]

I then analyse the Australian case law to demonstrate that judges' acceptance of the relevance of customary law is founded—explicitly or implicitly—on these underlying principles of criminal punishment. I attempt to bring some conceptual order to the role of customary law in Australian sentencing, rather than treating the case law as a wilderness of single instances.

The corollary of this analysis is that the statutory exclusion of customary law denies Indigenous offenders the equal application of those principles. Certain Indigenous offenders are not sentenced in accordance with all relevant factors, and are thereby denied individualised justice. In Brennan J's words, the Federal Provisions undermine 'the even administration of criminal justice'.[35]

B Sentencing Theory

(i) Utilitarian

On the utilitarian account, criminal punishment is justified because, and to the extent that, it produces the greatest amount of utility.[36] Punishment causes inconvenience and pain to the offender, but it is justified by its broader beneficial consequences.[37] Punishment produces good consequences because it reduces 'the frequency in which socially desirable laws are violated'.[38] First, when it involves imprisonment, punishment incapacitates the offender, directly preventing him from re-offending for a period of time.[39] Second, punishment deters the offender from engaging in the criminal conduct again, and deters members of the general public from committing that crime.[40] Third, punishment can rehabilitate the offender, to make him a contributing member of society and reduce the risk of re-offending.[41]

It might be thought that this account justifies as much punishment as is conducive to these beneficial consequences. This is potentially problematic for utilitarianism as an account of criminal justice in Australia. The High Court has emphasised that punishment cannot be extended beyond what is proportionate to the seriousness of the crime, even for the purposes of community protection.[42] Proportionality can be justified on utilitarian grounds, however. People have a 'pervasive intuitive belief' in the importance of proportionality.[43] If judges habitually imposed disproportionate sentences, this would undermine the public's support for the criminal justice system.[44]

(ii) Communicative

On the communicative account, the purpose of criminal punishment is to convey blame to a person who has acted wrongfully.[45] When a person culpably harms someone, criminal punishment censures him for this wrongful conduct.[46] In contrast to the utilitarian account, punishment is not valued primarily 'in order to produce preventive or other societal benefits'.[47] It is valued because the offender deserves blame.[48]

Proportionality also lies at the core of the communicative account, although for intrinsic rather than instrumental reasons. To the extent that an offender does not deserve blame, censure is ethically objectionable.[49] Disproportionate sentences 'purport to condemn the actor for his conduct, and yet visit more or less censure on him than the degree of blameworthiness of that conduct would warrant'.[50]

The blameworthiness of criminal conduct can be understood as the product of two factors: the harmfulness of the conduct and the culpability of the offender.[51] Harmfulness refers to the extent to which the conduct would typically reduce a person's capacity to live a good life.[52] Culpability depends on a range of factors, including the offender's intention, capacity and motives, and the relevant surrounding circumstances.[53]

(iii) Restorative

The restorative account sees the goal of the criminal justice system as 'repairing the harm of crime'.[54] Crime often involves material loss to the victim, or to society more generally.[55] But the crucial harm is the loss of trust.[56] Trust is the presumption that 'we all play by the same rules and that we can rely on each other in our interpersonal dealings without fear of force or fraud to overcome our will'.[57] It is an essential condition of life in any community.[58] When an individual breaks these rules by committing a crime, these expectations are undermined. The function of the criminal justice system is to restore trust, both in the specific offender and in society as an enterprise governed by enforceable standards of behaviour.[59]

Trust can be restored in a variety of ways, both non-punitive and punitive. An apology might help to restore the victim's personal trust in the offender, by indicating the offender's awareness of the relevant norms and culpability for breaching them.[60] Punishment can also restore social trust, by providing 'the necessary means of enforcing the reciprocal altruism on which we depend for social interactions'.[61]

C Sentencing Practice

When Australian courts attribute weight to customary law in sentencing Indigenous offenders, they do so for reasons recognisably attributable to one or more of these theories of punishment.

(i) Utilitarian

The justification for taking customary law into account is often a utilitarian one. In *R v Goldsmith*, the offender was an Aboriginal man who had set fire to a house.[62] A friend had died there several months before.[63] The offender believed that the friend's 'restless spirit' still resided there and wanted to enable his friend to 'rest in peace'.[64] Justice Debelle held that the offender's cultural motivations altered the conventional assessment of the purposes of punishment. The need to deter members of the public from committing arson held less weight than in the ordinary case, because of the unique cultural circumstances.[65] A more lenient punishment was therefore justified on utilitarian grounds.

Conversely, in *R v Bulmer*, the claim that the offender acted in accordance with cultural practice weighed in favour of a harsher sentence, on utilitarian grounds.[66] Three Aboriginal men were sentenced for separate knife attacks on women and children.[67] In each case, the offender 'considered that they had a right to use a knife as a means of disciplining the child in the one and the women in the other'.[68] Justices Connolly and McPherson held that, 'far from calling for leniency in sentencing', this practice 'represents an attitude which the courts must be vigilant to discourage'.[69]

In *R v Gondarra*, clan leaders made an offender attend a 'chamber of law' for several months, where he was instructed in the observance of traditional law.[70] The offender's acceptance of this traditional punishment was taken as evidence that his prospects for rehabilitation were good.[71] Justice Southwood held that 'considerable weight must be given to this element in sentencing the offender'.[72]

In *R v Jadurin*, the Full Federal Court also accorded utilitarian weight to traditional punishment, but for a different reason. If the sentencing court ignored the fact that the offender had already been punished by his community for his offence, this would create 'in him resentment against a system of law of which he had little understanding'.[73] This reasoning mirrors the utilitarian justification for proportionality, as necessary to maintain public support for the criminal justice system.[74]

(ii) Communicative

In other cases, the justification for treating customary law as relevant can be seen to accord with the communicative account of punishment. Thus, it has been held that customary

law is relevant to the offender's blameworthiness, bearing on the offender's culpability and the harmfulness of the conduct.

With respect to the offender's culpability, *Jamilmira* concerned a 49 year-old Aboriginal man who was charged with having sexual intercourse with a person under the age of 16.[75] The offender claimed that the 15 year-old victim was his 'promised wife' under customary law, and that he had 'rights to touch her body'.[76] He was under some pressure from members of his community, including the victim's family, to commit the offence.[77] The evidence indicated that arranged marriages were considered 'the cultural ideal' within the community.[78]

This cultural context bore on the offender's culpability in several ways. First, the offender committed the sexual assault partly in response to social pressures stemming from this cultural practice.[79] In the language of the communicative account, the relevant customary law was an external circumstance that made it more onerous for the offender to comply with the criminal law.[80] Second, the cultural context showed that the offender did not commit the crime merely for his own sexual gratification.[81] Customary law illuminated the offender's motives in a manner that made him less culpable.[82]

The reasoning in *Jamilmira* was endorsed by the Northern Territory Court of Criminal Appeal in *R v GJ*.[83] The Court held that, where an Indigenous person commits a crime because he is acting in accordance with customary law, he is less morally culpable as a consequence.[84] Importantly, however, the Court drew a distinction between being obliged by customary law to act in a particular way, and merely being entitled to act in that way. In *GJ*, unlike in *Jamilmira*, the offender was under no pressure and no obligation to commit the crime.[85] Consistently with the communicative account, this reduced the mitigating effect of the customary law.[86]

In both *Jamilmira* and *GJ*, the court emphasised that customary law did not justify or excuse the offender's conduct. In accordance with *Walker*, the criminal law prevailed.[87] Indeed, in both cases, the court increased the offender's sentence, because the sentence imposed at trial was held to be manifestly inadequate.[88]

By contrast, *R v Wunungmurra* was decided after s 91 of the *NTNER Act* came into force.[89] The offender was charged with intentionally causing serious harm to his wife.[90] He sought to adduce evidence that he was 'acting in accordance with his duty as a Dalkarra man'.[91] Justice Southwood held that s 91 barred consideration of this evidence, despite its relevance to the assessment of culpability.[92]

Customary law can also affect the assessment of the harm caused by criminal conduct.[93] In *Aboriginal Areas Protection Authority v S & R Building & Construction Pty Ltd*, a construction company had unlawfully built a pit toilet on an Aboriginal sacred site.[94] The Indigenous custodians submitted that, under customary law, the damage to the site was 'permanent and irreparable'.[95] Due to s 91, however, Southwood J was unable to take this factor into account in determining the seriousness of the offence.[96]

In response to *Aboriginal Areas*, the Gillard Government excluded cultural heritage legislation from the operation of the Federal Provisions.[97] It recognised that 'otherwise relatively minor criminal behaviour, such as entering a particular site, is more serious by virtue of the significance of that site according to customary law'.[98]

But customary law bears on the seriousness of crimes beyond cultural heritage legislation. In *R v Nabegeyo*, the offender was an Indigenous man, who raped the victim while she was heavily intoxicated and unresponsive.[99] The offender and the victim had traditional kinship ties which the offender had violated by his conduct.[100] Ordinarily, the existence of this kinship relationship, and the consequent breach of customary law, would have aggravated the objective seriousness of the offence.[101] The Court held, however, that this circumstance could not be considered because of s 16AA(1) of the *Crimes Act*.[102]

Both *Aboriginal Areas* and *Nabegeyo* confirm that, in the terms of the communicative account, cultural practices can affect the impact of criminal acts on the victim's quality of life.[103]

(iii) Restorative

Finally, sentencing courts have repeatedly used the restorative account to justify consideration of customary law.[104] Where an offender submits to traditional punishment, this often helps to restore their relationship with the victim and the community. To the extent that trust has been restored, the rationale for criminal punishment is exhausted and a more lenient sentence is justified.[105]

In *Miyatatawuy*, the court received a written statement from the victim's community, stating that the offender had faced all the concerned clans and families 'under distressing conditions', and then been placed under 'a form of cultural good behaviour bond'.[106] Chief Justice Martin held that this was a significant mitigating factor, as it would 'assist in the restoring of peace between the affected communities'.[107]

Similarly, in *Poulson*, the offender had pleaded guilty to manslaughter.[108] Prior to sentencing, however, he submitted to traditional punishment: he was struck on the head by four women, and speared in the leg by the brother of the deceased on two occasions.[109] This was taken into account in determining his sentence. Justice Thomas held that traditional punishment had resolved the dispute between the families and averted future conflict.[110] It was also particularly important to the deceased's relatives, who saw the offender's participation as 'making reparation for his offence'.[111]

D Conclusion

Sentencing courts have recognised that customary law can bear directly—in a variety of different ways—on the achievement of the purposes of punishment, including incapacitation, deterrence, rehabilitation, censure and reparation.

In a particular case, customary law may raise conflicting issues.[112] Imagine an Indigenous man who commits a crime while acting in accordance with his obligations under customary law. On the utilitarian reasoning in *Bulmer*, this would justify a harsher sentence, to deter people from acting in accordance with this cultural practice.[113] On the communicative reasoning in *GJ*, however, this would reduce the offender's culpability, thereby warranting a more lenient sentence.[114]

This tension is neither surprising nor novel. In *Veen (No 2)*, Mason CJ and Brennan, Dawson and Toohey JJ emphasised that the purposes of punishment 'are guideposts to the appropriate sentence but sometimes they point in different directions.'[115] The law reflects the underlying moral reality that 'values can conflict in ways that are rationally irresoluble'.[116] The judge's role is to 'take account of *all* of the relevant factors', whether consonant or contradictory, to arrive at a single result which does justice in the individual case.[117]

The Federal Provisions require scrutiny precisely because they exclude a factor which would otherwise be relevant in sentencing certain Indigenous offenders. It is necessary to consider whether, as a consequence, these provisions contravene s 10(1) of the *Racial Discrimination Act*. First, however, two criticisms of the courts' treatment of customary law must be recognised.

IV Two Criticisms

The first criticism is that Aboriginal men have been allowed to distort customary law to justify their abuse of women and children. In her study on Aboriginal women and violence, Bolger described the phenomenon as 'an assault on women which takes place today for illegitimate reasons, often by drunken men, which they then attempt to justify as a traditional right'.[118] Aboriginal women in these communities were 'adamant' that the violence inflicted by men was 'in no way traditional'.[119] This distorted version of customary law has become known colloquially as 'bullshit' law.[120]

Critics assert that courts have failed to test the veracity of customary law claims. Cripps and Taylor note that in *Jamilmira* and *GJ*, no women elders were called to test the claims of customary law.[121] The resulting picture of customary law privileged 'the male perspective and male rights over those of women and children'.[122] A more robust and comprehensive system for scrutinising such claims is required.[123]

There is some judicial awareness of these concerns. In *Ashley v Materna*, the defendant had assaulted his sister after the sister's husband swore in front of the two of them.[124] The defendant claimed that his conduct was justified under customary law, and a local male elder gave evidence on this point. Justice Bailey held that, while customary law might once have permitted the assault, that law was now 'generally recognised and accepted as being obsolete'.[125] The elder's evidence 'fell far short' of establishing the purported customary practice.[126] His experience and qualifications were unclear.[127] There was no testimony as to whether the defendant was obliged to assault his sister in the circumstances, or as to the consequences of his failing to do so.[128] In these circumstances, his Honour said, to accept the evidence as proof of customary law would 'invite ridicule of the courts and make a mockery of the fundamental principle that all people stand equal before the law'.[129]

In *Mununggurr v The Queen*, the Northern Territory Court of Criminal Appeal stressed the importance of having

reliable evidence of customary law, rather than 'information reflecting only the views of the defendant's relatives and supporters'.[130] The Northern Territory Parliament has enacted legislation to this effect. Parties wishing to rely on customary law must give notice to the other party and provide the information by way of oral evidence, affidavit or statutory declaration.[131] These provisions are intended 'to ensure that courts are provided with fully tested evidence about relevant customary law issues'.[132]

These changes highlight a second criticism of this practice, which is that it makes Indigenous people and customary law subjects of settler law. Such space as is provided in sentencing for recognition of customary law is controlled by white law and white values. As Thalia Anthony argues, 'the "white" court is the ultimate arbiter of acceptable Indigeneity'.[133] The content of Indigenous customary law is determined in accordance with the procedures of the white legal system, including the rules of evidence. Its value is assessed by reference to the Western theories of punishment and responsibility outlined above. The opportunity for recognition only comes after the settler state's criminal law 'has well and truly been imposed on Indigenous persons', as *Walker* makes clear.[134]

On this view, the sentencing court is merely another site on which white Australia defines and classifies Aboriginality. According to Dodson, these sites serve the various interests of the settler state,[135] the power of definition conferring on the settler society 'a sense of power and control' over Indigenous peoples.[136] Jackson argues that Maori law is used in a similar way within the New Zealand criminal justice system, 'to freeze Maori cultural and political expression within parameters acceptable to the State.'[137] Anthony argues that the recognition of customary law in sentencing shores up the self-image of Australian society, by enhancing 'the fantasy of "whiteness" as humane'.[138]

These broader questions about the recognition of Indigenous customary law go beyond the scope of this paper. But there is, inescapably, a political dimension to the use of customary law in sentencing.

V The *Racial Discrimination Act*

As explained in Part III, the Federal Provisions prohibit consideration of matters which would otherwise be taken into account in the sentencing of Indigenous offenders. This raises the question of whether the provisions are racially discriminatory.

The historical interplay between these provisions and the *Racial Discrimination Act* has been complex. The Howard Government enacted s 16A(2A) in 2006 without reference to the *Racial Discrimination Act*. When the NT Intervention was launched in 2007, however, the entire *NTNER Act* (including s 91) was excluded from the scope of the *Racial Discrimination Act*.[139]

In 2010, the Gillard Government amended the *NTNER Act* to reinstate the *Racial Discrimination Act*.[140] Minister for Families, Community Services and Indigenous Affairs Jenny Macklin asserted that all NT Intervention measures were 'either special measures under the *Racial Discrimination Act* or non-discriminatory and therefore consistent with the *Racial Discrimination Act*'.[141] Section 91 of the *NTNER Act* subsequently became s 16AA(1) of the *Crimes Act*.

In July 2015, Minister for Indigenous Affairs, Nigel Scullion, claimed that the Federal Provisions were not racially discriminatory. On the contrary, the provisions purportedly 'ensure that all persons are subject to the same legal rules'.[142] The relationship between the Federal Provisions and the *Racial Discrimination Act* has never been tested. The Federal Government has asserted that the exclusion of customary law stands comfortably alongside the *Racial Discrimination Act*. Part V of this paper challenges that assertion.

A The Operation of the *Racial Discrimination Act*

Section 10(1) of the *Racial Discrimination Act* applies where, by reason of a Commonwealth, State or Territory law, people of a particular race do not enjoy a right to the same extent as people of another race.[143] The relevant rights are human rights and fundamental freedoms,[144] including those set out in art 5 of the *International Covenant on the Elimination of All Forms of Racial Discrimination*.[145] The function of s 10(1) is to ensure equal enjoyment of those rights.[146] Pursuant to s 8(1) of the *Racial Discrimination Act*, however, s 10(1) does not apply to a law which is a 'special measure' within the meaning of art 1(4) of the *ICERD*.[147]

In *Maloney*, the High Court considered s 8(1) in detail. The issue in *Maloney* was whether a prohibition on the possession of alcohol on Palm Island contravened the *Racial Discrimination Act*. The Court's reasoning on s 8(1) was not

uniform. Each judge held that a combination of the following four conditions was required for a law to qualify as a special measure:

1. There must be a certain racial or ethnic group or group of individuals.[148]
2. The group or individuals must require protection in order to ensure their equal enjoyment of rights and freedoms.[149]
3. The sole purpose of the measure must be to secure the adequate advancement of the group or individuals, in order to ensure their equal enjoyment of rights and freedoms.[150] According to French CJ and Bell J, this depends on whether the measure is reasonably capable of being appropriate and adapted to that sole purpose.[151]
4. The measure must be reasonably necessary to achieve that purpose, in the sense that there are no less restrictive but equally effective means available to achieve it.[152]

In applying s 8(1), a court is entitled to determine the facts as best it can, by taking judicial notice of well-known facts or relying on other relevant materials. It is not bound by the ordinary rules of evidence.[153]

B Do the Federal Provisions Deny 'Equal Enjoyment' of a Right?

The Federal Provisions prevent courts from having regard to customary law to determine the objective seriousness of the offending, or the culpability of the offender.[154] In *Wunungmurra*, Southwood J held that a court could still look to customary law to provide an explanation for the offender's crimes or to establish that the offender has good prospects for rehabilitation.[155] Even on this narrow reading, the Federal Provisions prevent courts from considering all relevant factors when sentencing an Indigenous offender. In *Wunungmurra*, Southwood J stated that section 16AA(1):

> precludes an Aboriginal offender who has acted in accordance with traditional Aboriginal law or cultural practice from having his or [her] case considered individually on the basis of all relevant facts which may be applicable to an important aspect of the sentencing process, distorts [the] well established sentencing principle of proportionality, and may result in the imposition of what may be considered to be disproportionate sentences.[156]

This statement supports the analysis in Part III. When these provisions are engaged, courts are not permitted to have regard to matters (namely, customary law) that are otherwise relevant to sentencing, in the sense that they shed light on the Indigenous offender's culpability or the seriousness of the offence. In the case of a white Australian who has committed the same crime, courts are not merely permitted but required to take into account such matters.[157]

The Federal Provisions thus prevent Indigenous people from enjoying a relevant right to the same extent as non-Indigenous people. Article 5(a) of the *ICERD* specifically protects the right to 'equal treatment before the tribunals and all other organs administering justice'.[158] It is difficult to read article 5(a) alongside section 10 of the *Racial Discrimination Act*. Whether certain people enjoy a right to equal treatment to the same extent as others is a circular question.[159] Practically speaking, art 5(a) protects the right not to be treated differently from people of another race by a court, in matters of procedure or in the application of the law.[160]

The effect of the Federal Provisions is that certain Indigenous people are treated differently from non-Indigenous people, particularly white Australians, in the application of the criminal law. Courts are required to ignore relevant matters when sentencing certain Indigenous offenders, and thus forced to depart from the principle of individualised justice that governs the application of the criminal law to other Australians.[161]

On their face, the Federal Provisions are racially neutral. But s 10(1) does not require that a law make an express distinction on the basis of race.[162] Nor does the differential treatment have to affect all members of a particular race.[163] The law in *Maloney* was also racially neutral. It prohibited the possession of alcohol on Palm Island, rather than by Indigenous people. The law engaged s 10(1) through its operation and effect. Because the population of Palm Island is predominantly Aboriginal, Aboriginal persons' rights were limited in comparison with the rights of people elsewhere in Queensland, who are overwhelmingly non-Aboriginal.[164]

The Federal Provisions similarly discriminate against Indigenous people in their operation and effect.[165] These provisions deny individualised justice to those people who live under and act in accordance with 'customary law and cultural practices'. Those people are overwhelmingly Indigenous Australians. Non-Indigenous people, particularly white

Australians, are not seen to live under and act in accordance with 'cultural practices'. Mainstream Australian culture is 'so accepted as part of the normal, or as part of the way of the "ordinary person"', that it is not characterised as 'culture'. It is 'invisible'.[166] Most non-Indigenous Australians will thus not be denied individualised justice by the Federal Provisions. This is reflected in the case law. The Federal Provisions have been applied only once to a non-Indigenous defendant: a second-generation Vietnamese-Chinese migrant.[167]

This conclusion is unsurprising, because the Federal Provisions were intended to have this very effect.[168] Their purpose was to target offenders in Indigenous communities.[169] Section 10(1) is engaged because the Federal Provisions deny Indigenous people equal treatment in the application of the criminal law as compared with non-Indigenous people, particularly white Australians.

C Do the Federal Provisions Qualify as 'Special Measures'?

Jonathan Hunyor has criticised these provisions for having been 'rushed through' without consultation with Indigenous people who observe customary law.[170] But the High Court in *Maloney* held that s 8(1) did not require consultation with, or prior 'free and informed consent' from, those subject to the measure.[171] Nor does the fact that the Federal Provisions are temporally unlimited disqualify them from being special measures.[172] It is sufficient if they are a special measure at the time they are called into question.[173] This requires attention to the four conditions set out in *Maloney*.

The relevant group of individuals is Indigenous women and children. When s 16A(2A) was introduced, the explanatory memorandum expressly noted the 'high levels of family violence and child abuse in Indigenous communities'.[174] Similarly, in the second reading speech for the *NTNER Act*, Minister for Families, Community Services and Indigenous Affairs, Mal Brough, explained the measures by asserting that 'basic standards of law and order and behaviour have broken down' and 'women and children are unsafe'.[175]

It was open to the Commonwealth Parliament to determine that this group required protection in order to ensure their equal enjoyment of rights and freedoms.[176] In *Maloney*, French CJ and Bell J held that empirical evidence supported the Queensland Parliament's finding that the Palm Island community required protection from alcohol-related violence.[177] Likewise, the empirical evidence indicates that violence in Indigenous communities is 'widespread and disproportionately high' compared to non-Indigenous communities.[178] Child sexual abuse is 'a significant problem across the [Northern] Territory'.[179] Indigenous women are 35 times more likely to be hospitalised from family violence-related assaults than their non-Indigenous counterparts.[180]

The provisions do not satisfy the third and fourth conditions, however. Their sole purpose is not the adequate advancement of Indigenous women and children, because they are not 'reasonably appropriate and adapted' to achieve that purpose. For similar reasons, the provisions are not 'reasonably necessary' to achieve that purpose. This is because there is no rational connection between Indigenous customary law and the systemic violence against women and children.[181]

On their face, the Federal Provisions purport to protect Indigenous women and children. Section 16A(2A) aimed to ensure that adequate sentences were imposed on those who perpetrate family violence and child abuse in Indigenous communities.[182] Section 16AA(1) was intended to 'continue measures which have helped make communities safer and to protect their most vulnerable members, women and children'.[183]

The *NTNER Act* was premised on the finding in the *Little Children are Sacred Report* that 'child sexual abuse among Aboriginal children in the Northern Territory is serious, widespread and often unreported'.[184] But that report expressly rejected the claim that customary law was 'connected to causing, promoting or allowing family violence or child sexual abuse'.[185] Although cases such as *Jamilmira* and *GJ* were covered extensively in the media, there was no evidence to show that children 'were being regularly abused within, and as a result of, traditional marriage practices'.[186]

The report's finding was to the opposite effect. It concluded that customary law was 'a key component in successfully preventing the sexual abuse of children'.[187] There was more dysfunction and violence in communities where systems of traditional law had collapsed.[188] Many Indigenous people considered customary law as essential to their identities, and they were more likely to respond to their own law than to 'white fella law'.[189]

These findings are supported by the vast majority of empirical evidence.[190] The Law Reform Commission of Western Australia has found that:

> The relevance of Aboriginal customary law is not that it contributes to the abuse, but rather that it is the destruction of Aboriginal customary law and the breakdown of traditional forms of maintaining order and control that has impacted upon the extent of violence and sexual abuse in Aboriginal communities.[191]

In summarising five years of research and consultation, the Human Rights and Equal Opportunity Commission concluded that 'Aboriginal customary law does not condone family violence and abuse, and cannot be relied upon to excuse such behaviour'.[192] The National Child Protection Clearinghouse states that the loss and destruction of customary law has contributed to increased family violence in Indigenous communities.[193]

The Federal Provisions are thus clearly distinguishable from the law considered in *Maloney*. In *Maloney*, the empirical evidence established a clear nexus between alcohol and violence on Palm Island.[194] For French CJ and Bell J, a prohibition on the possession of alcohol could reasonably be considered to be appropriate and adapted to the purpose of reducing alcohol-related violence.[195] Moreover, because the appellant failed to point to less restrictive means for achieving this purpose, Hayne, Crennan, Kiefel and Gageler JJ concluded that the prohibition was reasonably necessary to achieve that purpose.[196]

There is no similar connection between customary law and violence. The presumption underlying the Federal Provisions is that the Indigenous offenders responsible for the high levels of family violence and child abuse in their communities are acting in accordance with customary law. This presumption is not supported by the empirical evidence. The Federal Provisions cannot reasonably be considered appropriate and adapted to the purpose of protecting Indigenous women and children from violence.

Instead, violence in Indigenous communities stems from a complex range of other factors, including underlying historical injustices, socio-economic disadvantage, physical and mental health issues, and substance abuse.[197] Larissa Behrendt locates the root causes of violence in failures to provide basic services, adequate infrastructure and investment in human capital.[198] Measures to address these shortfalls would be less restrictive of the rights of Indigenous offenders than the Federal Provisions, and more effective in protecting Indigenous women and children from violence, given the lack of any substantial connection between that violence and customary law. These provisions are not reasonably necessary to achieve the relevant protective purpose.

Between 1994 and 2006, customary law was raised in less than 1 per cent of cases where offenders were convicted in the Northern Territory Supreme Court.[199] Prohibiting courts from having regard to customary law during sentencing is not a solution to the systemic problem of violence against Indigenous women and children. For these reasons, the Federal Provisions are not special measures. They contravene s 10(1) of the *Racial Discrimination Act*.

D Consequences

Given that the Federal Provisions require courts to treat Indigenous people differently in the application of the criminal law, what consequences follow from this?

If the Federal Provisions were State laws, they would be invalid by virtue of s 109 of the *Constitution*.[200] As Mason J explained in *Gerhardy*, where a State law imposes a prohibition forbidding the enjoyment of a human right by persons of a particular race, s 10(1) confers the right on those people. This results in a direct inconsistency between s 10(1) and the State law. Section 109 thus invalidates the State law.[201]

Because the *Crimes Act* is a federal statute, however, s 109 has no work to do.[202] The question is one of two inconsistent federal laws.

Subject to any applicable constitutional qualification, the Federal Parliament can repeal any statute which it has the power to pass.[203] A statute may be repealed by the express words of a later statute, or by implication if the later statute provides an inconsistent rule.[204]

In the absence of express words, however, 'an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied'.[205] This reflects a presumption that the legislature intended the provisions to work together.[206] Williams and Reynolds suggest that this presumption applies with greater

force where the earlier provision confers a right, privilege or immunity.[207]

Even if this is so, the wording of the Federal Provisions is 'irresistibly clear'.[208] The conflict between these two federal laws is irreconcilable. Section 10(1) of the *Racial Discrimination Act* provides that, notwithstanding anything in any other law, Indigenous people enjoy the right to equal treatment by courts as compared to non-Indigenous people. The Federal Provisions, in their operation and effect, unequivocally deny Indigenous people that right.[209]

As a matter of necessary implication, ss 16A(2A) and 16AA(1) partially repeal the *Racial Discrimination Act*. The Federal Government's assertion that these provisions are consistent with the *Racial Discrimination Act* cannot be supported.[210] Rather than being cloaked in the respectable colours of the *Racial Discrimination Act*, these provisions should be recognised as racially discriminatory and repealed.

VI Conclusion

Australia's 'weak legal pluralism' has been fractured by the Federal Government's exclusion of customary law from sentencing. In *R v Fuller-Cust*, Eames JA cautioned against the 'simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored'.[211] But ss 16A(2A) and 16AA(1) of the *Crimes Act* make that very assumption. These provisions force sentencing courts to depart from the underlying values and purposes of criminal punishment, which require the consideration of customary law where relevant. They also breach the *Racial Discrimination Act*'s guarantee of equality before the law, despite the Federal Government's claims to the contrary. Australia's 'weak legal pluralism' is not perfect. It offers only limited recognition of Indigenous customary law, in a space controlled by white law and white values. Courts must be wary of the distortion of customary law to justify violence against women and children. But these issues are not insurmountable. Crucially, the empirical evidence suggests that embracing customary law, rather than excluding it, is the key to reducing violence in Indigenous communities.

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3 *Walker v New South Wales* (1994) 182 CLR 45, 49 (Mason CJ) ('*Walker*').

4 '*Racial Discrimination Act*'.

5 *Racial Discrimination Act 1975* (Cth).

6 (1982) 149 CLR 305 ('*Neal*').

7 Ibid 326 (Brennan J).

8 Ibid.

9 Ibid. See also *Bugmy v The Queen* (2013) 249 CLR 571, 593-4 [39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Bugmy*'); *Munda v Western Australia* (2014) 249 CLR 600, 618-9 [50]-[53] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ) ('*Munda*').

10 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(m).

11 *Penalties and Sentences Act 1992* (Qld) s 9(2)(o).

12 Thalia Anthony, Indigenous Justice Clearinghouse, *Sentencing Indigenous offenders* (2010) 2.

13 See, eg, *Hales v Jamilmira* (2003) 13 NTLR 14 ('*Jamilmira*').

14 See, eg, *R v Minor* (1992) 2 NTLR 183 ('*Minor*').

15 (1994) 182 CLR 45.

16 Ibid 49 (Mason CJ).

17 Ibid.

18 Ibid 50 (Mason CJ).

19 Heather Douglas, 'Customary Law, Sentencing and the Limits of the State' (2005) 20(1) *Canadian Journal of Law and Society* 141, 156.

20 Ibid.

21 *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) ss 2(1), sch 1 item 5; Commonwealth, *Gazette*, No 50, 20 December 2006, 3444.

22 Commonwealth, *Parliamentary Debates,* House of Representatives, 14 September 2006, 12 (Sandy Macdonald).

23 *Crimes Act 1914* (Cth) s 16A(2A) ('*Crimes Act*').

24 *Crimes Act 1914* (Cth) s 16A(2B).

25 *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) sch 1 item 4. In Canada, courts are required to take into account systemic or background factors which may have played a part in an Aboriginal offender's conduct, by virtue of s 718.2(e) of the

Criminal Code (Can). See the discussion in *Bugmy* (2013) 249 CLR 571, 589-92 [29]-[34] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

26 *Northern Territory National Emergency Response Act 2007* (Cth) s 2(1) ('*NTNER Act*').

27 *Northern Territory National Emergency Response Act 2007* (Cth) s 91.

28 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth) s 2(1), sch 1 item 1; *Stronger Futures in the Northern Territory Act 2012* (Cth) s 2(1).

29 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth) sch 4 item 8.

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31 R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing, 2007) 7.

32 R A Duff and Stuart Green, 'Introduction: Searching for Foundations' in R A Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 1, 4.

33 Duff, above n 31, 5.

34 As to the utilitarian conception, see, eg, *Sentencing Act 1995* (NT) ss 5(1)(b)-(c); *Crimes Act 1914* (Cth) ss 16A(2)(j)-(ja), 16A(2)(n); *R v Rushby* [1977] 1 NSWLR 594 (Street CJ, Lee and Slattery JJ); *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370, 377-8 (Kirby P, Campbell and Newman JJ). As to the communicative conception, see, eg, *Sentencing Act 1995* (NT) s 5(1)(d); *Channon v The Queen* (1978) 33 FLR 433, 437 (Brennan J); *Inkson v The Queen* (1996) 6 Tas R 1, 2 (Underwood J); *Ryan v The Queen* (2001) 206 CLR 267, 302 [118] (Kirby J). As to the restorative conception, see, eg, *Sentencing Act 1995* (NT) ss 5(2)(b), 5(2)(da); *Crimes Act 1914* (Cth) s 16A(2)(ea), 16A(2)(f)(i); *Vartzokas v Zanker* (1989) 44 A Crim R 243, 245 (King CJ); *DPP (Vic) v Toomey* [2006] VSCA 90 (19 April 2006) [21]-[24] (Vincent JA), quoted in *DPP (Vic) v Wightley* [2011] VSCA 74 (22 March 2011) [33] (Neave JA), [47] (Mandie JA), [48] (Tate JA); *Pahuja v The Queen* (1989) 40 A Crim R 252, 263 (White J). See generally Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006) 133-9.

35 *Neal* (1982) 149 CLR 305, 326.

36 Mirko Bagaric, 'In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights' (1999) 24 *Australian Journal of Legal Philosophy* 95, 105.

37 Ibid 106.

38 Mirko Bagaric, 'Suspended Sentences and Preventive Sentences: Illusory Evils and Disproportionate Punishments' (1999) 22(2) *University of New South Wales Law Journal* 535, 553.

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40 Ibid.

41 Ibid 554.

42 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472-3 (Mason CJ, Brennan, Dawson and Toohey JJ) ('*Veen (No 2)*'), cited in ibid 558. The principle of proportionality can be abrogated by statute. For example, in Victoria, s 6D of the *Sentencing Act 1991* (Vic) permits the Supreme Court or the County Court to impose a disproportionate sentence on a 'serious offender', to achieve the purpose of community protection.

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44 Ibid 561.

45 Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 17.

46 Ibid 17-8.

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62 (1995) 65 SASR 373 ('*Goldsmith*').

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67 Ibid 155-6 (Connolly and McPherson JJ).

68 Ibid 158 (Connolly and McPherson JJ).

69 Ibid.

70 (Unreported, Supreme Court of the Northern Territory, Southwood J, 15 July 2005).

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72 Ibid. In *Munda*, French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ queried whether courts should attach any weight to the fact that an offender is willing to undergo traditional punishment. Their Honours noted that 'one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community'. As this question was not at issue in the proceedings, no concluded view was expressed. See *Munda* (2014) 249 CLR 600, 620 [54], 622 [61]-[63] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ), 641 [127] (Bell J).

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74 Bagaric, above n 38, 561

75 (2003) 13 NTLR 14.

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77 Ibid 22 [16] (Martin CJ), 36 [49] (Mildren J), 47 [85] (Riley J).

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79 Ibid 37-8 [52]-[53] (Mildren J). See also ibid 28 [26] (Martin CJ).

80 Von Hirsch, above n 53, 72.

81 *Jamilmira* (2003) 13 NTLR 14, 28 [26] (Martin CJ), 36 [49] (Mildren J).

82 Von Hirsch, above n 53, 73. See also *Goldsmith* (1995) 65 SASR 373, 375 (Mullighan J), 377 (Nyland J).

83 (2005) 196 FLR 233 ('*GJ*').

84 Ibid 239 [30] (Mildren J), 248 [66] (Riley J), 249 [71] (Southwood J).

85 Ibid 239-40 [30]-[31] (Mildren J), 248 [66] (Riley J).

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88 Ibid 31 [35] (Martin CJ), 48-8 [88]-[90] (Riley J); *GJ* (2005) 196 FLR 233, 242 [41] (Mildren J), 248 [66] (Riley J), 248 [67] (Southwood J).

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91 Ibid 181 [8] (Southwood J).

92 Ibid 185 [23]-[25] (Southwood J).

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95 Ibid [28] (Southwood J).

96 Ibid.

97 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth) sch 4 items 7-8; *Crimes Act 1914* (Cth) ss 16A(2AA) and 16AA(2); Replacement Explanatory Memorandum, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) 19.

98 Replacement Explanatory Memorandum, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) 18.

99 (2014) 34 NTLR 154, 156-7 [4]-[11] (Southwood, Barr and Riley JJ) ('*Nabegeyo*').

100 Ibid 157 [11]-[12] (Southwood, Barr and Riley JJ).

101 Ibid 158 [16] (Southwood, Barr and Riley JJ).

102 Ibid.

103 Von Hirsch and Ashworth, above n 45, 145.

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181 Cf. *Maloney* (2013) 252 CLR 168, 223 [139] (Crennan J), 237-8 [184] (Kiefel J), 261 [249] (Bell J), 304 [371] (Gageler J).

182 Revised Explanatory Memorandum, Crimes Amendment (Bail and Sentencing) Bill 2006 (Cth) 2.

183 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 2011, 13545 (Jenny Macklin).

184 Commonwealth, *Parliamentary Debates,* House of Representatives, 7 August 2007, 10 (Mal Brough).

185 *Little Children are Sacred Report*, above n 179, 176.

186 Ibid 68.

187 Ibid 175.

188 Ibid 176.

189 Ibid 175.

190 Janet Stanley, Adam M Tomison and Julian Pocock, National Child Protection Clearinghouse, Department of Family and Community Services (Cth), *Child Abuse and Neglect in Indigenous Australian Communities* (2003) 12; Memmott et al, above n 178, 18; Sue Gordon, Kay Hallahan and Darrell Henry, Western Australia Government, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002) 68-71. Justice Judith Kelly, writing extra-curially, argues that 'there is a cultural dimension to some of the violence that occurs', while recognising that the systemic violence towards, and sexual abuse of, women and children 'could never have been part of the cultural or customary law of any people'. Even so, her Honour suggests that the problem be addressed by the recognition, rather than exclusion, of customary law within the legal system. See Justice Judith Kelly, *The Intersection of Aboriginal Customary Law with the NT Criminal Justice System: The Road Not Taken?* (Paper presented at the Northern Territory Bar Association Conference, Dili, 10 July 2014).

191 Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Final Report* (2006) 22.

192 Human Rights and Equal Opportunity Commission, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Communities: Key Issues* (2006) 10.

193 Stanley, Tomison and Pocock, above n 190, 12. See also Chris Cunneen, 'Assimilation and the Re-invention of Barbarism' (2007) 11 *Australian Indigenous Law Review* 42, 44.

194 *Maloney* (2013) 252 CLR 168, 193-4 [46] (French CJ), 223 [139] (Crennan J), 237 [184] (Kiefel J), 260-1 [249]-[250] (Bell J), 304 [371] (Gageler J).

195 Ibid 193-4 [46] (French CJ), 260-1 [248]-[253] (Bell J).

196 Ibid 213 [109] (Hayne J), 222-3 [137] (Crennan J), 239 [187] (Kiefel J), 305 [374] (Gageler J).

197 Memmott et al, above n 178, 11-22; Kyllie Cripps and Megan Davis, Indigenous Justice Clearinghouse, *Communities Working To Reduce Indigenous Family Violence* (2012) 1.

198 Larissa Behrendt, 'Finger Pointing Ignores the Issue' (2006) 3 *Balance: Journal of the Northern Territory Law Society* 9, 34.

199 Chief Justice Brian Martin, 'Customary Law—Northern Territory' (Speech delivered at Judicial Conference of Australia Colloquium, Sydney, 5 October 2007) 30.

200 *Gerhardy* (1985) 159 CLR 70, 98-9 (Mason J); *Ward* (2002) 213 CLR 1, 99-100 [106]-[107] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Maloney* (2013) 252 CLR 168, 178-9 [10] (French CJ), 200-1 [66] (Hayne J), 213 [112] (Crennan J), 227 [149] (Kiefel J).

201 *Gerhardy* (1985) 159 CLR 70.

202 George Williams and Daniel Reynolds, 'The *Racial Discrimination Act* and Inconsistency under the Australian Constitution' (2015) 36 *Adelaide Law Review* 241, 249.

203 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 355 [13] (Brennan CJ and McHugh J), 368-369 [47] (Gaudron J), 372 [57] (Gummow and Hayne JJ); *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651, 659 [3] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

204 Williams and Reynolds, above n 202, 249-50.

205 *Saraswati v The Queen* (1991) 172 CLR 1, 17 (Gaudron J), quoted in *Shergold v Tanner* (2002) 209 CLR 126, 136-7 [34] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

206 Ibid.

207 Williams and Reynolds, above n 202, 251.

208 *Wunungmurra* (2009) 231 FLR 180, 184 [21] (Southwood J).

209 For an example of this kind of inconsistency in the s 109 context, see *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 478 (Knox CJ and Gavan Duffy J).

210 Commonwealth, *Parliamentary Debates,* House of Representatives, 25 November 2009, 12784 (Jenny Macklin); Parliamentary Joint Committee on Human Rights, Parliament of Australia, *2016 Review of Stronger Futures Measures* (2016) Appendix 3 (ministerial correspondence).

211 (2002) 6 VR 496, 520 [80] (Eames JA), quoted in *Munda* (2014) 249 CLR 600, 619 [52] (French CJ, Hayne, Crennan, Kiefel, Gageler, Keane JJ).