

CITATION: *Blackwell v Bara* [2022] NTSC 17

PARTIES: BLACKWELL, Owen

v

BARA, Daryl

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SPECIAL CASE stated from LOCAL
COURT exercising Territory jurisdiction

FILE NO: 21910017

DELIVERED: 2 March 2022

HEARING DATE: 3 April 2020

JUDGMENT OF: Southwood J

CATCHWORDS:

HUMAN RIGHTS – Discrimination – Grounds – Racial discrimination –
Constitutional law – Inconsistency of laws

Whether s 5D of the *Misuse of Drugs Act* is invalid (in whole or in part) because it is inconsistent with s 10 of the *Racial Discrimination Act* – Both Aboriginal and non-indigenous drug offenders subject to same sentencing regime for an offence against s 5D – Laws of bail and sentencing apply equally to both Aboriginal and non-indigenous offenders – Legislation does not impose any relevant limitation or prohibition on right to liberty – The right to equal treatment before the courts not properly equated to a right to equal protection of the law – The right to equal treatment before the courts is focused on equality in the administration and enforcement of laws by courts and tribunals – Legislation does not impose any relevant limitation or prohibition on equality of treatment – Section 5D of the *Misuse of Drugs Act* is valid.

Bail Act 1982 (NT) s 7A

Misuse of Drugs Act 1990 (NT) s 4B, s 5A, s 5D, s 37

Racial Discrimination Act 1975 (Cth) s 10

Al-Kateb v Godwin (2004) 219 CLR 562, *Daniels v The Queen* (2007) 20 NTLR 147, *Duthie v Smith* (1992) 83 NTR 21, *Gerhardy v Brown* (1985) 159 CLR 70, *Ibbs v The Queen* (1987) 163 CLR 447, *Mabo v Queensland (No 1)* (1988) 166 CLR 186, *Maloney v The Queen* (2013) 252 CLR 168, *Markarian v The Queen* (2005) 228 CLR 357, *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, *Munkara v Bencsevich* [2018] NTCA 4, *Nunnggargalu v Millar* (unreported, 11 January 2013, NTSC, Barr J), *R v Day* (2004) 14 NTLR 218, *R v Geddes* (1936) 36 SR (NSW) 554, *R v Williams* [2012] NTSC 47, *Suttie v The Queen* [2013] NTSC 37, *Williams v Balchin* [2012] NTSC 15, *Williams v The Queen* (1986) 161 CLR 278, *Work Health Authority v Outback Ballooning* (2019) 266 CLR 428, referred to.

REPRESENTATION:

Counsel:

Informant:

T Moses

Defendant:

P Coleridge

Solicitors:

Informant:

Solicitor for the Northern Territory

Defendant:

North Australian Aboriginal Justice
Agency

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Blackwell v Bara [2022] NTSC 17
No. 21910017

BETWEEN:

OWEN BLACKWELL

Informant

AND:

DARYL BARA

Defendant

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 2 March 2022)

- [1] The defendant stands charged on an information for an indictable offence. Relevantly, count 1 on the information charges that contrary to s 5D(1) of the *Misuse of Drugs Act 1990* (NT) on 5 March 2019 the defendant supplied less than a commercial quantity of cannabis to unnamed persons in Malkala indigenous community on Groote Eylandt. The maximum penalty for this offence is imprisonment for nine years.
- [2] On 18 September 2019, the charge came before the Local Court at Angurugu and the defendant pleaded not guilty.

Questions of law reserved

- [3] On 3 January 2020, the Local Court at Darwin stated a special case for consideration by the Supreme Court under s 162 of the *Local Court (Criminal Procedure) Act 1928* (NT), and reserved the following questions of law for the opinion of the Court.

1. Is s 5D of the *Misuse of Drugs Act 1990* (NT) invalid (in whole or in part) because it is inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth)?
2. If the answer to Question 1 is “Yes”, to what extent is s 5D of the *Misuse of Drugs Act 1990* invalid?

Answers

- [4] For the following reasons, the questions are answered:
1. No. Section 5D is valid. It is consistent with s 10(1) of the *Racial Discrimination Act 1975*.
 2. Unnecessary to answer.

The agreed facts

- [5] The parties have agreed the following facts for the purpose of the stated case only. The facts set out under the heading “Alleged facts in relation to the offending” are admitted without prejudice to the defendant’s right to challenge them if the charge proceeds to trial.

Alleged facts in relation to the offending

1. The following facts are agreed to reflect the facts that the informant will seek to prove at hearing. [...]
 - (a) The defendant in this matter is Daryl BARA, a sixty-six year old Aboriginal man who has lived much of his life in Umbakumba Community on Groote Eylandt.

- (b) As at March 2019, the defendant ***was living in Darwin*** dividing his time between the "long grass" and his sister Linda Bara's house at Victoria Drive in Gray.
- (c) On the morning of Tuesday, 5 March 2019 the defendant was approached by his granddaughter **Darlene Durilla** at Victoria Drive, Gray and persuaded to take a grey backpack to Groote Eylandt.
- (d) The backpack contained seven packages containing a combined total of 300 grams of cannabis and small deal size bags.
- (e) The defendant was aware that the backpack contained cannabis.
- (f) The defendant was told by Ms Durilla to give the backpack to another one of the defendant's and Ms Durilla's family members — Renelle Durilla — who would be waiting at the Groote Eylandt airport to take the backpack to Malkala Community on Groote Eylandt, where further members of the defendant's extended family reside. The defendant was told that the backpack, and thus the cannabis, ***was intended for persons in Malkala.***
- (g) The defendant was told by Ms Durilla that his flight to Groote Eylandt would be paid for and that he would receive \$200 for taking the backpack.
- (h) The defendant travelled from Palmerston to Darwin [Airport] in a mini bus taxi with Naleeta Mamarika, Linda Bara and Darlene Durilla.
- (i) On arrival at Darwin Airport, Naleeta Mamarika gave the defendant the backpack. He then went to the Airnorth Desk and checked himself and the backpack onto the flight.
- (j) At 09:45am the defendant boarded the Airnorth Service TL 404 to Groote Eylandt.
- (k) At 11:25am the defendant's flight arrived at Groote Eylandt where disembarking passengers were being screened by members of the Alyangula Dog Operations Unit.
- (l) Narcotic Detector Dog "Bear" was deployed to screen the baggage and provided a conditioned response to the grey backpack checked in by the defendant.
- (m) Macreena Bara, the defendant's granddaughter, spoke to the defendant and told him in her language that he should not tell the Police about the cannabis.

- (n) The defendant left the airport and sat in the rear driver's side seat of a white Toyota Landcruiser parked in the airport carpark where he watched Macreena Bara attempt to retrieve the grey backpack.
- (o) At this time, the defendant was arrested by Senior Constable Matthew Woldseth and a Section 120C search was carried out on the bag by Senior Constable First Class George Hillen, recovering the seven packages of cannabis.
- (p) The defendant was conveyed to Alyangula Police Station and later participated in an electronic record of interview, in which he made full and frank admissions. These included admissions to transporting cannabis and being paid \$200 [for] that transportation. He [also] identified two co-offenders.
- (q) Malkala is an indigenous community on Groote Eylandt [...] within the meaning of s 3(1) of the *Misuse of Drugs Act 1990* (NT).
- (r) Cannabis is currently estimated by Northern Territory Police to be worth between \$100 and \$150 for one gram of cannabis on Groote Eylandt. 300 grams of cannabis could be sold for between \$30,000 and \$45,000 if sold individually.
- (s) Cannabis is a dangerous drug listed in Schedule 2 of the *Misuse of Drugs Act 1990* (NT), and 300 grams is a traffickable quantity, being in excess of 50 grams [and less than 500 grams].

Population statistics

- 2. According to 2016 Census data, the population of the whole of the Northern Territory is 228,833, of whom 25.5% are indigenous.
- 3. According to a police estimate, *Malkala's population is between 80 and 100 people*, of whom 100% are indigenous.
- 4. "Indigenous communities" within the meaning of s 3(1) of the *Misuse of Drugs Act 1990* (NT) are overwhelmingly populated by indigenous people. According to 2016 Census data, approximately 87% of the population of indigenous communities is indigenous.

Charge statistics

- 5. The table below represents Local Court finalization data for charges against s 5A (Sch 2 drugs only) and s 5D of the *Misuse of Drugs Act* in the whole of the Northern Territory for the years 2017 and 2018 combined.

Result	Charge	Indigenous	Non-Indigenous	Unknown	Percentage Indigenous
Sentenced	s 5A	36	34	1	50.7%
	s 5D	88	5	1	93.6%
Withdrawn or Dismissed	s 5A	39	34	0	53.4%
	s 5D	108	2	0	98.2%
Committed to Supreme Court	s 5A	11	18	1	36.7%
	s 5D	5	3	0	62.5%
Total	s 5A	86	86	2	49.4%
	s 5D	201	10	1	94.9%

6. Of persons sentenced for offences against s 5A (Sch 2 drugs only), approximately 68.5% were sentenced to terms of imprisonment. Of persons sentenced for offences against s 5D, approximately 78.5% were sentenced to terms of imprisonment.

[6] The figures contained in the table incorporated into the agreed facts provide statistics for matters that were finalised in the Local Court in 2017 and 2018. They contain no information about the dates when the drug offences were committed. In addition, because of the manner and difficulty in policing drug offences it is likely that drug offences that remain undetected will also have been committed.

[7] The table reveals the following information for the years 2017 and 2018.

- (a) 140 Aboriginal people were charged and either sentenced or committed for drug offences contrary to ss 5A and 5D.
- (b) 47 Aboriginal people were charged and either sentenced or committed for drug offences against s 5A.
- (c) 93 Aboriginal people were charged and either sentenced or committed for drug offences against s 5D.

- (d) 60 non-indigenous people were charged and either sentenced or committed for drug offences contrary to ss 5A and 5D.
- (e) 52 non-indigenous people were charged and either sentenced or committed for drug offences against s 5A.
- (f) Eight non-indigenous people were charged and either sentenced or committed for drug offences against s 5D.
- (g) More offenders were committed to the Supreme Court for an offence against s 5A than for an offence against s 5D (30:8). Arguably, 22 more serious offences were committed against s 5A than against s 5D in 2017 and 2018.
- (h) As it is quite conceivable that some Aboriginal offenders who were dealt with in 2017 and 2018 committed more than one offence against s 5D, the precise number of Aboriginal offenders who committed the 93 drug offences against s 5D (for which the offenders were sentenced or committed) is unknown.

[8] For the years 2017 and 2018, the great preponderance of people sentenced or committed for an offence against s 5D were Aboriginal people. Roughly equal numbers of Aboriginal people and non-indigenous people were sentenced or committed for an offence against s 5A. In addition, while the differences in the rates of imprisonment for offences against s 5A and s 5D respectively are not insignificant, those imprisoned were by no means overwhelmingly offenders who had committed an offence against s 5D. The

statistics provided do not show the extent of any disparity between the terms of imprisonment imposed for offences against s 5A and the terms of imprisonment imposed for offences against s 5D respectively.

- [9] In addition, the agreed facts do not show the number of Aboriginal drug offenders who were actually living in indigenous communities at the time they committed these offences against s 5D. By way of example, the defendant and his granddaughter, Darlene Durilla, did not live in an indigenous community at the time of the offending. They lived in Darwin. While they had connections to Groote Eylandt, they did not live there at the time the alleged offence was committed. In addition, the defendant's crime of drug supply was essentially a preparatory act that was almost wholly committed outside the indigenous community of Groote Eylandt. His offending conduct was almost complete when he disembarked from the aeroplane with the backpack containing the cannabis. The plan was that upon disembarkation the offender was to give the backpack containing the cannabis to Renelle Durilla who would be waiting at the airport.
- [10] The figures in paragraph 2 of the agreed facts under the heading "Population statistics" reveal that 58,353 Aboriginal people, or thereabouts, lived in the Northern Territory at the time of the 2016 Census. However, more recent statistics issued by the Australian Government indicate that at 31 March 2021 there were 247,000 people living in the Territory, of whom at least 74,000 were Aboriginal people. A fair estimate is that at least 29,000

Aboriginal people lived in indigenous communities (including town camps) in the Territory in 2016.

The aggravating circumstance of supplying dangerous drugs in an indigenous community

- [11] According to the agreed facts, the defendant deliberately chose to act as a drug courier for commercial gain and transport 300 grams of cannabis to Groote Eylandt for distribution in Malkala Indigenous Community. Had he not done so, he would not have been subject to any of the provisions of the *Misuse of Drugs Act*. In return for his crime, the defendant received \$200 and his airfare was paid. Those who engaged the defendant as a drug courier were organised offenders, but he also fulfilled an important role. Dangerous drugs cannot be sold in indigenous communities in the Territory without couriers bringing the drugs into those communities from elsewhere.
- [12] The supply of cannabis in indigenous communities is a prevalent offence. Of the 200 drug offences committed against ss 5A and 5D that the Local Court dealt with in 2017 and 2018, 101 of those offences involved the supply of dangerous drugs in an indigenous community contrary to s 5D. Depending on the manner of sale, the sale of 300 grams of cannabis in Malkala community could have resulted in the removal of \$30,000 to \$45,000 from an indigenous community of 80 to 100 people.

[13] In 2007, the Court of Criminal Appeal delivered its judgment in *Daniels v The Queen*.¹ The case concerned an appeal against sentences imposed for two counts of aggravated unlawful possession of cannabis and one count for the possession of property obtained from the commission of a drug offence. The appellant in that case was an Aboriginal man who engaged in the drug trade in an indigenous community. In the course of their Reasons for Decision, Martin (BR) CJ and Riley J stated (emphasis added):

Although the appellant was not in the position commonly referred to as a “principal”, nevertheless he played an important and essential role in the commercial distribution. He did so for profit. The circumstances in which the appellant came into possession of the cannabis in June 2006 are known only to the appellant, but in October 2006 the appellant did not merely wait in the community of Ngukurr to receive the cannabis. He obtained the cannabis in Darwin for the purposes of conveying the cannabis to the community of Ngukurr and selling it within that community.

As we have mentioned, the appellant grew up in the community of Ngukurr. Within that community, he committed the offences for which he was sentenced on 8 June 2005. Notwithstanding the lesson of being caught and the extension of leniency through the suspension of the sentences imposed in June 2005, after 12 months the appellant reoffended in the same community and the gravity of his offending escalated. That escalation continued in October 2006 notwithstanding that the appellant had been arrested in June 2006 and granted bail.

It is a significantly aggravating feature of the appellant’s criminal conduct that he was engaged in the drug trade within an Aboriginal community. In reality, the appellant chose targets for his criminal conduct that were particularly vulnerable, namely, members of the Aboriginal community in which he grew up. The Ngukurr community is a small Aboriginal community comprised of less than 2,000 people. In June 2006, having sold sufficient cannabis within that community to amass proceeds in the order of \$11,700, the appellant was left in possession of 560 small plastic clip seal bags containing a total weight of 597.6 grams. If the 1.232 kilograms of cannabis in the possession of the appellant in October 2006 were similarly divided into plastic clip

1 *Daniels v The Queen* (2007) 20 NTLR 147.

seal bags, approximately 1,100 such bags would have been involved and available for sale within that small community.

The criminal courts of the Northern Territory are all too familiar with the devastating effects of cannabis within Aboriginal communities across the Territory. It is not correct to view such offending as victimless. There are countless victims. They are the users of cannabis within Aboriginal communities and others in those communities who are adversely affected by the devastating impact upon the users. In particular, the children of heavy users suffer dreadfully.

Over many years, sentencing judges in this Court have repeatedly emphasised the gravity of the criminal conduct involved in the distribution of cannabis within Aboriginal communities. Offenders have been on notice that significant terms of imprisonment will be imposed for such offending. [...]

[...]

The use of cannabis in remote Aboriginal communities is part of a widespread problem arising out of substance abuse of many kinds in those communities. The substance most commonly used is alcohol, but cannabis and other drugs have a significant impact.

The recently published report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse included a finding (at 161) that:

... alcohol and other drugs are having a massive negative impact on the social fabric of Aboriginal communities and contribute greatly to family and cultural break down. [...]

The report went on to note that extreme alcohol abuse has become normal in Aboriginal communities in the Northern Territory and the devastating effects of such abuse are rapidly increasing. Similar observations apply to the use of cannabis. As with alcohol, it seems the use and abuse of cannabis has become a way of life for many Aboriginal people. The effect is to contribute significantly to the severe dysfunction found in many communities and within families in those communities. The negative effects of the consumption of cannabis not only impact upon the individuals immediately concerned, but upon the community as a whole.

Research referred to in the report identified a number of individual “community harms” linked to the abuse of cannabis. The identified harms reflect the experience of the Court. Those harms include increased suicide and self-harm, friction and disputes stemming from users seeking money for drug use, young people making demands for money to purchase cannabis and threatening violence or self-harm if money is withheld and a negative impact on participation by users in work, school, sports, culture and other aspects of community life.

Cannabis use has led to mental health problems and to the compounding of harms associated with excessive drinking, kava consumption and inhalant abuse.

The price paid for cannabis (substantially greater in remote communities than in Darwin) means there is a reduced amount of money available to purchase food and other necessities. The report identified child neglect as a recurring issue in households where one or more of the occupants divert money for cannabis use or other addictions. It is readily apparent that substantial amounts of money are being taken from communities by way of payment for cannabis, resulting in money that would otherwise be spent for the benefit of members of the community being lost to the community. [...]

It is clear that users of cannabis, non-users of cannabis and the children of users of cannabis are all victims of the illegal trade. The abuse of cannabis continues to cause tremendous damage within Aboriginal communities. It leads to misery and dysfunction within those communities.

Courts in the Northern Territory have for some time been expressing increasing concern as to the consequences of offending of this kind. Research conducted by the Northern Territory Department of Health and Community Services supports the view that cannabis is in widespread use in remote communities and the use is increasing. A snapshot of cannabis use undertaken in April 2002 by the Department revealed an increase in use and identified cannabis use in males as young as 10. Use of cannabis in the Arnhem region of the Northern Territory, where this matter arose, was described as increasing at an “alarming rate”.

It is plain that the problem must be addressed by the wider community and by diverse strategies. It is not a problem which will be resolved within the criminal justice system alone. Insofar as the courts of the Northern Territory are concerned, it is apparent that the sentences that have been imposed in the past have failed to provide an adequate deterrent and have failed to stem the flow of cannabis into such communities. Commercial drug offending within Aboriginal communities has remained far too prevalent. As we have said, it is time for penalties to be increased in order to reflect the need for greater general deterrence. Those who engage in drug offending related to Aboriginal communities, particularly commercial drug activities, are on notice that in future longer terms of imprisonment will be imposed.²

2 *Daniels v The Queen* (2007) 20 NTLR 147 at [22]-[26], [35]-[42].

- [14] The principles expressed in *Daniels* have been repeated and applied by the Supreme Court since that time.³

The legislative history of s 5D of the *Misuse of Drugs Act*

- [15] Consistent with the aggravating factors referred to by the Court of Criminal Appeal in *Daniels*, in 2008 the Legislative Assembly of the Northern Territory passed the *Misuse of Drugs Amendment Act 2008*. The amending Act commenced on 23 July 2008. It amended s 5(2)(a)(iv) of the *Misuse of Drugs Act* and introduced a precursor offence that was in almost identical terms to s 5D.

- [16] Subsection 5(2)(a)(iv) stated:

where the dangerous drug is a dangerous drug specified in Schedule 2 and subparagraph (iii) does not apply - \$10,000 or imprisonment for 5 years, *or if the drug is supplied to a person in an indigenous community, 9 years.*

- [17] The effect of s 5(2)(a)(iv) of the *Misuse of Drugs Amendment Act 2008* was to provide an increased maximum penalty for the supply of less than a commercial quantity of a Schedule 2 dangerous drug according to the characteristics of the community (an indigenous community) in which the dangerous drugs are to be distributed.

- [18] The amending Act also inserted s 4B into the parent Act to define an indigenous community. Section 4B stated:

³ See, for example, *Witham v The Queen* [2018] NTCCA 1 at [33], [37]-[38]; *Mamarika v Lee* [2013] NTSC 10 at [19], [23]; *Williams v Balchin* [2012] NTSC 15 at [17]; *Nayidawawa v Moore* (2007) 178 A Crim R 473 at [9]-[10], [21]-[22]; *Musgrave v Liyawanga* [2004] NTSC 53 at [66].

- (1) An **indigenous community** is:
 - (a) a prescribed area; or
 - (b) an area prescribed by regulation.
- (2) However, a regulation may declare a prescribed area is not an indigenous community.
- (3) In this section:

prescribed area, see section 4 of the *Northern Territory National Emergency Response Act 2007* (Cth).

[19] In the Second Reading Speech, the Minister for Justice and Attorney-General, Dr Burns, stated (emphasis added):

The purpose of the Bill is to increase the maximum penalty for supplying Schedule 2 drugs in indigenous communities. In September 2007, as part of the Commonwealth intervention in the Northern Territory, alcohol was banned in prescribed areas, which include most remote Aboriginal communities and town camps. The Commonwealth Minister for Indigenous Affairs, the Hon. Jenny Macklin MP, recently visited the Northern Territory. She was told by community members that the use of cannabis had increased since the intervention. The Chief Minister and bush MLAs have heard similar reports. A recently published observational study conducted by researchers from the Menzies School of Health Research noted an increase in cannabis use, an in the problems associated with its use, since the commencement of the alcohol restrictions in remote communities under the intervention.

[...] This Bill represents a commitment that Government is serious about tackling the devastating impact that alcohol and drugs are having on families in indigenous communities. Although this Bill targets a range of dangerous drugs, it is well known amongst health workers and the police that cannabis in particular has been seen to be linked to harm in the community.

The price paid by a remote community for cannabis abuse is substantially greater than in a major centre like Darwin. In communities where cannabis use is prevalent, there is less money available for the purchase of food and other necessities. The use of cannabis in these communities can be linked to other harm such as people fighting with their families to get money for drugs, people fighting when they cannot get access to drugs, and neglected children. The Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse Report, “Little Children are Sacred”, found that cannabis

was a significant issue for participants at nearly every community meeting the Board of Inquiry held.

Participants identified that cannabis had a negative effect on community and family life and, in particular, on the care and protection of children. The negative effects of cannabis within indigenous communities was a significant contributing factor in Government's decision to make the penalty for the offence of supplying drugs to those communities more serious. [...]

Some consideration was given as to how best to define what constitutes an indigenous community. Ultimately, it was decided the easiest way to do this was to rely on the parameters set by the Commonwealth Government in the *Northern Territory National Emergency Response Act*. These parameters were set to restrict the possession of alcohol in the same community; this Bill now seeks to target the supply of drugs. However, while the Commonwealth Act sets up appropriate parameters for most indigenous communities, it does not provide for all of them.

As a result, it will be necessary to allow Government to make regulations to ensure communities not already covered by the Commonwealth legislation can be included in this amendment. As members would be aware, the Commonwealth legislation has a sunset clause, and will expire in 2012. After that time, the prescribed areas as defined in the Commonwealth Act may not have any further application in the Northern Territory.

[...]

Consideration has been given to the potential impact the *Racial Discrimination Act* may have on this Bill. Is Government unfairly targeting our indigenous population by increasing penalties for drug laws (sic) only in their communities? No, Madam Speaker, dangerous drugs as defined under the *Misuse of Drugs Act* are prohibited everywhere. What this Bill does is increase the penalty for supply in particular areas. It does not matter who is doing the supplying, they will all face the same penalty. While some persons who are apprehended will be local indigenous people, police quite regularly apprehend systematic and organised drug suppliers who travel directly into the communities from southern states and elsewhere in the Northern Territory in order to facilitate illicit drug supply. These people will also fall under the new provision if they are found with a trafficable quantity of drugs. If they are found supplying commercial quantities, then the different provision of the Act applies and the penalty is heavier again.

The Supreme Court has also recently indicated that it will view all future supplies into indigenous communities as a particularly serious element of aggravation in this type of offending. Clearly, this comment, as well as these amendments, is not intended to unfairly target local

residents of our indigenous communities. However, in the light of the recent reports, research, and community consultations regarding the negative impact that drugs are having on our indigenous communities, this Bill seeks to work in conjunction with all other initiatives such as the Commonwealth Intervention, as well as this Government's *Closing the Gap* initiatives. This Bill offers significant deterrents to those who threaten the safety and harmony of indigenous communities.⁴

[20] There was no challenge to the validity of the amended provisions inserted into the *Misuse of Drugs Act 1990* in 2008 on the basis that those provisions were inconsistent with the *Racial Discrimination Act 1975*.

[21] In 2013, the *Misuse of Drugs Act* was further amended. Of relevance, the *Misuse of Drugs Amendment Act 2013* made the following amendments to the parent Act.

- (a) It omitted the words “to a person” in s 5(2)(a)(iv) of the parent Act to overcome the decisions of the Supreme Court in *Nunnggargalu v Millar*⁵ and *Williams v Balchin*.⁶ Those decisions potentially had the effect of narrowing the meaning of “supply” in an indigenous community by requiring the Crown to prove actual supply of dangerous drugs to a person who was in an indigenous community. Contrary to the express legislative intention, the rulings in the two cases arguably meant that the provisions of s 5(2)(a)(iv) of the *Misuse of Drugs Act* did not apply to the whole of the supply chain involved in supplying dangerous drugs in an indigenous community.

4 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 1 May 2008.

5 *Nunnggargalu v Millar* (unreported, 11 January 2013, NTSC, Barr J).

6 *Williams v Balchin* [2012] NTSC 15.

- (b) It omitted the existing s 5(3) of the *Misuse of Drugs Act* and inserted the following:

In a prosecution for an offence against subsection (2), a statement in the complaint or information that the place at which the alleged supply occurred, or was to occur, was at the relevant time an indigenous community, is evidence of the matters stated.

- (c) It inserted s 37(1)(d) which provided that an aggravating circumstance for the purposes of s 37(2) included:

an offence against section 5 [drug supply] that was committed in an indigenous community.

[22] The *Justice Legislation Amendment (Drug Offences) Act 2016* (NT)

extensively amended the *Misuse of Drugs Act*. The provisions of the amending Act commenced on 18 July 2016. So far as is relevant to this proceeding, the amending Act:

- (a) Omitted the definition of “indigenous community” in the Act and placed the definition in the *Misuse of Drugs Regulations 1990*.
- (b) Expanded the definition of “supply” in s 3 of the *Misuse of Drugs Act* as follows.

supply means:

- (a) give, distribute, sell, administer, transport or supply, whether or not for fee, reward or consideration or in expectation of fee, reward or consideration; or
- (b) offer to do an act mentioned in paragraph (a); or
- (c) do, or offer to do, an act preparatory to, in furtherance of, or for the purpose of, an act mentioned in paragraph (a);
- and includes barter and exchange.

- (c) Repealed s 4B and inserted a new s 4B.
- (d) Repealed ss 5 to 8 and inserted a new Part II, Division 1, Subdivision 1 that is headed “Supply of dangerous drug”. Subdivision 1 created the following standalone offences for the supply of dangerous drugs in the Territory:
 - (i) Section 5 that deals with the supply of a commercial quantity of Schedule 1 and Schedule 2 dangerous drugs. The maximum penalty for Schedule 1 drugs is imprisonment for 25 years. The maximum penalty for Schedule 2 drugs is imprisonment for 14 years.
 - (ii) Section 5A that deals with the supply of less than a commercial quantity of Schedule 1 and Schedule 2 dangerous drugs. The maximum penalty for Schedule 1 drugs is imprisonment for 14 years. The maximum penalty for Schedule 2 drugs is 500 penalty units or imprisonment for five years.
 - (iii) Section 5B that deals with the supply of a commercial quantity of Schedule 1 and Schedule 2 dangerous drugs to a child. The maximum penalty for Schedule 1 drugs is imprisonment for life. The maximum penalty for Schedule 2 drugs is imprisonment for 25 years.
 - (iv) Section 5C that deals with the supply of less than a commercial quantity of Schedule 1 and Schedule 2 dangerous drugs to a child. The maximum penalty for Schedule 1 drugs is imprisonment for

life. The maximum penalty for Schedule 2 drugs is imprisonment for 14 years.

(v) Section 5D that is the subject of this proceeding.

(e) Inserted a new s 37(1)(d) to reflect the provisions of new

Subdivision 1. The subsection relevantly states:

(1) In this section:

aggravating circumstance means, subject to subsection (2):

[...]

(d) an offence against Part II, Division 1, Subdivision 1 that was committed in an indigenous community;

[23] The provisions of s 37(1)(d) have no relevance to this proceeding because they apply only to drug supply offences that have a maximum penalty of less than 7 years: s 37(2)(b). However, the effect of s 37(1)(d) and s 37(2)(a) and (b) mean that all people who are charged and convicted of any drug supply offence to or in an indigenous community will be subject to the presumptive minimum mandatory sentencing provisions of s 37(2) and (3) of the *Misuse of Drugs Act*.

[24] The paramount distinguishing factor between the various offences in Part II, Division 1, Subdivision 1 of the *Misuse of Drugs Act* and their maximum penalties is the level of seriousness of each offence. The seriousness of each offence is based on the quantity of the drug supplied, the type or category of the dangerous drug supplied (Schedule 1 or Schedule 2), and the vulnerability of and potential harm caused to the end-users of the dangerous drug, including children or members of an indigenous community. The

maximum penalties for the various offences in Subdivision 1 range from a fine of 500 penalty units or imprisonment for five years, to imprisonment for nine years, to imprisonment for 14 years, to imprisonment for 25 years, to life imprisonment. The most serious offences are the supply of a Schedule 1 dangerous drug to a child, which attract a maximum penalty of life imprisonment. The maximum penalty of imprisonment for nine years for an offence against s 5D is towards the bottom end of the range of maximum penalties under the Act. However, it is almost double the maximum penalty for an offence against s 5A.

The operation of s 5D of the *Misuse of Drugs Act*

[25] Section 5D of the *Misuse of Drugs Act*, which was inserted into the Act as part of the amendments made in 2016, states (emphasis added):

- (1) A person commits an offence if:
 - (a) the person intentionally supplies, or takes part in the supply of, a substance or thing to another person; and
 - (b) the substance or thing is a dangerous drug and the person is reckless in relation to that circumstance; and
 - (c) less than a commercial quantity of the dangerous drug is supplied; and
 - (d) the dangerous drug is a Schedule 2 drug; and
 - (e) the dangerous drug is supplied in an indigenous community.
- Maximum penalty: Imprisonment for 9 years.

- (2) Absolute liability applies to subsection (1)(c), (d) and (e).

[26] Section 5D makes it an offence to supply less than a commercial quantity (500 grams) of Schedule 2 dangerous drugs to or in an indigenous community. The section applies to the supply of less than a commercial

quantity of Schedule 2 dangerous drugs only. There is no standalone provision for the supply of less than a commercial quantity of Schedule 1 dangerous drugs to or in an indigenous community. Section 5A applies to the supply of less than a commercial quantity of Schedule 1 and Schedule 2 dangerous drugs generally.

[27] The distinguishing criterion between s 5D and the prohibition on the supply of less than a commercial quantity of Schedule 2 drugs in s 5A is whether the supply is to or in an indigenous community. A person who commits an offence against s 5D could alternatively be charged with an offence against s 5A, although it is unlikely that the prosecutorial discretion would be exercised in that manner.

[28] The extended definition of “supply” contained in s 3(1) means that, in addition to its ordinary denotation, supply includes transport, offering to do an act of supply, and doing or offering to do an act preparatory to, in furtherance of, or for the purpose of supply. This means that s 5D applies not only at the end-point of street level supply in an indigenous community, but covers a person who is engaged at any point in the supply chain for dangerous drugs. The section prohibits all persons, of any ethnicity and descent, whether they reside in an indigenous community or not (and, in fact, whether they reside in the Northern Territory or not), from engaging in acts that fall within the extended definition of “supply” of less than a commercial quantity of a Schedule 2 dangerous drug in an indigenous community. This includes interstate suppliers, couriers, local street dealers,

people offering to commit an act of supply, people committing an act preparatory to, or in furtherance of, or for the purpose of, the supply of Schedule 2 dangerous drugs.

[29] It is not a requirement of s 5D of the *Misuse of Drugs Act* that the transaction or act that constitutes the offence must take place in an indigenous community. Nor is it a requirement that the offender must reside in an indigenous community. As in this case, a significant number of Aboriginal drug offenders who do not reside in indigenous communities nevertheless commit acts preparatory to the supply of dangerous drugs in indigenous communities while outside those communities. The geographical reach of s 5D extends well beyond the boundaries of indigenous communities.

[30] The term “indigenous community” is defined in s 3 of the *Misuse of Drugs Act* to mean “an area prescribed by regulation”. For that purpose, r 2A of the *Misuse of Drugs Regulations 1990* prescribes the same areas as prescribed under s 4 of the *Northern Territory National Emergency Response Act 2007* (Cth) (“the Intervention Act”) immediately before its repeal.⁷ Under the Intervention Act, “prescribed areas” included an area covered by paragraph (a) of the definition of “Aboriginal land” in s 3(1) of the *Aboriginal Land*

⁷ Under the *Misuse of Drugs Act*, the term “indigenous community” has always been defined by reference to those areas covered by the Intervention Act; initially under s 4B of the *Misuse of Drugs Act* (as in force on 23 July 2008), and from 10 October 2016, under s 3(1) of the Act and r 2A of the *Misuse of Drugs Regulations*.

Rights (Northern Territory) Act 1976 (Cth). Paragraph (a) of that definition covers “land held by a Land Trust for an estate in fee simple”.⁸

- [31] Accordingly, the term “indigenous community” in s 5D(1)(e) of the *Misuse of Drugs Act* describes a geographical location whose residents are considered by the legislature (and the courts) as particularly vulnerable to this type of drug offending; and whose residents are to receive the benefit of the extra protection provided by the nine year maximum penalty for an offence against s 5D. The imposition of higher sentences for offenders based on the aggravated impact of their offending on a particular community is an established sentencing principle. The particular harm done to a community and the prevalence of an offence are mandatory considerations under s 5(2)(da) and (g) of the *Sentencing Act 1995* (NT). Prior to the enactment of the *Misuse of Drugs Amendment Act 2008*, and the subsequent enactment of s 5D in 2016, there was already an established body of sentencing law that held that higher sentences should be imposed on offenders who commit drug supply offences with the aggravating circumstance that they involved drug supply in an indigenous community. The sentencing principles developed because of the greater harm drug offences cause in indigenous communities,

⁸ Subsection 4(2A) of the *Aboriginal Land Rights (Northern Territory) Act* establishes the Anindilyakwa Land Trust over an area described in Sch 6 of that Act. The boundaries of that area are described as the areas of Groote Eylandt and Bickerton Island and every other island within defined coordinates. Under s 12AAB of the *Aboriginal Land Rights (Northern Territory) Act*, the Anindilyakwa Land Trust was granted an estate in fee simple over the land area of Groote Eylandt. Accordingly, all residents of Groote Eylandt are members of an “indigenous community” within the meaning of the *Misuse of Drugs Act*, including residents of Malkala community, Angurugu community and Umbakumba community where the accused is on bail.

and those sentencing principles were subsequently given express and specific legislative recognition.

- [32] Sentencing courts must have regard to the maximum penalty of imprisonment for nine years prescribed by s 5D in accordance with established sentencing principles about the weight a sentencing court is required to give to the maximum penalty specified by the legislature. Section 5(2)(a) of the *Sentencing Act* states that a sentencing court must have regard to the maximum penalty and any minimum penalty prescribed for an offence, and the purpose of the 2008 amendments was to increase the maximum penalty for supplying less than a commercial quantity of Schedule 2 drugs in an indigenous community. However, it is important to note the following principles which govern the weight a sentencing court is to give the maximum penalty in a particular case:

- (a) The other mandatory considerations specified in s 5(2) of the *Sentencing Act* including: (i) importantly, the level of seriousness of the offence; (ii) the extent to which the offender was to blame; (iii) any harm done to a community as a result of the offence; and (iv) the prevalence of the offence.
- (b) While the maximum penalty for an offence is both a reflection on the level of communal abhorrence and a directive to sentencing judges on how to weigh the gravity of this kind of offending, sentencing courts must also consider the circumstances of the particular case.

- (c) The range of seriousness of the various acts or transactions that fall under the relevant prohibition, from the very minor to the most serious. In cases involving minor offending, sentencing courts place less weight upon the maximum penalty. This is particularly so given that the range of conduct potentially caught by s 5D of the *Misuse of Drugs Act 1990* is very wide. The unlawful conduct prohibited by s 5D ranges from a family member giving a joint of cannabis to another family member in an indigenous community up to members of an organised criminal syndicate engaging in a series of discrete supply transactions of a pound of cannabis (450 grams) at a time in an indigenous community for commercial gain.
- (d) It is wrong to assume that the maximum penalty is of more than general assistance in determining the actual sentence for an offence that is nowhere near the upper end of the range of seriousness for the offence. There are too many other relevant factors, including the circumstances of the instant offence and matters personal to the offender.
- (e) Where the maximum penalty is increased, it is expected that median sentences will also increase. However, it is very rare for sentences imposed by the courts to increase in the same proportion as the increase in the maximum penalty specified by the legislature. For example, a doubling of the maximum penalty for an offence by the legislature will not result in a doubling of the length of sentences of imprisonment imposed by the courts.

- (f) The relevance of the maximum penalty is not to be confused with the relevance of the current sentencing practice to which the Court must also have regard. Recourse to that practice provides guidance as to the applicable range of sentences.
- (g) The maximum penalty is not a fixed benchmark or starting point for the exercise of the sentencing discretion. It provides both the public and sentencing courts with a guide to the seriousness with which the community should view the gravity of the particular offence. In *Markarian v The Queen* the plurality of the High Court stated (emphasis added):

It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick. That having been said, in our opinion, it will rarely be, and was not appropriate for Hume J here to look first to the maximum penalty, and to proceed by making a proportional deduction from it. That was to use a prescribed maximum erroneously, as neither a yardstick, nor as a basis for comparison of this case with the worst possible case.⁹

- (h) The maximum penalty reflects the outer limit of criminal liability and is reserved for the worst category of case.¹⁰
- (i) The maximum penalty will rarely be a significant driver of the ultimate sentencing disposition.¹¹

9 *Markarian v The Queen* (2005) 228 CLR 357 at [31] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

10 *Ibbs v The Queen* (1987) 163 CLR 447 at 451-452.

[33] It is noteworthy that despite the maximum penalty of imprisonment for nine years and the presumptive minimum mandatory penalty of 28 days imprisonment, one-fifth of drug offenders who were sentenced for an offence against s 5D in 2017 and 2018 did not receive a sentence of imprisonment.

The incidental legislative provisions relied on by the defendant

[34] The maximum penalty of imprisonment for nine years for an offence against s 5D of the *Misuse of Drugs Act*, in conjunction with other provisions, indirectly introduces two incidental consequences. *First*, under s 7A(1)(c) and (2) of the *Bail Act 1982* (NT) there is a presumption against the grant of bail to a person charged with an offence against s 5D of the *Misuse of Drugs Act 1990*. Bail must not be granted unless the person satisfies an authorised member or court that bail should be granted. *Second*, as already described above, the offender is subject to the presumptive minimum mandatory sentencing provisions of s 37(2) and (3) of the Act, as is the case for all drug supply offences committed in an indigenous community.

[35] Neither s 7A(1) and (2) of the *Bail Act* nor s 37(2) and (3) of the *Misuse of Drugs Act* operate exclusively by reference to the maximum penalty of imprisonment for nine years stipulated by s 5D of the *Misuse of Drugs Act*. The presumption against bail applies to a number of offences under the *Misuse of Drugs Act*, the *Criminal Code 1983* (NT) and various other Acts.

11 *R v Geddes* (1936) 36 SR (NSW) 554 at 555-556; approved in *Markarian v The Queen* (2005) 228 CLR 3357 at [65] per McHugh J.

The provisions of s 37(2) and (3) of the *Misuse of Drugs Act* apply to all drug offences that have a maximum penalty of “7 years imprisonment or more” and to drug offences that have a maximum penalty of “less than 7 years imprisonment but the offence is accompanied by an aggravating circumstance” specified by s 37(1), which includes drug supply in an indigenous community. Both statutory provisions are laws of general application that apply according to their terms.

[36] Section 7A of the *Bail Act* states:

(1) This section applies to the following offences:

[...]

(c) an offence against the *Misuse of Drugs Act 1990* punishable by a term of imprisonment for more than 7 years.

[...]

(2) Bail must not be granted to a person accused of an offence to which this section applies unless the person satisfies an authorised member or court that bail should be granted.

[37] In *R v Williams*,¹² the Supreme Court held that the correct approach to bail when the *presumption against bail* applies is to consider the application by having regard to the matters in s 24 of the *Bail Act* only, on the basis that the applicant bears the legal and evidentiary onus of showing that bail should be granted. In *Suttie v The Queen*,¹³ the applicant was charged with various offences against the *Misuse of Drugs Act*, including two offences that carried a maximum penalty of imprisonment for 14 years. This meant

¹² *R v Williams* [2012] NTSC 47.

¹³ *Suttie v The Queen* [2013] NTSC 37.

that the presumption against bail applied to the applicant. Hiley J applied *R v Williams*. His Honour stated:

As previously noted, s 7A(2) of the *Bail Act* requires the Applicant to satisfy the Court that bail should not be refused.

Section 7A(2A) provides that s 7A(2) does not apply to a person who “is assessed to be suitable to participate in a program of rehabilitation that is prescribed by the Regulations”.

Although the Bail Assessment Report suggests that the Applicant is suitable to participate in a program of rehabilitation [for the purpose of s 7A(2A)], for example at Banyan House, the Regulations do not include this as an appropriate program of rehabilitation for the purposes of s 7A(2A). Indeed, the Regulations do not specify any suitable program of rehabilitation for such purposes. (I mention that because this indicates that Parliament did contemplate that a person might be released on bail even where charged with serious offences of the kind set out in s 7A(1), where he or she is assessed as being suitable to participate in a program such as that proposed for the Applicant in this case.)

Needless to say, the onus of proof referred to in s 7A(2) still remains on the Applicant.

Notwithstanding the opinion of Reeves J in *R v Wilson* [2011] NTSC 15 to the effect that this subsection imposes a “heavy burden” on an applicant, I prefer to follow the construction of Kelly J in *R v Williams* [2012] NTSC 47 at [5]:

It seems to me that the plain words of s 7A do nothing more than cast an onus on the applicant to satisfy the court that bail ought not to be refused, and in considering whether or not the applicant for bail has satisfied the onus, the court must (as in all other applications) take into consideration the matters set out in s 24 of the Act, and no others. If the applicant does not satisfy the onus, then bail should be refused.

This is consistent with the approach of other Judges of this Court, including Mildren J in several unreported matters, and Blokland J in *R v JDT* [2011] NTSC 39. [...]

It is necessary therefore to consider the criteria set out in s 24, and to determine whether or not the Applicant has satisfied the Court that bail ought not be refused, having regard to those criteria.¹⁴

14 *Suttie v The Queen* [2013] NTSC 37 at [29]-[35].

[38] Under s 24 of the *Bail Act*, a court is to take into consideration the following matters:

- (a) The probability of whether or not the person will appear in court in respect of the offence for which bail is being considered. This assessment involves a consideration of the strength of evidence against the person and the severity of the probable penalty.
- (b) The interests of the person.
- (c) The risk that the person would interfere with evidence, witnesses or jurors.
- (d) The risk that the person would commit another offence or breach his conditions of bail.
- (e) The risk to the safety or welfare of the victim and anyone else, if any, that would result from granting the person bail.

[39] It is important to note that the determination of an application for a grant of bail by an accused person involves the exercise of a judicial discretion, not the proof of a cause of action. Under s 7A(2) of the *Bail Act*, the burden is on an accused to persuade the Court that, having regard to the matters in s 24 of the Act, the Court should exercise its discretion in favour of granting bail. In addition, the burden created by s 7A(2) and s 24 may be satisfied by the imposition of appropriate bail conditions.

[40] There is no evidence before the Court that the defendant had any difficulty obtaining a grant of bail to reside at Umbakumba. Nor is there any information before the Court that suggests the presumption against bail has had an adverse impact on the liberty of Aboriginal people charged with an offence against s 5D of the *Misuse of Drugs Act* compared to non-indigenous people charged with an offence contrary to s 5A of the Act, or at all.

[41] Subsections 37(2) and (3) of the *Misuse of Drugs Act* state (emphasis added):

(2) In sentencing a person for an offence against this Act the court shall, in the case of an offence for which the maximum penalty provided by this Act (with or without a fine) is:

(a) 7 years imprisonment or more; or

(b) less than 7 years imprisonment but the offence is accompanied by an aggravating circumstance,

impose a sentence requiring the person to serve a term of actual imprisonment unless, having regard to the particular circumstances of the offence or the offender (including the age of the offender where the offender has not attained the age of 21 years) it is of the opinion that such a penalty should not be imposed.

(3) Where a court imposes a sentence requiring the serving of a period of actual imprisonment for an offence against this Act, it shall not impose a sentence of less than actual imprisonment for 28 days.

[42] It is apparent from s 37(1)(d), (2) and (3) of the *Misuse of Drugs Act 1990* that the minimum mandatory sentencing provisions apply equally to an

offence committed against s 5A of the Act, if the offence is committed in an indigenous community.¹⁵

[43] Under s 37(2) and (3) of the *Misuse of Drugs Act 1990*, the Court must impose a minimum sentence of actual imprisonment for 28 days, unless the Court is of the opinion that such a penalty should not be imposed due to the particular circumstances of the offence or the offender (including the age of the offender where the offender has not attained the age of 21 years).

[44] In *R v Day*,¹⁶ the Court of Criminal Appeal applied the principles which had been expressed in *Duthie v Smith*¹⁷ about the operation of s 37(2) of the *Misuse of Drugs Act*. In *Duthie v Smith*, Mildren J held that the legislature intended no more restriction upon the sentencing discretion than to reverse the normal sentencing approach that a sentencing court must first consider and reject non-custodial dispositions before the Court imposes a sentence of imprisonment. In other words, s 37(2) of the *Misuse of Drugs Act* specifies a *presumptive penalty* only. Mildren J stated (emphasis added):

It seems to me that the approach called for by the legislature is to look at a sentence of actual imprisonment unless the circumstances of the offence or of the offender warrant otherwise. This places an onus on the accused to establish that either of those circumstances exist, and if that onus is not discharged [then under s 37(3) of the *Misuse of Drugs Act*

15 As already stated, s 37(1)(d) of the *Misuse of Drugs Act* defines "aggravating circumstance" to include "an offence against Part II, Division 1, Subdivision 1 that was committed in an indigenous community".

16 *R v Day* [2004] NTCCA 2; (2004) 14 NTLR 218.

17 *Duthie v Smith* (1992) 83 NTR 21.

1990] a 28 day minimum sentence of actual imprisonment must follow.¹⁸

[45] In addition, it seems to me that a sentencing court may of its own motion, find that particular circumstances exist upon a consideration of the facts.

[46] Mildren J rejected the view that “particular” can be equated with “exceptional” and concluded:

In the end I consider that the preferable interpretation to be given to s 37(2) is, as Angel J concluded in *Maynard v O’Brien*, that the circumstances must be “**sufficiently noteworthy** or out of the ordinary, relative to the prescribed conduct constituting the offence, or of the offender, to warrant a non-custodial sentence”, but like Kearney J, I do not consider that the circumstances need to be so noteworthy or out of the ordinary as to convey the meaning that only in rare cases will there be found circumstances that fall within that class. Indeed, it is apparent that Angel J himself could not have intended that consequence given that he found that the fact that the appellant in that case was of exemplary character, a first offender, and intended to use the cannabis for his own use, amounted to “particular circumstances” warranting the imposition of a non-custodial sentence.¹⁹

[47] In addition, sentencing courts may consider the cumulative effect of all relevant circumstances when determining if the particular circumstances of the offence or the offender lead to a decision not to impose the minimum mandatory penalty of 28 days imprisonment. It is not necessary to consider each discrete circumstance of an offence in isolation.

Section 10 of the *Racial Discrimination Act*

18 *Duthie v Smith* (1992) 83 NTR 21 at 28.

19 *Duthie v Smith* (1992) 83 NTR 21 at 30.

[48] Subsections 10(1) and (2) of the *Racial Discrimination Act* state as follows (emphasis added):

- (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
- (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

[49] Subsection 10(1) of the *Racial Discrimination Act* may operate in one of the following two ways for laws of the Territory:²⁰

- (a) If a Territory law creates a right which is not universal because it is not conferred (to the same extent) on persons of a particular race, then s 10(1) supplies persons of that race a complimentary right so that the right becomes universal.
- (b) If a Territory law prohibits or limits persons of a particular race from enjoying human rights or fundamental freedoms to the same extent as persons of another race, then s 10(1) confers the rights which the Territory law removes or limits.

[50] The Territory law is invalid, or inoperative, to the extent of the inconsistency between the two groups of people's enjoyment of the human

20 *Gerhardy v Brown* (1985) 159 CLR 70 at 94 per Mason J.

rights in contention. The High Court has held that the test for determining an inconsistency between a Territory law and a Commonwealth law is the same as the test for determining inconsistency for the purpose of s 109 of the Constitution.²¹

[51] The defendant submits that s 5D of the *Misuse of Drugs Act* is inoperative for inconsistency with s 10(1) of the *Racial Discrimination Act* in accordance with the second manner of application of s 10(1) described in *Gerhardy v Brown*. That is, the defendant contends that, “by reason of” the practical operation of s 5D, Aboriginal people on Groote Eylandt enjoy certain human rights and fundamental freedoms to a more limited extent than non-indigenous people who reside elsewhere.

[52] In order to demonstrate that there is a conflict between s 5D of the *Misuse of Drugs Act* and s 10(1) of the *Racial Discrimination Act* it is necessary for a claimant to identify and establish the following.

- (a) The legislative provisions that are challenged.
- (b) The human rights and fundamental freedoms the enjoyment of which is said to be unfavourably impaired or limited.
- (c) The persons of a particular race whose enjoyment of human rights and fundamental freedoms is said to be unfavourably limited.

²¹ *Work Health Authority v Outback Ballooning* (2019) 266 CLR 428 at [30], [58] and [104].

- (d) The other group of persons whom it is said are able to enjoy the relevant human rights and fundamental freedoms without limitation or in a less limited way.
- (e) How it is said those persons of the particular race enjoy to a more limited extent the identified human rights and fundamental freedoms.
- (f) The impugned statutory provisions caused the disparity in the enjoyment of the identified human rights and fundamental freedoms.

The decision in *Maloney v The Queen*

[53] It is useful to consider the decision of the High Court in *Maloney v The Queen* (“*Maloney*”)²² before considering the defendant’s submissions.

[54] In *Maloney*, the majority of the High Court held that Queensland legislation prohibiting an Aboriginal person from possessing alcohol other than the prescribed type and volume in a public area on Palm Island created a discriminatory limitation on the human right to own property contrary to s 10 of the *Racial Discrimination Act*. However, the High Court found in addition that the prohibition was a “special measure” under s 8 of the *Racial Discrimination Act*, and so operated as an exception. The case is difficult to analyse because each of the five High Court Judges published separate reasons for decision, and considered different issues were more important than others. Their Honours also dealt with a range of issues that were arguably not strictly necessary for them to decide, and arguably do not form

22 *Maloney v The Queen* (2013) 252 CLR 168.

part of the *ratio decidendi*. The factual and legislative background to the decision was as follows.

[55] In 2002, the Queensland Legislative Assembly passed the *Indigenous Community Liquor Licences Act 2002* (Qld) in an attempt to reduce the harm that the consumption of alcohol was causing Aboriginal people in indigenous communities in Queensland. The Act introduced Part 6A (ss 173F-173J) of the *Liquor Act 1992* (Qld) that provided for the declaration by regulation of an area as a “restricted area” (s 173G), and for the declaration by regulation of a prohibition on the possession of more than the specified volume of the prescribed type of alcohol in a public place in a restricted area (s 173H). The Explanatory Notes for the Bill for the *Indigenous Community Liquor Licences Act 2002* (Qld) stated that Part 6A was part of a package of reforms to address the prevalence of alcohol abuse and violence in indigenous communities in Cape York and other parts of Queensland.

[56] As at 31 May 2008, the *Liquor Act 1992* (Qld) and *Liquor Regulation 2002* (Qld) (r 37A) declared each of the areas specified in eighteen schedules of the *Liquor Regulation 2002* (Qld) to be a restricted area. Each of the areas was associated in some way with an indigenous community. Schedule 1R related to Palm Island. The residents of Palm Island are overwhelmingly Aboriginal people. Clause 1 of Schedule 1R of the *Liquor Regulation 2002* (Qld) declared each of three areas (community area, foreshore and jetty) of Palm Island to be a restricted area. Clause 2 of Schedule 1R declared the

prescribed volume and type of alcohol for each of those areas (other than the licensed premises known as the Palm Island Canteen) to be 11.25 litres of beer with a concentration of alcohol of less than 4 percent. The effect of these provisions was that no person in a public place in a restricted area on Palm Island could have any other type or greater volume of alcohol in their possession.²³

[57] On 27 October 2010, Ms Maloney (“the appellant”) was charged and convicted of breaching s 168B(1) of the *Liquor Act 1992* (Qld) by possessing in a public place on Palm Island a prohibited type and volume of alcohol. On 31 May 2008, the police intercepted her motor vehicle on Park Road, Palm Island. A black backpack in the boot of her vehicle contained one 1125ml bottle of Jim Beam bourbon and one 1125ml bottle of Bundaberg Rum, which was three quarters full. The appellant admitted to being the owner of the alcohol. Her prosecution before a magistrate proceeded *ex parte*. A fine of \$150 was imposed. The fine was to be paid within two months, with one-day imprisonment in default of payment.

[58] Ms Maloney appealed on the ground that the restrictions on the possession of alcohol in public places on Palm Island imposed by the *Liquor Act 1992* (Qld) and its associated Regulation were invalid under s 109 of the Constitution because of inconsistency with s 10 of the *Racial Discrimination*

23 Subsection 168B(1) of the *Liquor Act 1992* (Qld) made it an offence for a person to have in their possession, in a public place in a restricted area, more than the prescribed volume of the specified type of alcohol for the area, other than under the authority of a “restricted area permit”. Subsection 168B(1) provides the mechanism for enforcing the prohibition against possessing a proscribed amount of alcohol in a restricted area.

Act. The appellant claimed that by reason of the *Liquor Act 1992* (Qld) and the Regulation, she was denied the right to possess property that she owned. The right to possess goods, which is fundamental to human existence, must include the right to transport the goods from the place of acquisition to the place of consumption. There was no such limitation on other persons in non-restricted areas in Queensland.

[59] As stated above, the majority of the High Court held that if the impugned provisions had not been a “special measure” they would have been inconsistent with s 10 of the *Racial Discrimination Act* and invalid under s 109 of the Constitution. However, the impugned provisions were a “special measure” within s 8(1) of the *Racial Discrimination Act* and s 10 of the Act therefore did not apply to them.

[60] It is important to note:

- (a) The provisions of the *Liquor Act 1992* (Qld) and *Liquor Regulation 2002* (Qld) limited the property rights of all people on Palm Island from the commencement of the legislation by expressly limiting the type and volume of alcohol that could be possessed in public places in restricted areas on Palm Island.
- (b) Schedule 1R of the *Liquor Regulation* was geographically targeted to affect only a single community government area, the population of which was overwhelmingly Aboriginal. Its practical or operational impact on that population was neither accidental nor incidental.

- (c) The direct operation and effect of the *Liquor Act 1992* (Qld) and *Liquor Regulation 2002* (Qld) was to substantially limit the extent to which the overwhelmingly Aboriginal residents of Palm Island could acquire, possess and consume alcohol compared to the extent to which non-indigenous people in their communities could acquire, possess and consume alcohol.²⁴ Non-indigenous people in non-indigenous communities were not subject to the same limitation of the right to engage in an otherwise lawful activity.
- (d) The mere residence of Aboriginal people on Palm Island resulted in a limitation or restriction on their human rights. Different laws applied to different people in different places according to their race.
- (e) Accordingly, there was a direct causal relationship between the practical operation of the *Liquor Act 1992* (Qld) as amended and the associated Regulation, and the limited enjoyment of an identifiable human right by Aboriginal people.

[61] While the Queensland legislation contains enforcement provisions, the direct operation of the legislation is not confined to those members of the Palm Island community who are charged with an offence against s 168B of the *Liquor Act 1992* (Qld). The restrictions in the legislation apply to all 2000 residents of Palm Island and not to people who are resident elsewhere.

²⁴ It is not necessary to demonstrate that all members of a particular race enjoy a particular right to a more limited extent than members of another race – it is enough that some Indigenous persons experience a limited enjoyment of the right: *Maloney v The Queen* (2013) 252 CLR 168 at [66], [70], [79] and [80] per Hayne J.

[62] It was in the above context that Gageler J stated (emphasis added):

The direct cause of that differential enjoyment of human rights by Aboriginal persons living on Palm Island ... was the existence in force on that date of Sch 1R of the *Liquor Regulation*. The Schedule was geographically targeted to affect only a single community government area, the population of which is overwhelmingly Aboriginal. Its practical impact on that population was neither accidental nor incidental. The *Liquor Regulation* was brought into existence in an attempt to prevent harm arising from alcohol-related conditions and behaviours perceived generally to exist within indigenous communities but not perceived generally to exist elsewhere in Queensland. Schedule R1 was inserted and tailored specifically to address conditions and behaviours [of indigenous persons] perceived to exist within the indigenous community of Palm Island. Geography was used as a proxy for race.²⁵

[63] Although it is difficult to discern a clear ratio from *Maloney* for the reasons already described, a majority²⁶ appears to have concluded that a law of general application which has a disproportionate impact on persons of a particular race will attract the operation of s 10(1) of the *Racial Discrimination Act* notwithstanding that it may be race-neutral in its language, and may have application to people of other races. Even accepting that to be so, in contrast to the Queensland legislation under consideration in *Maloney*, the possession and supply of any quantity of cannabis is unlawful throughout the Territory, and s 5D of the *Misuse of Drugs Act* simply imposes a greater maximum penalty for supplying less than a commercial quantity of Schedule 2 dangerous drugs in an indigenous community. The legislation does not impose a limitation on the right to engage in an

²⁵ *Maloney v The Queen* (2013) 252 CLR 168 at [362].

²⁶ French CJ, Hayne, Bell and Gageler JJ.

otherwise lawful activity by any Aboriginal people on Groote Eylandt.

Unlike the provisions of the *Liquor Act 1992* (Qld) and the *Liquor Regulation 2002* (Qld), s 5D has no application unless a person commits such an offence against s 5D and is charged with doing so. The section applies to both Aboriginal and non-indigenous people who commit the offence, and the offence may be committed by engaging in acts of supply committed outside an indigenous community.

[64] Taking into account the fact that, in 2017 and 2018, for the whole of the Territory, a total of 93 Aboriginal people committed offences against s 5D of the Act, a rough estimate is that in those years, only 1 in 314 or thereabouts Aboriginal people in indigenous communities were affected by the operation of s 5D. In addition, their rights were unaffected until they were charged with or convicted of such an offence. The persons affected by s 5D are persons (including non-indigenous people) who are engaged in the supply of less than a commercial quantity of a Schedule 2 dangerous drug “in an indigenous community” within the extended meaning of supply, not Aboriginal people in indigenous communities *per se*.

[65] Against that background, I turn to consider the conditions which must be satisfied in order to find a material conflict between the operation of s 5D of the *Misuse of Drugs Act* and s 10 of the *Racial Discrimination Act*.

The legislative provisions that are challenged

[66] The legislative history and operation of s 5D of the *Misuse of Drugs Act*, together with the operation of the incidental bail and sentencing provisions identified by the defendant, have been described at some length above.

The human rights and fundamental freedoms the enjoyment of which is said to be unfavourably impaired or limited

[67] The defendant contends that the operational effect of s 5D of the *Misuse of Drugs Act*, in combination with the other statutory provisions identified, is to reduce the enjoyment of the rights of Aboriginal people in “indigenous communities”²⁷ to:

- (a) liberty; and
- (b) equal treatment before the tribunals and other organs administering criminal justice in the criminal justice system (hereafter “equal treatment before the courts”),

to an extent less than the enjoyment of those rights by non-indigenous people living elsewhere in the Territory.

[68] Turning first to the right to “liberty”, it should be noted at the outset that s 10(2) of the *Racial Discrimination Act* provides that “[a] reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention. The “Convention” is defined in s 3 of the *Racial Discrimination Act* to mean the *International Convention on the Elimination of All Forms of Racial Discrimination*. Counsel for the

²⁷ More specifically, those indigenous persons residing in Malkala indigenous community.

defendant submits that while “liberty” is not a right that is expressly recognised in Article 5 of the Convention, it is nonetheless a right which falls within s 10(1) of the *Racial Discrimination Act*. The purpose of the *Racial Discrimination Act* is not simply to give effect to the Convention but, subject to the Act, to prohibit all forms of racial discrimination.

Consequently, the term “includes” in s 10(2) of the *Racial Discrimination Act* should not be interpreted as being exhaustive. Liberty is a fundamental natural law right and it would be strange if it was not included in the rights contemplated by s 10(1) and (2) of the *Racial Discrimination Act* 1975. In addition, liberty is a right that is recognised in Article 3 of the *Universal Declaration of Human Rights* which states: “everyone has the right to life, liberty and security of person”.

[69] Counsel for the defendant’s submission is consistent with the authority on the point. In *Gerhardy v Brown*, Gibbs CJ stated (emphasis added):

The words of s 10(1) are wide; they refer to laws by reason of which persons of (inter alia) one race do not enjoy “a right” that is enjoyed by persons of another race. By s 10(2), a reference to a right includes, but is not expressly limited to, a reference to a right of a kind referred to in Art. 5 of the Convention. Although the validity of s 10(1) was not argued before us, there can be no doubt that its provisions will be valid only if they conform to, and carry into effect, the provisions of the Convention. Under Art. 5, State Parties to the Convention undertake to prohibit and eliminate racial discrimination “in all its forms”. If s 10(1) and (2) have the effect of prohibiting and eliminating racial discrimination they will be valid notwithstanding that they comprehend rights other than those specifically mentioned in Art. 5.²⁸

[70] Similarly, in that same case Mason J stated (emphasis added):

28 *Gerhardy v Brown* (1985) 159 CLR 70 at 85-86.

Although s 10(2) includes rights of a kind referred to in Art. 5, it is not confined to the rights actually mentioned in that Article. What then are the other rights, if any, to which s 10(1) relates? The answer is the human rights and fundamental freedoms with which the Convention is concerned, the rights enumerated in Art. 5 being particular instances of those rights and freedoms, without necessarily constituting a comprehensive statement of them.²⁹

[71] In *Mabo v Queensland (No 1)*, Brennan, Toohey and Gaudron JJ stated:

Section 10 relates to the enjoyment of a right, not the doing of an act. The “right” referred to in s 10(1) is not, or is not necessarily, a legal right. Sub-section (2) directs attention to rights “of a kind referred to in Article 5 of the Convention”, each of which may be a “right” for the purposes of s 10(1). [...]

[...]

The rights referred to in Art. 5 are human rights for which, as the preamble to the Convention testifies, “universal respect... and observance” are encouraged. Human rights are calculated to preserve and advance “the dignity and equality inherent in all human beings”. The preamble states that the Convention was agreed to in furtherance of the purposes of the United Nations “to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion”.

Section 10 of the *Racial Discrimination Act* is enacted to implement Art. 5 of the Convention and the right to which s 10 refers is, like the rights mentioned in Art. 5, a human right – not necessarily a legal right enforceable under the municipal law. [...] ³⁰

[72] In *Maloney*, Gageler J stated:

Human rights within the scope of s 10 of the RDA, not being limited to those listed in Art 5 of the Convention, may be accepted to encompass the full gamut of the civil, political, economic and social rights recognised in the Universal Declaration and in the ICESCR and the ICCPR.³¹

²⁹ *Gerhardy v Brown* (1985) 159 CLR 70 at 101.

³⁰ *Mabo v Queensland (No 1)* (1988) 166 CLR 186 at 216-217.

³¹ *Maloney v The Queen* (2013) 252 CLR 168 at [336].

[73] It seems to me that the right to liberty comes within the category of human rights and fundamental freedoms in the political, social and cultural fields of public life. For at least 300 years, liberty has been recognised as the most elementary and important right of all common law rights. It is a right that evokes a value common to all societies.

[74] In *Williams v The Queen*, Mason and Brennan JJ stated (emphasis added):

The right to personal liberty is, as Fullagar J described it, “the most elementary and important right of all common law rights: *Trobridge v Hardy* (1955) 94 CLR 147 at 152. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the Laws of England “*without sufficient cause*”: *Commentaries on the Laws of England* (Oxford, 1765) Bk 1, pp 120-121, 130-131.³²

[75] In *Al-Kateb v Godwin*, Gleeson CJ stated (emphasis added):

In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights and freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language...³³

[76] However, the right to personal liberty is a qualified human right. The *Universal Declaration of Human Rights*, the *European Convention on Human Rights* and the *International Covenant on Civil and Political Rights* all recognise the qualified nature of the right to personal liberty.

[77] Article 3 of the *Universal Declaration of Human Rights* states:

32 *Williams v The Queen* (1986) 161 CLR 278 at 292. See also *South Australia v Totani* (2010) 242 CLR 1 at [423] per Crennan and Bell JJ; and *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at [180] per Kiefel and Keane JJ.

33 *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19].

Everyone has the right to life, liberty and security of person.

[78] However, Articles 9 and 11 qualify Article 3. They respectively state as follows.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

[79] Likewise, Article 5(1) of the *European Convention on Human Rights* relevantly states:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

[...]

[80] Likewise, Article 9 of the *International Covenant on Civil and Political*

Rights states:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a Judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

[81] In *Minister for Immigration and Multicultural and Indigenous Affairs v Al*

Masri, the Full Court of the Federal Court considered the right expressed by

Article 9 of the *International Covenant on Civil and Political Rights* and

stated:

In construing Art 9(1) it should first be noted that the right not to be subjected to arbitrary detention is, textually, in addition to the right not to be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Prof Manfred Nowak, in his authoritative commentary on the ICCPR, *The UN Covenant on Civil and Political Rights: CCPR Commentary...* notes this additional limitation and observes that is not enough for the deprivation of liberty to be provided for by law; the law itself must not be arbitrary.

The history of the second sentence of Art 9 supports the conclusion pointed to by the text and supports, as well, a broad view of what constitutes arbitrary detention for the purposes of Art 9. Professor Nowak reviews the travaux préparatoires at 172 [29] and observes that the prohibition of arbitrariness was adopted as an alternative to an exhaustive listing of all the permissible cases of deprivation of liberty. It was based on an Australian proposal that was seen as highly controversial, and although some delegates were of the view that the word arbitrary (“arbitrariness”) meant nothing more than unlawful, the majority stressed that its meaning went beyond this and contained elements of injustice, unpredictability, unreasonableness and unproportionality (sic).

Having considered the history of Art 9 Professor Nowak concludes that “the prohibition of arbitrariness is to be interpreted broadly” and that “[c]ases of deprivation of liberty provided for by law must not be manifestly unproportional (sic), unjust or unpredictable”.³⁴

[82] As counsel for the informant submitted, the significance of the above is that international law recognises both the right not to be deprived of liberty except by due process of law and a separate but related right to be free from arbitrary detention. It does not recognise an unqualified right to liberty. However, the fact that the right to liberty is a qualified right, or a composite of certain specific rights, does not mean that an interference with personal liberty, which is otherwise a valid interference, will be valid if it directly limits the right to personal liberty of the persons of one race to a greater extent than the rest of the population.

[83] Turning then to the right to equal treatment before the courts, Article 5(a) of the Convention expressly recognises “[t]he right to equal treatment before the tribunals and all other organs administering justice”. This is also a

³⁴ *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at [143]-[145] per Black CJ, Sundberg and Weinberg JJ.

fundamental right recognised in other international instruments. For example, Article 10 of the *Universal Declaration of Human Rights* states:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

[84] Likewise, Article 6 of the *European Convention on Human Rights* states:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[85] The provisions of Article 14 of the *International Covenant on Civil and Political Rights* are in largely the same terms as Article 6 above, with the addition of the following clauses:

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

[86] The nature of the right to equal treatment before the courts requires careful characterisation. As Gageler J observed in *Maloney*, the right referred to in Article 5(a) of the Convention (like Article 14 of the *International Covenant on Civil and Political Rights*), “is not properly equated to a right to equal protection of the law”. Rather, it “is more narrowly focused: on the administration and enforcement of laws by courts and tribunals rather than on the content of laws more generally”.³⁵

[87] The right to equal treatment before the courts requires equal access to and application of: (a) a public hearing within a reasonable time, subject to

35 *Maloney v The Queen* (2013) 252 CLR 168 at [336].

certain qualifications directed to the preservation of countervailing rights; (b) the presumption of innocence; (c) the adoption of fair procedures, including the provision of particulars, the presentation of a defence, the right to call evidence, the right to examine and cross-examine witnesses, the use of an interpreter if necessary, and the right of appeal; and (d) the determination of the matter by an independent and impartial tribunal. It is with regard to those requirements, rather than the content of s 5D of the *Misuse of Drugs Act* generally, that the assertion of some discriminatory prohibition or limitation on the right to equality before the law must be considered.

The persons of a particular race whose enjoyment of human rights and fundamental freedoms is said to be unfavourably limited, and the other group said to be able to enjoy the relevant rights and freedoms without limitation or in a less limited way

[88] Counsel for the defendant initially submitted that the group of people of a particular race discriminated against were all Aboriginal people living in indigenous communities, in particular those living in the indigenous community of Groote Eylandt. In making that submission, counsel for the defendant sought to distinguish this case from *Munkara v Bencsevich*³⁶ on the basis that the argument rejected in that case was that the legislative scheme discriminated on the basis of race because “indigenous Territorians are more likely than non-indigenous Territorians to be intoxicated” when

36 *Munkara v Bencsevich* [2018] NTCA 4.

committing a qualifying offence. Counsel submitted that he did not advance a similar argument here.

[89] Instead, counsel claimed that, as in *Maloney*, the legislature has used geography as an indicium or proxy for race. Counsel contended that as the residents of indigenous communities are overwhelmingly Aboriginal people, they are more likely in a statistical sense to commit an offence against s 5D of the *Misuse of Drugs Act*. Aboriginal people in indigenous communities are thereby subject to a harsher sentencing regime for supplying less than a commercial quantity of a Schedule 2 dangerous drug in indigenous communities than non-indigenous people are for the supply of a Schedule 2 dangerous drug in their communities contrary to s 5A of the *Misuse of Drugs Act*.

[90] However, counsel for the defendant could not sustain the submission for four reasons. *First*, the argument is very similar to the unsuccessful argument made in *Munkara*. The fact that more Aboriginal people than non-indigenous people have committed an offence against s 5D does not mean that the legislation is discriminatory against them. *Second*, there is no right to supply less than a commercial quantity of Schedule 2 dangerous drugs anywhere in the Territory. *Third*, a person of any race living in any part of the Territory may commit an offence against s 5D by engaging in acts that fall within the extended definition of supply in an indigenous community. *Fourth*, s 5D only applies to Aboriginal people in indigenous communities

who commit such an offence. Section 5D has no operational effect at all until someone commits the specified offence.

[91] The section has no application to the vast majority of Aboriginal people living in indigenous communities. Only a very small percentage of Aboriginal people living in indigenous communities have committed an offence against s 5D of the *Misuse of Drugs Act*, or will commit such an offence in the future. Unlike the Queensland legislation in *Maloney*, the alleged “reduction in rights” in the Territory is contingent on the commission of the specified drug offence, not a declaration by the legislature that expressly restricts the otherwise lawful rights of Aboriginal people. Even then, the application of s 5D is subject to the application of the wide range of sentencing principles and other legislative provisions, described earlier in these Reasons for Decision, that may result in a sentencing disposition similar to a sentencing disposition imposed for an offence against s 5A for like offending.

[92] Consequently, it was necessary for counsel for the defendant to re-identify the two groups of people who the defendant says experienced a differential enjoyment of human rights and fundamental freedoms according to their race. In turn, counsel submitted that Aboriginal people in indigenous communities who committed an offence against s 5D were subject to a more severe sentencing regime than non-indigenous offenders who committed an offence against s 5A in a non-indigenous community. Different laws applied to the same criminal conduct depending upon the place of the offence and

the race of the person who committed the offence. Consequently, the rights to liberty and to equal treatment before the courts of Aboriginal drug offenders who committed a s 5D offence in an indigenous community were more limited than the rights of non-indigenous drug offenders who committed a drug offence against s 5A in a non-indigenous community.

[93] Counsel for the defendant developed his alternate argument as follows.

First, the enforcement provisions of s 5D only apply to Schedule 2 dangerous drugs supplied within the geographical bounds of an indigenous community. *Second*, as Aboriginal people are overwhelmingly the residents of indigenous communities, they are overwhelmingly the persons prosecuted under s 5D of the *Misuse of Drugs Act*. *Third*, a harsher sentencing regime applies to Aboriginal offenders in indigenous communities who commit a like offence to s 5A in their communities. *Fourth*, Aboriginal drug offenders' rights to liberty and to equal treatment before the courts are therefore more limited than the rights of non-indigenous drug offenders, because a charge against s 5D exposes them to a harsher sentencing regime than non-indigenous offenders charged with the corresponding offence against s 5A. It was submitted that such differential treatment was a consequence of using geography as an indicium or proxy for race and is in direct conflict with s 10 of the *Racial Discrimination Act*.

[94] The defendant's second attempt at identifying the group of persons of a particular race whose rights were limited or restricted according to their race by s 5D also cannot be sustained. Sections 5A and 5D do not apply to two

discrete groups of people according to their race. The offences against s 5A and s 5D of the *Misuse of Drugs Act* are not equivalent offences. The legislature has determined that an offence against s 5D is a more serious offence. Sections 5A and 5D do not apply to different groups of people in different geographic areas. Both sections are of general application. Both Aboriginal and non-indigenous people commit offences against s 5A and s 5D of the *Misuse of Drugs Act*. In addition, Aboriginal people who do not live in indigenous communities commit offences against s 5D.

[95] In 2017 and 2018, Aboriginal offenders comprised approximately half the offenders who committed an offence against s 5A. An Aboriginal person who commits an offence against s 5A is subject to the same sentencing regime as a non-indigenous person who commits that offence. A non-indigenous person who commits an offence against s 5D is subject to the same sentencing regime as an Aboriginal person who commits that offence. An Aboriginal person who commits an offence against s 5A is subject to a different sentencing regime to an Aboriginal person who commits an offence against s 5D.

[96] The fact that: (a) proximity to the ultimate consumers of Schedule 2 dangerous drugs, (b) the pyramid-shaped hierarchy of those engaged in the unlawful supply of dangerous drugs, and (c) the greater visibility of lower level drug offending, resulted in a preponderance of Aboriginal offenders being charged and convicted of offences against s 5D in 2017 and 2018 does not mean that more severe sentencing laws apply to Aboriginal drug

offenders than non-indigenous drug offenders. Nor does it mean that Aboriginal drug offenders are racially targeted. Nor does the preponderance of charges against Aboriginal drug offenders under s 5D mean that the increased criminal penalty of imprisonment for nine years is unfavourably directed at Aboriginal people in indigenous communities.

- [97] Having regard to those considerations, s 5D of the *Misuse of Drugs Act* cannot be said to unfavourably limit the rights and freedoms of Aboriginal people in indigenous communities, as a group of persons of a particular race, when compared to people resident outside indigenous communities, as the other group of persons whom it is said are able to enjoy the relevant rights and freedoms without limitation or in a less limited way.

How it is said those persons of the particular race enjoy to a more limited extent the identified human rights and fundamental freedoms, and whether s 5D of the *Misuse of Drugs Act* caused a disparity in the enjoyment of those rights and freedoms

- [98] Even if one was to accept for the sake of argument that Aboriginal people in indigenous communities do constitute a group of persons of a particular race for these purposes, the determination of whether and how s 5D of the *Misuse of Drugs Act* causes the identified rights and freedoms to be enjoyed to a more limited extent gives rise to similar considerations.

The right to liberty

[99] Counsel for the defendant submits that the defendant's right to liberty is limited by the prospect of a greater curtailment of personal liberty at two points:

- (a) the point of bail consideration;³⁷ and
- (b) the point of sentence.

[100] Counsel for the defendant submits that the impugned provisions have the effect that Aboriginal drug offenders who reside in indigenous communities and commit an offence against s 5D of the *Misuse of Drugs Act* face a presumption against bail and are exposed to more severe penalties than non-indigenous drug offenders who reside elsewhere and commit an offence against s 5A of the *Misuse of Drugs Act*. This is said to occur by virtue of both the increased maximum penalty of nine years imprisonment and the presumptive minimum mandatory sentence of 28 days actual imprisonment for an offence against s 5D, which do not attach to offences against s 5A. Counsel submits that if all things are equal, sentencing courts must impose higher penalties on Aboriginal people who commit an offence against s 5D than on non-indigenous persons who commit an equivalent offence against s 5A. In addition, the presumptive mandatory minimum sentence of 28 days imprisonment for s 5D means that more persons connected with indigenous communities will face a period of actual imprisonment compared to persons

³⁷ As described above, s 7A(1)(c) and (2) of the *Bail Act* creates a presumption against bail for an offence against the *Misuse of Drugs Act* punishable by a term of imprisonment for seven years or more. The presumption applies to offences contrary to ss 5, 5A (Schedule 1 drug), 5B, 5C, 5D, 6, 6C, 6D, 6E, 6F, 6G, 7, and 7C (Schedule 1 drug).

who are unconnected to indigenous communities and commit an offence against s 5A.

[101] The right to liberty has the following elements. Laws that provide for the deprivation of liberty must not be arbitrary. The laws must be capable of being known in advance and must be reasonably predictable. A person must not be deprived of their liberty without sufficient cause and due process. A person must not be subjected to arbitrary arrest or detention. Anyone arrested or detained on a criminal charge shall be brought promptly before a Judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release subject to guarantees to appear at trial or at any other stage of the proceeding. No one shall be deprived of his or her liberty except on such grounds, and in accordance with such procedures, as are established by law. A person may only be criminally punished following a finding of guilt at trial, or a plea of guilty. A heavier penalty than that which was applicable at the time the offence was committed must not be imposed. Any penalty must be proportional to the objective seriousness of the offence.

[102] In the Territory, all persons charged with an offence against either s 5A or s 5D of the *Misuse of Drugs Act* are entitled to all of the rights described in the preceding paragraph. Neither the greater maximum penalty of nine years imprisonment attached to s 5D, nor the presumptive minimum mandatory penalty attached to s 5D, nor the presumption against bail deprives a person charged with an offence against s 5D of any of those rights.

[103] The defendant's submissions are predicated on a comparison between the sentencing regime applicable to an offence against s 5A of the *Misuse of Drugs Act 1990* on the one hand, and the sentencing regime applicable to an offence against s 5D on the other hand. Those submissions fail to acknowledge the fact that the two offences are discrete offences of general and equal application. An Aboriginal person who resides in an indigenous community may commit an offence against s 5A by supplying drugs to a person in Darwin or the same Aboriginal person may commit an offence against s 5D by supplying drugs in an indigenous community. Accordingly, Aboriginal offenders are subject to different sentencing regimes depending on whether they have offended against s 5A or s 5D.

[104] Likewise, non-indigenous people may commit an offence contrary to either s 5A or s 5D and are subject to different sentencing regimes accordingly. However, both Aboriginal drug offenders and non-indigenous drug offenders are subject to the same sentencing regime and the same minimum and maximum penalties if they commit an offence against s 5D. It is likewise, if they both commit an offence against s 5A. In respect of both offences, the laws of bail and sentencing apply equally to both Aboriginal and non-indigenous offenders.

[105] Section 5D of the *Misuse of Drugs Act* has no impact upon an Aboriginal person's right to liberty unless he or she commits an offence contrary to s 5D and is duly charged and subject to the due process of the law. The provisions of s 5D are certain and taken to be known in advance. The

consequences of being charged and convicted of such an offence are predictable. There is no suggestion that the defendant was detained arbitrarily or is to be dealt with under an arbitrary law. The defendant has a right of appeal if the sentencing court imposes a disproportionate sentence on her.

[106] The defendant seeks to address the general and equal application of the provisions on the basis that, although they are facially neutral, the population and conviction statistics before the Court compel a conclusion that s 5D of the *Misuse of Drugs Act* nevertheless limits the enjoyment of the right to liberty by Aboriginal people who commit an offence against that provision. The defendant submits that the limitation of that right turns upon a connection of the offender to an “indigenous community”, a connection that must primarily attach to Aboriginal people as a matter of logic. The defendant contends that in this case “criminal offending” is not the legislative discrimin on which the limited enjoyment of rights turns. Rather, under s 5D of the *Misuse of Drugs Act*, presence in an indigenous community serves as a proxy for race. Thus, the defendant says, the higher maximum penalty, and the corresponding limitation on the enjoyment of the right to liberty by offenders, is a function of race.

[107] The defendant says the contention that s 5D creates an operational discrimination is not answered by asserting that the aggravated offence applies to conduct by persons both within and without indigenous communities. The defendant submits that the analogy is false because it does

not compare like with like. The defendant submits the proper analogy is between drug suppliers based in Malkala who supply in Malkala contrary to s 5D and suppliers based in Darwin who supply in Darwin contrary to s 5A. On that analysis, it is said to be demonstrably incorrect to assert that both groups face the same prohibition, and are exposed to the same penalties.

[108] In support of the last proposition the defendant relies on the remarks made by Hayne J in *Maloney*, and in particular where his Honour stated (emphasis added):

It is important to recognise that, even though the impugned provisions take geographical place as the criterion for their operation, they deal with the rights of persons. When it is said, correctly, that the impugned provisions apply equally according only to whether a person is in a restricted area on Palm Island, it remains of the very first importance to the application of the RDA to recognise that the effect of the impugned provisions is on the rights of those who live on Palm Island (and any other person who is visiting Palm Island). Those who live on Palm Island are overwhelmingly Aboriginal persons. The extent to which the residents of Palm Island enjoy the right to own property differs from the extent to which persons resident elsewhere in Queensland enjoy that right, and argument in this court proceeded on the implicit footing that those who are resident elsewhere are predominantly non-Aboriginal persons.³⁸

[109] The defendant's suggested analogy and submissions are unsustainable. *First*, as stated above, s 5D of the *Misuse of Drugs Act* imposes no prohibition or restriction on otherwise lawful conduct or activity; and the prohibition on supply activity is not directed to persons who live in indigenous communities or who are necessarily visiting indigenous communities. Geography is not used as a proxy for race as it was in the Queensland

38 *Maloney v The Queen* (2013) 252 CLR 168 at [84]; see also [78]-[83].

legislation under consideration in *Maloney*. *Second*, as stated above, the agreed facts do not show the number of Aboriginal drug offenders who were actually living in indigenous communities at the time they committed these offences against s 5D; and there is no information before the Court that suggests the mandatory sentencing provisions or the presumption against bail have had an adverse impact on the liberty of Aboriginal people charged with an offence against s 5D of the *Misuse of Drugs Act* compared to non-indigenous people charged with an offence contrary to s 5A of the Act. *Third*, as stated above, almost 50 percent of offenders who committed an offence against s 5A of the *Misuse of Drugs Act* in 2017 and 2018 were Aboriginal offenders. The offence those offenders committed is a different offence to that of supplying less than a commercial quantity of Schedule 2 dangerous drugs in an indigenous community. They were sentenced according to the legislative provisions applicable to s 5A, not those applicable to s 5D. *Fourth*, even if it is accepted that s 5D of the *Misuse of Drugs Act* has a disproportionate operation in relation to Aboriginal offenders in some relevant sense, for the reasons already given that operation is not one which imposes a limitation on the enjoyment of the right to liberty as properly characterised. The determination of the minimum and maximum penalties is not arbitrary, an Aboriginal person's liberty cannot be lost without due process, and the difference in incarceration rates is not manifestly disproportionate.

[110] Section 5D of the *Misuse of Drugs Act* does not directly affect anyone's rights. Section 5D creates an aggravated criminal offence for the supply of a particular type and quantity of dangerous drugs in an indigenous community. The purpose of the section is to try to protect Aboriginal people who reside in deprived and disadvantaged indigenous communities from the ravages of the illicit drug trade that are well known to the courts. The words "indigenous community" in s 5D identify the protected persons, not the persons whose rights are affected. The purpose of s 5D is to deter all people (not just Aboriginal people residing in indigenous communities) from engaging in the supply of less than a commercial quantity of Schedule 2 dangerous drugs in indigenous communities. Section 5D has no operational effect until a person commits an offence contrary to that section. The offence is committed by both Aboriginal and non-indigenous people.

[111] Mere connection to an indigenous community is insufficient to give rise to any liability under s 5D. An Aboriginal person who lives in an indigenous community and supplies dangerous drugs in a non-indigenous community cannot be subjected to the application of s 5D. The necessary connection is the supply of dangerous drugs in an indigenous community. The fact that Aboriginal people may appear disproportionately in the sentencing statistics for a criminal offence does not, in and of itself, compel the conclusion that in its legal and practical operation the law discriminates against Aboriginal people based on race.

[112] The prosecution of a greater proportion of Aboriginal defendants than non-indigenous defendants for an offence against s 5D in 2017 and 2018 is not a function of their race; it is a function of the number of Aboriginal offenders who deliberately chose to commit an offence against s 5D. It is the experience of the courts that the majority of Aboriginal offenders tend to engage in more visible, lower level offending and are more likely to be observed and caught. That experience is borne out by the agreed facts, which show that only about 5 percent of Aboriginal offenders were committed to the Supreme Court for an offence against s 5D, whereas more than 50 percent of non-indigenous offenders are committed to the Supreme Court for an offence against s 5D.

The right to equal treatment before the courts

[113] A limitation on the right to equal treatment before the courts is said by counsel for the defendant to be imposed in three ways:

- (a) In bail proceedings, Aboriginal persons in indigenous communities who are charged with an offence against s 5D of the *Misuse of Drugs Act* face a presumption against bail. Whereas, non-indigenous persons charged with an offence against s 5A of the *Misuse of Drugs Act* (all things being equal) enjoy a presumption in favour of bail.
- (b) In sentencing proceedings, Aboriginal persons in indigenous communities charged with an offence against s 5D face a presumptive mandatory minimum sentence of 28 days actual imprisonment under

s 37(2) and (3) of the *Misuse of Drugs Act*. Non-indigenous persons charged with an offence against s 5A do not.

- (c) By prescribing a higher maximum penalty of 9 years imprisonment under s 5D for the supply of less than a commercial quantity of a Schedule 2 dangerous drug in an indigenous community.

[114] Counsel for the defendant submits that the presumption against bail is a procedural presumption that reverses the onus of proof for Aboriginal people charged with an offence against s 5D who are applying for bail. In fact, the onus of proof in bail applications is reversed for all people charged with an offence against s 5D. The reversal of the onus of proof has the consequence that the courts treat Aboriginal people charged with an offence against s 5D less favourably than non-indigenous people charged with an offence against s 5A. The presumption against bail, which operates prior to a finding of guilt, creates a substantial procedural disadvantage that limits the rights of Aboriginal people in indigenous communities charged with an offence against s 5D to equal treatment before the courts.

[115] Counsel for the defendant accepts that the right to equal treatment before the courts is a right to equality of access to the courts and tribunals and in the application of the law by them. However, the defendant submits that s 37(2) of the *Misuse of Drugs Act* is a procedural or adjectival provision. The defendant says that the effect of s 37(2) and (3) of the Act is that the law of sentencing is not equally applied to Aboriginal drug offenders in indigenous

communities who are found guilty of an offence against s 5D. Subsections 37(2) and (3) create a presumption that an Aboriginal drug offender who is guilty of an offence against s 5D should spend at least 28 days in prison. All things equal, no such presumption applies to a non-indigenous drug offender who has committed an offence against s 5A in his community.

[116] Counsel for the defendant says the maximum penalty of nine years imprisonment has the consequence that Aboriginal drug offenders who commit an offence against s 5D of the *Misuse of Drugs Act* are subject to sentencing principles that apply to serious offences. Those sentencing principles are different to the sentencing principles that apply to non-indigenous drug offenders who are sentenced for drug offences against s 5A. The impugned provisions have the effect that Aboriginal persons found guilty of offences against s 5D are not treated equally before the courts because they are exposed to a more severe sentencing regime than non-indigenous people found guilty of an offence against s 5A.

[117] Those submissions cannot be accepted. As already stated, the right to equal treatment before the courts is not properly equated to a right to equal protection of the law. The right to equal treatment before the courts in Article 5(a) of the Convention is focused on equality in the administration and enforcement of laws by courts and tribunals. It was on this basis that a majority of the High Court in *Maloney* found, or at least observed, that the Queensland legislation under consideration there, although it breached identified proprietary rights and freedoms, did not impose any relevant

limitation or prohibition on the right to equal treatment before the court. In terms similar to the observations made by Gageler J which have been extracted above, French CJ stated:

The appellant's reliance upon the equal treatment right was not well founded. The complaint, as the majority (Chesterman JA and Daubney J) of the Court of Appeal characterised it, was not that the Magistrates Court discriminated against her on the basis of race, but that the law pursuant to which she was prosecuted had a discriminatory operation. In this Court, the appellant did not argue that she had been treated in the courts of Queensland any differently in matters of procedure from the way in which a non-Aboriginal person would have been treated. She submitted, in effect, that the unequal treatment was constituted by her being charged and convicted for an offence against a law which, in its practical operation and effect, was directed to persons of a particular race. That complaint, however, was not one about equal treatment before the courts. As the respondent submitted, the *Liquor Act* and the *Liquor Regulation* did not require any court to apply the law to the appellant in a manner that was different from the way in which the laws applied to non-Aboriginal persons.³⁹

[118] Hayne J stated:

It may be doubted that by reason of the impugned provisions Aboriginal persons (whether those who reside on Palm Island or some wider class) do not enjoy the same rights to equal treatment before the courts and the same rights of access to any place or services as persons of any other race. It is not necessary, however, to decide these issues. It is sufficient in this appeal to consider only the right to own property.⁴⁰

[119] Kiefel J stated:

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. Procedural equality, as the

³⁹ *Maloney v The Queen* (2013) 252 CLR 168 at [36].

⁴⁰ *Maloney v The Queen* (2013) 252 CLR 168 at [73].

respondent submits, may be taken to extend to equality in the application of the law.⁴¹

[120] Bell J stated:

The first right which Ms Maloney submits the liquor restrictions limit is the right to equal treatment before the tribunals and all other organs administering justice recognised by Art 5(a). Ms Maloney does not complain that she was treated differently from the way non-Aboriginal accused persons are treated before the courts in Queensland. Her contention is that the right to equality of treatment extends to the substantive provisions of the law. She complains that she has been convicted of an offence against a law that in its practical operation and effect is directed to Aboriginal persons. Those submissions should be rejected. The right in Art 5(a) is akin to the right declared in Art 14 of the ICCPR 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.⁴²

[121] The legislation under consideration in this case imposes no limitation on the right to equal treatment. The defendant has wrongly endeavoured to equate the substantive content of s 5D and s 37(2) and (3) of the *Misuse of Drugs Act*, and s 7A of the *Bail Act*, with the administration and enforcement of those provisions. There is nothing in those provisions which would interfere in the relevant sense with their administration and enforcement by the courts.

[122] For these reasons, the questions of law reserved for the opinion of this Court are answered in the terms set out at paragraph [4] above.

⁴¹ *Maloney v The Queen* (2013) 252 CLR 168 at [151].

⁴² *Maloney v The Queen* (2013) 252 CLR 168 at [215].