AFFIRMATIVE ACTION AS A FORM OF SPECIAL MEASURES IN AUSTRALIA: CANVASSING THE HIDDEN ISSUES

Antony Barac and Loretta Kelly*

> The use of race is a dangerous business; it lends itself to great abuses. If we allow policymakers to use race, we open the way to policies which do good but we necessarily also open the door to inevitable abuses which in the long run will outweigh all the good. Over the long run, general welfare is best served by our adopting an absolute prohibition against the use of race.[1]

I Introduction

Most nations of the world have now chosen to be bound by international law that prohibits racial discrimination.[2] Indeed the *Universal Declaration of Human Rights* states: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'[3]

Parties to the *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD') seek to enforce part of this entitlement to freedom by undertaking 'to prohibit and to eliminate racial discrimination in all its forms'.[4] Further, the ICERD requires a State party to take special measures if its population includes a race(s) that does not enjoy human rights on a basis equal to the rest of the population.[5]

In this article, we do not take issue with the ICERD's requirement to implement special measures.[6] Rather, we consider whether affirmative action programs (which are a large sub-set of special measures) that purport to be for the 'adequate development' of Indigenous Australians are, when closely examined and investigated, actually beneficial.[7]

II Affirmative Action as a Species of Special Measures?

As a party to the ICERD,[8] Australia prohibits racial discrimination through Commonwealth,[9] state and territory laws.[10] Even the benign intent of a racially differentiating measure will not operate to save such a measure, should it be challenged.[11] The only way to validate an impugned racially differentiating measure is, in most cases, to satisfy the special measures exception, stated in section 8(1) of the *Racial Discrimination Act 1975* (Cth) ('RDA').[12] The legal basis of race-based differential treatment in Australian law thus differs from international law, as the Parliamentary Joint Committee on Human Rights notes:

> The Court [in *Maloney v The Queen*][13] proceeded on the basis of the judgment in *Gerhardy v Brown* and the constraints of section 10 of the RDA which the Court interpreted as having the effect of rendering all legislation which involves racially based treatment discriminatory – and thus only capable of being lawful if it can be characterised as a special measure.
>
> The relevant international law is not so constrained – a racially based distinction may be justified as a reasonable and proportionate measure in pursuit of a legitimate goal, even if it is not a special measure (special measures are just one example of a reasonable and proportionate measure adopted in pursuit of a legitimate goal).[14]

Although we often use the blanket term special measures,[15] as defined by domestic law,[16] in reference to programs and policies specifically restricted to Aboriginals and Torres Strait Islanders,[17] we are mainly concerned with the dominant sub-species of special measures that are better understood as affirmative action.[18]

We acknowledge that, in Australia, affirmative action is the term typically used for programs that encompass gender-based preferential treatment[19] (even though the *Convention on the Elimination of all Forms of Discrimination Against Women* also uses the term special measures).[20] In this article, we restrict our discussion of affirmative action to race-based preferential treatment.

In most cases, the two terms (affirmative action and special measures) are used interchangeably, as French CJ commented in *Maloney v The Queen*[21] *('Maloney')*:'"special measures" are ordinarily measures of the kind generally covered by the rubric "affirmative action".'[22] However, *Maloney* held that the special measures exception could validly be asserted as applying to actions far beyond what would normally be considered as affirmative action, including 'negative' measures that criminalise alcohol possession in (predominantly) Aboriginal communities.

III Recent Australian Experience with Special Measures

History is replete with discriminatory law and policies intended to benefit Aboriginal people, an obvious example being the forcible removal of 'mixed-blood' children. Who decides whether a special measures law is for the advancement of Indigenous people? Contrary to international law, in Australia it is not Indigenous people who decide what is beneficial. As *Maloney*[23] has confirmed, it is the government (and ultimately the High Court) that decides. Simon Rice argues that, '*Maloney* significantly narrows any basis for challenge [to a special measure], by significantly broadening the latitude given to government to "foist" special measures on communities.'[24]

This follows the invidious example of the Northern Territory Emergency Response ('NTER') package of legislation,[25] which took a double-barrelled blast at the RDA, deeming its amendments to be both exempt from the RDA's prohibition on racial discrimination and a special measure under the RDA.[26]

In light of the NTER, and other special measures that restrict the rights of Indigenous people, Hunyor argues for a re-thinking of the approach to special measures, because:

> Somewhere along the way, the concept of special measures has shifted from positive measures that confer additional benefits upon a disadvantaged group, to measures that take them away because it is 'good for them'. The reasons for this seem to lie in the 'mechanical jurisprudence' of the High Court in *Gerhardy* that, in effect, gives us nowhere else to go by equating all differential treatment with discrimination.[27]

An Indigenous addendum to the analyses of *Maloney* might be that, even if the government does consult communities,[28] ultimately it is a non-Indigenous body that decides the matter, whether that is the High Court or Parliament.

IV Success of Special Measures in Australia

Which 'special and concrete measures' will achieve adequate development and protection of Indigenous Australians? In other words, what will work? The reason this is perplexing is that an array of special measures[29] have not shifted Indigenous disadvantage across most socio-economic categories in over four decades[30]of special measures: 'despite successive governments at all levels implementing policies aimed at addressing this disparity, gaps persist in many areas.'[31]

As Altman et al, conclude:

> While our analysis suggests that at the national level there has been improvement in the three and a half decades to 2006, we also accept that the current rate of improvement is too slow. Nevertheless, using recent economic history as our guide, we predict that it will take many years, possibly many generations, before the respective gaps are closed.[32]

In higher education, for example, Indigenous students are less than one per cent of enrolled students, but constitute two and a half per cent of the Australian population[33] and '[d]espite various efforts made by Australian universities to tackle issues behind low education participation rates of Indigenous Australians, the state of Indigenous education can be currently described as being in crisis.'[34]

The situation in employment is similarly disturbing. Altman takes the view that the employment gap (between Indigenous and non-Indigenous people) is growing, 'especially … in remote areas because CDEP (community development employment project) is being cut in places where there are few alternate forms of employment'. In particular, '[b]etween 2006 and 2011 the [I]ndigenous employment/population ratio for those aged 15–64 declined from 48.0 to 46.2'[35] and 'the [I]ndigenous unemployment rate has increased from 15.6% to 17.1%.'[36]

On the other hand, there is evidence in other areas that Indigenous-targeted government spending initiatives,[37] as part of the Closing the Gap ('CTG') strategy, have been successful in important respects. Of the six CTG targets,[38] the following three are on-track to be (or already have been) met:

- Ensur[ing] access to early childhood education for all Indigenous four year olds in remote communities by 2013;
- halv[ing] the gap in mortality rates for Indigenous children under five by 2018; and
- halv[ing] the gap for Indigenous students in Year 12 (or equivalent) attainment rates by 2020.[39]

The other three are behind schedule:

- Halv[ing] the gap in reading, writing and numeracy achievements for children by 2018;
- halv[ing] the gap in employment outcomes between Indigenous and other Australians by 2018; and
- clos[ing] the gap in life expectancy within a generation (by 2031).[40]

Interestingly, the three CTG targets that are on-track all relate to children. There is little public controversy about special measures related to children (such as free pre-school for remote Aboriginal children), nor about special measures in critical areas of health (such as Aboriginal-specific ante-natal care). This is because most Australians believe that merit and personal resources should never play a part in access to health or childhood education.

Unlike health and childhood education in Australia, merit and personal resources are in constant tension in determining who should be able to access prestigious university positions and public service employment. Historically, family riches and status swayed the allocation of such positions to the ruling classes. But during the 19th century, the concept of 'meritocracy', which the West borrowed from China, meant that scarce public resources were increasingly allocated on the basis of a person's ability and intellect. However, the benefits of this meritocracy were generally restricted to white men until the 1960s. Affirmative action sought to change the situation.

V Types and History of Affirmative Action

United States researchers typically divide affirmative action programs ('AAPs')[41] into several categories.[42] For example, Louis Pojman differentiates between two types of affirmative action. Pojman notes the existence of 'weak' affirmative action, which would be like the programs undertaken by large private employers to address gender discrimination under equal opportunity programs.[43] He also notes the existence of 'strong' affirmative action, which involves further steps such as 'hiring candidates on the basis of race and gender in order to reach equal or near equal results'.[44] This form of affirmative action is also known as race or gender preferencing.

Affirmative action in the United States preceded the 1965 adoption of the ICERD in the United Nations General Assembly by several years.[45] However, India has been the country with the longest experience of affirmative action,[46] where: 'at the beginning of the twentieth century, prior to independence, three southern states of India had a policy of reserving places for lower caste people in the state civil service.'[47]

Despite a long history of AAPs around the globe, the question of their benefit is not settled. Critics such as Thomas Sowell have been particularly scathing about AAPs:

> Innumerable principles, theories, assumptions and assertions have been used to justify affirmative action programs - some common around the world and some peculiar to particular countries or communities. What is remarkable is how seldom these notions have been tested empirically, or have even been defined clearly or examined logically, much less weighed against the large and often painful costs they entail. Despite sweeping claims made for affirmative action programs, an examination of their actual consequences makes it hard to support those claims, or even to say that these programs have been beneficial on net balance - unless one is prepared to say that any amount of social redress, however small, is worth any amount of costs and dangers, however large.[48]

A Controversy over Affirmative Action

Perhaps because of the scale of its AAPs, United States research and discussion has been voluminous.[49] Public controversies spring up often; two recent United States Supreme Court cases,[50] about the validity of affirmative action in higher education, has generated many pages of commentary and opinion.[51]

Surprisingly, Australia has seen little public controversy, aside from talk-back radio and the popular press,[52] about

the merits (or otherwise) of special measures. There has been even less academic discussion. However, in the private domain of working class Australia, the view that Aboriginal and Torres Strait Islanders 'get lots of [government] benefits' is one held by many non-Indigenous Australians. For example, Maggie Walter refers to:

> A cross-wave (1993–2004) analysis of Australian election studies data…on respondents' agreement with the statement 'Government help for Aborigines has gone too far' also found older, male, less educated respondents were statistically more likely to agree with the statement.[53]
> …
> Respondent statement agreement levels were 46 per cent in 1993, rose to more than 50 per cent agreement in 1996 and 1998, but by 2004 had returned to their 1993 levels of just less than a majority. The period of higher agreement, 1996–98, coincides with the political influence of Pauline Hanson's One Nation party. This link suggests attitudes can be affected by dominant public discourses, but also tend to reflect an underlying population norm.[54]

B Purpose of Affirmative Action

Affirmative action programs have both a past and a future focus; they are intended to address past injustices and improve social inequalities in the future. As Pojman explains in relation to affirmative action in the United States:

> The backward-looking feature is its attempt to correct and compensate for past injustice. This aspect of Affirmative Action is strictly deontological. The forward-looking feature is its implicit ideal of a society free from prejudice; this is both deontological and utilitarian.[55]

It is possible to suggest that affirmative action also has an immediate present feature, being the control of minority dissent. Controversially, Reno argues that '[a]ffirmative action is a technique for social engineering' and that it is also:

> [A] way to fine-tune racial (or gender or sexual identity) politics. Put somewhat more provocatively - and perhaps more accurately - affirmative action has become a technique for confecting a docile diversity that both eases social tensions and reinforces elite dominance. This has proven to be very useful. These are among the reasons why it remains so popular among people in positions of power who feel themselves responsible for ensuring just outcomes, maintaining social equilibrium (which of course includes their own predominance).[56]

Whether or not these past and present features underlie, or are implied by, affirmative action measures in Australia is a matter for debate. More relevant is the stated purpose of the measure, because, as Lederer argues, 'the effectiveness of affirmative action can only be measured if its objectives are defined in clear goals. The lack of the latter … makes it hard to evaluate the success or failure of affirmative action measures.'[57]

Indeed critics of affirmative action suggest that any measure relying on race as a criterion implies that the recipient's race - and the individual himself or herself – is 'lesser' to some extent.[58] Despite this, there is a compelling social purpose for affirmative action, as Reno acknowledges:

> There are historical and cultural reasons why affirmative action seems indispensible, even today, and the law almost always bends to make room for what we can't imagine doing without.
> …
> [Yet] [a]ffirmative action requires discrimination for the sake of overcoming discrimination, which can be hard to reconcile with the anti-discrimination principles.[59]

VI Affirmative Action and the Merit Argument

Merit is critical to the type of post-school education and vocation to which one has access. Much greater controversy exists in these areas, at least in the United States, because the decision to override the merit criterion[60] with the race criterion is of great moral significance.[61] However, the definition of merit changes over time and with context, and is highly subjective. McCrudden points out that '[m]erit has no one set of conceptual or moral requirements.'[62] Indeed, he proposes that there are 'five basic conceptions of merit, and (at least) two different weightings are possible of each… and this is before we get to the issue of how to put it into operation.'[63] In contrast, David Sacks and Peter Thiel argue that:

> The sole criterion … in defining 'merit' should be individual achievement - not just grades and test scores, of course, but a broad range of accomplishments, in athletics, music, student government, drama, school clubs and other extracurricular efforts.[64] But race and ethnicity (or gender or sexual

> preference) do not have a place on this list; these are traits, not achievements.'[65]

This bears resemblance to Pojman's belief that merit should not include race, in stating 'Even the most ardent advocate of affirmative action on university campuses refrains from advocating that positions on the football, basketball or track team be based on any other criterion than merit.'[66]

There is little argument that race or ethnicity is an important criterion in a small number of occupations. For example, an Aboriginal health worker should usually be Aboriginal because of the need for affinity with patients. The debate centres on occupations where race has little, or no, relevance to one's ability to do the job.[67] In higher education, most courses feed into vocations that do not require persons of a specific race or ethnicity in order to do their job well. Thus the use of race as a criterion of admission on the basis that the future job requires someone of a particular race to fulfil the requirements of the position is, in most situations, dubious, if not objectionable.[68] Our discussion focuses on special measures in tertiary education and the professions because of the importance of 'merit' in determining both admission and progress.

VII The Race Base

The fact that race has no genetic basis[69] has been difficult for many to accept, as David Hollinsworth explains, with some exasperation: 'Because this is contrary to what many of us believe (and can "see with our own eyes"), it has been hard to get this scientific truth accepted or to get the media and politicians to take it on board…the laws about racial discrimination still use this faulty language.'[70]

However, race is a powerful social construct that exists separately from any scientific concept of race, as Loury points out:

> [The] use of 'race' as an instance of social-cognition is an altogether distinct enterprise from using 'race' as an instrument of biological taxonomy.
>
> …
>
> No objective racial taxonomy need be valid for the subjective use of racial classifications to become warranted.[71]

Without an objective taxonomy, the use of race as a determinant for receiving scarce public goods (such as enrolment in a medical course) presents its own technical and social difficulties, which we have explored elsewhere.[72] Furthermore, the stamp of government approval on the use of racial tests[73] for affirmative action or special measures leads to the possibility that (scientifically false) perceptions of racial difference are heightened.[74] Ironically, this is occurring at the same time that the argument of white race privilege for the success of white people is becoming increasingly undermined by the economic success across the Anglophone world of non-white peoples, chiefly those from eastern Asia and the Indian sub-continent.

Given the strength of the cultural, social, economic, and psychological aspects of race or ethnicity, its centrality in certain government policies (affirmative action and special measures policies)[75] presents a danger to the national psyche. The idea that one's race may have played a part in one's success (or failure) threatens the liberal, meritocratic tradition.[76] By contrast, others have noted the positive effects on the national psyche when a person of a disadvantaged minority succeeds on their own merits.[77]

For example, Anthony Dillon opines that:

> While this nation takes some pride in including and celebrating Aboriginal culture, the obsession with Aboriginal identity by some (typically by those with the least Aboriginal ancestry) contributes to the divide between Aboriginal Australians and non-Aboriginal Australians, thus leading to a state of separatism. Separatism is the ideology that the interests of Aboriginal people are best served where Aboriginal people, as a collective, function separately from non-Aboriginal people, and hence are assumed to have greater freedom in deciding how they will live. When this happens, there is the potential for Aboriginal people to see themselves and others, primarily in terms of racial/cultural differences, rather than focusing on human commonalities, which far outweigh any differences. It is the human commonalities that unite us and make us one people - this realisation is a prerequisite for reconciliation.[78]

VIII Unintended Consequences of Affirmative Action

The intractability of Indigenous disadvantage described earlier suggests, borrowing a phrase from economics, that there is an 'invisible hand' working contrary to the intent of policy.[79]

Surprisingly, there is little debate in Australia about the effectiveness or efficiency of affirmative action measures and research about its unanticipated consequences is almost non-existent. This stands in stark contrast to the United States, where affirmative action has been a contentious topic for research and debate, both in academia and in the media, ever since it was enacted in the early 1960s.

In relation to Australian affirmative action measures, the suggestion made by some critics is that the inadvertent effect of benevolent government policies has been to exacerbate (or at least not alter) the deplorable socio-economic conditions of many Indigenous Australians in key policy areas. Several Indigenous politicians, spokespeople and the occasional academic have pointed to the cumulative psychological impact of race-based policies on Indigenous people. Noel Pearson comments that:

> While in the past there was much adverse discrimination against Indigenous people on the basis of race, now there is positive discrimination - well intentioned - but often with adverse results…The race-based approach has perpetuated low expectations and undermined personal responsibility.[80]

Alison Anderson refers to 'separate development', rather than affirmative action or special measures:

> The idea that separate development was the answer provided hope for many and jobs for an increasingly powerful few. However, it has failed. I suggest the past 40 years of Aboriginal policy has been a sort of experiment, an experiment with human lives costing billions of dollars … It was a great experiment, perhaps even a necessary one, but it has failed.
> …
> How did all this happen? For the usual reason: because we continued to judge our ideas by their noble intentions instead of by their results.[81]

Kerryn Pholi writes:

> To accept preferential treatment on the basis of one's race - in employment, academe, the arts, the media - is to participate in racism. It does not 'close the gap', promote role-models or let you 'challenge the system from within'.
>
> To genuinely challenge racism we need to stop rationalising our individual self-interest, reject preferential treatment, compete in the open market for jobs, grants and audiences, and accept the financial and career consequences of refusing to be bought.[82]

Helen Hughes, a non-Aboriginal researcher, argues in relation to remote communities that, 'a range of Commonwealth, Territory and State exceptionalist policies[83] have created Indigenous disadvantage. In effect, Hughes makes out an unintended consequences argument. Despite the criticism this publication received,[84] her work highlights powerful conflicting incentives that have developed across a host of policy areas, leading her to argue that, 'the effects of positive discrimination have been even more disastrous than the previous eras of discrimination against Aborigines and Torres Strait Islanders'.[85]

This corresponds with some of the discussion about the impact of AAPs in the United States, such as Armstrong Williams' opinion piece for *The Washington Times* stating, 'The social engineering of liberal policymakers often has the unintended consequences of making life more difficult for the people it is trying to help.'[86]

A Use of Affirmative Action in Employment and Higher Education

Like Canada and Australia, mandatory *quotas* for minorities and women in employment are rarely used in the United States. The setting of numerical *goals* however, is common for employment AAPs in all three nations.[87] Despite the prevalence of AAPs amongst large (particularly public sector) employers in these and other nations, published research on AAPs – especially in the United States, from which most of this corpus of research emanates – centres on the higher education sector. This may be because, 'affirmative action preferences have become institutionalized in various settings, but perhaps in none so extensively - and so much as a matter of institutional credo - as in higher education.'[88]

Nonetheless, eight American states have now banned the use of race-based preferences for admission to public universities.[89] Indeed some commentators, such as Kahlenberg and Potter suggest that, '[a]fter almost a half century, American higher education's use of racial preferences in admissions to selective colleges may well be coming to an end.'[90]

If that is the case, Australia is travelling further in the opposite direction. At present, 35 of Australia's 39 universities have 'alternative entrance' for admission of Indigenous students.[91] The Panel of the Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People recommends that:

> The government and universities should negotiate stand-alone performance targets related to Aboriginal and Torres Strait Islander student and staffing levels within the mission-based compact negotiations. This approach was supported in submissions to the Review.[92]

Furthermore, the previous Labor Federal Government supported recommendation 30 of the Bradley report,[93] being '[t]hat the Australian Government regularly review the effectiveness of measures to improve higher education access and outcomes for Indigenous people in consultation with the Indigenous Higher Education Advisory Council.'[94] The Bradley report did take note of developments in the United States, which highlighted that, 'initiatives to broaden participation in higher education in the United States to date have been mainly focused on race, but it is now recognised that low socio-economic status is a primary determinant.'[95]

It remains to be seen whether the 20 per cent target set by the Australian higher education sector for admission of low socio-economic status students[96] renders affirmative action in the sector redundant.[97] The argument however, that class-based affirmative action could and should replace race-based affirmative action is not the point, argues Walter Benn Michaels:

> [T]he fundamental inequalities in American life today - the rich getting richer while the poor get poorer - are not produced by discrimination and cannot be resolved by anti-discrimination. And affirmative action - whether class-based or race-based - is only a way of buttressing those inequalities. As is, indeed, the entire emphasis on education as the key to a more economically just society.
>
> …
>
> In fact, the debate over affirmative action has never had anything to do with reducing inequality; it's always been about justifying it.[98]

We cannot evaluate the political basis of Michael's thesis in this article, but we can outline a number of arguments about the unintended negative effects of affirmative action that have been investigated by a variety of American studies.

AAPs operate in the United States on a vast scale in comparison to Australia. This is because of three factors:

- Size of the population: The United States' population is 316 million[99] in contrast to Australia's 23 million.[100]
- Size of minorities to which AAPs apply: For example, the 'Black or African American alone' minority constitutes 13.1 per cent of the United States' population[101] (note that the 'American Indian and Alaska Native alone' category is only 1.2 per cent of the United States' population).[102] By contrast, race-based special measures in Australia apply to only three per cent of the population who identify as Indigenous.[103]
- Mandatory nature of some AAPs: For example, numerical goals for employment of minorities and women are mandatory for United States Federal Government contractors.[104]

The size of AAPs in the United States makes them much more visible to the public and therefore more open to scrutiny, which explains why much of the research we cite is of American origin. We cannot do justice to all of these studies here, as this is merely a snapshot of important arguments and research on the topic, not a comprehensive review.[105]

B Evidence about the Unintended Consequences of Affirmative Action

(i) Academic Mismatch Hypothesis

The argument is that placing people in courses or jobs that they did not gain access to on their own merit sets them up to fail. They may not have the aptitude or ability for that position or course,[106] and as a result may be more likely to quit.

However, research by Mary Fischer and Douglas Massey concludes that their 'estimates provided no evidence whatsoever for the mismatch hypothesis.'[107] On the other hand, this has been disputed, most notably in the book by Richard Sander and Stuart Taylor.[108] Sander and Taylor's support for the academic mismatch hypothesis has itself received scathing criticism, including from William Kidder, who states 'their [Sander and Taylor's] thesis is not supported by the relevant body of peer-reviewed social

science, and…[their support for] "mismatch" does the debate about affirmative action - and the country - a great disservice.'[109]

The higher education system in the United States is significantly different to Australia's, most notably in the presence of up-front fees. The demographics of the student body,[110] policy and historical differences also constrain the application of United States research to Australia. We can only really use United States studies as food for thought, and to stimulate our own research. Nonetheless, there are prima facie signs of academic mismatch in Australia, as highlighted by Asmar, Page and Radloff:

> Indigenous students' attrition, retention and completion rates are…areas of concern. The attrition rate for first year Indigenous students is estimated to be 35 to 39 per cent. Indigenous students have an overall completion rate of less than 50 per cent, compared to 72 per cent among non-Indigenous Australian domestic students.[111]

Academic mismatch may have some basis due to 'a system-wide issue: the relatively small pool of Indigenous Australians with adequate preparation for tertiary education'.[112] This is noted by Pechenkina and Anderson, who state:

> A phenomenon termed 'leaky pipeline' is used to describe a situation where only a small percentage of Indigenous students graduating from high school are actually eligible for university based on their test results. For example, in 2008 only 11 per cent of Indigenous students completing Year 12 were eligible for university entry. In comparison, 47 per cent of non-Indigenous students who completed Year 12 qualified for university entry in the same year.[113]

(ii) Stereotype-Threat Hypothesis

This is the idea that affirmative action 'at a collective level … place[s] undue psychological pressure on the very groups they seek to help'.[114] Fischer and Massey's study found that there existed:

> some support for the stereotype threat hypothesis, which argues that institutional use of affirmative action stigmatizes black and Hispanic students to compromise performance and well being. Our indicator of institutional affirmative action suggested that the greater an institution used affirmative action criteria in admissions, the lower the grades, the greater the odds of school leaving, and the less the satisfaction with college life expressed by individual minority students, holding constant socioeconomic background, academic preparation, and aptitude.[115]

Massey subsequently conducted another higher education affirmative action study with Jayanti Owens to test whether the stereotype threat theory, which has been demonstrated in laboratory conditions, is detectable in real world conditions.[116] They tested both internalisation and externalisation of negative stereotypes and concluded that:

> The externalisation of negative stereotypes - expecting to be judged invidiously by majority group members on the basis of a stereotypical belief in minority intellectual inferiority - increases the performance burden experienced by individual minority group members and that this extra psychological burn, in turn, lowers grade performance...Although statistically significant…however, the externalization pathway is not particularly strong.

For Blacks and Hispanics, the hypothesised pathway through internalisation appears to be much stronger in certain respects. To the extent that minority group members internalise negative stereotypes - believing at some level that the canard of intellectual inferiority might actually apply to them - they reduce their academic efforts in keeping with a psychological process of disidentification, which involves disengaging from grade achievement as a domain of self-evaluation. However, the strong, direct relationship between internalisation and academic performance suggests other mechanisms are at work beyond those specified by stereotype threat theory.[117]

In Australia, there is some prima facie evidence for the internalisation of a negative stereotype amongst post-graduate Indigenous students, 'due partly to the small number of Indigenous students in postgraduate study, there are indications that Indigenous students may feel isolated and 'out of their depth' studying in universities at this level.'[118]

However, this does not appear to be the case overall:

> The puzzle is that, whilst Indigenous students are very positive about their studies, and are engaged on similar (or in some instances, higher) levels to their peers, they remain more likely to seriously consider leaving. The continued

> under-representation of Indigenous students in higher education, combined with the greater likelihood of non-completion, remains a serious concern.[119]

(iii) Reduced Standards Hypothesis

The argument is that initial preferential entry sets the stage for on-going reward of below-par performance**.** Indigenous students and workers who are admitted, or employed, under special measures will progress through courses of study, or be promoted because of further special measures in the education institution or workplace. The suggestion is that lowering the bar, initially at the point of entry only, leads to lowering the bar across the whole course of studies or workplace, in order to enable less competent individuals to 'succeed' in their course of study or place of employment.

There have been claims in the United States that incompetent people have been hired by public agencies to fulfil affirmative action 'quotas'.

> If the effort to achieve diversity means that incompetent people are being hired into positions of public trust, then society bears a large burden. Such, claimed Linda Gottfredson… is exactly what has happened with the police force in Nassau County, New York. [120]
>
> …At the moment, hard evidence from other sources is scarce and contradictory…Yet even if the abuses are not as devastating as Gottfredson claimed, her warnings should be seriously heeded. Accounting systems can be falsified in the short run, and a mechanical compliance with the letter of the law, but not the spirit of the law, can have serious negative consequences.[121]

Crosby et al state, that there is 'compelling evidence [that] exists to show that under certain circumstances, white men question the capabilities of women and of people of color when affirmative action is known to be in operation'. They suggest that 'the unintended negative effects of affirmative action are disturbing'. They note however, that these effects are seen mainly in controlled experimental conditions and 'there are reasons why the laboratory results do not discredit affirmative action as it is actually practiced.'[122]

Even though there may be no evidence of a reduced standard of competence amongst the targeted minority workforce, the perception of lesser competence is often felt very keenly by minorities (whether or not they have been recipients of an AAP):

> Several prominent public intellectuals, all men of color, have decried the negative effects of affirmative action on self-esteem. Stephen Carter, now a law professor at Yale University, has written eloquently of the assault to pride that comes from being admitted to law school as the best Black applicant rather than as the best applicant.[123]

Clarence Thomas, United States Supreme Court Justice, also wrote:

> As much as it stung to be told that I'd done well in the seminary DESPITE my race, it was far worse to feel that I was now at Yale BECAUSE of it. I sought to vanquish the perception that I was somehow inferior to my white classmates by obtaining special permission to carry more than the maximum number of credit hours and by taking a rigorous curriculum of courses in such traditional areas as corporate law, bankruptcy, and commercial transactions. How could anyone dare to doubt my abilities if I excelled in such demanding classes?
>
> But it was futile for me to suppose that I could escape the stigmatizing effects of racial preference, and I began to fear that it would be used forever after to discount my achievements.[124]

Not much is known about whether the reduced standards hypothesis is a reality in relation to affirmative action in Australia. The fact that there are significant financial incentives for universities to both admit and incentivise Indigenous students to graduate[125] certainly presents a hazard in this regard, especially given internalised perceptions of a deficit.[126]

(iv) Reduced Investment Hypothesis

This hypothesis posits that affirmative action lowers the value of education or work from the perspective of young people targeted by the AAP, and so they are less willing to invest their own human capital.

In the United States, research on this issue has provided equivocal results. Recent research by Brent Hickman has found that there is little empirical evidence for this argument:

> The counterfactual results indicate that the American-style admission preference greatly improves both investment incentives and market outcomes for minority students… For most minority students there is a significant increase in investment due to AA, with the gap between median [Scholastic Assessment Test] scores narrowing by 14 per cent, relative to a color-blind mechanism. The reason for the improved incentives is that American AA is roughly an SAT mark-up with a positive slope that rewards students for higher investment with a larger mark-up. In other words, American AA effectively subsidizes marginal costs of [human capital] production and induces most minorities to invest as if their costs were lower. American AA also discourages investment among the highest performing minorities, but this group is very small, amounting to only the top 1.6 per cent of the group.[127]

It is difficult to determine the applicability of this hypothesis, as well as all of the above hypotheses, to Australia, because we have neither an equivalent test, (the Scholastic Assessment test) nor an equivalent university admission system. In addition, very few Australian undergraduate university courses charge up-front fees, so financial investment (as opposed to human capital investment) is usually not required by students or their families.

(v) Erosion of Social Capital Argument

This is related to the reduced standards hypothesis. It suggests that the 'goodwill' toward Indigenous people that has accumulated in the non-Indigenous population since the 1960s is eroded by preferential treatment. Non-Indigenous people may begin to believe Indigenous people who succeed 'only got there because of special admission (or cheap loans or identified jobs)'.[128] Williams points to this issue in American higher education, as well as its possible consequence:

> At elite law schools such as Harvard and Yale, the implicit assumption by faculty and students is that black and Hispanic students have lower LSAT scores and college grades than their Asian and white classmates. The rebuttable presumption at these law schools is that these minority students are not as smart as their classmates. When minority law school students graduate, the prestigious law firms make the same assumptions. Consequently, minority students do not get the same job opportunities as their classmates.[129]

The successes of the last half-century in the battle to overcome the irrational arguments of racists may be worn-away by suggestions that Indigenous people are *not* equal to others, that they cannot achieve on their own intelligence, ability and diligence, and can only 'achieve' via a special benefit. Even worse, Indigenous people themselves may begin to believe this internalised racist argument. The underlying concern is not that 'Whitefellas might think that Blackfellas are no good,' but rather that there are serious long-term consequences to a society when it officially distinguishes between people on the basis of race or ethnicity.

(vi) 'Just Deserts' Argument

The argument here is that those most likely to obtain the benefits of affirmative action measures (the children of professional or trade-qualified Indigenous parents) are those least likely to need them. Those who would benefit most from special measures (the children of unemployed and socio-economically disadvantaged Indigenous parents) are least likely to be selected for such programs, for a range of reasons. This argument, essentially 'who deserves what?' was canvassed during United States President Clinton's review of affirmative action policy.[130]

In Australia, the argument has differed a little from the United States, with commentators in the popular media suggesting that privileged 'white' Aboriginal peoples are over-represented in elite awards and grants designed for 'real' Aboriginal peoples. Their argument, though poorly (and often pejoratively) made out, is that special measures are being poorly targeted.[131]

(vii) Reinforcement of Black Victimhood and White Guilt

Pojman, referencing Shelby Steele,[132] argues that 'affirmative action reinforces the spirit of victimization by telling Blacks that they can gain more by emphasizing their suffering, degradation and helplessness than by discipline and work.'[133]

David Price and Bess Price make a novel argument about a concomitant result when Whites accept the Black victimhood argument, claiming that it adds to the power that dominant Whites hold by encouraging Whites today to take responsibility for 'their' historical persecution of Blacks. They note 'Whitefellas accepting all the blame when things go wrong is another perverse kind of racism. They

still want to be masters of the universe. We are all vulnerable and fallible and we're all in this together.'[134]

This seems to be along the lines of Steele's argument,[135] as Pearson elucidates:

> White guilt is a product of the vacuum of moral authority that comes from knowing that one's people are associated with racism. Whites – and, [Steele] asserts, American institutions – must acknowledge historical racism to atone for it. In acknowledging it, however, they lose moral authority over matters of social justice and become morally – and, one could argue, politically – vulnerable. To overcome this vulnerability, white Americans have embraced a social morality, designed to rebuild moral authority by simultaneously acknowledging past racial injustices while separating themselves from those injustices. Steele calls this dissociation.[136]

According to Pearson, as a result of Black victimisation and White guilt, 'Black entitlement and White obligation have become interlocked.'[137]

This is a difficult argument to evaluate, because few Indigenous writers would openly argue for entitlement based on victim-status (rather than pre-existing rights or socio-economic disadvantage). Moreover, few non-Indigenous writers would argue that they *personally* have an obligation to Indigenous people because of past injustices. Indeed even the suggestion that one is playing the 'victim card' is quickly repudiated.[138]

Dillon believes there are vested interests in maintaining Indigenous victimhood status:

> Being the victim, paradoxically, can place one in a position of power. Few are game to disagree with victims (or their supporters), or question motives, or challenge them in any way for fear of being seen as an uncaring bully. When Aboriginal identity and mandated 'respect' are factored in, questioning victim status will likely be seen as tantamount to racism. Therefore, adopting the victim role (feeling upset, offended, outraged, racially vilified, or whatever) can be a very effective and convenient way of silencing dissent, and inducing feelings of guilt in others. Silencing others provides the 'offended' victim with a sense of power over others – and that feels good. Victims remain unchallenged with their victim status intact and unassailable. Any open debate on the problems facing Aboriginal people is stifled.[139]

IX Future of Special Measures

Supporters of affirmative action generally argue that, despite the problems, the goal is worth it:

> Many supporters of affirmative action policy believe that, irrespective of the cost, affirmative action always helps its beneficiaries. That is, it is better to attend an institution because of preferential treatment than not to attend. Moreover, supporters of affirmative action argue that minorities admitted under affirmative action are likely to benefit from the myriad [of] academic, social and network externalities that exists at selective institutions.[140]

In the following section we briefly outline alternative policy approaches to current race-based affirmative action policy in Australia.

A Confine Affirmative Action to Selected Areas in order to Increase 'Critical Mass'

Some of the unintended negative effects of affirmative action can, in fact, be ameliorated. The stereotype threat effect could, for example, be reduced by vastly increasing the number of Indigenous students in a selected class, course or university. As Abigail Stewart and Danielle LaVaque-Manty explain:

> When women [or minorities] constitute approximately a third (or more) of workplaces, they are more satisfied and accepted, perhaps because a critical mass has been reached. At this point, the salience of gender or race is minimized (although not absent), and the proportion of women in the pool is more likely to remain stable, instead of continuing to drop.[141]

Is it unrealistic that one-third of the student body of an Australian university could be constituted by Indigenous students? Outside of the Northern Territory, it is indeed unlikely. But the issue of ensuring that a 'critical mass' of Indigenous students is realised in a university is a question requiring further research. It may be the case that affirmative action programs in Indigenous higher education should generally be abandoned, on the grounds that this critical mass is unachievable.

An alternative is that special measures in higher education could be restricted to one Indigenous-only university, or a number of Indigenous-only courses. This is likely to not

only be more effective, but also more efficient - and in accord with the argument put forward in the Commonwealth's own review of Indigenous-specific programs:

> There is a strong case to reduce the number of Indigenous-specific programs operating across the Commonwealth. A smaller number of programs, with more clearly defined objectives, would have benefits both in clarity and flexibility.[142]

On the other hand, perhaps the one-third proportion is not necessary to achieve critical mass. If not, then what proportion? Stewart and LaVaque-Manty are in agreement, stating 'the question of what demographic balance would be required to alleviate this sense of constant visibility and its accompanying disadvantages remains open.'[143]

B Abandon Affirmative Action

Another view - one that should not be ruled out without serious consideration - is that affirmative action should be abandoned altogether. It may be that there is very little that AAPs are able to achieve in redressing social inequality. This may have nothing to do with the tailoring or targeting or such programs. Rather, it may be that the discrimination model on which affirmative action is based simply does not explain the differences in average rates of socially-valued outcomes amongst racial groups. Rushton and Jensen explain this as follows:

> Herrnstein termed the two fundamentally different models put forth to explain why racial groups differ in their average rate of socially valued outcomes the distributional model and the discrimination model. Each may be partially correct. The *discrimination model* focuses on social and institutional practices that discriminate against members of one group (or favor members of another), thus tilting the playing field. It assumes that in the absence of discrimination, outcomes should be about equal for all populations; thus evidence of differential performance in itself constitutes evidence of discrimination. Factors hypothesized under this model that cause mean race differences include relative poverty, anti-Black bias, a lack of access to legitimate channels of upward mobility, and dysfunctional family organization growing out of the legacy of slavery ...
>
> The discrimination model has also been used to explain the *overrepresentation* of some groups in valued outcomes. Blacks are said to excel in sports such as boxing, basketball, track and field, and football because other channels of upward mobility are closed to them. As early as the 1920s, sociologists explained the underrepresentation of East Asians in US crime statistics as being due to the East Asian 'ghetto.' This self-imposed segregation was seen as a response to external prejudice, which protected its members from the disruptive tendencies of the outside society.
>
> The *distributional model,* on the other hand, explains the overlapping of the racial groups and their differing averages in terms of their mean group characteristics - for example, the mean differences in inheritable IQ and possibly other traits too. However, it could also fit Sowell's theory of socialization through subtle cultural traditions, or Loury's theory of racial stigma, which postulates a unique type of gene–culture correlation in which people react to others on the basis of physical appearance. Other factors hypothesized to underlie a distributional model include deep-rooted cultural values and family structures endemic to certain populations, as well as biological variables such as body type, hormonal levels, and personality and temperament. Thus according to the distributional model, population differences are expected to occur and to do so globally.
>
> …
>
> Although the distributional model does not rule out affirmative action or compensation-type initiatives, it does reduce the impact of arguments in their favor based on an exclusive adherence to the discrimination model.[144]

This is a highly controversial argument, which is rarely raised in academia, and even then only in hushed tones. However, the dearth of detailed research on Australian AAPs means we have no idea whether Rushton and Jensen's above conclusion is correct.

Barring an electoral backlash, AAPs are unlikely to be abandoned in Australia in the near future. Australian governments have shown remarkable commitment to CTG via AAPs, even in areas where that gap has not closed.

Reno implies that (at least, in America) the use of AAPs will decline as a political consequence of demographic and attitudinal changes, stating 'attitudes about race are slowly changing in America, as much because of new demographic realities brought by the latest wave of immigration, interracial and inter-ethnic marriage, and progress among Black Americans.'[145] Australian racial demographics are

obviously different to the United States; nonetheless, the increasing non-white population in Australia, coupled with the high level of Indigenous-white marriages, will eventually put pressure on race-based AAPs.

C Expand Affirmative Action

Altman et al, put forward two radical suggestions to CTG, requiring both qualitative and quantitative expansion of affirmative action:

> One possibility is to require a fundamental reallocation of property rights in resources that fully acknowledge the original ownership of the country.[146] Another alternative is that a massive increase in investment in Indigenous infrastructure and Indigenous people may eventually affect the persistent gaps.[147]

In the present political and economic climate neither option is likely to be implemented, so we will not discuss them further.

D Confine Affirmative Action to the Private Sector

Peter Schuck's novel suggestion in favour of continuing *private* affirmative action is based on the argument that official, public-body recognition of racial difference perpetuates racial prejudice, and therefore should be avoided:

> I propose instead that we treat governmental, legally mandated preferences differently than private, voluntary ones. While prohibiting the former (except in the narrow remedial context approved by the Supreme Court), I would permit the latter - but only under certain conditions discussed below…
>
> A private preference speaks for and binds only those who adopt it and only for as long as they retain it. It does not serve, as public law should, as a social ideal. As I explained in *The Limits of Law: Essays on Democratic Governance*,[148] legal rules tend to be cruder, more simplistic, slower to develop, and less contextualized than voluntary ones, which are tailored to more specific needs and situations…
>
> Because even private affirmative action violates the non-discrimination principle…I would permit it only on two conditions: transparency and protection of minorities. First, the preference - its criteria, weights, and reasons - must be fully disclosed. If it cannot withstand public criticism, it should be scrapped. The goal is to discipline preferences by forcing institutions to reveal their value choices. This will trigger market, reputational, and other informal mechanisms that make them bear more of the policy's costs rather than just shifting them surreptitiously to non-preferred applicants, as they do now. Second, private affirmative action must not disadvantage a group to which the Constitution affords heightened protection. A preference favoring whites, for example, would violate this condition.[149]

E Adopt "Race-neutral" Affirmative Action

Kahlenberg and Potter argue that socio-economic status is a fairer way to identify students who have experienced difficulties in accessing university, and it also serves as a race-neutral proxy for disadvantaged racial minorities. They state:

> If college admissions officers want to be fair - truly meritocratic - they need to consider not only a student's raw academic credentials, but also what obstacles she had to overcome to achieve them…[nation- or state-wide exams] can be used to identify what Anthony Carnevale calls 'strivers' - students who overcame the odds to do quite well despite various disadvantages. In this way, economic affirmative action is not meant to be a challenge to merit but rather a better approximation of it. Unlike race-based affirmative action, class-based preferences compensate for what research suggests are the more substantial obstacles in today's world: those associated with socioeconomic status.[150]

X Conclusion

In a thoughtful essay, John Lucaites argues for:

> The need to open the debate [in the United States] on affirmative action more fully by considering what, given our history and the traditions that constitute us as a policy, a more productive conception of *merit* might be, and how it might be more effectively articulated with the concepts of diversity and racial difference so as to enhance the capacity of liberal-democracy as an egalitarian culture.[151]

But what do we do when individuals have been unable to achieve the broad range of accomplishments underlying

common understandings of merit due to historical injustices based on race? These historical injustices in Australia continue to have a colonial legacy that factor into Indigenous poverty, as reiterated by Hunter:

> Indigenous disadvantage is multidimensional and… Indigenous poverty is different to other forms of poverty in Australia in the prevalence and depth of poverty experienced. Furthermore, the multiple disadvantages that are experienced by many, if not most, Indigenous Australians indicate that Indigenous disadvantage is complex and multigenerational and cannot be reduced into one simple static notion of Indigenous poverty.[152]

As we have suggested, other than in relation to some of the positive measures relating to Indigenous children in the CTG targets, a wide range of special measures seem to have had little impact in reducing comparative Indigenous disadvantage. Indeed on some measures, that disadvantage has worsened.[153]

The primary policy response over the last 40 years has been that, where there is Indigenous disadvantage, an AAP should be introduced. In light of the failure of these 'positive' special measures to induce significant socio-economic improvement, governments of the past decade are increasingly resorting to 'negative' special measures, such as the NTER. As our headline quote alludes,[154] differentiation on the basis of race to implement moderate, positive policies inevitably opens the door to using racial differentiation for increasingly harsh policies. These harsher policies are, at best, unproven in achieving their benign intent and, at worst, pernicious and racist.

If we are to persist with special measures, a critical approach is needed to assessing both their intended and unintended consequences. We may find that a renewed, but limited, performance-based special measures policy results in the changes that Indigenous people have been waiting for since invasion.

---

* Antony Barac is a lawyer, educator, and casual academic at Southern Cross University. Loretta Kelly is a lawyer, dispute resolution practitioner, and senior lecturer at Southern Cross University. Barac and Kelly are business and life partners of more than 20 years.

1 Robert K Fullinwider, *The Reverse Discrimination Controversy: A Moral and Legal Analysis* (Rowman and Littlefield, 1980) 240.

2 There are 193 Member States of the United Nations: United Nations, *UN Member States:On the Record* (2001) United Nations <http://www.un.org/depts/dhl/unms/whatisms.shtml#states> . Most (177) of these are parties to the *International Convention on the Elimination of All Forms of Racial Discrimination*. See, United Nations, *Status of Treaties: International Convention on the Elimination of All Forms of Racial Discrimination,* United Nations Treaty Collection<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#3>.

3 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 2.

4 *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD'), opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5.

5 Ibid, art 2(2).

6 As a report to the Inter-American Commission on Human Rights of the Organization of American States in 2004 stated: '[A]ffirmative action is strongly endorsed by international law, as seen through the language of regional and international treaties and the decisions of global and regional institutions. Countless norms mandate equality and non-discrimination, while additionally requiring states to take active measures to guarantee these rights': Global Rights, 'Affirmative Action: A Global Perspective' (Global Rights: Partners for Justice, 2005) 1.

7 There are several ways in which one could argue that special measures should no longer be taken in Australia, without endangering Australia's compliance with article 2(2) of ICERD: the circumstances no longer warrant it; race-based measures will not ensure adequate development; protection of certain racial groups is already achieved by anti-discrimination legislation; race-identifying measures cannot guarantee full and equal enjoyment of human rights; and fundamental freedoms are already protected by Australian laws.

8 Australia signed ICERD on 13 October 1966, but it was not until 30 September 1975 that it was ratified.

9 *Racial Discrimination Act 1975* (Cth) ('RDA').

10 *Discrimination Act 1991* (ACT) pt 2; *Anti-Discrimination Act 1977* (NSW) pt 2, div 1; *Anti-Discrimination Act* (NT) pt 3, div 1; *Anti-Discrimination Act* 1991 (Qld) ch 2, pt 2; *Equal Opportunity Act 1984* (SA) pt 4, div 1; *Anti-Discrimination Act 1998* (Tas) pt 4, div 1; *Equal Opportunity Act 1995* (Vic) pt 2;*Equal Opportunity Act 1984* (WA) pt III.

11 *Gerhardy v Brown* (1985) 159 CLR 70, 131 (Brennan J)

('*Gerhardy*'): 'Section 9(1) [of the RDA] relates to all formal discrimination including benign discrimination unless the benign discrimination is effected by a special measure which section 8(1) takes out of the ambit of section 9(1). Section 8(1) would have no operation if the exception was already provided for by section 9(1).' See also Wilson J at 114.

12 We say 'in most cases' because the legal position of private racially-differentiating measures is not clear. As domestic law currently stands, all Indigenous-specific programs (ie, those that exclude non-Indigenous people) operating pursuant to legislation or executive order potentially offend section 10(1) of the RDA. If such a program is challenged on the basis of section 10(1), it can only be saved by reference to section 8(1) of the RDA (the special measures exception). Otherwise, it must have been granted an exemption under state or territory anti-discrimination legislation. This understanding of the operation of section 10(1) was made explicit in two of the judgments delivered in *Maloney v The Queen* (2013) 298 ALR 308; [2013] HCA 28 (19 June 2013) ('*Maloney*'). Hayne J stated (329 at [68]) that:

> One understanding of "discrimination" is that differential treatment does not amount to discrimination if that treatment is justifiable. Transplanting this understanding to section 10 would cut down the section's operation. Section 10 does not say that persons of a particular race may enjoy a right to a more limited extent than persons of another race by reason of a Commonwealth, state or territory law if that difference is justifiable or proportionate to a legitimate end. If the law is not a special measure within the meaning of section 8(1), the conclusion that persons of a particular race enjoy a right to a more limited extent than persons of another race is necessary and sufficient to engage section 10. [references omitted]

Justice Bell was in agreement with Hayne J's understanding (365 at [214]).

> Although Gageler J queried the view expressed by Brennan J in *Gerhardy* on this point (391 at [304]), citing the Court's joint judgment in *Western Australia v Commonwealth* [1995] HCA 47 at [144], in the end his Honour seemed to affirm Hayne and Bell JJ's views that 'such a measure can only be so justified if it meets the requirements of a special measure as expressed in Articles 1(4) and 2(2) of the Convention. If justified as a special measure, it is not discrimination within the meaning of the convention. If not justified as a special measure, it is discrimination and a denial of equal protection' (*Maloney* (2013) 298 ALR 308, 402-403 [347]).
>
> The vast majority of race-differentiating programs in Australia operate pursuant to legislative or executive schemes (there are relatively few private schemes operating without legislative or executive support).They are therefore vulnerable to challenge via section 10(1) of the RDA, and would require the invocation of section 8(1) to save them.
>
> Returning to our point that the position of *private* racially-differentiating measures is not clear: if an affirmative action program undertaken by a *private* body was challenged on the basis of section 9 of the RDA (assuming that the private program is *not* undertaken pursuant to legislation or executive order, and therefore the program does not engage section 10 of the RDA), it is unclear whether a defence would need to rely on section 8(1) (as per Brennan J in *Gerhardy* at 131) or whether a future High Court would accept the 'non-discriminating differential treatment' argument put forward by the Committee on the Elimination of Racial Discrimination (see, Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms Racial Discrimination*, 75th session, 3-28 August 2009, ICERD/C/GC/32 (24 September 2009) [3]), which would take the program outside the ambit of discrimination altogether. This question has not yet been determined by Australian courts.

13 *Maloney* (2013) 298 ALR 308.

14 Parliamentary Joint Committee on Human Rights, Commonwealth, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Stronger Futures in the Northern Territory Act 2012 and Relegated Legislation* (2013) 1.108-1.109.

15 Nicole Lederer, on the other hand, adopts a broader definition: 'The term 'special measures' is the term commonly used in Australian law to describe affirmative action policies'. See, Nicole M Lederer, *Affirmative Action: A Never-ending Story?* (Doctor of Philosophy Thesis, University of Adelaide, 2013) 172.

16 The indicia of a special measure were laid out by Brennan in *Gerhardy* at 133:

> 'A special measure (1) confers a benefit on some or all members of a class, (2) the membership of which is based on race, colour, descent, or national or ethnic origin, (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.'

Chief Justice French in *Maloney* held that in characterising a law as a special measure, the court may determine whether:

- [T]he law evidences or rests upon a legislative finding that there is a requirement for the protection of a racial or ethnic group or individuals in order to ensure their equal enjoyment or exercise of human rights and fundamental freedoms;
- [T]hat finding was reasonably open;
- [T]he sole purpose of the law is to secure the adequate advancement of the relevant racial or ethnic group or individuals to ensure their equal enjoyment or exercise of human rights and fundamental freedoms; and
- [T]he law is reasonably capable of being appropriate and adapted to that sole purpose.

(*Maloney* (2013) 298 ALR 308, 316; [2013] HCA 28 (19 June 2013) [21])

17 Theoretically, the special measures exception in the RDA could be applied to any disadvantaged race. However, we are not aware of any programs explicitly restricted to non-Indigenous races in Australia.

18 Other common terms include differential treatment, positive discrimination and reverse discrimination. Equal opportunity, in relation to race, does not necessarily imply preferential treatment in Australia.

19 This is because the original Commonwealth legislation and agency to advance women used affirmative action in their titles: the *Affirmative Action (Equal Employment Opportunity for Women)Act 1986* (Cth), administered by the Affirmative Action Agency ('AAA'), was later replaced by the *Equal Employment Opportunity for Women in the Workplace Act 1999 (Cth).* The AAA was renamed the Equal Opportunity for Women in the Workplace Agency ('EOWWA'). The EOWWA was itself replaced by the *Workplace Gender Equality Act 2012(Cth) and the EOWWA renamed the Workplace Gender Equality Agency.*

20 *Convention on the Elimination of all Forms of Discrimination Against Women*, GA Res 34/180, 107th plen mtg, 1249 UNTS 13 (18 December 1979, entered into force 3 September 1981) art 4. 'Special measures' is not used in the *Workplace Gender Equality Act 2012 (Cth).*

21 *Maloney v* (2013) 298 ALR 308.

22 Ibid [46] (French CJ).

23 Ibid.

24 Simon Rice, 'Casenote: Joan Monica Maloney v The Queen [2013] HCA 28' (2013) 8(7) *Indigenous Law Bulletin* 28, 32.

25 The principal statute in this package was the *Northern Territory National Emergency Response Act 2007* (Cth), which was repealed by the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth). Its successor is the *Stronger Futures in the Northern Territory Act 2012* (Cth).

26 *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) sub-ss 4(1), (2); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) sub-ss 4(4), (5).

27 Jonathon Hunyor, 'Is it Time to Re-Think Special Measures under the Racial Discrimination Act? The Case of the Northern Territory Intervention' (2009) 14(2) *Australian Journal of Human Rights* 39, 63.

28 See, Committee on the Elimination of Racial Discrimination, above n 12, [18].

29 There are 'numerous Indigenous-specific programs, which are aimed at addressing the underlying disadvantage confronting many Indigenous Australians, [which] would qualify as special measures': Attorney General's Department, *Rights of Equality and Non-Discrimination* (2014) Attorney-General's Department Australian Government <http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Rightsofequalityandnondiscrimination.aspx>.

The following government spending estimate for Indigenous persons is inclusive of both Indigenous-specific services and general (non-race specific) services: 'Estimated direct government expenditure per person on all services was $44,128 per Indigenous person and $19,589 per non-Indigenous person in 2010-11. That is, an estimated $2.25 was spent per Indigenous person for every dollar spent per non-Indigenous person in the population in 2010-11': Productivity Commission Steering Committee for the Review of Government Service Provision ('Productivity Commission'), *2012 Indigenous Expenditure Report* (Productivity Commission, 2012) 34.

30 For example:

> ABSTUDY was established in 1969 in response to inequities in education experienced by Aboriginal and Torres Strait Islanders. There have been many changes to the scheme and the scheme's name over the years. The scheme, including the provisions of rent assistance within the Scheme is necessary to ensure that the rates of participation of [I]ndigenous Australians in education is raised to the same as those for non-[I]ndigenous Australians, to promote equity in educational opportunity and to improve educational outcomes for [I]ndigenous Australians: *Bruch v Commonwealth* [2002] FMCA 29 (13 March 2002) [28] (McInnis FM).

31 Productivity Commission, above n 29, 34: 'Across virtually all the indicators in this report, there are wide gaps in outcomes between Indigenous and other Australians. The report shows that

the challenge is not impossible — in a few areas, the gaps are narrowing. However, many indicators show that outcomes are not improving, or are even deteriorating. There is still a considerable way to go to achieve COAG's commitment to close the gap in Indigenous disadvantage'.

32 Jon C Altman, Nicholas Biddle and Boyd H Hunter, 'Prospects for 'Closing the Gap' in Socioeconomic Outcomes for Indigenous Australians?' (2009) 49(3) *Australian Economic History Review* 225, 246-247.

33 Ekaterina Pechenkina and Ian Anderson, 'Background Paper on Indigenous Australian Higher Education: Trends, Initiatives and Policy Implications' (September 2011) prepared for The Review of Higher Education Access and Outcomes for Aboriginal and Torres Straits Islander People: Commissioned Paper #1, 6.

34 Ibid 1. On the surface, the participation in higher education had been good: 'the proportion of Aboriginal and Torres Strait Islander people aged 15-64 studying in higher education has been increasing since the mid-1980s: Australian Bureau of Statistics, *Hitting the Books: Characteristics of Higher Education Students - 4102.0 - Australian Social Trends* (2013) Australian Social Trends for July 2013 <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20July+2013>.

However, like employment, the gap between Indigenous and non-Indigenous participation has barely changed: 'The rate of Aboriginal and Torres Strait Islander people aged 15-24 attending a higher education institution more than tripled in the 25 years between 1986 and 2011 (1.4% to 4.9%). The non-Indigenous rate also tripled, from 7.5% to 21%.'

35 In 2011, the employment to population ratio for non-Indigenous people aged 15-64 was 73.4%: Australian Bureau of Statistics, *Table 8: Comparison of Estimates of Labour Force Status by Data Source and Remoteness, Indigenous Persons Aged 15 Years and Over* (2011) Australian Bureau of Statistics <http://www.abs.gov.au/AUSSTATS/subscriber.nsf/log?openagent&62870do008_2011.xls&6287.0&Data%20Cubes&BD0FF592F0743581CA257A460018E67C&0&2011&26.07.2012&Latest>.

36 Jon C Altman, *Seeking Truth from Facts in Indigenous Employment Data* (2013) *Crikey* (online) <http://www.crikey.com.au/2013/02/11/seeking-truth-from-facts-in-indigenous-employment-data/>. However, the worsening employment/population ratio is partly because of the removal of Community Development Employment Projects ('CDEP') participants from the definition of 'employed'. Altman claims 'The new approach renders over 10,000 CDEP participants invisible if they are neither employed nor unemployed, and so get a little lost in a statistical void'.

37 Although most 'Closing the Gap' programs do not use the term 'special measure', they are clearly targeted at Indigenous people only. If non-Indigenous people are excluded from these programs (which is the case for many, but not all, such programs) then they are prima facie discriminatory and must satisfy the special measures exception in the RDA.

38 See, Council of Australian Governments, *Closing the Gap in Indigenous Disadvantage* (2008) Council of Australian Governments <http://www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage >.

39 Commonwealth, *Closing the Gap: Prime Minister's Report 2013* (Australian Commonwealth Government, 2013) 14.

40 Ibid.

41 Lederer, above n 15: 'A universal definition of affirmative action does not exist'.

42 Harrison et al, use four general types of Affirmative Action Programs ('AAPs'): opportunity enhancement, equal opportunity, tiebreak AAPs (or 'weak preferential treatment'), and strong preferential treatment AAPs. See, David A Harrison et al, 'Understanding Attitudes Toward Affirmative Action Programs in Employment: Summary and Meta-Analysis of 35 Years of Research' (2006) 91(5) *Journal of Applied Psychology* 1013, 1014. The authors base this on the categorisation in David A Kravitz, 'Attitudes Toward Affirmative Action Plans Directed at Blacks: Effects of Plan and Individual Differences' (1995) 25(24) *Journal of Applied Social Psychology* 2192. Our article is concerned with strong preferential treatment AAPs.

43 Such as those pursuant to the *Workplace Gender Equality Act 2012* (Cth).

44 Louis P Pojman, 'The Moral Status of Affirmative Action' (1992) 6(2) *Public Affairs Quarterly* 181, 183.

45 The term stems from its use by President Kennedy. See, John F Kennedy, *President Kennedy's Executive Order 10925 Establishing The President's Committee On Equal Employment Opportunity* (US Equal Employment Opportunity Commission, 6 March 6 1961) <http://www.eeoc.gov/eeoc/history/35th/thelaw/eo-10925.html>.

46 This was a program that is comparable to modern affirmative action. However, there are older programs that also have similarities to affirmative action. For example, the *1864 Freedmen's Bureau Bill* in the United States. See, Carl E Brody Jr, 'A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court' (1995-6) 29 *Akron Law Review* 291, 294 ff.

47 Anne Daly, Tesfaye Gebremedhin and Muhammad Sayem, 'A Case Study of Affirmative Action Australian-Style for Indigenous People' (2013) 16(2) *Australian Journal of Labour Economics* 277, 281.

48 Thomas Sowell, *Affirmative Action Around the World: An Empirical Study* (Yale University Press, 2004) 211.

49 The US affirmative action studies we refer to are those that relate only to race-based affirmative action, unless otherwise stated.

50 *Fisher v University of Texas at Austin* 133 S Ct 2411 (2013) and *Schuette v Coalition to Defend Affirmative Action* US SC, No 12-682 (22 April 2014).

51 See, eg, Kat Cohen, *The Truth About Affirmative Action Cases and College Admissions* (6 November 2013) *Huffington Post* (online) <http://www.huffingtonpost.com/kat-cohen/the-truth-about-affirmative-action-cases_b_3415333.html>.

52 See, eg, Andrew Bolt, *The New Tribe of White Blacks* (21 August 2009) *Herald Sun* (online) <http://blogs.news.com.au/heraldsun/andrewbolt/index.php/heraldsun/comments/column_the_new_tribe_of_white_blacks/P40.html>. See, also, the associated cases: *Eatock v Bolt* (2011) 197 FCR 261; *Eatock v Bolt* [No 2] (2011) 284 ALR 114; [2011] FCA 1180.

53 See, Maggie Walter and Gavin Mooney, 'Employment and Welfare' in Bronwyn Carson et al (eds), *Social Determinants of Indigenous Health* (Allen and Unwin, 2007) 153.

54 Maggie Walter, 'Keeping Our Distance: Non-Indigenous/Aboriginal Relations in Australian Society' in Juliet Pietsch and Haydn Aarons (eds), *Australia: Identity, Fear and Governance in the 21st Century* (ANU Press, 2012) 15, 17-18.

55 Pojman, above n 44. Maxwell Chibundu's conception is similar: 'Affirmative action starts out as a highly defensive theory of justice with three distinct branches: a moral past grounded in the need for rectification, a pragmatic present tethered to the dynamics of politics and prognostications about the future that lean heavily on conceptions of social utilitarianism'. See, Maxwell O Chibundu, 'Affirmative Action and International Law' (1999) 15(2) *Law in Context* 11, 18.

56 R R Reno, *Affirmative Action and the Supreme Court* (21 October 2013) *On the Square* (online) <http://www.firstthings.com/onthesquare/2013/10/affirmative-action-and-the-supreme-court>. This is similar to the argument raised by Michaels, which we mention below. See, Walter Benn Michaels, *Class-Based Affirmative Action is not the Answer* (1 July 2013) *The American Prospect* (online) <http://prospect.org/article/class-based-affirmative-action-not-answer>.

57 Lederer, above n 15, 246.

58 Ibid, 298-291. Lederer argues that,'The notion that beneficiaries of affirmative action cannot compete on an equal level in the employment market without these policies is strengthened if policies are not limited. Therefore, goals and limits to affirmative action are crucial for the social acceptance and respect of its beneficiaries'.

59 Reno, above n 56.

60 An Australian example of overriding the merit criterion in the workplace relates to caseworkers employed by the New South Wales Department of Family and Community Services: 'Degree level qualification is mandatory for appointment to caseworker, casework manager, and Helpline team leader positions in Community Services, with the exception of those who identify and are recognised as Aboriginal'. See, Department of Family and Community Services, *Qualifications Assessment Guide: Caseworker, Casework Manager & Helpline Team Leader* (New South Wales Government, July 2011) <http://www.community.nsw.gov.au/docswr/_assets/main/documents/caseworker_qualifications.pdf>.

61 This is because, as Pojman puts it, 'Desert and merit claims are grounded in our deepest notions of justice, as ancient philosophers and religious thinkers testify'. See, Louis Pojman, 'Merit: Why Do We Value It?' (1999) 30(1) *Journal of Social Philosophy* 83, 98.

62 Christopher McCrudden, 'Merit Principles' (1998) 18 *Oxford Journal of Legal Studies* 543, 578.

63 Ibid, 579.

64 We note that these ideas of merit are also value-laden. For example, participation in athletics and music may have little connection to success in a law course to which one seeks entrance.

65 David Sacks and Peter Thiel, *The Case Against Affirmative Action* (Stanford Alumni, 2012) <http://alumni.stanford.edu/get/page/magazine/article/?article_id=43448>.

66 Louis Pojman, 'Justice as Desert' (2001) 1(1) *Queensland University of Technology Law and Justice Journal* 88, 103.

67 Unless their job is located in a predominantly Aboriginal community or with an Aboriginal organisation, many non-Aboriginal people would not encounter an Aboriginal person in their working lives. In most, if not all, professions and trades (except for some positions in the human and social services), there is no *scientific* evidence that being of a particular race enables one to do the job more effectively.

68 It would certainly be a concern if this argument were asserted beyond the limited number of occupations in which a person's race or ethnicity is essential to a job. Such an assertion is contrary to the principle of racial equality.

69 See the statement by the United States Department of Energy: 'DNA studies do not indicate that separate classifiable subspecies (races) exist within modern humans. While different genes for physical traits such as skin and hair colour can be identified between individuals, no consistent patterns of genes across the human genome exist to distinguish one race from another. There also is no genetic basis for divisions of human ethnicity'. See, United States Department of Energy Human Genome Project, *Minorities, Race, and Genomics* (Human Genome Project

Information Archive, 1990-2003) <http://web.ornl.gov/sci/techresources/Human_Genome/elsi/minorities.shthml>.

70 David Hollinsworth, *Confronting Racism in Communities: Guidelines and Resources for Anti-Racism Training Workshops* (Centre for Multicultural Pastoral Care and Centre for Multicultural and Community Development, 2006) 11.

71 Glenn C Loury, 'Racial Stigma: Toward a New Paradigm for Discrimination Theory' (2003) 93(2) *The American Economic Review* 334, 334-335.

72 See, eg, Loretta Kelly and Antony Barac, 'Our Views on Aboriginal and Torres Strait Islander Identity', *National Indigenous Times* (Woden, ACT), 9 June 2011, 46; Loretta Kelly and Antony Barac, 'Being Aboriginal: What does the Community Think about the Definition?', *National Indigenous Times* (Woden, ACT), 10 June 2010, 24.

73 See, eg, Indigenous Business Australia, *Aboriginality or Torres Strait Islander Descent Form* (Indigenous Business Australia, 2014) <http://www.iba.gov.au/wp-content/uploads/2011/05/Confirmation_of_Aboriginality_and_TorresStrait_Islander_Descent_Form_Web_version.pdf>.

74 'Negative' types of special measures, such as the Northern Territory Emergency Response ('NTER'), can further entrench perceptions of inherent Indigenous deficit, or even savagery. Alissa Macoun provides a variety of parliamentary and media sources in support of her contention that, 'Constructions of Aboriginality as savage or degraded and in need of externally imposed control or discipline circulate in discourse about the intervention, identifying Aboriginal people and communities as threats requiring constraint.' See, Alissa Macoun, 'Aboriginality and the Northern Territory Intervention' (2011) 46(3) *Australian Journal of Political Science* 519, 524 (references within quote omitted).

75 That is, in order to implement such measures, one must sustain and thereby reinforce racial difference.

76 This is not to suggest that *merit* is the only appropriate framework to assess, or explain, 'success'. Rather, most Australians embrace *fairness*, or 'a fair go', in their conceptualisation of what is (or should be) at the centre of our socio-political values:

> With 91% of Australians saying the ideal of a fair go is fundamental for defining Australian values, it sits at the heart of how Australians see the relationship between society and the individual. Although a fair go is a 'core Australian political value,' it is misleading to use it to sell particular policies. The community's conflicting views about fairness suggest that this ideal does not have a common meaning. A 2003 ACNielsen/CIS survey showed that for some Australians, fairness is synonymous with the egalitarian idea of an equal distribution of resources, while others equate it with the meritocratic ideal of reward for talent and effort or the classical liberal emphasis on voluntary transactions between free individuals. When offered a choice between the aforementioned egalitarian, meritocratic and classical liberal fairness principles, 46% of respondents supported a combination of two of these fairness principles, with a further 19% supporting all three. At the same time, 5% supported the egalitarian principle alone, 24% supported the meritocratic principle alone, and 2% supported the classical liberal principle alone. Saunders concluded, the muddled state of public opinion shows that although a 'belief in the "fair go" has evolved to become part of our national culture ... it is not entirely clear what this term means.'
>
> ...
>
> Depending on how this aspiration is fleshed out, it could be understood as a commitment to the meritocratic principle of fairness—reward for talent and effort—or the egalitarian fairness principle—resources should be distributed equally. See, Benjamin Herscovitch, *A Fair Go: Fact or Fiction?* (Centre for Independent Studies, 2013) 3-4 (references within quote omitted).

77 See, eg, Cathy Freeman's success at the 2000 Sydney Olympics: Leanne White, 'Cathy Freeman and Australia's Indigenous Heritage: a New Beginning for an Old Nation at the Sydney 2000 Olympic Games' (2012) 19(2) *International Journal of Heritage Studies* 153; Barack Obama's election to the United States Presidency: Tian Dayton, 'An Integrated National Psyche' *Huffington Post* (online) 11 May 2008 <http://www.huffingtonpost.com/dr-tian-dayton/an-integrated-national-ps_b_141299.html>.

78 Anthony Dillon, 'The Power of Victimhood' *Quadrant Online* (online), 29 May 2013<http://quadrant.org.au/opinion/bennelong-papers/2013/05/the-power-of-victimhood>.

79 This is also known as the unanticipated consequences of social action, first described by Merton in Robert K Merton, 'The Unanticipated Consequences of Purposive Social Action' (1936) 1(6) *American Sociological Review* 894.

Like Adam Smith, Noel Pearson refers to the positive socio-economic impact that the invisible hand of self-interest can achieve, stating, 'Self-interest for too many progressives is anathema to social justice, when in fact it is the very engine of the justice that is sought'. See, Noel Pearson, '2013 Whitlam Oration: The Reward for Public Life is Public Progress - An Appreciation of the Public Life of the Hon E G Whitlam AC QC Prime Minister 1972-1975' (Speech delivered at the Whitlam Institute, University of Western Sydney, 13 November 2013) <http://australianpolitics.

com/downloads/2013/13-11-13_whitlam-oration_noel-pearson.pdf> 10.

80 Pearson, ibid 13-14.

81 Alison Anderson, 'Real Education, Real Jobs' in Rhonda Craven, Anthony Dillon and Nigel Parbury (eds), *In Black & White: Australians All at the Crossroads* (Connor Court, 2013) 339.

82 Kerryn Pholi, 'Why I Burned my "Proof of Aboriginality"' *The Drum* (online) 27 September 2012<http://www.abc.net.au/unleashed/4281772.html>.

83 Helen Hughes, *Lands of Shame: Aboriginal and Torres Strait Islander "Homelands" in Transition* (Centre for Independent Studies, 2007) 184.

84 For example, Maddison argues that, 'The fundamental flaw in Hughes' argument, however, is her confusion of the recognition of cultural difference, and a respect for Aboriginal people's aspirations, with separatism and exceptionalism'. See, Sarah Maddison, 'Lands of Shame: Aboriginal and Torres Strait Islander "Homelands" in Transition (Book Review)' (2008) 13(2) *Australian Journal of Human Rights* 237, 238.

85 Helen Hughes, 'Who Are Indigenous Australians?' (2008) 52(11) *Quadrant* 26, 31.

86 Armstrong Williams, 'Williams: Unintended Consequences of Liberal Policies' *Washington Times* (online), 14 October 2009 <http://www.washingtontimes.com/news/2009/oct/14/williams-unintended-consequences-of-liberal-policies>. 'Social engineering' and 'liberal' are loaded terms in the United States. In Australia similar disparaging labels would be 'social activism' and 'socialist' or 'leftist'. We do not condone these terms in this discussion.

87 See, Lederer, above n 15, 221 ff. Aspirational targets in relation to race or ethnicity may well need to fit within the special measures exception (section 8(1) of the RDA) if section 10(1) of the RDA is validly invoked to disqualify such targets).

If such targets are voluntarily adopted by *private bodies independent of legislation*, section 10 is inapplicable. Depending on how the aspirational target of a private body is implemented and judicially construed, the aspirational target may still fall foul of section 9 of the RDA (and recourse would have to be had to section 8(1) to save it). However, section 9 is quite unlike section 10(1), as Hayne J acknowledged in *Maloney*: '[s]ection 10 is especially broad … Whatever the scope of section 9(1), it is sufficient to notice that it contains elements which section 10(1) does not'. See, *Maloney v The Queen*(2013) 298 ALR 308, 328-329; [2013] HCA 28 (19 June 2013) at [67].

It may be that a future Court construes such a (private, non-legislative) target as non-discriminatory (and therefore outside the ambit of section 9) in line with international law, as per the Committee on the Elimination of Racial Discrimination:

> General Recommendation 14 observes that 'differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'. The term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same: Committee on the Elimination of Racial Discrimination, above n 12, [3].

However, this question has not been judicially considered in Australia.

88 Larry Alexander and Maimon Schwarzschild, 'Race Matters' (2013) 13-109 *San Diego Legal Studies Research Paper Series* 16.

89 See, Greg Toppo, 'Affirmative Action Fading from College Scene' *USA Today* (online) 12 February 2014 <http://www.usatoday.com/story/news/nation/2014/02/12/black-history-affirmative-action/5432107>; Richard D Kahlenberg, 'Race-neutral Policies and Programs for Achieving Racial Diversity: The New Affirmative Action' *University Business* (online) August 2013 <http://www.universitybusiness.com/article/race-neutral-policies-and-programs-achieving-racial-diversity>.

90 Richard D Kahlenberg and Halley Potter, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences* (Century Foundation, 2012) 1.

91 Indigenous Scholarships, *Alternative Entry Schemes in Australia* (2011) The Aspiration Initiative <http://www.indigenousscholarships.com.au/resources/how-do-i-get-uni/alternative-entry-schemes/alternative-entry-schemes-australia>.

92 Larissa Behrendt et al, *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People: Final Report* (Panel of the Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People, 2012) <http://www.innovation.gov.au/highereducation/IndigenousHigherEducation/ReviewOfIndigenousHigherEducation/FinalReport/IHERFinalReport.pdf> 151.

Universities Australia, the peak body representing Australia's universities, states that it:

> is working with Government to implement these recommendations … The delivery of the recommendations from the Review is being overseen by the Aboriginal and Torres Strait Islander Higher Education Advisory Council

('ATSIHEAC'), a Government committee reporting through the Department of Education.

See, Universities Australia, *Indigenous Higher Education* (2014) Universities Australia <https://www.universitiesaustralia.edu.au/uni-participation-quality/Indigenous-Higher-Education#.U_QV5LySzZc>.

93 Denise Bradley et al, *Review of Australian Higher Education: Final Report* (Review of Australian Higher Education, 2008) <http://www.innovation.gov.au/HigherEducation/Documents/Review/PDF/Higher%20Education%20Review_one%20document_02.pdf>.

94 Australian Government, *Transforming Australia's HigherEducation System* (Australian Government, 2009) <http://www.innovation.gov.au/highereducation/Documents/TransformingAusHigherED.pdf> 62. See, also, Bradley et al, above n 93, 159.

95 Ibid 35.

96 Ibid, xxvi. Efforts to achieve low-SES targets are, however, proving just as challenging as Indigenous student targets. See, Australian Council for Educational Research, 'Low SES Student Enrolment Target may be Within Reach' (Media Release, 6 March 2013) <http://www.acer.edu.au/media/low-ses-student-enrolment-target-may-be-within-reach>.

97 Kahlenberg and Potter argue that 'class-based affirmative action programs' can 'indirectly produce racial and ethnic diversity'. See, Kahlenberg and Potter, above n 90, 11.

98 Michaels, above n 56.

99 United States Department of Commerce, *State and County Quick Facts* (2014) Census Bureau <http://quickfacts.census.gov/qfd/states/00000.html>. The 2013 estimate is 316,128,839.

100 Australian Bureau of Statistics, *3101.0 - Australian Demographic Statistics, Jun 2013* (2013) Australian Bureau of Statistics <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0/>. The 30 June 2013 estimate is 23,130,900.

101 United States Department of Commerce, above n 99. Note the 2012 figures.

102 Ibid.

103 Australian Bureau of Statistics, *3238.0.55.001 - Estimates of Aboriginal and Torres Strait Islander Australians, June 2011* (2013) Australian Bureau of Statistics <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>.

104 See Lederer, above n 15, 225-227. This probably does not invalidate a comparison with Australia, because AAPs with mandatory quotas comprise only a small part of AAPs in the United States. In any case, most of the United States research (and controversy) has centred on the college (university) sector, where there are no mandatory quotas.

105 Most American studies of AAPs for minorities do not include Native Americans, because of their relatively small numbers.

106 Pojman puts it bluntly in the sub-heading of his third argument against affirmative action, which states 'Affirmative action encourages mediocrity and incompetence'. See, Pojman, above n 44, 199.

107 Mary J Fischer and Douglas S Massey, 'The Effects of Affirmative Action in Higher Education' (2007) 36(2) *Social Science Research* 532, 544.

108 Richard Henry Sander and Stuart Taylor Jr, *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It* (Basic Books, 2012).

109 William Kidder, *A High Target for "Mismatch": Bogus Arguments about Affirmative Action* (7 February 2013) Los Angeles Review of Books <https://lareviewofbooks.org/review/a-high-target-for-mismatch-bogus-arguments-about-affirmative-action>.

110 Indeed the small cohort of Native American students (relative to the total number of students) means that Indigenous American students are not even separately considered in any of these national statistical analyses. Thus, we rely on the authors' conclusions about African American and Hispanic students to draw comparisons with Australian Indigenous students.

111 Christine Asmar, Susan Page and Ali Radloff, 'Dispelling Myths: Indigenous Students' (2011) 10 *Australasian Survey of Student Engagement* 1 (references omitted).

112 Pechenkina and Anderson, above n 33, 1.

113 Ibid 16 (references omitted).

114 Fischer and Massey, above n 107, 533.

115 Ibid 544.

116 Jayanti Owens and Douglas S Massey, 'Stereotype Threat and College Academic Performance: A Latent Variables Approach' (2011) 40(1) *Social Science Research* 150.

117 Ibid 163.

118 See, Pechenkina and Anderson, above n 33, 16. Pechenkina and Anderson refer to the Indigenous Higher Education Advisory Council, 'Improving Indigenous Outcomes and Enhancing Indigenous Culture and Knowledge in Australian Higher Education' (2006) (references omitted).

119 Asmar, Page and Radloff, above n 111, 12.

120 Linda S Gottfredson, 'Racially Gerrymandering the Content of Police Tests to Satisfy the US Justice Department: A Case Study' (1996) 2(3) *Psychology, Public Policy, and Law* 418.

121 Faye J Crosby et al, 'Affirmative Action: Psychological Data and the Policy Debates' (2003) 58(2) *American Psychologist* 93, 108.

122 Ibid 106.

123 Ibid 105-106 (references omitted).

124 On The Issues, *Clarence Thomas on Civil Rights* (2012) On the Issues: Every Political Leader On Every Issue <http://www.

ontheissues.org/Clarence_Thomas.htm>, quoting Clarence Thomas, *My Grandfather's Son: A Memoir* (Harper Collins, 2008) 74-75.

125 See, eg, *Higher Education Support Act 2003 - Other Grants Guidelines (Education) 2012* (Cth).

126 Scott Gorringe et al, argue that:

> While these perceptions may have arisen first within non-Indigenous Australia, introduced concepts of deficit, difference, authenticity and validity are also prevalent among Aboriginal people and are having an effect on relations between the many different nations, groups, communities and individuals that now constitute 'Aboriginal Australia: Scott Gorringe, Joe Ross and Cressida Fforde, *"Will the Real Aborigine Please Stand Up": Strategies for Breaking the Stereotypes and Changing the Conversation*' (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2011) 5.

127 Brent R Hickman, *Pre-College Human Capital Investment and Affirmative Action: A Structural Policy Analysis of US College Admissions* (June 2013) Department of Economics, University of Chicago <http://home.uchicago.edu/~hickmanbr/uploads/AA_Empirical_paper.pdf> 3-4.

128 Such a view is, of course, prejudiced and irrational, because it is never made in relation to Indigenous people who are successful in sport, visual arts or performing arts. In those fields, we see a kind of 'friendly' racism, one that paints Indigenous people as uber-talented footballers, artists, and musicians. However, it is then only a small logical step to conclude that, in other areas, such as schooling – or parenting, or citizenship – Aboriginal peoples are *Untermenschen*. This is the ultimate danger whenever we set people apart on the basis of race or ethnicity.

129 Williams, above n 86.

130 This is also known as 'the coal miner's son [or daughter]' argument. See the discussion under the heading, '10. Desert Confounded, Desert Misapplied' in Robert Fullinwider, *Affirmative Action* (17 September 2013) Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/affirmative-action/#4>.

131 This is a complex argument that we have raised elsewhere. See, Loretta Kelly and Antony Barac, 'Like a Bolt out of the Blue?', *National Indigenous Times* (Woden, ACT), 14 April 2011, 30.

132 See, eg, Shelby Steele, *White Guilt: How Blacks and Whites Together Destroyed the Promise of the Civil Rights Era* (Harper Collins, 2007).

133 Pojman, above n 44, 198.

134 Dave Price and Bess Price, 'Good Culture - Bad Culture, Where do we go from here?' in Rhonda Craven, Anthony Dillon and Nigel Parbury (eds), *In Black & White: Australians All at the Crossroads* (Connor Court, 2013) 191, 206.

135 See, Shelby Steele, *White Guilt* (Harper Collins, 2006).

136 Noel Pearson, 'White Guilt, Victimhood and the Quest for a Radical Centre' (2007) 16*Griffith Review* 11, 21.

137 Ibid.

138 For example, Aileen Moreton-Robinson strongly refutes an alleged implication by Dirk Moses:

> that I am stating only Aboriginal people carry a heavy load and need help, in order to substantiate his accusation that I deploy a victimhood narrative. He deliberately avoids naming whiteness, preferring instead to use racial signifiers 'non-Aboriginal' and 'non-black' to denote the people to whom he thinks I am referring. In this discursive move he disavows the existence of whiteness as a category of analysis and transfers his victimhood narrative onto my work: Aileen Moreton-Robinson, 'The White Man's Burden' (2011) 26(70) *Australian Feminist Studies* 413, 420. Moreton-Robinson refers to A Dirk Moses, 'Time, Indigeneity, and Peoplehood: The Postcolony in Australia' (2010) 13(1) *Postcolonial Studies* 9, 17.

139 Dillon, above n 78.

140 Roland G Fryer Jr and Glenn C Loury, 'Affirmative Action and Its Mythology' (2005) 19(3) *Journal of Economic Perspectives* 1, 13.

141 Abigail J Stewart and Danielle LaVaque-Manty, 'Achieving Critical Mass: The Future of Gender and Higher Education in the United States' in David Lee Featherman, Marvin Krislov and Martin Hall (eds), *The Next Twenty-Five Years: Affirmative Action in Higher Education in The United States and South Africa* (University of Michigan Press, 2010) 309, 311.

142 Department of Finance and Deregulation, *Strategic Review of Indigenous Expenditure: Report to the Australian Government* (Australian Government, 2009) 12 (emphasis in original).

143 Stewart and LaVaque-Manty, above n 141, 312. However, the authors are unequivocal about being the *only* member of a minority on campus. They state, 'it is clear that being the only member of an under-represented group is extremely disadvantageous. This is true for students, as well as faculty, and should be taken into account in a wide range of educational settings'.

144 J Philippe Rushton and Arthur R Jensen, 'Thirty Years of Research on Race Differences in Cognitive Ability' (2005) 11(2) *Psychology, Public Policy, and Law* 235, 281-283. Rushton and Jensen do not state whether or not Australian Aborigines and Pacific Islanders are part of the 'Black" group. It may be that they are not, being non-African. They state, 'the greatest genetic divergence within the human species is between Africans (who have had the most time for random mutations to accumulate) and non-Africans.': Ibid, 266.

145 Reno, above n 56.

146 Referring to Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974).

147 Altman, Biddle and Hunter, above n 32, 247.

148 Peter Schuck, *The Limits of Law: Essays on Democratic Governance* (Westview Press, 2000).

149 Peter H Schuck, *Affirmative Action: Don't Mend It or End It - Bend It* (2002) Brookings Review <http://www.brookings.edu/research/articles/2002/12/winter-affirmativeaction-schuck>. This also appears as a chapter in, Peter H Schuck, *Diversity in America: Keeping Government at a Safe Distance* (Harvard University Press, 2006).

150 Kahlenberg and Potter, above n 90,12.

151 John Louis Lucaites, *Ben Franklin and The Bell Curve: Rhetoric, Race, and Affirmative Action* (2001) Fragments <http://mcgeefragments.net/OLD/guests/Ben_Franklin.html> (emphasis added).

152 Boyd Hunter, 'Indigenous Social Exclusion: Insights and Challenges for the Concept of Social Inclusion' (2009) 82 *Familly Matters* 52, 52.

153 For example, rates of Indigenous incarceration have increased over the past two decades in the face of greater per capita government Indigenous spending.

154 Robert K Fullinwider, *The Reverse Discrimination Controversy: A Moral and Legal Analysis* (Rowman and Littlefield, 1980) 240.