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ANTI-DISCRIMINATION LAW AS THE PROTECTOR OF OTHER RIGHTS AND FREEDOMS: THE CASE OF THE *RACIAL DISCRIMINATION ACT*

Abstract

The prohibitions on discrimination on the basis of race in the *Racial Discrimination Act 1975* (Cth) ('*RDA*') are different from those contained in other Commonwealth anti-discrimination legislation. Rather than requiring complainants to demonstrate 'less favourable' treatment on the basis of a ground, the *RDA* requires complainants to demonstrate that an act or a law has made a distinction based on race that has the purpose or effect of nullifying or impairing the enjoyment of a person's human rights and fundamental freedoms. This article argues that while this construction has avoided some of the problems that plague other Commonwealth discrimination laws, the focus on 'other rights and freedoms' in the *RDA* gives rise to a different problem — the need for an effective articulation of the content and scope of such other rights and freedoms. Such a problem could be resolved through refocusing attention on the underlying purpose of the *RDA* — the facilitation of equality and non-discrimination on the basis of race.

I Introduction

Similar to much of the case law on anti-discrimination legislation in Australia, the field of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') is 'littered with the wounded who appear to present the problem of discrimination which the law was designed to prevent and redress',[1] but who still fail in their claims. Though the failures of the *RDA* in redressing discrimination are consistent with outcomes for complainants utilising other Commonwealth anti-discrimination legislation some of the reasons for these failures are nevertheless distinctive. This stems from the different analysis required in a racial discrimination claim made pursuant to the *RDA*. Rather than requiring a complainant to demonstrate 'less favourable' or 'unfavourable' treatment on the basis of a ground,[2] ss 9(1) and 10(1) of the

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1 *X v Commonwealth* (1999) 200 CLR 177, 213 [120] (Kirby J).

2 'Less favourably' is the wording used to describe direct discrimination in other Commonwealth legislation: *Age Discrimination Act 2004* (Cth) s 14(a) ('*ADA*'); *Disability Discrimination Act 1992* (Cth) s 5(1) ('*DDA*'); *Sex Discrimination Act 1984* (Cth) ss 5,

RDA require a complainant to demonstrate that an act or a law has the purpose or effect of creating a distinction based on race, that in turn has the purpose or effect of impairing a person's human rights or fundamental freedoms.[3] This focus on the impairment of the enjoyment of a person's rights or freedoms adds an additional layer of complexity to *RDA* claims.

Complainants lose racial discrimination claims for several reasons. First, as Beth Gaze,[4] Jonathan Hunyor,[5] and Loretta De Plevitz[6] have all identified, courts have consistently placed a heavy burden on complainants to prove racial discrimination, persistently utilising the so-called '*Briginshaw* standard'[7] for assessing evidence.[8] Second, complainants have often failed to demonstrate a distinction based on race.[9] Third, courts have accepted that measures which have created a distinction based on

5A, 5B, 5C, 6 ('*SDA*'). 'Unfavourable treatment' is the wording used to describe direct discrimination in some of the state legislation: *Discrimination Act 1991* (ACT) s 8(2); *Equal Opportunity Act 2010* (Vic) s 8. For a discussion of the difference between these two expressions, see Colin Campbell and Dale Smith, 'Direct Discrimination without a Comparator: Moving to a Test of Unfavourable Treatment' (2015) 43(1) *Federal Law Review* 91.

3 *Racial Discrimination Act 1975* (Cth) ss 9(1), 10(1) ('*RDA*'). Sections 9 and 10 of the *RDA* actually prohibit discrimination on the basis of 'race, colour, descent or national or ethnic origin'. The content of this article relates to discrimination on all of these grounds, however, for ease of expression this article will only refer to 'racial discrimination' or 'discrimination on the basis of race'.

4 Beth Gaze, 'Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000–04' (2005) 11(1) *Australian Journal of Human Rights* 171, 191.

5 Jonathan Hunyor, 'Skin-Deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review* 535, 539.

6 Loretta De Plevitz, 'The *Briginshaw* "Standard of Proof" in Anti-Discrimination Law: "Pointing with a Wavering Finger"' (2003) 27(2) *Melbourne University Law Review* 308, 311.

7 See *Briginshaw v Briginshaw* (1938) 60 CLR 336 ('*Briginshaw*'). The '*Briginshaw* standard' is derived from the judgment of Dixon J, where his Honour remarked in obiter that more convincing evidence is required to meet the standard of proof, if the allegation in question is particularly serious or unlikely to have occurred: at 362.

8 An approach first taken in *Department of Health (Vic) v Arumugam* [1988] VR 319: at 330. Such an approach was adopted in numerous decisions such as *Sharma v Legal Aid (Qld)* (2002) 115 IR 91: at 98–9 [40]. However, more recent decisions have cautioned against simply applying the *Briginshaw* (n 7) standard. See, eg: *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 571 [110] (French and Jacobson JJ), 576–7 [139] (Branson J); *Wotton v Queensland [No 5]* (2016) 352 ALR 146, 183 [113] ('*Wotton [No 5]*').

9 See, eg, *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing (Qld)* [2012] 1 Qd R 1 ('*Aurukun*'). See also 'Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury' (2010) 14(1) *Australian Indigenous Law Review* 106.

race are, nevertheless, 'special measures'.[10] However, I suggest that one of the less explored reasons for the failure of racial discrimination claims is the parasitic nature of the rights contained in ss 9 and 10 of the *RDA*. This notion stems from the requirement of infringement of 'other human rights and fundamental freedoms', the focus on which gives rise to a challenge not faced by complainants pursuing other anti-discrimination law claims — that of effectively articulating the existence, content and scope of these other human rights and fundamental freedoms and demonstrating that they have been breached. Complainants have frequently struggled with this challenge and have been admonished by the courts for failing to develop arguments as to the substance and content of those rights.[11] Thus, I aim to unpack this particular challenge foisted on complainants and determine whether the analysis required is effective in achieving the *RDA*'s ultimate aim of *eliminating* discrimination.

In this article, I interrogate cases which invoke a right to minority language usage to demonstrate the challenges faced by complainants. By using the right to minority languages as a case study, I demonstrate that bringing a successful claim is particularly challenging where the right invoked is not well developed in international law. I argue that the approach to the content of other rights and freedoms is problematic, because the focus on the specific content of the human right or fundamental freedom fails to appreciate the difference between a claim of discrimination and a claim that another specific human right has been infringed. While one solution offered in the case law, particularly with respect to s 9, is to accept that the *RDA* captures a generalised right to equality, I suggest that there is a better approach to understanding the purpose and content of ss 9 and 10 of the *RDA*. This involves a shift of focus back to the discriminatory act or law complained of by only requiring the act or law to be within the 'ambit' of the fundamental right or freedom.[12]

To make this argument, this article is presented in four substantive parts. In Part II, I interrogate the text and structure of the prohibition of discrimination in the *RDA*. I assess the general approach taken to the construction of ss 9 and 10 of the *RDA* and outline some of the benefits of the adopted interpretation. In Part III, I interrogate the case law to determine the content, scope and source of the rights and freedoms protected by the *RDA*. In particular, I utilise recent cases invoking a right to use a minority language as a case study. I argue that the need to define the scope and content of the right or freedom said to have been infringed is unnecessarily burdensome for complainants. In Part IV, I tackle the vexed problem of the protection, content and scope of a freestanding right to equality and argue that without substantive content,

10 See *Maloney v The Queen* (2013) 252 CLR 168 ('*Maloney*') 177 [5] (French CJ), 195 [51] (Hayne J), 213–14 [112] (Crennan J), 239 [191] (Bell J), 263–4 [263] (Gageler J). See also George Williams and Daniel Reynolds, 'The Racial Discrimination Act and Inconsistency under the Australian Constitution' (2015) 36(1) *Adelaide Law Review* 241.

11 See Mortimer J's criticisms of the complainant's submissions in *Wotton [No 5]* (n 8): at 317 [677]–[679].

12 Aaron Baker, 'The Enjoyment of Rights and Freedoms: A New Conception of the "Ambit" under Article 14 ECHR' (2006) 69(5) *Modern Law Review* 714, 715.

a shift to a focus on a right to equality is not a useful or fulfilling enterprise. In Part V, I suggest that rather than requiring a complainant to demonstrate in precise terms the *content and scope* of the right or freedom engaged, a better and more normatively consistent approach would be to focus on the *ambit* of ss 9 and 10, drawing on the jurisprudence on art 14 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*').[13]

II The Text and Structure of the Prohibition of Discrimination in the *RDA*

The *RDA* was the first federal prohibition of discrimination on any ground when it was passed in 1975. In introducing the Bill, the Commonwealth Attorney-General Kep Enderby acknowledged that its purpose was to implement Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*CERD*'),[14] remedy the inadequacies of the common law, and educate the public about the 'undesirable and unsocial consequences of discrimination … and make them more obvious and conspicuous'.[15] The structure of the *RDA* is different from the other Commonwealth anti-discrimination legislation. This is, in part, because the *RDA* is older than the other legislation. The most obvious difference is that its text and structure closely resembles the *CERD*. In contrast, though each of the other Commonwealth statutes lists corresponding international conventions in its objects clauses or application provisions,[16] none of them follow the structure of those conventions as closely as the *RDA* follows the *CERD*.[17] The close textual relationship between the *RDA* and the *CERD* could be explained by the fact that at the time of passage, the full extent of the Commonwealth's powers with respect to external affairs were yet to be clarified by the High Court.[18] Regardless of the reason, the close resemblance is distinctive and has led to the use of different tests to prove discrimination from those required by other Commonwealth anti-discrimination legislation.[19]

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13 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 14 ('*ECHR*').

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

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 1975, 285 (Kep Enderby, Attorney-General).

16 *SDA* (n 2) s 3(1); *ADA* (n 2) s 10(7); *DDA* (n 2) s 12(8).

17 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 227.

18 Ibid; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 217–20 (Stephen J), 224 '(Mason J) ('*Koowarta*').

19 Rees, Rice and Allen (n 17) 133–4.

While all other Commonwealth anti-discrimination legislation prohibits direct and indirect discrimination on the basis of an attribute (also commonly understood as a ground),[20] the *RDA* defines discrimination differently, namely, as a distinction which has the purpose or effect of impairing or nullifying a person's human rights or fundamental freedoms.[21] Section 9 makes racial discrimination unlawful and s 10 confirms that there is a right to equality before the law. Section 9(1) provides:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of *nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom* in the political, economic, social, cultural or any other field of public life.[22]

Section 9(1) is described as the prohibition on 'direct discrimination', though there is nothing in its wording which precludes it from also prohibiting 'indirect discrimination'.[23] To clarify that the *RDA* was also intended to cover indirect discrimination, the Commonwealth Parliament amended it in 1990 to include the prohibition in s 9(1A).[24] However, again, unlike other Commonwealth anti-discrimination legislation, indirect discrimination is defined as requiring a person to comply with a term, condition or requirement which is not reasonable and has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom.[25]

Section 10 provides for a right to equality before the law. This is not a general protection, but arises only where a measure affects the enjoyment of a person's rights and freedoms. Section 10 provides:

> If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.[26]

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20 *SDA* (n 2) ss 5–7B, 7D; *ADA* (n 2) ss 14–15; *DDA* (n 2) ss 5–6.

21 *RDA* (n 3) ss 9(1), 9(1A), 10(1).

22 Ibid s 9(1) (emphasis added).

23 *Australian Medical Council v Wilson* (1996) 68 FCR 46, 71, 74 (Sackville J) ('*Wilson*').

24 *Law and Justice Legislation Amendment Act 1990* (Cth) sch, inserting *RDA* (n 3) s 9(1A).

25 *RDA* (n 3) s 9(1A).

26 Ibid s 10(1).

While s 10 has been described as pursuing equality before the law,[27] it more modestly could be described as being designed to overcome inequality before the law on the basis of race.[28]

Though the aim of ss 9 and 10 may be understood as providing a right to non-discrimination and to achieve equality, this is not necessarily reflected in the respective provisions. Consequently, some judges have questioned whether the provisions are directed towards discrimination at all.[29] However, because the nature of a distinction on the basis of race is undefined, considerable scope is given to the judiciary in interpreting these provisions.

The High Court jurisprudence on the *RDA* has generally been focused on the provision for equality before the law in s 10(1),[30] but both ss 9–10 are relevant in understanding the nature of the obligations set out in the *RDA*.[31] The test to prove discrimination has been described as having a number of steps. In *Baird v Queensland* ('*Baird*'),[32] Allsop J cautioned that the prohibition should be understood and interpreted in a holistic manner and not simply as the sum of finite parts.[33] In *Wotton v Queensland [No 5]* (2016) 352 ALR 146 ('*Wotton [No 5]*'),[34] Mortimer J described s 9(1) as having two separate limbs.[35] The first is a conduct limb which requires an 'act involving a distinction, exclusion, restriction or preference which is based on race'.[36] The second is an outcome-based limb which looks at whether the conduct had the purpose or effect of nullifying or impairing human rights.[37] Another test which has been adopted breaks down the steps of proving racial discrimination into small parts.[38] These parts were articulated by Sackville J in *Australian Medical Council v Wilson* ('*Wilson*') which are still cited as the test for s 9(1).[39] In summary:

(1) a person;

(2) must have done some act or conduct;

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27 See, eg: *Gerhardy v Brown* (1985) 159 CLR 70, 94 (Mason J) ('*Gerhardy*'); *Mabo v Queensland* (1988) 166 CLR 186, 198 (Mason CJ), 205 (Wilson J) ('*Mabo [No 1]*').

28 *Maloney* (n 10) 179 (French CJ).

29 See, eg: *Western Australia v Ward* (2002) 213 CLR 1, 99 [105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('*Ward*'); *Maloney* (n 10) 200–2 [65]–[68] (Hayne J).

30 See, eg: *Gerhardy* (n 27); *Koowarta* (n 18); *Mabo [No 1]* (n 27); *Ward* (n 29); *Maloney* (n 10).

31 *Wotton [No 5]* (n 8) 282 [527].

32 (2006) 156 FCR 451 ('*Baird*').

33 Ibid 462 [37].

34 *Wotton [No 5]* (n 8).

35 Ibid 283 [530]–[531].

36 Ibid 283 [530].

37 Ibid 283 [530]–[531].

38 *Barngarla Determination Aboriginal Corporation RNTBC v District Council of Kimba* [2019] FCA 1585, [58].

39 *Wilson* (n 23) 73.

(3) the act or law must involve a distinction, exclusion, restriction or preference;

(4) that distinction must have been drawn on the basis of race or ethnic origin; and

(5) the distinction must have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Regardless of whether courts use the two-limb test or the five step test, complainants bringing applications under the *RDA* have avoided some of the difficulties confronted by those proceeding under other anti-discrimination legislation.

The test described above is different to that utilised when considering other Commonwealth anti-discrimination legislation. In particular, there is less emphasis placed on constructing a hypothetical comparator to compare the complainant's treatment against.[40] In *Baird*, a case concerning stolen wages of Indigenous persons,[41] the Full Court of the Federal Court accepted that complainants proceeding under the *RDA* do not need to show that there is a direct comparison to demonstrate racial discrimination.[42] This conclusion was justified because in some cases, there will be no comparator to be found.[43]

In avoiding this challenge, the *RDA* could theoretically be a more flexible instrument than other Australian discrimination laws. Nevertheless, complainants are still overwhelmingly unsuccessful in their claims for various reasons. First, as Hunyor has highlighted, the evidentiary burden on complainants is often heavy.[44] In many cases, complainants are required to adduce evidence of facts that are only within the knowledge of the respondent. In some cases, such evidence may not even be consciously acknowledged by the respondent, such as the 'true' reason why the complainant was unsuccessful in a job application.[45] Second, in many cases where courts have rejected a claim of racial discrimination, they have rejected the argument that there has been a distinction made on the basis of race.[46] However, there are a further group of cases where the complainant has overcome evidentiary challenges, and has

40 *Baird* (n 32) 469 [63] (Allsop J, Spender J agreeing at 452 [5], Edmonds J agreeing at 473 [82]).

41 *Baird* (n 32). For further discussion of this case and others concerning stolen wages, see Margaret Thornton and Trish Luker, 'The Wages of Sin: Compensation for Indigenous Workers' (2009) 32(3) *University of New South Wales Law Journal* 647.

42 *Baird* (n 32) 469 [63] (Allsop J, Spender J agreeing at 452 [5], Edmonds J agreeing at 473 [82]).

43 Ibid.

44 Hunyor (n 5) 536–7, 542–3, 546–7. See also Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 180.

45 Hunyor (n 5) 537–8.

46 A recent example of this kind of case is *Barngarla Determination Aboriginal Corporation RNTBC v District Council of Kimba [No 2]* (2020) 275 FCR 669.

demonstrated a distinction based on race but has nevertheless failed in their claim/s. What has challenged complainants in this instance is the need to demonstrate that the act or law has the prohibited purpose or effect under s 9. This challenge has remained a sticking point for complainants.

III Impairing the Enjoyment of Human Rights and Fundamental Freedoms

In their focus on the nullification or impairment of the enjoyment of rights and freedoms, the general prohibitions in the *RDA* have a parasitic or dependent quality. That is because they rely upon the existence of *another* human right or fundamental freedom, which must be engaged and impaired in some way for a claim to be successful. Thus, a complainant needs to demonstrate the existence of another right or freedom of the kind protected by the *RDA*. From an assessment of the case law, this inquiry appears to have three stages of analysis. A complainant is required to identify the human right or freedom which has been impaired,[47] the precise content, scope or sphere of operation of that right or freedom,[48] and the manner in which there is an impairment or nullification of that right or freedom.[49]

A *Identifying the Human Right or Fundamental Freedom*

The kind of rights and freedoms required to be identified by complainants is described in ss 9(2) and 10(2) as 'a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'[50] and 'includes any right of a kind referred to in … [art] 5 of the … [*CERD*]'.[51] In *Gerhardy v Brown* (1985) 159 CLR 70 ('*Gerhardy*'),[52] it was accepted that the rights and freedoms referred to in s 9(2) (and in s 10(2)) were not only legal rights found in domestic law but also a wide variety of rights as understood at international law.[53] Further, the High Court accepted that ss 9(2) and 10(2) are not limited to those rights articulated in art 5 of the *CERD* but also encompass rights of a similar kind in other international instruments to which Australia is a signatory.[54]

The wide scope of human rights and fundamental freedoms protected does present some challenges, as highlighted by Mason J in *Gerhardy*:

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47 *Gerhardy* (n 27) 102 (Mason J).

48 Ibid; *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86, 111 [85] (Kenny J, Greenwood J agreeing at 117 [115], Logan J agreeing at 117 [116]) ('*Iliafi*').

49 *Iliafi* (n 48) 101 [42], 102 [45], 103 [51], 104 [56].

50 *RDA* (n 3) s 9(2).

51 Ibid. See also at s 10(2) which is in similar terms.

52 *Gerhardy* (n 27).

53 Ibid 125–6 (Brennan J).

54 Ibid.

> In deciding whether the right of access given by s 18 is a human right or fundamental freedom we encounter the ever present problem of defining or describing the concept of human rights. The expression 'human rights' is commonly used to denote the claim of each and every person to the enjoyment of rights and freedoms generally acknowledged as fundamental to his or her existence as a human being and as a free individual in society. … As a concept, human rights and fundamental freedoms are fundamentally different from specific or special rights in our domestic law which are enforceable by action in the courts against other individuals or against the State, the content of which is more precisely defined and understood. The primary difficulty is that of ascertaining the precise content of the relevant right or freedom. This is not a matter with which the Convention concerns itself.[55]

As a consequence, it becomes important to identify what is entailed by the notion of human rights and fundamental freedoms in the context of the *RDA*. In his Honour's judgment in *Gerhardy*, Mason J emphasised the challenge:

> The concept of human rights as it is expressed in the Convention … evokes universal values, ie values common to all societies. This involves a paradox because the rights which are accorded to individuals in particular societies are the subject of infinite variation throughout the world with the result that it is not possible, as it is in the case of a particular society … to distil common values readily or perhaps at all. Although there may be universal agreement that a right is a universal right, there may be no universal or even general agreement on the content of that right.[56]

Due to the broad scope of the possible rights incorporated in ss 9–10, there is a need to have some clarity as to the sources that can be relied upon to determine the 'precise content of the relevant right or freedom'.[57] This has become more challenging since the High Court's decision in *Maloney v The Queen* (2013) 252 CLR 168 ('*Maloney*'), which concerned the legality of alcohol restrictions on Palm Island.[58] As Patrick Wall has argued, the High Court's approach to international law in *Maloney* was 'narrow'.[59] While in *Maloney*, all members of the Court accepted the legitimacy of referring to international law and, in particular, the *CERD*, their Honours justified the use of international law on a variety of bases and in a variety of ways.[60] In particular, the Court was divided on the materials that could legitimately be used

55 Ibid 101–2.

56 Ibid 102.

57 Ibid. See also *Iliafi* (n 48); *Bropho v Western Australia* (2008) 169 FCR 59; *Wotton [No 5]* (n 8).

58 *Maloney* (n 10) 176 (French CJ).

59 Patrick Wall, 'The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15(1) *Melbourne Journal of International Law* 228, 228.

60 *Maloney* (n 10) 185 [23] (French CJ), 198–9 [61] (Hayne J), 221–2 [134] (Crennan J), 263–4 [263] (Gageler J).

to interpret the *CERD*.[61] As Wall highlights, all members of the Court overlooked the use of customary international law.[62] Further, the majority took a conservative approach to the use of extrinsic materials.[63] In the context of interpreting ss 8 and 10 of the *RDA*, all judges aside from Gageler J warned against interpretations at odds with the express wording of the *CERD*, which could potentially undermine the intention of states parties.[64] In their respective judgments, French CJ, Hayne J, Crennan J, Kiefel J and Bell J did not use international materials in a significant manner to develop the content of ss 8 or 10 of the *RDA*, despite acknowledging the integral link between those provisions and the *CERD*.[65]

The early case law indicates that the concept of human rights and freedoms is fundamentally different from rights found in domestic law. Sections 9(2) and 10(2) invoke and protect rights which are broader than the specific rights contained in the *CERD*.[66] To determine the content of those rights, in *Wotton [No 5]*, Mortimer J suggested that it was appropriate to have regard to international materials in developing the content of rights in the *CERD* and other international conventions such as the *International Covenant on Civil and Political Rights* ('*ICCPR*').[67] Her Honour acknowledged that such a finding was potentially inconsistent with some of the judgments in *Maloney*.[68] Nevertheless, Mortimer J determined that international materials were relevant and justified their use by determining that the content of rights was not a question regarding the construction of a provision of a domestic statute.[69] Justice Mortimer concluded that although the use of extrinsic materials may be impermissible in construing the meaning of ss 9–10, those materials were nevertheless relevant in determining the content of the human rights protected by those provisions.[70] In determining whether a right is 'of a kind referred to in … [art] 5', in terms of ss 9–10, courts engage in statutory interpretation to determine what the expression 'of a kind' means, in the context of the rights protected by the *RDA*.[71] However, the case law, particularly those

61 Ibid 198–9 [61] (Hayne J), 221–2 [134]–[135] (Crennan J), 234–5 [174]–[176] (Kiefel J). Cf ibid 180–1 [14] (French CJ), 255–6 [234]–[236] (Bell J).

62 Wall (n 59) 231, 234.

63 Simon Rice, '*Joan Monica Maloney v The Queen* [2013] HCA 28' (2013) 8(7) *Indigenous Law Bulletin* 28, 30; *Maloney* (n 10) 181–2 (French CJ), 198–9 (Hayne J), 221–2 (Crennan J), 235 (Kiefel J), 255–6 (Bell J).

64 *Maloney* (n 10) 185–6 [23]–[26] (French CJ) 198–9 [61] (Hayne J), 221–2 [134] (Crennan J), 234–5 [171]–[176] (Kiefel J), 255–6 [234]–[235] (Bell J).

65 Wall (n 59) 250.

66 *Koowarta* (n 18); *Gerhardy* (n 27); *Mabo [No 1]* (n 27).

67 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); *Wotton [No 5]* (n 8) 279–80 [516].

68 *Wotton [No 5]* (n 8) 280 [519]–[520].

69 Ibid 280–2 [516]–[527].

70 Ibid 281–2 [526] .

71 See, eg, Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 320.

cases involving novel rights claims, seems to indicate that since *Maloney*, courts have still been referring to a variety of international and foreign materials in interpreting the content of rights protected by ss 9–10 of the *RDA*.[72]

B *The Limitations of 'Content and Scope': An Exploration of Language Rights Cases*

A criticism in some judgments is that complainants have failed to articulate clearly the scope or content of the rights and freedoms upon which they rely.[73] However, this articulation can be challenging due to the way in which the right is understood and articulated in international and foreign legal materials, and the manner in which those ideas can be transposed into the Australian context given the general lack of broad human rights protection in Australian domestic law. Notably, in Australia there has often been a marked reluctance to recognise and discuss human rights.[74]

A useful illustration of this challenge is presented by cases which focus on the intersection between language and race. Language represents an interesting case study in understanding the operation of racial discrimination in the Australian context as language rights are of significant concern for minority groups, whilst being ill-defined at international law. Australia has no official national language.[75] The 2016 Census indicated that more than 300 languages are spoken at home across Australia and that more than 21% of respondents speak a language other than English at home.[76] Nevertheless, other polling data from around the same period indicates that 92% of respondents considered that speaking English was a more important identifier of Australian identity than birthplace or citizenship.[77] In 2020, in announcing changes to citizenship requirements, both the Prime Minister and the Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs emphasised a renewed focus on English language competency in preparing migrants for Australian citizenship.[78] The rationale for the focus on English language ability was identified

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72 See, eg: *Iliafi* (n 48); *Wotton [No 5]* (n 8); *Hamzy v Commissioner of Corrective Services (NSW)* [2020] NSWSC 414 ('*Hamzy*').

73 See, eg, *Iliafi* (n 48). In that case, the complainants were chastised for failing to engage in a 'sophisticated jurisprudential analysis' of the right to freedom of expression 'at their peril': at 111 [89] (Kenny J, Greenwood J agreeing at 117 [115], Logan J agreeing at 117 [116]).

74 See, eg, Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195, 196.

75 Cf *Official Languages Act*, RSC 1985 (4th Supp), c C-31, s 2.

76 Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia* (Catalogue No 2071.0, 28 June 2017).

77 Jill Sheppard, *Australian Attitudes towards National Identity: Citizenship, Immigration and Tradition* (Report No 18, Australian Centre for Applied Social Research Methods, April 2015) 2.

78 Mostafa Rachwani, 'The New Australian Citizenship Test: What Is It and What Has Changed?', *The Guardian* (online, 18 September 2020) <https://www.theguardian.com/australia-news/2020/sep/18/the-new-australian-citizenship-test-what-is-it-and-what-has-changed>.

as a means to counteract the negative economic and social outcomes for migrants who arrive with limited English.[79] However, the solution to such a problem is focused on achieving a form of assimilation based on language, rather than focusing on the capacity for an accommodation of difference.[80] Consequently, though many languages are spoken throughout Australia, the general approach to race and language suggests a strong preference towards the assimilation of language.

There remains a critical link between language, race and inequality. A shared language is integral to the continued existence of a minority community and a continuing connection to culture. Many scholars have recognised the important role of language in keeping individuals associated with their culture and race.[81] Language acts as an important aspect of identity, both for the individual as well as for the cultural community that they are part of.[82] Focusing specifically on Indigenous languages and the Indigenous experience, Laura Beacroft highlights that Indigenous identity is better represented through an association with language groups as opposed to the colonial conception of race.[83] The rapid decline in languages is presented as a significant cultural cost and one that, at its heart, is a question of inequality. As James Crawford highlights, 'language death does not happen in privileged communities. It happens to the dispossessed and disempowered'.[84]

Part of the challenge for complainants in language rights cases is that at an international level, language rights are often not particularly well developed compared to other human rights and fundamental freedoms.[85] Stephen May describes language rights as the 'Cinderella' of human rights, 'a "bastard stepchild" … roundly rejected

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79 Anveet Arora, 'Australia Announces Changes to Citizenship Test and English Language Program for Migrants', *SBS Punjabi* (online, 28 August 2020) <https://www.sbs.com.au/language/english/australia-announces-changes-to-citizenship-test-and-english-language-program-for-migrants>.

80 Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 30. This would appear to be consistent with the idea of 'racelessness' in Australian society presented in Margaret Thornton and Trish Luker, 'The New Racism in Employment Discrimination: Tales from the Global Economy' (2010) 32(1) *Sydney Law Review* 1: at 20.

81 See, eg: Laura Beacroft, 'Indigenous Language and Language Rights in Australia after the *Mabo (No 2)* Decision: A Poor Report Card' (2017) 23 *James Cook University Law Review* 113; David Smillie, 'Human Nature and Evolution: Language, Culture, and Race' (1996) 19(2) *Journal of Social and Evolutionary Systems* 145; Philip Riley, *Language, Culture and Identity: An Ethnolinguistic Perspective* (Continuum, 2007).

82 Alison Crump, 'Introducing LangCrit: Critical Language and Race Theory' (2014) 11(3) *Critical Inquiry in Language Studies* 207, 208.

83 Beacroft (n 81) 117.

84 James Crawford, 'Endangered Native American Languages: What Is to Be Done and Why?' (1995) 19(1) *Bilingual Research Journal* 17, 35.

85 Stephen May, 'Language Rights: The "Cinderella" Human Right' (2011) 10(3) *Journal of Human Rights* 265, 270–1.

as problematic and/or regularly ignored at worst'.[86] Drawing on Kloss, May argues that there are two different ways of approaching language rights: a tolerance-oriented approach and a promotion-oriented approach.[87] The tolerance-oriented approach conceives of the purpose of language rights as a means to preserve a person's own language in private, non-governmental spheres of life.[88] This can include the right to use one's first language at home and in public and encompasses a freedom of association and assembly as well as the right to private and cultural expressions of language in private institutions.[89] In contrast, a promotion-oriented approach to language rights involves promoting the use of minority languages in public spaces and through public institutions such as legislative, administrative and educational bodies.[90]

Unlike the position of language rights in international law generally, the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*') appears to adopt a promotion-oriented approach to Indigenous language rights.[91] The *UNDRIP* includes the right of Indigenous peoples to use, develop and transmit to future generations their language as well as the right to establish and control educational systems and institutions to provide education in their language.[92] A case which concerns Indigenous language and persons is *Munkara v Bencsevich*,[93] but this case involved an argument that a failure to accommodate individuals who had difficulties speaking English was racially discriminatory, rather than an infringement of a right to use an Indigenous language.[94] It may be that given the more specific rights contained in the *UNDRIP*, Indigenous language rights cases may be treated differently to other language rights cases given the significantly different contexts and experiences of different racial groups.

The Australian case law focuses on two aspects of language disadvantage. Complainants have brought claims arguing that their limited ability to speak English has meant that restricted time periods for appeals in both curial and non-curial settings are

86 Ibid 265.

87 Ibid 266.

88 Ibid.

89 Ibid.

90 Ibid.

91 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

92 Ibid arts 13.1, 14.1.

93 [2018] NTCA 4 ('*Munkara*').

94 Ibid [14] (Kelly J). Consistently with the limited use of the *RDA* by Indigenous communities more generally, see, eg: Fiona Allison, 'A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians through an Access to Justice Lens' (2013) 17(2) *Australian Indigenous Law Review* 3; Jennifer Nielsen, 'Whiteness and Anti-Discrimination Law: It's in the Design' (2008) 4(2) *Australian Critical Race and Whiteness Studies Association* 1.

racially discriminatory and impair their right to the equal administration of justice.[95] Cases in which it has been argued that the disadvantages suffered by persons due to a limited ability to speak English are racial discrimination have almost uniformly failed. That is because the courts have distinguished between a racial characteristic and a personal characteristic and have deemed that a limited ability to speak English is a personal 'characteristic' unconnected to race.[96] The question of rights infringement has generally not been considered in these cases because the complainants have failed to demonstrate a distinction on the basis of race.

Claims also arise where private and public bodies have limited the ability of persons to use a language other than English in both public and private settings. In cases where the complainant makes such an allegation, the courts generally focus on whether an infringement of the enjoyment of a fundamental right or freedom has occurred. The first useful illustration of this type of case is *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* ('*Iliafi*').[97] In *Iliafi*, the appellants were Samoan members of the Church of Jesus Christ of Latter-Day Saints ('Church'). The Church had operated several Samoan-speaking wards or congregations and the appellants were able to worship in their native language.[98] The Church discontinued their Samoan-speaking wards and directed that worshippers could only worship in English.[99] The appellants argued that this change constituted discrimination pursuant to s 9 of the *RDA*.[100] The appellants argued that the decision had violated their rights to nationality as outlined in art 5(d)(iii) of the *CERD*, freedom of religion as outlined in art 5(d)(vii), and freedom of expression as outlined in art 5(d)(viii).[101] The central issue in the appeal was whether the right of a group to worship publicly in their native language was a human right or fundamental freedom of the kind protected by s 9.[102] This involved two steps — first, identifying the content of arts 5(d)(iii), (vii) and (viii) of the *CERD*,[103] and second, whether the claimed right was of a kind referred to in those provisions.[104]

Justice Kenny (Greenwood J and Logan J agreeing) consulted extensive international materials including international, supranational and foreign jurisprudence,

95 *Munkara* (n 93); *Sahak v Minister for Immigration and Multicultural Affairs* (2002) 123 FCR 514 ('*Sahak*'); *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311 ('*Nguyen*').

96 See, eg, *Sahak* (n 95) 525 [47] (Goldberg and Hely JJ). Similar conclusions were also reached in *Nguyen* (n 95); *Munkara* (n 93); *Hamzy* (n 72).

97 *Iliafi* (n 48).

98 Ibid 88 [2] (Kenny J, Greenwood J agreeing at 117 [115], Logan J agreeing at 117 [116]).

99 Ibid 88 [3].

100 Ibid 88 [4].

101 Ibid 93 [12].

102 Ibid 117 [110].

103 Ibid 104 [55].

104 Ibid.

conventions, and literature.[105] Her Honour determined that although art 5 was not an exhaustive list of rights, the right to worship in one's native language was not a right of the kind protected by s 9 of the *RDA*. Justice Kenny concluded that though both the right to public worship and the right of minority groups to use their language in private and in public were protected,[106] this did not equate to a protection of a right to worship in public in a person's native language.[107] Drawing on European jurisprudence on art 9 of the *ECHR*, Kenny J concluded that the appellants' right to freedom of religion was not infringed by the Church's decision because the appellants still had the ability to leave the religious community and the Church.[108] The right to belong to a linguistic minority was also not infringed by the Church's decision, because the appellants still had the right to use their native language outside of the Church. Further, the Court concluded that the purpose of the protection of linguistic diversity was to ensure the survival of cultural, religious and social identity of minorities which was not at issue in this case.[109] Consequently, the appellants failed to establish that a right to worship publicly as a group in their native language was of a 'kind' protected by art 5 of the *CERD*.[110]

While this decision appears consistent with the international jurisprudence cited by Kenny J, it is hard to reconcile with the overarching goals of anti-discrimination law. It is noticeable that the decision does not focus on rights to non-discrimination or equality but instead focuses on the substance of *other* rights and freedoms. In particular, utilising Kenny J's consideration of the rights protected by the *RDA*, it is hard to imagine many scenarios in which a person's right to a freedom of worship or their language rights could be protected by s 9. Although the complainants' right to freedom of religion may be preserved through their capacity to leave the Church, such a finding does not resolve a question of whether the Church's behaviour still could constitute racial discrimination and impair the complainants' right to be free from discrimination. For example, any differentiation between racial groups by religious organisations would not be racial discrimination pursuant to s 9 because a complainant would continue to have the right to leave the religious organisation. With respect to a right to worship however, such an outcome would nevertheless appear to be the antithesis of the *RDA*'s purpose because it would essentially allow for all religious organisations to indirectly discriminate on the basis of race.

Another recent decision which highlights some of the challenges for complainants is *Hamzy v Commissioner of Corrective Services* ('*Hamzy*').[111] In *Hamzy*, the complainant was an inmate at a correctional facility and was designated as an 'extreme high risk restricted … inmate' ('EHRR').[112] As a consequence of his EHRR status,

105 Ibid 104–5 [57]–[59].

106 Ibid 107 [70].

107 Ibid 111 [85].

108 Ibid 108–10 [78]–[84].

109 Ibid 115 [103].

110 Ibid 117 [110].

111 *Hamzy* (n 72).

112 Ibid [2].

the *Crimes (Administration of Sentences) Regulation 2014* (NSW) required that all conversations that the complainant had with visitors (with the exception of conversations with a legal practitioner) be conducted in English, or a language approved by the Commissioner of Corrective Services.[113] The complainant was a Lebanese Arab and an Arabic speaker.[114] He communicated with his parents, in part, in Arabic as their English was limited. Arabic was not an approved language that the complainant was able to use to communicate with visitors.[115] The complainant argued that the consequent and effective requirement to speak English (or another approved language) was inconsistent with ss 9 or 10 of the *RDA*.[116]

The complainant argued that the 'right' infringed was 'the right to speak to members of his family in the Arabic language when they visit[ed] him in custody'.[117] The defendant argued that the regulation was not discriminatory because its purpose was not to constrain the rights of an inmate but to ensure that communications could be monitored securely.[118] The defendant argued that it was necessary that communications be properly monitored.[119] English, as the most widely spoken language, was Australia's 'de facto' national language and it was legitimate to limit a prisoner's right to speak languages other than English as prisons were public spaces.[120]

In his Honour's judgment, Bellew J considered which rights were engaged by the dispute and whether any such rights were protected by ss 9(1) or 10(1) of the *RDA*.[121] At the outset, Bellew J concluded that conversations in English were conversations that consisted entirely of English words, phrases or expressions or words that have been borrowed from other languages and incorporated into English.[122] His Honour further accepted that conversations in English also included conversations which incorporated some foreign phrases such as Arabic phrases based upon Quranic verses.[123] Justice Bellew concluded that the right engaged by the dispute was the right to 'speak and/or express … [oneself] in Arabic in all circumstances'.[124]

It was on the basis of this framing of the right said to have been engaged that Bellew J proceeded to determine whether such a right was protected by the *RDA*. For Bellew J, the closest corresponding right protected by the *RDA* was the right of

113 Ibid [4].

114 Ibid [120].

115 Ibid.

116 Ibid [121]–[122].

117 Ibid [125].

118 Ibid [127]–[128].

119 Ibid.

120 Ibid [127].

121 Ibid [138].

122 Ibid [136]–[137].

123 Ibid.

124 Ibid [141].

freedom of opinion and expression as outlined in art 5(d)(viii) of the *CERD*.[125] Thus, the question became whether the right to freedom of opinion and expression was broad enough in scope to capture the complainant's 'right' as framed by Bellew J.[126] In his Honour's judgment, Bellew J utilised both domestic and foreign authorities including views of the United Nations Human Rights Committee and judgments of the European Court of Human Rights ('ECtHR') to establish that the right to freedom of opinion and expression did not extend to allowing the complainant to communicate in Arabic while in prison.[127]

In coming to this decision, Bellew J emphasised the following three propositions. First, drawing on *Nguyen v Refugee Review Tribunal*,[128] Australia's 'official' language was English and thus it was justifiable that in some public contexts, persons are required to speak English.[129] This appears to be an acceptance of the idea put forward by the defendant that English is Australia's 'de facto' language as Australia technically has no official language. Second, Bellew J highlighted that, as was accepted in *Iliafi*, a right to freedom of expression encompasses 'every form of subjective ideas and opinions capable of transmission to others' but does not equate to a 'right to language'.[130] Third and finally, not only did Bellew J emphasise that the right to expression did not encompass a right to language, his Honour also found that any right to language was relatively narrowly drawn. Drawing upon international jurisprudence, his Honour appeared to adopt a tolerance-oriented approach to any possible right to language. In taking this approach, Bellew J drew a distinction between regulating choice of language in 'spheres of public life' and regulating a person's language in a private capacity.[131] In this conception, the state was entitled to regulate and prohibit the use of some languages in the public sphere but not in the private sphere.[132] As the prison was a public facility, there were no limitations on the regulation of speech and language.[133]

Articulating the content and scope of rights and freedoms has been a challenging exercise for complainants. In the early case law, the High Court accepted that 'human rights and fundamental freedoms' are broad in scope. However, more recent case law has become more complex. Complainants have been chastised for failing to utilise a full range of international and foreign materials to develop their claims

125 Ibid [144].

126 Ibid.

127 Ibid [153].

128 *Nguyen* (n 95).

129 *Hamzy* (n 72) [154].

130 Ibid [146], quoting *Iliafi* (n 48) 111–12 [91]–[92] (Kenny J, Greenwood J agreeing at 117 [115], Logan J agreeing at 117 [116]).

131 Ibid [148]–[150], quoting Human Rights Committee, *Views: Communications Nos 359/1989 and 385/1989*, 47th sess, UN Docs CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (5 May 1993) [11.4] ('*Ballantyne v Canada*').

132 *Hamzy* (n 72) [148]–[150].

133 Ibid [153].

'at their peril',[134] yet in other decisions, international and foreign materials are not referred to.[135] Part of the problem could be the reality that the circumstances of cases do not cleanly fit within the scope of traditional understandings of rights and freedoms.

A larger problem is that in focusing on the content of rights and freedoms, the crux of the claim, namely racial discrimination, is lost. The purpose and focus of the *RDA* is to prevent discrimination in the enjoyment of rights and freedoms on the basis of race. The *RDA* does not import the substance of other international human rights into domestic law but instead prevents those rights from being impaired on the basis of race. The focus on the content and scope of human rights and fundamental freedoms loses sight of this important distinction. The question should not be whether the complainant can demonstrate a substantive infringement of a human right or fundamental freedom, but whether in the *enjoyment* of those rights there has been a distinction based on race.

The facts in *Hamzy* provide a useful illustration of this distinction, as Bellew J determined whether the complainant had a right to speak and communicate with others in a language of his choosing. This is the wrong question in a racial discrimination complaint. The question is not whether the substantive right has been breached, but whether, in limiting the complainant's speech on the basis of language, the complainant's right to express themself has been *impaired* to a *greater extent* than those from other racial backgrounds. By changing the question to consider the difference in treatment and the impairment, the inquiry then is focused on different treatment and effects based on race rather than the substantive content of other rights and freedoms. Thus, the question becomes one of impairment and limitation as compared to others, rather than one focused on the substantive content of the right in question. There is a chance that by changing the question, courts could interpret the *RDA* in a similar manner to other anti-discrimination legislation in Australia and require a strict and formalistic comparison between people.[136] However, this would appear to be unlikely given the relatively flexible manner in which comparison has been dealt with elsewhere in the case law.[137]

IV The Position of Equality in the *RDA*

One solution to the problem of determining the content and scope of rights and freedoms could be accepting that a general, freestanding right to equality is protected by ss 9–10 of the *RDA*. In what appears to be an attempt to sidestep the detailed rights and freedoms analysis required by the courts, complainants have argued that

134 *Iliafi* (n 48) 111 [89] (Kenny J, Greenwood J agreeing at 117 [115], Logan J agreeing at 117 [116]).

135 See, eg: *Morton v Queensland Police Service* (2010) 271 ALR 112 ('*Morton*'); *Munkara* (n 93).

136 See, eg, *Purvis v New South Wales* (2003) 217 CLR 92.

137 See, eg: *Baird* (n 32); *Vata-Meyer v Commonwealth* [2015] FCAFC 139.

the *RDA* protects a general and freestanding right to equality. Whether the *RDA* protects such a right is a vexed issue in the case law without a clear position. It may be that the answer depends on whether the complainant is claiming an infringement of s 9 or s 10 of the *RDA*. Complainants have argued for an application of ss 9–10 to protect a freestanding right to equality as contained in art 26 of the *ICCPR* in *Aurukun*,[138] *Morton v Queensland Police Service* ('*Morton*'),[139] *Maloney*,[140] and *Wotton [No 5]*.[141] Article 26 is in the following terms:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[142]

From this line of cases, there is no clear statement as to whether art 26 can operate as a freestanding right protected by either ss 9 or 10 of the *RDA*.

In considering the nature, content and applicability of the right to equality, judges have come to differing conclusions as to the nature and the effect of the right depending on whether the case is concerned with s 9 or s 10 of the *RDA*. The argument was first put in *Aurukun*, which involved limitations on the sale of alcohol in Indigenous communities.[143] Justice Philippides accepted the existence of a freestanding right to equality in art 26 and that a broad construction of s 10 could protect a right to 'equal protection of the law' which operates to nullify legislation that is racially discriminatory in 'any field regulated and protected by public authorities'.[144] In doing so, her Honour relied upon the recommendation of the Human Rights Committee and concluded that art 26 was a right capable of autonomous and substantive content.[145] In her Honour's judgment, McMurdo P also accepted that art 26 operated as a freestanding right against discriminatory laws.[146] In contrast, Keane JA rejected the existence of a freestanding right to equality that was protected by the *RDA*.[147] His Honour concluded that art 26 was simply a paraphrase of the purpose of s 10 of the *RDA*. As such, the right had no freestanding content of its own.

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138 *Aurukun* (n 9) 37 [32]–[34] (McMurdo P), 65 [139] (Keane JA).

139 *Morton* (n 135) 134 [82], 136–7 [90]–[94] (Chesterman JA, Holmes JA agreeing at 125 [39]).

140 *Maloney* (n 10) 294–5 [336] (Gageler J).

141 *Wotton [No 5]* (n 8) 175 [650]–[651].

142 *ICCPR* (n 67) art 26.

143 *Aurukun* (n 9).

144 Ibid 98 [241].

145 Ibid.

146 Ibid 37 [34].

147 Ibid 65 [140].

The position of the Queensland Court of Appeal changed when the argument came before it again in *Morton*,[148] which considered the legality of alcohol bans in Queensland Indigenous communities. The majority of the Court concluded that art 26 was not a right protected by s 10 of the *RDA*. In his Honour's judgment, Chesterman JA (with whom Holmes JA agreed) concluded:

> The right 'without any discrimination to the equal protection of the law', is elusive in meaning and content. It is the expression of an ideal, or high moral principle, lacking any indication of how it is to be achieved, or more profoundly, what it means.
>
> …
>
> It is, I think, obvious that s 10 itself confers a right on persons of all races to be treated equally by the law. It does so by the particular mechanism described in the section. It is not obvious to me that the object sought by [a]rt 26 is not achieved by the enactment of s 10.
>
> The focus of [a]rt 26 is on equal treatment before the law, or equal protection of the law. Section 10, it seems to me, is a provision which aims to achieve that very goal.[149]

In her Honour's dissenting judgment, McMurdo P did not specifically address the issue but acknowledged that the *RDA* could capture rights contained in the *ICCPR*.[150]

The High Court's decision in *Maloney* did little to clarify matters. Though a right to equality was argued by the complainant and the Australian Human Rights Commission, intervening, supported the existence of such a right, only three judges considered the issue. Of those, Bell J did not consider the content of such a right.[151] Chief Justice French, Hayne J and Crennan J all declined to consider whether s 10 protected a freestanding right to equality. Both Kiefel J and Gageler J concluded that equality could not itself be a 'right' protected by s 10 of the *RDA*.[152] In Kiefel J's opinion, giving art 26 substantive content would render s 10 unnecessary.[153] Justice Kiefel's statements were made in the context of the broader claim made in *Maloney* and in light of her Honour's conclusions that the 'right' to possess alcohol was not a right protected by the *CERD* or the *RDA*.[154] Justice Kiefel further rejected the submissions by the complainant and the interveners that there was a 'right' to be protected from the practical discriminatory effect of domestic laws.[155] Instead, her

148 *Morton* (n 135).

149 Ibid 136 [89]–[91] (Chesterman JA, Holmes JA agreeing at 125 [39]).

150 Ibid 119 [18]–[19].

151 *Maloney* (n 10) 250–1 [219]–[222].

152 Ibid 230–1 [161]–[162] (Kiefel J), 294 [335]–[336](Gageler J).

153 Ibid 230 [161].

154 Ibid 229–31 [156]–[162].

155 Ibid.

Honour concluded that the purposes of art 26 of the *ICCPR* and art 5(a) of the *CERD* were to illustrate the 'broader' objectives that the *CERD* and the *RDA* addressed.[156] Justice Gageler made similar conclusions regarding art 26, though his Honour, in particular, focused on the circularity of operation if art 26 were within the scope of s 10.[157] In particular, Gageler J concluded:

> [I]t is in the nature of such a right that a question about its enjoyment requires the undertaking of an analysis that mirrors the very analysis that s 10 requires to be undertaken with respect to the human rights to which it refers. To inquire for the purposes of s 10 into whether there is by reason of a law unequal enjoyment of a human right to equality before the law or equal protection of the law is to become mired in unproductive circularity.[158]

Only Bell J concluded that art 26 of the *ICCPR* was a right which was protected by the *CERD* and formed part of the customary law of nations.[159] However, her Honour also refrained from determining the content of art 26 for the purposes of the *RDA* or its interaction with ss 9 or 10 specifically.[160]

In *Wotton [No 5]*, which considered whether the Queensland Police Service's response after a death in custody on Palm Island was racially discriminatory, the complainants argued that art 26 established an autonomous human right which was protected by s 9 of the *RDA*.[161] They contended that art 26 had three aspects or limbs of operation:[162] first, equality before the law and the entitlement, without discrimination, to equal protection before the law;[163] second, an entitlement to a guarantee of equal and effective protection against discrimination on any ground;[164] and third, an entitlement to a guarantee of non-discrimination through prohibitions in the law.[165] In contrast, the respondent argued that there was no freestanding right to equality and that art 26 operated as an 'objective' which the *CERD* and the *RDA* were designed to address.[166] While Mortimer J considered that the weight of authority indicated that art 26 was not a human right upon which s 10 operated, her Honour distinguished the facts under consideration in *Wotton [No 5]* on the basis that the complainants had argued that the police's impugned conduct was in breach of s 9 of the *RDA*, rather than s 10.[167]

156 Ibid 230 [160].

157 Ibid 294 [336].

158 Ibid.

159 Ibid 249–50 [219].

160 Ibid.

161 *Wotton [No 5]* (n 8) 308 [635].

162 Ibid.

163 Ibid.

164 Ibid.

165 Ibid.

166 Ibid 308 [636].

167 Ibid 308 [639], 311 [654].

Further, Mortimer J distinguished the different limbs of operation of art 26.[168] Her Honour concluded that the second and third limbs, the entitlement to a guarantee of equal and effective protection against discrimination on any ground, and the entitlement to a guarantee of non-discrimination through prohibitions in the law, were captured and implemented by s 10.[169] However, the first limb, encompassing the *application* of the law without discrimination, was not.[170]

Justice Mortimer explained that art 26 was captured by s 9 of the *RDA* where a person's right to equality has been nullified, not by a domestic statute per se but by the application or exercise of a discretionary statutory power.[171] In her Honour's analysis, Mortimer J considered the exercise of a discretion as an 'act' which can impair the protection that the law provides to a person on equal footing.[172] However, while Mortimer J concluded that art 26 had substantive and freestanding content, her Honour nevertheless found that the utility of such a right was limited in respect of most of the complainant's claims.[173] Many of these allegations were better characterised as breaches of other rights and freedoms, leaving the right to equality with little relevance in the case.[174]

After Mortimer J's decision in *Wotton [No 5]*, it appears that while a right to equality will not be captured by s 10, it is still possible that such a right, to a limited extent, is captured by s 9. However, though Mortimer J's judgment does develop the substance of the right to equality, it is still difficult to understand how such a right is particular or distinctive as compared to other rights and freedoms which are engaged by ss 9–10. What a right to equality requires is not an easy question, particularly if one accepts that the substance of a right to equality is more than simply formal equality. A substantive interpretation of equality creates challenges for judges which do not exist within a formal paradigm. Substantive equality requires judges to make determinations as to whether distinctions are just or unjust. It necessitates a balancing exercise not necessary for formal equality. How that balancing exercise should be conducted is not obvious or clear. Whether it is based upon notions such as dignity, liberty, equality or a combination of these values, is a matter that needs to be articulated by the courts.

Without a clear articulation of what substantive equality requires, the interpretation of ss 9–10 of the *RDA* by courts, and the interactions between non-discrimination and rights and freedoms including equality, could conform to Peter Westen's

168 Ibid.

169 Ibid 311 [653].

170 Ibid.

171 Ibid 316 [672].

172 Ibid 316–17 [675].

173 Ibid 318 [682]–[683].

174 Ibid.

conception of the 'empty' idea of equality.[175] He maintains that whilst, prima facie, discrimination claims seem substantively concerned with 'equality', any claim of discrimination 'must originate in a substantive idea of the kinds of wrongs from which a person has a right to be free'.[176] For Westen, the right to equal treatment on its own, without reference to other rights, is meaningless. But when articulated with reference to other rights, 'equality' is merely a restatement of those rights rather than a separate and distinctive right of its own.[177] An example given by Westen is the right to vote. In his view, a statement that all citizens have an equal right to vote is no different to a statement that all citizens have a right to vote.[178] The problem with such an approach is that it does not adequately grapple with the kinds of harms caused by discrimination and distinctions on the basis of race.

V A Better Way: A Focus on Discrimination

Rather than conceptualising ss 9–10 of the *RDA* as protecting a general right to equality, a different and possibly simpler solution would be to place less emphasis on interrogating the nature of the various rights engaged. This would allow for a more expansive and flexible definition of the impairment of the enjoyment of human rights and fundamental freedoms and focus attention on the potential harms caused by distinction, differentiation and discrimination rather than the content of separate and distinct rights.

The question is whether such an expansive and flexible definition of rights and freedoms is possible given the wording of the provisions. As was highlighted in Part III, Mason J's judgment in *Gerhardy* and the more recent Federal Court decisions have accepted the need for a complainant to articulate precisely the 'scope and content' of the right or freedom they contend is engaged and impaired. However, there is nothing in the provisions of the *RDA* or the *CERD* which requires such an approach to be adopted. The Committee on the Elimination of Racial Discrimination recommends a flexible interpretation of the instrument to achieve its overarching goal, which is the elimination of all forms of racial discrimination.[179]

175 Peter Westen, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537. For a critique of Westen, see Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712.

176 Westen (n 175) 567.

177 Ibid 538.

178 Ibid 563–4.

179 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 of Racial Discrimination*, 75th sess, UN Doc CERD/C/GC/32 (24 September 2009) 3–4.

A way to achieve such a flexible interpretation could be to look towards the interpretation of art 14 of the *ECHR*. Similar to ss 9–10 of the *RDA*, art 14 of the *ECHR* is a 'parasitic' right.[180] It is in the following terms:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[181]

Similar to ss 9–10 of the *RDA*, art 14 is not prescriptive and gives judges a broad discretion in the interpretation of its terms. Of particular focus for this article, courts interpreting art 14 have to consider what it means to enjoy rights and freedoms. That is because art 14 guarantees non-discrimination but only in the 'enjoyment of the rights and freedoms set forth in … [the] Convention'.[182] The ECtHR has considered that art 14 has no independent existence.[183] As such other rights and freedoms need to be engaged for art 14 to have effect. In the early case law, the ECtHR assumed that there had to be a breach of another Convention right in order to give art 14 any effect.[184] Such an interpretation makes a provision like art 14 redundant — if another Convention right has been breached, then there is little work for a non-discrimination principle to do, that is, if a Convention right has not been breached, then there is also no discrimination. However, the wording of art 14, similarly to the wording of ss 9–10 of the *RDA*, does not require discrimination in the breach of a Convention right, only that the *enjoyment* of Convention rights 'shall be secured without discrimination'. This subtle, but important, distinction was first recognised in the *Belgian Linguistics Case [No 2]* ('*Belgian Linguistics*').[185]

Belgian Linguistics involved a claim that the Dutch speaking regions of Belgium did not provide adequate French language education.[186] The complainants argued that the various pieces of legislation which limited educational opportunities for French speaking children breached their right to education and their right to non-discrimination.[187] The Belgian government argued that the breach of another Convention right was required for art 14 to be enlivened.[188] In contrast, the European Commission of Human Rights submitted that a substantive breach of a Convention right was not necessary.[189] Instead, art 14 only required that the discrimination complained of 'touch[ed] the enjoyment' of

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180 Sandra Fredman, 'Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights' (2016) 16(2) *Human Rights Law Review* 273, 273 ('Emerging from the Shadows').

181 *ECHR* (n 13) art 14.

182 Ibid.

183 Fredman, *Discrimination Law* (n 80) 146.

184 Baker (n 12) 715.

185 *Belgian Linguistics Case [No 2]* (1968) 1 EHRR 252 ('*Belgian Linguistics*').

186 Ibid 3–4.

187 Ibid 4–5.

188 Ibid 5–6, 8.

189 Ibid 6–7.

another protected right or freedom.[190] The Court accepted the latter approach,[191] which has since become known as the 'ambit' principle.[192]

This was an important development for art 14. Accepting that a claim only needed to fall within the 'ambit' of another right has greatly expanded the scope of art 14 and allowed for a greater development of the concept of 'discrimination' pursuant to the *ECHR*.[193] The 'ambit' principle has expanded the scope of state actions which fall within the purview of art 14, particularly in the context of social and cultural rights. For example, the outcome of *Belgian Linguistics* was that, while the Court rejected the complainant's claim with respect to a right to education because art 2 of Protocol 1 to the *ECHR* did not give individuals the right to a particular kind of educational establishment, the complainants could nevertheless succeed in their claim.[194] This was because once a state has determined that it will provide a certain kind of educational establishment, art 14 of the *ECHR* requires its provision to be conducted in a non-discriminatory fashion.

Another example of the distinction between the breach of a substantive Convention right and art 14 is provided by *Ghaidan v Godin-Mendoza* ('*Ghaidan*').[195] In *Ghaidan*, the House of Lords determined that although the *ECHR* did not require a state to provide security of tenure to members of a deceased tenant's family, if a state chose to enact legislation which did require such security, it could not do so in a discriminatory fashion.[196] As Baroness Hale emphasised:

> Everyone has the right to respect for their home. This does not mean that the state — or anyone else — has to supply everyone with a home … [b]ut if it does grant that right to some, it must not withhold it from others in the same or an analogous situation.[197]

In essence, the concept of ambit requires that if the state offers a benefit, it cannot discriminate in the provision of that benefit. Such an approach has opened opportunities for courts to engage in art 14 analysis in a wide variety of cases and on a variety of issues not previously explored or considered. There is, unsurprisingly, considerable debate as to how far the ambit of art 14 extends and how closely the case must 'touch' on another right or freedom. In their more recent analysis, the members of the ECtHR have taken a relatively expansive approach to the scope or ambit of art 14.[198] The result of this approach may be significant and far-reaching in extending socio-economic benefits and protections to often excluded and marginalised groups.

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190 Ibid 25.

191 Ibid 30.

192 Baker (n 12) 715.

193 Fredman, 'Emerging from the Shadows' (n 180) 274.

194 *Belgian Linguistics* (n 185) 79, 85.

195 [2004] 2 AC 557.

196 Ibid 565 [5] (Lord Nicholls).

197 Ibid 605 [135].

198 Fredman, 'Emerging from the Shadows' (n 180) 276.

Aaron Baker has advocated for an approach in which art 14 will be applicable where state conduct 'touches' on a right based on the 'ordinary understanding, in the relevant society, of when a person can be said to be enjoying … privacy, liberty, or free expression'.[199] Rather than considering the specifics of the right in question, this places the focus on the distinction or discrimination that is involved.

How such an approach would work in the context of the *RDA* is usefully explored utilising the fact scenario of *Hamzy*.[200] In *Hamzy*, the infringed right was described as the right to speak in any language one wished to speak in all circumstances.[201] That such a right existed or was infringed was rejected by the Supreme Court of New South Wales. However, if one understood and framed that case differently and in line with the idea of ambit, a more nuanced discussion of the discrimination issues could emerge. By regulating the language that inmates could speak, the conduct of Corrective Services New South Wales *touched on* the enjoyment of rights of inmates to speak their own language and potentially their right to freedom of expression. If it could be established that such conduct touches on the enjoyment of a human right or fundamental freedom, the complainant would not need to demonstrate an infringement of the right or provide significant evidence from international and foreign materials as to the extent and nature of the right in question. Instead, the focus of the analysis would remain on the question of discrimination. Consequently, the analysis would shift to whether such conduct makes a distinction based upon race. This would allow for a proper interrogation of the conduct, why it is wrongful and how the acts or laws in question discriminate on the basis of race.

VI Conclusion

The *RDA* continues to be distinctive in the Australian anti-discrimination law landscape. This distinctiveness has some benefits. The very existence of s 10 of the *RDA* affords the *RDA* greater capacity to curtail discriminatory actions of the state, more effectively than the other Commonwealth anti-discrimination legislation. Its broader language and closer relationship with its corresponding international convention, the *CERD*, suggests that a flexible approach could be taken as to its meaning. Such an approach can be seen in the wider and more flexible interpretation of comparators taken with respect to the *RDA* as compared to other Commonwealth anti-discrimination legislation. However, I have argued that there are potential pitfalls in its interpretation, particularly in the focus on the existence and scope of 'other rights and freedoms' where those other rights and freedoms are not well developed in the international jurisprudence. Those pitfalls have, thus far, curtailed the *RDA*'s effectiveness in protecting complainants from racial discrimination. Nevertheless, international jurisprudence continues to provide avenues for substantive and progressive interpretations of the *RDA*. Those avenues shift the focus back to the fundamental question of discrimination, distinction and impairment rather than the nebulous conception of other rights and freedoms.

199 Baker (n 12) 717.

200 *Hamzy* (n 72) [13]–[31].

201 Ibid [141].