REDRESSING STATE-INFLICTED RACIAL VIOLENCE: A FEDERAL DISCRIMINATION LAW REMEDY FOR DEATHS IN CUSTODY AFTER *WOTTON*

ALAN ZHENG*

Despite the vast number of First Nations deaths in custody and community experiences of racial injustice, the Racial Discrimination Act 1975 (Cth) has rarely been engaged. Section 9(1) has lain in deep freeze since 1975, generating equal parts mystique and contestation. In Wotton v Queensland, the Federal Court found section 9(1) contraventions in relation to conduct following the death in custody of Waanyi man Cameron 'Mulrunji' Doomadgee. An eleventh-hour procedural infelicity prevented the Court from examining conduct preceding his death. This article argues that section 9(1) supplies a remedy for state-inflicted racial violence preceding some deaths in custody because section 9(1) contains an unstructured comparison, an analytical tool for discerning a racial basis that avoids the difficulties of a complex comparator structure found in other anti-discrimination statutes. Section 9(1) also accommodates a denial of rights inquiry which incorporates concepts of arbitrariness and proportionality well-suited to reviewing police discretion.

* BA/LLB (Hons) (Syd). Tipstaff, Supreme Court of New South Wales (Equity Division). The idea for this article was set in motion from my time as an Aurora Intern at the UTS Jumbunna Legal Strategies Hub. It then crystallised into an LLB honours thesis under the supervision of Professor Simon Rice OAM. It was refined and vastly improved with the wisdom and guiding hand of many people including Mick Gooda, Craig Longman, Chris Ronalds SC, Josh Pallas, Dr Tanya Mitchell and Professor Tim Soutphommasane. An earlier version of the paper was presented at Sydney Law School's Inspiring Legal Research Conference in 2022. Viv and my family were patient and always supportive. I acknowledge the Wallumedegal and Gadigal on whose unceded lands this article was written. The subject of this article refers to conduct which disproportionately affects First Nations peoples. Where I refer to the views of First Nations in this article, I have endeavoured to rely on empirical sources which engage and listen to First Nations perspectives. At the same time, the arguments made in this article should not be generalised in such a way that masks the diversity of First Nations cultures, opinions and practices which are neither static nor homogenous. Finally, I am grateful to the diligent editors of the *UNSW Law Journal* for their assistance and the three anonymous reviewers for their helpful and important feedback. All views and errors in the article are mine alone.

I INTRODUCTION

The common law has failed to provide a cognisable remedy for harms done by discrimination to collective identity.[1] Rather than developing the common law towards this remedy,[2] an alternative course lives in statute. The 'landmark'[3] *Racial Discrimination Act 1975* (Cth) ('*RDA*'), reflecting its provenance,[4] has been deployed in robust ways to contest injustices against First Nations peoples.[5] Now, as in 1975, such injustices are widely known.[6] Various subjects have attracted the *RDA*'s concern, ranging from land and labour rights to membership in community

1 See, eg, Colin Campbell, 'The Nature and Limitations of Commonwealth Anti-Discrimination Law' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 163, 164; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492; David Rolph, 'Racial Discrimination Laws as a Means of Protecting Collective Reputation and Identity' in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar Publishing, 2015) 477; Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1416 (Kep Enderby); James Spigelman, 'The Common Law Bill of Rights' (Speech, McPherson Lecture, 10 March 2008) 25.

2 *Constantine v Imperial Hotels Ltd* [1944] KB 693, 708 (Birkett J); *Nagle v Feilden* [1966] 2 QB 633, 647–8 (Denning MR), 651 (Danckwerts LJ), 655–6 (Salmon LJ); *Lane v Cotton* (1706) 88 ER 1458, [484] (Holt CJ); Jeffrey Jowell, 'Is Equality a Constitutional Principle?' (1994) 47(2) *Current Legal Problems* 1, 4, 7; *Green v The Queen* (2011) 244 CLR 462, 472–3 (French CJ, Crennan and Kiefel JJ), quoting *Wong v The Queen* (2001) 207 CLR 584, 608 (Gaudron, Gummow and Hayne JJ); *Commissioner of Police v Estate of Russell* (2002) 55 NSWLR 232, 247 (Spigelman CJ) ('*Russell 2002*'); *Leeth v Commonwealth* (1992) 174 CLR 455, 488 (Deane and Toohey JJ). See generally James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) 27–9; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 41–2 (Brennan J).

3 Chief Justice Robert French, 'The *Racial Discrimination Act*: A 40 Year Perspective' (Inaugural Kep Enderby Lecture, 22 October 2015) 2 <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22oct15.pdf>; John Chesterman, 'Defending Australia's Reputation: How Indigenous Australians Won Civil Rights, Part Two' (2001) 32 *Australian Historical Studies* 201, 218–19.

4 See generally Commonwealth, *Parliamentary Debates,* House of Representatives, 6 March 1975, 1223 (Gareth Clayton); Commonwealth, *Parliamentary Debates,* Senate, 21 November 1973, 1976 (Lionel Murphy, Attorney-General).

5 Australian Human Rights Commission, *2018–2019 Complaint Statistics* (Report, 2019) 12 tbl 12; Andrew Trlin, 'The Racial Discrimination Act: Provisions and the Receipt and Outcomes of Complaints' (1984) 19(4) *Australian Journal of Social Issues* 245, 252.

6 See, eg, Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody (New South Wales), Legislative Council, *The High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* (Report No 1, April 2021); Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, December 2017); Megan Davis, 'Family is Culture: Independent Review of Aboriginal Children and Young People in Out of Home Care in NSW' (Report, November 2019); Australian Human Rights Commission, *Bringing Them Home* (Report, April 1997); Wayne Martin, 'Unequal Justice for Indigenous Australians' (2018) 14(1) *The Judicial Review* 35; Inclusive Australia, *Measuring Social Inclusion: The Inclusive Australia Social Inclusion Index* (Report, May 2021) 15; PricewaterhouseCoopers Indigenous Consulting, *Indigenous Incarceration: Unlock the Facts* (Report, May 2017); Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey, 2014–15* (Catalogue No 4714.0, 28 April 2016) <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4714.0>; Dani Larkin, 'Excessive Strip-Searching Shines Light on Discrimination of Aboriginal Women in the Criminal Justice System', *The Conversation* (online, 19 July 2021) <https://theconversation.com/excessive-strip-searching-shines-light-on-discrimination-of-aboriginal-women-in-the-criminal-justice-system-163969>.

associations.[7] However, the *RDA* has never been deployed to safeguard the implicit premise at the heart of a 'public life'[8] lived free of discrimination[9] – that of *life* itself and the right not to be arbitrarily deprived of life because of racial discrimination.[10] Being comes *before* wellbeing.[11] Yet, the *RDA* has never provided redress where Indigenous people have died in circumstances involving racial discrimination, despite such claims being 'possible'[12] and deaths being *ipso facto* arbitrary.[13]

This much is unsurprising. Anti-discrimination law is 'unusual and complex'.[14] Appellate judicial consideration of racial discrimination law is limited.[15] Anti-discrimination jurisprudence was recently 'at an early stage of development in Australia'[16] and remains a 'comparatively new area of rights protection'.[17] The limited usage of the *RDA* in circumstances involving death is shaped by a mandatory and confidential conciliation process,[18] with settlement as its 'sole objective'.[19] Yet, none of this necessarily means the *RDA* is *doctrinally* incapable

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7 See, eg, *Mabo v Queensland [No 1]* (1988) 166 CLR 186 ('*Mabo No 1*'); *Baird v Queensland* (2006) 156 FCR 451 ('*Baird*'); *Wharton v Conrad International Hotels Corporation* [2000] QADT 18; *House v Queanbeyan Community Radio Station* [2008] FMCA 897 ('*House*'); *Bligh v Queensland* [1996] HREOCA 28.

8 *Racial Discrimination Act 1975* (Cth) s 9(1) ('*RDA*').

9 *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) art 1(1) ('*ICERD*'). See also *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 2 ('*UDHR*').

10 *International Convention on Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 6(1), 26 ('*ICCPR*').

11 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 141–2 (Latham CJ), quoting Oliver Cromwell. See also Daniel Nsereko, 'Arbitrary Deprivation of Life: Controls of Permissible Deprivations' in Bertrand Ramcharan (ed), *The Right to Life in International Law* (Nijhoff, 1985) 245, 245.

12 Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Deaths in Custody 1989-1996* (Report, October 1996) xxi ('*Social Justice Commissioner Deaths in Custody Report*').

13 Human Rights Committee, *General Comment No 36: Article 6 of the International Covenant on Civil and Political Rights on the Right to Life,* 124th sess, UN Doc CCPR/C/GC/36 (30 October 2018) 14, [61] ('*UNHRC General Comment No 36*').

14 Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 1st ed, 2015) 87. See generally Legal and Constitutional Affairs Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (Final Report, February 2013) 1.

15 Peter Bailey, *Human Rights: Australia in an International Context* (Butterworths, 1990) 185, 189. See generally Australian Human Rights Commission, *Free and Equal: A Reform Agenda for Federal Discrimination Laws* (Report, December 2021) 230.

16 *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217, 239 (Lockhart J) ('*Hall*').

17 Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Law Journal* 188, 190. See also Colm O'Cinneide, 'The Uncertain Foundations of Contemporary Anti-Discrimination Law' (2011) 11 *International Journal of Discrimination and the Law* 7, 10–11.

18 See *Australian Human Rights Commission Act 1986* (Cth) ss 46P–46PN ('*AHRC Act*'); Dominique Allen and Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 384, 394–6.

19 Patrick Pentony, 'Conciliation under the *Racial Discrimination Act 1975*: A Study in Theory and Practice' (Occasional Paper No 15, November 1986) 9. See also Belinda Smith, 'Australian Anti-Discrimination Laws: Framework, Developments and Issues' in Hiroya Nakakubo and Takashi Araki (eds), *New Developments in Employment Discrimination Law* (Kluwer, 2008) 115, 121.

of providing redress for racial discrimination which precedes death. Indeed, it has come promisingly close.

In *Wotton v Queensland* ('*Wotton*'),[20] section 9(1) of the *RDA* was engaged in relation to circumstances following the death in custody of Cameron Doomadgee, known posthumously as Mulrunji. Lead plaintiffs, Lex Wotton and his family, brought a class action on behalf of Palm Island's Indigenous residents against the State of Queensland and the Commissioner of the Queensland Police Service ('QPS') alleging the police investigation and 'quasi-martial law'[21] response to local protests after Mulrunji's death was racially discriminatory. Although Mulrunji's death triggered the events on Palm Island,[22] it was mere context in *Wotton*. On the eve of trial, Mortimer J refused an application to amend the statement of claim to include allegations concerning treatment of Mulrunji *before* his death, including his arrest and the failure of QPS officers to take adequate care of him in custody.[23] The amendment was refused on procedural grounds because these allegations were not included in the prior complaint to the Australian Human Rights Commission ('AHRC')[24] as well as ancillary concerns of overlapping proceedings[25] and standing.[26] An *RDA* claim in respect of Mulrunji's death would have also been barred by a settlement deed between Mulrunji's family and QPS, which released QPS from civil liability arising from the death.[27] Accordingly, the Court did not consider whether the treatment of Mulrunji itself was unlawful discrimination. However, it subsequently found that QPS's conduct after death, including treatment of Lex Wotton and his family, contravened section 9(1).[28] The State appealed these findings.[29] Following public criticism and legal advice on prospects, the appeal

20 *Wotton v Queensland [No 5]* (2016) 352 ALR 146 ('*Wotton*').

21 Lex Wotton, 'Outline of Submissions', Submission in *Wotton v Queensland,* QUD535/2013, 18 September 2015, [20], [22]; Ibid 338 [785], 494 [1483].

22 Jack Maxwell, 'Epistemic Injustice on Palm Island' (2018) 43(1) *Alternative Law Journal* 40, 40; Jennifer Corrin and Heather Douglas, 'Another Aboriginal Death in Custody: Uneasy Alliances and Tensions in the Mulrunji Case' (2008) 28(4) *Legal Studies* 531, 531.

23 Lex Wotton, 'Third Further Amended Statement of Claim', Submission in *Wotton v Queensland*, QUD535/2013, 25 August 2015, [167]–[185] which contains deleted particulars under the subheadings 'Unlawful arrest of Mulrunji', 'Failure to attempt resuscitation' and 'Failure to take adequate care of person in custody'; *Wotton v Queensland* [2015] FCA 910, [4] ('*Wotton SOC Amendment Proceedings*').

24 *Wotton SOC Amendment Proceedings* (n 23) [98]–[100]; *AHRC Act* (n 18) ss 46PO(3)(a)–(b). See generally *Dye v Commonwealth Securities Ltd [No 2]* [2010] 63 AILR 101-302, [43]–[48] (Marshall, Rares and Flick JJ); *King v Jetstar Airways Pty Ltd [No 2]* (2012) 286 ALR 149, 158 [25], [28] (Robertson J).

25 *Wotton SOC Amendment Proceedings* (n 23) [98]–[100]. But see *Wotton* (n 20) 185 [123]–[124].

26 *Wotton SOC Amendment Proceedings* (n 23) [101] (Mortimer J).

27 Australian Associated Press, 'Family Given Settlement over Palm Island Death', *Brisbane Times* (online, 24 November 2010) <https://www.brisbanetimes.com.au/national/queensland/family-given-settlement-over-palm-island-death-20101124-1864l.html>.

28 *Wotton* (n 20) 566–8 [1804].

29 Australian Associated Press, 'Queensland Police Appeal against Court Finding that Response to Palm Island Riots Was Racist', *The Guardian* (online, 19 January 2017) <https://www.theguardian.com/australia-news/2017/jan/19/queensland-police-appeal-against-court-finding-that-response-to-palm-island-riots-was-racist>.

was discontinued.[30] The Federal Court approved a settlement with remaining class members in 2018.[31]

The limited usage of the *RDA*'s comparatively underexplored avenue for redressing deaths in racially discriminatory circumstances[32] can be set against the prevalence of deaths in custody.[33] In 1991, the Human Rights and Equal Opportunity Commission's ('HREOC') National Inquiry into Racist Violence ('National Inquiry') identified 'the widespread involvement of police in acts of racist violence, intimidation and harassment.'[34] Police officers punched, shoved, and beat Indigenous suspects with batons[35] and threatened them that they would be the next death in custody.[36] Racial discrimination by police persists.[37] Indeed, courts have taken judicial notice of it.[38] Racist violence remains an 'endemic problem' for Indigenous people[39] – a perceived fact of life.[40] Even as Indigenous over-representation in the criminal justice system worsens, recommendations of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') remain unimplemented.[41] So far as the *RDA* provides a remedy for state-inflicted racial violence, I do not enter the well-trodden debate surrounding the *RDA*'s

30 Ella Archibald-Binge, 'Wotton "Relieved" After Government Drops Palm Island Racism Appeal', *NITV* (online, 28 February 2017) <https://www.sbs.com.au/nitv/nitv-news/article/2017/02/28/wotton-relieved-after-government-drops-palm-island-racism-appeal>.

31 *Wotton v Queensland [No 10]* [2018] FCA 915, Sch 1 (Murphy J); *Wotton v Queensland [No 9]* [2017] FCA 1315.

32 *Social Justice Commissioner Deaths in Custody Report* (n 12) 296–7; Larissa Behrendt et al, *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, 2nd ed, 2018) 70–5.

33 The Guardian, 'Deaths Inside: Indigenous Australian Deaths in Custody', *Deaths Inside* (Web Page) <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody> ('*Deaths Inside Database*').

34 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (Final Report, 27 March 1991) 387 ('*NIRV Report*').

35 JH Wootten, Parliament of Australia, *Royal Commission into Aboriginal Deaths in Custody: Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (Final Report, 30 March 1991) 278.

36 *NIRV Report* (n 34) app 14.

37 Discrimination does not only manifest in causing deaths. See, eg, Reconciliation Australia, *Australian Reconciliation Barometer* (Report, 2016) 65; Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, Oct 2010* (Catalogue No 4704.0, 17 February 2011) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter450Oct+2010>; Fiona Allison, 'Cause for Hope or Despair? Evaluating Race Discrimination Law as an Access to Justice Mechanism for Aboriginal and Torres Strait Islander Peoples' (PhD Thesis, James Cook University, August 2019) 260. See generally *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 239 (Murphy J) ('*Koowarta*'); *Henry v Thompson* [1989] 2 Qd R 412.

38 *Koowarta* (n 37) 239, 242–3 (Murphy J).

39 *NIRV Report* (n 34) 121, 387; *Reconciliation Australia* (n 37) 61.

40 *NIRV Report* (n 34) 115; Hal Wootten, 'Aborigines and Police' (1993) 16(1) *University of New South Wales Law Journal* 265, 266–7; Pentony (n 19) 60–1.

41 Thalia Anthony et al, '30 Years On: Royal Commission into Aboriginal Deaths in Custody Recommendations Remain Unimplemented' (Working Paper No 140, Centre for Aboriginal Economic Policy Research, 2021). See also Productivity Commission, *Overcoming First Nations Disadvantage: Key Indicators 2020* (Report, 3 December 2020) 4.139.

accessibility,[42] practical barriers to litigation,[43] and broader issues of trust between First Nations communities and the law,[44] nor do I engage in a normative assessment of the *RDA*. It suffices to note that achieving outcomes of 'justice'[45] like *Wotton* engages difficulties well-known to public-interest litigation.[46] Deaths in custody raise issues of social justice and not simply matters of racial discrimination. For that reason, I should not be taken as centring an *RDA* remedy at the expense of focus on other equally and more important areas such as constitutional reform and structural changes to prevent deaths in custody. Rather, the article simply suggests an *RDA* remedy exists and steps through how it could be used. Whether the *RDA* is preferable to other legal remedies and its relationship to broader structural campaigns is outside the scope of this article.

Instead, this article adopts a doctrinal focus. I suggest section 9(1) of the *RDA* provides a remedy against state-inflicted racial violence where acts *preceding* death constitute unlawful racial discrimination. Put differently, the *RDA* can be extended 'backwards' in *Wotton* to capture discriminatory circumstances preceding Mulrunji's death. I use 'state-inflicted racial violence' to focus analysis on a *subset* of deaths in custody[47] and to direct specific attention to the function of rights in restraining the exercise of sovereign power and attributing liability to

42 See generally 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; 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; Greta Bird, 'Access to the *Racial Discrimination Act*' in Race Discrimination Commissioner (ed), *The Racial Discrimination Act: A Review* (Australian Government Publishing Service, 1995) 287; Beth Gaze and Rosemary Hunter, 'Access to Justice for Discrimination Complainants: Courts and Legal Representation' (2009) 32(3) *University of New South Wales Law Journal* 699; Beth Gaze, 'Anti-Discrimination Laws in Australia' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Thomson Reuters, 1st ed, 2012) 155.

43 Behrendt et al (n 32) 41. See also Jennifer Clarke, 'Case Note: *Cubillo v Commonwealth*' (2001) 25(1) *Melbourne University Law Review* 218, 269–86.

44 Chief Justice Tom Bathurst, 'Trust in the Judiciary' (Speech, Opening of the Law Term Address, 3 February 2021) 2, 20–2, 24. See generally Jennifer Nielsen, 'Whiteness and Anti-Discrimination Law: It's in the Design' (2008) 4(2) *Australian Critical Race and Whiteness Studies Journal* 1, 2; Nicole Watson and Heather Douglas, 'Introduction' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making* (Routledge, 1st ed, 2021) 1, 1–17; Christine Coumarelos, Zhigang Wei and Albert Z Zhou, Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (Report, March 2006) 81, 100.

45 Allison (n 37) 241.

46 Michael Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127(4) *Law Quarterly Review* 537, 568–77; Josh Gibson, 'Public Interest Litigation Matures in Australia' (2019) 28(1) *Human Rights Defender* 19, 20; Andrea Durbach et al, 'Public Interest Litigation: Making the Case in Australia' (2013) 38(4) *Alternative Law Journal* 219, 221. See also *Wotton* (n 20) 242 [357], 258 [417], 259 [421]; Transcript of Proceedings, *Wotton v Queensland* (Federal Court of Australia, QUD535/2013, Mortimer J, 21–5 September 2015, 28–9 September 2015, 30 September 2015, 1–2 October 2015, 7–11 March 2016, 14–17 March 2016).

47 *Royal Commission into Aboriginal Deaths in Custody* (Final National Report, 15 April 1991) vol 1 [4.4.45] ('*RCIADIC National Report*').

the State[48] and its authorities.[49] While some scholarly work has tested the *RDA*'s remedial limits, efforts have overwhelmingly concentrated on section 10.[50] Both *Wotton* and the '*sui generis*' quality of section 9(1)[51] have attracted patchy doctrinal analysis despite section 9's status as the broadest prohibition in Australian anti-discrimination law[52] and the 'most interesting' provision in Commonwealth human rights legislation.[53] *Wotton* is more often cited for its discussion of anti-discrimination remedies rather than its approach to section 9(1).[54] This article is organised as follows. Part II outlines the facts preceding Mulrunji's death – a paradigm of state-inflicted racial violence. I propose a definition for state-inflicted racial violence which is conceptually coherent within broader legal understandings of racial violence. Although racial violence does not have an explicit home in the *RDA*, this is attributable to patterns in the *RDA*'s historical development rather than section 9(1)'s doctrinal capacity.

Part III turns to *Wotton* and argues that *Wotton* provides a distinctive framework ('*Wotton* Framework') which guides the use of section 9(1) in cases of state-inflicted racial violence by using what I call an 'unstructured comparison'. Moreover, the doctrine of arbitrariness in international human rights law is introduced as a mechanism for analysing the denial of rights question in section 9(1).

Part IV tests the *Wotton* Framework against the pre-death conduct in *Wotton* to illustrate its effective application to circumstances leading up to Mulrunji's death. If section 9(1) can redress state-inflicted racial violence preceding death, this complements *Wotton*'s settled coverage of post-death conduct.[55] In Part V,

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48 *RDA* (n 8) ss 6(1), 18A(1); *Wotton* (n 20) 186 [128]; *Gerhardy v Brown* (1985) 159 CLR 70, 125–6 (Brennan J) ('*Gerhardy*'). See generally Duncan Ivison, *Rights* (Routledge, 2008) 85; Jeremy Waldron, 'Rights' in Robert E Goodin, Philip Pettit, and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy* (Blackwell, 2nd ed, 2007) 745, 745; Rex Martin, 'Rights' in Hugh LaFollette (ed), *The International Encyclopaedia of Ethics* (Blackwell, 2013) 3.

49 See, eg, *ICERD* (n 9) arts 2(1), 2(1)(b).

50 See, eg, Loretta Ruth de Plevitz, 'The Failure of Australian Legislation on Indirect Discrimination to Detect the Systemic Racism which Prevents Aboriginal People from Fully Participating in the Workforce' (PhD Thesis, Queensland University of Technology, 29 May 2001); Martin Flynn, 'Why Has the *Racial Discrimination Act 1975* (Cth) Failed Indigenous People?' (2005) 9(1) *Australian Indigenous Law Reporter* 15; Bindi MacGill, 'Aboriginal Education Workers in South Australia: Towards Equality of Recognition of Indigenous Ethics of Care Practices' (PhD Thesis, Flinders University, September 2008) 203–16; Hayley Schindler and Bruno Zeller, 'Indirect Systemic Discrimination in Education: A Comparative Analysis' (2011) 8 *Macquarie Journal of Business Law* 111, 119–30; Fiona Campbell, 'Special Measures and Racial Discrimination: A Study of the Cape York Welfare Reform' (PhD Thesis, James Cook University, December 2016).

51 *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8, 39 (Weinberg J) ('*Macedonian Teachers*').

52 Gaze, 'Has the *Racial Discrimination Act* Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000–04' (n 42) 178; 'Part II of the *Racial Discrimination Act*' in Race Discrimination Commissioner (ed), *The Racial Discrimination Act: A Review* (Australian Government Publishing Service, 1995) 55, 78 ('Part II of the *RDA*').

53 Bailey (n 15) 188.

54 *Wotton* (n 20) 517 [1587]. See, eg, *Eastman v Australian Capital Territory* (2019) 14 ACTLR 195, 215 [107] (Elkaim J); *Chandrasekaran v Western Sydney Local Health District [No 7]* [2019] NSWSC 567, [21] (Adamson J); *Hughes v Hill* (2020) 277 FCR 511, 524 (Perram J)

55 *Wotton* (n 20) 361–93 [886]–[1028], 394–409 [1034]–[1096].

the *Wotton* Framework's wider application to other cases of state-inflicted racial violence is briefly demonstrated by reference to recent cases.

II LOCATING STATE-INFLICTED RACIAL VIOLENCE WITHIN RACIAL DISCRIMINATION LAW

A *Wotton*: A Paradigm

Mulrunji's treatment in *Wotton* is paradigmatic of state-inflicted racial violence and its assault on human dignity.[56] On 19 November 2004, Senior Sergeant Christopher Hurley and Aboriginal Police Liaison Officer Lloyd Bengaroo were arresting Patrick Bramwell for public nuisance. Thirty-six-year-old Mulrunji walked past. He was intoxicated,[57] in the mood of an 'agitator'.[58] He asked Bengaroo why he was locking up his own people.[59] Bengaroo told Mulrunji to continue walking or he would also be locked up.[60] Mulrunji continued walking. Thirty metres down the road, he turned around and either sang the lyrics to Baha Men's 'Who Let the Dogs Out'[61] or swore at Hurley and Bengaroo.[62] Hurley, who knew Mulrunji was intoxicated,[63] asked Bengaroo who Mulrunji was. Bengaroo identified Mulrunji.[64] Hurley drove down and arrested Mulrunji for public nuisance.[65] At the police station, Mulrunji struck Hurley in the face as he was taken out of the police van. In the struggle, Hurley punched Mulrunji three times in the face.[66] Both Hurley and Mulrunji fell to the ground. Whether Hurley landed on top of Mulrunji, beside him,

56 Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016) 94. See also *Gerhardy* (n 48) 125–6 (Brennan J).

57 *Inquest into the Death of Mulrunji* (Coroner's Court of Queensland, Coroner Clements, 27 September 2006) ('*2006 Inquest*') 7; *Inquest into the Death of Mulrunji* (Coroner's Court of Queensland, Coroner Hine, 14 May 2010) ('*2010 Inquest*') 36 [104]. See generally *Wotton* (n 20) 209–11 [212]–[226].

58 'Many of the great religious and political figures of history have been agitators, and human progress owes much to the efforts of these and the many who are unknown': John Chesterman and George Villaflor, 'Mr Neal's Invasion: Behind an Indigenous Rights Case' (2000) 15 *Australian Journal of Law and Society* 90, 91, quoting *Neal v The Queen* (1982) 149 CLR 306, 316–17 (Murphy J).

59 *2006 Inquest* (n 57) 2. See also *Wotton* (n 20) 359 [880]. See generally Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Routledge, 1st ed, 2001) 216–21.

60 *Wotton* (n 20) 354 [860], 359 [880].

61 Chloe Hooper, *The Tall Man: Death and Life on Palm Island* (Penguin Books, 1st ed, 2008) 23–4; Joanne Watson, *Palm Island: Through a Long Lens* (Aboriginal Studies Press, 2010) 2. See also Palm Island Aboriginal Council, 'Final Submissions', Submission in *Inquest into the Death of Mulrunji on Palm Island*, 4 July 2006, 23 ('Palm Island Aboriginal Council Submissions to *2006 Inquest*').

62 *2006 Inquest* (n 57) 2. See also *Wotton* (n 20) 354–5 [860].

63 *Wotton* (n 20) 356 [867].

64 Ibid 367 [916].

65 *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7AA, as at 19 November 2004. See also *Summary Offences Act 2005* (Qld) s 6.

66 *2010 Inquest* (n 57) 138 [365].

or deliberately applied force was the subject of three inquests,[67] multiple statutory inquiries,[68] a manslaughter charge, and Hurley's acquittal.[69]

Mulrunji's demeanour changed. His body was limp – 'dead weight'.[70] He did not stand when asked and was physically dragged into the cell by Hurley and Sergeant Michael Leafe. Compared to the flurry of activity before the fall, Mulrunji had, by then, stopped speaking.[71] Mulrunji was placed in the cell without medical assessment[72] at around 10:26am. Hurley noticed that Mulrunji was bleeding above the eye[73] and his face was visibly swollen[74] – the only externally visible sequelae.[75] Hurley concluded that Mulrunji had fallen asleep.[76] Around 10:45am, Hurley checked on Mulrunji believing him to be asleep and snoring,[77] despite him making audible sounds and moving in ways inconsistent with sleeping.[78] Around 11:15am, Leafe conducted a further check on Mulrunji, discovering no pulse. Mulrunji was pronounced dead by paramedics at 12:00pm. An autopsy indicated Mulrunji died around 11:00am[79] from an intra-abdominal haemorrhage due to a ruptured liver 'cleaved in two'.[80] Mulrunji had sustained four broken ribs, resulting in significant internal blood loss.[81] He did not have these injuries upon arrival at the police station.[82]

B Taxonomy of Racial Violence

This article advances a novel category of conduct called 'state-inflicted racial violence' which constitutes personal violence in the sense of physical and/or neglectful conduct. This conduct also has a direct link to the death and occurs in racially discriminatory circumstances where the State is vicariously liable.[83] This

67 *2006 Inquest* (n 57) 7; *Hurley v Clements* [2008] QDC 323; *Hurley v Clements* [2010] 1 Qd R 215; *2010 Inquest* (n 57) 50 [126], 53 [137], 58 [153], 60–2 [159]; Jeff Waters, 'Michael Barnes Stands Down as Coroner for Doomadgee Inquest', *ABC News* (online, 3 March 2005). The first inquest was adjourned after Mulrunji's lawyers objected to the fact that the coroner had previous involvement in assessing complaints against Senior Sergeant Hurley.

68 See, eg, Crime and Misconduct Commission, *CMC Review of the Queensland Police Service's Palm Island Review* (Report, June 2010) ('*CMC Palm Island Review*').

69 *R v Hurley* (Supreme Court of Queensland, Dutney J, 20 June 2007); Janet Ransley and Elena Marchetti, 'Justice Talk: Legal Processes and Conflicting Perceptions of Justice about a Palm Island Death in Custody' (2008) 12(2) *Australian Indigenous Law Review* 41, 46.

70 *Wotton* (n 20) 217 [258]; *2010 Inquest* (n 57) 53 [137].

71 *Wotton* (n 20) 356 [867].

72 Ibid 357 [869].

73 Ibid 215 [254].

74 Ibid 356 [864].

75 *2006 Inquest* (n 57) 6–7.

76 *Wotton* (n 20) 356 [867].

77 Ibid 225–6 [285]–[286], 355 [862].

78 Ibid 384 [994].

79 *2010 Inquest* (n 57) 13 [35].

80 Ibid 2 [1]; *2006 Inquest* (n 57) 7. See generally Russ Scott, 'Medical Issues: Inquest into the Death of Cameron Doomadgee' (2010) 17(5) *Journal of Law and Medicine* 677, 681.

81 *2010 Inquest* (n 57) 38 [109].

82 Ibid 34 [95]–[97]. *Wotton* (n 20) 231 [309].

83 See, eg, *Wotton* (n 20) 186 [128], 504–5 [1532]; *Russell 2002* (n 2) 250 (Spigelman CJ). See generally Joseph Carabetta, 'Employment Status of the Police in Australia' (2003) 27(1) *Melbourne University Law Review* 1, 2.

anchors state-inflicted racial violence in section 9(1)'s scope of redress against acts operating '*directly*' on complainants[84] – including discretionary actions taken by the executive through the police,[85] but not laws which are the province of section 10.[86]

Australian law has no definition of racial violence, despite it being a centuries-old phenomenon[87] and growing attention on violence as a form of discrimination.[88] In 1991, the HREOC's National Inquiry defined racist violence as 'a specific act of violence, intimidation or harassment carried out against any individual, group or organisation (or their property) on the basis of [race]'.[89] Although this definition provides a blanket description of violence, reflecting the National Inquiry's broad terms of reference,[90] it is overinclusive for the task of connecting section 9(1) to scenarios like *Wotton* and uncalibrated for the violence involved in deaths in custody. Indigenous people have a unique historical relationship with state violence dating back to colonisation.[91]

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84 *Australian Medical Council v Wilson* (1996) 68 FCR 46, 63 (Heerey J, Black CJ agreeing at 47) ('*AMC v Wilson*'); *Bropho v Western Australia* (2008) 169 FCR 59, 69 (Ryan, Moore and Tamberlin JJ) ('*Bropho*'). See also *RDA* (n 8) s 3(3).

85 Martin Flynn, 'Aboriginal Interaction with the Criminal Justice System of the Northern Territory: A Human Rights Approach' (LLM Thesis, University of New South Wales, 1998) 141. See also *Wotton* (n 20) 316–17 [672]–[675].

86 *Wotton* (n 20) 499 [1501]; *Gerhardy* (n 48) 81–2 (Gibbs CJ), 92–3 (Mason J), 120–2 (Brennan J); *Western Australia v Ward* (2002) 213 CLR 1, 98 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Mabo No 1* (n 7) 230 (Deane J). See also 'Part II of the *RDA*' (n 52) 71.

87 See, eg, Jane Lydon and Lyndall Ryan, *Remembering the Myall Creek Massacre* (University of New South Wales Press, 2018); Raymond Evans, Kay Saunders and Kathryn Cronin, *Race Relations in Colonial Queensland: A History of Exclusion, Exploitation and Extermination* (University of Queensland Press, 3rd ed, 1993) 33–66; Hannah McGlade and Jeannine Purdy, 'No Jury Will Convict: An Account of Racial Killings in Western Australia' (2001) 22 *Studies in Western Australian History* 91; Steven Schubert, 'Coniston Massacre: NT Police Apologise for State-Sanctioned Massacre of Aboriginal People', *ABC News* (online, 24 August 2018) <https://www.abc.net.au/news/2018-08-24/nt-police-apologise-for-state-sanctioned-coniston-massacre/10162850>.

88 Harmit Athwal, Jenny Bourne and Rebecca Wood, 'Racial Violence: The Buried Issue' (Briefing Paper No 6, Institute of Race Relations, June 2010) 3; Martin Baldwin-Edwards, 'National Analytical Study on Racist Violence and Crime: RAXEN National Focal Point for Greece' (Research Paper, European Monitoring Centre on Racism and Xenophobia, 2003) 16–17; Ayushi Agarwal, 'The Case for Treating Violence against Women as a Form of Sex Discrimination in India' (2021) 21(1) *International Journal of Discrimination and the Law* 5, 17–18; Valorie Vojdik, 'Conceptualizing Intimate Violence and Gender Equality: A Comparative Approach' (2008) 31(2) *Fordham International Law Journal* 487, 493; Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence against Women,* 11th sess, UN Doc A/47/38 (1992) para 1; Ruth Rubio-Marín and Mathias Möschel, 'Anti-Discrimination Exceptionalism: Racist Violence before the ECtHR and the Holocaust Prism' (2015) 26(4) *European Journal of International Law* 881, 888–91; Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination Law: Theory and Context* (Sweet & Maxwell, 1st ed, 2008) 230–1. But see James Spigelman, 'Violence Against Women: The Dimensions of Fear and Culture' (2010) 84(6) *Australian Law Journal* 372, 375.

89 *NIRV Report* (n 34) 14.

90 Ibid 15–17, 418.

91 Ibid 38–47. See also Jenny Earle, 'Racist Violence: A Plethora of Proposals for Reform' (1991) 62 *Australian Law Reform Commission Reform Journal* 97, 97–8; Chris Cunneen, 'Police Violence: The Case of Indigenous Australians' in Peter Sturmey (ed), *The Wiley Handbook of Violence and Aggression* (John Wiley & Sons, 2017) 1591, 1592 <https://doi.org/10.1002/9781119057574.whbva119>.

Racial violence can be understood through an exhaustive, though not mutually exclusive, three-part taxonomy. First, there is substantial literature which analyses racial violence as systemic in nature,[92] referring to facially neutral 'rules, practices, habits'[93] with discriminatory effects which may be gleaned from statistical data.[94] Second, racial violence can also mean racial vilification,[95] that is, conduct *preceding* personal violence, either because it precedes personal violence in a particular case[96] or because its very nature 'leads inevitably to personal violence'.[97] Third, whereas speech-related activity and mental harm is the core of vilification,[98] the critical category for our purposes lies in the physical realm; acts of physical violence such as assault or what Cunneen termed the 'violence of neglect'.[99] Conduct causing death tends to blend both physical violence and neglect, such as for Mulrunji, or John Pat who died in custody from a head injury caused by police assault when no medical care was provided.[100] State-inflicted racial violence is a *subset* of this final category. This article suggests personal violence or neglect is a necessary but not sufficient precondition for state-inflicted racial violence because the latter further entails the State's vicarious liability[101] and a direct nexus between conduct and death.

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92 *RCIADIC National Report* (n 47) vol 2 [12.1.26]–[12.1.38], vol 4 [29.5.2]. See also *Inquest into the Death of Tanya Day*, Ruling on Application Regarding the Scope of the Inquest (COR 2017 6424) 2; *NIRV Report* (n 34) 70–2; Iyiola Solanke, *Making Anti-racial Discrimination Law: A Comparative History of Social Action and Anti-racial Discrimination Law* (Routledge, 2009) 43; Harry Blagg et al, *Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Victorian Criminal Justice System* (Report, September 2005) 12; Phillip Tahmindjis, 'The Law and Indirect Racial Discrimination: Of Square Pegs, Round Holes, Babies and Bathwater?' in Race Discrimination Commissioner (ed), *The Racial Discrimination Act: A Review* (Australian Government Publishing Service, 1995) 123. See generally Sir William Macpherson, *The Stephen Lawrence Inquiry* (Final Report No CM4262-1, February 1999) 49 [6.34].

93 *RCIADIC National Report* (n 47) vol 2 [12.1.30].

94 See generally John Gardner, 'Racial Discrimination and Statistics' (1989) 105 *Law Quarterly Review* 183.

95 *RDA* (n 8) s 18C. See also *Anti-Discrimination Act 1977* (NSW) s 20C(1) ('*ADA*'); *Anti-Discrimination Act 1991* (Qld) s 124A(1); *Racial and Religious Tolerance Act 2001* (Vic) s 7(1); *Racial Vilification Act 1996* (SA) s 4.

96 See, eg, *Russell v Commissioner of Police* [2001] NSWADT 32 ('*Russell*').

97 Commonwealth, *Parliamentary Debates,* House of Representatives, 15 November 1994, 3336, 3340 (Michael Lavarch, Attorney-General); Luke McNamara, 'Regulating Racism: Racial Vilification Laws in Australia' (Monograph Series No 16, Sydney Institute of Criminology, 2002) 11–12, 23.

98 See, eg, Bill Swannie, 'Protecting Victims Not Punishing Perpetrators: Clarifying the Purpose of s 18C of the *Racial Discrimination Act*' (2020) 24 *Media and Arts Law Review* 24, 31–2, 40; Simon Rice, 'Why Free Speech Comes at a Price: Reflections on Race, Civility and the Law' (Conference Paper, Deakin University, 31 July 2014) 8; Yin Paradies, 'A Systematic Review of Empirical Research on Self-reported Racism and Health' (2006) 35(4) *International Journal of Epidemiology* 888, 892. See also Katharine Gelber and Luke McNamara, 'Anti-vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488, 489; Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Racial Hatred Bill 1994* (Report, March 1995) 27 [1.83].

99 Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (n 59) 106, 124–5. See also Cunneen, 'Police Violence: The Case of Indigenous Australians' (n 91) 1597.

100 Elliot Johnston, *Inquiry into the Death of John Peter Pat* (Report of the Royal Commission into Aboriginal Deaths in Custody, 30 March 1991) 72. See generally *Deaths Inside Database* (n 33).

101 *RDA* (n 8) s 18A(1)–(2).

These categories of racial violence move in prophylactic degrees of breadth from the widest, system-level protective perimeter to the narrowest protection against trespass upon the body. This illuminates four significant conclusions. First, while the *RDA* operates against racial vilification under section 18C[102] and systemic forms of discrimination under indirect discrimination provisions in sections 9(1A) and 10,[103] its operation against personal violence, including state-inflicted racial violence is uncertain.[104] The National Inquiry identified no 'definite enough remedy' for personal violence and suggested this required 'criminal as well as civil remedies'.[105] This uncertainty in operation is a consequence of Australian courts not yet having any opportunity to consider whether state-inflicted racial violence is caught by section 9(1). Just as it was 'by no means clear' whether the *RDA* captured vilification in 1991,[106] or whether sexual harassment constituted sex discrimination prior to the landmark decision in *O'Callaghan v Loder,*[107] this uncertainty does not suggest section 9(1) is *doctrinally* unavailable as a statutory wrong enlivened by violence resulting in deaths in discriminatory circumstances. Indeed, applying the modern approach to statutory interpretation, nothing in section 9(1)'s text would suggest otherwise.[108] Section 9(1) is action-neutral, generalised from specific activities,[109] beneficially construed,[110] and directed to '*any* act'[111] and discrimination in '*all* its forms'.[112] Instead, the uncertainty can be attributed to the

102 See especially *Eatock v Bolt* (2011) 197 FCR 261.

103 See generally Tamar Hopkins, 'Litigating Racial Profiling: The Use of Statistical Data' (2021) 37(2) *Law in Context* 37, 39–40. Cf Alice Barter and Dennis Eggington, 'Institutional Racism, the Importance of Section 18C and the Tragic Death of Miss Dhu' (2017) 8(28) *Indigenous Law Bulletin* 8, 9.

104 See, eg, Committee on the Elimination of Racial Discrimination, *Opinion of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,* Communication No 46/2009 (*Dawas v Denmark*), 80th sess, UN Doc CERD/C/80/D/46/2009 (6 March 2012) annex I.

105 *NIRV Report* (n 34) 277–8.

106 Ibid 298.

107 (1983) 3 NSWLR 89, 92–7 (Matthews DCJ); *Hall* (n 16) 277 (French J). See also Phillip Tahmindjis, 'Sexual Harassment and Australian Anti-Discrimination Law' (2005) 7 *International Journal of Discrimination and the Law* 87, 88; Gail Mason and Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' (2003) 31 *Federal Law Review* 195, 197.

108 Perry Herzfeld and Thomas Prince, *Interpretation* (Thomson Reuters, 2nd ed, 2020) 15–18. See generally Jeffrey Barnes, 'Contextualism: "The Modern Approach to Statutory Interpretation"' (2018) 41(4) *University of New South Wales Law Journal* 1083. See also *Vienna Convention on the Law of Treaties,* opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1) ('*Vienna Convention*'); *Victrawl Pty Ltd v Telstra Corp Ltd* (1995) 183 CLR 595, 622 (Deane, Dawson, Toohey and Gaudron JJ).

109 *RDA* (n 8) s 9(4); *Woomera Aboriginal Corporation v Edwards* [1993] HREOCA 24, 2 (Commissioner Nettlefold); *Elmaraazey v University of New South Wales* [1996] HREOCA 17.

110 *Baird* (n 7) 468, [60]–[62] (Allsop J, Spender J agreeing at 452, Edmonds J agreeing at 473); *Maloney v The Queen* (2013) 252 CLR 168, 177 (French CJ) ('*Maloney*'); *Macedonian Teachers* (n 51) 29–30 (Weinberg J). See also Commonwealth, *Parliamentary Debates,* House of Representatives, 13 February 1975, 285–6 (Kep Enderby, Attorney-General); Theodor Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79(2) *American Journal of International Law* 283, 303.

111 *RDA* (n 8) s 9(1) (emphasis added).

112 *ICERD* (n 9) Preamble, art 5 (emphasis added); *AMC v Wilson* (n 84) 48 (Black CJ).

reluctance towards rights in Australian jurisprudence,[113] and possible uncertainties of standing. Greater societal opprobrium towards circumstances involving a victim's death may generate a perception that the *RDA* is unsuitable because of the associated mandatory conciliation procedures.[114] Complainants may, instead, seek to have a wrongdoer 'punished' – an option generally unavailable in anti-discrimination law.[115]

Second, the *RDA*'s historical development led to underappreciation of how state-inflicted racial violence could be remedied other than by criminalisation.[116] Although the 1973 draft bill of the *RDA* contained criminal penalties for 'physical violence',[117] this was later dropped[118] and underexplored in the ensuing decades. Prompted by international criticisms,[119] reform efforts throughout the 1990s turned to removing Australia's reservation to article 4(a) of the *International Convention on the Elimination of Racial Discrimination* ('*ICERD*') which required states parties to declare as 'an offence … all dissemination of ideas based on racial superiority or hatred … as well as acts of violence'.[120] Although this required criminal sanctions,[121] Australia proceeded with civil vilification provisions[122] following

113 Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195, 212–213; Sir Anthony Mason, 'The Role of the Judiciary in Developing Human Rights in Australian Law' in David Kinley (ed), *Human Rights in Australian Law* (Federation Press, 1998) 26, 46; Michael Legg, 'Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations' (2002) 20(2) *Berkeley Journal of International Law* 387, 398.

114 Email from Tim Soutphommasane, former Race Discrimination Commissioner, to Alan Zheng, 1 October 2021 ('Email from Tim Soutphommasane'). See also Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide (n 88) 847. But see *AHRC Act* (n 18) s 46PH(1B)(b).

115 Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (Federation Press, 2nd ed, 2004) 561–2; Email from Craig Longman, Deputy Director of the Jumbunna Research Unit, to Alan Zheng, 28 October 2021) ('Email from Craig Longman'). But see *Anti-Discrimination Act 1998* (Tas) s 89(1)(e). The breadth of conduct involved in deaths in custody means not all cases will neatly fit under one remedial purpose.

116 *NIRV Report* (n 34) 252, 301. See also Paul Iganski, European Network Against Racism, Open Society Foundations, *Racist Violence in Europe* (Report, March 2011) 6–7; Email from Tim Soutphommasane (n 114). See also David Keane, 'Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument' (2020) 20(2) *Human Rights Law Review* 236, 243–4.

117 Racial Discrimination Bill 1973 (Cth) cl 30. See also Commonwealth, *Parliamentary Debates,* House of Representatives, 21 November 1973, 1978 (Lionel Murphy, Attorney-General).

118 Sarah Joseph, 'The *Racial Discrimination Act*: A 1970s Perspective' (Conference Paper, Australian Human Rights Commission, August 2015) 39; Bailey (n 15) 52–3, 181.

119 *Report of the Committee on the Elimination of Racial Discrimination to the General Assembly,* 49th sess, UN Doc A/49/18 (19 September 1994) para 549. See also McNamara (n 97) 21.

120 *ICERD* (n 9) art 4(a); *ICERD* (n 9) (Australia) Reservation to Art 4(a); *Racial Hatred Act 1995* (Cth); *RDA* (n 8) pt IIA. See also Saku Akmeemana and Melinda Jones, 'Fighting Racial Hatred' in Race Discrimination Commissioner (ed), *The Racial Discrimination Act: A Review* (Australian Government Publishing Service, 1995) 129.

121 Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, April 1992) [7.29] ('*ALRC Report*'); Human Rights Committee, *Views: Communication No 4/1991 (LK v The Netherlands),* 42nd sess, UN Doc A/48/18 (16 March 1993) [4.6]. See also Karl Josef Partsch, 'Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination' in Sandra Coliver (ed), *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (London and Human Rights Centre, 1992) 21, 27.

122 McNamara (n 97) 6. See also *RDA* (n 8) s 26.

criticism of criminalisation approaches to racist harassment and violence.[123] The operation of vilification provisions has dominated the preceding two decades.[124] The possibility of section 9(1) providing a civil remedy for state-inflicted racial violence was overlooked, caught between the National Inquiry which avoided overlap with the RCIADIC's focus on issues unique to Indigenous people,[125] and the RCIADIC's primary objective of structural reforms and *preventing* deaths, not remedial mechanisms.[126]

Third, the above taxonomy demonstrates a wider remedial deficit insofar as a remedy exists to recognise a racial basis in personal violence. Whereas criminal law captures serious racial vilification,[127] it only considers a racial basis in personal violence indirectly in sentencing.[128] Despite the National Inquiry's recommendations for a federal offence of racist *personal* violence, which the Australian Law Reform Commission subsequently endorsed,[129] none was legislated.[130] With limited criminal prosecutions for deaths in custody,[131] and no specialised offences, criminal law

123 *RCIADIC National Report* (n 47) vol 4 [28.3.49]. See generally James Morsch, 'The Problem of Motive in Hate Crimes: The Argument against Presumptions of Racial Motivation' (1991) 82(3) *Journal of Criminal Law and Criminology* 659; Desmond Fagan, 'Crimes of "Racist Violence": Report of the National Inquiry into Racist Violence in Australia' (1992) 8(1) *Policy: A Journal of Public Policy and Ideas* 57, 59; Ian Freckelton, 'Censorship and Vilification Legislation' (1994) 1(1) *Australian Journal of Human Rights* 327; NSW Law Reform Commission*, Review of the Anti-Discrimination Act 1977 (NSW)* (Report No 92, November 1999) 515–19 ('*NSWLRC Report*').

124 See, eg, Adrienne Stone, 'The Ironic Aftermath of *Eatock v Bolt*' (2015) 38(3) *Melbourne University Law Review* 926, 927; Simon Rice, 'Commentary: *Eatock v Bolt* [2011] FCA 1103' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision-Making* (Routledge, 1st ed, 2021) 169, 174–5; Luke Chircop, 'A Response to Legal Justifications for Amending s 18C of the *Racial Discrimination Act*' (2018) 22 *Media and Arts Law Review* 148, 151; *Prior v Queensland University of Technology [No 2]* [2016] FCCA 2853.

125 *NIRV Report* (n 34) 7.

126 See, eg, *RCIADIC National Report* (n 47) vol 1 [3.2.8], [3.2.24], [3.3.91], [4.1.2], [4.3.1]; Flynn (n 85) 32–3. See generally George Newhouse, Daniel Ghezelbash and Alison Whittaker, 'The Experience of Aboriginal and Torres Strait Islander Participants in Australia's Coronial Inquest System: Reflections from the Front Line' (2020) 9(4) *International Journal for Crime, Justice and Social Democracy* 76; Victorian Aboriginal Legal Service Co-Operative Limited, 'The Centrality of the Royal Commission into Aboriginal Deaths in Custody when Discussing Potential Reform to the Victorian Coronial System' (2008) 12 (Special Edition 2) *Australian Indigenous Law Review* 55.

127 See, eg, *Crimes Act 1900* (NSW) s 93Z(1).

128 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h), as inserted by *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) sch 1; Jano Gibson, 'Five Jailed for Racist Alice Springs Killing', *ABC News* (online, 23 April 2010) <https://www.abc.net.au/news/2010-04-23/five-jailed-for-racist-alice-springs-killing/408320>; *R v Doody* (Supreme Court of the Northern Territory, Martin CJ, 23 April 2010).

129 *NIRV Report* (n 34) 297; *ALRC Report* (n 121) [7.33]–[7.39]. But see *RCIADIC National Report* (n 47) vol 4 [28.3.49].

130 But see *Criminal Code Act 1995* (Cth) s 80.2A; Ben Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28(3) *University of New South Wales Law Journal* 868, 876.

131 Jumbunna Institute of Indigenous Education and Research, Submission No 115 to NSW Parliament, *Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* (7 September 2020) 29; Alison Whittaker, 'Despite 432 Indigenous Deaths in Custody Since 1991, No One Has Ever Been Convicted. Racist Silence and Complicity Are to Blame', *The Conversation* (online, 3 June 2020) <https://theconversation.com/despite-432-indigenous-deaths-in-custody-since-1991-no-one-has-ever-been-convicted-racist-silence-and-complicity-are-to-blame-139873>.

has not to date adequately vindicated family and community experiences of racial violence as a form of discrimination,[132] affirmed the race relations entangled in a death in custody,[133] or met community calls for greater police accountability under the law.[134] That section 9(1) might perform this task is consistent with the Committee on the Elimination of Racial Discrimination's ('CERD Committee') support for a 'legal system where several different types of legal avenues are available'[135] and with states parties' obligation to ensure effective remedies, including *civil* remedies, for '*any* damage suffered' from '*any* acts of racial discrimination'.[136] There is nothing novel about the use of non-criminal law remedies against conduct which might otherwise amount to criminal wrongdoing.[137]

Finally, state-inflicted racial violence is a subset of deaths in custody, which is defined broadly.[138] In *Russell v Commissioner of Police,* police assaulted Edward Russell whilst using derogatory language.[139] Later, Russell committed suicide at Long Bay Correctional Centre. Although Russell's suicide constituted a death in custody, it is not state-inflicted racial violence. If death is intentionally self-inflicted without direct personal violence or neglect by the State, or any person's exercise of discretion, then the factual and temporal connection between conduct and death is less *direct*.[140] This highlights how some deaths in custody, including *Russell*, are more appropriately remedied under vilification (as it was)[141] or under section 10

132 Allison (n 37) 188; Robyn Carroll and Normann Witzleb, '"It's Not Just About the Money": Enhancing the Vindicatory Effect of Private Law Remedies' (2011) 37(1) *Monash University Law Review* 216, 227; Robyn Carroll, 'You Can't Order Sorriness, So Is There Any Value in the Ordered Apology? An Analysis of Ordered Apologies in Anti-Discrimination Cases' (2010) 33(2) *University of New South Wales Law Journal* 360, 367. See also Benjamin Law, 'Indigenous Author Anita Heiss: "Speaking Language is an Act of Sovereignty"', *The Sydney Morning Herald* (online, 6 August 2021) < https://www.smh.com.au/national/indigenous-author-anita-heiss-speaking-language-is-an-act-of-sovereignty-20210714-p589q6.html>.

133 *NIRV Report* (n 34) 297; *RCIADIC National Report* (n 47) vol 2 [12.1.2].

134 Whether the criminal process *can* achieve those purposes is outside the scope of this article. The reality at present is that the criminal process *has not* led to any convictions.

135 Timo Makkonen, *Equal in Law, Unequal in Fact: Racial and Ethnic Discrimination and the Legal Response Thereto in Europe* (Brill, 2012) 146.

136 *ICERD* (n 9) art 6 (emphasis added); Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2013) 822.

137 For instance, tortious causes of action have played a substantial role in that context but that pathway has been affected by difficult questions of vicarious liability; *Quayle v New South Wales* (1995) Aust Torts Report 81-367; Ian Freckelton, 'Suing the Police: The Moral of the Disappointing Morsel' (1996) 21(4) *Alternative Law Journal* 173; Email from Craig Longman (n 115). However, it is important that practitioners consider the particular purpose that family and relatives are seeking in each individual case and where punitive measures are sought, that should influence practitioner advice on whether to, for instance, utilise the *RDA* or emphasise the prosecutorial process.

138 *RCIADIC National Report* (n 47) vol 1 [4.5.45].

139 *Russell* (n 96) [87]–[89] (Judicial Member Ireland, Members Farmer and Taksa).

140 See generally Alexandra Gannoni and Samantha Bricknell, 'Indigenous Deaths in Custody: 30 Years Since the Royal Commission into Aboriginal Deaths in Custody' (2021) 13(2) *Australasian Policing* 12, 16.

141 *Russell* (n 96). See also '*Russell v Commissioner of Police, NSW Police Service & Ors*' (2001) 6(1) *Australian Indigenous Law Reporter* 75, 75–6.

systemic conceptions of racial violence in light of the higher statistical likelihood of Indigenous detainees engaging in self-harm,[142] than under section 9(1).

III THE *WOTTON* FRAMEWORK

Having located state-inflicted racial violence, it is necessary to turn to the *Wotton* framework. Section 9(1) makes it unlawful to do 'any act involving a distinction, exclusion, restriction or preference based on race …' ('*differential treatment*'). The act must also have the 'purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right …' ('*denial of rights*').[143] Constitutional pragmatism demanded section 9(1)'s fidelity to its source.[144] Section 9(1) transplanted *ICERD's* definition of racial discrimination in article 1(1) verbatim, imbuing it with operational effect.[145] Early on, section 9(1) could not escape its use in triggering constitutional inconsistency arguments.[146] To clarify this, section 9(1A) was introduced in 1990 to confirm direct discrimination could also trigger inconsistency,[147] and is mutually exclusive to section 9(1).[148] Since then, Bar and Bench have lamented section 9(1) for being unconducive to clarity,[149] general,[150] 'exotic ... and notoriously difficult to employ',[151] of uncertain effect,[152] difficult to yield a clear 'statutory command',[153] of 'illusory precision',[154]

142 *RCIADIC National Report* (n 47) vol 3 [23.4.24]–[23.4.26]; Tamara Walsh and Angelene Counter, 'Deaths in Custody in Australia: A Quantitative Analysis of Coroners' Reports' (2019) 31(2) *Current Issues in Criminal Justice* 143, 159; Matthew Willis et al, 'Self-inflicted Deaths in Australian Prisons' (Trends and Issues in Crime and Criminal Justice No 513, Australian Institute of Criminology, August 2016) 8; Mick Dodson, 'Linking International Standards with Contemporary Concerns' in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (Federation Press, 1998) 18, 25.

143 *RDA* (n 8) s 9(1).

144 French (n 3) 14–16. See also Hilary Charlesworth, 'Translating the International Convention on Racial Discrimination into Australian Law' (Conference Paper, Australian Human Rights Commission, August 2015) 56; Hilary Charlesworth, 'Internal and External Affairs: The *Koowarta* Case in Context' (2014) 23(1) *Griffith Law Review* 35.

145 Bailey (n 15) 186–7.

146 See, eg, *Gerhardy* (n 48) 121, 123 (Brennan J), 146–7 (Deane J); *Aboriginal Legal Rights Movement Inc v South Australia [No 2]* (1995) 64 SASR 558, 560 (Doyle CJ); *Mabo No 1* (n 7) 216 (Brennan, Toohey and Gaudron JJ).

147 Commonwealth, *Parliamentary Debates,* House of Representatives, 20 September 1990, 2339–40 (Michael Duffy, Attorney-General); Explanatory Memorandum, Law and Justice Amendment Bill 1990 (Cth) 47–8. See also 'Part II of the *RDA*' (n 52) 61.

148 See, eg, *AMC v Wilson* (n 84) 47–8 (Black CJ), 55 (Heerey J), 74 (Sackville J). Cf *Maiocchi v Royal Australian & New Zealand College of Psychiatrists [No 4]* [2016] FCA 33, [342] (Griffiths J).

149 *Macedonian Teachers* (n 51) 30 (Weinberg J). See also *Baird* (n 7) 460 (Allsop J, Spender J agreeing at 452, Edmonds J agreeing at 473); De Plevitz (n 50) 280.

150 *NSWLRC Report* (n 123) 109–11, [4.23], [4.27]–[4.29]; Attorney-General's Department, 'Consolidation of Commonwealth Anti-Discrimination Laws' (Discussion Paper, Commonwealth Government, September 2011) 27.

151 Stewart Levitt and Daniel Meyerowitz-Katz, '*Wotton v Queensland* and Palm Island's Quest for Justice' (2014) 8(14) *Indigenous Law Bulletin* 3, 6.

152 *Koowarta* (n 37) 182 (Gibbs CJ); *Gerhardy* (n 48) 81–2 (Gibbs CJ).

153 Sir Harry Gibbs, 'Eleventh Wilfred Fullagar Memorial Lecture: The Constitutional Protection of Human Rights' (1982) 9(1) *Monash University Law Review* 1, 13.

154 Makkonen (n 135) 131.

and even being 'meaningless' in domestic law.[155] Indeed, Commonwealth Solicitor-General Maurice Byers had recommended section 9(1)'s removal from the final bill.[156] The *Wotton* Framework structures section 9(1) to preserve its principled operation within the *RDA* and unique synthesis of discrimination and human rights questions without becoming transmogrified into a general claim of unlawfulness of police conduct, or quasi-administrative review of statutory power[157] – remedial avenues already explored for deaths in custody.[158]

The *Wotton* Framework is organised in three parts. Part A examines how impugned section 9(1) 'acts' should be framed. Part B demonstrates a method I call the 'unstructured comparison' which is more consistent with the flexibility of section 9(1)'s text. First, under this comparison, police policies are used as part of a 'Two-World Comparison Exercise' to isolate differential treatment. Second, an open-textured inquiry is used to identify the racial basis. Third, a residual and supplementary function is found for the comparator. Part C overcomes the hurdles posed in *Maloney v The Queen* ('*Maloney*') to a fully realised denial of rights question which allows for the use of the flexible concept of arbitrariness to analyse the denial of the rights to life[159] and liberty.[160] Arbitrariness, as I explain, preserves section 9(1)'s field of substantive protection beyond mere questions of lawfulness.[161]

A Framing the Impugned Acts

Unlike criminal and coronial avenues, section 9(1) provides a complainant significant scope in selecting the focus of their own inquiry and the relevant acts to be examined.[162] Thus, in the Palm Island encounter at the heart of *Wotton*, Hurley and Mulrunji's forensically contentious fall can be avoided entirely as the subject of complaint and inquiry and, instead, Mulrunji's arrest and watchhouse treatment can be examined. A difficulty is the particularity with which acts are framed so as to remain meaningful without breaking section 9(1) into different elements

155 *Koowarta* (n 37) 173 (DM Dawson QC) (during argument), cf 265 (Brennan J). See also *Gerhardy* (n 48) 157–8 (Dawson J). But see Edward Santow, 'The Australian Human Rights Commission' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Bloomsbury, 2019) 123, 141.

156 Bailey (n 15) 189; National Archives of Australia, *Solicitor-General's Opinions Byers 1973-1976* (NAA: A3177, 'Racial Discrimination Bill: Suggested Amendments for Consideration', 17 February 1975) 246. See generally Anne Twomey, 'Legal Advice in the Constitutional Maelstrom of the Whitlam Era' (Sir Maurice Byers Lecture, New South Wales Bar Association, 27 October 2020).

157 *Wotton* (n 20) 326 [725]–[727]. See also *Bulsey v Queensland* [2015] QCA 187.

158 *Social Justice Commissioner Deaths in Custody Report* (n 12) 289–95. See, eg, *Appleton v New South Wales* (Unreported, District Court of New South Wales, Judge Quirk, 28 July 2005).

159 *ICCPR* (n 10) art 6.

160 *ICCPR* (n 10) art 9.

161 Laurent Marcoux Jr, 'Protection from Arbitrary Arrest and Detention under International Law' (1982) 5(2) *Boston College International and Comparative Law Review* 345, 350, 362; Parvez Hassan, 'The Word Arbitrary as Used in the Universal Declaration of Human Rights: "Illegal or Unjust?"' (1969) 10(2) *Harvard International Law Journal* 225, 254–8, 262; Commission on Human Rights, *Study of the Right of Everyone to Be Free from Arbitrary Arrest, Detention and Exile,* 18th sess, Agenda Item 14, UN Doc E/CN.4/826 (5 January 1962) 16–20, paras 23–30.

162 *Wotton* (n 20) 179 [99], 243 [365], 248 [378].

contrary to its holistic interpretation.[163] As *Wotton* demonstrated, for section 9(1)'s purposes, 'act[s]' are not viewed in isolation but are inclusive of all consequences and surrounding circumstances 'involved' in the act on an objective assessment.[164] Therefore, section 9(1) acts should not be framed over-specifically. Over-specification not only complicates the Court's understanding of contravention,[165] but may preclude findings of contravention.[166] Equally, acts must not be framed to capture a *course of conduct* akin to a case theory or general narrative.[167] Guided by the earlier taxonomy on racial violence, the acts complained of should not concern systemic conceptions of racial violence.[168] Instead, the 'goldilocks' conditions lie at an intermediate level of abstraction which recognises that section 9(1) is a composite concept structured around conduct.[169] It is the act which carries the differential treatment and which has the purpose or effect of denying rights.[170] For section 9(1)'s purposes, acts can be framed which inherently impair a particular right.[171] Ultimately, framing the relevant acts is a purposive process which can maximise the evaluative scope of the differential treatment and denial of rights components of section 9(1).

B Differential Treatment in Section 9(1)

Section 9(1)'s gravamen lies in the racial basis of the treatment because it elevates the act, bare distinction and denial of rights to conduct affecting substantive dignity and respect.[172] In asking whether the treatment is *based on race,* section 9(1) is unique[173] because the court is not required to construct a notional person (the comparator), place them in similar circumstances, and determine whether the victim was treated less favourably than the comparator.[174] The *RDA* does not follow the

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163 *Baird* (n 7) 462 (Allsop J, Spender J agreeing at 452, Edmonds J agreeing at 473); *Payne v Long* [2019] FCA 1765, [64] (Perry J); *Barngarla Determination Aboriginal Corporation RNTBC v District Council of Kimba* [2019] FCA 1092, [70] (White J); *Wotton* (n 20) 172 [69]–[70], 283 [530], 325 [718]–[724], 432 [1209], 447 [1283]. Cf *AMC v Wilson* (n 84) 73 (Sackville J); *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86, 101–2 (Kenny J) ('*Iliafi*').

164 *Wotton* (n 20) 290–1 [559]–[560], 428 [1189], 464 [1370].

165 Ibid 325–6 [714]–[722].

166 Ibid 179 [97].

167 Ibid 172 [69]–[70].

168 See especially *Jenkings v Northern Territory of Australia [No 2]* [2018] FCA 1706, [90]–[94], [119]–[120] (White J) ('*Jenkings*').

169 Egon Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15(4) *International and Comparative Law Quarterly* 996, 1001.

170 *Wotton* (n 20) 283 [530], 289 [554], 392–3 [1026], 464 [1370]; *Baird* (n 7) 470 [70] (Allsop J, Spender J agreeing at 452, Edmonds J agreeing at 473); *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 564 (French and Jacobson JJ, Branson J agreeing at 573) ('*Gama*').

171 *Wotton* (n 20) 328 [735].

172 *Gerhardy* (n 48) 125–6 (Brennan J).

173 Human Rights and Equal Opportunity Commission, *An International Comparison of the Racial Discrimination Act 1975* (Background Paper No 1, November 2007) 31. See also Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 169.

174 *Wotton* (n 20) 284 [539]; *Baird* (n 7) 469 (Allsop J, Spender J agreeing at 452, Edmonds J agreeing at 473); *Gama* (n 170) [76] (French and Jacobson JJ, Branson J agreeing at 573); *Campbell v Northern Territory [No 3]* [2021] FCA 1089, [727], [737] (White J) ('*Campbell*'). Cf *Philip v New South Wales*

'comparative model' in conventional anti-discrimination provisions.[175] However, what is in the comparator's place? Parties – indeed, even the applicants in *Wotton* – continue to assume a comparator is required;[176] some magically read the words of the comparative formula 'less favourable treatment' into 9(1),[177] and treat it as a conventional direct discrimination provision.[178] Until *Wotton,* alternatives to a comparator's conceptual 'shackles'[179] in section 9(1) were not squarely confronted. Mortimer J stated that 9(1) had no 'complex comparator structure' like in other anti-discrimination statutes.[180] However, without challenge from either party,[181] her Honour held that section 9(1) still 'required' a 'comparison.'[182] Not only does the *Wotton* comparison creep into a functional comparator, it is regrettable that Mortimer J relied upon authorities as supporting a 'comparison' when the same authorities demonstrate a comparison in section 9(1) is merely an analytical device for identifying differential treatment and noncomparative reasoning can be used to reach the same conclusions in *Wotton.*

[2011] FMCA 308, [210]–[213] (Lloyd-Jones FM) ('*Philip*'); *RDA* (n 8) ss 11(a)–(b), 12(1)(b)–(c), 13, 15(2); *Sex Discrimination Act 1984* (Cth) s 5(1) ('*SDA*'); *Disability Discrimination Act 1992* (Cth) s 5(1) ('*DDA*'). See also Robert Dubler, 'Direct Discrimination and a Defence of Reasonable Justification' (2003) 77(8) *Australian Law Journal* 514, 522–6.

175 O'Neill, Rice and Douglas (n 115) 524, 526. See also Attorney-General's Department, 'Consolidation of Commonwealth Anti-Discrimination Laws' (Discussion Paper, Commonwealth Government, September 2011) 10–11.

176 Levitt and Meyerowitz-Katz (n 151) 3. See also *Kitoko v University of Technology Sydney* [2018] FCCA 699, [225] (Judge Nicholls); *Taylor v Yamanda Aboriginal Association Inc* [2016] FCCA 1298, [25] (Judge Driver); *Jenkings* (n 168) [30], [108] (White J); *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, [38], [41] (Drummond J); Joy Cumming and Ralph Mawdsley, 'Language and Culture Restrictions and Discrimination in K-12 Private Schools: An Australian Perspective' (2013) 22(2) *International Journal of Educational Reform* 152, 162; Kirsty Gover, 'Indigenous-State Relationships and the Paradoxical Effects of Anti-Discrimination Law: Lessons from the Australian High Court in *Maloney v The Queen*' in Jennifer Hendry et al (eds), *Indigenous Justice: New Tools, Approaches and Spaces* (Palgrave Macmillan, 2018) 27, 34.

177 See, eg, *Philip* (n 174) [205], [213] (Lloyd-Jones FM); Jonathan Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review* 535, 536; cf *Vata-Meyer v Commonwealth* [2014] FCCA 463, [57] (Judge Driver) ('*Vata-Meyer First Instance*'), cited without disapproval in *Vata-Meyer v Commonwealth* [2015] FCAFC 139, [26] (North, Collier and Katzmann JJ) ('*Vata-Meyer Appeal*').

178 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 251, citing *Hussein v Commonwealth Department of Human Services Centrelink* [2015] FCCA 1440; *Jin v University of Queensland* (2015) 303 FLR 189. See also *Waters v Public Transport Corporation* (1991) 173 CLR 349, 392 (Dawson and Toohey JJ), 357 (Mason CJ and Gaudron J) ('*Waters*'); Human Rights and Equal Opportunity Commission, *Your Guide to the Racial Discrimination Act* (Report, 2006) 5–6.

179 *Purvis v New South Wales* (2003) 217 CLR 92, 130 (McHugh and Kirby JJ) ('*Purvis*'); Sandra Fredman, *Discrimination Law* (Clarendon Press, 2001) 96. See generally *NSWLRC Report* (n 123) [3.51]–[3.64]. See generally Australian Human Rights Commission (n 15) 280–1.

180 *Wotton* (n 20) 285 [540].

181 Transcript of Proceedings, *Wotton v Queensland* (Federal Court of Australia, QUD535/2013, Mortimer J, 21 September 2015) 15, 51 ('*Wotton Transcript of Proceedings*').

182 *Wotton* (n 20) 285 [542].

1 A Comparator in Different Clothing: The 'Comparison' with the 'Non-Indigenous Community' in Wotton

Despite disclaiming a comparator, Mortimer J's 'comparison' resembles the hypothetical comparator exercise in other anti-discrimination statutes. Her Honour considered whether the conduct would have taken place in a non-Indigenous community variously cloaked with characteristics of remoteness and close community ties[183] – such as a pastoralist community in rural Queensland[184] – concluding it would not have taken place.[185] If this approach were used to assess conduct preceding Mulrunji's death, it would necessitate considering whether a non-Indigenous person within a non-Indigenous community would have been arrested for swearing at police. However, this replicates the 'complex comparator structure' in other anti-discrimination statutes by removing the protected attribute of race from the comparator and placing the comparator in circumstances which are the same or not materially different.[186] Ultimately, the comparison exercise in *Wotton* suffered from limited evidence; the Applicants and the State traded assertions that the non-Indigenous community could be a suburb of inner-city Brisbane, or another remote island.[187] Reasonable minds may differ on the relevant circumstances in which the comparison is made, as argument demonstrated.[188] Further, unlike other anti-discrimination provisions, section 9(1) lacks the architecture to assist in giving content to a comparator, such as 'characteristics extensions' incorporating characteristics which appertain generally to the person's race.[189] A conventional comparator exercise under section 9(1) strains its text, fortifies stereotypic assumptions and incorporates inappropriate judicial value judgments.[190] If section 9(1) is approached on the belief that a comparator is required, that misdirects its inquiry. Recently, in *Campbell v Northern Territory [No 3]* ('*Campbell*'), the applicants alleged, inter alia, that the transfer of Aboriginal youth from Alice Springs Youth Detention Centre ('ASYDC') to Don Dale was discriminatory because no non-Aboriginal detainees were transferred. However, the Territory contested that as there were no non-Aboriginal detainees at ASYDC at the time, no real comparator existed. The applicants did not argue for a hypothetical comparator and the claim failed.[191]

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183 See, eg, ibid 361–2 [890], 390 [1016].

184 Ibid 361–2 [890].

185 Ibid 408 [1093].

186 See, eg, *SDA* (n 174) s 5(1). See, eg, *IW v City of Perth* (1997) 191 CLR 1, 15–16 (Brennan CJ, McHugh J) ('*IW*').

187 *Wotton Transcript of Proceedings* (n 181) 51–2, 1049; *Wotton* (n 20) 181 [106].

188 *Wotton Transcript of Proceedings* (n 181) 51–2.

189 *Philip* (n 174) [94]–[97], [225] (Lloyd-Jones FM); *Sahak v Minister for Immigration and Multicultural Affairs* (2002) 123 FCR 514, 525 (Goldberg and Hely JJ); *Hamzy v Commissioner of Corrective Services* [2020] NSWSC 414, [162]–[165] (Bellew J).

190 *IW* (n 186) 69 (Kirby J); Susan Roberts, 'The Inequality of Treating Unequals Equally: The Future of Direct Discrimination under the *Disability Discrimination Act 1992* (Cth)' (Research Paper, AIAL Forum No 45, 6 November 2004) 34–5; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 1.

191 *Campbell* (n 174) [726], [727], [731] (White J).

2 A 'Required' Comparison?

A 'required'[192] comparison in section 9(1) is inconsistent with authority and restricts the provision's flexibility with a conceptually limited mode of analysis.[193] Mortimer J found support for a required comparison in Gleeson CJ's remark in *Griffiths v Minister for Lands* ('*Griffiths*') that 'discrimination is judged by making comparisons'.[194] However, his Honour's remark is overly-broad at the time of *Griffiths* in 2008. The Australian Capital Territory's *Discrimination Act,* enacted in 1991, defined discrimination in terms of detriment rather than comparative treatment.[195] Since *Griffiths*, Victoria abandoned comparators in its test of 'unfavourable treatment'.[196] Plainly, his Honour's remarks, made in the section 10 context, ought to have been read *secundum subjectam materiam*.[197]

Mortimer J also relied upon Allsop J's (as the Chief Justice then was) reasoning in *Baird v Queensland* ('*Baird*') in finding a 'required' comparison.[198] However, this diverges from *Baird* because Allsop J found no 'direct … comparison' could be read into section 9(1).[199] Although Allsop J's use of 'direct' could be a substitute for 'real life' – that is, no 'real life … comparison' is required by section 9(1)[200] – such a reading sits uncomfortably with Allsop J's further reasoning that 'those suffering the disadvantage of discrimination may find themselves in circumstances quite unlike others more fortunate than they.'[201] That those circumstances are 'unlike' would militate against the viability of a hypothetical comparison.[202] Further, even if Allsop J's words could be read that way, it would not suggest a hypothetical comparison is *required* and may nonetheless collapse into a comparator exercise.[203] Simply because *Baird* contained comparative analysis comparing what was paid and what *should* have been paid,[204] does not make a comparison 'required'. In *Campbell,* White J presupposed other means of identifying differential treatment

192 *Wotton* (n 20) 285 [542].

193 Suzanne B Goldberg, 'Discrimination by Comparison' (2011) 120(4) *Yale Law Journal* 728, 772, 777.

194 *Wotton* (n 20) 284 [539], quoting *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 238 (Gleeson CJ).

195 See, eg, *Re Prezzi and Discrimination Commissioner and Quest Group Pty Ltd* (1996) 39 ALD 729, 735–6 (President Curtis, Members Attwood and Corkery); *Discrimination Act 1991* (ACT) s 8(1)(a), as enacted.

196 Colin Campbell and Dale Smith, 'Direct Discrimination without a Comparator: Moving to a Test of Unfavourable Treatment' (2015) 43(1) *Federal Law Review* 91, 94, citing *Equal Opportunity Act 2010* (Vic) s 8(1). See also *Aitken v Victoria* (2013) 46 VR 676, 687 (Neave and Priest JJA).

197 Herzfeld and Prince (n 108) 722 [34.40]; *IW* (n 186) 37 (Gummow J). See generally *Maloney* (n 110) 201 (Hayne J); Amelia Simpson, 'The High Court's Conception of Discrimination: Origins, Applications and Implications' (2007) 29(2) *Sydney Law Review* 263, 268–72, 286, 288–9.

198 *Wotton* (n 20) 284 [539], citing *Baird* (n 7) 469 (Allsop J).

199 *Baird* (n 7) 467, 469 (Allsop J). See also *Vata-Meyer First Instance* (n 177) [58]–[59] (Judge Driver).

200 *Vata-Meyer First Instance* (n 177) [59] (Judge Driver); *Baird* (n 7) 467 (Allsop J); *Baird v Queensland [No 1]* (2005) ALR 541, 574–5 [138] (Dowsett J).

201 *Baird* (n 7) 469 (Allsop J, Spender J agreeing at 452, Edmonds J agreeing at 473).

202 Margaret Thornton and Trish Luker, 'The Wages of Sin: Compensation for Indigenous Workers' (2009) 32(3) *University of New South Wales Law Journal* 647, 667. Cf Jonathon Hunyor, 'Human Rights: Landmark Decision in Aboriginal Wages Case: Broad Scope of Prohibition on Discrimination' (2007) 45(1) *Law Society Journal* 46, 47.

203 See, eg, *Philip* (n 174) [210]–[212] (Lloyd-Jones FM).

204 *Wotton* (n 20) 285 [541].

after the applicant's comparator arguments failed.[205] In *Qantas Airways v Gama* ('*Gama*'),[206] the majority suggested a comparison was *only one way* of establishing a racial basis and non-comparative means such as examining the surrounding circumstances of the conduct also suffice,[207] particularly where explicit racial epithets are made.[208] In *Australian Medical Council v Wilson* ('*AMC v Wilson*'),[209] Heerey J remarked, in obiter, that if an act is 'based on' race, 'no comparison is required' and 9(1) is engaged.[210] However, his Honour also found the words 'equal footing' in section 9(1A)(c) required an essential comparison,[211] though its precise nature is unclear.[212] Although section 9(1) contains the same words,[213] this reasoning for an essential comparison cannot be imported and is defective because it elides sections 9(1A) and 9(1), rendering their mutually exclusive relationship[214] otiose if they rise and fall together based on the same comparison. This elision is avoided if 'equal footing' is found to import no comparison.[215] Alternatively, Black CJ's suggestion in *AMC v Wilson*, that the comparison must be with sections of the community at large not suffering from racial discrimination,[216] is perfunctory. Communities not suffering from section 9(1) racial discrimination are necessarily communities whose rights have not been denied. Such a comparison collapses differential treatment with denial of rights and takes the analysis no further than the pre-existing and non-comparative examination of denied rights. As Drummond J identified in *Ebber v HREOC,* section 9(1) 'focuses on protecting … certain fundamental rights; it does not purport to aim at achieving equality of treatment'.[217] Accordingly, the 'inequality of rights' with which section 9(1) is concerned[218] is the consequence of differential treatment on rights, not strictly its proof. As some rights can be deprived absolutely as well as relatively,[219] an approach to differential treatment unable to accommodate both scenarios cannot be sustained.

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205 *Campbell* (n 174) [727], [737] (White J).
206 *Gama* (n 170).
207 Ibid 564 (French and Jacobson JJ, Branson J agreeing at 573).
208 Ibid 546, 548, 550 (French and Jacobson JJ, Branson J agreeing at 573).
209 *AMC v Wilson* (n 84).
210 Ibid 63 (Heerey J). Cf *AMC v Wilson* (n 84) 58 (Heerey J).
211 Ibid 63 (Heerey J).
212 Ibid 48 (Black CJ) 63 (Heerey J), 80 (Sackville J); *Commonwealth v McEvoy* (1999) 94 FCR 341, 353 (Von Doussa J).
213 *Wotton* (n 20) 285–6 [540]–[545], quoting Maloney (n 110) 294 (Gageler J); *AMC v Wilson* (n 84) 48 (Black CJ); *Philip* (n 174) [209] (Lloyd-Jones FM). See generally Makkonen (n 135) 131.
214 *AMC v Wilson* (n 84) 47–8 (Black CJ), 55 (Heerey J), 74 (Sackville J). See also *De Silva v Minister for Immigration* (1998) 89 FCR 502, 513 (Black CJ, Goldberg and Finkelstein JJ) ('*De Silva*').
215 *AMC v Wilson* (n 84) 81 (Sackville J). See also *Tocigl v Aitco Pty Ltd* (1996) EOC 92-775, 78,763 (Wilson P).
216 *AMC v Wilson* (n 84*)* 48 (Black CJ).
217 *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455, 475 (Drummond J) ('*Ebber*'); *Secretary, Department of Veteran's Affairs v P* (1998) 79 FCR 594, 600 (Drummond J) ('*Department of Veteran's Affairs*').
218 Sub-Commission of Discrimination and Protection of Minorities, *Draft International Convention on the Elimination of All Forms of Racial Discrimination,* 16th sess, 414th mtg, UN Doc E/CN.4/Sub.2/SR.414 (7 February 1964) 9; Thornberry (n 56) 102–3, 128–30.
219 See, eg, *Macedonian Teachers* (n 51) 33–4 (Weinberg J), discussing *Korematsu v United States* (1944) 323 US 214; Joseph and Castan (n 136) 30, 216. See generally Peter Westen, 'The Empty Idea of

Yet, a required comparison largely embraces the latter and is an unwieldy tool for analysing the former. Caution is required before introducing limitations on section 9(1)'s scope not clearly flowing from its language.[220]

3 Comparative Reasoning as an Analytical Tool, Not Doctrine

The preferable approach is that differential treatment based on race is a simple question of causation,[221] that is, there was a distinction based on race meaning 'by reference to' race.[222] As Smith argued, a comparator might, along with inferences drawn from language, suggest causation, but it is not a distinct requirement.[223] Put differently, comparators may explain a racial basis but are not necessary preconditions to reaching that conclusion.[224] Comparators are 'no more than tools which may or may not justify an inference of discrimination'.[225] Although this approach has not been adopted in Australian anti-discrimination law generally,[226] that has been confined to provisions requiring proof of less favourable treatment.[227] *Wotton* leaves this approach open for section 9(1). As the *Wotton* comparison was ultimately resolved in favour of the applicants,[228] it was unnecessary for Mortimer J to decide whether the comparison was a necessary precondition for finding differential treatment. If her Honour had resolved the comparison against the applicants and accordingly found no unlawful discrimination, that would have suggested the failure to establish differential treatment using a comparison necessarily disposes of the claim as occurs under conventional anti-discrimination statutes.[229] This would confirm that the so-called 'comparison' in *Wotton* has become a comparator in substance. However, this did not occur because where differential treatment was not established, the allegation was rejected due to

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Equality' (1982) 95(3) *Harvard Law Review* 537, 537; Joel Feinberg, 'Noncomparative Justice' (1974) 83(3) *Philosophical Review* 297, 298.

220 *AMC v Wilson* (n 84) 81 (Sackville J). See generally Committee on the Elimination of Racial Discrimination, *General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent)*, 61st sess; Committee on the Elimination of Racial Discrimination, *General Recommendation XXIV Concerning Article 1 of the Convention*, 55th sess, 1371st mtg, UN Doc A/54/18 (27 August 1999), annex V; Committee on the Elimination of Racial Discrimination, *General Recommendation XIV on Article I, Paragraph I, of the Convention*, 42nd sess, 981st mtg, UN Doc A/48/18 (17 March 1993); Thornberry (n 56) 97–139.

221 *Dutt v Central Coast Area Health Service* [2002] NSWADT 133, [65] (Judicial Member Rice, Members Alt and McDonald) ('*Dutt*').

222 *Macedonian Teachers* (n 51) 30 (Weinberg J), affd *Victoria v Macedonian Teachers' Association of Victoria* (1999) 91 FCR 47, 48–9 (O'Connor, Sundberg and North JJ) ('*Victoria v Macedonian Teachers' Association*').

223 Belinda Smith, 'From *Wardley* to *Purvis*: How Far Has Australian Anti-Discrimination Law Come in 30 Years?' (Research Paper No 07/55, Sydney Law School, August 2007) 7.

224 Sophie Moreau, 'Equality Rights and the Relevance of Comparator Groups' (2006) 5(1) *Journal of Law and Equality* 81, 91–2.

225 *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, 374 [109] (Lord Scott); 341–2, [10]–[13] (Lord Nicholls); Khaitan (n 14) 72–3.

226 See, eg, Smith (n 223) 7.

227 *DDA* (n 174) s 5(1); *SDA* (n 174) s 5(1).

228 *Wotton* (n 20) 483 [1432].

229 See especially *Purvis* (n 179).

insufficient evidence rather than the applied comparison.[230] Accordingly, *Wotton* preserves the comparison as an analytical tool.

4 Alternative Comparative Tools: Police Policies

As *Wotton* demonstrates, comparative reasoning can aid the search for differential treatment. One way of using comparative reasoning is to identify police conduct which derogates from police policies.[231] In this sense, derogation from police policies is a *bare* distinction because it has not yet been impugned with a racial basis.[232] Therefore, not all deviations from police policies constitute differential treatment under section 9(1).[233] As the applicants learned in *Wotton,* collapsing the bare distinction with a racial basis wrongly assumes the former establishes the latter.[234] Further, this collapsing would hold police to a standard of perfection when departures from policy may be for reasons other than race.[235] As police discretion inherently involves discriminating between options, a race-based discretion is something more than the conventional discretionary exercise of police policies.[236] However, within section 9(1)'s holistic interpretation,[237] police policies can identify a bare distinction and assist in isolating a racial basis. Although departure from police policies is not an exhaustive means of identifying bare distinctions and derogation from legal or societal standards could be considered,[238] it provides a more stable and objective reference point for identifying a distinction than, for instance, a hypothetical comparison with an Anglo-Australian community, the content of which is more amorphous.

C Unstructured Comparison

1 Two Worlds Comparison Exercise: Isolating the Racial Basis

As the foregoing analysis demonstrated, comparative reasoning is an analytical tool which, unlike the traditional comparator, is not dispositive but designed to focus the search for differential treatment. An alternative tool, what I term the 'Two Worlds Comparison Exercise' ('Two-Worlds Comparison'), compares the world of the impugned acts against the world of what *should* have been done, for instance, according to police policies in the case of *Wotton*. Put differently, the Two-Worlds Comparison is a focussing exercise to isolate inferences of race and find where

230 See, eg, *Wotton* (n 20) 391 [1018].
231 See, eg, NSW Police Force, *NSW Police Force Handbook* (6 August 2014); Tasmania Police, *Tasmania Police Manual* (18 December 2018).
232 *Baird* (n 7) 462 (Allsop J); *Macedonian Teachers* (n 51) 30 (Weinberg J), affd *Victoria v Macedonian Teachers' Association* (n 222) 49 (O'Connor, Sundberg and North JJ); *Bropho* (n 84) 78–9 (Ryan, Moore and Tamberlin JJ).
233 *Wotton* (n 20) 329–30 [739]–[740].
234 Ibid 326–7 [727]–[739], 444 [1266], 503 [1522]. See also Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) *Yale Law Journal* 16, 27.
235 *Wotton* (n 20) 329 [738].
236 Simon Bronitt and Philip Stenning, 'Understanding Discretion in Modern Policing' (2011) 35(6) *Criminal Law Journal* 319, 321; *Wotton* (n 20) 175 [83].
237 *Baird* (n 7) 470 (Allsop J).
238 *Wotton* (n 20) 407 [1087].

differential treatment based on race might lie.[239] The Two-Worlds Comparison shares a traditional comparator's analytical utility because it similarly 'shrink[s] the set of possible explanations for an … action'[240] by setting up factual parameters for what decisions could have been made out of all decisions available.[241] However, unlike conventional comparators, a comparison with police policies avoids the need for the court to give content to the comparative yardstick and minimises the scope for value judgments which may entrench discriminatory practices.[242] Therefore, the Two-Worlds Comparison is more effective at facilitating rather than obstructing identification of differential treatment.

The use of a Two-Worlds Comparison can be identified in various decisions.[243] In *Gama,* the plurality examined Mr Gama's allegation that he had not been nominated for training courses, comparing this to Qantas' policies for development and training.[244] In *Vata-Meyer v Commonwealth,* the Full Court compared Mr Lee's words, 'black babies', with workplace standards, including his cultural competency training about Indigenous issues.[245] In *Baird,* the Full Court compared what had been paid to Aboriginal workers to what should have been paid to isolate a racial basis, concluding the payments were based on race because the government believed it had a statutory basis for authorising lower rates for Aboriginal workers.[246] The Two-Worlds Comparison assists the court in identifying differential treatment by examining the gap between the two worlds to explain the nature of the difference.[247] *Wotton* also illustrates how this exercise is done. QPS's conduct in failing to communicate with the Palm Island community in the intervening week after Mulrunji's death[248] can be compared to the sophisticated and multifaceted response contemplated in the QPS Operational Procedures Manual ('OPM') including the use of cultural communication and liaison strategies.[249] This comparison – between what the QPS did and what the OPM shows should have been done – focusses the inquiry on seeking the reasons why the QPS did not engage in a substantive or appropriate way with the community[250] and leads to the next step.

239 Ibid 283 [533], 319 [687].
240 Goldberg (n 193) 776.
241 See generally Nicholas Cowdery, *Discretion in Criminal Justice* (LexisNexis, 2022) 9–18.
242 See *Banovic v Australian Iron and Steel* (1989) 168 CLR 165, 180 (Deane and Gaudron JJ). There is a similar reliance on policing procedures in English jurisprudence: Shreya Atrey, 'Structural Racism and Discrimination' (2021) 74(1) *Current Legal Problems* 1, 12.
243 See also *Sharma v Legal Aid Queensland* (2001) 112 IR 124, 130 [27] (Kiefel J) ('*Sharma*'); *Philip* (n 174) [133]–[145], [151]–[153] (Lloyd-Jones FM); *Ejuyitsi v Commissioner of Police (Western Australia)* [2013] FMCA 120, [32]–[33] (Lucev FM).
244 *Gama* (n 170) 548 (French and Jacobson JJ, Branson J agreeing at 573).
245 *Vata-Meyer Appeal* (n 177) [42], [83]–[85] (North, Collier and Katzmann JJ).
246 *Baird* (n 7) 471 (Allsop J).
247 *Wotton* (n 20) 286 [545]; *Macedonian Teachers* (n 51) 33 (Weinberg J).
248 *Wotton* (n 20) 398–408 [1052]–[1093].
249 Ibid 400 [1061]. See also 391 [1018], 405 [1080], 427–8 [1187]–[1188].
250 Ibid 408 [1093].

2 Open-Textured Inquiry: Identifying the Racial Basis

Absent smoking gun evidence, such as a 'racially-based sign outside a cinema',[251] a racial basis generally requires evidential inferences.[252] To identify a racial basis as an explanation of the difference between the two worlds, an open-textured analysis is used to detect the indicia of racially-based decision-making in language and conduct. The analysis is 'open-textured' because the forms of racially discriminatory acts of discretion, like notions of bias and partiality, are 'as diverse as human frailty'.[253] Additionally, the vagueness of racial basis cannot be avoided because it encompasses a range of dynamic possibilities which evolve as understandings of race – a 'chameleonic'[254] social construct – change with 'historical and social context[s]'.[255] This open-texturedness leaves it open for judges to develop section 9(1)[256] and give racial basis a meaning sensitive to the 'realities of life'.[257] *Wotton* illustrates three non-exhaustive categories of conduct linked to a racial basis including: first, attitudinal evidence, such as partiality, ignorance, a failure to understand the Indigenous community being served,[258] dismissiveness towards community needs, experience or evidence[259] as well as wider attitudes of impunity, disregard, lack of care, a wish to retaliate[260] and an 'us and them' mentality;[261] second, knowledge-based evidence, such as limited knowledge of the RCIADIC's recommendations,[262] the failure to engage in culturally sensitive

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251 Ibid 184 [117]. See also *Sharma v Legal Aid Queensland* (2002) 115 IR 91, 98–9 [40] (Heerey, Mansfield and Hely JJ).

252 *Wotton* (n 20) 184 [117]; *Macedonian Teachers* (n 51) 30 (Weinberg J).

253 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [8] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See generally Alberto Urquidez, *(Re-)Defining Racism: A Philosophical Analysis* (Palgrave MacMillan, 2020) 310–16; Clevis Headley, 'Philosophical Analysis and the Problem of Defining Racism' (2006) 9(1) *Philosophia Africana* 1, 2.

254 Urquidez (n 253) 312.

255 Fredman (n 179) 53. See also *AMC v Wilson* (n 84) 81 (Sackville J); Anne-Marie Cotter, *Race Matters: An International Legal Analysis of Race Discrimination* (Ashgate, 2006) 8–9; Aileen Morton-Robinson, 'White Possession and Indigenous Sovereignty Matters' in Tania Gupta et al (eds), *Race and Racialization: Essential Readings* (Canadian Scholars, 2nd ed, 2018) 211, 212. See also *Jones and Harbour Radio Pty Ltd v Trad [No 2]* [2011] NSWADTAP 62, [32] (Deputy President Madgwick, Judicial Member Perrignon, Non-Judicial Member Hayes); Sandra Fredman, 'Combating Racism with Human Rights: The Right to Equality' in Sandra Fredman (ed), *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2001) 9, 10 ('Combating Racism with Human Rights') <https://doi.org/10.1093/acprof:oso/9780199246038.003.0002>. See also Stewart Shapiro and Craige Roberts, 'Open Texture and Analyticity' in Dejan Makovec and Stewart Shapiro (eds), *Friedrich Waismann: The Open Texture of Analytic Philosophy* (Palgrave Macmillan, 2019) 189, 193 <https://doi.org/10.1007/978-3-030-25008-9_9>.

256 See generally Brian H Bix, 'Waismann, Wittgenstein, Hart, and Beyond: The Developing Idea of "Open Texture" of Language and Law' in Dejan Makovec and Stewart Shapiro (eds), *Friedrich Waismann: The Open Texture of Analytic Philosophy* (Palgrave Macmillan, 2019) 245, 250, 254 <https://doi.org/10.1007/978-3-030-25008-9_11>; HLA Hart, *The Concept of Law* (Clarendon Press, 3rd ed, 2012) 123, 126.

257 *Gerhardy* (n 48) 86 (Gibbs CJ).

258 *Wotton* (n 20) 344 [814], 401 [1064].

259 Ibid 383 [987], 426–7 [1184].

260 Ibid 486 [1441].

261 Ibid 273 [491], 361–2 [890], 402 [1067], 489 [1454].

262 Ibid 176 [85]–[86], 273 [490], 333 [755]–[756], 335 [769]–[770], 340–5 [792]–[815].

policing or disrespect for cultural practices;[263] third, stereotype-based evidence, such as viewing Indigenous people with an emphasis on alcoholism, violence, criminality and anti-social behaviour without objective evidence.[264] Further, whilst one act may not allow an inference of differential treatment, the court can take an aggregative approach by considering that act together with other acts to support inferences drawn from the latter acts.[265]

Comparator-style reasoning can be used to obscure inferences of racial basis. One way is to separate the protected attribute of race and qualities of its manifestation and then explain conduct by reference to the manifested qualities. This approach was successful in *Purvis v New South Wales* ('*Purvis*').[266] The High Court considered an allegation of direct discrimination under the *Disability Discrimination Act 1992* (Cth) arising from a school's expulsion of Daniel Hoggan. Daniel had intellectual and visual disabilities sometimes manifesting in aggressive behaviour which was not planned or motivated by ill intent.[267] In constructing the hypothetical comparator, the High Court found the school's treatment of Daniel should be compared to how it would treat a non-disabled student exhibiting the same aggressive behaviour as Daniel.[268] Accordingly, as the school would have expelled the comparator in the same circumstances, the majority found no direct discrimination.[269] Consider a scenario where the section 9(1) act is a police officer's arrest of an intoxicated Indigenous man for public nuisance.[270] The police could justify the arrest because of conduct expressed with hyper-specificity – disorderly behaviour in public – and suggest this characteristic is wholly removed from his race.[271] Unlike *Purvis* and disability discrimination cases, where manifested behaviour can be explained by the disability's effect on free will,[272] race is different.

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263 Ibid 273 [490].

264 Ibid 273–5 [490]–[500], 333 [755]–[756], 335 [769]–[770], 340–5 [792]–[815], 385 [998]–[999], 398 [1051], 404 [1074], 426 [1180], 435 [1226], 439 [1245], 488–9 [1449]–[1454]. See generally *Nagarajan v London Regional Transport* [2000] 1 AC 501, 510 (Lord Browne-Wilkinson), 521–2 (Lord Steyn); *Murray v Forward & Merit Protection Review Agency* [1993] HREOCA 21 (Commissioner Wilson) ('*Murray*'); Karon Monaghan, *Monaghan on Equality Law* (Oxford University Press, 2nd ed, 2013), quoting *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1, 55–6 [73]–[74] (Baroness Hale).

265 *Wotton* (n 20) 351 [847]–[848].

266 (2003) 217 CLR 92.

267 *Purvis* (n 179) 148 (Gummow, Hayne and Heydon JJ).

268 Ibid 161 (Gummow, Hayne and Heydon JJ), 100 (Gleeson CJ), 175 (Callinan J). See generally Colin D Campbell, 'A Hard Case Making Bad Law: *Purvis v New South Wales* and the Role of the Comparator under the *Disability Discrimination Act 1992* (Cth)' (2007) 35(1) *Federal Law Review* 111, 112 <https://doi.org/10.22145/flr.35.1.4>.

269 But see *Purvis* (n 179) 134–7 (McHugh and Kirby JJ).

270 See, eg, *Summary Offences Act 2005* (Qld) s 6.

271 See generally Asher Gabriel Emanuel, 'To Whom Will Ye Liken Me, and Make Me Equal: Reformulating the Role of the Comparator in the Identification of Discrimination' (2014) 45(1) *Victoria University of Wellington Law Review* 1, 4. Constable Zachary Rolfe, who was acquitted of murder charges in relation to the fatal shooting of Kumanjayi Walker in Yuendumu reasoned similarly in an interview 'I don't care what race anyone is … I care about people's behaviour, not their race': 'Zachary Rolfe's Story Part 1: To Serve the Crown', *Yuendumu: The Trial* (The Australian, 13 March 2022) 0:11:05–0:11:25 <https://www.theaustralian.com.au/podcasts/yuendumu>.

272 *Purvis* (n 179) 134 (McHugh and Kirby JJ).

These arguments place applicants in a difficult position by obscuring the court's understanding of a racial basis.

Broadly, three responses are possible. First, the Indigenous man's disorderly behaviour was a manifestation of his Aboriginality, and the arrest was still based on race. However, this argument is plainly misdirected because substantiating a link between particular characteristics with race only establishes the *content* of race; it does not indicate a racial basis of conduct. Critically, this argument would also perversely fortify stereotypic racial assumptions.[273] An alternative approach is to frame the behaviour as the *cause* of the arrest which, insofar as it incorporates questions of the police officer's motive, is irrelevant.[274] The conduct could be given another characterisation emblematic of the man's Aboriginality within the alleged discriminatory circumstances. In *Wotton,* one component of Mulrunji's purported public nuisance was a comment that 'black men should not be arresting each other' – a common comment on Palm Island.[275]

Conversely, it could be countered that the specific justification – the purportedly racially benign decision in discontinuing the disorderly behaviour – was based on race because in proceeding to arrest without a second thought, the officer's decision-making *failed to account* for the man's Aboriginality.[276] This is somewhat unsettled. *Campbell* appears to reject such an approach,[277] and it might be queried how an act involving a distinction based on total failure to account for race could be 'by reference to' race.[278] However, by reference to race is wider than being positively *distinguished by race*[279] because the causal nexus must accommodate not only distinctions, but 'preference[s]' as well. If only conduct where a person consciously adverted to race was caught by section 9(1), that places a subjective gloss on causation inconsistent with the ordinary meaning of 'based on'[280] and enlivens an impermissible assessment of motive.[281] Further, it would inoculate self-perceptions of colour-blindness where, for instance, a person asserts they accounted for the preferences of all persons by 'levelling up' and treating every person as if they were Anglo-Australian even though this would amount to treating

273 Similar risks may arise in relation to characteristics extensions in state legislation but in those cases, the conduct is at least considered discriminatory for the purposes of the relevant provision: *ADA* (n 95) ss 24(1A), 49B(2).

274 *Macedonian Teachers* (n 51) 34 (Weinberg J).

275 *Wotton Transcript of Proceedings* (n 181) 6.

276 *Campbell* (n 174) [730]–[734] (White J). See generally Wojciech Sadurski, '*Gerhardy v Brown* v the Concept of Discrimination: Reflections on the Landmark Case that Wasn't' (1986) 11(1) *Sydney Law Review* 5, 32 ('*Gerhardy v Brown* v The Concept of Discrimination'); *Regents of the University of California v Bakke*, 438 US 265, 407 (Blackmun J) (1978).

277 *Campbell* (n 174) [731] (White J).

278 *Macedonian Teachers* (n 51) 30 (Weinberg J), affd *Victoria v Macedonian Teachers' Association* (n 222) 49 (O'Connor, Sundberg and North JJ).

279 Makkonen (n 135) 136.

280 *Macedonian Teachers* (n 51) 31–2 (Weinberg J), quoting *Cosco Holdings Pty Ltd v Thu* (1997) 79 FCR 566, 576 (Northrop ACJ).

281 *AMC v Wilson* (n 84) 74 (Sackville J, Heerey J agreeing at 58); *Macedonian Teachers* (n 51) 33–4, 40–1 (Weinberg J); *Wotton* (n 20) 288–9 [551]–[552].

unlike cases similarly.[282] Moreover, it would nonetheless be a 'preference' because it provides a practical advantage to Anglo-Australian persons[283] which may constitute differential treatment.

In *Campbell,* weight was given to the subjective perceptions of witnesses who expressly disclaimed the suggestion that they took the Indigenous applicant's heritage into account[284] even though such perceptions are not necessarily racially neutral. In *Wotton*, Mortimer J appeared to take a different view; her Honour found a racial basis where there was no 'objective, racially neutral starting point' in police failing to give sufficient weight to an inculpatory account of a white police officer by an Aboriginal man.[285] That a racial basis can be discerned by a person failing to take race into account or, alternatively, by taking race into account, is not unpredictable. The approach which is available turns on the rights said to be denied in each particular case. To take a benign example, in deciding to offer pizza to a room of persons, it would be unnecessary to account for the fact that one of the persons is Indigenous because failing to account for their race would not deny their rights. In contrast, if I invited members of the Jewish community and only offered non-Kosher food, that may be problematic insofar as it denies their rights.[286] Alternatively, if a pizzeria refused to allow Indigenous persons to enter its premises, that would take race into account in a way which denies rights.[287] This approach not only maintains section 9(1)'s holistic operation, it recognises that the invidiousness of section 9(1)'s discrimination is stipulated as the adverse purpose or effect of this classification on human rights and not simply using race as a classifying criterion.[288] In the context of section 10, a High Court majority has

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282 *Wotton* (n 20) 496 [1490], quoting *Green v The Queen* (2011) 244 CLR 462, 472–3 [28] (French CJ, Crennan and Kiefel JJ); *Waters* (n 178) 402 (McHugh J); Linda J Kirk, 'Discrimination and Difference: Race and Inequality in Australian Law' (2000) 4(4) *International Journal of Discrimination and the Law* 323, 325–7 <https://doi.org/10.1177/135822910000400402>. See also Bailey (n 15) 189; Robert Walker, 'Treating Like Cases Alike and Unlike Cases Differently: Some Problems of Anti-Discrimination Law' (Speech, Victoria University of Wellington, 29 July 2010) 1; Derek Browne, 'Nonegalitarian Justice' (1978) 56(1) *Australasian Journal of Philosophy* 48, 53 <https://doi.org/10.1080/00048407812341051>; Deborah Hellman, 'Two Concepts of Discrimination' (2016) 102(4) *Virginia Law Review* 895, 917; Denise Réaume, 'Dignity, Equality, and Comparison' in Deborah Hellman and Sophia Moreau (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 7, 8 <https://doi.org/10.1093/acprof:oso/9780199664313.003.0002>, discussing Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) 229 <https://doi.org/10.1093/0198248075.003.0009>.

283 *Macquarie Dictionary* (online at 9 December 2022) 'preference' (n, def 4). See also Australian Human Rights Commission, *Federal Discrimination Law* (Report, 2016) 44 n 130; *AMC v Wilson* (n 84) 76 (Sackville J); Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Brill Nijhoff, rev ed, 2014) 33.

284 *Campbell* (n 174) [733]–[735] (White J).

285 *Wotton* (n 20) 383 [987], 483–4 [1432], 489 [1454].

286 See, eg, *ICCPR* (n 10) art 27. See also Bailey (n 15) 189.

287 *ICERD* (n 9) art 5(f).

288 Wojciech Sadurski, 'Equality before the Law: A Conceptual Analysis' (1986) 60(3) *Australian Law Journal* 131, 137; Sadurski, '*Gerhardy v Brown* v The Concept of Discrimination' (n 276) 28–30, 35–6; Sarah Pritchard, 'Special Measures' in Race Discrimination Commissioner (ed), *The Racial Discrimination Act: A Review* (Australian Government Publishing Service, 1995) 183, 198–9; Meron (n 110) 291–2; Hellman (n 282) 929; Taylor (n 17) 197; Michael O'Flaherty, 'Substantive Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination' in Sarah Pritchard

found not all racial distinctions will offend the *RDA*.[289] Therefore, a racial basis is *contingently* wrongful under section 9(1), subject to proving a denial of rights, but not *intrinsically* wrongful.[290] It is difficult to conceive of a scenario where a benign racial classification, absent denial of rights, demands legal redress.[291] Failing to account for Aboriginality before arresting an Indigenous person for an offence disproportionately affecting Indigenous people could therefore still be based on race. Equally, accounting for Aboriginality in deciding that an Indigenous person must be drunk, rather than injured and in need of medical attention, could also be based on race.

The third response to the *Purvis*-style reasoning, evident in *Wotton,* is to recontextualise race in its specific manifestations which might otherwise be described as unrelated, or as Hopkins writes, provide the 'social context' from which racial basis is identified.[292] This is predominantly an evidential task. In *Wotton,* the RCIADIC's findings and expert evidence on the historical relationship between police and the Palm Island Aboriginal community,[293] served this contextualising purpose. Returning to the public nuisance example earlier, a police officer might claim an arrest was based on the Indigenous man's rude behaviour. However, attention can be drawn to the RCIADIC's findings about the disproportionate impact of public nuisance offences on Indigenous people.[294] A combined lack of knowledge about the local community and the recommendations of the RCIADIC and its implications for day-to-day policing in an Indigenous community supply a stronger inference for a racial basis.[295]

3 Comparator Confirmation: Checking the Differential Treatment

If differential treatment is identified, that finding can be expressed in comparator-style terms. Consider a scenario where a court finds that a person's conduct had a racial basis. This conclusion necessarily entails that the conduct would *not* have

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(ed), *Indigenous Peoples, the United Nations and Human Rights* (Federation Press, 1998) 162, 165–166; Fredman, 'Combating Racism with Human Rights' (n 255) 30–1; *Gerhardy* (n 48) 86 (Gibbs CJ), 104, 126–7 (Mason J), 144–7 (Deane J); *Ebber* (n 217) 471, 479 (Drummond J), quoting *Re Jamorski and Attorney-General of Ontario* (1988) 49 DLR (4th) 426 (Ontario Court of Appeal); Warwick McKean, *Equality and Discrimination under International Law* (Clarendon Press, 1983) 159. Cf *Gerhardy* (n 48) 114 (Wilson J), 128 (Brennan J).

289 *Western Australia v Commonwealth* (1994) 183 CLR 373, 483–4 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

290 See generally Larry Alexander, 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) 141(1) *University of Pennsylvania Law Review* 149, 153 <https://doi.org/10.2307/3312397>.

291 See Kenneth W Simons, 'Discrimination is a Comparative Injustice: A Reply to Hellman' (2016) 102 *Virginia Law Review Online* 85, 90. But see Taylor (n 17) 197; David Partlett, 'Benign Racial Discrimination: Equality and Aborigines' (1979) 10(3) *Federal Law Review* 238, 247 <https://doi.org/10.1177/0067205X7901000302>.

292 Hopkins (n 103) 40.

293 *Wotton* (n 20) 170 [59].

294 *RCIADIC National Report* (n 47) vol 1 [7.1.9]–[7.1.11], vol 3 [21.1.8]–[21.1.51]. See also Crime and Misconduct Commission, *Policing Public Order: A Review of the Public Nuisance Offence* (Report, May 2008) 21–2, 116–18.

295 See especially *Wotton* (n 20) 191 [143]–[144], 186–91 [129]–[142].

occurred to a person of a different race. For instance, if a racial epithet made towards an Indigenous person supplied sufficient evidence for differential treatment in the open-textured inquiry, that finding of differential treatment has the same effect as comparative language, in other words, that the statement would not be made to a non-Indigenous or Anglo-Australian person because it would have no relevance or meaning,[296] or that the statement was made to Indigenous persons and not others.[297]

Under section 18 of the *RDA,* race only needs to be one of the reasons for an act to be deemed the reason for the section 9(1) act.[298] Accordingly, the fact that a person would act similarly towards a non-Indigenous person does not detract from finding the treatment of the Indigenous person was based on race.[299] However, if a racial basis is substantiated under the open-textured inquiry, section 18 has no work to do. Equally, without a substantiated racial basis, race is not one of the reasons for the act, and section 18 is not enlivened. Courts have tended to find acts were done for one reason[300] and the possibility of multiple reasons may not be raised at all.[301] This reaffirms the centrality of the open-textured inquiry and its binary function in either identifying a racial basis or not.

The sequencing of a comparator *after* finding differential treatment has been previously noted.[302] In *Dutt v Central Coast Area Health Service*,[303] the NSW Administrative Decisions Tribunal considered 'it is not until the ground for the actual treatment is known that it is possible to say whether a hypothetical person not of the applicant's race would have been treated differently'.[304] Instead of using a comparator dispositively, the comparator is merely another way of expressing, or confirming, the finding of racial basis using the open-textured inquiry.[305] The existence of a better-off comparator is discrimination's residual 'by-product', which reinforces a conclusion of differential treatment, but is not the discrimination itself.[306]

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296 *Gama v Qantas Airways Ltd [No 2]* [2006] FMCA 1767, [77] (Raphael FM).

297 *Gama* (n 170) 564 (French and Jacobson JJ, Branson J agreeing at 573).

298 *RDA* (n 8) s 18. See also *House* (n 7) [109] (Neville FM).

299 Colin Campbell and Dale Smith, 'The Grounding Requirement for Direct Discrimination' (2020) 136 (April) *Law Quarterly Review* 258, 277.

300 *Macedonian Teachers* (n 51) 45 (Weinberg J). See generally *Vata-Meyer Appeal* (n 177) [71] (North, Collier and Katzmann JJ); *French v Gray, Special Minister of State (Cth)* (2013) 217 FCR 404, 429 [135] (Besanko J); *Bahonko v Sterjov* (2007) 167 IR 43, 102 [178] (Jessup J); *Batzialas v Tony Davies Motors Pty Ltd* [2002] FMCA 243, [78] (McInnis FM); *Philip* (n 174) [214]–[219] (Lloyd-Jones FM); *House* (n 7) [109] (Neville FM).

301 See generally *Wotton* (n 20).

302 See generally *Baird* (n 7) 471 (Allsop J); *AMC v Wilson* (n 84) 63 (Heerey J).

303 [2002] NSWADT 133.

304 *Dutt* (n 221) [63] (Judicial Member Rice, Members Alt and McDonald).

305 *Wotton* (n 20) 362 [890], 390–1 [1016], 394 [1032], 398 [1051], 400 [1060], 408 [1093], 443–4 [1265], 460 [1341], 483–4 [1432], 489 [1454], 490 [1456], 500 [1505].

306 Goldberg (n 193) 777. See also Sophia Moreau, 'In Defense of a Liberty-Based Account of Discrimination' in Sophia Moreau and Deborah Hellman (eds), *Philosophical Foundations of Discrimination Law* (Oxford University Press, 2013) 71, 75 <https://doi.org/10.1093/acprof:oso/9780199664313.003.0005>; Aileen McColgan, 'Cracking the Comparator Problem: Discrimination, "Equal" Treatment and the Role of Comparisons' [2006] (6) *European Human Rights Law Review* 650, 663.

D Denial of Rights

One cannot engage with section 9(1) unless one understands its interface with human rights.[307] The human rights in section 9(1), beyond *including* rights in article 5 of *ICERD*,[308] is non-exhaustive and extends to international instruments to which Australia is party.[309] Whether a right is impaired or nullified turns upon its content. Judicial exegesis on this denial of rights question has historically been limited, in part because cases were not overcoming the 'baggage'[310] of preceding anti-discrimination law concepts.[311] Courts have utilised formalistic constructions,[312] without reference to international materials, which have denuded the inquiry of the vitality of its international context.[313] The denial of rights question has increasingly come of age as the content of human rights gains greater precision and courts increasingly deploy international materials such as the CERD Committee's general recommendations and United Nations Human Rights Committee ('UNHRC') jurisprudence.[314] Section 9(1)'s denial of rights question is unique amongst anti-discrimination provisions because it defines the scope of discrimination using human rights,[315] a feature which makes it an archetype of the 'liberty approach' to anti-discrimination law concerned with the denial of rights rather than comparative assessment.[316] Moreover, this is axiomatic of the use of the international rights

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307 Sarah Pritchard, 'The Significance of International Law' in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (Federation Press, 1998) 2, 2.

308 *RDA* (n 8) s 9(2).

309 *Gerhardy* (n 48) 85 (Gibbs J), 101 (Mason J), 126 (Brennan J), cf 157 (Dawson J); *Obieta v New South Wales Department of Education and Training* [2007] FCA 86, [214] (Cowdroy J); *Department of Veteran's Affairs* (n 217) 596 (Drummond J); Committee on the Elimination of Racial Discrimination, *General Recommendation XX(48) on Article 5*, 48th sess, 1147th mtg, UN Doc CERD/48/Misc.6/Rev.2 (8 March 1996) para 1. See also *Wotton* (n 20) 283 [532], 292 [564], 316 [672], 319 [687]–[689].

310 *Maloney* (n 110) 201 [68] (Hayne J).

311 See, eg, *AMC v Wilson* (n 84) 78 (Sackville J); *Macedonian Teachers* (n 51) 39 (Weinberg J); *De Silva* (n 214) 513 (Black CJ, Goldberg and Finkelstein JJ); *Department of Veteran's Affairs* (n 217) 601 (Drummond J); *Lewis v Trebilco* (1984) 53 ALR 581.

312 *Gerhardy* (n 48) 125–6 (Brennan J). See generally Sadurski, '*Gerhardy v Brown* v The Concept of Discrimination' (n 276) 7; Margaret Thornton, 'Disabling Discrimination Legislation: The High Court and Judicial Activism' (2009) 15(1) *Australian Journal of Human Rights* 1, 7, 21 <https://doi.org/10.1080/1323238X.2009.11910859>; *New South Wales v Amery* (2006) 230 CLR 174, 200–1 (Kirby J); Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *Melbourne University Law Review* 325, 333; Simon Rice, 'And Which "*Equality Act*" Would that Be?' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 197, 204, 225 <https://doi.org/10.26530/OAPEN_459527>.

313 See, eg, *Koowarta* (n 37) 184 (Gibbs CJ), 266 (Brennan J); *Baird v Queensland [No 1]* (2005) 224 ALR 541, 572 [130] (Dowsett J); *Gama* (n 170) 564 (French and Jacobson JJ, Branson J agreeing at 573); *Gerhardy* (n 48) 103 (Mason J); Sadurski, '*Gerhardy v Brown* v The Concept of Discrimination' (n 276) 31; *Department of Veteran's Affairs* (n 217) 601 (Drummond J); *Vata-Meyer Appeal* (n 177) [50]–[53] (North, Collier and Katzmann JJ); *Bropho* (n 84) 83 (Ryan, Moore and Tamberlin JJ).

314 See, eg, *Gerhardy* (n 48) 126 (Brennan J); *Baird* (n 7) 468 (Allsop J); *Iliafi* (n 163) 105–16 (Kenny J); *Wotton* (n 20) 311–13 [655]–[658], 323 [706].

315 *Wotton* (n 20) 279 [516]. See also Gibbs (n 153) 13; 'Part II of the *RDA*' (n 52) 59.

316 See especially *Ebber* (n 217) 475 (Drummond J); Taylor (n 17) 191–3. See also Campbell (n 1) 163; Fredman, *Discrimination Law* (n 179) 95–6; Hellman (n 282) 909–10, 950, discussing *Obergefell v Hodges*, 576 US 644 (2015); Sophia Moreau, 'What Is Discrimination?' (2010) 38(2) *Philosophy and Public Affairs* 143, 147–8 <https://doi.org/10.1111/j.1088-4963.2010.01181.x>; Alexander A Boni-Saenz,

framework to supply minimum standards and hold government accountable.[317] Although deaths in custody can be viewed in the broader context of the 'third generation'[318] rights of Indigenous peoples as a distinct community,[319] another way is to characterise such deaths is as incursions upon fundamental human rights[320] including the right to life. This shift can be seen in practice.[321] A death in custody can be characterised as categorically inconsistent with the right to life, either because the right has been arbitrarily deprived ('negative component') or because custodial conditions were inconsistent with recognition and preservation of life ('positive component').[322] As complaints to the UNHRC require the exhaustion of domestic remedies,[323] including an *RDA* complaint to the AHRC,[324] section 9(1)'s denial of rights question is increasingly relevant.

'Age, Time, and Discrimination' (2019) 53(3) *Georgia Law Review* 845, 850–1. Cf Colin Campbell and Dale Smith, 'Deliberative Freedoms and the Asymmetric Features of Anti-Discrimination Law' (2017) 67(3) *University of Toronto Law Journal* 247, 248 <https://doi.org/10.3138/utlj.2016-0015>; Fredman, *Discrimination Law* (n 179) 23–4. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(2) ('*Victorian Charter*'); Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Thomson Reuters, 2nd ed, 2019) 79; *ICCPR* (n 10) art 2(1).

317 Larissa Behrendt, 'Indigenous Self-Determination: Rethinking the Relationship between Rights and Economic Development' (2001) 24(3) *University of New South Wales Law Journal* 850, 856. See generally Jennifer Nielsen and Gary Martin, 'Indigenous Australian Peoples and Human Rights' in David Kinley (ed), *Human Rights in Australian Law* (n 113) 92, 103–9.

318 Philip Alston, 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' (1982) 29(3) *Netherlands International Law Review* 307, 307 <https://doi.org/10.1017/S0165070X00012882>; Penelope Mathew, 'International Law and the Protection of Human Rights in Australia: Recent Trends' (1995) 17(2) *Sydney Law Review* 177, 184–5.

319 Catherine J Iorns Magallanes, 'International Human Rights and Their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada, and New Zealand' in Paul Havemann (ed), *Indigenous Peoples' Rights in Australia, Canada, & New Zealand* (Oxford University Press, 1999) 235, 238–41. See generally *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, 61st sess, 107th plen mtg, Agenda Item 68, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

320 See, eg, Allison (n 37) 372–3; Chris Cunneen and David McDonald, 'Indigenous Imprisonment in Australia: An Unresolved Human Rights Issue' (1997) 3(2) *Australian Journal of Human Rights* 90; Hugh Dillon and Marie Hadley, *The Australasian Coroner's Manual* (Federation Press, 2015) 161; Jonathon Hunyor, 'Human Rights in Coronial Inquests' (2008) 12 (Special Edition 2) *Australian Indigenous Law Review* 64, 65–6.

321 Human Rights Committee, *Communication No. 1995/2010*, 111th sess, UN Doc CCPR/C/111/D/1995/2010 (20 October 2014, adopted 21 July 2014) ('*Hickey v Australia*'). See also Carly Williams, 'David Dungay Jr's Mother Takes Fight against Indigenous Deaths in Custody to United Nations', *ABC News* (online, 10 June 2021) <https://www.abc.net.au/news/2021-06-10/david-dungay-family-take-fight-to-united-nations/100200828>. See also Irene Watson, 'Law and Indigenous Peoples: The Impact of Colonialism on Indigenous Cultures' (1996) 14(1) *Law in Context* 107, 111.

322 *RCIADIC National Report* (n 47) vol 5 [36.2.50]–[36.2.54]; Bailey (n 15) 248–50.

323 *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 5(2)(b); Elizabeth Evatt, 'Individual Communications under the Optional Protocol to the International Covenant on Civil and Political Rights' in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (Federation Press, 1998) 86, 98–100.

324 *Hickey v Australia* (n 321) 8–9 [4.10]. See also Alan Zheng, 'Revisiting Racial Violence in the International Convention on the Elimination of All Forms of Racial Discrimination: The Right to Life and Deaths in Custody', *International Law Association Reporter* (Blog Post, 10 January 2022) <https://ilareporter.org.au/2022/01/revisiting-racial-violence-in-the-international-convention-on-the-elimination-of-all-forms-of-racial-discrimination-the-right-to-life-and-deaths-in-custody/>.

1 The Maloney Hurdle: Ascertaining the Content and Scope of Rights

It is a settled canon of statutory construction that in ascertaining the meaning of the *RDA*, courts must construe its source text in *ICERD* according to rules of treaty interpretation in international law.[325] This is true of ascertaining the content and scope of claimed human rights and fundamental freedoms[326] – a subject with which the *ICERD* is not concerned.[327] The High Court's decision in *Maloney*, which concerned section 10 of the *RDA*, is a hurdle insofar as it affects how widely or narrowly the content of section 9(1)'s human rights can be ascertained and, therefore, the incorporation of arbitrariness review.

In *Maloney,* Joan Maloney was convicted of an offence under section 168B of the *Liquor Act 1992* (Qld) for possessing alcohol in a public place on Palm Island. These restrictions did not 'single out' Indigenous persons, but applied to Palm Island's residents, an overwhelmingly Indigenous community.[328] She sought to have the conviction set aside on the basis that the impugned provisions affected her right to own property under article 5(d)(v) of *ICERD*,[329] and were therefore inconsistent with section 10 and triggered constitutional inconsistency. Six judgments concluded the provisions engaged section 10 but were saved as a 'special measure' under section 8 of the *RDA*.[330] Kiefel J (as the Chief Justice then was) alone found no right protected by section 10.[331]

Maloney argued the special measure required consultation with its beneficiaries, relying upon, inter alia, the CERD Committee's general recommendations.[332] However, these materials, along with international practice, decisions by international courts or foreign municipal courts, were ultimately given less weight under the Court's narrow approach to interpretation. Although such materials can be constructional aids, it cannot rewrite the incorporated text or burden it with glosses its language will not bear.[333] The narrowest view was taken by Hayne J's reasoning that only materials existing at the time of the *RDA*'s enactment in 1975 could be used to aid interpretation of the *RDA*.[334] Gageler J took the widest view of extrinsic materials, finding that general recommendations of human rights

325 *Maloney* (n 110) 185 (French CJ), 198 (Hayne J), 221 (Crennan J), 263–4 (Gageler J). See generally *Wotton* (n 20) 280 [517]; *Gerhardy* (n 48) 124 (Brennan J).

326 *Koowarta* (n 37) 264–5 (Brennan J).

327 *Gerhardy* (n 48) 102 (Mason J).

328 *Maloney* (n 110) 206 (Hayne J), 219 (Crennan J), 223–4 (Kiefel J), 243 (Bell J), 302 (Gageler J). See also Virginia Bell, 'Equality, Proportionality and Dignity: The Guiding Principles for a Just Legal System' (2017) 13(2) *The Judicial Review* 167, 178.

329 *Maloney* (n 110) 190 [35] (French CJ), quoting *ICERD* (n 9) art 5(d)(v).

330 *Maloney* (n 110) 194–5 (French CJ), 212–13 (Hayne J), 223 (Crennan J), 261 (Bell J), 305 (Gageler J); *ICERD* (n 9) art 1(4).

331 *Maloney* (n 110) 227–30 (Kiefel J); Rachel Gear, 'Alcohol Restrictions and Indigenous Australians: The Social and Policy Implications of *Maloney v The Queen*' (2014) 21 *James Cook University Law Review* 41, 48. But see Thornberry (n 56) 346.

332 *Maloney* (n 110) 185 [24] (French CJ), quoting 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 sess, UN Doc CERD/C/GC/32 (24 September 2009) 6.

333 *Maloney* (n 110) 185–6 (French CJ), 198–9 (Hayne J), 221–2 (Crennan J), 235 (Kiefel J), 255–6 (Bell J).

334 Ibid 199 [63] (Hayne J), citing *Coleman v Power* (2004) 220 CLR 1, 27–30 [17]–[24] (Gleeson CJ).

bodies post-dating the *RDA* could nonetheless be used unless it was shown that such recommendations were not generally accepted amongst states parties to the Convention.[335]

For present purposes, it is unnecessary to evaluate Hayne J's reasoning[336] which remains uncertain.[337] Instead, the *Maloney* hurdle can simply be sidestepped under section 9(1). First, the narrow interpretation of international materials in *Maloney* was limited to construing 'special measures', not discerning the content of *rights* – the more analogous task for section 9(1). The plurality accepted the claimed right to own property was enjoyed by Aboriginal people on Palm Island to a lesser extent.[338] Excepting Kiefel J, this reflected a purposive approach to construing the human right to own property[339] which is likely to apply, *mutatis mutandis*, to rights analysis under section 9(1).[340]

Second, Bell J and Gageler J were receptive to using materials post-dating the *RDA*[341] whereas Hayne J's narrow view has been ignored in subsequent High Court decisions[342] – a sign of its 'implied repudiation'.[343] *Maloney* should not therefore be considered an absolute barrier to using extrinsic materials, even materials post-dating the *RDA*, provided they do not rewrite the text of *ICERD* and derivatively the *RDA*.[344] Mortimer J took this view in *Wotton,* noting the content of human rights in section 9(1) is shaped by decisions of the UNHRC or courts interpreting the relevant articles or similar human rights.[345] In particular, the UNHRC's decisions were not extraneous to the interpretation of such rights, but integral to it[346] – a position aligned with Gageler J's approach in *Maloney*.[347] Significantly, no judge in *Maloney* considered whether the materials were 'supplementary means of interpretation' which the Court could consider due to ambiguity,[348] nor were

335 *Maloney* (n 110) 275–6 (Gageler J).

336 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, 234; Charlesworth (n 144) 62; Kate Eastman, 'Mere Definition? Blurred Lines? The Intersection of Race, Religion and the *Racial Discrimination Act 1975*' (Conference Paper, Australian Human Rights Commission, August 2015) 125, 130–1; Simon Rice, 'Case Note: *Joan Monica Maloney v The Queen* [2013] HCA 28' (2013) 8(7) *Indigenous Law Bulletin* 28.

337 Justin Gleeson, 'The Increasing Internationalisation of Australian Law' (2017) 28(1) *Public Law Review* 25, 30.

338 *Maloney* (n 110) 191–2 (French CJ), 301–2 (Gageler J).

339 Ibid 191–2 (French CJ), 206 (Hayne J), 213, 219 (Crennan J), 241, 251 (Bell J), 301–2 (Gageler J). See also Gear (n 331) 62–3; Greg McIntyre, 'Aboriginal Title: Equal Rights and Racial Discrimination' (1993) 16(1) *University of New South Wales Law Journal* 57, 58–9. Cf *Maloney* (n 110) 228 (Kiefel J).

340 See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J).

341 *Maloney* (n 110) 247–51 (Bell J), 300 (Gageler J).

342 See, eg, *Macoun v Federal Commissioner of Taxation* (2015) 257 CLR 519.

343 Patrick Wall, 'A Marked Improvement: The High Court of Australia's Approach to Treaty Interpretation in *Macoun v Commissioner of Taxation* [2015] HCA 44' (2016) 17(1) *Melbourne Journal of International Law* 170, 184.

344 *Maloney* (n 110) 185 (French CJ), 235 (Kiefel J), 222 (Crennan J), 247–51 (Bell J), 300 (Gageler J).

345 *Wotton* (n 20) 315 [669]–[670].

346 Ibid 315 [667]–[670].

347 *Maloney* (n 110) 256 (Bell J), 275–9 (Gageler J).

348 *Vienna Convention* (n 108) art 32. See also *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497, 508–9 (Perram J).

submissions made on this point.[349] Third, Maloney's argument for consultation had no textual basis in section 8's source, article 1(4) of *ICERD*.[350] In contrast, section 9(1) incorporates by reference human rights.[351] The concept of arbitrariness, which I explore further below, has a textual anchor in international instruments. The International Covenant on Civil and Political Rights ('*ICCPR*') article 6(1) provides '[n]o one shall be *arbitrarily* deprived of his life'.[352] Similarly, *ICCPR* article 9(1) provides '[n]o one shall be subjected to *arbitrary* arrest or detention'.[353] To determine the meaning of arbitrariness is no 'gloss' on language and cannot be equated to using international materials to supplement text with *additional* criteria.[354] Accordingly, *Maloney* is unlikely to prevent the use of materials which can be used to aid interpretation of rights, as *Wotton* – heard two years after *Maloney* – ultimately demonstrates.[355]

2 The Principle of Arbitrariness in Articles 6 (Life) and 9 (Liberty) of the ICCPR

Section 9(1)'s denial of rights question can incorporate the principle of arbitrariness from human rights jurisprudence, generating questions of proportionality and reasonableness which are calibrated for reviewing state-inflicted racial violence. *Wotton* pioneered this approach in the context of article 17 of the *ICCPR* which provides '[n]o one shall be subjected to *arbitrary* or unlawful interference with his privacy, family, home or correspondence'.[356] Mortimer J found this right was impaired by the use of Special Emergency Response Team ('SERT') officers in effecting arrests and searches, but not the arrests themselves.[357] Although her Honour reached this conclusion by finding the arrests were unlawful because the emergency declaration triggering SERT's deployment lacked statutory authorisation,[358] Mortimer J further suggested in obiter that the conduct, even if lawful, would have been arbitrary to impair the *ICCPR* article 17 right.[359] In defining arbitrariness for this purpose, her Honour preferred a definition consistent with interpretation in domestic jurisprudence under the *Victorian Charter of Rights and Responsibilities*,[360] capturing 'at least, lack of proportionality to ends sought, and lack of justification'.[361] Unlike the use of proportionality in other anti-

349 See generally Transcript of Proceedings, *Maloney v The Queen* [2012] HCATrans 243, 342, 343.
350 *Maloney* (n 110) 185–6 (French CJ).
351 *Wotton* (n 20) 281 [526].
352 *ICCPR* (n 10) art 6(1) (emphasis added).
353 Ibid art 9(1) (emphasis added). See generally at arts 12(4), 17(1).
354 Cf *Maloney* (n 110) 256 (Bell J).
355 *Wotton* (n 20) 280–1 [521].
356 *ICCPR* (n 10) art 17(1) (emphasis added).
357 *Wotton* (n 20) 446–7 [1276]–[1282].
358 Ibid 461–3 [1355]–[1363]. See also at 460 [1343].
359 Ibid 459 [1338]–[1340], 500 [1508].
360 *Victorian Charter* (n 316) s 13(a).
361 *Wotton* (n 20) 324–5 [716], 500 [1508]. See generally Joseph and Castan (n 136) 168 [8.04], discussing Human Rights Committee, *Views: Communication No 45/1979*, 15th sess, UN Doc CCPR/C/15/D/45/1979 (31 March 1982) [13.3] ('*De Guerrero v Colombia*'); Pound and Evans (n 316) 89.

discrimination provisions which is anchored to statutory text like 'reasonably',[362] 'adequate'[363] or 'proportionate',[364] this proportionality analysis arises through arbitrariness which, in turn, depends on what rights are said to be denied and does not therefore restrict section 9(1)'s flexibility.[365]

Before proceeding, it may be unnecessary to ascertain the content of arbitrariness at all. As the UNHRC identified, deprivation of life based on discrimination in law or fact is '*ipso facto* arbitrary'.[366] Under section 9(1), the denial of rights question only arises *after* differential treatment based on race is established.[367] Provided death is involved in the act, a finding of differential treatment necessarily entails the conclusion that the right to life is arbitrarily deprived, and thus impaired, under section 9(1). This allows for a novel approach of selecting a right which, by its nature, is denied by differential treatment. For instance, article 5(b) of *ICERD* upholds the right to security of a person against violence or bodily harm. Mortimer J reasoned that as racially discriminatory arrests nullify the right against arbitrary arrest, an analytically prior finding of differential treatment entails the further finding that this right was impaired.[368] A similar approach can be taken to *ICCPR* article 9(1) because arrests on discriminatory grounds are 'in principle arbitrary'.[369] This is more unsettled for the right of non-discrimination in articles 2(1), 3 and 26 of *ICCPR*. Provided it can be understood as a freestanding human right rather than the broader objective of the *RDA* or its particular provisions,[370] it may be open to use the right of non-discrimination in a similar way.[371] Although this 'shortcut' approach is open, it relies upon the use of supplementary means of interpretation, including the UNHRC's General Comments. To utilise it, an analogy can be drawn

362 *RDA* (n 8) s 18D. See, eg, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 128 (French J); *Maloney* (n 110) 185 (French CJ), 219, 222–3 (Crennan J), 234–7 (Kiefel J), 248 (Bell J), 295–7 (Gageler J).

363 *Maloney* (n 110) 211 (Hayne J); *ICERD* (n 9) art 1(4).

364 See, eg, *SDA* (n 174) s 7B(2)(c).

365 Cf *Maloney* (n 110) 171 (KL Eastman SC) (during argument), 233 (Kiefel J); *Gerhardy* (n 48) 72 (MF Gray QC) (during argument), 113–14 (Wilson J).

366 *UNHRC General Comment No 36* (n 13) 13 [61] (emphasis added).

367 *Wotton* (n 20) 345 [816], 499 [1501].

368 Ibid 322 [703], 501 [1514]; Thornberry (n 56) 323.

369 Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 3 [17] ('*General Comment No 35*').

370 *Maloney* (n 110) 230–1 (Kiefel J), 294 (Gageler J); *Aurukun Shire Council v Chief Executive Officer, Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1, 67 (Keane JA) ('*Aurukun*'); *Morton v Queensland Police Service* (2010) 240 FLR 269, 292–5 (Chesterman JA) ('*Morton*').

371 See generally *Wotton* (n 20) 308–18 [635]–[683], 495–500 [1486]–[1506]; *Maloney* (n 110) 250–1 (Bell J); *Morton* (n 370) 276, 278 (McMurdo P); *Aurukun* (n 370) 37 (McMurdo P), 449–450 (Philippides J); Joseph and Castan (n 136) 768–9 [23.17]–[23.18]; Human Rights Committee, *General Comment No 18: Non-Discrimination,* 37th sess, UN Doc CCPR/C/21/Rev.1/Add.1 (10 November 1989) para 12; Human Rights Committee, *Views: Communication No 172/1984*, 29th sess, UN Doc CCPR/C/OP/2 (9 April 1987) [12.3] ('*Broeks v The Netherlands*').

between the CERD Committee being tasked with clarifying the content of *ICERD*[372] and the UNHRC's similar function under the *ICCPR*.[373]

Another approach is to give content to arbitrariness in *ICCPR* articles 6 and 9 using relevant domestic and international materials.[374] Domestic jurisprudence on the right to life,[375] despite its status as a 'supreme right',[376] has been limited.[377] More consideration has been given to the right to liberty under article 9.[378] Although *Wotton* principally relied upon domestic materials,[379] arbitrariness can also be given content by construing the *ICCPR*. First, the meaning of arbitrariness should be construed in conformity between the right to life[380] in article 6 and article 9, consistent with the use of the same text within the same treaty,[381] and the *travaux préparatoires*' emphasis on harmonising the meaning of arbitrariness across numerous articles.[382] As the meaning of 'arbitrarily' is obscure on its face, the court can use supplementary means of interpretation.[383] In this inquiry, UNHRC consideration of the phrase remains relevant, particularly as it involves discussion of the article's preparatory work and drafting history.[384] Accordingly, the meaning of arbitrariness in articles 6(1) and 9(1) can be given similar content.

Arbitrariness can be traced back to the *Universal Declaration of Human Rights*[385] and expresses a broader principle than lawfulness.[386] The *travaux* to article

372 *Maloney* (n 110) 275–6 (Gageler J).

373 *ICCPR* (n 10) art 28, 40(4); *Wotton* (n 20) 315 [667]. See generally Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press, 1994) 52–5.

374 *Wotton* (n 20) 281 [526].

375 See, eg, *Victorian Charter* (n 316) s 9; *Human Rights Act 2004* (ACT) s 9; *Human Rights Act 2019* (Qld) s 16.

376 Office of the High Commissioner for Human Rights, *CCPR General Comment No 6: Article 6 (Right to Life)*, 16th sess (30 April 1982) [1]; *De Guerrero v Colombia* (n 361) [13.1].

377 Pound and Evans (n 316) 88–9; Judicial College of Victoria, 'Charter of Human Rights' (Bench Book, 10 May 2016) 6.3.1. See generally *Wallace v A-G* [2021] NZHC 1963, [273] (Ellis J).

378 See, eg, *Victorian Charter* (n 316) s 21; *Human Rights Act 2004* (ACT) s 18. See, eg, *Brown v Australian Capital Territory* (2020) 350 FLR 417, 429–30 [98] (Murrell J); *Monaghan v Australian Capital Territory [No 2]* (2016) 315 FLR 305, 357 [228] (Mossop AsJ); *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 92 (Black CJ, Sundberg and Weinberg JJ) ('*Al Masri*').

379 *Wotton* (n 20) 324–5 [715]–[716], discussing *Director of Housing v Sudi* [2010] VCAT 328 ('*Sudi VCAT Decision*') and *Director of Housing v Sudi* (2011) 33 VR 559 ('*Sudi*'); *WBM v Chief Commissioner of Police* (2010) 27 VR 469; *WBM v Chief Commissioner of Police* (2012) 43 VR 446; *Victorian Police Toll Enforcement v Taha* (2013) 49 VR 1 ('*Taha*').

380 Joseph and Castan (n 136) 167; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 1993) 106–7.

381 *Vienna Convention* (n 108) art 31(1).

382 Marc J Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, 1987) 122; *ICCPR* (n 10) arts 9(1), 12(4), 17(1). See also Marcoux (n 161) 359, 365.

383 *Vienna Convention* (n 108) art 32(a).

384 *Maloney* (n 110) 199 (Hayne J), 235 (Kiefel J), 256 (Bell J), 292 (Gageler J); *Al Masri* (n 378) 91 (Black CJ, Sundberg and Weinberg JJ).

385 GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) arts 9, 12, 15, 17.

386 *Wotton* (n 20) 323–5 [709]–[716]; *Al Masri* (n 378) 90 (Black CJ, Sundberg and Weinberg JJ); Nowak (n 380) 110–11, 172–3; Bossuyt (n 382) 121–4; Joseph and Castan (n 136) 168, citing *De Guerrero* (n 361); Pound and Evans (n 316) 89.

6 indicated arbitrariness included conduct 'fixed or done capriciously … without adequate determining principle … depending on the will alone … not governed by any fixed rule or standard'.[387] Although this led to concerns that arbitrariness had vague scope, it was agreed to as an alternative to enumerating permissible deprivations of life.[388] The principles have been subsequently refined. The UNHRC has clarified that arbitrariness concerns elements of 'reasonableness, necessity and proportionality'[389] which is also replicated in guidance surrounding article 9.[390] In assessing interference with the right, both UNHRC jurisprudence[391] and domestic jurisprudence have relied on these principles.[392]

As a general standard containing a flexible class of criteria,[393] Mortimer J's selection of proportionality and justification in *Wotton* should be viewed as *aspects* of arbitrariness, rather than a 'construction' of it.[394] As the relevant aspects of arbitrariness are adopted on a case-by-case basis rather than *in abstracto*,[395] that begs the question: what aspects are selected in a particular case? In this context, difficulties follow from its breadth.[396] With little jurisprudence to guide this process, the relevant aspect of arbitrariness selected in each case must turn upon the purpose and object of the relevant right.[397] For instance, while proportionality may be useful in one case, it may not be useful in examining the ends sought of omissions or neglect because the ends sought by an omission are difficult to discern. As the purpose and object of *ICCPR* article 6 is to protect life,[398] examining an omission according to the reasonableness of its justification and necessity in all the circumstances of the case[399] gives effect to this object. Whether the right is impaired or nullified thus turns upon the reasonable justification of the interference.

Where proportionality is selected to examine arbitrariness, this opens an additional frontier for proportionality to scrutinise discretionary acts which limit

387 Bossuyt (n 382) 123.
388 Ibid 122–3.
389 *UNHRC General Comment No 36* (n 13) 3 [12]. See also CK Boyle, 'The Concept of Arbitrary Deprivation of Life' in BG Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff, 1985) 221, 240.
390 Nowak (n 380) 172–3; *General Comment No 35* (n 369) 3 [12].
391 Human Rights Committee, *Views: Communication No 305/1988 (Van Alphen v the Netherlands),* 39th sess, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) 116 ('*Van Alphen v The Netherlands*'); Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('*A v Australia*') 23 [9.2]; Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) ('*Toonen v Australia*') [8.3].
392 *Wotton* (n 20) 324–5 [713]–[716]. See especially *Sudi VCAT Decision* (n 379) [153]–[158] (Bell J).
393 Boyle (n 389) 221.
394 Cf *Wotton* (n 20) 324 [716].
395 Nowak (n 380) 111. See also BG Ramcharan, 'The Concept and Dimensions of the Right to Life' in BG Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff, 1985) 1, 19.
396 See, eg, Richard B Lillich, 'Civil Rights' in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Clarendon Press, 1984) vol 1, 115, 121.
397 *Vienna Convention* (n 108) art 31(1). See especially Marcoux (n 161) 373–4.
398 Joseph and Castan (n 136) 198.
399 *Van Alphen v The Netherlands* (n 391) 116.

human rights.[400] Although a full evaluation of the possible scope of proportionality in section 9(1) cannot be provided here, it is worthwhile to understand how it fits into section 9(1)'s architecture. As section 9(1) is mutually exclusive with section 10, it generally cannot be used to review legislative power.[401] Therefore, proportionality is used to examine interactions at a more granular level. Specifically, it balances the ends sought by the acts of discretion, including acts taken in enforcement of law[402] which limit or interfere with the relevant human rights, against the means employed.[403] Existing Australian human rights legislation provide a guide of when an act is out of proportionality in its limitation on a human right.[404] Factors such as the nature of the right, the nature and extent of the limitation and the availability of reasonably available and less restrictive means to achieve the purpose of the limitation are relevant.[405] This last factor is particularly significant. In *Wotton*, Mortimer J considered 'less drastic and obviously available methods of arrest' were available other than the violent police entries into homes on Palm Island.[406]

IV APPLICATION TO CONDUCT PRECEDING MULRUNJI'S DEATH

In the foregoing parts, I have established that *Wotton* provides an analytical framework for redressing state-inflicted racial violence. This part connects the dots, linking the Framework to conduct preceding Mulrunji's death.

400 Cf *McCloy v New South Wales* (2015) 257 CLR 178, 215–16 (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'). See generally Shipra Chordia, 'Proportionality in Australian Constitutional Law' (PhD Thesis, University of New South Wales, 2018) 252 <https://doi.org/10.26190/unsworks/3411>; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, tr Doron Kalir (Cambridge University Press, 2012) 3; Pound and Evans (n 316) 62–75. See also *Bruce v Cole* (1998) 45 NSWLR 163, 185 (Spigelman CJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 352 (French CJ), 366 (Hayne, Kiefel and Bell JJ); Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 377; Janina Boughey, 'The Use of Administrative Law to Enforce Human Rights' (2009) 17(1) *Australian Journal of Administrative Law* 25, 27, 30.

401 *AMC v Wilson* (n 84) 55 (Heerey J); *Waters* (n 178) 357–9 (Mason CJ and Gaudron J), 382 (Deane J), 400–2 (McHugh J). See also *Gerhardy* (n 48) 81–2 (Gibbs CJ), 92–3 (Mason J), 120, 128 (Brennan J); *Mabo No 1* (n 7) 197 (Mason CJ), 203 (Wilson J), 242 (Dawson J).

402 Nowak (n 380) 162; Nsereko (n 11) 275–7. See also Vera Gowland-Debbas, 'The Right to Life and the Relationship between Human Rights and Humanitarian Law' in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds), *The Right to Life* (Martinus Nijhoff, 2010) 123.

403 Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) 3, para 6.

404 Pound and Evans (n 316) 61. See, eg, *Victorian Charter* (n 316) s 7(2); *Human Rights Act 2004* (ACT) s 28; *Human Rights Act 2019* (Qld) ss 8, 13.

405 See, eg, *Victorian Charter* (n 316) ss 7(2)(a)–(e); *Human Rights Act 2004* (ACT) ss 28(2)(a)–(e); *Human Rights Act 2019* (Qld) ss 13(2)(a)–(g).

406 *Wotton* (n 20) 500–1 [1509].

A The Acts

Consistently with the holistic interpretation of section 9(1),[407] the acts preceding Mulrunji's death can be loosely grouped into two intermediate categories. First, there is Mulrunji's arrest which is bound up in the surrounding circumstances and consequential transport to the police station ('arrest conduct'). Second, there is the act of Hurley's struggle with Mulrunji at the station and subsequent failure to conduct a medical check ('station conduct'). Applying a purposive approach to the framing of 'act[s]', the arrest conduct sets up the downstream analysis of the right to liberty. Station conduct captures the circumstances of Mulrunji's death and enables analysis using the right to life.

B Unstructured Comparison

The *Wotton* Framework allows for an unstructured comparison between the world of police policies and what occurred to identify bare distinctions. Using the QPS OPM, the following derogations from policy arise. The arrest conduct fell short of the principle of arrest as a last resort and the need to consider other options of commencing proceedings such as a notice to appear.[408] In other words, the distinction is that Hurley saw Mulrunji as fit to be arrested despite the OPM's guidance. Equally, the station conduct did not involve medical assessment 'at the earliest opportunity'.[409] Officers were aware of Mulrunji's altercation with Hurley. Mulrunji's Aboriginality and intoxication were also indicators of vulnerability; the latter grounding thorough monitoring because it affects a person's ability to manage his own needs.[410] Any perceived non-compliance was no excuse to limit monitoring.[411] Finally, as Mulrunji's best verbal response was unintelligible groans which could not be understood, the OPM's medical checklist recommended administering first aid and seeking a medical opinion.[412] Beyond policy, the station conduct derogated from expectations that police provide help reasonably sought as required by the reasonable expectations of the community.[413]

Having established these bare distinctions, it is necessary to identify an impugned racial basis. As the Framework demonstrated, this requires no comparator nor comparison, but an open-textured inquiry. Even if the arrest conduct, viewed alone, does not establish differential treatment based on race, it can be argued that, aggregated alongside the station conduct, the arrest conduct nonetheless evinces a broader pattern of differential treatment based on race.[414]

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407 Ibid 326 [722].
408 Queensland Police Service, *Operational Procedures Manual* (Issue 90, 7 October 2022) ch 3 [3.5.9], ch 16 [16.6.3].
409 Ibid ch 16 [16.13.1].
410 Ibid ch 16 app 16.1; ch 6 [6.3.1].
411 Ibid ch 16 [16.13.1].
412 Ibid ch 16 app 16.1; *2006 Inquest* (n 57) 32.
413 *Police Service Administration Act 1990* (Qld) ss 2.3(g)(i), (ii). See also *Wotton* (n 20) 347–8 [827]–[832], 408 [1091].
414 *Wotton* (n 20) 351 [847]–[848].

1 Arrest Conduct

The question is why Hurley arrested Mulrunji for public nuisance rather than follow the OPM in taking other measures such as giving a caution,[415] speaking to Mulrunji or doing nothing at all, particularly as Mulrunji was walking away.[416] Nor did Hurley consult Bengaroo about options, despite claiming he initially acted because Bengaroo's 'pride was hurt'[417] and 'Bengaroo was offended'.[418] Knowledge-based evidence can be used – specifically, Hurley's limited knowledge of the RCIADIC's recommendations and limited training in policing in an Aboriginal community 'some years ago'.[419] Like other Palm Island police officers, it is probable that Hurley had little interest in the RCIADIC's impact on day-to-day policing.[420] By justifying the public nuisance charge on grounds that Mulrunji swore near residential houses, Hurley failed to account for the context in which public nuisance offences are overwhelmingly used against Indigenous people when police are the only victims of the offence.[421] The RCIADIC recommended that offensive language not be an occasion for arrest and charge.[422] As Bengaroo stated at the Inquest, only he and Hurley were offended by Mulrunji.[423]

Attitudinal evidence reinforces this argument. Although there is little evidence of Hurley's language in unguarded contexts,[424] his language during the arrest can be examined. As Mortimer J noted, 'when people are pressed … there is not time to tailor or modify what they say or do … people's true perspectives and understandings come through more clearly'.[425] Rather than informing Mulrunji of the reason for arrest, Hurley's first words to him were to ask 'what his problem with the police was' before forcibly placing Mulrunji in the police van.[426] The content of Hurley's 'abusive' words towards Mulrunji at the station could be further examined.[427] This language may be emblematic of an attitude of impunity that, as a police officer, Hurley could do whatever was required to reassert police authority after Mulrunji's earlier questioning remarks to Bengaroo and challenge to police operations, as demonstrated by Hurley's reflection that 'hit[ting] [a] copper' was 'not normal [on

415 *2006 Inquest* (n 57) 28.
416 Ibid 3.
417 'Palm Island Aboriginal Council Submissions to *2006 Inquest*' (n 61) 21–2.
418 Ibid 21.
419 Human Rights and Equal Opportunity Commission, 'Comments of the Coroner Pursuant to Section 46(1) of the Coroners Act 2003', Submission in *2006 Inquest into the Death of Cameron Doomadgee,* 30 June 2006, [73] ('HREOC Submissions to the *2006 Inquest*').
420 *Wotton* (n 20) 176 [85].
421 Joanne Lennan, 'The "Janus Faces" of Offensive Language Laws, 1970–2005' (2006) 8 *UTS Law Review* 118, 120–5. See, eg, Robert Jochelson, 'Aborigines and Public Order Legislation in New South Wales' (Crime and Justice Bulletin No 34, NSW Bureau of Crime Statistics and Research, February 1997) 9; Paula Morreau, 'Policing Public Nuisance: The Legacy of Recent Events on Palm Island' (2007) 6(28) *Indigenous Law Bulletin* 9.
422 *RCIADIC National Report* (n 47) vol 3 [21.1.80].
423 Hooper (n 61) 152.
424 *Wotton* (n 20) 275 [500], 420–1 [1149]. But see *2006 Inquest* (n 57) 18.
425 *Wotton* (n 20) 275 [496]–[500], 420–1 [1149].
426 Ibid 355 [860]; 'Palm Island Aboriginal Council Submissions to *2006 Inquest*' (n 61) 22.
427 See especially *Wotton* (n 20) 365–6 [909], quoting *2010 Inquest* (n 57) 116–17 [316]–[321].

Palm Island]'.[428] Rather than being reflexive of his status as a white police officer in an Indigenous community and the history of this relationship,[429] Hurley failed to account for this context in the way he arrested Mulrunji.

2 Station Conduct

The question is why QPS officers departed from the OPM in, variously, their failure to conduct a medical assessment when Mulrunji was placed into the cell, their cursory checks and their failure to identify Mulrunji's deteriorating condition. Using the open-textured inquiry, stereotype-based evidence is relevant. In dragging Mulrunji into the cells, Hurley and Leafe misconceived Mulrunji's incapacitation[430] using baselessly adverse stereotypes. Hurley incorrectly believed Mulrunji turning limp was a refusal to cooperate,[431] 'foxing',[432] and later, that Mulrunji was 'ready to [sleep]' and 'snoring'.[433] Similarly, Leafe thought Mulrunji turned limp because he did not wish to assist police.[434] Hurley had never interacted with Mulrunji before.[435] These misconceptions reflect overgeneralised stereotypes of a lawless, 'drunken Aboriginal'.[436] Although stereotype alone may not be probative,[437] it can be reinforced by expert anthropological evidence like in *Wotton*[438] and evidence of the 'system and the latent or patent racist attitudes that infect it'[439] such as a Facebook group composed of police officers making racist remarks.[440] Further, reference can be made to RCIADIC's findings that police interactions with Aboriginal people involve stereotypes of drunkenness[441] and other recommendations that police be trained to recognise dangerous misconceptions associated with unconscious or semi-

428 *Wotton* (n 20) 223 [274], 486 [1441].
429 Ibid 159–170 [23]–[59], 360 [883], 400–2 [1063]–[1064].
430 *2010 Inquest* (n 57) 103 [274].
431 Ibid 120–1 [330].
432 HREOC Submissions to the *2006 Inquest* (n 419) [129].
433 *Wotton* (n 20) 355–6 [862]–[867], 384 [994]. See also *2006 Inquest* (n 57) 14, 18.
434 *2010 Inquest* (n 57) 105–6 [282].
435 *2006 Inquest* (n 57) 2.
436 *Wotton* (n 20) 385 [999], 398 [1051], 489 [1455], 535 [1664]. See also Ronald Groves and Simone Pettigrew, 'Australia, Alcohol and the Aborigine: Alcohol Consumption Differences between Non-Indigenous and Indigenous Australians' in Rami Zwick and Tu Ping (eds), *Asia-Pacific Advances in Consumer Research* (Association for Consumer Research, 2002) vol 5, 148, 150; Marcia Langton, 'Rum, Seduction and Death: "Aboriginality" and Alcohol' (1993) 63(3) *Oceania* 195, 198–200 <https://doi.org/10.1002/j.1834-4461.1993.tb02417.x>.
437 *Carr v Baker* (1936) 36 SR (NSW) 301, 306–7 (Jordan CJ); *Jones v Dunkel* (1959) 101 CLR 298, 305 (Kitto J).
438 *Wotton* (n 20) 264 [450].
439 *Murray* (n 264) 4 (Commissioner Wilson). See also *Sharma* (n 243) 138 [65] (Kiefel J); *Gama* (n 170) 563 (French and Jacobson JJ, Branson J agreeing at 573).
440 Kate McKenna, 'Facebook Group to be Closed as Racist, Homophobic Comments by Queensland Police Officers Investigated', *ABC News* (online, 13 July 2021) <https://www.abc.net.au/news/2021-07-13/qld-police-investigate-racist-homophobic-facebook-comments/100289770>; Jodan Perry, 'NT Police Officer Suspended without Pay for Allegedly Creating Racist Singlet Referencing Kumanjayi Walker', *NITV* (online, 8 April 2020) <https://www.sbs.com.au/nitv/article/2020/04/08/nt-police-officer-suspended-without-pay-allegedly-creating-racist-singlet>.
441 *RCIADIC National Report* (n 47) vol 2 [13.2.28].

rousable persons[442] which have arisen in other deaths in custody.[443] Considering these stereotypes, alongside Hurley's minimisation of Mulrunji's injuries in describing considerable swelling as a 'very small injury',[444] can allow a further inference of Hurley's disregard for Mulrunji's life. Consequently, Hurley's conduct was skewed away from the reality of Mulrunji's circumstances into one based on race. If this establishes a racial basis, that racial basis can be expressed in comparative terms – the police would not have arrested a non-Aboriginal man, nor left him to die.

C Denial of Rights

Finally, to demonstrate the full realisation of the denial of rights question, the concept of arbitrariness can be used to review whether the arrest and station conduct had the effect of denying the rights to liberty and life respectively – a question of fact.[445]

1 Arrest Conduct

Article 9's concern for liberty begins from restraint.[446] The right to liberty, 'like all rights' is not an absolute right.[447] In selecting the relevant aspect of arbitrariness, proportionality provides a useful lens because it balances the ends sought by Hurley's interference with Mulrunji's right to liberty and the means chosen to effect the limitation. The ends sought by Hurley cannot be understood in accordance with the legislative aim such as the function of the public nuisance offence because that impermissibly extends section 9(1) into legislative review.[448] If Hurley's arrest was unlawful, that could instead raise considerations under the lawfulness limb of the right to life.[449] Instead, the ends sought are of the discretionary acts which interfered with the right to liberty. That is, Hurley's arrest of Mulrunji and the multifaceted ends sought of that interference. Proportionality is a 'variable standard of review involving questions of fact and degree'[450] which entails examining less drastic means of arrest.[451] First, Hurley stated the ends sought of the arrest was to discontinue the

442 *Social Justice Commissioner Deaths in Custody Report* (n 12) 126–7.

443 See, eg, *Inquest into the Death of Tanya Louise Day* (Coroner's Court of Victoria, Coroner English, 9 April 2020) 89 ('*Day Inquest*'); *Inquest into the Death of Julieka Ivanna Dhu* (Coroner's Court of Western Australia, Coroner Fogliani, 15 December 2016) 47, 90, 93, 99, 105, 106, 135, 161; Barter and Eggington (n 103) 9; *Inquest into the Death of Nathan Reynolds* (Coroner's Court of New South Wales, Coroner Ryan, 11 March 2021) 14.

444 *Wotton* (n 20) 356 [864].

445 *Gama* (n 170) 564 (French and Jacobson JJ, Branson J agreeing at 573).

446 Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 22nd sess, Agenda Item 3, UN Doc A/HRC/22/44 (24 December 2012) 20 [53]. See generally *DPP v Kaba* (2014) 44 VR 526, 549, 646 (Bell J), citing *R v Therens* [1985] 1 SCR 613, 644 (Le Dain J); Pound and Evans (n 316) 188–90.

447 *Bropho* (n 84) 82 [80] (Ryan, Moore and Tamberlin JJ). See also Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press, 2012) 178–9 <https://doi.org/10.1093/acprof:oso/9780199650453.001.0001>; Nowak (n 380) 159–60. But see Legg (n 447) 204.

448 *Gerhardy* (n 48) 81 (Gibbs CJ), 92–3 (Mason J), 120 (Brennan J).

449 *Wotton* (n 20) 461–3 [1350]–[1365].

450 Pound and Evans (n 316) 62.

451 See, eg, *Wotton* (n 20) 509–10 [1509].

offence, but conceded Mulrunji 'said his piece', was walking away, and Mulrunji's conduct may not recur.[452] The other stated end sought was Mulrunji needed to be taken into the watch-house 'for a sleep'.[453] Against the former, less drastic means were readily available including requesting Mulrunji attend the police station or issuing a court attendance notice, particularly as Palm Island is a small community, Hurley was a community police officer[454] and Bengaroo already identified Mulrunji.[455] The latter ends are also problematic because it suggests Mulrunji's detention was *unrelated* to the offence of public nuisance (and instead concerned public drunkenness), which points towards arbitrariness.[456] If those were the ends sought, other reasonably available options were open, such as discontinuing the arrest and issuing a court attendance notice, particularly as the seriousness of the offence was trivial and did not require consulting any victims.[457] If the ends sought were to allow Mulrunji to rest, no attempt was made to take Mulrunji to his own permanent residence known to police.[458] These other reasonably available means would have placed a lesser limitation on Mulrunji's right to liberty.

2 Station Conduct

Article 6's concern for the arbitrary deprivation of the right to life extends to more than positive conduct including excessive use of lethal force;[459] its negative component captures omissions as well.[460] Accordingly, the failures of QPS officers to medically assess Mulrunji, conduct adequate checks, refrain from assumptions about his wellbeing, and procure or render medical assistance, impaired this right. In this way, arbitrariness sets a human rights-based standard of care.[461] As previously noted, it is necessary to select an aspect of arbitrariness which gives effect to the right. As the QPS conduct involves an omission where applying proportionality is more difficult, an alternative approach is to examine whether QPS failures to act were reasonably justified.[462] Explanation precedes justification.[463] Therefore, the reasons behind the failure can be probed. Hurley suggested no medical assessment was conducted 'because of [Mulrunji's] aggression and because of the fact [he

452 HREOC Submissions to the *2006 Inquest* (n 419) [23], [35].
453 Ibid [34].
454 Cf *Wotton* (n 20) 440 [1250]–[1251], 446–7 [1281].
455 HREOC Submissions to the *2006 Inquest* (n 419) [31].
456 *General Comment No 35* (n 369) para 14. See also Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (3 April 1997) 8 [7.2].
457 *Police Powers and Responsibilities Act 2000* (Qld) ss 209(1), 209(3)(b), 209(4)(b), as at 19 November 2004.
458 HREOC Submissions to the *2006 Inquest* (n 419) [34].
459 See, eg, *De Guerrero v Colombia* (n 361) [1.1]–[1.2]. See also Joseph and Castan (n 136) 167. See also Ralph Crawshaw, Stuart Cullen and Tom Williamson, *Human Rights and Policing* (Nijhoff, 2nd ed, 2007) 126 <https://doi.org/10.1163/ej.9789004154377.i-514.12>.
460 *UNHRC General Comment No 36* (n 13) 1 [3]; Pound and Evans (n 316) 88.
461 Cf Beth Gaze, 'The *RDA* after 40 Years: Advancing Equality, or Sliding into Obsolescence?' (Conference Paper, Australian Human Rights Commission, August 2015) 66, 80.
462 *Wotton* (n 20) 324 [716].
463 *McCloy* (n 400) 231 [130] (Gageler J).

and Leafe] took [Mulrunji] straight to the cell'.[464] However, without properly ascertaining Mulrunji's condition, Hurley marked 'no' on the Watchhouse Custody Register for whether medical treatment or assessment was required.[465]

Hurley's justifications for interfering with Mulrunji's right to life are likely to be unreasonable. First, when Mulrunji was placed in the cell, his body was 'virtually limp'[466] and, on Hurley's view, Mulrunji was resigned to going into the cell.[467] Any lingering *perception* of aggression could be mitigated by conducting a medical assessment through the cell door, deferring to another officer,[468] or calling an ambulance and seeking a paramedic's advice. In the subsequent physical welfare checks, verbal cues should have been examined rather than momentary prodding of Mulrunji with feet[469] which was more concerned with 'maintaining security' than making active inquiries of the health of detainees.[470] Hurley had already noticed Mulrunji's facial swelling and blood above his right eye, but no further medical attention was provided. Hurley did not seek to identify the injuries' source despite it suggesting possible underlying medical issues.[471] Moreover, Leafe identified no injury because he did not look for one.[472] Finally, in the interval between the discovery of no pulse and the arrival of paramedics, QPS officers made no attempt at cardio-pulmonary resuscitation.[473] Although this was explained by the absence of suitably skilled personnel and necessary equipment,[474] and Hurley's *equivocal* belief that Mulrunji was 'deceased',[475] it is questionable whether this is a plausible justification. The positive component of the right to life requires the State take necessary measures to protect the lives of individuals deprived of liberty, including providing necessary medical care.[476]

V APPLICATION TO OTHER CASES OF STATE-INFLICTED RACIAL VIOLENCE

As the procedural machinery of anti-discrimination law is 'as important as the substantive law',[477] the issue of standing should be briefly considered. Provided

464 *Wotton* (n 20) 216 [255], 356–7 [868]–[869].
465 HREOC Submissions to the *2006 Inquest* (n 419) [133].
466 *Wotton* (n 20) 223 [274]; HREOC Submissions to the *2006 Inquest* (n 419) [129].
467 *Wotton* (n 20) 223 [274].
468 HREOC Submissions to the *2006 Inquest* (n 419) [130]–[131].
469 Ibid [131]–[132]; *2006 Inquest* (n 57) 32.
470 *2006 Inquest* (n 57) 33; *Royal Commission into Aboriginal Deaths in Custody* (Regional Report of Inquiry, 15 April 1991) vol 2 [5.2.5].
471 *2006 Inquest* (n 57) 15; *Wotton* (n 20) 215 [254], 356 [864].
472 *2010 Inquest* (n 57) 106 [286].
473 *2006 Inquest* (n 57) 19, 33.
474 Ibid 33.
475 Ibid 18–19, 27. See also *CMC Palm Island Review* (n 68) 25.
476 *UNHRC General Comment No 36* (n 13) 5 [25].
477 David Partlett, 'The *Racial Discrimination Act 1975* and the *Anti-Discrimination Act 1977*: Aspects and Proposals for Change' (1977) 2(2) *University of New South Wales Law Journal* 152, 173, quoting Harry Street, Geoffrey Howe and Geoffrey Bindman, *Anti-Discrimination Legislation* (Report, November 1967) 62 [119.1].

the alleged discrimination occurred during a victim's life, death is unlikely to obstruct the lodgement of a complaint and the commencement of section 9(1) proceedings.[478] This is fortified where discrimination has a 'direct connection' with the death – a conventional feature of state-inflicted racial violence.[479] Further, anti-discrimination claims are 'administrative-type interest[s]'[480] which do not die with the victim. Rather, section 9(1)'s 'societal object' of eliminating racial discrimination transcends whether a personal remedy can be given to the victim.[481]

A few observations can demonstrate the Framework's wider applicability to other cases involving state-inflicted racial violence,[482] however a full assessment is left to another day. The failure to provide timely and adequate custodial care is a recurring theme of deaths in custody.[483] Ian Ward died from heatstroke whilst being transported 360 kilometres between Laverton and Kalgoorlie when outside temperatures were over 40 degrees Celsius.[484] No rest stops or physical welfare checks were conducted, nor air-conditioning used, over the entire four-hour drive.[485] The open-textured inquiry into a racial basis can identify attitudes of disregard and impunity in the lack of concern of officers involved.[486] Further, Tanya Day died after sustaining traumatic head injuries whilst detained in a watchhouse. Police observations were cursory and failed to identify a deterioration in condition,[487]

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478 Rees, Rice and Allen (n 178) 811. See also *Stephenson v Human Rights and Equal Opportunity Commission* (1996) 68 FCR 290, 296–7 ('*Stephenson*'); *Commissioner of Police, NSW Police Service v Estate Edward John Russell* [2001] NSWSC 745, [5] (Sully J); *Ryan as Personal Representative of the Estate of the Late Peter John Ryan v Sunshine Coast Hospital and Health Service* [2021] FCCA 1537, [2] (Judge Jarrett) ('*Ryan*'); *Trustee for the Estate of the Late Darryl Anderson v Rose City Kitchens* [2018] VCAT 338, [14] (Member Smith); *Sydney Local Health Network v QY* (2011) 83 NSWLR 321, 340 [113] (Young JA); *Cuna Mutual Group Ltd v Bryant* (2000) 102 FCR 270, 281 [49] (Branson J). See generally Therese MacDermott, 'The Collective Dimension of Federal Anti-Discrimination Proceedings in Australia: Shifting the Burden from Individual Litigants' (2018) 18(1) *International Journal of Discrimination and the Law* 22, 24 <https://doi.org/10.1177/1358229118759712>; *AHRC Act* (n 18) ss 3(1) (definitions of 'affected person' and 'complaint'), 46P(2)(a)(ii), 46PO(1); *Koowarta* (n 37) 184–5 (Gibbs CJ). See also *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, 328 (Collier J); *Susan v Smith, Kowalik and Australian Air Force Cadets* [2004] TASADT 16 (Chairperson Wood); *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509, 519 (French J); *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537, 545 (Wilcox J); *Munday v Commonwealth of Australia [No 2]* (2014) 226 FCR 199.

479 *Commonwealth v Wood* (2006) 148 FCR 276, 287 [43] (Heerey J), revd *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85 on other grounds.

480 *The Executor of the Estate of Terence Keith Haigh and Mary Patricia Haigh and Western Australian Planning Commission* [2007] WASAT 303, [52] (Member McNab).

481 *Stephenson* (n 478) 297–8 (Wilcox J, Jenkinson and Einfeld JJ agreeing); *Acts Interpretation Act 1901* (Cth) s 15AA; *AHRC Act* (n 18) s 46PO(4); *Ryan* (n 478) [6], [100]–[102] (Judge Jarrett).

482 *Wotton* (n 20) 177 [87].

483 *RCIADIC National Report* (n 47) vol 1 [3.2.17]–[3.2.27]. See, eg, JH Wootten, *Royal Commission into Aboriginal Deaths in Custody: Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (Report, 30 March 1991) 89–99; LF Wyvill, *Royal Commission into Aboriginal Deaths in Custody: Regional Report of Inquiry in Queensland* (Report, 30 March 1991) 16; Chris Cunneen, 'Police Violence: The Case of Indigenous Australians' (n 91) 1598.

484 *Inquest into the Death of Ian Ward* (Coroner's Court of Western Australia, Coroner Hope, 12 June 2009) 3–4.

485 Ibid 112–13, 120–1.

486 Ibid 83, 121–2, 136.

487 See, eg, *Day Inquest* (n 443) 103.

and attributed her behaviour to intoxication – 'doing what all drunks do'.[488] Police stereotypes of Day not only go to the racial basis, but also point to arbitrariness.

The *Wotton* Framework also captures positive conduct. A Corrective Services Officer's fatal shooting of Dwayne Johnstone while he attempted to escape a corrective services facility in wrist and ankle shackles[489] would raise arbitrariness issues, particularly in the disproportionality in lethal force used.[490] Although one or both rights to life and liberty are likely to be engaged across most cases of state-inflicted racial violence, the Framework is not inflexible. Specific rights can be tailored to each case. For instance, a police arrest in circumstances where an Indigenous person is partaking in Sorry Business may deny the right to enjoy one's culture with other members of their community.[491] In August 2021, the extended family of Warlpiri man Kumanjayi Walker, who was shot dead by Constable Zachary Rolfe in Yuendumu, filed an AHRC complaint alleging racial discrimination by the police in the 'lead-up to, and following, Walker's death'.[492] Relatives claimed Walker fled court-ordered rehabilitation in Alice Springs to attend a family member's funeral in Yuendumu. Yuendumu Police initially arranged to delay Walker's arrest until after the funeral on the condition that Walker would voluntarily present at the police station. However, the arrangement was purportedly broken by the deployment of the Immediate Response Team ('IRT') to Yuendumu.[493] Although other rights are available, it is prudent to select rights fully substantiated in conventional international materials.[494] The IRT's conduct could

488 Ibid 89–90.

489 Australian Associated Press, 'Inquest into Fatal Shooting of Dwayne Johnstone Suspended after Person Referred for Prosecution', *The Guardian* (online, 29 October 2020) <https://www.theguardian.com/australia-news/2020/oct/29/inquest-into-fatal-shooting-of-dwayne-johnstone-suspended-after-person-referred-for-prosecution>.

490 See generally Joseph and Castan (n 136) 170. The jury has been discharged in the murder trial of the police officer involved: Bruce Mackenzie, 'Jury Unable to Reach Verdict in Murder Trial over Shooting Death of Indigenous Inmate', *ABC News* (online, 14 November 2022) <https://www.abc.net.au/news/2022-11-14/jury-unable-to-reach-verdict-in-shooting-death-indigenous-inmate/101650258>.

491 *ICCPR* (n 10) art 27; *ICERD* (n 9) art 5(e)(vi); *Wotton* (n 20) 502 [1518].

492 Amos Aikman, 'Cops Face Racism Claim over Deadly Shooting', *The Australian* (online, 14 August 2021) <https://www.theaustralian.com.au/nation/cops-face-racism-claim-over-deadly-shooting/news-story/ff19f3518807add27ba17be7c5e2681d>; Amy McQuire, '$1.1 Million Payment Will Not Stop Ms Dhu's Family from Seeking Justice over Death in Custody', *Buzzfeed News* (online, 20 September 2017) <https://www.buzzfeed.com/amymcquire/11-million-payment-will-not-stop-ms-dhus-family-from>.

493 Zach Hope, 'Palm Island Death Lawyers May Take Case of Central Australian Man Allegedly Killed by Police', *The Sydney Morning Herald* (online, 17 November 2019) <https://www.smh.com.au/national/palm-island-death-lawyers-may-take-case-of-central-australian-man-allegedly-killed-by-police-20191116-p53b8k.html>; Anna Krien, 'The Death of Kumanjayi Walker', *The Monthly* (online, May 2022) <https://www.themonthly.com.au/issue/2022/may/anna-krien/death-kumanjayi-walker>. A factual background to Walker's death can also be gleaned from inquest materials. See, eg, Northern Territory Department of Attorney and Justice, 'Coronial Inquests and Findings', *Kumanjayi Walker Coronial Inquest* (Web Page, 5 September 2022) <https://justice.nt.gov.au/attorney-general-and-justice/courts/inquests-findings/kumanjayi-walker>. The IRT was disbanded following Walker's death: Jano Gibson, 'NT Chief Minister Says Zachary Rolfe's Immediate Response Team Disbanded following Shooting of Kumanjayi Walker', *ABC News* (online, 22 March 2022) <https://www.abc.net.au/news/2022-03-22/nt-police-immediate-response-team-disband-michael-gunner/100928778>.

494 *Al Masri* (n 378) 90–1 (Black CJ, Sundberg and Weinberg JJ); *Vienna Convention* (n 108) art 32. See also Transcript of Proceedings, *Macoun v Commissioner of Taxation* [2015] HCATrans 257, [2495] (JT

be reviewed against the right against arbitrary interference with the home,[495] and Rolfe discharging his handgun three times at close range[496] can be scrutinised under article 6 though questions of self-defence may enter the proportionality analysis.[497] Constable Rolfe's text messages also demonstrate his perception of Alice Springs as 'like the Wild West' and that the IRT 'get to do cowboy stuff with no rules'. These messages, analogous to the conduct of QPS in *Wotton,* point to a sense of impunity and separateness in Rolfe's conduct which could serve as stereotype-based evidence to substantiate a racial basis.[498]

As the Johnstone and Walker cases demonstrate, section 9(1)'s application to *pre-death* conduct is comparatively more difficult than post-death conduct. Temporal limitations circumscribe the number and breadth of 'acts' in pre-death conduct and, consequently, the scope for evaluating differential treatment and denial of rights. Time elapsing between police contact and death may be fleeting. Less than an hour elapsed between Mulrunji's contact with police and his death. Mere minutes defined Rolfe and Walker's interaction. Post-death conduct in *Wotton* extended over nine days. This contributes a further hurdle to well-known forensic difficulties in anti-discrimination law.[499] Amid a recent surge in *RDA* representative

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Gleeson SC). See especially *Baird* (n 7) 468 (Allsop J). Some writers have specifically noted that the '[c]omplainants have frequently … been admonished by the courts for failing to develop arguments as to the substance and content of those rights': Alice Taylor, 'Anti-Discrimination Law as the Protector of Other Rights and Freedoms: The Case of the *Racial Discrimination Act*' (2021) 42(2) *Adelaide Law Review* 405, 407.

495 *ICCPR* (n 10) art 17.

496 *R v Rolfe [No 5]* [2021] NTSCFC 6, [17]–[20] (Southwood J and Mildren AJ).

497 *De Guerrero v Colombia* (n 361) [13.2]. See also Joseph and Castan (n 136) 207; AJ Ashworth, 'Self-Defence and the Right to Life' (1974) 34(2) *Cambridge Law Journal* 282, 293 <https://doi.org/10.1017/S0008197300086128>; Yoram Dinstein, 'The Right to Life, Physical Integrity, and Liberty' in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, 1981) 114, 119.

498 I have written on the application of the unstructured comparison to the Rolfe case elsewhere. See Alan Zheng, '*Campbell v Northern Territory*: The Lingering Uncertainty over Comparators and Comparisons in the *Racial Discrimination Act*', *Australian Public Law* (Blog Post, 23 March 2022) <https://www.auspublaw.org/blog/2022/03/campbell-v-northern-territory-the-lingering-uncertainty-over-comparators-and-comparisons-in-the-racial-discrimination-act>. There may also be a role for attitudinal evidence in light of revelations that Rolfe referred to Aboriginal people using racially derogatory language. See Lorena Allam, 'Racist Texts, Cover-up Allegations: Kumanjayi Walker Inquest Poses Big Questions for Police', *The Guardian* (online, 17 September 2022) <https://www.theguardian.com/australia-news/2022/sep/17/racist-texts-cover-up-allegations-kumanjayi-walker-inquest-poses-big-questions-for-police>.

499 See, eg, *Wotton* (n 20) 183 [113], 454 [1316]; *Evidence Act 1995* (Cth) s 140(2)(c). See also *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361–2 (Dixon J); *Dutt* (n 221) [47]–[58] (Judicial Member Rice, Members Alt and McDonald); 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, 330–1; Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (n 190) 180; Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579; Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, 66th sess, UN Doc CERD/C/AUS/CO/14 (14 April 2005) para 15; Janet Ransley, Jessica Anderson and Tim Prenzler, 'Civil Litigation Against Police in Australia: Exploring its Extent, Nature and Implications for Accountability' (2007) 40(2) *Australian and New Zealand Journal of Criminology* 143, 154 <https://doi.org/10.1375/acri.40.2.143>; Laurence Lustgarden, *Legal Control of Racial Discrimination* (Macmillan Press, 1980) 204–21 <https://doi.org/10.1007/978-1-349-16439-4_12>. But see *Wotton* (n 20) 183 [113]; Tim

proceedings,[500] section 9(1) claims can be structured to avoid perceptions of discrimination as an isolated event[501] and fashion broader remedies such as changes to police practices under the broad remedial power in the *Australian Human Rights Commission Act*.[502] Consideration could be given to state-inflicted racial violence representative proceedings.[503]

VI CONCLUSION

Indigenous deaths in custody continue. If the law is to combat discrimination rather than facilitate it,[504] and the *RDA* is to fulfil its promise of being an 'Act for the Future',[505] new remedial options should be explored. Although section 9(1) of the *RDA* has never been engaged in circumstances *preceding* a death in custody, it is available as a remedy for state-inflicted racial violence using the unstructured comparison in *Wotton* and concepts of arbitrariness and proportionality in international human rights law. The result is a statutory provision capable of enabling a flexible review of police discretion in deaths in custody.

Notwithstanding these possibilities, the *RDA* is not a remedial panacea for the root causes which underlie deaths in custody and questions of sovereignty and self-determination remain. A doctrinal account of section 9(1)'s possible application does not translate into practical feasibility. There is no guarantee that a remedy under the *RDA* will sidestep broader societal impediments to recognising racial

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Soutphommasane, 'Forty Years of the *Racial Discrimination Act*' (2015) 40(3) *Alternative Law Journal* 153, 154 <https://doi.org/10.1177/1037969X1504000302>.

500 See, eg, *Dawson v Commonwealth* [2021] FCA 1354; *Davison v Commissioner of Police, NSW Police Force* [2021] FCA 1324; *Fisher v Commonwealth of Australia* (Full Federal Court of Australia, VID545/2021, commenced 23 September 2021); *Street v Western Australia* (Federal Court of Australia, WAD237/2020, commenced 19 October 2020); *Cumaiyi v Northern Territory of Australia* [2020] FCA 1299; *Pearson v Queensland [No 2]* [2020] FCA 619; *Arthur v Northern Territory [No 2]* [2020] FCA 215; *Mununggurr v Channel Seven Sydney Pty Ltd* [2019] FCA 2188; *Campbell* (n 174); *Jenkings* (n 168). See also Georgina Mitchell, 'Sunrise to be Sued for Racial Discrimination over Stolen Generations Broadcast', *The Sydney Morning Herald* (online, 11 June 2020) <https://www.smh.com.au/national/nsw/sunrise-to-be-sued-for-racial-discrimination-over-stolen-generations-broadcast-20200611-p551mx.html>; Amanda Meade, 'Palm Island Residents Launch Human Rights Complaint over "Racist" Channel Nine and Daily Mail Reports', *The Guardian* (online, 21 August 2020) <https://www.theguardian.com/media/2020/aug/21/palm-island-residents-launch-human-rights-complaint-over-racist-channel-nine-and-daily-mail-reports>.

501 Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 83, 88, 101.

502 *AHRC Act* (n 18) s 46PO(4); *Wotton* (n 20) 561 [1785]. But see Taylor (n 17) 196.

503 See, eg, *RDA* (n 8) s 46PB; *Federal Court of Australia Act 1976* (Cth) Pt IVA. But see ss 33C(1)(b)–(c); *Jenkings v Northern Territory of Australia* [2017] FCA 1263 [12] (White J), citing *Guglielmin v Trescowthick [No 2]* [2005] FCA 138, [30], [48] (Mansfield J); *Wotton v Queensland [No 8]* [2017] FCA 639; *Wotton v Queensland [No 7]* [2017] FCA 406.

504 Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 3rd ed, 2003) 417.

505 Race Discrimination Commissioner, *Battles Small and Great: The First Twenty Years of the Racial Discrimination Act* (Australian Government Publishing Service, 1995) 43.

discrimination.[506] Despite the outcome in *Wotton,* Palm Island's residents have subsequently faced discriminatory media coverage of the outcome in the case.[507] Other impediments, such as a limited appreciation of disadvantages that Indigenous people face,[508] are exacerbated by unrepresentative juries.[509] Notwithstanding that judicial education on race has made headway in some courts and judicial education materials now refer to unconscious racial bias,[510] judges remain the ultimate arbiters of racial discrimination at law and are immanently limited to determining issues in the cases which are brought before them. Proposed structural reforms in the context of self-determination, sovereignty and constitutional recognition will certainly inform lawmaking that impacts First Nations communities.[511] In reshaping political power in this country, it is at least an open possibility that structural reforms such as the proposed First Nations Voice will mitigate political impediments in the pathway to justice for deaths in custody and provide a structural context which may inform future *RDA* cases, or remove the need for such *RDA* cases altogether.

ICERD's potential was 'unrealized' in 1975.[512] The same was subsequently said of section 9(1).[513] Ultimately, by providing a remedy for state-inflicted racial violence, section 9(1) of the *RDA* could well have a role to play in the broader justice aspirations of First Nations communities.

506 See, eg, Laurence Lustgarden, 'Racial Inequality and the Limits of Law' (2011) 49(1) *Modern Law Review* 68, 78 <https://doi.org/10.1111/j.1468-2230.1986.tb01678.x>.

507 Meade (n 500).

508 Yin Paradies, 'Attitudinal Barriers to Reconciliation in Australia' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage* (Springer, 2016) 103, 107–10 <https://doi.org/10.1007/978-981-10-2654-6_7>.

509 Thalia Anthony and Craig Longman, 'Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds' (2017) 6(3) *International Journal of Crime, Justice and Social Democracy* 25, 33 <https://doi.org/10.5204/ijcjsd.v6i3.419>; Rachael Hocking, 'Warlpiri Call for Court to Remain in Central Desert', *NITV* (online, 11 December 2019) <https://www.sbs.com.au/nitv/article/warlpiri-call-for-court-to-remain-in-central-desert/88cz5zwxz>. The Northern Territory Supreme Court later ordered the hearing be held in Darwin: *R v Rolfe [No 1]* [2020] NTSC 80.

510 Judicial Commission of New South Wales, 'Equality Before the Law' (25 October 2022, Bench Book) 1.4.1.

511 See, eg, Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart Publishing, 2020) 87–8; Megan Davis, 'A First Nations Voice, Constitutional Law Reform, and the Responsibility of Lawyers', *Australian Public Law* (Blog Post, 26 May 2022) <https://www.auspublaw.org/blog/2022/05/a-first-nations-voice-constitutional-law-reform-and-the-responsibility-of-lawyers>.

512 Brian Kelsey, 'A Radical Approach to the Elimination of Racial Discrimination' (1975) 1(1) *University of New South Wales Law Journal* 56, 57.

513 'Part II of the *RDA*' (n 52) 57; Bailey (n 15) 189.