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.
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

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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).


associations. However, the RDA has never been deployed to safeguard the implicit premise at the heart of a ‘public life’ lived free of discrimination — that of life itself and the right not to be arbitrarily deprived of life because of racial discrimination.

Being comes before wellbeing. Yet, the RDA has never provided redress where Indigenous people have died in circumstances involving racial discrimination, despite such claims being ‘possible’ and deaths being *ipso facto* arbitrary.

This much is unsurprising. Anti-discrimination law is ‘unusual and complex’. Anti-discrimination jurisprudence was recently ‘at an early stage of development in Australia’ and remains a ‘comparatively new area of rights protection’. The limited usage of the RDA in circumstances involving death is shaped by a mandatory and confidential conciliation process, with settlement as its ‘sole objective’. Yet, none of this necessarily means the RDA is doctrinally incapable

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


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’).


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


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

In Wotton v Queensland (‘Wotton’), 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’ response to local protests after Mulrunji’s death was racially discriminatory. Although Mulrunji’s death triggered the events on Palm Island, 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. The amendment was refused on procedural grounds because these allegations were not included in the prior complaint to the Australian Human Rights Commission (‘AHRC’) as well as ancillary concerns of overlapping proceedings and standing. 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. 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). The State appealed these findings. Following public criticism and legal advice on prospects, the appeal

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20 Wotton v Queensland [No 5] (2016) 352 ALR 146 (‘Wotton’).
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).
28 Wotton (n 20) 566–8 [1804].
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

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


36 NIRV Report (n 34) app 14.


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

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


accessibility,\textsuperscript{42} practical barriers to litigation,\textsuperscript{43} and broader issues of trust between First Nations communities and the law,\textsuperscript{44} nor do I engage in a normative assessment of the \textit{RDA}. It suffices to note that achieving outcomes of ‘justice’\textsuperscript{45} like \textit{Wotton} engages difficulties well-known to public-interest litigation.\textsuperscript{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 \textit{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 \textit{RDA} remedy exists and steps through how it could be used. Whether the \textit{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 \textit{RDA} provides a remedy against state-inflicted racial violence where acts \textit{preceding} death constitute unlawful racial discrimination. Put differently, the \textit{RDA} can be extended ‘backwards’ in \textit{Wotton} to capture discriminatory circumstances preceding Mulrunji’s death. I use ‘state-inflicted racial violence’ to focus analysis on a \textit{subset} of deaths in custody\textsuperscript{47} and to direct specific attention to the function of rights in restraining the exercise of sovereign power and attributing liability to


\textsuperscript{43} Behrendt et al (n 32) 41. See also Jennifer Clarke, ‘Case Note: \textit{Cubillo v Commonwealth}’ (2001) 25(1) \textit{Melbourne University Law Review} 218, 269–86.


\textsuperscript{45} Allison (n 37) 241.


\textsuperscript{47} \textit{Royal Commission into Aboriginal Deaths in Custody} (Final National Report, 15 April 1991) vol 1 [4.4.45] (‘\textit{RCIADIC National Report}’).
the State and its authorities. While some scholarly work has tested the RDA’s remedial limits, efforts have overwhelmingly concentrated on section 10. Both Wotton and the ‘sui generis’ quality of section 9(1) have attracted patchy doctrinal analysis despite section 9’s status as the broadest prohibition in Australian anti-discrimination law and the ‘most interesting’ provision in Commonwealth human rights legislation. Wotton is more often cited for its discussion of anti-discrimination remedies rather than its approach to section 9(1). 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.

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


53 Bailey (n 15) 188.


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. 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,


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).


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


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, multiple statutory inquiries, a manslaughter charge, and Hurley’s acquittal.

Mulrunji’s demeanour changed. His body was limp – ‘dead weight’. 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. Mulrunji was placed in the cell without medical assessment at around 10:26am. Hurley noticed that Mulrunji was bleeding above the eye and his face was visibly swollen – the only externally visible sequela. Hurley concluded that Mulrunji had fallen asleep. Around 10:45am, Hurley checked on Mulrunji believing him to be asleep and snoring, despite him making audible sounds and moving in ways inconsistent with sleeping. 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 from an intra-abdominal haemorrhage due to a ruptured liver ‘cleaved in two’. Mulrunji had sustained four broken ribs, resulting in significant internal blood loss. He did not have these injuries upon arrival at the police station.

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.

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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’).


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].


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

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

anchors state-inflicted racial violence in section 9(1)’s scope of redress against acts operating ‘directly’ on complainants84 – 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 phenomenon87 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

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).
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.
89 NIRV Report (n 34) 14.
90 Ibid 15–17, 418.
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, referring to facially neutral ‘rules, practices, habits’ with discriminatory effects which may be gleaned from statistical data. Second, racial violence can also mean racial vilification, that is, conduct preceding personal violence, either because it precedes personal violence in a particular case or because its very nature ‘leads inevitably to personal violence’. Third, whereas speech-related activity and mental harm is the core of vilification, the critical category for our purposes lies in the physical realm; acts of physical violence such as assault or what Ćunneen termed the ‘violence of neglect’. 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. 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 and a direct nexus between conduct and death.


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


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’).


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 and systemic forms of discrimination under indirect discrimination provisions in sections 9(1A) and 10, its operation against personal violence, including state-inflicted racial violence is uncertain. The National Inquiry identified no ‘definite enough remedy’ for personal violence and suggested this required ‘criminal as well as civil remedies’. 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, or whether sexual harassment constituted sex discrimination prior to the landmark decision in O’Callaghan v Loder, this uncertainty does not suggest section 9(1) is doctrinally unavailable as a statutory wrong enlarged 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. Section 9(1) is action-neutral, generalised from specific activities, beneficially construed, and directed to ‘any act’ and discrimination in ‘all its forms’. Instead, the uncertainty can be attributed to the

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105 NIRV Report (n 34) 277–8.
106 Ibid 298.
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.
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,\textsuperscript{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.\textsuperscript{114} Complainants may, instead, seek to have a wrongdoer ‘punished’ – an option generally unavailable in anti-discrimination law.\textsuperscript{115}

Second, the RDA’s historical development led to underappreciation of how state-inflicted racial violence could be remedied other than by criminalisation.\textsuperscript{116} Although the 1973 draft bill of the RDA contained criminal penalties for ‘physical violence’,\textsuperscript{117} this was later dropped\textsuperscript{118} and underexplored in the ensuing decades. Prompted by international criticisms,\textsuperscript{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’.\textsuperscript{120} Although this required criminal sanctions,\textsuperscript{121} Australia proceeded with civil vilification provisions\textsuperscript{122} following

\begin{itemize}
\item \textsuperscript{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 \textit{AHRC Act} (n 18) s 46PH(1B)(b).
\item \textsuperscript{115} Nick O’Neill, Simon Rice and Roger Douglas, Retreat from Injustice: Human Rights Law in Australia (Federation Press, 2\textsuperscript{nd} 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 \textit{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.
\item \textsuperscript{117} Racial Discrimination Bill 1973 (Cth) cl 30. See also Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 21 November 1973, 1978 (Lionel Murphy, Attorney-General).
\item \textsuperscript{119} \textit{Report of the Committee on the Elimination of Racial Discrimination to the General Assembly}, 49\textsuperscript{th} sess, UN Doc A/49/18 (19 September 1994) para 549. See also McNamara (n 97) 21.
\item \textsuperscript{120} ICERD (n 9) art 4(a); ICERD (n 9) (Australia) Reservation to Art 4(a); \textit{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), \textit{The Racial Discrimination Act: A Review} (Australian Government Publishing Service, 1995) 129.
\item \textsuperscript{122} McNamara (n 97) 6. See also \textit{RDA} (n 8) s 26.
\end{itemize}
criticism of criminalisation approaches to racist harassment and violence. The operation of vilification provisions has dominated the preceding two decades. 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, and the RCIADIC’s primary objective of structural reforms and preventing deaths, not remedial mechanisms.

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, it only considers a racial basis in personal violence indirectly in sentencing. Despite the National Inquiry’s recommendations for a federal offence of racist personal violence, which the Australian Law Reform Commission subsequently endorsed, none was legislated. With limited criminal prosecutions for deaths in custody, and no specialised offences, criminal law


125 NIRV Report (n 34) 7.


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


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].


has not to date adequately vindicated family and community experiences of racial violence as a form of discrimination, affirmed the race relations entangled in a death in custody, or met community calls for greater police accountability under the law. 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’ and with states parties’ obligation to ensure effective remedies, including civil remedies, for ‘any damage suffered’ from ‘any acts of racial discrimination’. There is nothing novel about the use of non-criminal law remedies against conduct which might otherwise amount to criminal wrongdoing.

Finally, state-inflicted racial violence is a subset of deaths in custody, which is defined broadly. In Russell v Commissioner of Police, police assaulted Edward Russell whilst using derogatory language. 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. This highlights how some deaths in custody, including Russell, are more appropriately remedied under vilification (as it was) or under section 10

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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.


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.

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

### III THE WOTTOM FRAMEWORK

Having located state-inflicted racial violence, it is necessary to turn to the Wottom 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’).\textsuperscript{143} Constitutional pragmatism demanded section 9(1)’s fidelity to its source.\textsuperscript{144} Section 9(1) transplanted ICERD’s definition of racial discrimination in article 1(1) verbatim, imbuing it with operational effect.\textsuperscript{145} Early on, section 9(1) could not escape its use in triggering constitutional inconsistency arguments.\textsuperscript{146} To clarify this, section 9(1A) was introduced in 1990 to confirm direct discrimination could also trigger inconsistency,\textsuperscript{147} and is mutually exclusive to section 9(1).\textsuperscript{148} Since then, Bar and Bench have lamented section 9(1) for being unconducive to clarity,\textsuperscript{149} general,\textsuperscript{150} ‘exotic … and notoriously difficult to employ’,\textsuperscript{151} of uncertain effect,\textsuperscript{152} difficult to yield a clear ‘statutory command’,\textsuperscript{153} of ‘illusory precision’,\textsuperscript{154}

\begin{itemize}
\item \textsuperscript{143} RDA (n 8) s 9(1).
\item \textsuperscript{145} Bailey (n 15) 186–7.
\item \textsuperscript{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).
\item \textsuperscript{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.
\item \textsuperscript{148} See, eg, AMC v Wilson (n 84) 47–8 (Black CJ), 55 (Heerney J), 74 (Sackville J). Cf Maiocchi v Royal Australian & New Zealand College of Psychiatrists [No 4] [2016] FCA 33, [342] (Griffiths J).
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{152} Koowarta (n 37) 182 (Gibbs CJ); Gerhardy (n 48) 81–2 (Gibbs CJ).
\item \textsuperscript{154} Makkonen (n 135) 131.
\end{itemize}
and even being ‘meaningless’ in domestic law.\textsuperscript{155} Indeed, Commonwealth Solicitor-General Maurice Byers had recommended section 9(1)’s removal from the final bill.\textsuperscript{156} The \textit{Wotton} Framework structures section 9(1) to preserve its principled operation within the \textit{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\textsuperscript{157} — remedial avenues already explored for deaths in custody.\textsuperscript{158}

The \textit{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 \textit{Maloney v The Queen} (‘\textit{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\textsuperscript{159} and liberty.\textsuperscript{160} Arbitrariness, as I explain, preserves section 9(1)’s field of substantive protection beyond mere questions of lawfulness.\textsuperscript{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.\textsuperscript{162} Thus, in the Palm Island encounter at the heart of \textit{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

\begin{itemize}
\item \textsuperscript{155} \textit{Koowarta} (n 37) 173 (DM Dawson QC) (during argument), cf 265 (Brennan J). See also \textit{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), \textit{The Legal Protection of Rights in Australia} (Bloomsbury, 2019) 123, 141.
\item \textsuperscript{157} \textit{Wotton} (n 20) 326 [725]–[727]. See also \textit{Bulsey v Queensland} [2015] QCA 187.
\item \textsuperscript{158} \textit{Social Justice Commissioner Deaths in Custody Report} (n 12) 289–95. See, eg, \textit{Appleton v New South Wales} (Unreported, District Court of New South Wales, Judge Quirk, 28 July 2005).
\item \textsuperscript{159} ICCPR (n 10) art 6.
\item \textsuperscript{160} ICCPR (n 10) art 9.
\item \textsuperscript{162} \textit{Wotton} (n 20) 179 [99], 243 [365], 248 [378].
\end{itemize}
contrary to its holistic interpretation. 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. Therefore, section 9(1) acts should not be framed over-specifically. Over-specification not only complicates the Court’s understanding of contravention, but may preclude findings of contravention. Equally, acts must not be framed to capture a course of conduct akin to a case theory or general narrative. Guided by the earlier taxonomy on racial violence, the acts complained of should not concern systemic conceptions of racial violence. Instead, the ‘goldilocks’ conditions lie at an intermediate level of abstraction which recognises that section 9(1) is a composite concept structured around conduct. It is the act which carries the differential treatment and which has the purpose or effect of denying rights. For section 9(1)’s purposes, acts can be framed which inherently impair a particular right. 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. In asking whether the treatment is based on race, section 9(1) is unique 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. The RDA does not follow the

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’).
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  Gerchardy (n 48) 125–6 (Brennan J).
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. However, what is in the comparator’s place? Parties – indeed, even the applicants in Wotton – continue to assume a comparator is required; some magically read the words of the comparative formula ‘less favourable treatment’ into 9(1), and treat it as a conventional direct discrimination provision. Until Wotton, alternatives to a comparator’s conceptual ‘shackles’ 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. However, without challenge from either party, her Honour held that section 9(1) still ‘required’ a ‘comparison’. 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.
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).


\(^{191}\) Campbell (n 174) [726], [727], [731] (White J).
2 A ‘Required’ Comparison?

A ‘required’ comparison in section 9(1) is inconsistent with authority and restricts the provision’s flexibility with a conceptually limited mode of analysis. 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’. 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. Since Griffiths, Victoria abandoned comparators in its test of ‘unfavourable treatment’. Plainly, his Honour’s remarks, made in the section 10 context, ought to have been read secundum subjectam materiam.

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. However, this diverges from Baird because Allsop J found no ‘direct … comparison’ could be read into section 9(1). 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) – 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.’ That those circumstances are ‘unlike’ would militate against the viability of a hypothetical comparison. 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. Simply because Baird contained comparative analysis comparing what was paid and what should have been paid, does not make a comparison ‘required’. In Campbell, White J presupposed other means of identifying differential treatment.

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192 Wotton (n 20) 285 [542].
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 Atwood and Corkery); Discrimination Act 1991 (ACT) s 8(1)(a), as enacted.
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).
203 See, eg, Philip (n 174) [210]–[212] (Lloyd-Jones FM).
204 Wotton (n 20) 285 [541].
after the applicant’s comparator arguments failed.\textsuperscript{205} In \textit{Qantas Airways v Gama} (‘\textit{Gama}’),\textsuperscript{206} the majority suggested a comparison was \textit{only one way} of establishing a racial basis and non-comparative means such as examining the surrounding circumstances of the conduct also suffice,\textsuperscript{207} particularly where explicit racial epithets are made.\textsuperscript{208} In \textit{Australian Medical Council v Wilson} (‘\textit{AMC v Wilson}’),\textsuperscript{209} Heerey J remarked, in obiter, that if an act is ‘based on’ race, ‘no comparison is required’ and 9(1) is engaged.\textsuperscript{210} However, his Honour also found the words ‘equal footing’ in section 9(1A)(c) required an essential comparison,\textsuperscript{211} though its precise nature is unclear.\textsuperscript{212} Although section 9(1) contains the same words,\textsuperscript{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\textsuperscript{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.\textsuperscript{215} Alternatively, Black CJ’s suggestion in \textit{AMC v Wilson}, that the comparison must be with sections of the community at large not suffering from racial discrimination,\textsuperscript{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 \textit{Ebber v HREOC}, section 9(1) ‘focuses on protecting … certain fundamental rights; it does not purport to aim at achieving equality of treatment’.\textsuperscript{217} Accordingly, the ‘inequality of rights’ with which section 9(1) is concerned\textsuperscript{218} is the consequence of differential treatment on rights, not strictly its proof. As some rights can be deprived absolutely as well as relatively,\textsuperscript{219} an approach to differential treatment unable to accommodate both scenarios cannot be sustained.

\textsuperscript{205} Campbell (n 174) [727], [737] (White J).
\textsuperscript{206} Gama (n 170).
\textsuperscript{207} Ibid 564 (French and Jacobson JJ, Branson J agreeing at 573).
\textsuperscript{208} Ibid 546, 548, 550 (French and Jacobson JJ, Branson J agreeing at 573).
\textsuperscript{209} AMC v Wilson (n 84).
\textsuperscript{210} Ibid 63 (Heerey J). Cf AMC v Wilson (n 84) 58 (Heerey J).
\textsuperscript{211} Ibid 63 (Heerey J).
\textsuperscript{212} Ibid 48 (Black CJ) 63 (Heerey J), 80 (Sackville J); Commonwealth v McEvoy (1999) 94 FCR 341, 353 (Von Doussa J).
\textsuperscript{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.
\textsuperscript{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) (‘\textit{De Silva}’).
\textsuperscript{215} AMC v Wilson (n 84) 81 (Sackville J). See also Tocigl v Aitco Pty Ltd (1996) EOC 92-775, 78,763 (Wilson P).
\textsuperscript{216} AMC v Wilson (n 84) 48 (Black CJ).
\textsuperscript{217} Ebber v Human Rights and Equal Opportunity Commission (1995) 129 ALR 455, 475 (Drummond J) (‘\textit{Ebber}’); Secretary, Department of Veteran’s Affairs v P (1998) 79 FCR 594, 600 (Drummond J) (‘Department of Veteran’s Affairs’).
\textsuperscript{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.\textsuperscript{220}

3 \textbf{Comparative Reasoning as an Analytical Tool, Not Doctrine}

The preferable approach is that differential treatment based on race is a simple question of causation,\textsuperscript{221} that is, there was a distinction based on race meaning ‘by reference to’ race.\textsuperscript{222} As Smith argued, a comparator might, along with inferences drawn from language, suggest causation, but it is not a distinct requirement.\textsuperscript{223} Put differently, comparators may explain a racial basis but are not necessary preconditions to reaching that conclusion.\textsuperscript{224} Comparators are ‘no more than tools which may or may not justify an inference of discrimination’.\textsuperscript{225} Although this approach has not been adopted in Australian anti-discrimination law generally,\textsuperscript{226} that has been confined to provisions requiring proof of less favourable treatment.\textsuperscript{227} \textit{Wotton} leaves this approach open for section 9(1). As the \textit{Wotton} comparison was ultimately resolved in favour of the applicants,\textsuperscript{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.\textsuperscript{229} This would confirm that the so-called ‘comparison’ in \textit{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
insufficient evidence rather than the applied comparison. 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. In this sense, derogation from police policies is a bare distinction because it has not yet been impugned with a racial basis. Therefore, not all deviations from police policies constitute differential treatment under section 9(1). As the applicants learned in Wotton, collapsing the bare distinction with a racial basis wrongly assumes the former establishes the latter. Further, this collapsing would hold police to a standard of perfection when departures from policy may be for reasons other than race. As police discretion inherently involves discriminating between options, a race-based discretion is something more than the conventional discretionary exercise of police policies. However, within section 9(1)’s holistic interpretation, 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, 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

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230 See eg, Wotton (n 20) 391 [1018].
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].
237 Baird (n 7) 470 (Allsop J).
238 Wotton (n 20) 407 [1087].
differential treatment based on race might lie. The Two-Worlds Comparison shares a traditional comparator’s analytical utility because it similarly ‘shrink[s] the set of possible explanations for an … action’ by setting up factual parameters for what decisions could have been made out of all decisions available. 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. 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. 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. 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. 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. 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. *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 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. 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 and leads to the next step.

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239 Ibid 283 [533], 319 [687].
240 Goldberg (n 193) 776.
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 evidence259 as well as wider attitudes of impunity, disregard, lack of care, a wish to retaliate260 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

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).
254 Urquidez (n 253) 312.
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;\textsuperscript{263} third, stereotype-based evidence, such as viewing Indigenous people with an emphasis on alcoholism, violence, criminality and anti-social behaviour without objective evidence.\textsuperscript{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.\textsuperscript{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 \textit{Purvis v New South Wales} (‘\textit{Purvis}’).\textsuperscript{266} The High Court considered an allegation of direct discrimination under the \textit{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.\textsuperscript{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.\textsuperscript{268} Accordingly, as the school would have expelled the comparator in the same circumstances, the majority found no direct discrimination.\textsuperscript{269} Consider a scenario where the section 9(1) act is a police officer’s arrest of an intoxicated Indigenous man for public nuisance.\textsuperscript{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.\textsuperscript{271} Unlike \textit{Purvis} and disability discrimination cases, where manifested behaviour can be explained by the disability’s effect on free will,\textsuperscript{272} race is different.

\textsuperscript{263} Ibid 273 [490].
\textsuperscript{265} Wotton (n 20) 351 [847]–[848].
\textsuperscript{266} (2003) 217 CLR 92.
\textsuperscript{267} \textit{Purvis} (n 179) 148 (Gummow, Hayne and Heydon JJ).
\textsuperscript{269} But see \textit{Purvis} (n 179) 134–7 (McHugh and Kirby JJ).
\textsuperscript{270} See, eg, \textit{Summary Offences Act 2005} (Qld) s 6.
\textsuperscript{272} \textit{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. 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. 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.

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. This is somewhat unsettled. Campbell appears to reject such an approach, 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. However, by reference to race is wider than being positively distinguished by race 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’ and enlivens an impermissible assessment of motive. 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.


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.\textsuperscript{282} Moreover, it would nonetheless be a ‘preference’ because it provides a practical advantage to Anglo-Australian persons\textsuperscript{283} which may constitute differential treatment.

In \textit{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\textsuperscript{284} even though such perceptions are not necessarily racially neutral. In \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{288} In the context of section 10, a High Court majority has


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

\textsuperscript{284} Campbell (n 174) [733]–[735] (White J).

\textsuperscript{285} Wotton (n 20) 383 [987], 483–4 [1432], 489 [1454].

\textsuperscript{286} See, eg, ICCPR (n 10) art 27. See also Bailey (n 15) 189.

\textsuperscript{287} ICERD (n 9) art 5(f).

found not all racial distinctions will offend the RDA.\textsuperscript{289} Therefore, a racial basis is \textit{contingently} wrongful under section 9(1), subject to proving a denial of rights, but not \textit{intrinsically} wrongful.\textsuperscript{290} It is difficult to conceive of a scenario where a benign racial classification, absent denial of rights, demands legal redress.\textsuperscript{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 \textit{Purvis}-style reasoning, evident in \textit{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.\textsuperscript{292} This is predominantly an evidential task. In \textit{Wotton}, the RCIADIC’s findings and expert evidence on the historical relationship between police and the Palm Island Aboriginal community,\textsuperscript{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.\textsuperscript{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.\textsuperscript{295}

\section{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

\begin{itemize}
\item \textsuperscript{289} \textit{Western Australia v Commonwealth} (1994) 183 CLR 373, 483–4 (Mason CJ, Brennan, Toohey, Gaudron and McHugh JJ).
\item \textsuperscript{292} Hopkins (n 103) 40.
\item \textsuperscript{293} \textit{Wotton} (n 20) 170 [59].
\item \textsuperscript{295} See especially \textit{Wotton} (n 20) 191 [143]–[144], 186–91 [129]–[142].
\end{itemize}
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, or that the statement was made to Indigenous persons and not others.

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. 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. 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 and the possibility of multiple reasons may not be raised at all. 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. In Dutt v Central Coast Area Health Service, 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’. 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. 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.

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).
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).
302 See generally Wotton (n 20).
303 See generally Baird (n 7) 471 (Allsop J); AMC v Wilson (n 84) 63 (Heerey J).
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].
D Denial of Rights

One cannot engage with section 9(1) unless one understands its interface with human rights. The human rights in section 9(1), beyond including rights in article 5 of ICERD, is non-exhaustive and extends to international instruments to which Australia is party. 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’ of preceding anti-discrimination law concepts. Courts have utilised formalistic constructions, without reference to international materials, which have denuded the inquiry of the vitality of its international context. 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. Section 9(1)’s denial of rights question is unique amongst anti-discrimination provisions because it defines the scope of discrimination using human rights, 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. Moreover, this is axiomatic of the use of the international rights

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 Trebíčko (1984) 53 ALR 581.
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); Brpho (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.
framework to supply minimum standards and hold government accountable. 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’). As complaints to the UNHRC require the exhaustion of domestic remedies, including an RDA complaint to the AHRC, section 9(1)’s denial of rights question is increasingly relevant.
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 freedoms326 – 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 (Crennann 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).
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 (Crennann J), 261 (Bell J), 305 (Gageler J); ICERD (n 9) art 1(4).
333 Maloney (n 110) 185–6 (French CJ), 198–9 (Hayne J), 221–2 (Crennann J), 235 (Kiefel J), 255–6 (Bell J).
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.\footnote{Maloney (n 110) 275–6 (Gageler J).}

For present purposes, it is unnecessary to evaluate Hayne J’s reasoning\footnote{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.} which remains uncertain.\footnote{Justin Gleeson, ‘The Increasing Internationalisation of Australian Law’ (2017) 28(1) Public Law Review 25, 30.} 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.\footnote{Maloney (n 110) 191–2 (French CJ), 301–2 (Gageler J).} Excepting Kiefel J, this reflected a purposive approach to construing the human right to own property\footnote{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).} which is likely to apply, *mutatis mutandis*, to rights analysis under section 9(1).\footnote{See also Mabo v Queensland [No 2] (1992) 175 CLR 1, 42 (Brennan J).}

Second, Bell J and Gageler J were receptive to using materials post-dating the *RDA*\footnote{Maloney (n 110) 185 (French CJ), 235 (Kiefel J), 222 (Crennan J), 247–51 (Bell J), 300 (Gageler J).} whereas Hayne J’s narrow view has been ignored in subsequent High Court decisions\footnote{See, eg, Macoun v Federal Commissioner of Taxation (2015) 257 CLR 519.} — a sign of its ‘implied repudiation’.\footnote{Maloney (n 110) 256 (Bell J), 275–9 (Gageler J).} *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*.\footnote{Wotton (n 20) 315 [669]–[670].} 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.\footnote{Vienna Convention (n 108) art 32. See also Minister for Immigration and Citizenship v Anochie (2012) 209 FCR 497, 508–9 (Perram J).} In particular, the UNHRC’s decisions were not extraneous to the interpretation of such rights, but integral to it\footnote{Ibid 315 [667]–[670].} — a position aligned with Gageler J’s approach in *Maloney*.\footnote{Maloney (n 110) 228 (Kiefel J).} Significantly, no judge in *Maloney* considered whether the materials were ‘supplementary means of interpretation’ which the Court could consider due to ambiguity,\footnote{Vienna Convention (n 108) art 32. See also Minister for Immigration and Citizenship v Anochie (2012) 209 FCR 497, 508–9 (Perram J).} nor were...
submissions made on this point. Third, Maloney’s argument for consultation had no textual basis in section 8’s source, article 1(4) of ICERD. In contrast, section 9(1) incorporates by reference human rights. 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’. Similarly, ICCPR article 9(1) provides ‘[n]o one shall be subjected to arbitrary arrest or detention’. 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. 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.

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’. 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. Although her Honour reached this conclusion by finding the arrests were unlawful because the emergency declaration triggering SERT’s deployment lacked statutory authorisation, Mortimer J further suggested in obiter that the conduct, even if lawful, would have been arbitrary to impair the ICCPR article 17 right. 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, capturing ‘at least, lack of proportionality to ends sought, and lack of justification’. Unlike the use of proportionality in other anti-

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).
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/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 and the UNHRC’s similar function under the ICCPR.

Another approach is to give content to arbitrariness in ICCPR articles 6 and 9 using relevant domestic and international materials. Domestic jurisprudence on the right to life, despite its status as a ‘supreme right’, has been limited. More consideration has been given to the right to liberty under article 9. Although Wotton principally relied upon domestic materials, 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 and article 9, consistent with the use of the same text within the same treaty, and the travaux préparatoires’ emphasis on harmonising the meaning of arbitrariness across numerous articles. As the meaning of ‘arbitrarily’ is obscure on its face, the court can use supplementary means of interpretation. In this inquiry, UNHRC consideration of the phrase remains relevant, particularly as it involves discussion of the article’s preparatory work and drafting history. 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 and expresses a broader principle than lawfulness. The travaux to article

372 Maloney (n 110) 275–6 (Gageler J).
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) [273] (Ellis J).
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.
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’.\textsuperscript{387} Although this led to concerns that arbitrariness had vague scope, it was agreed to as an alternative to enumerating permissible deprivations of life.\textsuperscript{388} The principles have been subsequently refined. The UNHRC has clarified that arbitrariness concerns elements of ‘reasonableness, necessity and proportionality’,\textsuperscript{389} which is also replicated in guidance surrounding article 9.\textsuperscript{390} In assessing interference with the right, both UNHRC jurisprudence\textsuperscript{391} and domestic jurisprudence have relied on these principles.\textsuperscript{392}

As a general standard containing a flexible class of criteria,\textsuperscript{393} Mortimer J’s selection of proportionality and justification in \textit{Wotton} should be viewed as aspects of arbitrariness, rather than a ‘construction’ of it.\textsuperscript{394} As the relevant aspects of arbitrariness are adopted on a case-by-case basis rather than \textit{in abstracto},\textsuperscript{395} that begs the question: what aspects are selected in a particular case? In this context, difficulties follow from its breadth.\textsuperscript{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.\textsuperscript{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 \textit{ICCPR} article 6 is to protect life,\textsuperscript{398} examining an omission according to the reasonableness of its justification and necessity in all the circumstances of the case\textsuperscript{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

\begin{footnotesize}
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\item \textsuperscript{387} Bossuyt (n 382) 123.
\item \textsuperscript{388} Ibid 122–3.
\item \textsuperscript{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), \textit{The Right to Life in International Law} (Martinus Nijhoff, 1985) 221, 240.
\item \textsuperscript{390} Nowak (n 380) 172–3; General Comment No 35 (n 369) 3 [12].
\item \textsuperscript{392} Wotton (n 20) 324–5 [713]–[716]. See especially \textit{Sudi VCAT Decision} (n 379) [153]–[158] (Bell J).
\item \textsuperscript{393} Boyle (n 389) 221.
\item \textsuperscript{394} Cf Wotton (n 20) 324 [716].
\item \textsuperscript{395} Nowak (n 380) 111. See also BG Ramcharan, ‘The Concept and Dimensions of the Right to Life’ in BG Ramcharan (ed), \textit{The Right to Life in International Law} (Martinus Nijhoff, 1985) 1, 19.
\item \textsuperscript{397} Vienna Convention (n 108) art 31(1). See especially Marcoux (n 161) 373–4.
\item \textsuperscript{398} Joseph and Castan (n 136) 198.
\item \textsuperscript{399} \textit{Van Alphen v The Netherlands} (n 391) 116.
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human rights. 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. 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 which limit or interfere with the relevant human rights, against the means employed. Existing Australian human rights legislation provide a guide of when an act is out of proportionality in its limitation on a human right. 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. 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.

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.


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 Gerhardt (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 Gowlland-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.


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) s 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), 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. 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’. Officers were aware of Mulrunji’s alteration 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. Any perceived non-compliance was no excuse to limit monitoring. 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. Beyond policy, the station conduct derogated from expectations that police provide help reasonably sought as required by the reasonable expectations of the community.

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.

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, speaking to Mulrunji or doing nothing at all, particularly as Mulrunji was walking away. Nor did Hurley consult Bengaroo about options, despite claiming he initially acted because Bengaroo’s ‘pride was hurt’ and ‘Bengaroo was offended’. 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’. Like other Palm Island police officers, it is probable that Hurley had little interest in the RCIADIC’s impact on day-to-day policing. 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. The RCIADIC recommended that offensive language not be an occasion for arrest and charge. As Bengaroo stated at the Inquest, only he and Hurley were offended by Mulrunji.

Attitudinal evidence reinforces this argument. Although there is little evidence of Hurley’s language in unguarded contexts, 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’. 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. The content of Hurley’s ‘abusive’ words towards Mulrunji at the station could be further examined. 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
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Palm Island’. Rather than being reflexive of his status as a white police officer in an Indigenous community and the history of this relationship, 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 using baselessly adverse stereotypes. Hurley incorrectly believed Mulrunji turning limp was a refusal to cooperate, ‘foxing’ and later, that Mulrunji was ‘ready to [sleep]’ and ‘snoring’. Similarly, Leafe thought Mulrunji turned limp because he did not wish to assist police. Hurley had never interacted with Mulrunji before. These misconceptions reflect overgeneralised stereotypes of a lawless, ‘drunken Aboriginal’. Although stereotype alone may not be probative, it can be reinforced by expert anthropological evidence like in Wotton and evidence of the ‘system and the latent or patent racist attitudes that infect it’ such as a Facebook group composed of police officers making racist remarks. Further, reference can be made to RCIADIC’s findings that police interactions with Aboriginal people involve stereotypes of drunkenness and other recommendations that police be trained to recognise dangerous misconceptions associated with unconscious or semi-

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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.
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 243) 138 [65] (Kiefel J); Gama (n 170) 563 (French and Jacobson JJ, Branson J agreeing at 573).
441 RCIADIC National Report (n 47) vol 2 [13.2.28].
rousable persons which have arisen in other deaths in custody. Considering these stereotypes, alongside Hurley’s minimisation of Mulrunji’s injuries in describing considerable swelling as a ‘very small injury’, 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.

1 Arrest Conduct

Article 9’s concern for liberty begins from restraint. The right to liberty, ‘like all rights’ is not an absolute right. 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. If Hurley’s arrest was unlawful, that could instead raise considerations under the lawfulness limb of the right to life. 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’ which entails examining less drastic means of arrest. First, Hurley stated the ends sought of the arrest was to discontinue the

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).
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.\textsuperscript{452} The other stated end sought was Mulrunji needed to be taken into the watch-house ‘for a sleep’.\textsuperscript{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\textsuperscript{454} and Bengaroo already identified Mulrunji.\textsuperscript{455} The latter ends are also problematic because it suggests Mulrunji’s detention was \textit{unrelated} to the offence of public nuisance (and instead concerned public drunkenness), which points towards arbitrariness.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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;\textsuperscript{459} its negative component captures omissions as well.\textsuperscript{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.\textsuperscript{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.\textsuperscript{462} Explanation precedes justification.\textsuperscript{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

\textsuperscript{452} HREOC Submissions to the 2006 Inquest (n 419) [23], [35].
\textsuperscript{453} Ibid [34].
\textsuperscript{454} Cf Wotton (n 20) 440 [1250]–[1251], 446–7 [1281].
\textsuperscript{455} HREOC Submissions to the 2006 Inquest (n 419) [31].
\textsuperscript{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].
\textsuperscript{457} Police Powers and Responsibilities Act 2000 (Qld) ss 209(1), 209(3)(b), 209(4)(b), as at 19 November 2004.
\textsuperscript{458} HREOC Submissions to the 2006 Inquest (n 419) [34].
\textsuperscript{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, \textit{Human Rights and Policing} (Nijhoff, 2\textsuperscript{nd} ed, 2007) 126 <https://doi.org/10.1163/etj.9789004154377.i-514.12>.
\textsuperscript{460} UNHRC General Comment No 36 (n 13) 1 [3]; Pound and Evans (n 316) 88.
\textsuperscript{461} Cf Beth Gaze, ‘The \textit{RDA} after 40 Years: Advancing Equality, or Sliding into Obsolescence?’ (Conference Paper, Australian Human Rights Commission, August 2015) 66, 80.
\textsuperscript{462} Wotton (n 20) 324 [716].
\textsuperscript{463} McCloy (n 400) 231 [130] (Gageler J).
and Leafe] took [Mulrunji] straight to the cell’. However, without properly ascertaining Mulrunji’s condition, Hurley marked ‘no’ on the Watchhouse Custody Register for whether medical treatment or assessment was required.

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’ and, on Hurley’s view, Mulrunji was resigned to going into the cell. Any lingering perception of aggression could be mitigated by conducting a medical assessment through the cell door, deferring to another officer, 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 which was more concerned with ‘maintaining security’ than making active inquiries of the health of detainees. 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. Moreover, Leafe identified no injury because he did not look for one. Finally, in the interval between the discovery of no pulse and the arrival of paramedics, QPS officers made no attempt at cardio-pulmonary resuscitation. Although this was explained by the absence of suitably skilled personnel and necessary equipment and Hurley’s equivocal belief that Mulrunji was ‘deceased’, 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.

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’, the issue of standing should be briefly considered. Provided
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. This is fortified where discrimination has a ‘direct connection’ with the death – a conventional feature of state-inflicted racial violence. Further, anti-discrimination claims are ‘administrative-type interest[s]’ 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.

A few observations can demonstrate the Framework’s wider applicability to other cases involving state-inflicted racial violence, 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. Ian Ward died from heatstroke whilst being transported 360 kilometres between Laverton and Kalgoorlie when outside temperatures were over 40 degrees Celsius. No rest stops or physical welfare checks were conducted, nor air-conditioning used, over the entire four-hour drive. The open-textured inquiry into a racial basis can identify attitudes of disregard and impunity in the lack of concern of officers involved. 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,


480 The Executor of the Estate of Terence Keith Haigh and 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].


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


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.
491 ICCPR (n 10) art 27; ICERD (n 9) art 5(e)(vi); Wotton (n 20) 502 [1518].
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, and Rolfe discharging his handgun three times at close range can be scrutinised under article 6 though questions of self-defence may enter the proportionality analysis. 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.

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

### VI CONCLUSION

Indigenous deaths in custody continue. If the law is to combat discrimination rather than facilitate it, and the *RDA* is to fulfil its promise of being an ‘Act for the Future’, 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...
discrimination. 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.

507 Meade (n 500).
513 ‘Part II of the RDA’ (n 52) 57; Bailey (n 15) 189.