Unearthing Language Rights Protections in the Racial Discrimination Act 1975 *(Cth)*

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Abstract

The *Racial Discrimination Act 1975* (Cth) ('*RDA*') has been ineffective at preventing discrimination based on language. Australian courts have adopted narrow approaches to deny language-based claims by misconstruing the relationship between language and racial discrimination. These approaches portray language as an individual characteristic, subject language rights to proportionality analysis, require the positive existence of a language right, or narrow the scope of rights protected by the *RDA* to exclude language claims. This article argues that these denials have no basis. Historically, the use of language as a proxy for race has been a means of effecting exclusionary policies which fail to defend against racial and linguistic discrimination. Recognition of these dimensions of language supports the deconstruction of the doctrinal arguments which have been deployed to deny protection from racial discrimination in the context of language.

I Introduction

Language is fundamental to the construction of identities — personal, communal, social, cultural, religious and national. Yet the languages of dominant and minority groups are enjoyed to different extents. Increasingly, more dominant languages have encroached upon the right of minority groups to sustain their languages. Assimilationist pressures prevent the use of minority languages in private and public spaces.

In this context, the *Racial Discrimination Act 1975* (Cth) ('*RDA*') provides a possible avenue for redress where acts or laws discriminate against linguistic minorities. The *RDA* gives effect to Australia's obligations assumed under the

Please cite this article as:

Catherine Zhou and William Ruan, 'Unearthing Language Rights Protections in the Racial Discrimination Act 1975 (Cth)' (2024) 46(3) *Sydney Law Review* 293.

DOI: https://doi.org/10.30722/slr.20424

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International Convention on the Elimination of All Forms of Racial Discrimination ('*ICERD*') which, in its preamble, recites the purposes to secure the 'understanding of and respect for the dignity of the human person' and to eliminate racial discrimination.[1] However, although several litigants have argued claims based on differential enjoyment of language rights, Australian courts have generally refused to recognise that linguistic discrimination is a form of racial discrimination that falls within the *RDA*. The justifications for this refusal reflect misconceptions surrounding language which devalue its sociocultural importance and ignore the ongoing effects of injustice on racial and linguistic minorities. This article argues that judicial failures to recognise language protection in the *RDA* are founded on weak premises. By analysing these cases in turn, we contend that the *RDA* can defend against racial and linguistic discrimination, contributing to a conception of language which is more firmly situated in its sociological context.

The article is organised into three main parts. Part II outlines the present threat against minority languages, considering the connections between language, culture and race that have been forged by communities and imposed by colonial structures and the state. Part III considers the context of the *RDA*. It argues that current jurisprudence on language claims under the *RDA* fails to adequately theorise the role of language in racial discrimination. Instead, courts have adopted an approach which fails to recognise the use of language as a proxy for race, relegating language to an individual characteristic which has no collective effects. Claims are also barred by other justifications such as proportionality analysis, the lack of a positive right, the absence of racial reference or 'targeting', and the ineffectiveness of deriving language rights from other rights and freedoms. We argue that each of these justifications is untenable such that the *RDA* has a greater capacity to uphold language rights than is evidenced by its record. Part IV considers arguments against the overbroad operation of the *RDA* where conferral of rights might result in the enjoyment of rights to a greater extent. It concludes that it is nonetheless appropriate to import a beneficial and remedial construction into the *RDA* to address historical injustices, especially when language and race are conceived in collective, contingent capacities.

II The Threat to Language

A *Minority Languages in a Linguistic Market*

The value of language is typically theorised through two lenses which justify its protection under language rights, being rights which protect language-related acts and values.[2] The first lens claims that language preserves cultural identities. Those

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1 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) Preamble paras 5, 10 ('*ICERD*'). For a more detailed explication of the legal interrelationship between the *RDA* and international law, see *Wotton v Queensland [No 5]* (2016) 325 ALR 146, 279–81 [516]–[525] (Mortimer J).

2 Susanna Mancini and Bruno de Witte, 'Language Rights as Cultural Rights: A European Perspective' in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff, 2008) 247, 247. Skutnabb-Kangas and Phillipson have also written on a category of 'linguistic human

identities are both personal and communal.[3] Having full language rights is part of securing the long-term viability of a national minority.[4] The second lens suggests that linguistic pluralism is desirable for enhancing the diversity of society. These justifications are echoed in international legal protections for minority languages. Article 27 of the *International Covenant on Civil and Political Rights* ('*ICCPR*') provides that linguistic minorities 'shall not be denied the right, in community with the other members of their group … to use their own language'.[5] The United Nations Human Rights Committee ('UNHRC') states that art 27 'is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole'.[6] As such, language preserves individual and communal identities,[7] but is also a constitutive force which shapes identities and societal pluralism.[8] Under both conceptions, language is fundamentally connected to the cultural, national and racial identities with which it intersects.

The UNHRC's statement of value captures part of the importance of language. But minority languages must also be understood as existing within a system in which they are continuously under threat. That threat originates in the historical weaponisation of language and race against minority populations. The historical entanglement of language and race recurringly involves the co-extensive construction of both through colonial projects which created racial and linguistic 'others' by privileging the European subject and European languages.[9] These ideologies ascribed colonised subjects with a state of 'languagelessness' in which representations of non-European languages were characterised as simplistic or

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rights' within language rights, being inviolable and inalienable rights 'which are necessary for individuals and groups to live a dignified life': Tove Skutnabb-Kangas and Robert Phillipson, 'Introduction: Establishing Linguistic Human Rights' in Tove Skutnabb-Kangas and Robert Phillipson (eds), *The Handbook of Linguistic Human Rights* (John Wiley & Sons, 2023) 1, 16.

3 Moria Paz, 'The Tower of Babel: Human Rights and the Paradox of Language' (2014) 25(2) *European Journal of International Law* 473, 480, citing *Hernandez v New York*, 500 US 352 (1991). For similar arguments, including poststructuralist perspectives, see Bonny Norton, *Identity and Language Learning: Extending the Conversation* (Multilingual Matters, 2nd ed, 2013); Bonny Norton, 'Language and Identity' in Nancy H Hornberger and Sandra Lee McKay, *Sociolinguistics and Language Education* (Multilingual Matters, 2010) 349; David Block, 'The Rise of Identity in SLA Research, Post Firth and Wagner (1997)' (2007) 91(S1) *Modern Language Journal* 863; Grace Cho, 'The Role of Heritage Language in Social Interactions and Relationships: Reflections from a Minority Language Group' (2000) 24(4) *Bilingual Research Journal* 369.

4 Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford University Press, 2001) 252.

5 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27.

6 Human Rights Committee, *General Comment No 23: Article 27 (Rights of Minorities)*, 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (26 April 1994) [9] ('*General Comment No 23*').

7 Alice Taylor, 'Anti-Discrimination Law As the Protector of Other Rights and Freedoms: The Case of the *Racial Discrimination Act*' (2021) 42(2) *Adelaide Law Review* 405, 416, citing Laura Beacroft, 'Indigenous Language and Language Rights in Australia after the *Mabo (No 2)* Decision: A Poor Report Card' (2017) 23 *James Cook University Law Review* 113, David Smillie, 'Human Nature and Evolution: Language, Culture, and Race' (1996) 19(2) *Journal of Social and Evolutionary Systems* 145 and Philip Riley, *Language, Culture and Identity: An Ethnolinguistic Perspective* (Continuum, 2007).

8 Paz (n 3) 474.

9 Jonathan Rosa and Nelson Flores, 'Unsettling Race and Language: Toward a Raciolinguistic Perspective' (2017) 46(5) *Language in Society* 621, 623.

animalistic modes of illegitimate communication.[10] Further, the privileging of the English language served as a proxy for racial exclusion. In Australia, for example, the White Australia policy was facilitated by tests of linguistic fluency which operated as forms of indirect racial discrimination.[11] Under the policy, the Queensland Parliament mandated a 'dictation test' which 'operate[d] specifically, in fact if not in form, against Asiatic labourers'.[12] The *Immigration Restriction Act 1901* (Cth) enshrined a similar dictation test, which 'except in one or two instances [was] never … applied to Europeans'.[13] The languages of Aboriginal and Torres Strait Islander peoples have also been systematically targeted by decades of bans on Indigenous language use by governments and churches.[14] These policies illustrate how language has been used as a mechanism to facilitate racial discrimination and cultural destruction. Colonial concepts of language and race are interlinked in that both are complicit in effecting exclusion and linguicide.

Language is also an instrument of nationhood. It has been described as 'the crucial criterion of nationality'.[15] In Australia, that nexus is demonstrated by a focus on English language competency in citizenship tests.[16] In this context, the value of minority languages cannot be understood absent their standing in a 'linguistic market'[17] mediated by the means through which states choose to value or devalue them. State formation creates the conditions for 'the constitution of a unified linguistic market, dominated by the official language'.[18] The nature of a linguistic market is such that minority languages are always in tension with dominant languages associated with linguistic capital, power and authority.[19] They are under threat when they do not facilitate the stability of a unified political structure. As such, linguistic exchanges are 'relations of symbolic power in which the power relations between speakers of their respective groups are actualized'.[20] This tension extends to the absence of positive measures: 'the absence of explicit policy … is in itself an

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10 Ibid 624.

11 Phillip Tahmindjis, 'The Law and Indirect Racial Discrimination: Of Square Pegs, Round Holes Babies and Bath Water?' in Race Discrimination Commissioner, *The Racial Discrimination Act: A Review* (Australian Human Rights Commission, December 1995) 101, 102.

12 KH Bailey, 'The Legal Position of Foreigners in Australia' in Norman MacKenzie (ed), *The Legal Status of Aliens in Pacific Countries* (Oxford University Press, 1937) 32, 46.

13 Myra Willard, *History of the White Australia Policy to 1920* (Melbourne University Press, 2nd ed, 1967) 122.

14 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (Report, Australian Human Rights Commission, 2009) 58.

15 EJ Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Cambridge University Press, 2012) 95. For further discussion of language as ideology, including the centralisation of monolingualism in the 'one nation, one language' ideology, see Ingrid Piller, 'Language Ideologies' in Karen Tracy, Cornelia Ilie and Todd Sandel (eds), *The International Encyclopedia of Language and Social Interaction* (John Wiley & Sons, 2015) vol 2, 917.

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

17 Pierre Bourdieu, *Language and Symbolic Power* (Polity Press, 1991) 39.

18 Ibid 45.

19 Pierre Bourdieu, 'The Economics of Linguistic Exchanges' (1977) 16(6) *Social Science Information* 645, 648–53.

20 Bourdieu, *Language and Symbolic Power* (n 17) 37.

act of language policy'.[21] Further, the absence of explicit policy is situated against a baseline of assimilationist pressure. As such, it is a myth that the state can be ethnoculturally 'neutral' without privileging a particular identity or culture.[22] The value of language is not constitutive in a vacuum; it is also preservation against assimilation.

Legal protections internationally have largely failed to intervene where minority languages are under threat, with one exception — courts are more willing to give credence to language rights in the context of preserving political compromises between majority and minority groups. This is illustrated by leading cases in overseas jurisdictions founded on compromises that involve bargains of language. In Canada, the *Canadian Charter of Rights and Freedoms* provides that English and French are the two official languages of Canada 'and have equality of status'.[23] It also grants minority language educational rights, including the right for children of an English or French linguistic minority population to be educated in the first language of their parents.[24] In *Mahe v Alberta*, for example, the Canadian Supreme Court upheld a claim by French-speaking parents that a new school be established with an autonomous French school board due to dissatisfaction with the quality of French-language schools provided by their government.[25] Dickson CJ stated that the purpose of s 23 of the *Canadian Charter* (which enshrines minority language educational rights) is 'to preserve and promote the two official languages of Canada, and their respective cultures'.[26] The section 'places positive obligations on government to alter or develop major institutional structures'.[27] This category of protection does not rely on an identity-constitutive justification for language rights.[28] It also does not afford linguistic protection to other linguistic minorities, and concedes that the English and French are privileged over other linguistic groups by virtue of their special status in Canada.[29] Simultaneously, political compromises can compel linguistic minorities to conform to the terms of a national bargain. In *Mathieu-Mohin v Belgium*, the European Court of Human Rights held that two French-speaking citizens who resided in the Flemish region of Belgium were required to take a parliamentary oath in Dutch to assume their positions in office.[30] That gave effect to a principle by which the institutional system of the Belgian State was designed, being 'to achieve an equilibrium between the Kingdom's various regions and cultural communities by means of a complex system of checks and balances'.[31] These examples evidence how certain national circumstances can extend strong legal protection for minority languages, but only where such protection facilitates the political compromises and negotiations enabling the

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21 Christina Bratt Paulston, 'Language Policies and Language Rights' (1997) 26(1) *Annual Review of Anthropology* 73, 77 (citations omitted).
22 Kymlicka (n 4) 253.
23 *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') s 16(1).
24 Ibid s 23. Legislation was also passed in 2019 relating to respect for Indigenous languages in Canada: see *Indigenous Languages Act*, SC 2019, c 23.
25 *Mahe v Alberta* [1990] 1 SCR 342.
26 Ibid 362.
27 Ibid 365 (Dickson CJ).
28 Paz (n 3) 487.
29 Ibid 489.
30 *Mathieu-Mohin v Belgium* (1988) 10 EHRR 1.
31 Ibid 19 [57].

existence of a unitary nation. The respect afforded to these languages is not in their capacity to be culturally constitutive at an individual or communal level, but in their capacity to facilitate a political structure. There is accordingly a vacuum of language protection in the absence of a political structure that relies on bargains of language, as is evident in Australia.

B *Government Policy*

Within this context, there are varying degrees to which governments can intervene along an axis of pluralism, integration and assimilation.[32] A policy of pluralism may grant linguistic minorities significant latitude in the administration of their own affairs.[33] Integration 'aims at the unity of the various groups of a given society while allowing them to maintain their own characteristics through the adoption of specific measures'.[34] Some governments may also attempt active efforts at improving intergroup relations, including increasing representation of members of various minority groups in civic institutions and emphasising cultural exchange in education.[35] Conversely, other policy positions tend to de-emphasise intergroup differences.[36] If pursued through mechanisms of assimilation, these policies effect enforced homogeneity in which minority groups are forced to abandon their traditions, culture and language in favour of majoritarian norms.[37] A desire for unity through assimilation can perversely undermine intergroup relationships. When groups feel alienated or are victims of discrimination, they may feel that they do not identify with the nation and that they cannot participate in public life.[38] This desire also reveals an ideological assumption that the language practices of racialised subjects are unfit for legitimate social participation.[39] Simultaneously, the law tends to favour and reinforce policies that subordinate language protection — for example, through emphasising the importance of learning the English language rather than protecting the longevity of minority languages.[40] Those practices are evident in Australia's historical White Australia policy and the present English language requirements of the Australian citizenship test.[41]

Another axis through which these policy orientations are theorised spans tolerance and promotion. Kloss distinguishes between 'tolerance-oriented' and 'promotion-oriented' minority rights. Tolerance-oriented minority rights are laws and measures which 'provide for the minorities and which, if need be, protect for the minorities the right to cultivate their language in a private sphere, namely, in the

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32 Francesco Capotorti, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc E/CN.4/Sub.2/384/Rev.1 (1979) 50 [293].

33 Ibid.

34 Ibid.

35 Ibid 49–50 [292].

36 Ibid 45 [267].

37 Ibid 50 [293].

38 Ibid 46 [272].

39 Rosa and Flores (n 9) 627.

40 In the European context, see Paz (n 3) 483. Paz notes that the European Court of Human Rights only requires language protection insofar as it is needed for understanding.

41 See above nn 15–20 and accompanying text.

family and in private organizations'.[42] It may also involve privileging a majority language in the public sphere — through, for example, subsidising public schools that use the majority language.[43] Conversely, promotion-oriented rights 'regulate how public institutions may use and cultivate the languages and cultures of the minorities'.[44] While tolerance-oriented rights derive from formal equality, promotion-oriented rights can only be derived from material equality.[45]

Increasingly, however, these axes have begun to represent a divide between the use of minority languages in private and public life. Approaches which emphasise unity and tolerance may accept minority languages in private spaces but actively impede the use of minority languages in public life. International materials discuss language rights as operating within linguistic communities but not beyond them. In *General Comment No 23*, the UNHRC states that the relevant right is '[t]he right of individuals belonging to a linguistic minority to use their language among themselves'.[46] Over time, that qualification has manifested in human rights jurisprudence as a mode of exclusion from the public sphere. The distinction between the right to use a language internally and the absence of a right to use it externally has been mapped onto the distinction between private and public life. For example, in *Ballantyne v Canada*, a leading case on language rights under the *ICCPR*, the UNHRC considered whether a Quebec law mandating the use of French in advertising was a violation of the rights of individuals seeking to advertise in English, including the right to freedom of expression.[47] The UNHRC determined that '[a] State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice'.[48] In *Hamzy v Commissioner of Corrective Services* at first instance, Bellew J stated that the corollary of this is that a state 'may exclude the freedom to express oneself in a language of one's choice within spheres of what might be regarded as "public life"'.[49] The enforcement of a monolingual public life is capable of marginalising linguistic minorities such that their use of language is relegated to the private domain. This marginalisation has downstream effects on the capacity of linguistic minorities to partake in domains such as schooling, work and religion — all of which are facilitated through the medium of language.[50] In Australia, courts have reinforced this divide and refused to recognise both the independent importance of minority languages, and the discriminatory effects of a monolingual public life. That position is discussed in the next Part in relation to the *RDA*.

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42 Heinz Kloss, *The American Bilingual Tradition* (Center for Applied Linguistics, 1998) 20.
43 Paz (n 3) 494.
44 Kloss (n 42) 21.
45 Ibid.
46 *General Comment No 23* (n 6) 3 [5.3].
47 Human Rights Committee, *Views: Communications Nos 359/1989 and 385/1989*, 47th sess, UN Doc CCPR/C/47/D/359/1989 ('*Ballantyne v Canada*').
48 Ibid [11.4].
49 *Hamzy v Commissioner of Corrective Services* [2020] NSWSC 414, [149] (Bellew J) ('*Hamzy Trial*'). See below Part III for a more detailed analysis of this case and its appeal.
50 Alastair Pennycook, *Language as a Local Practice* (Routledge, 2010) 26.

III The Relationship between Language and the *Racial Discrimination Act 1975* (Cth)

Claims to language rights have primarily been litigated through s 10 of the *RDA*. Section 10 provides a right to equality before the law. If, due to the operation of a Commonwealth or state or territory law,

> persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, [then those persons] shall, by force of this section, enjoy that right to the same extent …

As such, s 10 is a provision that is uniquely directed toward the operation and effect of *legislation*, rather than individual acts.[51] Section 10 also does not require the complainant to show that a law expressly makes a distinction based on race. Rather, it is 'directed to the discriminatory operation and effect of the legislation'.[52] As Hayne J drew attention to in *Maloney v The Queen*, 's 10(1) does not use the word "discriminatory" or any cognate expression'.[53] The focus is 'on the *enjoyment* of rights by some but not by others'.[54] What flows from this focus is that s 10 applies to laws that are facially neutral but have disparate impacts on different racial groups. Section 10 is therefore well suited to target not only laws that explicitly privilege the English language — such as the laws considered in the *Hamzy* appeal[55] — but also laws that cause a disparate impact on linguistic minorities as a result of unofficial preferences for English in public life — such as the impugned laws in *Nguyen v Refugee Review Tribunal*,[56] in *Sahak v Minister for Immigration and Multicultural Affairs*[57] and in *Munkara v Bencsevich*.[58]

An incompatibility with s 10 may have substantial consequences. For instance, where the incompatible legislation is a state law that expresses a limitation, that law would be rendered inoperative by s 109 of the *Australian Constitution*.[59] For this reason, the *RDA* has been described as 'almost constitutional'.[60] On the

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51 Cf *Racial Discrimination Act 1975* (Cth) ss 9, 11–17 ('*RDA*'); *Age Discrimination Act 2004* (Cth) ss 18–32; *Disability Discrimination Act 1992* (Cth) ss 15–21, 22–30; *Sex Discrimination Act 1984* (Cth) ss 15–27.

52 *Maloney v The Queen* (2013) 252 CLR 168, 179–80 [11] (French CJ) (citations omitted) ('*Maloney*'). Ms Maloney was charged and convicted under s 168B of the *Liquor Act 1992* (Qld) for possession of more than the prescribed quantity of liquor in a restricted area. She appealed her conviction on the basis that the impugned provisions — which restricted the possession of liquor in Palm Island, an area whose population was 97% constituted by Aboriginal people — were inconsistent with s 10 of the *RDA*, could not be rescued as special measures pursuant to s 8 of the *RDA* and were therefore invalid. The High Court found that the impugned provisions were special measures and dismissed her appeal.

53 Ibid 200 [65].

54 Ibid (emphasis in original).

55 *Hamzy v Commissioner of Corrective Services (NSW)* (2022) 107 NSWLR 544 ('*Hamzy Appeal*').

56 *Nguyen v Refugee Review Tribunal* (1997) 74 FCR 311 ('*Nguyen*').

57 *Sahak v Minister for Immigration and Multicultural Affairs* (2002) 123 FCR 514 ('*Sahak*').

58 *Munkara v Bencsevich* [2018] NTCA 4 ('*Munkara*').

59 See, eg, *Gerhardy v Brown* (1985) 159 CLR 70, 98–9 (Mason J) ('*Gerhardy*'). See generally Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 42–3.

60 Alice Taylor, 'The "Constitutional" Value of the *Racial Discrimination Act 1975* (Cth)' (2021) 43(4) *Sydney Law Review* 519, 519.

other hand, where the incompatible legislation is a law that confers a relevant positive right but does not do so universally, s 10 will extend the conferral of that right so that it is not unequally enjoyed by people of different races.[61]

Section 9 of the *RDA* has also been used to litigate language rights claims, though its operation is more limited. Section 9(1) makes unlawful any acts of 'direct' racial discrimination that have the purpose or effect of 'nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom …' Section 9(1A) extends these protections to 'indirect' racial discrimination in circumstances where a person 'requires another person to comply with a term, condition or requirement which is not reasonable' and the other person 'does not or cannot comply'.

While the link between racial discrimination and language has been recognised,[62] claims to protection against racialised linguistic discrimination made pursuant to s 10 (and s 9) have been entirely unsuccessful.[63] In contradistinction to the existing case law, this Part argues that the *RDA* has the potential to be a bulwark against policies of language assimilation and a rare mechanism that supports the advancement of promotion-oriented language rights. This potential exists despite the evidence that courts have so far resisted recognising the force and breadth of the *RDA*. This resistance has manifested itself in several approaches evident in the case law that have been or could be used to deny language rights claims: first, that language is a personal characteristic that is not linked to race; second, that even if language is linked to race, a law (or act) cannot be impugned if it is proportionate to a legitimate end; third, that a right must positively be protected for members of other races before s 10 is engaged in relation to that right; fourth, that a law must target or single out a race before it engages s 10; and finally, that relevant rights must be characterised or identified in an exceedingly narrow way.

In our view, these approaches are unsupportable, even within the current framework of the *RDA*. They cut against 'the large objects which the *RDA* evidently pursues and the generality of the words which it uses'.[64] In the following sections, we evaluate each of these approaches in detail. Our analysis centres on s 10, but we also refer to s 9 where appropriate given the similarities between the two sections and how reasoning about one overlaps with the other. We find that the approaches are inconsistent with the text and purpose of the *RDA*. Only once they fall away can the *RDA* begin to provide adequate protection to language rights.

A *Language Ability as Personal Characteristic*

Courts have recurringly refused to recognise a link between language and race so as to enliven ss 9 and 10 of the *RDA*. In *Sahak*, Mr Sahak challenged s 478 of the

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61 See, eg, *Gerhardy* (n 59) 98 (Mason J).

62 *Hamzy Appeal* (n 55) 571–2 [79] (Basten JA).

63 It is worth acknowledging that very few *RDA* claims reach the courts, and decisions involving linguistic discrimination under the *RDA* are a small subset of these claims: we refer here to the cases of *Nguyen* (n 56), *Hamzy Appeal* (n 55), *Sahak* (n 57), *Munkara* (n 58) and *Iliafi v Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86 ('*Iliafi*'). None of these cases were binding on any other of these cases, as they were either at the same level, or in a different jurisdiction.

64 *Maloney* (n 52) 201 [68] (Hayne J).

Migration Act 1958 (Cth) which prescribed a 28-day period in which an application for review of a decision of the Refugee Review Tribunal could be lodged.[65] Mr Sahak argued that the effect of s 478 is that persons of Syrian and Afghani origin enjoy only a limited right to equality before the law, including access to the courts and their judicial review procedures, because an attribute or characteristic of persons of those national origins is that English is not spoken or written, or is a secondary language. Goldberg and Hely JJ held that linguistic discrimination 'is not based on race, colour, descent or national or ethnic origin, but rather on the individual personal circumstances of each applicant'.[66] These circumstances may include 'if their comprehension of the English language is sufficient, or if they have access to friends or professional interpreters so as to overcome the language barrier'.[67] North J disagreed, contending that Goldberg and Hely JJ's view 'appears … to adopt a verbal formula which avoids the real and practical discrimination which flows as a result of the operation of s 478'.[68] North J analogised[69] the facts to the decision of the United States Supreme Court in *Griggs v Duke Power Co*, in which an employer's requirement that applicants for employment pass an intelligence test or hold a school diploma was unlawful because it operated to disqualify African American applicants at a substantially higher rate than white applicants.[70] That case articulated the importance of defending against the disparate impacts of facially neutral policies.

Subsequent claims have been denied through the reasoning of Goldberg and Hely JJ in *Sahak*, despite appellants invoking the reasoning of North J.[71] In *Munkara*, the appellant challenged the validity of parts of the *Alcohol Protection Orders Act 2013* (NT) ('*APO Act*') on the basis that they contravened the *RDA*. Sections 9 and 11 of the *APO Act* provide that a person who has been issued with an alcohol protection order may apply for reconsideration by a senior officer or to a Local Court for a review of the senior officer's decision. The appellant contended that the 'poorer English language literacy of indigenous Territorians compared with non-indigenous Territorians' meant that the law impermissibly imposed a disproportionate burden on Indigenous Territorians.[72] Blokland J held that there was no such basis for invalidating the law, citing the finding in *Sahak* that any difficulty in completing and filing applications was due to personal characteristics and not racial characteristics.[73] Blokland J went on to state that '[t]he reasoning of the majority in *Sahak* is not contrary to the established authority concerning the application of s 10(1) of the *Racial Discrimination Act*'.[74]

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65 *Sahak* (n 57) 517 [10] (Goldberg and Hely JJ).
66 Ibid 525 [45].
67 Ibid.
68 Ibid 516 [6]. However, North J ultimately agreed with Goldberg and Hely JJ's conclusion that the appeals should be dismissed, because 'the only limitation is that the appellants may be confined to instituting proceedings in the High Court rather than having available the opportunity to commence proceedings in both the High Court and the Federal Court': at 516 [3].
69 Ibid 516 [8].
70 *Griggs v Duke Power Co*, 401 US 424 (1971).
71 See, eg, *Munkara* (n 58) [118] (Blokland J).
72 Ibid [14] (Kelly J).
73 Ibid [117].
74 Ibid [118].

Similarly, in *Hamzy* at first instance the plaintiff, who was serving a sentence of full-time imprisonment,[75] submitted that he had 'the right to speak to members of his family in the Arabic language when they visit[ed] him in custody' pursuant to ss 9 and 10 of the *RDA*.[76] Clause 101(1) of the *Crimes (Administration of Sentences) Regulation 2004* (NSW) impaired this right by providing that, during a visit to an extreme high risk restricted inmate, 'all communications must be conducted in English or another language approved by the Commissioner'. At first instance, Bellew J rejected this argument[77] stating that 'there will be no breach of s 10(1) if a person does not enjoy a human right, or does so to a lesser extent, because of [their] individual personal circumstances'.[78] In his Honour's view, the fact that the plaintiff was required to speak English arose 'from the personal circumstances of his being in custody'.[79] These cases indicate that courts are willing to individualise language at multiple stages of analysis. First, as in *Sahak* and *Munkara*, language itself may be treated as an individual characteristic which has no connection to race or national origin. Second, in *Hamzy* at first instance the scope of 'personal circumstances' was extended to a context in which a language was mandated.

After *Hamzy* was appealed to the New South Wales Supreme Court of Appeal, Basten JA preferred to hold that a constraint on some languages 'will adversely impact on some groups in a multicultural society' and therefore will engage the operation of s 9 or s 10 of the *RDA*.[80] In reaching this conclusion, Basten JA expressly endorsed the reasoning of North J in *Sahak*.[81] This approach should be preferred. It should also be taken as a refutation of both senses in which language was individualised in previous jurisprudence, such that language claims under the *RDA* should not be defeated on this basis. First, it recognises an undeniable collective dimension to the nature of language. As discussed in Part II above, language constraints necessarily have disproportionate impacts on persons of certain racial and national origins. Accepting an association between language and race does not essentialise that association. Rather, it recognises that this association has historically been constructed — by communities, who preserve their languages to preserve their own identities and cultures, and by discriminatory policies, which have used language as a proxy for race. Second, it refutes Bellew J's concept of 'personal circumstances' as context. Basten JA observed that Bellew J's description of the 'personal circumstances of [Mr Hamzy] being in custody' does no more than describe 'the area of operation of the restriction on communication'.[82] The relevant comparison in racial discrimination must be whether persons within the same context enjoy rights to different degrees. The context in which a law operates does not justify its unequal application within that context.

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75 *Hamzy Trial* (n 49) [1] (Bellew J). The case was appealed unsuccessfully in *Hamzy Appeal* (n 55).

76 Ibid [125] (Bellew J).

77 Ibid [159]–[166].

78 Ibid [165], citing *Sahak* (n 57) 525 [45] (Goldberg and Hely JJ).

79 *Hamzy Trial* (n 49) [165].

80 *Hamzy Appeal* (n 55) 574 [89]. His Honour nonetheless rejected the appeal because he considered the relevant issue to be whether s 9(1A) was engaged, a question which was not raised in the trial or on appeal: at 566 [63].

81 Ibid 554 [27]–[28].

82 Ibid 568 [68]. See also Alexandra Grey, 'Lawful Limits on Freedom of Expression for Private Communications "in Public Life"' (2023) 12(2) *Cambridge International Law Journal* 328, 330.

B *Language and Proportionality*

Courts have imported proportionality in assessing ss 9 and 10 claims in two ways: by reading proportionality into the operation of s 10, and by constraining the ambit of rights which engage ss 9 and 10 by reference to proportionality.[83] While the High Court did not explicitly identify these plausibly separate approaches, it decisively rejected both approaches to proportionality analysis across separate judgments in *Maloney*. Though these approaches continue to be used to deny language rights claims, they are unsustainable.

The former approach of reading proportionality into the operation of s 10 is arguably evident in the reasoning of Basten JA in the *Hamzy* appeal. His Honour concluded that whether an act constitutes unlawful discrimination 'will depend on whether it has a legitimate purpose which is pursued by means which are not unreasonable, in the sense that the mechanism … is proportionate to the legitimate purpose'.[84] A similar approach was adopted in *Nguyen*. In that case, the appellant contended that he was 'less able to enjoy the right to be notified of the Department [of Immigration and Ethnic Affairs]'s decision than a person of another race who could understand English'.[85] Tamberlin J held that the use of English as a de facto national language could not be said to be discriminatory.[86] In his view, the use of English in official correspondence is 'reasonable and appropriate', and any other approach would be 'impractical and inefficient'.[87]

Several of the judgments in *Maloney* explicitly rejected the idea of importing notions of proportionality to assess claims of inconsistency with s 10 otherwise than through s 8. Hayne J (with whom Crennan J agreed) found that '[s]ection 10 does not say that persons of a particular race may enjoy a right to a more limited extent … if that difference is justifiable or proportionate to a legitimate end'.[88] Kiefel J stated that there is no foundation for proportionality analysis in the terms of s 10. In her view, '[n]othing in s 10 requires or permits a justification for a legal restriction on a human right or fundamental freedom'.[89] Rather, '[i]t is left to s 8 to test whether a law is a special measure to which s 10 does not apply'.[90] Bell J formed a similar view, stating that she '[did] not consider the application of s 10(1) to be subject to a test of proportionality'.[91] While Gageler J indicated that proportionality may be relevant to analysis in s 10,[92] his Honour ultimately concluded that proportionality

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83 Grey (n 82) refers to another way in which proportionality may be relevant: as a requirement for 'Australian federal laws that incorporate international conventions … because such laws rely on the "purposive" legislative power in s 51(xxix) of the *Australian Constitution*': at 334. However, this constitutional test of proportionality is a question of whether the *RDA* is proportional in giving effect to the *ICERD* (n 1). We do not consider this to be a live legal question and to the authors' best knowledge it has never been tested by any court.

84 *Hamzy Appeal* (n 55) 574 [90]. Leeming JA, with whom Bathurst CJ agreed, took a different approach: see below Part III(C).

85 *Nguyen* (n 56) 316 (Tamberlin J).

86 Ibid 319.

87 Ibid.

88 *Maloney* (n 52) 202 [68] (Hayne J, Crennan J agreeing at 213 [112]) (citations omitted).

89 Ibid 232 [167].

90 Ibid.

91 Ibid 241 [197].

92 Ibid 296 [342].

was effected through s 8 of the *RDA*. The application of s 10 to a law that 'does not meet the requirements of a special measure, cannot be avoided by showing that the criteria the law adopts are nevertheless proportionate or reasonably necessary to the pursuit of a legitimate aim'.[93] It is difficult to see how proportionality may be relevant to a s 10 analysis. Section 8 of the *RDA* provides that special measures are excepted from s 10 of the *RDA*. Section 8 imports art 1(4) of the *ICERD* which states that special measures 'taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary … shall not be deemed racial discrimination'. This forms a textual basis for proportionality that is absent from the terms of s 10. Because s 10 encompasses laws which are necessarily detrimental and deny or restrict a human right or fundamental freedom, there is no capacity for it to be excepted.

The latter approach of constraining the ambit of rights by reference to proportionality can be found in the judgment of Chesterman JA in the Queensland Court of Appeal decision in *R v Maloney*.[94] His Honour quoted the observation in *Bropho v Western Australia* that 'it has long been recognised in human rights jurisprudence that all rights in a democratic society must be balanced against other competing rights and values',[95] and concluded that

> reasonable and legitimate [impositions on the right to property] do not have the effect that the human right and fundamental freedom recognised by Art 5(d)(v) [of the *ICERD*] have been infringed. [Therefore, s] 10 of the *RD Act* is not engaged.[96]

The approach holds that if the relevant right is not infringed in the first place because the limit placed on the right by the law is proportional, s 10 is never engaged. French CJ directly addressed this point in the High Court decision in *Maloney*, finding that it 'diminishes, if it does not render otiose, the particular and limited exemption for operational discrimination provided by the special measures provisions of the *ICERD*'.[97] Subsequently, in *Iliafi v Church of Jesus Christ of Latter-Day Saints Australia*, the applicant relied on freedom of expression as the right which engaged s 9.[98] In obiter, Kenny J appeared to suggest this approach in noting that 'the right to freedom of expression engages a sophisticated jurisprudential analysis' and, by reference to provisions of the *ICCPR* and the jurisprudence of the European Court of Human Rights, stating that the 'right to freedom of expression is in and of itself limited … by measures … proportionately designed'.[99] Her Honour criticised the applicant's submission on the basis that it 'did not invoke, involve or depend on any aspect of th[is] jurisprudential analysis'.[100]

This latter approach may reflect a confusion in how the *RDA* is understood. The human rights jurisprudence relied upon in the foregoing cases and formalised in

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93 Ibid 298 [348].
94 *R v Maloney* [2013] 1 Qd R 32.
95 Ibid 38 [20], quoting *Bropho v Western Australia* (2008) 169 FCR 59, 83 [81] (Ryan, Moore and Tamberlin JJ).
96 *R v Maloney* (n 94) 62 [99].
97 *Maloney* (n 52) 191 [39].
98 *Iliafi* (n 63) 111 [87] (Kenny J).
99 Ibid 112 [92].
100 Ibid 112 [93].

international instruments takes those rights as freestanding rights. The relevant question there is whether the limitations imposed on those rights can be justified. Such a limitation on the rights themselves can be justified so long as the limitation is reasonably necessary to achieve a legitimate end. On the other hand, the *RDA* is concerned with the *differential* enjoyment of those human rights. The *RDA* only permits the causing of that differential enjoyment in very limited circumstances. For acts, the circumstances are given by 9(1A) — when a term, condition or requirement that is imposed via an act of indirect discrimination is reasonable. For laws, as noted above, s 8 carves out the only exception. To limit the breadth of the human rights to which the *RDA* is directed by reference to human rights jurisprudence rather than the limited circumstances prescribed by ss 8 and 9(1A) is to mix the two different contexts in which those rights are protected. The statements of Southwood J in *Blackwell v Bara* are apposite.[101] His Honour noted that although international law

> does not recognise an unqualified right to liberty [this] does not mean that an interference with personal liberty, which is otherwise a valid interference, will be valid if it directly limits the right to personal liberty of the persons of one race to a greater extent than the rest of the population.[102]

C *Positive Existence of a Right*

Leeming JA, with whom Bathurst CJ agreed, did not rely on proportionality to dismiss the s 10 claim in the *Hamzy* appeal. Instead, he did so on the basis that there 'was no other law which conferred a right enjoyed by persons of another race, colour or national or ethnic origin which, by dint of s 10, could be relied upon by the appellant'.[103]

To require the affirmative existence of a right that applies to members of another race before s 10 is engaged would risk rendering the right which it protects — equality under the law — theoretical and illusory. At the very least, it would significantly narrow the scope of its operation. The fundamental human rights under s 10(2) are often not protected under Australian law; nor are the particular manifestations of those rights that are the subject of a s 10 analysis. In New South Wales (the jurisdiction in *Hamzy*), there is no law that protects the right to speak in the language of one's origin, which was the right raised by the appellant. Nor is there a law that protects the broader right to freedom of expression other than where that right overlaps with the implied freedom of political communication. The conclusion reached by Leeming JA was that a law which suppressed those rights for some races but not others will still be consistent with s 10 as long as those rights are not explicitly protected. The application of this principle to the denial of a prisoner's ability to speak to their family in their mother tongue is sufficiently unsound as to raise doubts as to the correctness of this approach. Under this approach, a hypothetical New South Wales law that criminalised the use of a language in circumstances that were not otherwise protected by the implied freedom of political communication, while undeniably racially discriminatory, would not be inconsistent with s 10.

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101 *Blackwell v Bara* (2022) 364 FLR 381.
102 Ibid 408 [82].
103 *Hamzy Appeal* (n 55) 615–16 [274].

There are language rights cases where the criterion imposed by Leeming JA in *Hamzy* of the existence of a positive right may seem more straightforward to fulfil. In *Sahak*, the relevant human right was the right to access the courts.[104] That human right was manifested in a right to judicial review which was granted in a statute.[105] *Nguyen* also concerned a right that was referable to statute.[106] But these form only a part of the universe of language rights cases. Many will concern circumstances where the right to use a language in a particular context is denied and where there is no explicit conferral of the relevant right. But even where the relevant right is explicitly granted, a narrow construal of that right might still see it fall outside this *Hamzy* criterion.

Given this criterion would severely curtail the operation of s 10, it is unsurprising that doubts were raised about it in *Fisher v Commonwealth*.[107] *Fisher* concerned a challenge to the *Social Security Act 1991* (Cth) ('*SSA*') by an Aboriginal man.[108] He alleged that the provision of the age pension under the *SSA*, which begins at age 67, was inconsistent with s 10 of the *RDA* because the shorter life expectancy of Aboriginal men compared with other Australian men meant that they received the age pension for fewer years and their right to social security was therefore differentially impaired.[109] Though the Full Federal Court dismissed the appeal, it questioned whether 'a particular law giving effect to the right needs to exist, in order for a law curtailing its enjoyment by members of a particular race to engage s 10(1)'.[110] Instead, the Court considered that if the rights burdened in *Hamzy* were a kind of right protected by art 5 of the *ICERD*, they would be rights enjoyed by persons in Australia generally because 'the common law permits that which is not prohibited'.[111] This is the better view. As French CJ[112] and Gageler J[113] reiterated in *Maloney*, the rights which engage s 10 are not limited to the legal rights enforceable under domestic law. It would be contrary to the purpose of the *RDA* and s 10 which is directed to the differential enjoyment of 'human rights' to require an applicant to point to a domestic law conferring that legal right on members of other races when the practical effect of a law is to cause the differential enjoyment of human rights. Nothing in the text of s 10 suggests that such a limitation should exist, and it would be contrary to the rule that beneficial and remedial legislation is to be given a liberal construction.[114]

D *Referring to or Targeting Race*

Other judges have expressed concerns that an overbroad interpretation of the *RDA* would capture general laws with no intention to refer to or target a particular race. In *Maloney*, Bell J posed a hypothetical planning law that required coastal buildings

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104 *Sahak* (n 57) 517 [10] (Goldberg and Hely JJ).
105 Ibid 524 [39]–[41] (Goldberg and Hely JJ).
106 *Nguyen* (n 56) 319 (Tamberlin J).
107 *Fisher v Commonwealth* (2023) 298 FCR 543 ('*Fisher*').
108 Ibid 546 [4] (the Court).
109 Ibid.
110 Ibid 568 [84] (the Court).
111 Ibid (citations omitted).
112 *Maloney* (n 52) 178 [9].
113 Ibid 280 [300].
114 *IW v City of Perth* (1997) 191 CLR 1, 12 (Brennan CJ and McHugh J).

to meet extreme-weather specifications. Her Honour asked whether s 10(1) would invalidate the law if the 'overwhelming majority of building owners affected by the law [were] members of a particular race'.[115] Without definitively answering the question, her Honour distinguished the laws in *Maloney* from this scenario on the basis that they 'unarguably target Aboriginal persons'.[116] The judgment of Mitchell AJA in *Athwal v Queensland* followed a similar line of reasoning but raised the idea that the impugned law should target race to a threshold requirement.[117] In *Athwal*, the impugned law prohibited the carrying of knives in schools. For many Sikhs, the carrying of a knife is a matter of religious obligation. The appellant argued that the law therefore limited the right of Sikhs to freedom of movement. Mitchell AJA considered that s 10 would not apply to a 'general law [which] prohibits certain conduct by all members of the community, even where that conduct may be the subject of religious belief only by persons of a particular ethnic origin'.[118] His Honour only allowed the appeal because the law was subject to several reasonable excuses, and the reasonable excuse of possessing a knife for a genuine religious purpose was specifically excluded, which 'effectively single[d] out Sikhs for differential treatment'.[119]

Often, no race is being expressly targeted by the laws that deny people their language rights. Both laws that impose an English requirement and laws that entrench racial inequality through a background assumption of English use and understanding, such as laws which provide for a limited time for an appeal, are general laws that do not single out a particular group for differential treatment.

There is an argument that it would be unworkable for s 10 to be engaged by *any* general law that in its practical operation causes differential impacts on the rights of different races. Many laws may, as in the planning law scenario given by Bell J, cause a disparate impact in an accidental and limited way unconnected to race, and to construe s 10 to be engaged by such laws may go beyond the purpose of ensuring equality before the law. The literal meaning of s 10 might therefore have to be tempered by some further limit to carve from its ambit cases where any differential impact is accidental, small and has no relationship with race. One way to put the question would be when a differential impact caused by a law becomes 'adverse impact discrimination'[120] or, more precisely, a 'section 10 adverse impact' given the 'difficulties with casting s 10(1) of the Act as an anti-discrimination provision'.[121]

However, in the context of language, we make two points. First, differential treatment through the medium of language generally does not arise in an accidental way unconnected to race. This may be hard to identify when the differential treatment is part of the construction of Australian nationhood. Some of the laws which effect this differential treatment may be described as making 'no reference,

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115 *Maloney* (n 52) 244 [203].
116 Ibid 244 [204].
117 *Athwal v Queensland* (2023) 379 FLR 92, 117 [113] ('*Athwal Appeal*').
118 Ibid 117 [109].
119 Ibid 117–8 [113].
120 See *Maloney* (n 52) 285 [308] (Gageler J); *Fraser v A-G (Canada)* [2020] 3 SCR 113, 115 (Abella J for Wagner CJ, Moldaver, Karakatsanis, Martin and Kasirer JJ).
121 *Athwal Appeal* (n 117) 102 [33] (Dalton JA).

direct or indirect, to race, ethnicity, colour or nationality'.[122] But, as we have shown, the racialisation of language in Australia has been no accident. As described in Part II(A) above, the privileging of the English language through both explicit and implicit requirements historically served policies of racial exclusion; today, they marginalise minority groups from public life. The impugned law in *Munkara*, which provided for an exceptionally short period of three days to apply for a reconsideration of a decision, will limit the ability of non-English speaking minorities to make such an application. It does so because the decisions are made in English and the application must be made in English, and that is the case notwithstanding the lack of any explicit legal requirements saying so, because racially exclusionary and assimilationist policies have constructed English as the de facto language of Australia.

Second, while these laws may not 'single out' particular racial groups, that is not the touchstone to be used under s 10. There is no requirement of discriminatory intent.[123] As a matter of authority, Bell J hypothesised in *Maloney* that the planning law scenario would not engage s 10 because any limitation would have 'no connection to race',[124] an idea that was also taken up in *Fisher*.[125] Gageler J preferred the touchstone to be whether the differential enjoyment was 'inconsistent with persons of those two races being accorded equal dignity and respect'.[126] In any case, while the law on this question may still be developing, s 10 can undoubtedly apply to laws that do not 'inarguably target' a racial group but that simply '[treat] equally things that are unequal'.[127] Many laws that impinge on language rights might fall on the right side of a discriminatory intent test but should and would fall on the wrong side of s 10.

E *Rights Categorisation and Characterisation*

Once a relevant human right has been identified, the question turns to how the particular incident of that right should be characterised in the assessment of whether its enjoyment is limited. This is a complex issue upon which *RDA* cases have often turned.[128] The complexity arises from the fact that there are many ways to characterise a right. In practice, the process of characterisation is often unprincipled and can be engineered to deny a claim. In the first-instance decision of *Athwal*, Brown J characterised the rights to be the 'rights to religious freedom and freedom of movement, while wearing a knife as an article of faith in a school'.[129] Notwithstanding the fact that Sikhs are the only ethno-religious group whose adherents must wear knives as an article of faith, the rights so characterised are enjoyed in principle equally by members of all races. A similar characterisation could have been an alternative means to deny the claim in the *Hamzy* appeal: the

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122 *Nguyen* (n 56) 319 (Tamberlin J).

123 See Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 280. See generally Gaze and Smith (n 59) 54.

124 *Maloney* (n 52) 244 [204].

125 *Fisher* (n 107) 582–3 [132] (the Court).

126 *Maloney* (n 52) 294 [335].

127 *Athwal Appeal* (n 117) 101 [30] (Dalton JA), quoting *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 478 (Gaudron and McHugh JJ).

128 See, eg, *Maloney* (n 52) 228–9 [154]–[157] (Kiefel J).

129 *Athwal v Queensland* (2022) 372 FLR 291, 306 [67] (citations omitted).

right to freedom of expression while speaking English in prison communications is equally enjoyed by all. Unsurprisingly, this approach to characterisation was criticised in the *Athwal* appeal.[130] Dalton JA re-iterated the idea that s 10 is concerned with broad rights and observed that the approach taken by Brown J meant that 's 10 could not operate as it was intended' because the characterisation incorporated 'into the definition of the relevant right the attribute fastened onto by the impugned legislative provision'.[131] It would therefore be 'impossible to compare Sikhs' enjoyment of the defined right and the enjoyment of others'.[132] His Honour preferred characterising the rights at a high level of generality as the 'right to religious freedom and the right to freedom of movement'.[133]

The approach of Dalton JA has much to recommend it. As his Honour observed, it is consistent with general discrimination law[134] and forecloses a self-defeating characterisation of the right. But while it applies easily to laws that impose a limitation, there remain difficulties with laws that grant a right because of a tendency to consider *what* right is really being granted. In *Fisher*, the Court bypassed a high level of generality in rights characterisation in favour of characterising the right by reference to the statute that purported to grant the right in practice.[135] The question before the Court was whether the pension age was inconsistent with s 10 because Indigenous male Australians enjoyed on average significantly fewer years on the age pension compared to males of other races due to a shorter lifespan.[136] The relevant s 10(2) right was identified as the right to social security.[137] The Court observed that '[c]onsideration for the purpose of s 10(1) of the extent to which people of different races in Australia enjoy the right to social security involves, primarily, analysis of how the *SSA* applies to them'[138] and concluded that the relevant right was the 'right to a level of income support, covering the period from when a person reaches "retirement age" until death, however long that period might be'.[139] There was no differential enjoyment of the right framed in these terms.[140] If contestation had centred on this issue in the time limit cases of *Sahak* or *Munkara*, those claims could have been dismissed in a similar way. The rights could be characterised as 'the right to appeal a decision within the timeframe specified in the law, however long it takes for a person to understand the original decision and consider an appeal'.

Due in part to these difficulties, Taylor has argued for '[placing] less emphasis on interrogating the nature of the rights involved'[141] and for an approach to the *RDA* that instead considers whether the 'discrimination complained of

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130 *Athwal Appeal* (n 117) 95–6 [10]–[11] (Dalton JA), 118–9 [118] (Mitchell AJA).
131 Ibid 95–6 [11].
132 Ibid.
133 Ibid 95 [5].
134 See *Addy v Federal Commissioner of Taxation* (2021) 273 CLR 613, 631 [30] (Kiefel CJ, Gageler, Gordon, Edelman and Gleeson JJ).
135 *Fisher* (n 107) 575–6 [107] (the Court).
136 Ibid 546–7 [6] (Mortimer CJ, Katzmann, Charlesworth, Abraham and Kennett JJ).
137 Ibid 575 [105].
138 Ibid 577 [111].
139 Ibid 582 [130].
140 Ibid 582 [131].
141 Taylor (n 7) 427.

"touch[ed] the enjoyment" of another protected right or freedom', also called the 'ambit' principle.[142] In our view, while a focus on interrogating the nature of the rights may be misplaced, using the ambit principle does not avoid the characterisation exercise. As Taylor describes, '[t]he concept of ambit requires that if the state offers a benefit, it cannot discriminate in the provision of that benefit'.[143] On these terms, the concept of 'benefit' may simply be a substitute for the concept of 'right' in the characterisation exercise, with the result that the same answer is reached. For instance, it might equally be said in *Fisher* that the benefit conferred by the *SSA* is a level of income support, covering the period from when a person reaches 'retirement age' until death. With such a characterisation, no discriminatory benefit is conferred.

The issue with *Fisher* is instead the characterisation exercise itself. In a similar way to Brown J at first instance in *Athwal*, the Court fastened the attribute that is the subject of substantive differentiation onto the definition of the right. The attribute complained of in *Fisher* is precisely that the period of retirement age until death is substantively less on average for Indigenous men. To characterise the right as income support during that period, especially with the caveat of 'however long that period might be', neuters the possibility of identifying any differentiation in the enjoyment of the right as between different races in relation to the complained-of attribute. The basis for the characterisation in *Fisher* was drawn from what was 'embodied in the legislation' and 'inherent in its design'.[144] Rather than reflecting a principled approach, it begs the question because the relevant issue, at a high level of generality, is whether the design of the legislation is discriminatory. We consider the criticisms of Dalton JA canvassed earlier to apply equally in these cases where a right is granted rather than limited. In line with his approach, a broader, less technical characterisation of the right is to be preferred.

The problem that a narrow approach to rights characterisation poses to language claims may alternatively be theorised as a function of the rigidity of rights categorisations. The assertion of a linguistic right typically relies on other rights given the lack of a freestanding constitutional or legal right to linguistic freedom. In *Iliafi*, the appellants contended that their right to worship publicly as a group in the Samoan language was contravened by a prohibition of the Samoan language in church services.[145] The appellants argued that this right emerged from one or other or all of the right to nationality; the right to freedom of thought, conscience and religion; and the right to freedom of opinion and expression.[146] The Court canvassed an extensive body of international law, but ultimately considered that the claim could not be supported by any of these rights.[147] The Court considered that an individual's freedom of religion is sufficiently protected by their right to leave their church.[148] Further, the Court stated that the right to freedom of expression 'does not guarantee "linguistic freedom as such" or "guarantee a right to use the language of one's

142 Ibid 428–9 (citations omitted).
143 Ibid 429.
144 *Fisher* (n 107) 581–2 [127] (Mortimer CJ, Katzmann, Charlesworth, Abraham and Kennett JJ).
145 *Iliafi* (n 63) 95 [20] (Kenny J).
146 Ibid 103–4 [53]–[54] (Kenny J).
147 Ibid 117 [110] (Kenny J).
148 Ibid 109 [78], 110 [81] (Kenny J).

choice" in all circumstances'.[149] The freedom of expression upon which the appellants relied was an aspect of the right contained in art 27 of the *ICCPR* in relation to minority languages. In that context, the Court held that the right to speak Samoan extended only to a right 'in community with other members of their group' — but not in the company of non-Samoan speaking persons, and Samoan youth who were unable to speak the Samoan language.[150] The Court's approach in *Iliafi* reflects the subsidiarisation of language rights, in which each potential source of a language right is interrogated and dismissed in turn. This approach fails to conceptualise that the intersection of these rights may give rise to a broader conceptualisation of the enjoyment of language which is more coherent with the purposes of the *RDA*. Through that failure, 'the crux of the claim, namely racial discrimination, is lost'.[151]

IV Laws That Confer Rights

One of the idiosyncrasies of s 10 is that where the effect of a law is to confer a right in an unequal way, s 10 would *extend* or *augment* that conferral to ensure that its enjoyment is not unequal.[152] This is especially pertinent in the context of language rights because assimilationist pressures on minority languages largely arise from indirect rather than direct discrimination (such as the laws in *Nguyen*, *Sahak* and *Munkara*). In *Fisher*, however, the Court expressed several reservations about the exercise of its powers in extending or augmenting rights in circumstances of indirect discrimination. If those reservations held, the effectiveness of s 10 as a defender against assimilationist pressures on minority languages would be severely curtailed. This Part therefore briefly attempts to address those reservations raised in *Fisher* relevant to language rights claims.

In *Fisher*, the Court stated that an adjustment for a facially neutral law that treats all members of a race in the same way (for instance, by extending the time limit for appeals for people of a racial group that typically does not use English as a first language) may not be 'adequate or principled'.[153] Individuals in that cohort may be fluent in English and therefore have not suffered any limitation on their enjoyment of the relevant right. They would end up enjoying their right to a *greater* extent than members of other races. The Court in *Fisher* considered that this sort of amelioration might 'test the limits of what a court exercising the judicial power of the Commonwealth may properly do'.[154] It pointed to the existence of s 8 of the *RDA* as indicating that Parliament intended to maintain its power to decide what measures would be appropriate.[155] It noted that statistically evident disadvantage that is not intrinsic to a race 'may change over time'.[156]

However, it would also be inadequate and unprincipled for s 10 to be operative on facially neutral laws that limit a right but not on those that confer a right. The fact that the relevant disadvantage — as evinced in statistical evidence

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149 Ibid 117 [92] (Kenny J).
150 Ibid 113 [96] (Kenny J) (emphasis omitted).
151 Taylor (n 7) 422.
152 *Fisher* (n 107) 550–1 [15] (Mortimer CJ, Katzmann, Charlesworth, Abraham and Kennett JJ).
153 Ibid 584 [140].
154 Ibid 585 [143].
155 Ibid 584–5 [142].
156 Ibid 582–3 [132].

and arising from a host of social and historical factors — may change over time and is not an intrinsic racial characteristic should not operate as a limit on any s 10 claim. To conclude so reflects a failure to acknowledge that racial categories are themselves contingent and constructed, and that their construction is bound up in the social and historical factors that give rise to disproportionate disadvantage. To rely on characteristics that are intrinsic to a concept that is itself contingent is an absurdity. The existence of s 8 also does not mean that Parliament intended to *exclude* the operation of s 10 to augment rights in the context of a facially neutral law; s 8 simply ensures that s 10 does not operate on special measures that *are* passed by Parliament. Finally, the difficulty of framing appropriate relief in a principled way can be answered by observing that just as a law may adopt facially neutral criteria in effecting a disparate impact, so too can the remedy provided by the court. Where the use of language is a proxy for discrimination, language can also be the proxy to negate it. In the time limit cases, the court could augment the rights of those suffering a disparate impact by ordering that an appropriate amount of additional time be given to those who are not fluent with the English language. This would avoid the difficulties of treating members of the same race with differing characteristics in the same way, and severely limit the scope of any 'complex and contestable judgments, based on potentially shifting facts'.[157]

V Conclusion

The conclusion of our analysis is that there are reasons to doubt the correctness of all the past language rights cases under the *RDA*. As we have seen, the reasoning used to dismiss those claims is problematic, and alternative lines of reasoning drawn from other *RDA* cases also betray weaknesses. To take an example, and based on our analysis above, the appeal in *Hamzy* should not have been dismissed on the basis of proportionality, nor on the lack of an explicit right. Reasoning based on either characterising the right in a way that renders comparison with other racial groups impossible or highlighting the lack of racial targeting in the relevant provision would also be unhelpful. The contest for these such cases should centre on whether the impact of the impugned law meets the s 10 adverse impact threshold. In *Hamzy*, as Basten JA identified, the limitation imposed by the law did reveal a connection to race.[158] And restricting the ability of prisoners to speak to family members in languages other than English is (to use the test preferred by Gageler J in *Maloney*)[159] inconsistent with those of minority language backgrounds being accorded equal respect and dignity. The law should have been invalidated.

Language is a means for people to express themselves and communicate with others. It is intimately bound up with a person's sense of identity and community. Respect for a person's language is therefore respect for their human dignity. However, historically, language has been instrumentalised as a discriminator through which Australian governments have marginalised minorities. Today, minority languages continue to be undermined by assimilatory laws that demand the use of English in public life and provide for no appropriate affordances. We have

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157 Ibid 585 [143].
158 *Hamzy Appeal* (n 55) 568 [68].
159 *Maloney* (n 52) 294 [335].

argued that the *RDA* possesses the capacity to be a tool to defend against both linguistic discrimination and legal regimes that effect assimilatory pressure. We have sought to progress toward this powerful potential of the *RDA* by deconstructing all the justifications which have thus far barred the success of language rights in *RDA* litigation. Our analysis has revealed these justifications to be limited and that there are cogent reasons for the *RDA* to be interpreted in a way that helps secure the dignity of linguistic minorities. Nothing less ought to be expected of a piece of legislation that was claimed to represent our 'best [efforts] to redress past injustice and build a more just and tolerant future'.[160]

[160] Gough Whitlam, 'Proclamation of the Racial Discrimination Act' (Speech, Canberra, 31 October 1975).