SUPREME COURT OF QUEENSLAND

CITATION:	*Kamaljit Kaur Athwal v State of Queensland* [2022] QSC 209
PARTIES:	**KAMALJIT KAUR ATHWAL** (Applicant) **v** **STATE OF QUEENSLAND** (Respondent)
FILE NO/S:	No 1362 of 2021
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	30 September 2022
DELIVERED AT:	Brisbane
HEARING DATE:	7 December 2021
JUDGE:	Brown J
ORDER:	**The Order of the Court is that:** **1. The application is dismissed.** **2. No order as to costs.**
CATCHWORDS:	HUMAN RIGHTS – DISCRIMINATION – RACIAL DISCRIMINATION – where State legislation prohibits the carrying of a knife in a public place without reasonable excuse – where State legislation was amended to create an exception for a "genuine religious purpose" – where exception did not extend to school grounds – where applicant is an initiated Sikh – where the Kirpan is a mandatory article of faith – where applicant complains that initiated Sikhs are because of their religious beliefs prevented from entering school grounds as a result – whether State legislation deprives the applicant from enjoying a human right or fundamental freedom to the extent that it is enjoyed by persons of another race – whether there is an inconsistency between s 10 of the *Racial Discrimination Act 1975* (Cth) and the State legislation *Commonwealth Constitution*, s 109 *Racial Discrimination Act 1975* (Cth) s 10 *Weapons Act* 1990 (Qld) s 51 *Weapons Amendment Act 2011* (Qld) *United Nations International Convention on the Elimination of All Forms of Racial Discrimination* [1975] ATS 40; 660

UNTS 195, Art 1, Art 5

Blackwell v Bara [2022] NTSC 17, cited
Bropho v Western Australia (2008) 169 FCR 59; [2008] FCAFC 100, cited
Gerhardy v Brown (1985) 159 CLR 70; [1985] HCA 11, considered
Maloney v The Queen (2013) 252 CLR 168; [2013] HCA 28, considered
Momcilovic v The Queen (2011) 245 CLR 1; [2011] HCA 34, cited
Munkara v Bencsevich [2018] NTCA 4, cited
R v Grose (2014) 119 SASR 92; [2014] SASCFC 42, cited
Western Australia v Ward (2002) 213 CLR 1; [2002] HCA 28, considered

COUNSEL: S E Holt QC with M J Jackson and Z G Brereton for the applicant
G A Thompson QC S-G with F J Nagorcka and K J E Blore for the respondent

SOLICITORS: Caxton Legal Centre for the applicant
Crown Solicitor for the respondent

Matters in dispute

[1] Ms Kamaljit Kaur Athwal (the "**applicant**") is an Amritdhari Sikh. As part of their faith, once initiated, Amritdhari Sikhs are required to wear a Kirpan, which is a small ceremonial sword. Section 51(1) of the *Weapons Act 1990* (Qld) (the "***Weapons Act***") prohibits the carrying of a knife in a school, which would include a Kirpan, without reasonable excuse. Under s 51(5) of the *Weapons Act* it is not a reasonable excuse that the knife is carried for a "genuine religious purpose".

[2] The gravamen of the applicant's complaint is that initiated Sikhs are prevented from entering school grounds because of their religious beliefs as a result of the operation of s 51 of the *Weapons Act*, specifically s 51(5) which impinges on a number of human rights and freedoms not suffered by non-Sikhs, such that it is contrary to s 10 of the *Racial Discrimination Act 1975* (Cth) (the "***RDA***"). The question for the Court is whether s 51 of the *Weapons Act* deprives the applicant from enjoying a human right or fundamental freedom to the extent that is enjoyed by persons of another race. In that event, the question is whether there is an inconsistency between s 10 of the *RDA* and s 51 of the *Weapons Act*, such that s 10 of the *RDA* prevails.

[3] The applicant seeks a declaration that s 51(5) of the *Weapons Act* is inconsistent with s 10 of the *RDA*, and by reason of s 109 of the *Constitution*, is invalid.[1]

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1 CFI 1.

[4] The State of Queensland (the "**respondent**") concedes that the applicant has standing to bring the present application. As a result of further concessions by the respondent the real issues in dispute are:

(a) what is the proper characterisation of the rights which are affected by s 51 of the *Weapons Act* and engage s 10 of the *RDA*; and

(b) is that right or are those rights not enjoyed by Amritdhari Sikhs or enjoyed to a lesser extent than people of other race "by reason of" s 51 of the *Weapons Act*.

[5] It is necessary to briefly address the factual background of the matter, none of which is materially in dispute, before turning to the terms of the *Weapons Act* and whether s 10 of the *RDA* will apply.

Background

[6] The applicant is a Sikh who has been initiated as an "Amritdhari Sikh" and has been a director of the Sikh Nishkam Society of Australia since 2010.[2] The initiation of Sikhs can occur at any age. Not all Sikhs are initiated.[3] Once a Sikh is initiated, they are required at all times to wear or possess the five mandatory articles of faith, which are as follows:

(a) Kachera (an undergarment);

(b) Kangha (a small wooden comb);

(c) Kara (an iron band);

(d) Kes (un-cut hair covered by a turban); and

(e) Kirpan (a ceremonial sword).[4]

[7] The Kirpan is made of either steel or iron.[5] Kirpans come in a variety of shapes, sizes, bluntness and material, and are usually worn underneath clothing on a cloth sling called a Gatra.[6]

[8] It runs counter to the beliefs of an initiated Sikh to remove or to have removed any of the five articles of faith.[7] If an initiated Sikh removes any one or more of the five articles of faith, including in cases of medical emergency, they must go through an absolution process which in its strictest form would see a person refrain from eating or drinking until prayers are recited.[8] That would extend to the removal of the Kirpan to enter school grounds.

Amendment to the *Weapons Act*

[9] Section 51(1) of the *Weapons Act* prohibits the carrying of a knife in a public place or a school without "a reasonable excuse". Section 51 of the Act was amended in

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2 Affidavit of Kamaljit Kaur Athwal affirmed 4 February 2021 ("**CFI 2**") at [2], [7].
3 The applicant estimates that approximately 30 per cent of Sikhs are initiated, see CFI 2 at [10], [19].
4 CFI 2 at [12]; see also Affidavit of Harjit Singh affirmed 21 October 2021 ("**CFI 9**") at [29].
5 CFI 2 at [20].
6 CFI 9 [34]-[35].
7 CFI 2 at [14]; CFI 9 at [32]-[33].
8 CFI 2 at [15].

2011 by the *Weapons Amendment Act 2011* (Qld) "to clarify that a person may physically possess a knife in a public place for a genuine religious purpose".[9] Under the amendments made to the *Weapons Act*, which inserted s 51(4) and s 51(5), a "reasonable excuse" was stated to extend to the carrying of a knife for genuine religious purposes in a public place, however s 51(5) specified that it was not a reasonable excuse to possess a knife in a school for a "genuine religious purpose".[10]

[10] Section 51 of the *Weapons Act* relevantly states:

> "**51 Possession of a knife in a public place or a school**
>
> (1) A person must not physically possess a knife in a public place or a school, unless the person has a reasonable excuse.
>
> Maximum penalty—40 penalty units or 1 year's imprisonment.
>
> (2) It is a reasonable excuse for subsection (1) to physically possess a knife—
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> (a) to perform a lawful activity, duty or employment; or
>
> (b) to participate in a lawful entertainment, recreation or sport; or
>
> (c) for lawfully exhibiting the knife; or
>
> (d) for use for a lawful purpose.
>
> …
>
> (3) However, it is not a reasonable excuse to physically possess a knife in a public place or a school for self-defence purposes.
>
> (4) Also, it is a reasonable excuse for subsection (1), to the extent the subsection relates to a public place, to physically possess a knife for genuine religious purposes.
>
> Example—
>
> A Sikh may possess, in a public place, a knife known as a kirpan to comply with the person's religious faith.
>
> (5) However, it is not a reasonable excuse to physically possess a knife in a school for genuine religious purposes.
>
> (6) In deciding what is a reasonable excuse for subsection (1), regard may be had, among other things, to whether the way the knife is held in possession, or when and where it is held in possession, would cause a reasonable person concern that he or she, or someone else in the vicinity, may be threatened or harmed.
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> (7) In this section—
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> ***knife*** includes a thing with a sharpened point or blade that is reasonably capable of—

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9 Explanatory Notes, Weapons Amendment Bill 2011 (Qld) at p. 3.

10 Explanatory Notes, Weapons Amendment Bill 2011 (Qld) at p. 9.

> (a) being held in 1 or both hands; and
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> (b) being used to wound or threaten to wound anyone when held in 1 or both hands.
>
> ***public place*** includes a vehicle that is in or on a public place.
>
> ***school*** means any part of the premises of—
>
> (a) a State educational institution under the *Education (General Provisions) Act 2006*; or
>
> (b) a non-State school under the *Education (Accreditation of Non-State Schools) Act 2017*." (emphasis added)

[11] For the purposes of the present application, it was not contentious that a Kirpan was likely to be a knife notwithstanding its varied forms and often is a blunt instrument.

[12] According to the Explanatory Notes to the *Weapons Amendment Bill 2011* (Qld) the amendment to s 51 was "to clarify that a person may physically possess a knife in a public place for a genuine religious purpose" and refers to the legislation giving the example of carrying of a Kirpan as part of the Sikh religion. That was then qualified "[h]owever, clause 10 excludes a genuine religious purpose as a reasonable excuse where the possession of the knife is in a school". The Explanatory Notes further state that "[t]he carriage of any weapon onto school premises is not permitted and is deemed an unacceptable behaviour which has the potential to significantly violate the rights of students".

[13] As to s 51(5), the Explanatory Notes recognise the potential effect of the limitation and state:[11]

> "A potential FLP breach is created in the clause by excluding a genuine religious purpose as a reasonable excuse for a knife to be physically possessed in a school.
>
> While the potential breach has the capacity to interfere with an individual's freedom to undertake genuine religious practices, the safety and welfare of children attending Queensland schools is of paramount importance."

[14] In that respect the Explanatory Notes make reference to "[r]estrictions on the physical possession of knives, including knives carried for genuine religious purposes, currently exist in relation to commercial air travel."[12]

[15] As it stands with the amendments, s 51 of the *Weapons Act*:

(a) prohibits a person physically possessing a knife in a public place or a school unless the person has a reasonable excuse;

(b) sets out in s 51(2) circumstances which can give rise to a reasonable excuse including "for use for a lawful purpose", which would apply to a public place or a school. An example is given by s 51(2)(b) of a scout carrying a knife in his or her belt as part of the scout uniform and by s 51(2)(d) of a person using

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11 Explanatory Notes, Weapons Amendment Bill 2011 (Qld) at p. 9.

12 Explanatory Notes, Weapons Amendment Bill 2011 (Qld) at p. 10, 15-16.

a knife to prepare or cut food at a restaurant in a public place or having a picnic in a park;

(c) provides in s 51(3) that the physical possession of a knife in a public place or school for self-defence in s 51(2) is not a reasonable excuse;

(d) provides in s 51(4) for an additional reasonable excuse, namely carrying a knife for a genuine religious purpose "to the extent the subsection relates to a public place";

(e) provides in s 51(5) that it is not a reasonable excuse to physically possess a knife in a school for genuine religious purpose.

[16] "School" includes both State and non-State schools.

[17] The applicant deposes to the fact that she was consulted prior to the amendment of the *Weapons Act* as part of her work with the Sikh Nishkam Society of Australia, who had raised the issue of initiated Sikh's carrying a Kirpan potentially being in breach of the Act with various government stakeholders.[13] However, Parliament took a different view.

[18] The evidence provided on behalf of the applicant identifies the effect of the prohibition of the possession of knives in schools on parents who wish to participate in school life and on Sikhs such as the applicant who wish to enter the school for educational purposes.

[19] As a result, the applicant contends that the applicant and other initiated Sikhs have been excluded from doing the following:

(a) dropping off and picking up their children;

(b) attending assemblies;

(c) meeting teachers;

(d) attending school activities; and

(e) conducting other work on school grounds.

[20] The applicant also contends that she has been deprived of the ability to vote at Government elections at the local school, the most convenient place for her to do so.

[21] None of that evidence was contested.

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13 CFI 2 at [28].

The *RDA*

[22] The *RDA* is based on the *United Nations International Convention on the Elimination of All Forms of Racial Discrimination*[14] (the "**Convention**"). The Convention is directed to eliminating discrimination in relation to human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Article 1 of the Convention states that "racial discrimination" shall mean "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

[23] The Convention imposes an obligation to eliminate racial discrimination in relation to such rights and freedoms and to guarantee equality before the law in the enjoyment of them rather than imposing an obligation to introduce such human rights and fundamental freedoms.[15]

[24] Sections 10(1) and 10(2) of the *RDA* state that:

> **"10 Rights to equality before the law**
>
> (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention."

[25] Section 10 of the *RDA* is beneficial legislation and is to be interpreted broadly. Although part of the legislative regime directed to elimination of discrimination, the section does not refer to discrimination but is directed to the enjoyment of rights by some but not by others or to a more limited extent. [16] It operates to confer on the persons discriminated against the enjoyment of a relevant right to the same extent as enjoyed by persons of another race, colour or national or ethnic origin.[17] According to Mason J in *Gerhardy v Brown* (*"**Gerhardy**"*)[18] "[t]he exclusion of persons of a race, colour or origin from the enjoyment of a relevant right by reason of a law does not necessarily involve "racial discrimination' in that it may not amount to a distinction, exclusion, restriction or preference 'which has the purpose or effect of

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14 [1975] ATS 40; 660 UNTS 195.

15 *Gerhardy v Brown* (1985) 159 CLR 70 at 97 per Mason J; see also *Maloney v The Queen* (2013) 252 CLR 168 per Hayne J at [67].

16 *Western Australia v Ward* (2002) 213 CLR 1 at [105].

17 *Gerhardy* at 98.

18 At 99.

nullifying or impairing the recognition, enjoyment or exercise' of the right 'on an equal footing.'" His Honour further stated that:[19]

> "Consequently, s 10 should be read in the light of the Convention as a provision which is directed to lack of enjoyment of a right arising by reason of a law whose purpose or effect is to create racial discrimination."

[26] Section 10(2) of the *RDA* provides that a reference in s 10(1) to a right includes a right of a kind which is identified to in art 5 of the Convention. The rights identified in art 5 of the Convention are set out in the schedule of the *RDA*. The rights referred to are not exhaustive but are instances of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life to which art 5 of the Convention and therefore s 10 of the *RDA* applies.[20] The applicant however has identified rights identified in art 5 of the Convention for the purposes of this application. Article 5 relevantly states:

> "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
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> …
>
> (c) Political rights, in particular the rights to participate in elections--to vote and to stand for election--on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
>
> (d) Other civil rights, in particular:
>
> (i) The right to freedom of movement and residence within the border of the State;
>
> …
>
> (vii) The right to freedom of thought, conscience and religion;
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> …
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> (e) Economic, social and cultural rights, in particular:
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> …
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> (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
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> …
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> (vi) The right to equal participation in cultural activities;
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> …

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19 At 99, referred to with approval by the majority in *Ward* at [115].

20 *Gerhardy* at 101 per Mason J.

> (f) The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks."

[27] In discussing the application of s 10 of the *RDA* in *Gerhardy*,[21] Mason J identified that it would apply, relevant to the present case, where a State law prohibits persons of a particular race from enjoying a human right or fundamental freedom enjoyed by persons of another race. In such a case, his Honour stated that:

> "When racial discrimination proceeds from a prohibition in a State law directed to persons of a particular race, forbidding them from enjoying a human right or fundamental freedom enjoyed by persons of another race, by virtue of that State law, s 10 confers a right on the persons prohibited by State law to enjoy the human right or fundamental freedom enjoyed by persons of that other race. This necessarily results in an inconsistency between s 10 and the prohibition contained in the State law…
>
> …Consequently, s 10 should be read in the light of the Convention as a provision which is directed to lack of enjoyment of a right arising by reason of a law whose purpose or effect is to create racial discrimination.'"

[28] The majority of the High Court in *Western Australia v Ward*[22] (*"**Ward**"*) also stated that the second category to which s 10 applies identified by Mason J includes a State law which deprives persons of a particular race of a human right or fundamental freedom otherwise enjoyed by all regardless of race.

[29] Referencing the decision of Mason J in *Gerhardy*, the majority in *Ward*[23] outlined that the analysis of inconsistency of impugned legislation to s 10 of the *RDA* is to be couched in the 'enjoyment of a right' as follows:

> "In determining whether a law is in breach of s 10(1), it is necessary to bear in mind that the sub-section is directed at the enjoyment of a right; it does not require that the relevant law, or an act authorised by that law, be "aimed at'" native title, nor does it require that the law, in terms, makes a distinction based on race. Section 10(1) is directed at "the practical operation and effect" of the impugned legislation and is "concerned not merely with matters of form but with matters of substance." (footnotes omitted)

[30] It is uncontentious that s 51 of the *Weapons Act* is racially neutral on its face.

[31] In order to be engaged, Section 10 of the *RDA* does not however necessarily require that the law in question make a distinction expressly based on race, colour or national or ethnic origin.

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21 *Gerhardy* at 98-99; approved in *Ward* at [106]-[107].

22 (2002) 213 CLR 1 at [107].

23 At [115]-[116] per Gleeson CJ, Gaudron, Gummow and Hayne JJ (Kriby J generally concurring with the majority save as to minor qualifications, McHugh and Callinan JJ separately dissenting).

[32] French CJ in *Maloney v The Queen*[24] (*"**Maloney**"*) described the section as not requiring the law to which it applies to make a distinction expressly based on race and is directed to the discriminatory operation and effect of the legislation.[25] Gageler J in *Maloney*[26] described the operation of s 10 of the *RDA* as follows:

> "The joint judgment of four members of the Court in *Ward* built on the reasoning in *Mabo [No 1]* and the *Native Title Act Case* in emphasising that s 10 of the RDA is not confined to laws whose purpose can be identified as discriminatory nor to laws that can be said to be aimed at a racial characteristic or to make a distinction based on race and that fulfilment of the condition for the application of s 10 turns rather on the effect of a law on the relative "enjoyment" of a "right" by persons of different races". (footnotes omitted)

[33] Gageler J further stated that:[27]

> "…The focus on practical operation is not, however, inconsistent with recognition that causation in fact is itself a question of degree. What is required is a direct relationship between the practical operation of the law and the differential enjoyment of human rights. Differential enjoyment of human rights that is the direct result of the practical operation of a law fulfils the first of the two conditions for the existence of discrimination within the meaning of the Convention: different treatment." (emphasis added)

[34] Section 10 of the *RDA* speaks of the enjoyment of rights rather than using the phrase "discriminatory". Hayne J in *Maloney* reiterated that the operation was not confined to laws the purpose of which can be described as 'discriminatory" and pointed out that the questions of the enjoyment of rights "require consideration of more than the purpose of the relevant law."[28]

[35] According to Hayne J in *Maloney*, the differential enjoyment of rights to which s 10 of the *RDA* is directed does not import any notion that it does not operate if the difference is justifiable or proportionate to a legitimate end.[29] It is only if the law qualifies as a special measure that s 10 will not be offended if the other preconditions of s 10 are met. Similarly, Bell J in *Maloney* stated that:[30]

> "Nothing in the text of s 10 interpreted in its statutory context warrants reading the provision as engaged only by a law that limits the enjoyment of rights for a purpose that is not "legitimate" or in a manner that is disproportionate to the achievement of a "legitimate" purpose. Section 8(1) is the means by which laws may validly

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24 (2013) 252 CLR 168.

25 At [11]; see also Hayne J at [78]; Crennan J at [126]; Kiefel J (as she then was) at [148] (although her Honour found that the *Liquor Act 1992* (Qld) was not directed to a relevant right to which s 10 of the *RDA* was directed: at [188]) Bell J at [204].

26 At [306].

27 *Maloney* at [338].

28 At [65]; with whom Crennan J relevantly agreed: see [112].

29 At [68].

30 At [214].

> provide for the differential enjoyment of Convention rights based on race in order to secure substantive equality."

[36] Justice Gageler in *Maloney* appeared to adopt a different view in that regard, as discussed below.

[37] Questions of proportionality may however be relevant to special measures which are an exception to the operation of s 10 by virtue of s 8 of the *RDA*.

[38] According to the respondent, the circumstances of the present case differ from *Maloney* and the other High Court authorities, none of which considered the extent of the connection required to race and the position that would apply in the present case where it contends there was only an indirect connection, was only touched upon by Gageler and Bell JJ. The applicant however contends that the statements of the majority in *Maloney* were clear and should apply in the present case. I will address these matters further below in dealing with the points of difference between the parties.

Requirements of s 10 of the *RDA*

[39] In *Gerhardy*, Mason J identified six elements that an applicant must establish to bring a matter within the purview of s 10 of the *RDA*, which were formulated in a slightly different way by Justice Hayne in *Maloney*, as follows:[31]

> "The text of s 10(1) of the RDA shows that its application requires consideration of five questions. First, who are the persons of a particular race, colour or national or ethnic origin whose enjoyment of rights is to be considered? Secondly, how is it said that those persons do not enjoy, or enjoy to a more limited extent, a right? Thirdly, what is the right that (i) is enjoyed by persons of another race, colour or national or ethnic origin, but which (ii) is not enjoyed (or is enjoyed to a more limited extent) by the persons identified in answer to the first question? Fourthly, who are the persons of another race, colour or national or ethnic origin? Fifthly, is the absence of enjoyment (or enjoyment to a more limited extent) of that right "by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory"? The order in which the issues raised by these questions should be considered may differ from case to case."

[40] By reference to the matters which must be satisfied for s 10 of the *RDA* to apply, the applicant has reframed those issues in terms of the present case to be:

> "(a) ***first***, that the applicant (and Sikhs generally) are persons of a particular race, colour or national or ethnic origin;
>
> (b) ***secondly***, that persons other than Sikhs are persons who fall within the class of "persons of a particular race, colour or national or ethnic origin";

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31 At [62].

> (c) ***thirdly***, by reason of s 51 of the State Act, the applicant does not enjoy the right of access to schools that is enjoyed by persons of other races (or does not enjoy it to the same extent);
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> (d) ***fourthly***, that the exclusion of the applicant from enjoyment of the right of access arises by reason of a statutory provision whose purpose or *effect* is to create racial discrimination;
>
> (e) ***fifthly***, that this exclusion amounts to an exclusion from enjoyment of a human right or fundamental freedom or a right of a kind referred to in Art 5 of the Convention; and
>
> (f) ***sixthly***, that s 51 of the State Act of which it forms part, is not a special measure within the meaning of Art. 1.4 of the Convention."

[41] The respondent concedes that Sikhs are persons of a particular race, colour or national or ethnic origin. Nor does it dispute that the fact only initiated Sikhs wear Kirpans and are affected by s 51 of the *Weapons Act* is sufficient for them to be affected as persons of a particular race or ethnic origin for the purposes of s 10 of the *RDA*. That accords with the approach in the authorities.[32]

[42] Similarly, there is no dispute that non-Sikhs are persons of a particular race, colour or national or ethnic origin.

[43] Section 8 of the *RDA* carves out an exception to s 10, being "special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3)." The respondent concedes that the amendment to s 51 of the *Weapons Act* was not a special measure.

[44] The respondent however disputes that by reason of s 51(5) of the *Weapons Act,* the applicant enjoys a relevant right to a lesser extent than people who are not Sikhs.

[45] Given the approach of the parties, the issues to be determined are of narrow purport and on this basis, the first, second, fifth and sixth elements do not require further consideration. The following issues as set out in *Gerhardy* and referred to above require consideration:

(a) what is the right enjoyed by persons of another ethnic origin but which is not enjoyed (or not enjoyed to the same extent) by the applicant and other initiated Sikhs; and

(b) to the extent that initiated Sikhs enjoy a right to a lesser extent, is the enjoyment of that right by reason of s 51 of the *Weapons Act*.

Contentions

[46] The applicant submits that by removing as a "reasonable excuse" possession of a knife at a school a "genuine religious purpose", s 51(5) effectively prohibits initiated Sikhs from entering and accessing school premises. This is because in order to legally access school grounds the applicant and other initiated Sikhs must either breach their religious faith or they otherwise cannot lawfully attend a school

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32 See for example, Hayne J in *Maloney* at [80].

in Queensland. The applicant therefore contends that the prohibition in s 51 of the *Weapons Act* has the effect of differentiating between access to schools by persons who are Sikhs and access to schools by persons who are non-Sikhs. The applicant contends that s 51 of the *Weapons Act* therefore results in "operational discrimination" notwithstanding its race neutral language. According to the applicant, the religious initiation is inseparable from membership of the ethnic group as all initiated Sikhs are Sikhs. The fact that only initiated Sikhs are affected is sufficient for the purposes of s 10 of the *RDA*.

[47] The applicant therefore contends that as a result of Sikhs not being able to access schools as they are prevented from doing so while wearing a Kirpan due to s 51(5) of the *Weapons Act*, the applicant and initiated Sikhs have been deprived of being able to enjoy a number of human rights:[33]

(a) as a result of not being able to attend the school for educational purposes, rights in "freedom of thought, conscience and religion" and "equal participation in cultural activities;" and

(b) as a result of not being able to attend school grounds for work or for the purposes of voting in elections, political rights, particularly participation in elections and "work to free choice of employment" and "access any place or service intended for use by the general public such as transport, hotels, restaurants, cares, theatres and parks."

[48] In terms of the statutory regime prior to the introduction of s 51(4) and s 51(5) of the *Weapons Act*, the applicant's counsel submits that, although there is no authority on point, possessing a knife a bona fide religious purpose "would have been at least a candidate for being a reasonable excuse" in s 51(2) which would extend to schools as well as public places.

[49] The respondent contends that unlike the provision considered in *Maloney*, s 51(1) of the *Weapons Act* is "a law of general application, which neither in terms, nor substance, is directed to people of a particular race, colour or national or ethnic origin."[34]

[50] In support of their contention the respondent points to the prohibition in s 51(1) of the *Weapons Act* being a law of general application which neither in its terms or in substance is directed to people of particular race, colour or national or ethnic origin, to which s 51(4) creates an exception. Section 51(5) is said to merely clarify the scope of the exception. It contends that it is unlikely s 10 of the *RDA* was intended to invalidate racially neutral State laws of general application, which have no connection to race and which lack any 'direct relationship' with differential enjoyment of human rights.

[51] According to the respondent, the present case turns on identifying the relevant right at the appropriate level of generality. According to the respondent, the real

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33 Section 10(2) of the *RDA* and Art 5 of the Convention provide examples of such rights. The other rights are "the human rights and fundamental freedoms with which the Convention is concerned the rights enumerated in Art 5 being particular instances of those rights and freedoms": see *Gerhardy* at 101 per Mason J.

34 CFI 13 at [6].

gravamen of the applicant's complaint is that it impedes the freedom of religion and freedom of movement.

[52] It contends that Sikhs and non-Sikhs are subject to precisely the same limits on their freedom to manifest their religion by carrying a knife as well as their freedom of movement while carrying a knife. Were the right to be characterised otherwise at a higher level of abstraction, the respondent contends that would be to entrench an absolute right of Sikhs to move freely carrying a knife, regardless of the circumstances.

[53] In response the applicant contends that the reframing of the right by the respondent departs from the approach established by the majority of judges in *Maloney* and distracts from the practical effect of the *Weapons Act*, relevant to her case of operational discrimination. In further contrast to the approach of the respondent, the applicant's primary focus is on s 51(5) of the *Weapons Act.* Like *Maloney* the applicant contends that the law unquestionably "targets" Sikhs. The notion of targeting is something to which I will return.

Determining the relevant 'right(s)'

[54] Critical to the determination of the present case is the identification of the right the enjoyment of which is said to be affected by s 51 of the *Weapons Act*. According to the majority in *Ward*[35] "[s]ome care is required in identifying and making the comparison between the respective "rights" involved".

[55] Identification of the relevant right requires a degree of specificity. In discussing a right to own property, Hayne J in *Maloney* stated that "[a]t its most abstract, reference might be made to the right to own property without attempting to elucidate what is meant by "own" or to connect the right with any particular object of tangible or intangible property."[36] In his Honour's view that approach does not focus attention sufficiently upon how the impugned provisions intersect with the right and further it assumes that the relevant right is absolute or that s 10 of the *RDA* only applies where persons of one race do not enjoy a right enjoyed by persons of another race. In his Honour's view:[37]

> "…this form of analysis tends to obscure the operation of s 10 in cases, like the present, where it is said that persons of one race enjoy a right "to a more limited extent" than persons of another race. Consideration of that issue requires close attention to the legal and practical operation of the legislation to which it is alleged s 10 applies in order to identify with some specificity what right is enjoyed by persons of one race and how that right is not enjoyed, or is enjoyed to a more limited extent, by persons of another."

[56] While his Honour had identified "the ambiguity and looseness with which the word "property" can be used is notorious", the above comments appear to establish a more general approach to enable the comparison under s 10 of the *RDA* to occur.[38]

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35 At [116].
36 At [76].
37 At [76].
38 At [74].

[57] In *Maloney*, s 168B(1) of the *Liquor Act 1992* (Qld) (the *"**Liquor Act**"*) made it an offence to possess more than a prescribed quantity of liquor in a public place[39] in a restricted area. Palm Island was declared by regulation to be such a restricted area. The law by its terms applied to all persons on Palm Island alike, non-Aboriginal and Aboriginal. There was no dispute that the residents of Palm Island were overwhelmingly indigenous. The majority of the High Court found that the combined effect of the *Liquor Act* and regulation, which prohibited an Aboriginal person from possessing alcohol other than as prescribed in a public area on Palm Island had a discriminatory effect on the human right to own property, namely alcohol, contrary to s 10 of the *RDA*, as indigenous persons who were the Palm Island community, including the appellant, could not enjoy the a right of ownership of property to the same extent as non-indigenous people outside the community. The impugned law was considered by the majority of the High Court for differing reasons to have effected operational discrimination notwithstanding the race-neutral language used. However, the prohibition was ultimately determined to be a "special measure" under s 8 of the *RDA* and accordingly operated as an exception to s 10. As noted above, the respondent has conceded in the present case that the impugned section in the present case is not a special measure.

[58] The respondent does not seek to dispute the rights identified by the applicant to which I have referred above, as human rights and freedoms under art 5 which are affected by the restriction of the reasonable excuse to wearing a knife in a school by s 51(5) of the *Weapons Act* and denial of access to school grounds. However, it contends that the real gravamen of the applicant's complaint about s 51 of the *Weapons Act* is that it impedes freedom of Sikhs to manifest their religion under art 5(d)(vii) and thereby impedes their freedom of movement (to enter schools). Given they are the principal matters which are relied upon to establish their restricted enjoyment of rights for the purposes of s 10 of the *RDA* I will focus upon those rights, at least in the first instance.

[59] According to the respondent, the proper characterisation of the rights affected by s 51 of the *Weapons Act* is the freedom to manifest religion by carrying a knife as well as freedom of movement by carrying a knife. It contends the prohibition affects Sikhs and non-Sikhs in the same way. The applicant however contends that to frame the right in this way ignores the practical effect of the provision and incorporating the relevant characteristic of initiated Sikhs, namely the carrying of a Kirpan, into the right prevents the provision from revealing substantive discrimination. The applicant characterises the right as a right of access to schools.[40]

[60] In *Maloney*, Hayne J (with whom Crennan J relevantly agreed) commented that the fact that impugned provisions did not take race as a criterion for their operation was a necessary but not sufficient condition for a law to be consistent with s 10(1) of the *RDA* as the Court not only looked at the purpose of the law and s 10 was not confined to laws which expressly use race as a criterion for operation of s 10.[41] In his Honour's view, the critical operation of the *Liquor Act* together with the regulation was to regulate possession of liquor in public in certain places. Thus they prohibited the exercise of one of the bundle of rights constituting ownership of a

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39 Which included transport through a public place: Kiefel J at [141] and [154].

40 Applicant's outline at [8].

41 At [78].

chattel.[42] Those outside those nominated public places were not so restricted. Thus the right of ownership of particular chattels was treated differently according to the place of exercise.[43]

[61] While the impugned laws applied equally to and affected the rights of those on Palm Island regardless of race, Hayne J stated that "it was of the very first importance" to s 10 of the *RDA* that the effect of the impugned provisions was on those who lived on Palm Island who were overwhelmingly Aboriginal persons.[44] His Honour concluded that the extent to which the residents of Palm Island enjoyed the right to own property differed from the extent to which persons resident elsewhere in Queensland (who it was accepted were predominantly non Aboriginal persons) enjoyed that right, s 10 of the *RDA* was engaged unless s 8 of the *RDA* applied.[45] Thus the comparison of the right of ownership of alcohol enjoyed between Aboriginals and non-Aboriginals was based on their place of residence.

[62] In *Maloney*, Chief Justice French identified the relevant right as a right of ownership of property, namely alcohol.[46] Bell J referred to the relevant right as a right to the ownership and possession of alcohol.[47] Gageler J considered that the impugned laws wholly prohibited Aboriginal persons living with the community government area of Palm Island from possessing alcohol in any public place within the government area in which they lived without a permit.[48] He considered the enjoyment by Aboriginal persons living within on Palm Island of human rights "to own property" and "of access to any place…intended for use by the general public" were the relevant human rights to be considered.[49]

[63] The applicant characterises the right in the same way as it was referred to by Mason J in *Gerhardy*, one of access to schools. Given the fact that it is not a lawful excuse to possess a knife in a school for a genuine religious purpose, I accept on the evidence before me that an initiated Sikh cannot access a school without having to remove the Kirpan contrary to their religious faith or otherwise not access the school at all. However, unlike the State law the subject of consideration in *Gerhardy* which permitted the Pitjantjatjara unrestricted rights of access to a certain tract of land and otherwise prohibited non-Pitjantjatjara access to those lands without permission, the *Weapons Act* is not directed to access per se and is the converse of the position in *Gerhardy* insofar as the primary provision is a general prohibition with some exceptions provided as a "reasonable excuse".

[64] The general prohibition is with respect to the physical possession of a knife in a public place or school without lawful excuse. In that respect it bears similarity to the *Liquor Act* and regulation considered in *Maloney* where the relevant right considered was a right of property, namely, to possess alcohol in a public place. It is the general prohibition without the provision of a lawful excuse for accessing school while wearing a Kirpan which results in the initiated Sikhs not enjoying the freedom of religion and freedom of movement under art 5.

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42 At [83].
43 At [84].
44 At [84].
45 At [84].
46 At [38].
47 At [224].
48 At [360].
49 At [361].

[65] To the extent that the respondent gave examples of regulations that could not be imposed if the relevant rights were not characterised at the level of abstraction for which it contends, that provides little assistance in the characterisation of the relevant right to which s 51 of the *Weapons Act* may affect. Similarly, the reference to other laws which it contends would be rendered invalid if the relevant right were not characterised in the abstract, is an irrelevance. Similarly, regarding examples of other laws which regulate but do not prohibit the wearing of the Kirpan provided by the applicant in response to the respondent's argument, while they suggest that the respondent may be overstating its argument that the applicant's approach results in an absolute right, it is the *Weapons Act* itself which is pivotal to the identification of the relevant right.

[66] The approach to identifying the relevant rights has been identified by the High Court in *Ward* as requiring care in the identification of rights. Consistent with that care is the approach identified by Hayne J[50] of the need to pay close attention to the legal and practical operation of the legislation to which it is alleged s 10 of the *RDA* applies, to identify with some specificity what right is enjoyed by persons of one race to determine whether that right is not enjoyed or enjoyed to a lesser extent by reason of the *Weapons Act*.

[67] The rights concerned must be identified with some specificity. Section 51 of the *Weapons Act* is directed to specific conduct, namely possession of a knife, at particular places, namely a public place or school, without reasonable excuse. No person of any race enjoys an unrestricted right of possession of a knife at a school under s 51 unless they have a reasonable excuse for doing so. The wearing of a knife for a genuine religious purpose is not provided for as a reasonable excuse in school grounds. However other circumstances outlined in s 51(2) do provide circumstances giving rise to a reasonable excuse. In my view the characterisation of the rights which focusses attention upon how the impugned provisions intersect with the relevant rights to which s 10 of the *RDA* applies is narrower than a right of access to schools. The right to religious freedom would include manifesting religion[51] by wearing articles of faith worn in accordance with religious beliefs and while doing so engaging in freedom of movement and access to places intended for use by the public. In my view, the relevant rights effected by s 51 of the *Weapons Act* and which would engage s 10 of the *RDA* are the rights to religious freedom and freedom of movement,[52] while wearing a knife as an article of faith in a school.[53]

[68] Contrary to the contention of the applicant, framing the right in that way does not introduce the relevant characteristic to the inquiry to prevent the provision from revealing the substantive discrimination because that is reflective of the terms of the legislation itself, which is directed at the possession of knives in certain circumstances and not to a more general right.

Are rights enjoyed to a more limited extent?

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50 Who was part of the majority in *Ward*.
51 Art 5 (d)(vii) of the Convention.
52 Art 5 (d)(i) of the Convention.
53 Art 5 (f) of the Convention.

[69] There is no doubt that Parliament was aware that the provision of reasonable excuse in s 51(4) with a carve out in respect of schools in s 51(5) would affect the right of Sikhs to abide by their religious beliefs by wearing a Kirpan.

[70] Section 10 of the *RDA* is directed at the differentiation in enjoyment of rights arising, relevantly in this case, under a State law in relation to members of one particular race or ethnic origin.

[71] According to Gageler J in *Maloney*, prior to that decision there was no case in the High Court which had "addressed whether, and if so how, s 10 of the *RDA* might apply to an impugned law that operates to impose the same legal burden on persons of all races but that so operates practically to burden the enjoyment of a human right by persons of a particular race to a greater extent than it burdens the enjoyment of a human right by persons of other races."[54] In the present case, the respondent contends that no case decided by the High Court has considered a case such as the present which is racially neutral and has the purpose of protecting society irrespective of race, ethnic origin or religion and what the extent of race connection is required to engage s 10(1) of the *RDA*, given in *Maloney* it was clear the liquor restrictions "unarguably target Aboriginal persons."[55]

[72] The applicant contends that it is incorrect and there is a race connection in the present case because the amendments made to the *Weapons Act* unquestionably targeted Sikhs as they followed consultation with the Sikh community, are referred to in the example given as to the operation of s 51(4) and the effect of the restriction in s 51(5) on the Sikh community was acknowledged in the Explanatory Notes to the *Weapons Amendment Bill 2011* (Qld). No other religion was identified as involving the carrying of a knife for a religious purpose.

[73] The respondent contends that the exercise in which the Court should engage is to focus on the norm of conduct[56] to which s 51 of the *Weapons Act* is directed, which is relevantly established by s 51(1). Section 51(5) is said to simply define the scope, to which clarification was given by the inclusion of s 51(4) that carrying a Kirpan in a public place was lawful as exception to s 51(1) where there was said to otherwise be a doubt. Counsel for the applicant however contended that the norm of conduct to which s 51 is directed is not to physically possess a knife in a public place or a school unless the person has a reasonable excuse. In my view the applicant's characterisation is correct.

[74] The respondent's contention neglects the fact that s 51(1) of the *Weapons Act* applies to prohibit the carrying of a knife in a public place or school unless the person has a "reasonable excuse". This is the converse of the position to which Kiefel J averted to in *Maloney*, where her Honour stated that for the purpose of the comparison required by s 10(1) of the *RDA* "the reference to a right or freedom said to be enjoyed by others must take account of any lawful restrictions on that enjoyment".[57] That requires an examination of the terms of the lawful excuses to the general prohibition.

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54 At [308].
55 Bell J at [204]. It was also evidenced in the Second Reading Speech and Explanatory Notes.
56 Referring to *Momcilovic v The Queen* (2011) 245 CLR 1 at [233] per Gummow J.
57 At [168].

[75] There is an explicit recognition that a "knife" may be worn for genuine religious purposes and s 51(4) and s 51(5) of the *Weapons Act* are directed specifically to that circumstance, particularly by Sikhs who wear a Kirpan for such purposes given the terms of the Explanatory Notes. Section 51(5) does limit the enjoyment of at least the right to religious freedom by excluding the possession of a knife for a genuine religious purpose as a lawful excuse when on school grounds. That is in contrast to the other instances of lawful excuse in s 51(2). By making the reference to wearing of a knife for religious purposes the subject of specific provisions in s 51(4) and s 51(5), the legislation implicitly excludes possession of a knife for a genuine religious purpose from being able to be a lawful excuse within s 51(2)(d) of the *Weapons Act.*

[76] The question is whether initiated Sikhs enjoy a lesser right by reason of the s 51 of the *Weapons Act*, given that no person, Sikh or non-Sikh, is permitted to access schools while in possession of a knife for a genuine religious purpose. In this regard, the applicant contends that the practical effect of the prohibition in s 51(5) is that initiated Sikhs cannot enjoy the right of religious freedom or freedom of movement, at least, because a characteristic of an initiated Sikh is the subject of a prohibition in schools, and they are excluded from relying on a defence which the applicant's counsel contends would otherwise be available under s 51(2) of the *Weapons Act*.

[77] The respondent submits that to the extent that initiated Sikhs may enjoy a right to a more limited extent than persons of another race or ethnic origin it was not "by reason of" s 51 of the *Weapons Act*. The respondent contends only Bell and Gageler JJ in *Maloney* adverted to the position that arises in circumstances similar to the present and the extent to which a law must be connected with race before s 10 of the *RDA* would operate. Where that connection is incidental, which the respondent says is the case here, s 10 of the *RDA* is not engaged because the limitation of the enjoyment of the rights concerned have no connection to race.

[78] To the extent that the limitation of law has no connection to race it may be relevant in demonstrating that any differentiation in the enjoyment of rights is not by operation of the law in question.

[79] While Bell J considered a hypothesised planning law given as an example by the Commonwealth if s 10 of the *RDA* was applied without reference to purpose, she ultimately expressed no view as to the extent to which there must be a connection with race to engage s 10(1) as the law.[58] Her Honour found that the liquor restrictions in *Maloney* "unarguably" targeted Aboriginal persons.

[80] Justice Gageler J in *Maloney* stated that the words " by reason of" in s 10 of the *RDA* connoted a causal nexus which was to reflect the principles and objectives of the Convention.[59] He considered that the principles of dignity and equality and the Convention objective of securing substantive racial equality in the enjoyment of human rights necessarily inform the application of the criterion for determining whether differential treatment of racial groups is justified for the purpose of implementation of the Convention.[60] Based on this analysis his Honour considered

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58 At [204].
59 At [337].
60 At [341].

that s 10 "is properly construed to admit of circumstances in which persons of one race enjoy a human right to a more limited extent than persons of another race as a result of the direct practical operation of a law without that different enjoyment of rights being "by reason of" the law".[61] Those circumstances would arise if consistent with the Convention, the law adopted criteria "that are both (i) applied in pursuit of a legitimate aim and (ii) reasonably necessary to achieve that aim."[62]

[81] Justice Gageler's view in that regard was not however adopted by any other judges on the Court, at least in relation to s 10 of the *RDA*.[63] That is a view shared by Gray J in *R v Grose*[64] who noted his Honour's view of justified differentiation did not carry the weight of authority. Further, while his Honour's analysis was referable to s 10 and his Honour referred to the condition he identified in [343] as being an antecedent inquiry as to whether s 10 is engaged, there is also some confusion as to what his Honour intended by his later statements. His Honour further commented that "the factual inquiry to be undertaken by a court in determining the legitimacy of a legislative aim and proportionality of the legislative criteria adopted in pursuit of that aim" was best left to be addressed in the context of special measures.[65] That lends considerable weight to the view that his Honour was speaking of the interaction between s 10 and s 8 of the *RDA* given at [348] his Honour stated:

> "…The application of s 10 to a law that operates directly in fact to result in persons of one race enjoying a human right to a more limited extent than persons of another race, but 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 where the substance of the aim is redressing some other imbalance in the enjoyment of human rights by persons of a particular race. Otherwise, the carefully tailored regime for permissible special measures would be undermined. Unless it is a special measure excluded by s 8, the law is one to which s 10 applies."

[82] The wording of s 10 requires a causal connection between the law and lack of enjoyment or lesser enjoyment of specified rights by the people of a particular race or ethnic origin. However, the notion that s 10 of the *RDA* will not be engaged if the law pursues a legitimate aim and be reasonably necessary to achieve that aim appears to introduce additional requirements beyond that found in the notion of causation. While the respondent contends the situation of the extent of the required connection was only considered by Justice Gageler, the remainder of the Judges on the Court did consider the requirements of s 10 in the context of racially neutral legislation and did not adopt the approach of his Honour in relation to identifying the proper approach to s 10 of the *RDA* as a matter of principle. In his analysis Hayne J noted that s 10 of the *RDA* does not refer to "discrimination." His Honour noted that a reference to "discrimination" may encompass differential treatment

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61 At [342].
62 At [343].
63 As to which p. 9 of the Explanatory Notes to the *Weapons Amendment Bill 2011* (Qld) refers to the "safety and welfare of children" being of paramount importance.
64 (2014) 119 SASR 92 at [78], with whom Sulan and Nicholson JJ agreed.
65 At [345]; see also [346]-[348].

which is justifiable. His Honour considered transplanting such a notion into s 10 of the *RDA* would cut down its operation[66] would not appear to support the approach of Gageler J. Justices Bell and Kiefel expressly rejected the approach of *Bropho v Western Australia*[67] where the Full Federal Court held that an interference with the enjoyment of a right would not be inconsistent with s 10 provided it was in accordance with a legitimate public interest.[68] Similarly, the majority in *Maloney* rejected any notion of proportionality being relevant to the application of s 10 of the *RDA*.[69]

[83] That is not to say that a law of general application with a social purpose which effects indirect discrimination of persons of a particular race will necessarily contravene s 10 of the *RDA*. There may be situations where, as Justice Bell suggested, laws which effect particular persons of a particular race or ethnic origin, not by reason of the law, but by other circumstance, such as a law being imposed in relation to an area, where a number of persons of the same race or ethnic origin live, such that the relevant causal connection is not established. Where a law is plainly directed to people of a particular race who predominantly live in a particular area such as Palm Island in *Maloney*, the relevant connection between the practical operation of the law and lesser enjoyment of rights[70] is likely to be established.

[84] Thus, while the Explanatory Notes reflect the fact that the respondent is motivated by public safety in schools in introducing s 51(5) of the *Weapons Act*, whether or not there are justifications founded in public policy for such a law and that a legitimate purpose for the provision is not directed to discriminating against a particular group, is not to the point in relation to the application of s 10 of the *RDA*[71]. However similarly while the Explanatory Notes acknowledge the effect of s 51(5) of the *Weapons Act* particularly on Sikhs, that acknowledgement does not support a conclusion that the *Weapons Act* was targeting Sikhs. It was consistent with the stated purpose seeking to clarify that the carrying of a knife for a genuine religious purpose could constitute a lawful excuse but not in all circumstances.

[85] The present is unlike the case of *Maloney* where the same right was enjoyed to a lesser extent by Aboriginals living on Palm Island to whom the liquor laws were directed.

[86] The comparator for determining whether Aboriginal people on Palm Island enjoyed a lesser right than non-Aboriginal people was how the right to possess alcohol in a public place on the mainland was enjoyed, notwithstanding all residents on Palm Island including non-indigenous residents were the subject of the prohibition. That arose from the fact that the residents on Palm Island were overwhelmingly indigenous.

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66 At [68].

67 (2008) 169 FCR 59 at [83].

68 Kiefel J at [164]-[168]; Bell J at [214]; French CJ appeared to adopt a similar view in his rejection of the Court of Appeal's approach: see [37]-[39].

69 See for example Kiefel J in *Maloney* at [167].

70 As was found in that case.

71 As discussed above in relation to *Maloney*, see Hayne J at [68] (with whom Crennan J agreed in this regard at [112]) and Kiefel J at [167] both of whom depart from the Full Federal Court in *Bropho v Western Australia* (2008) 169 FCR 59 at [83] that a law would not be inconsistent with the *RDA* if it was effected in accordance with legitimate public interest; see Bell J at [214].

[87] In this case, Sikhs and non-Sikhs enjoy the same right of lawful excuses to possess a knife as exceptions to the general prohibition in s 51(1) of the *Weapons Act.* While it may have been that the provision in s 51(2) for "other lawful excuse" may have extended to wearing a Kirpan for religious purposes, the effect of s 51(4) and s 51(5) of the *Weapons Act* in providing for lawful excuses does not have a practical effect of providing a greater of a right of wearing a knife for religious purposes to Sikhs and non-Sikhs. Those excuses in s 51(2) are however available to be relied upon by Sikhs and non-Sikhs alike.

[88] According to Blokland J in *Munkara v Bencsevich*:[72]

> "Section 10 is not to be approached by identifying the discriminatory effect of the law as to racial characteristics but rather turns on the effect of a law on the relative enjoyment of a right by persons of different races."

[89] This is a difficult case and the outcome no doubt will be difficult for the applicant and initiated Sikhs, particularly given it appears incongruous with some of the lawful excuses in s 51(2) of the *Weapons Act* which do allow the possession of a knife in a school to not allow the wearing of a Kirpan for a genuine religious purpose at school. However, s 10 of the *RDA* is engaged by a differentiation occurring in the enjoyment of rights between people of a race or ethnic origin as opposed to people of another race or ethnic origin by reason of the law and it is not relevantly engaged in the present case. The relevant comparison is not between lawful excuses permitting possession of a knife for other reasons which are not connected with possession for a genuine religious purpose and the exclusion of such a possession as a religious purpose, as that does not involve a comparison between the same right under art 5 of the Convention.

[90] The application therefore fails. The parties in that regard agreed costs lie where they fall and there will be no order as to costs.

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72 [2018] NTCA 4 at [118] with whom Kelly J and Barr J agreed.