

# Xenophobic Acts and Speech toward Migrants in Australia

Issues Paper, 15 October, 2015



## **ABOUT THE AUTHOR**

The UNSW Human Rights Clinic works to systemically advance the rights of temporary migrants and asylum seekers in Asia and Australia. Under intensive faculty supervision, clinic students work as legal advisers and advocates with individual clients, NGOs, governments and inter-governmental institutions globally. Bridging theory and practice, students learn the skills and responsibilities of human rights lawyering.

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## Preface

This issues paper was originally prepared as a briefing paper for the United Nations Special Rapporteur on the Human Rights of Migrants, François Crépeau. The Special Rapporteur had planned a two-week visit to Australia from 27 September to 9 October 2015 to gather information about the situation of migrants and asylum seekers in Australia and neighbouring detention centres.<sup>1</sup> The visit was postponed due to the 'lack of full cooperation from the Government regarding protection concerns and access to detention centres'.<sup>2</sup>

The paper provides an overview of xenophobic acts towards migrants in Australia, laws prohibiting racial discrimination and vilification and programs initiated in Australia to address hate speech. It is intended to serve as a resource for policymakers, journalists, civil society organisations, students and the general public who wish to better understand these issues.

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<sup>1</sup> Officer of the High Commissioner for Human Rights, 'Migrants/Human Rights: Official Visit to Australia Postponed due to Protection Concerns' (Media Release, 25 September 2015) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E>>.

<sup>2</sup> Ibid.

## Introduction

Australia's turbulent relationship with migrants reflects a deep and complex national identity struggle. On one hand, some believe that Australia should remain true to its British settler heritage. On the other hand, others view Australia as a welcoming and fair country that is strengthened by multiculturalism, which is now an intrinsic part of Australia's national identity.<sup>1</sup> Additionally, underlying both of these perspectives is modern Australia's complex relationship with its First People. These competing national identities frame Australia's complex struggle to reconcile historical realities with an increasingly globalised 21<sup>st</sup> century.

This issues paper contains an examination of xenophobic acts and speech faced by migrants in Australia. It begins with a summary of the scope of the problem of xenophobia in Australia. This is followed by an outline of the legislative landscape of federal and state laws prohibiting racial discrimination and racial vilification, with a focus on the Racial Discrimination Act 1975 (Cth). The paper concludes with a summary of government programs initiated to address hate speech directed towards migrants. Policy recommendations are outside the scope of this issues paper.

### 1. The incidence of xenophobia against migrants in Australia

Australian xenophobia towards migrants has existed since the Gold Rush of the 1850s brought a wave of non-British European and Chinese migrants to Australia, and Pacific Islanders were brought to Australia to meet the shortage of workers on sugar plantations.<sup>2</sup> The presence of Australia's first migrant workers spurred protests and riots, with local workers and trade unions expressing fears that foreign workers were 'taking' local jobs. In this context, at Federation in 1901, the government announced its intention to maintain Australia's White, European - predominantly British - heritage.<sup>3</sup> This policy, the White Australia Policy, was only fully dismantled in 1973, when the Whitlam Government entirely removed race as a criteria for migration. Australia's national Racial Discrimination Act<sup>4</sup> was adopted in 1975, and a policy of multiculturalism was officially adopted in 1979.<sup>5</sup>

Despite growing acceptance of multiculturalism during the 1980s and 1990s, xenophobic attitudes have re-emerged in recent years.<sup>6</sup> This is, at least in part, as a result of international events and a lack of leadership from consecutive governments on the issue. Internationally, the events of September 2001, the Global Financial Crisis in 2008, racial tensions in Europe and continuing conflict in the Middle East have fostered a global climate of uncertainty.<sup>7</sup> Domestically in the past decade, Australia has witnessed increasing unrest arising from racial, cultural and religious differences in the community, evidenced by the 2005 Cronulla beach riots,<sup>8</sup> racial attacks against Indian students in 2009 and 2010,<sup>9</sup> and the current anti-Islam Reclaim Australia movement.<sup>10</sup> This growing unrest has enlivened and strengthened lingering xenophobia towards migrants in Australia.

Most recently, regarding discussion prior to the Australian government's announcement on September 9 2015 that it would resettle 12,000 Syrian refugees,<sup>11</sup> Member of Parliament George Christensen commented:

'Aussies must always get first go at filling Aussie jobs and only when there's no Aussie to do the job can a foreigner be brought in... There's no rules regarding the tens of thousands of refugees that Labor wants to bring in. They either take a job an Australian can do or they go on the dole.'<sup>12</sup>

<sup>1</sup> Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation surveys 2014* (Monash University, Victoria, 2014), 4, <<http://scanlonfoundation.org.au/wp-content/uploads/2014/10/2014-Mapping-Social-Cohesion-Report.pdf>>.

<sup>2</sup> Australian Human Rights Commission, *Agenda for racial equality 2012-2016* (August 2012), 4 (available at <https://www.humanrights.gov.au/sites/default/files/document/publication/agenda-for-racial-equality-2012-2016.pdf>).

<sup>3</sup> *Immigration Restriction Act 1901* (Cth). Strictly speaking, that Act didn't spell out the White Australia policy but gave immigration officials virtually unfettered discretion which they exercised in a racially discriminatory way

<sup>4</sup> *Racial Discrimination Act 1975* (Cth).

<sup>5</sup> See, for example, objects of the *Australian Institute of Multicultural Affairs Act 1979* (Cth).

<sup>6</sup> Migration Council of Australia, *More Than Temporary: Australia's 457 Visa Program* (Cth of Australia, 2013), 5.

<sup>7</sup> Government of Tasmania, Submission 441 to Australian Parliament Joint Standing Committee on Migration Submission, *Inquiry into Multiculturalism in Australia*, 9 February 2011, p. 6; *Cosmopolitan Civil Societies Research Centre, Professor Andrew Jakubowicz, Submission 420*, to Australian Parliament Joint Standing Committee on Migration Submission, *Inquiry into Multiculturalism in Australia*, 9 February 2011, p. 3; *Australian Education Union – Federal Office (AEU), Submission 419*, to Australian Parliament Joint Standing Committee on Migration Submission, *Inquiry into Multiculturalism in Australia*, 9 February 2011, p. 3

<sup>8</sup> 'Mob violence envelops Cronulla', *Sydney Morning Herald* (online), December 11 2005 <<http://www.smh.com.au/news/national/mob-violence-envelops-cronulla/2005/12/11/1134235936223.html>>.

<sup>9</sup> Jeff Waters and Nic MacBean, 'Anger grows over Indian student bashings', *ABC* (online), 29 May 2009 <<http://www.abc.net.au/news/2009-05-29/anger-grows-over-indian-student-bashings/1697904>>; 'Australia says some attacks on Indian students are race based', *Sydney Morning Herald* (online), January 7 2010 <<http://www.smh.com.au/world/australia-says-some-attacks-on-indian-students-racebased-20100106-lv88.html>>

<sup>10</sup> Bianca Hall, 'Authorities brace for ugly scenes as Australian patriots plan mosque protests', *The Age* (online), August 13 2015, <<http://www.theage.com.au/victoria/authorities-brace-for-ugly-scenes-as-australian-patriots-plan-mosque-protests-20150813-giy69k.html>>

<sup>11</sup> Latika Bourke, 'Abbott government agrees to resettle 12,000 Syrian refugees in Australia', *Sydney Morning Herald* (online) September 9 2015, <<http://www.smh.com.au/federal-politics/political-news/abbott-government-agrees-to-resettle-12000-syrian-refugees-in-australia-20150909-gjibqz.html>>

<sup>12</sup> Shalailah Medhora, 'George Christensen called 'repugnant' over claim refugees will take Australian jobs', *The Guardian* (online), 9 September 2015, <<http://www.theguardian.com/australia-news/2015/sep/09/george-christensen-called-repugnant-over-claim-refugees-will-take-australian-jobs>>

In this context, Australians currently hold a wide range of views towards migrants and their place in Australia. The 2014 Scanlon Foundation Report (the Scanlon Report) found that although there is considerable support within Australia for multiculturalism and immigration in the abstract, the majority does not agree with entrenched cultural and ethnic difference. Current statistics demonstrate that xenophobia remains relatively widespread. For example, one study reports that one in five Australians have experienced race-hate talk, and one in 20 have been physically attacked because of their race.<sup>13</sup> In the Scanlon Report, 18 per cent of respondents reported experience of racial discrimination. Xenophobia is especially experienced by particular sectors of the community. For example, while only approximately 5 per cent of respondents reported negative attitudes towards Christian and Buddhist faiths, 25 per cent felt negatively about Muslims. Xenophobic speech and actions are also alarmingly common towards migrant workers and international students. For example, according to a 2012 survey of international students working in the cleaning industry, 40 per cent of participants reported experiencing rude or abusive behaviour by a supervisor, a rate double that of non-international workers.<sup>14</sup> A 2013 study reported that 18.4 per cent of 457 visa workers from non-English speaking backgrounds had experienced discrimination 'because of their skin colour, ethnic origin or religious beliefs'.<sup>15</sup>

## 2. Federal and state laws prohibiting racial discrimination and racial vilification

### a) Racial Discrimination Act 1975 (Cth)

The *Racial Discrimination Act 1975* (Cth) ('RDA') was Australia's first national legislation proscribing discrimination. It is substantially based on the *International Convention on the Elimination of all Forms of Racial Discrimination* ('ICERD') which is scheduled to the RDA.<sup>16</sup> The RDA prohibits direct and indirect<sup>17</sup> discrimination and makes it unlawful to do any act that involves a distinction, restriction, exclusion or preference based on race, colour, descent or national or ethnic origin in areas of public life, including employment and access to facilities.<sup>18</sup>

In relation to complaints of racial discrimination in employment, the RDA makes it unlawful for an employer to: refuse to employ a qualified person; refuse or fail to offer the same employment conditions, training opportunities or promotion; or to dismiss a person from employment based on the person's racial background.<sup>19</sup> Section 14 also prevents exclusion from trade unions due to racial background, by rendering invalid any rules or documents that so discriminate.<sup>20</sup>

#### i) Complaints and cases under the RDA relating to discrimination in the workplace

If a migrant believes that they have been discriminated against in breach of the RDA they can lodge a complaint with the Australian Human Rights Commission ('AHRC')<sup>21</sup> which would attempt to conciliate it. Of the complaints received in 2013-14, 37 per cent related to the area of employment and 24 per cent related to racial hatred.<sup>22</sup> The AHRC reports do not specify whether these complaints have been made by citizens, permanent residents or temporary visa holders.<sup>23</sup>

Complaints have been made where a person alleges that they were refused employment on the grounds of race, ethnicity or national origin. For example, a man of Sikh ethnicity alleged that he was refused a job in a dental practice because the

<sup>13</sup> Kevin Dunn, 'Challenging Racism: The Anti-Racism Research Project', Western Sydney University School of Social Sciences and Psychology, 2010, <[http://www.uws.edu.au/\\_data/assets/pdf\\_file/0007/173635/NationalLevelFindingsV1.pdf](http://www.uws.edu.au/_data/assets/pdf_file/0007/173635/NationalLevelFindingsV1.pdf)>.

<sup>14</sup> Migration Council of Australia, *More Than Temporary: Australia's 457 Visa Program* (Cth of Australia, 2013), 5; Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation surveys 2014* (Monash University, 2014), 4 (available at <http://scanlonfoundation.org.au/wp-content/uploads/2014/10/2014-Mapping-Social-Cohesion-Report.pdf>).

<sup>15</sup> Migration Council of Australia, *More Than Temporary: Australia's 457 Visa Program* (Cth of Australia, 2013), 5.

<sup>16</sup> As ICERD is included in the RDA schedule, the provisions in the RDA should be construed consistently with the corresponding words from the treaty. See *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 264-265 (Brennan J).

<sup>17</sup> Indirect discrimination occurs where a person requires another to comply with a term that is unreasonable in the circumstances, and has the purpose or effect of impairing the other person's enjoyment of their rights or recognition, by reason of their race. See *Racial Discrimination Act 1975* (Cth) s 9(1A).

<sup>18</sup> *Racial Discrimination Act 1975* (Cth) ss 15 and 11.

<sup>19</sup> *Racial Discrimination Act 1975* (Cth) s 15. Note that employers can be held vicariously liable for discriminatory actions of an employee or agent. See *Racial Discrimination Act 1975* (Cth) s 18A.

<sup>20</sup> There are only a limited number of exceptions to general prohibition on racial discrimination: See s 8(1) (special measures); 8(2) (instrument conferring charitable benefits); 9(3) and 15(4) (employment on a ship or aircraft if engaged outside Australia); 12(3) and 15(5) (accommodation and employment in private dwelling house or flat).

<sup>21</sup> *Australian Human Rights Commission Act 1986* (Cth) s 46P.

<sup>22</sup> AHRC, *Australian Human Rights Commission: Annual Report 2013-14*, (2015), 138.

<sup>23</sup> See AHRC, *Australian Human Rights Commission: Annual Report 2013-14*, (2015); AHRC, *Australian Human Rights Commission: Annual Report 2012-13* (2014); AHRC, *Australian Human Rights Commission: Annual Report 2011-12* (2013).

interviewer said that the applicant would not be a 'good fit' because he wore a turban.<sup>24</sup> Complaints have also been made where a person alleges that they were denied further work on the grounds of race (see Case Study 1).

#### CASE STUDY 1: Conciliated complaint to AHRC of race discrimination and racial hatred in employment<sup>25</sup>

The complainant, who is of Middle Eastern descent, was employed on a contract basis with the respondent manufacturing company. He alleged that his manager made various racially offensive comments in front of his co-workers, including calling him "f\*\*king Arab," "terrorist" and "bomb chucker". He also claimed his manager asked him if he was planning to blow up their place of work and whether he sold and used drugs. The complainant said he was eventually not given any further work with the company. In its response to the complaint, the company said that colourful language was a regular part of workplace banter. The complainant's manager acknowledged that he made some of the alleged comments but denied using the word "Arab". The company claimed the complainant and a number of other contract workers were not offered further work because of a downturn in business. The complaint was resolved with an agreement that the company would provide the complainant with a reference, a statement of service and \$25,000 as compensation. The company also agreed to provide anti-discrimination training to all employees and arrange additional training for the complainant's former manager.

If a complaint cannot be conciliated, or is otherwise terminated, the complainant can pursue the matter in the Federal Court or Federal Magistrates Court to obtain a decision that the respondent had acted unlawfully. Many cases turn on whether the complainant's allegedly discriminatory treatment was founded on racial grounds. For example, in *Sharma v Legal Aid Queensland*,<sup>26</sup> the Federal Court of Australia held that racial discrimination could not be found solely on the grounds that only a small portion of employees were of a non-English speaking background. Similarly, in *Gama v Qantas*<sup>27</sup> it was found that although Qantas personnel did unlawfully discriminate against Mr Gama, both the Federal Magistrates Court and the Federal Court of Australia did not accept that Mr Gama's applications for further training and promotion were denied on the grounds of his race (See Case Study 2).

#### CASE STUDY 2: Federal Court race discrimination case: *Gama v Qantas*

Mr Gama was employed as an aircraft maintenance engineer by Qantas from 1984 to 2002, and was of Indian origin. In this time, he was subject to racial taunts and other forms of discrimination. In particular, in 1998, Mr Gama's supervisor had described him as looking like a "Bombay taxi driver" and other colleagues said to him "Being black, you should be walking up the stairs like a monkey", as Mr Gama walked with difficulty due to a workplace injury. The Federal Magistrates Court held that these remarks amounted to unlawful discrimination under section 9 of the RDA. The Federal Court of Australia dismissed Qantas's appeal of this finding, and noted that:

'Undoubtedly remarks which are calculated to humiliate or demean an employee by reference to race, colour, descent or national or ethnic origin, are capable of having a very damaging impact on that person's perception of how he or she is regarded by fellow employees and his or her superiors. They may even affect their sense of self-worth and thereby appreciably disadvantage them in their conditions of work.'<sup>28</sup>

Further, both the Federal Magistrates Court and the Federal Court held that Qantas was vicariously liable for the discriminatory actions of its employees on the basis that the remarks were made by or in the presence of, a supervisor of Mr Gama. However, while the Federal Magistrates Court was satisfied that Mr Gama had proved a 'general attitude of racial intolerance and a few unpleasant incidents,' this evidence alone was considered insufficient to prove that Qantas refused his application for transfer or promotion on the basis of his race.<sup>29</sup> Mr Gama was awarded \$71,692.90 in damages, which covered damages for discrimination on the grounds of both race and disability.

#### ii) RDA provisions covering racial vilification and proposed changes to this section

Section 18C RDA also prohibits offensive behaviour based on racial hatred, making it unlawful to do an act, otherwise than in private, that is reasonably likely to offend, insult, humiliate or intimidate another person or group of people on the grounds of

<sup>24</sup> AHRC, *Australian Human Rights Commission: Annual Report 2013-14*, 24.

<sup>25</sup> AHRC, *Australian Human Rights Commission: Annual Report 2010-11* (2012), 28.

<sup>26</sup> [2001] FCA 1699 (21 June 2002).

<sup>27</sup> *Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767 [182]; *Qantas Airways Limited v Gama* [2008] FCAFC 69 (2 May 2008) [59]-[71].

<sup>28</sup> *Qantas Airways Limited v Gama* [2008] FCAFC 69 (2 May 2008) [78].

<sup>29</sup> *Gama v Qantas Airways Ltd (No 2)* [2006] FMCA 1767; *Qantas Airways Limited v Gama* [2008] FCAFC 69 (2 May 2008) [43]-[47].

race, colour or national or ethnic origin.<sup>30</sup> Section 18D provides exemptions for artistic work, statements and discussion genuinely made in the public interest, and for fair comment on matters of public interest provided the otherwise unlawful act was done reasonably and in good faith.<sup>31</sup>

In March 2014, the Australian Government proposed changes to section 18C to limit unlawful acts only to those which would be reasonably likely to 'vilify' (incite hatred against), or 'intimidate' (to cause fear of physical harm to, a person or group based on their race, colour or national or ethnic origin) and to include a broader exemption based on the right to freedom of speech, which would exempt any communication, whether words, sounds, written or otherwise, which was made in the course of public discussion.<sup>32</sup>

Although by August 2014 the Government stated that the changes were 'off the table',<sup>33</sup> the proposed amendments raised considerable public debate about the correct balance between the competing rights of freedom of speech and freedom from racial discrimination. The rationale offered for the proposed changes was that the existing section 18C unreasonably restricted freedom of speech because it made unlawful acts that merely hurt the feelings of others.<sup>34</sup> The Human Rights Commissioner, Tim Wilson, supported the changes on the grounds that restrictions on the freedom of speech should be very limited, as free speech is of fundamental importance to public debate and thus Australian democracy.<sup>35</sup> However, there was considerable opposition to the changes, including from Dr Tim Soutphommasane, the Race Discrimination Commissioner, and Professor Gillian Triggs, the Human Rights Commission President.<sup>36</sup> Those against the changes contended that they failed to account for emotional or mental intimidation, and set bad community standards, by allowing people to think that racism is socially acceptable.<sup>37</sup> Of the 4100 submissions to the Government regarding the proposal, 76 per cent were opposed to the changes.<sup>38</sup>

The debate on the proposed changes did not engage specifically with concerns of racial hatred against migrants, despite the entrenched discourse around migrant workers 'taking our jobs'. Submissions did note general concerns that racism is particularly harmful to new migrants, because they are often targeted due to their limited English language skills.<sup>39</sup> The lack of consideration of the effect of the proposed changes on migrant workers may be attributed to the fact that the amendments would make little change to the type of behaviour allowed in workplaces, because offensive racist speech would be prevented by other legislation, including State and Territory anti-discrimination statutes and also general anti-bullying legislation that both cover workplace contexts (see following section).<sup>40</sup> Public discourse surrounding the changes did not link the proposed amendments to events surrounding the incidents of xenophobic violence and safety concerns for international students, which had been sparked in 2012 after a gang attack on an Indian university student in Melbourne.<sup>41</sup>

## b) State Legislation

Each State and Territory in Australia has proscriptions against racial discrimination in the workplace and most have proscriptions against racial vilification. Laws in New South Wales, Queensland and the Australian Capital Territory create a distinction between 'racial vilification' and 'serious racial vilification'. The former only carries civil penalties, while the latter is a criminal offence. The relevant unlawful discrimination and racial vilification provisions in State/Territory legislation are contained in Appendix 1. Case study 3 provides an example of a complaint under the New South Wales anti-discrimination provisions.

<sup>30</sup> *Racial Discrimination Act 1975* (Cth) s 18C(1).

<sup>31</sup> *Racial Discrimination Act 1975* (Cth) s 18D.

<sup>32</sup> Attorney General's Department, *Exposure Draft - Freedom of Speech (Repeal of s 18C) Bill 2014*. See: Attorney General's Department, *Amendment to the Racial Discrimination Act 1975* <<http://www.ag.gov.au/consultations/pages/ConsultationsonamendmentstotheRacialDiscriminationAct1975.aspx>>.

<sup>33</sup> Stephanie Anderson, 'Proposed changes to Racial Discrimination Act "off the table"', 5 August 2014, *SBS* (online), <<http://www.sbs.com.au/news/article/2014/08/05/proposed-changes-racial-discrimination-act-table>>.

<sup>34</sup> See 'George Brandis releases proposed changes to Racial Discrimination Act' (25 March 2014) *News.com.au* (online) <<http://www.news.com.au/national/george-brandis-releases-proposed-changes-to-racial-discrimination-act/story-fncynjr2-1226864294542>>.

<sup>35</sup> Tim Wilson, *Freedom of Speech (repeal of s. 18C) Bill 2014 - response by Human Rights Commissioner, Tim Wilson*, Australian Human Rights Commission, (28 April 2014) <<https://www.humanrights.gov.au/submissions/freedom-speech-repeal-s18c-bill-2014-response-human-rights-commissioner-tim-wilson>>.

<sup>36</sup> Tim Leslie, *Explained: Racial Discrimination Act amendments*, ABC News, <<http://www.abc.net.au/news/interactives/racial-discrimination-act/>>.

<sup>37</sup> Public Interest Advocacy Centre Ltd, *Protecting people from racism AND ensuring freedom of speech: submission in relation to Exposure Draft of Freedom of Speech (Repeal of s 18C) Bill 2014* (30 April 2014).

<sup>38</sup> Heath Aston, 'Tony Abbott dumps controversial changes to 18C racial discrimination laws', 5 August 2014, *The Sydney Morning Herald* (online), <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-dumps-controversial-changes-to-18c-racial-discrimination-laws-20140805-3d651.html>>.

<sup>39</sup> All Together Now, *All Together Now's submission on proposed changes to Racial Discrimination Act* (17 April 2014) <[http://alltogethernow.org.au/news/rda-submission/#\\_edn7](http://alltogethernow.org.au/news/rda-submission/#_edn7)>.

<sup>40</sup> Mike Toten, 'Racial Discrimination Act changes: will it affect you' *Workplace Info* (2 April 2014) <<http://workplaceinfo.com.au/legislation/federal/analysis/racial-discrimination-act-amendments-the-impact-on-employers#.VdpxdRSqBc>>.

### CASE STUDY 3: *Borg v Commissioner, Department of Corrective Services & Anor*

Mrs Borg, a woman of Maltese origin, lodged a complaint with the NSW Anti-Discrimination Board alleging that she had been discriminated against on multiple grounds, including race. Borg claimed that the Respondents unlawfully discriminated against her on the ground of her race pursuant to section 8(2)(a) of the *Anti-Discrimination Act 1977* (NSW), in the condition of employment afforded to her. Borg further claimed that on separate occasions, Mr Wheeler Smith made comments of a racial nature to her during the course of her employment. For example, Mr Wheeler Smith allegedly said words to the effect, 'why can't you speak English', and 'Borgy why don't you go and learn how to speak English, you are in Australia now, not in your country, so forget your language and start learning English'. In relation to the claim of race discrimination, the New South Wales Administrative Decisions Tribunal (Equal Opportunities Division) ordered the Respondents to pay Mrs Borg general damages of \$7,500 (amounting to \$47,500 in total).<sup>42</sup>

#### c) Operation of the RDA and State/Territory legislation in the workplace

The RDA and State and Territory anti-discrimination legislation operate concurrently with the *Fair Work Act 2009* (Cth).<sup>43</sup> An employee who believes that they have been unlawfully discriminated against can elect to lodge a complaint with the Fair Work Ombudsman, the Australian Human Rights Commission or the relevant State/Territory Anti-Discrimination body. For remedies available under the *Fair Work Act 2009* (Cth) for migrant workers, refer to section 4.5, 'Discrimination and Unfair Dismissal' in UNSW Human Rights Clinic, *The Situation of Temporary Migrant Workers in Australia: Issues Paper*, 15 October, 2015.

### 3. Programs initiated to address hate speech

In 2012, the Australian Government launched the National Anti-Racism Strategy, encompassing a collection of programs aimed at addressing hate speech. The three year Strategy utilises education and youth engagement to promote clarity around the notion of 'racism', through events, training, online media and publications. Specifically, the Strategy aims to:

1. Create awareness of racism and how it affects individuals and the broader community
2. Identify, promote and build on good practice initiatives to prevent and reduce racism, and
3. Empower communities and individuals to take action to prevent and reduce racism and to seek redress when it occurs.<sup>44</sup>

The main public awareness component of the Strategy is the RACISM. IT STOPS WITH ME campaign. The campaign asks individuals and organisations throughout the community to develop tailored anti-racism activities, provides materials and education resources, and facilitates the sharing of good practice. It is a call to action that asks all Australians to reflect on what they can do individually to counter racism in the community anywhere, any time.<sup>45</sup> The campaign provides practical tips for bystanders, and how to counter casual and cyber racism.<sup>46</sup> Preliminary program evaluations have found that the Strategy has been successful in starting conversations about racism, sending a clear message, providing leadership and empowering action.<sup>47</sup> Going forward, the National Anti-Racism Strategy will focus particularly on the areas of employment, education, media, government services, sport, and online engagement.<sup>48</sup>

### Conclusion

Australia has become increasingly welcoming towards migrants over time.<sup>49</sup> The introduction of federal and state laws and government programs to combat racial discrimination and racial vilification constitute positive steps towards the eradication of xenophobic acts and speech towards migrants. Nevertheless, xenophobia remains common in Australia, and the government and civil society must continue to strengthen efforts to foster greater tolerance and harmony.

<sup>42</sup> *Borg v Commissioner, Department of Corrective Services & Anor* [2002] NSWADT 42 (26 March 2002).

<sup>43</sup> *Fair Work Act 2009* (Cth) s 351 prohibits an employer from taking adverse action against an employee, including dismissing the employee, detrimentally altering the employee's position or discriminating between employees in any way that would be considered unlawful under the RDA or State and Territory anti-discrimination legislation.

<sup>44</sup> AHRC, *National Anti-Racism Strategy and Racism. It Stops with Me Campaign* (14 May 2015) <<https://www.humanrights.gov.au/our-work/race-discrimination/projects/national-anti-racism-strategy-and-racism-it-stops-me-campaign>>.

<sup>45</sup> AHRC, *Racism It Stops with Me – And the National Anti-Racism Strategy: One Year On* (2013), 4.

<sup>46</sup> AHRC, *Racism. It Stops with Me*, <<http://itstopswithme.humanrights.gov.au/>>.

<sup>47</sup> AHRC, *National Anti-Racism Strategy and Racism. It Stops with Me: Summary Evaluation and Future Direction* (2015), 10.

<sup>48</sup> *Ibid*, 11.

<sup>49</sup> Markus, above n 1, 4.

## Appendix I – State and Territory Anti-Discrimination Provisions

State/Territory legislation	Provisions on unlawful discrimination	Provisions on racial vilification
Australian Capital Territory – <i>Discrimination Act 1991</i> (ACT)	Part 3 covers unlawful discrimination on the grounds of race, amongst other grounds, in the workplace and other areas. The term 'race' includes 'colour, descent, ethnic and national origin and nationality'.	Part 6 governs racial vilification. Section 66 states it is unlawful to incite hatred, serious contempt or serious ridicule towards a person or group of people on the grounds of race, amongst other grounds, in a public place, and carries civil penalties. Section 67 states it is a criminal offence if such vilification is a threatening act.
New South Wales – <i>Anti-Discrimination Act 1977</i> (NSW)	Part 2 Divs 2 and 3 cover unlawful discrimination specifically on the ground of race in the workplace and other areas. The term 'race' includes 'colour, nationality, decent and ethnic, ethno-religious or national origin'.	Part 2 Div 3A governs racial vilification. Section 20C states it is unlawful to incite hatred, serious contempt or serious ridicule towards a person or group of people on the ground of race, in a public place, and carries civil penalties. Section 20D states that it is a criminal offence if the act of racial vilification threatens physical harm to person or property. There are higher penalties where a corporation commits the offence. Prosecution under s 20D requires the Attorney General's consent.
Northern Territory – <i>Anti-Discrimination Act 1996</i> (NT)	Section 19 is a general provision stating that it is unlawful to discriminate on the ground of race, amongst other grounds. Part 4 states the areas of activity where discrimination is specifically prohibited, and includes the area of employment. 'Race' includes 'nationality, ethnic or national origin, colour, descent or ancestry of a person', and also includes 'that a person is or has been an immigrant'.	Racial "harassment" is prohibited by the civil law provisions of the Anti-Discrimination Act (NT) - section 20(1)(b). The Northern Territory Criminal Code also creates an offence of making a threat under section 200, which may apply to instances of vilification.
Queensland – <i>Anti-Discrimination Act 1991</i> (Qld)	Section 7 prohibits discrimination on the basis of an attribute, which includes 'race'. Division 2 prohibits such discrimination specifically in the workplace. 'Race' includes 'colour', 'decent or ancestry', 'ethnicity or ethnic origin' and 'nationality or national origin'.	Section 124A states it is unlawful to incite hatred, serious contempt or serious ridicule towards a person or group of people based on the person's race. Section 131A states that it is a criminal offence if the act of racial vilification threatens physical harm to person or property. There are higher penalties where a corporation commits the offence. The Crown Law Officer must give consent before legal proceedings can begin.
South Australia – <i>Equal Opportunity Act 1984</i> (SA)	Part 4 governs unlawful discrimination on the ground of race and Division 2 governs such discrimination in the workplace. The term 'race' includes 'skin colour, nationality, country of origin and ancestry'.	Racial Vilification Act 1996 (SA) makes it an offence to racially vilify a person and unlawful to racially victimise a person. There are higher penalties where a corporation commits the offence. The Director of Public Prosecutions must give consent before legal proceedings can begin.

<p>Western Australia – <i>Equal Opportunity Act 1984</i> (WA)</p>	<p>Part III prohibits racial discrimination. Division 2 governs discrimination in employment and the workplace. Part III Div 3A prohibits “racial harassment” in employment, education and in relation to accommodation. The term ‘race’ includes ‘colour, descent, ethnic or national origin and nationality’.</p>	<p>Racial vilification is not proscribed under the Equal Opportunity Act, or separate racial vilification legislation but the Criminal Code makes racial harassment and incitement to racial hatred a criminal offence. Offences include conduct intended or likely to incite racial animosity or racist harassment, possession of material for distribution with intent or which is likely to cause racial animosity or harassment, and conduct that is intended or likely to racially harass.<sup>50</sup></p>
<p>Victoria – <i>Equal Opportunity Act 2010</i> (Vic)</p>	<p>Section 7 defines ‘discrimination’ to be direct or indirect discrimination ‘on the basis of an attribute’, which includes on the basis of race and prohibits workplace discrimination, bullying and victimisation on the ground of race. The term ‘race’ includes ‘colour, nationality, ethnicity and ethnic origin’.</p>	<p>The Racial and Religious Tolerance Act 2001 (Vic) makes it unlawful to vilify a person or group of people on the grounds of their actual or assumed race or religion. Section 24 makes it an offence to incite hatred or threaten, or incite others to threaten, physical harm towards the other person, class or people or their property. The penalty for an individual is either imprisonment or a fine, while the penalty for a body corporate is a larger fine. The Director of Public Prosecutions must give consent before legal proceedings can begin.</p>
<p>Tasmania – <i>Anti-Discrimination Act 1998</i> (Tas)</p>	<p>Section 16 states that a person must not discriminate on the basis of race, amongst other grounds. Race includes ‘colour’, ‘nationality’, ‘descent’, ‘ethnic, ethno-religious or national origin’, and ‘status of being, or having been, an immigrant’.</p>	<p>Section 19 states that a person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on a number of grounds including race, religious belief or affiliation or religious activity in the areas defined for discrimination and prohibited conduct and any other area or in connection with any other activity. This conduct is not a criminal offence, but can be the basis for a complaint to the Anti-Discrimination Commissioner.</p>

<sup>50</sup> Criminal Code Compilation Act 1913 (WA) Chapt XI, as amended by Criminal Code Amendment (Racial Vilification) Act 2004.