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...in the community it occurs frequently. It's always difficult to pin point exactly what was a racist thing. Sometimes it's really obvious, but sometimes it's not so obvious. But I've seen bus drivers not pick up Muslim women you know, slow down open the door close the door then just drive off. What can they do? Do they even have the English skills to make the complaint? I think also with people who have just arrived here not so long ago, refugees from countries under particular stress. There's always that feeling too that you've come to a place that you can't kind of complain... you shouldn't be complaining and that is just a part of the deal.

Project participant (Interviewee E)

List of Commonly Used Abbreviations

ADEII Administrative Decisions (Effect of International Instruments) Bill 1995 (Commonwealth)

ADL Anti-Discrimination List

CaLD Culturally and Linguistically Diverse

EOA Equal Opportunity Act 1995 (Victoria)

FCA Federal Court of Australia

FMC Federal Magistrates Court

HREOC Human Rights and Equal Opportunity Commission

HREOCA Human Rights and Equal Opportunity Commission Act 1986 (Commonwealth)

ICCPR International Covenant on Civil and Political Rights

ICERD International Convention on the Elimination of All Forms of Racial Discrimination

RDA Racial Discrimination Act 1975 (Commonwealth)

Religion Declaration Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief

RRTA Racial and Religious Tolerance Act 2001 (Victoria)

The Charter Charter of Human Rights and Responsibilities Act 2006 (Victoria)

UN Charter United Nations Charter

Universal Declaration Universal Declaration of Human Rights

VCAT Victorian Civil and Administrative Tribunal

VCAT Act Victorian Civil and Administrative Tribunal Act 1998 (Victoria)

VEOHRC Victorian Equal Opportunity and Human Rights Commission

WSLS Western Suburbs Legal Service

**1 An Overview of the Racial & Religious Discrimination, Vilification & Harassment**

## Project (The Project)

### 1.1 Why do the Project?

The Western Suburbs Legal Service (WSLS) has provided services to this community for the last 28 years. Over this time it became clear that community members from the western suburbs were experiencing significant discrimination, ostensibly due to their racial, cultural or religious background. WSLS obtained this anecdotal evidence through direct feedback from clients who sought legal advice on a range of legal matters and from discussions held with community members as part of the community legal education program. WSLS was able to give advice and information to those suffering discrimination about racial discrimination laws, and procedures for making complaints under the relevant state and federal laws but the reports persisted. The legal service has a long-term commitment to engaging with systemic issues affecting access to justice and the enjoyment of basic human rights. WSLS decided to seek support for a longer-term project that would attempt to analyse the extent of racist behaviour in the western suburbs; the way the law deals with discrimination complaints; and other strategies that could alert the community to the incidence of racist behaviour and the need to eradicate it.

### 1.2 Partnerships

WSLS had obtained numerous short term grants for law reform and community education projects but were aware that this project required more than a short term grant. To adequately analyse the incidence of racism in this community, to make recommendations for change based on that analysis and in order to make effective change there needed to be financial support over a longer period of time and there needed to be input from many different bodies, (all levels of government and community organisations).

As there was a strong focus in our project plan on looking at how the law deals with discrimination, the legal service entered into partnerships with a number of private law firms who assisted with legal research and analysis. Partnerships were also entered into with community organisations who were prepared to act as a reference group for the Project, giving feedback on the way the Project was shaped, the methodology and the recommendations. Lastly and most importantly, without the support of the Reichstein Foundation, who provided funds to employ a project worker, the Project could not have been undertaken. It is a project that has had input from many sources but it could only have come together with the commitment of the worker concerned and the support of the Committee of Management of WSLS.

### 1.3 Aims

The Project was broken down into three stages: The initial investigation and analysis – the subject of this report; The second stage, looking at strategies for dealing with the findings, i.e. community education and awareness; The third and final stage, looking at issues of law reform. To date, only the first stage has received funding.

The aims of the first stage of the Project are:

To investigate the incidence of racial discrimination, harassment and vilification towards members of the community (including both overt and covert racism).

To investigate the success of the current laws, both state and federal, in dealing with complaints of racial discrimination and religious vilification.

To make recommendations to governments, local, state and federal on changes to policy and procedures and necessary legislative changes.

To write a report detailing the findings of the investigation and the recommendations for dealing with the issues raised both through the legal research and the community engagement.

The ultimate aim of the Project is to benefit all members of the community by heightening awareness of the existence of racial and religious discrimination, harassment and vilification in Melbourne's west. In the short term however, the major beneficiaries would be those who find themselves the target of this kind of behaviour. These include people from many culturally and linguistically diverse backgrounds and in particular those who are recent arrivals in the community, including refugees. This report presents our findings and recommendations from the research undertaken in the first stage of this project.

## 2 A Brief Look at Racism in Australia

I think there's heaps of systemic reasons; Indigenous communities are highly disempowered simply because of their economic situation and health situation. We also have lots of different... cultural groups that don't necessarily unite over these issues; we don't have the structures for people to unite... no systems in place. Government and media reinforce discrimination and racism and whatever... Part of the problem here in Australia is that it doesn't regard itself as racist; it's implied that there is not racism here, that we are not racists, we are not a racist country, everybody's open, we've had this policy of multiculturalism... like if we just go around saying we are not racist then that's enough. That's creating a problem because the problem is exacerbated when you don't recognise that there is even an issue.  
(Interviewee E)

Racism was embedded in the conquest and colonisation of Australia and has deeply affected Indigenous and other minority communities in myriad ways since 1788. Wahneema Lubiano suggests that, "central to the existence of racism is the politics of its denial."<sup>1</sup> Racism need not be consciously articulated as policy or personal belief in order to take affect – in reality, racism is often invisible in society, although it can affect access to employment, housing, education, and safety.<sup>2</sup> In Australia, Indigenous people rate lowest in every social indicator, suffering homelessness, unemployment, illiteracy, poor mental and physical health, and alcohol or other drug

problems.<sup>3</sup> The inequality suffered by Indigenous people is a result of systemic racial discrimination and inequality: “Aboriginal people are not simply ‘disadvantaged,’ they are part of a dispossessed nation of people who are oppressed.”<sup>4</sup>

Australia was colonised under the false notion of *terra nullius*; empty land. In 1992 in *Mabo v Queensland*, this legal fiction was successfully overturned in Australia’s High Court: “The common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their traditional laws and customs, to their traditional lands.”<sup>5</sup> However, Indigenous sovereignty is still not recognised, and discrimination against Indigenous peoples remains an issue. Indigenous peoples’ lives have been deeply affected by the denial of their sovereignty; from the absolute power of colonisers in the 1800-1900s to relocate, remove and incarcerate Aboriginal people onto reserves and missions where every aspect of life was pedantically controlled; to government authorised child-removal policies that continued until 1972; to the increasing criminalisation and incarceration of Indigenous people, predominantly for ‘crimes’ of disturbing the ‘good order,’ i.e.: offensive behaviour, sleeping in public places, failure to pay fines resulting from dog-control or parking infringements, or drinking in public places.<sup>6</sup> In 1991, a Royal Commission into Aboriginal Deaths in Custody (RCIADIC) was established to investigate 99 Aboriginal deaths in custody between January 1980 and May 1989. Judicial and police racism were found by the RCIADIC to affect Indigenous incarceration, at the level of police surveillance, arrest and sentencing. This finding was not new; the 1990 Human Rights and Equal Opportunity Commission’s (HREOC) National Enquiry into Racist Violence - based on interviews with 171 Aboriginal incarcerated young people - found that 85% of participants had been hit, punched, kicked or slapped by police.<sup>7</sup> Consequentially, Aboriginal youth consider police to be “racist and oppressive, sexist, harassing, intimidatory and violent.”<sup>8</sup>

Other minority communities in Australia suffer from racial and religious vilification that at times has been state-sanctioned. Migration to Australia has included European settlers post-invasion, Chinese workers during the gold rush of the 1950s, and South Sea Islanders who were kidnapped or “black-birded” as indentured labour in Queensland in the late 19th Century. In 1901 Australia tried to curb immigration with the White Australia Policy, restricting immigration to people from English-speaking cultures. During this period English language and skills tests were introduced to restrict immigrants from non-English-speaking cultures from coming to Australia.<sup>9</sup> The White Australia Policy was reflective of the attitude of the time, of the “need for a united race... not only [where] members can intermix, intermarry and associate...but implies one inspired by the same ideas... the same general cast of character, tone of thought, the same constitutional training and traditions.”<sup>10</sup> It was not until 1965 that the Australian Labor Party abandoned their commitment to the White Australia Policy saying “racially based discrimination was officially unacceptable,” and the Policy was abolished in 1973. This was a socially progressive era, where multiculturalism was hailed as Australia’s opportunity to recognise and celebrate Australia’s cultural diversity and deal with the challenges and opportunities arising from it.<sup>11</sup> The following decades saw a period of unprecedented action on anti-discrimination issues by courts,

governments and communities. The *Commonwealth Racial Discrimination Act* (RDA) was enacted in 1975, the land rights and Native Title movements were born, and HREOC and various state Anti-Discrimination Tribunals were established.

In the 1990s however, racism visibly resurfaced with the racist policies of the One Nation party receiving a massive swell of public support;<sup>12</sup> Native Title application limited and land rights claims denied; and the criminalisation and dehumanisation of asylum seekers through mandatory incarceration in geographically remote detention centres.<sup>13</sup> Recent acts of global terrorism and the war on Iraq have provided fertile grounds for racial hatred. An increase in fear and awareness of the potential for terrorism followed the attacks on the World Trade Centre in New York and the nightclub bombings in Bali. Across Australia there have been verbal and physical attacks on Muslim women wearing hijabs (veils/headscarves) or migrants visibly different due to their skin colour. A recent and distressing example of mass racism is the Cronulla Race Riots, where 5000 anglo-Australians gathered to violently “reclaim the beach” from people of Middle-Eastern appearance. The 2003 HREOC Isma project, found that prejudice against Arab and Muslim Australians has happened and continues to happen on the street, in shopping centers, in the media, in our schools, on public transport, in government and non-government services, at airports, hospitals, and so on.<sup>14</sup> This included: Muslim women wearing the hijab who are anxious to walk their children to school in the fear of being spat on, abused or ridiculed; children wondering why their friends won't play with them anymore; men and women being singled out at airports and feeling that they had been refused employment because their name was Mohamad, their resume said they spoke Arabic or because they were wearing the hijab; young men who felt that they were targeted by police; women and girls who had been physically abused, had objects been thrown at them, being run over by cars whilst walking on the footpath, all causing injury; people sick of having to justify their religion or cultural background, upset by what they felt was a wave of hatred perpetrated by talkback radio, mail drops and a barrage of TV images; seventh generation Australians being told to ‘go back to their own country.’

Not all racial discrimination is this overt. Many people suffer discrimination on a daily basis that is subtle, and difficult to pin-point as racially motivated. Although the number of reports of racial and religious vilification received by the Victorian Equal Opportunity & Human Rights Commission (VEOHRC), formerly the Equal Opportunity Commission Victoria, have gone down in the past three years, anecdotal evidence gathered by the WSLS suggests that racial and religious vilification remains an issue. This calls into question the effectiveness of government and community responses to racism and the possible need to implement new responses and strategies for dealing with discrimination. Under existing anti-discrimination legislation, the onus is on victims of racism to prove discrimination was committed by the perpetrator. Apart from the most obvious cases of discrimination, this is often almost impossible, and is in part reflected in the number of complaints to the VEOHRC that are unresolved. By confining our understanding of racism to the extreme bad behaviour of a few individuals, racism is seen as an “intentional, albeit irrational, deviation by a conscious wrong-doer from otherwise neutral, rational, and just ways of distributing wealth, power, jobs and prestige.”<sup>15</sup>

This approach ignores the broader effects of racism in legal and social structures.

## **2.1 Racism and Media Representation**

The mass media play a crucial role in the social construction of reality because knowledge of many social phenomena is obtained solely through the media rather than through direct experience... the mass media has evolved... to become the dominant player in the...reality construction process.<sup>16</sup> Media reporting of social problems in the western suburbs often refer directly or indirectly to social constructions of race. Strategies of selectivity and exaggeration (for example stereotypes) are commonly pursued, thus avoiding overt racism but nevertheless creating a construction in which racism is facilitated. For instance, where “the bulk of portrayals” of racial identity occur “in the context of ‘bad news’” a net image is created of persons of particular Culturally and Linguistically Diverse (CaLD) communities “as a threat or danger” to the community at large.<sup>17</sup>

Media exaggeration of the role of ‘new’ Australians in crime problems enjoys a symbiotic relationship with over-policing and police actions to placate public fears through strategies of racial profiling.

The influx of African refugees in Melbourne, including those settling in the western suburbs over the past ten years has generated new media discourses. For instance, recent headlines read:

‘Warning on African refugee gangs – Police in Melbourne fear the emergence of militant street gangs of young African refugees who have served in militia groups in their war-ravaged homelands.’ *The Australian*, 26 December 2006.

‘Refugees “turning to crime for kicks” – Young African men raised to idolize warlords and embrace violence are turning to crime and street fighting for ‘entertainment’ in Australia.’ *The Australian*, 27 December 2006.

Proffering highly prejudicial statements regarding the dangers posed by African youths to the communities in which they have settled, both articles in question were based on the opinion of a single commentator.<sup>18</sup> Though reference was made to the connection between unemployment, lack of opportunity and youth violence in these articles, the main focus is the ethnic/racial identity of those being discussed. The by-product of such exaggerated and selective media reporting is counter-productive, leaving the public “with the perception that there is some racial tendency to offend, rather than that certain ethnic groups are involved in crime because they have a lack of opportunities just as Anglo-Saxons will engage in crime for the same reasons.”<sup>19</sup> The impact both on the observers and the observed is severely problematic, in fact generating structural barriers to opportunity and inclusion. Such injustice is compounded where there is no evidential justification for the making of the statements.

Recent reporting of an accident occurring in Footscray, in which one man was killed and four injured by a car that had reversed onto the sidewalk, provided an instance where seemingly benign reporting was constructed to facilitate racism. Most news sources specifically reported the driver was an African woman, eliciting racist responses from community members, such as: “Would you please report what we want to know... Did the driver have a licence? If so, how did she get a licence? How long has she been in Australia? Accidents happen but too many of this type seem to involve drivers from backgrounds where driving does not come naturally.” - *Tim HALL of Victoria*

“Footscray used to be a lovely suburb of Melbourne, now with this multiracial rubbish it is a third world suburb. Slowly but surely the rest of Australia is following suit.” - *Mister Master of Australia*

The following day The Herald Sun published the piece, ‘Crowd Fury After Crash’, which described the scene in the following terms –

“...yesterday, in the wake of the tragic accident outside Café D’Afrique, racial tensions ran high. Five doors away is the Axum Café, which had a crowd of African men outside two hours after the accident.”<sup>20</sup>

In response Cr Michael Clarke, Mayor of the City of Maribyrnong, and the Honorary Marsha Thomson MP, Member for Footscray sent a letter to the newspaper expressing disappointment with the manner in which the incident had been reported. Having attended the scene soon after the accident, the authors stated that what they observed bore no resemblance to what was subsequently reported by the Herald Sun.<sup>21</sup> The authors continued:

“The delight of Footscray is how well our diverse and multicultural community interacts. What we witnessed at the scene was exactly this: people of all races, ages and genders, freely intermingling – shocked, upset and genuinely concerned for the victims of this tragic event.

At no stage did we notice the racial tensions or the racial outbursts reported in your story. There was one minor, isolated incident that while related to the accident, had no racist overtones.

The community of Footscray has worked hard to be a gathering place of tolerance and harmony. People were genuinely shocked and emotional after this tragic accident and the impact was devastating for us all. Yes, there was high emotion, but to suggest there was a ‘race row’ is simply untrue.”<sup>22</sup>

The disjuncture between media representations of the western suburbs and the experiences and views of most local residents is a recurring phenomenon.

### **3 Project Methodology and Findings**

#### **3.1 Methodology**

From the Project’s inception in 2004, WSLS recognised that in order to achieve the Project’s objectives, input from a range of participants over a significant period of time was required. This involved the development of a three part plan, the first stage of which forms the basis of this report. This project aims to encourage real dialogue and sustainable solutions to address issues of racial and religious discrimination and vilification in our community. Stage One of the Project took some time to get off the ground. Long before we had secured funding, we had begun preliminary consultations with community organisations, government bodies and the private legal profession. It has been a crucial part of this project that broad community consultation has taken place, allowing effective development of the Project and ensuring relevance and full participation. Once we were successful in securing project funding through the Reichstein Foundation and a commitment of pro bono assistance from private law firms, we hired a worker to coordinate the Project.

We invited local community workers and members, and lawyers from the pro bono team to attend the initial project meeting. After discussion of the Project objectives, it was decided that the best way to work was to divide into two groups. A steering group of interested community organisations and ethnic leaders was formed and a legal research group was formed. The Project worker liaised between the groups to coordinate the activities. The

steering group worked to ensure all of the issues and concerns relating to the collection of information about people's experiences of discrimination were addressed. This group dedicated itself to establishing all processes in relation to the collection of this information, including the 'Call for Stories' document (the primary promotion and invitation for people to share their experiences with us), interview/survey questions, interview protocol, consent forms and referral/support procedures for interviewees.

Members of the steering group provided networking and access opportunities and were able to discuss protocols to ensure individuals and groups were approached in an ethical manner. This process involved the principles of Action Research, meeting with specific groups within the community and surveying local communities. Included in this group were members of the Bahai faith, workers from Brimbank Melton Community Legal Centre, City of Hobsons Bay, Horn of Africa Communities Network, Moondani Balluk Indigenous Academic Unit (Victoria University), Norwood Association, Serbian Welfare Association, Westgate Migrant Resource Centre, Williamstown Community House and Women's Health West and two local residents. The community members and workers involved proved to be invaluable in their insights to their particular community groups, ideas for the Project and providing access to members of particular communities.

The legal research group was made up of lawyers from private firms that had made a commitment of time to undertake much of the research into current legislation at state and federal level, the role of international instruments and the remedies available through each jurisdiction. Lawyers from Allens Arthur Robinson, Blake Dawson Waldron, Mallesons Stephen Jaques and Maurice Blackburn Cashman worked together in completing this research based on our established plan. In addition, the VEOHRC and the HREOC offered assistance by providing access to their enquiry and complaints statistics. Once processes were established, the Project was promoted in the community in a variety of ways. These included extensive mail-outs to community and ethnic-specific organisations in the western suburbs, advertisement on 3ZZZ Ethnic Radio and local media articles. Project information was made available to people visiting our office and participants in our community legal education activities. The information about the Project invited people to share their experiences by way of one-on-one interviews or group consultations and was made available in 11 languages other than English. This was made possible by funding received through the Melbourne Community Foundation, Slater and Gordon Foundation.

### **3.2 Who we Interviewed**

Some of the interviews took place in people's homes, at the WSLS office or at neutral venues chosen by participants. Where the interviewee agreed, a tape recorder was used, otherwise notes of the interview were recorded. All participants were offered the use of an interpreter which was taken up in one of the group sessions.

Some people also left phone messages or just dropped into the WSLS office in response to hearing about the Project.

The legal service undertook seven (7) in-depth interviews and one (1) group consultation. A number of local community organisations also contributed information by way of a survey. In total approximately twenty five (25) individuals shared their experiences with us.

The people who shared their experiences with us came from at least ten (10) different racial backgrounds and at least one (1) defined religious/cultural group. The table below provides some general information about project participants:

The interview/survey questions focused on the participant's awareness of laws against racial and religious discrimination, the types of and places where experiences of discrimination have taken place, whether or not the participants made a complaint, to whom, and the success of that complaint. We also asked participants about their ideas for change. The interview questions can be viewed at Appendix 1.

### **3.3 Critical Reflections on the Process**

The size and diversity of the western suburbs population meant that the community consultation processes were very time consuming. A strength of our approach in this aspect of the Project was that we used our established knowledge and networking within the community prior to receiving project funding. Those organisations that were involved, involved themselves with gusto and great patience and this project would not have been possible without their committed involvement. Nonetheless, the difficulties associated with accessing such a diverse group of individuals and organisations must be acknowledged. Another useful aspect of our approach was the creative use of different forms of media. This allowed us access to people that would otherwise not have been able to contribute to the Project.

Although we did not conduct a great number of individual interviews, the quality and depth of those interviews was outstanding. Those individuals who participated, knowing that we were not able to change things for them in the short term at least, were nevertheless extremely frank and supportive of the Project as a whole. We must thank them for their contribution and acknowledge the difficulty they often faced in recounting highly distressing experiences.

The promotion of the Project also created an increase in demand for community legal education and information sessions about discrimination. Meeting this demand was possible, however the service continues to struggle with its casework capacity and is not necessarily always able to meet that need.

Upon reflection, the legal service could easily have used a full-time worker to coordinate this project. We relied heavily on the involvement of a large number of volunteers and we thank them for their time.

### **3.4 Research Findings**

#### **3.4.1 Awareness of laws**

All interviewees said they were aware that the law in Australia says it is illegal to discriminate on the basis of race or religion. In some cases it seemed there was confusion about the extent or particulars of the laws. Of the organisational surveys, one (1) said that people they work with know about the laws, one (1) said their clients didn't know and one (1) indicated some people they work with are aware and some are not. Interestingly, one organisation responded with the following comment to this question:

The law is contradicted by the behaviour of our authorities like the Prime Minister. When he disrespects or generalizes about us, it is difficult to believe the laws. (Org 3)

There was however, a clear idea from every person who participated that discrimination of this kind is an activity that all members of the community should be protected from:

Many people would not know what to do and therefore no action would be taken. (Org 2)

#### **3.4.2 Types of Experiences**

We asked participants to tell us whether they had experienced racial or religious discrimination, vilification or harassment under three broad categories, when dealing with authority, when accessing services or in the community. We also asked them to share what they had heard about other people in their communities experiencing this kind of discrimination. In the organisational surveys, we asked workers to comment on their observations and estimations in relation to the experiences of the particular groups they work with. Participant responses are described in the following sections.

##### **3.4.2.1 Authority**

In speaking of experiences of racial or religious discrimination by people in positions of authority, six (6) interviewees reported experiencing this discrimination by police, four (4) by schools, one (1) by an employer and one (1) by another authority. One (1) organisation reported that its clients face ongoing discrimination when dealing with authority and said that it often occurs when clients are accessing Centrelink and other government agencies.

##### **Police**

One interviewee stated that he went to the police station to make a complaint about racial discrimination by a neighbour, with the expectation that police would assist, but he was told to just ignore the situation.

Another interviewee said that when she went to complain to the police about religious discrimination experienced in a market (a store owner had grabbed her and tried to remove her head scarf), she was told it would be too difficult

to prove because there was no evidence of physical injury. Despite police assurance that they would pursue the matter, she heard nothing else from them.

These interviewees identified their treatment by police when making a complaint of racial or religious discrimination as another experience of racial or religious discrimination in itself. This raises the issue of secondary discrimination, something that was brought up again and again by interviewees in the sharing of experiences. The hopelessness and frustration that people feel when they experience racial or religious discrimination and are unable to gain assistance quickly is a major issue and is discussed later in this report.

## **Schools**

One interviewee talked of her experience in a particular class of an adult education institution, where a discussion on the wearing of head scarves occurred in response to a story they had seen on television about events in France. The teacher of the class advocated that head scarves should not be worn. Being the only person who wore a head scarf in the class, and feeling personally impacted on by the teacher's comments, the interviewee felt she needed to respond. She reported unfair treatment by her teacher to the administration. Both the teacher and the school administration ignored her verbal and written complaints:

I didn't mind at first as the person was ill-informed and I thought I could educate them. Others in the class accepted and supported me. .. This teacher made me do my work again when I got good feedback from other teachers. I wanted to leave because of her but I didn't want her to push me out. After a year I couldn't put up with it any longer so I left... What did I do? I talked to my husband, my sister. They told me I had to be strong. (Interviewee B)

The issue of complaints being ignored was also raised by a number of participants and is discussed later in this report.

## **Employers**

One (1) interviewee said he had experienced racial discrimination in temporary employment as a forklift driver. He was the only non-anglo worker and was made to clean the toilets. He was laughed at by other employees when asked to do these jobs. When he approached the boss to ask why he was made to do these jobs, he was asked to leave and escorted from the premises.

I only wanted to do the job I had applied for. (Interviewee A)

Organisations reported discrimination in employment as an ongoing issue for their clients but also said that clients did not complain for fear of losing their jobs.

Anecdotally, WSLs hears stories about victimisation in employment with some clients prepared to make formal complaints. Others fear repercussions in obtaining other work if they get a reputation as someone who complains.

### **3.4.2.2 Accessing Services**

When asked if they had experienced racial or religious discrimination in trying to access services, two (2) interviewees reported it in renting/buying/selling a house, four (4) in shops and restaurants, three (3) in government departments, two (2) in financial services, one (1) in health care and three (3) in relation to transport services.

Organisations reported issues for their clients in accessing mainstream services either by phone or face to face. Despite the frustration felt by the people experiencing this discrimination, they would not complain, but would tell family and friends and warn them off that particular service.

#### **Renting/buying/selling a house**

One (1) interviewee, although not talking of a personal experience said:

Indigenous people don't get into the private rental market. It is common among the community to hide aboriginality when trying to access services. (Interviewee G)

#### **Shops/restaurants**

One (1) participant reported:

"We had been to a 50th birthday party, after that everyone went to the ... Hotel and we got there a bit later than everyone else, but as we were getting there everyone was walking away and we said 'oh, what's going on' and they said, 'they won't let us in.'" One member of the group was persistent in her enquiries as to why they weren't being allowed into the hotel. Eventually the security guard said: "'cause you're aboriginal. And two weeks ago there was another bunch of Aboriginal people here that were fighting...' It spins me out because he actually said it, where everything's always been so indirect." This interviewee describes the anger and frustration that she and the group she was with felt at being discriminated against based on their aboriginality and having the behaviour of another group of people attributed to them: "I'm fed up with the attitude of not worrying about it and just let it go, 'cause we have the right to go into that pub just as anybody else. We've been there before...it happens a lot." (Interviewee G)

Another participant described an incident at her local market. A store owner accused her of damaging items. He shouted at her and told her to remove her headscarf and grabbed her headscarf. She told him not to touch her. This participant said she wanted to be "...swallowed up by the earth" (Interviewee D). Before this incident, she had been going to that market for almost 22 years.

Muslim women reported facing racial and religious discrimination whilst in shops and restaurants. They commonly reported poor service and refusal of service, in one group consultation, eight (8) women indicated they had experienced this kind of discrimination in supermarkets:

You get sometimes... checkout girls in the supermarket, 'no we're closed' and you have to go away, and the next person that comes they are open. Another time when a new queue started and the checkout girl [says] 'you can all come over here,' and [there is] someone, another customer in the queue saying 'no, you can't come here, you have to stand over there.' (Group 1)

It happens in [the] supermarket quite a lot and they pick and choose who they say hello to. They are usually friendly but they are very tough with us. You can find in this area, they don't know about Muslims. They look at you in the street. You can see, when the line closes, and you watch and one minute, two minute they open again. And you can't scream and cry you can't do anything, it's easier to just go to another line. It happens to everyone, shopping centres around here. Even here at Safeway, if Muslims apply, 'are you wearing the hijab? We'll call you back.' (Group 1)

### **Government departments**

One (1) participant reported the following interaction with a statutory body.

Centrelink is very very racist to African people the way they treat us. It is one thing for the government policy but another thing is the way they are acting when we take our forms in to give at the reception. We say 'hello' but they are supposed to say to us 'hello'. We are their clients but you know they just say 'mmph' and take the form just like that and ignore us. They actually say some extra comment which is not acceptable. (Phone 1)

### **Financial services**

No participants indicated experiences of racial discrimination in this area.

### **Health care**

No participants indicated experiences of racial discrimination in this area.

### **3.4.2.3 In the community**

In speaking to interview participants about experiences of discrimination in their local community it became apparent that this is one of the biggest areas of concern. One (1) participant answered 'yes' to experiencing racial or religious discrimination with neighbours, and many individual interviewees and group participants reported these experiences in their daily activities. Organisations surveyed also reported this as a major area in which discrimination occurs. Particularly when accessing public transport or just moving from place to place. The stories of these experiences are highly confronting.

One (1) organisation surveyed reported an increase in incidents of discrimination in the local community, after the London bombings.

## **Neighbours**

One (1) interviewee was successful in gaining an intervention order against a 'neighbour from hell' after a series of racist taunts and a physical assault, however he was left with the burden of a large solicitor's bill.

Again, anecdotally, WSLS sees clients complaining of racist comments being directed at them by their neighbours and they come to the legal service seeking protection from this sort of behaviour. The usual remedy is an Intervention Order under stalking legislation that prohibits the behaviour from continuing. These orders can be difficult to obtain, however, unless there is a history of sustained harassment and there are witnesses or physical evidence.

My son used to play with my neighbours child, we used to say hello to each other. After the London bombings my neighbours stopped saying hello and their son didn't play with my son anymore. (Org 3)

## **Local Facilities**

No participants indicated experiences of racial discrimination in this area.

## **Daily activities**

One (1) interviewee reported experiencing almost daily name-calling as a taxi driver.

Another interviewee described an experience of challenging racial discrimination onboard public transport:

"[There were] five women waiting at a bus stop – the driver didn't stop for them. A Christian Ethiopian woman on the bus asked 'why didn't you stop for them?' The bus driver said, 'I'm not going to stop for terrorists.'"

The Ethiopian woman insisted that the bus driver return to pick them up or drive directly to a police station. She wrote down his number and the name of the other passengers who agreed to be a witness. The complaint didn't go any further than the bus driver, however he did go back and pick the women up. She threatened to complain to police but didn't when the driver changed his behaviour. (Org 3)

In the street, a car came past and screamed religious profanities. (Org 1)  
When walking or driving in the street someone will wind down their window and say 'why don't you go back to your own country' or will call you a terrorist. (Org 3)

The following is an example of a horrendous experience of a female project participant:

I was on a tram in North Melbourne and I had the misfortune of sitting next to a neo-Nazi although I didn't realise it. Anyway, I sat down next to this guy, on the tram, and only at a certain time realised that he had the tattoos and stuff. I just hadn't noticed. I probably wouldn't have sat next to him otherwise, or I may well have but I would have been a bit wary. Anyway, he started doing this thing of kind of sniffing the air. He was kind of sniffing around me and stuff, it was a bit weird, but I still kind of fully hadn't registered who he was or whatever. And then he started saying in quite a loud voice, "something really smells around here," and he turned to me and said 'you really smell, you should take a shower.' And I sort of turned around and said 'what!?' and then he said, 'you smell like cattle.' then he said, 'get up, you can't sit here.' And I was really gobsmacked, it's a real shock, you're sitting in a public space, so it's quite embarrassing too, cos people don't really know who he is, they might just think that I really smell bad. And then, he was staring at me, and then he raised his hand at me, and I thought he was gonna hit me. And at the same time I stood up. And then this guy behind him, there was this Vietnamese guy sitting right behind him, I mean I presume he was Vietnamese, and he said to this guy, 'you're a f\*\*\*\*\* racist' and the guy turned to him, grabbed his head, and banged it against the side of the tram, and then they kind of got into a physical fight. I ran to the front of the tram to alert the tram driver of what was happening, and the tram driver unfortunately took the action of stopping the tram and closing the door and not letting anyone out, so we were all trapped in there with this crazy guy. I started to cry, I was very upset by the thing, and this girl turned to me and said, 'this is not such a big deal, what are you on about?' They were just completely separate people. I think they were trying to be consoling but it wasn't very helpful. The police actually came quite quickly and took him off. But the unfortunate thing about it, which was a little bit scary for me, was they took him off the tram, but the tram was just at my stop, like only 100metres away, and I actually lived at the tram stop, literally, so he was talking to the police and I had to walk out and go to my house, so I had to walk around the block, waiting for all this scary stuff to finish.' (Interviewee E)

The following is the description by an interviewee of a racist attack she experienced after and during an altercation with a driver as she was walking through a pedestrian crossing;

...and then he started screaming at me 'you f\*\*\*ing black s\*\*t' various racist kind of vitriol, but he was screaming it and so I was furious and turned around... you know so I started screaming as well you know, 'you racist f\*\*\*... what's wrong with you?' But at the same time walking away. And then this other woman on the street started screaming at me, she wasn't involved at all but she got involved because I was screaming at him so she perceived me to be creating a scene and then she started screaming and I was walking away in a high state of distress at the same time... The impression I got was that she was kind of supporting him... she was just a random person who joined him.. I don't know whether he deliberately hit me with his car and didn't stop. Or whether that was just an accident and that escalated the later stuff you

know. There were a lot of people around but nobody said anything.  
(Interviewee E)

Another interviewee described attending a local football club function where a well known guest speaker upon entering the stage made a 'joke' that was extremely derogatory:

"I just wanted to leave straight away but my friend wanted to stay. My friend heard someone in the crowd say '\*\*\*\* the Abo's just get on with it... I went up to him after and I said I work for... and I'm going to be taking this a lot further. And his attitude was 'you do what you want love' his attitude was that he was not sorry. Not sorry at all for what he said." (Interviewee F)

In talking about taking a walk in her neighbourhood one (1) participant said, "Why be against the Muslim? We walk around, half hour each day, we need it. But sometimes we stop, because the beeping. We come home, half an hour, headache. We can't stay at home, locked in 24 hours like a cage. We are part of the community we cannot be locked away." (Group 1)

### **Other people in the community**

Every participant in this project told us that they had seen or heard about other people in their communities experiencing racial or religious discrimination.

It should be noted that due to the experiences of particular groups in Australia, this was a difficult question for some participants to answer. In particular, the Indigenous people of this country have suffered the effects of colonialism for the last 200 years and reported feeling like racial discrimination and harassment was often a regular part of the everyday lives of their communities:

I could never understand why all my mob, the Indigenous people were so angry. If we get knock backs like that all the time then of course you are going to get angry. Angry leads to grief, leads to violence, leads to drugs, it leads to all those things. That's why I believe half of our mob are drinking and smoking and because they have been knocked back before and they have had all this shit happen to them. I guess I just wanted it to stop. (Interviewee G)

Muslims expressed similar feelings, being so readily vilified in the media and the subject of constant criticism/debate:

...in the community it occurs frequently. It's always difficult to pin point exactly what was a racist thing. Sometimes it's really obvious, but sometimes it's not so obvious. But I've seen bus drivers not pick up Muslim women you know slow down open the door close the door then just drive off. What can they do? Do they even have the English skills to make the complaint? That kind of thing. I think also with people who have just arrived here not so long ago particularly refugees you know from countries under particular stress. There's always that feeling to that you've come to a place that you can't kind of

complain... you shouldn't be complaining about and that that is just a part of the deal. (Interviewee E)

My niece was in the supermarket, and this man he starts to say Muslim, and go away and terrorist. (Group 1)

If I am driving at night time by myself, I might get hurt. So I am very quiet, very patient. I have a right here like everybody. (Group 1)

Frequent comments are made during the course of my contact with clients, 1 in 7. (Org 1)

Not only have clients complained but also family members and friends who's second language is English. Monthly there are definitely 5 people who I hear have felt discriminated against. (Org 2)

It is really common after terrorist attacks. But it is really common generally. Our group meets once a month; you will always hear a story about discrimination, whether it's towards women or her children. So we hear about this every time we meet. (Org 3)

Examples given included name calling, e.g.: "wog," and challenges to the wearing of headscarves: "...uncover your face, we don't know what you are going to do to us. We can't see your face". (Interviewee B)

## **Media**

Many participants also talked about the identification of people in the media and describing their race or religion when it is not relevant:

"These stories are very common, particularly after a terrorist attack or after some bad media coverage. It is really hard, particularly for a few months after these events." (Org 3)

Media portrayals were mentioned as a broader example of this discrimination or vilification and are discussed further in parts 2.1 and 10.3 of this report.

### **3.4.3 Participants' reactions and the impacts of racial and religious discrimination**

Everyone deals with discrimination differently. Some people can talk about how it feels, others cannot or will not. Racial and religious discrimination is destructive and disempowers people by devaluing their identity. It destroys community cohesion and creates divisions in society.

We asked participants about how they reacted to these various experiences of racial or religious discrimination, Responses varied from trying to ignore or make jokes about it, modifying their own behaviour or activities, talking to family or friends or making a complaint to an individual or the appropriate body. These complaints are discussed in part 7 of this report.

It must be made clear that almost every participant expressed feelings of extreme emotional distress and despair and indicated that these impacts were long-lasting:

Something very very painful, my emotion, my feeling. I lose hope. (Group 1)  
We're just, very uncomfortable and we see what's happening today. What about the youngsters on public transport coming home from schooling?  
(Group 1)

I don't go out much now. I stay indoors after 6pm and only go out into crowded streets. (Group 1)

What is the use? Who do you complain to and what will happen? No one thinks there will be any action taken. (Org 3)

The women did not complain to the police. They said because of our colour, he knows who we are and where we live and could come back and get us.  
(Org 3)

They didn't think anything could be done about it. (Org 1)

It makes women become fearful, they stop going out; they become isolated and are scared to take their kids to the park. (Org 3)

For the next little while this impacted on me, that's the way these things work. They impact on me in a way that initially I am quite affected... which means I'll modify my behaviour or even how I feel getting about in the world. Makes me a little bit more suspicious or wary or whatever... but then gradually that wears off and you become more trusting and at ease... but another such thing will happen and you'll just go back to that same feeling that you can't quite trust people. (Interviewee E)

I was highly distressed by that incident and it's quite a shock because you assume that you're getting about in your community particularly in a community like Footscray which is very, essentially diverse. You don't really expect that kind of racist behaviour. You all also don't expect that it would happen and to have nobody say anything. (Interviewee E)

I remember at the time I had a real issue about feeling trustful or at ease with white people with a working class background. Feeling that particular group is more prone to racism... because of what's happened with the Cronulla riots you know, and this incident. I have this neighbour and he and I always got along well you know. I've helped him with things and he brings in my bins and mows my lawn, we have a kind of relationship... but he's a real kind of white working class kind of guy. It never occurred to me that there would be any issue between us until this incident happened. I remember walking home thinking... I wonder if he has these attitudes too, it didn't mean I'd do anything about it, just caused me to wonder about it. It just makes you automatically untrusting and wary. (Interviewee E)

The four of us were standing there, we were just so angry and just got pissed off... and my friend went and got all the papers ...to put into Equal Opportunity but none of us followed through. So this time I said I'm not going to allow myself to just let it go this time, and I've heard a lot of people who've put in complaints and just got nowhere. (Interviewee G)

To me personally, because I getting angry you know and I was halted here and that's I guess how racism starts itself. You if you get knocked back and you start having anger and you be angry to everybody else. Yeah, it's not good for your mental health either. (Interviewee G)

As has been discussed earlier in this report, participants reported having their complaints ignored. Participants also described feelings of being discriminated against in the process of making a complaint. It involved not being believed or finding the process intimidating, voicing comments like "it is just as bad if not worse than the initial racist behaviour."

I personally don't like to be a victim. But indigenous people, the stats you know, you die 20 years younger, and my mother died 2 years ago at 46 and I reckon she allowed the white people to get to her. Honestly she allowed the system, Centrelink, just everyone get to her and just run all over her. And that's why I'm a bit different. I don't go down that path. I just want to break the cycle. (Interviewee G).

#### 4 Rights and Remedies under International Law

##### **4.1 International Obligations to Prevent Racial and Religious Discrimination Under Human Rights Conventions**

Since the inception of the United Nations in 1945, the promotion of, and respect for, human rights and fundamental freedoms for all without distinction has been at the forefront of international human rights law development. Today, the principle of non-discrimination on the basis of race and religion is recognised in major international human rights instruments, regional treaties and the constitutions of countries around the world and forms a core part of international law. Whether Australia's international obligations under such instruments can be classified as binding 'law' is a question open for debate. An argument frequently used to suggest that international law is not real 'law' is the lack of a central law making-authority and absence of an effective enforcement agency to police compliance and implement sanctions against States for violations of international obligations. While international law (as compared to domestic law) does have these inherent weaknesses, it is no less obligatory and binding than any other form of law. International law is law because both States and non-States conduct their affairs on the basis of the existence of this system of law and use it to regulate their international relations.<sup>23</sup> In the large part, international law is enforced through diplomatic channels, judicial and arbitral settlements and most importantly international public pressure<sup>24</sup>. Australia's international obligations to prevent discrimination on the grounds of race and religion, as enshrined in five principle international human rights instruments, are binding and are a

function of Australia being part of the international community. Set out below is an overview of these obligations:

#### **4.1.1 United Nations Charter**

The United Nations Charter (UN Charter) is the constitution of the United Nations. It was signed on June 26 1945 at the United Nations Conference on International Organisations by the 50 Original member countries and entered into force on October 24 1945. The UN Charter is a treaty and all signatories are bound by its articles.

The principle of non-discrimination is a commitment of all signatory States to the UN Charter and these States have pledged to take joint and several action to achieve this end.

**UN Charter Article 55(c) provides:** With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

#### **4.1.2 Universal Declaration of Human Rights**

The Universal Declaration of Human Rights (Universal Declaration) is the most widely accepted international expression of the content of human rights and its principles form the foundation of all international human rights instruments<sup>25</sup>. At the time of its drafting, the rights identified were expressly accepted by 48 States, including Australia. Although not legally binding in itself, many of its provisions are viewed as having acquired legal status through international customary law<sup>26</sup>.

The universality of the Declaration and the recognition of equal and inalienable rights for all people without distinction is emphasised in its title, preamble and first and second articles<sup>37</sup>. In particular, the enjoyment of all rights and freedoms without distinction as to race or religion and protection by the law from any such discrimination features prominently.

**Article 1 provides:** All humans beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood [sic].

**Article 2 provides:** Everyone is entitled to all the rights and freedoms set forth in this *Declaration*, *without distinction* of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (emphasis added).

**More specifically, Article 7 provides:** All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to

equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

#### **4.1.3 International Covenant on Civil and Political Rights**

The International Covenant on Civil and Political Rights (ICCPR) sets out in detail the civil and political rights identified in the Universal Declaration and is legally binding in international law on the countries that have ratified its content.

The principle of non-discrimination is an enshrined commitment of all signatory States to the ICCPR.

#### **ICCPR Article 2(1) provides:**

each State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, *without distinction* of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status.

#### **The ICCPR also provides:**

advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence must be prohibited by law (Article 20); every child has the right, without discrimination as to race or religion among other grounds, to measures of protection as required by the child's status as a minor on the part of the child's family, society and the State (Article 24(1)); and

everyone is entitled to equality before the law and equal protection of the law without discrimination on the ground of race or religion among other grounds (Article 26).

Obligations are placed on all signatory States under ICCPR Articles 2(2) and (3) to take necessary steps to adopt laws or other measures as may be required to give effect to the rights recognised in the ICCPR and an undertaking to ensure:

any persons whose rights or freedoms are violated to have an effective remedy;

that any person claiming a remedy has their rights determined by competent judicial, administrative or legislative authorities; and

that the competent authorities will enforce a remedy where one is granted.

Australia ratified the ICCPR in 1980. It then agreed to the *First Optional Protocol* (the Protocol) with effect from 25 December 1991. The Protocol allows individuals to take complaints about violations of their human rights

under the ICCPR to the Human Rights Committee. Although there have been a number of communications to the Human Rights Committee relating to Australia's compliance with the ICCPR, none have concerned discrimination on the grounds of race or religion.

#### **4.1.4 International Convention on the Elimination of All Forms of Racial Discrimination**

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was signed in 1965 and entered into force on 4 January 1969. Australia has been a signatory to the ICERD for over 30 years, ratifying the convention on 30 September 1975.

The ICERD builds on the non-discrimination provisions set out in the UN Charter by protecting the enjoyment of all human rights in the political, economic, social and cultural arenas of public life from racial discrimination.

Racial discrimination is defined by the ICERD as where a person or a group is treated differently because of their race, colour, descent, national origin or ethnic origin which has the purpose, or effect of, impairing their human rights and fundamental freedoms.

Accordingly, Article 5 addresses a signatory State's obligation to prohibit and 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 the enjoyment of the following rights:

the right to equal treatment before the tribunals and all other organs administering justice;

the right to security of person and protection by State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

political rights, in particular the right to participate in elections - to vote and to stand for election, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to the public service.

Other civil, economic, social and cultural rights are also protected from racial discrimination under Article 5, including among others:

the right to freedom of thought, conscience and religion (Article 5(d)(vii));

the right to work, to free choice of employment, just and favourable conditions of work and equal pay for equal work (Article 5(e)(i)); and

the right to education and training (Article 5(e)(v)).

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In addition to State signatories undertaking to prohibit and eliminate racial discrimination, the ICERD requires a State:

to engage in no act or practice of racial discrimination against persons or groups of persons and to ensure public authorities and public institutions comply with this obligation (Article 2(a));

not to sponsor, defend or support racial discrimination by any persons or organisation (Article 2(b));

to take effective measures to review government, national and local policies, and amend or repeal any laws which have the effect of creating or perpetuating racial discrimination (Article 2(c));

to prohibit and end racial discrimination by appropriate means (including legislation) by persons, groups and organisations (Article 2(d));

to prohibit organisations and propaganda that promote racial superiority, racial hatred, racial violence or racial discrimination (Article 4);

to ensure all persons have effective protection and remedies (through competent national tribunals and state institutions) against any acts of racial discrimination which violate human rights and fundamental freedoms (Article 6); and

to ensure all persons have the right to seek just and adequate reparation for any damage suffered as a result of the discrimination (Article 6).

Australia's approval of the ICERD is not without reservation. On ratification of the ICERD, Australia declared that:

Australia is not at present in a position specifically to treat as offences all the matters covered by Article 4(a) of the Convention. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of Article 4(a).

Article 4(a) mandates the following actions be declared an *offence punishable by law*:

all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as the act of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including their financing.

To date, serious acts of racial hatred or incitement to racial hatred are not criminal offences under Federal law<sup>28</sup>, however, serious acts of racial vilification are criminal offences in most Australian States<sup>29</sup>.

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#### **4.1.5 Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief**

In addition to international conventions addressing the principle of non-discrimination on the grounds of religion, the Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief (Religion Declaration) expresses the international community's desire to eliminate religious discrimination.

Unlike international conventions and treaties, declarations do not generally impose binding international legal obligations on States. A declaration is however, viewed as a statement of objectives carrying strong moral force and persuasion. To this end, declarations are an important international tool for setting human rights standards.

The Religion Declaration expands on the ICCPR guarantees and is considered to be the most comprehensive international statement of the right to freedom of religion and belief<sup>30</sup>. The Religion Declaration was adopted unanimously by the United Nations General Assembly in November 1981. Australia supported its adoption.

The Religion Declaration goes beyond engendering support for freedom of religion or belief and seeks to prohibit discrimination on such grounds. Article 2 of the Religion Declaration provides:

No one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or other belief.

Further, Article 3 of the Religion Declaration provides:

Discrimination between human beings on the ground of religion or belief constitutes an affront to human dignity and.....shall be condemned as a violation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

For the purposes of the Religion Declaration, 'discrimination' is defined as occurring where there is any distinction, exclusion, restriction or preference based on religion or belief made with the purpose, or effect of, impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Both intentional and unintentional acts of discrimination are prohibited under the Religion Declaration.

Beyond the general prohibition of discrimination on the grounds of religion or belief, the Religion Declaration also seeks that States take positive steps to prevent and eliminate discrimination. This includes requiring States to:

enact or rescind legislation where necessary to prohibit any such discrimination (Article 4(2)); and

- to take all appropriate measures to combat intolerance on the grounds of religion or belief (Article 4(2)).

## **4.2 Obligations Under International Law to Prevent Discrimination**

As highlighted above, the principle of non-discrimination, together with equality before the law and equal protection of the law without any discrimination, form the core thrust behind the main international human rights instruments in operation today and to which Australia is a signatory. While the ideal of equality and non-discrimination pervades these instruments, can it be said there is a positive obligation under international law to prevent discrimination? Based on notions of customary international law and an examination of relevant treaty law there are valid grounds to maintain that such an obligation exists at an international level.

### **Customary international law**

In addition to treaties and other expressly ratified agreements, customary international law is recognised as a primary source of international laws<sup>31</sup>. Customary international law consists of rules of law derived from the consistent conduct of States acting out of the belief that the law requires them to act in such a way<sup>32</sup>. In other words, customary international law can be discerned in the widespread practices of States that are carried out due to a sense of legal obligation.

The principle of non-discrimination on the basis of race and religion is widely viewed as customary international law. As expressed by Professor Humphrey, the universal acceptance of the principles contained in the Universal Declaration means that “whatever the drafters may have intended in 1948, it is now part of international customary law of nations and therefore binding on all States<sup>33</sup>”. Commentators suggest this assertion is supported by the many statements of international conferences referring to the Universal Declaration, general State practices and by reference to other instruments including the ICCPR, the ICERD, the Religion Declaration and regional instruments on human rights protection<sup>34</sup>.

### **Treaty law**

Where a treaty has been entered into and ratified by a State party, a binding agreement is created under international law and the relevant State party assumes responsibility for the fulfilment of the obligations contained in the treaty.

Obligations of a State under international instruments are threefold: to respect, to ensure and to fulfil these rights<sup>35</sup>. The obligation to “respect” rights, means

- a State cannot violate those rights<sup>36</sup>. To “ensure” rights a State must take any steps necessary to adopt legislative or other measures which give effect to those rights<sup>37</sup>. Finally, to “fulfil” the rights, the State must ensure that any person whose rights are violated would have an effective remedy<sup>38</sup>.

These obligations on States to prevent discrimination on the grounds of race and religion can be identified in Articles 2(1), 2(2), 18, 20, 26 and 27 of the ICCPR and Articles 2(a) - (d), 4 and 6 of the ICERD.

From a practical perspective, the obligations on State parties to implement the standards contained in the equality provisions of the ICCPR and the ICERD require a State party to take steps to:

prohibit discrimination on the grounds of race or religion;

implement concrete legislative measures to eliminate discrimination (including the implementation of treaty obligations into domestic law);

provide a right to an effective remedy, including a right for any claim to be determined by a competent judicial, administrative or legislative authority and compensation for rights violations;

ensure compliance by persons with treaty norms or adopt measures against interference with enjoyment of protected rights; and

take measures to ensure substantive equality of certain groups to remedy the effects of past and present discrimination.

### **4.3 Australia’s International Obligations**

Assessing whether Australia is a good international citizen and complying with each of its international human rights obligations is a complex question that requires a multi-layered analysis of issues spanning across Australian society from racial discrimination to anti-terrorism legislation and the promotion of racial hatred.

The scope of this report is not broad enough to consider each of these layers and topics in detail. This section will however, provide a summarised critique of Australia’s legal protection against racial and religious discrimination and vilification in comparison with its international obligations. In particular, we will examine whether Australian can be said to be:

*ensuring* the right to non-discrimination on the basis of race or religion by taking the necessary steps to adopt legislative measures which give effect to those rights; and

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- *fulfilling* the right to non-discrimination on the basis of race or religion by ensuring persons whose rights are violated have an effective remedy.

### **Ensuring the right to non-discrimination on the basis of race or religion**

A central principle of the Australian legal system is that a treaty “has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia<sup>39</sup>”. In other words, the provisions of a treaty to which Australia is a party do not become part of domestic law simply by virtue of the formal acceptance of the treaty by Australia. In this respect, Australian law differs from the law of the United States of America where treaties are ‘self-executing’. In Australia, legislation must be passed which reflects and implements the intent of the international convention before it becomes part of our domestic law<sup>40</sup>.

### **Domestic implementation**

Successive Australian Governments, in particular, the present Liberal Government, have shown great reluctance to domestically implement Australia’s international human rights obligations<sup>41</sup>. Justification for this approach has been based on the argument that human rights are already enjoyed in Australia and protected by the Australian political process of responsible government and the common law<sup>42</sup>.

An example of such reluctance to domestically incorporate Australia’s international human rights obligations is the failure of Australia to incorporate the provisions (and therefore the rights and protections) of the ICCPR by legislation into Australian law. Although the *Human Rights and Equal Opportunity Act 1986* (Cth) (HREOCA) appends the ICCPR (as well as the Religion Declaration) and grants individuals the right to complain to the HREOC about violations with respect to laws, practices and actions of the Federal Government<sup>43</sup>, this falls short of directly incorporating the instruments into domestic law and providing a source of substantive rights for Australians<sup>44</sup>. This is exacerbated by HREOC’s status as a non-judicial conciliation body and its limited remedial power to provide redress in relation to violations of rights protected by the appended instruments.

To some degree however, Australia has taken steps to directly implement a general scheme of human rights by way of the anti-discrimination legislation identified in Part 5 of this report. These enactments have granted ‘claims-rights’, in the sense of providing complainants with access to judicial remedies which can order an end to the discriminatory conduct<sup>45</sup> and provide for compensation.

At a Federal level, the RDA incorporates many of Australia’s obligations under the ICERD making it unlawful to directly or indirectly discriminate against

- a person on the basis of their race, colour, descent or national or ethnic origin in areas of public life.

Nevertheless, Australia's domestic implementation of its treaty obligations is not without its flaws and it is questionable whether these enactments establish the comprehensive regime of protection against discrimination on the grounds of race or religion envisaged in the principal human rights instruments.

The observations set out below identify key weaknesses in Australia's efforts to ensure an individual's right to non-discrimination on the basis of race or religion is protected:

### **Federal vs State protection of the principle of non-discrimination**

From an international law perspective it is important to note that no recognition is given to distinct jurisdictions within a federal nation state<sup>46</sup>. In practice, when a State ratifies a treaty (and accordingly, agrees to comply with its provisions), it must ensure compliance with the treaty throughout its territory<sup>47</sup>. In Australia, this means that to comply with international obligations, the protection of the right to non-discrimination on the grounds of race and religion must be enjoyed by all Australians. This can only be achieved consistently and equally through the implementation of treaty obligations at a Federal level.

Leaving the protection of these rights through implementation of international obligations on a state-by-state basis, for example through legislation such as the *Racial and Religious Tolerance Act 2001* (Vic) (RRTA), is not sufficient to discharge Australia's international obligations. It leads to patchwork protection in which the state in which an individual lives determines the degree to which (if at all) an individual's right to non-discrimination is protected.

### **Areas not covered by the RDA**

The RDA does not expressly extend to cover religion, religious belief or ethno-religious groups. This omission has serious implications because in many circumstances religion can be used as a surrogate for race<sup>48</sup>.

The second reading speech and explanatory memorandum of the *Racial Hatred Bill 1994* (Cth) indicate that a broad interpretation of the word 'ethnic' in the RDA should be applied to give the widest basis for protection of peoples such as Sikhs, Jews and Muslims<sup>49</sup>. Overseas experience indicates the term 'ethnic origin' as used in local anti-discrimination legislation has been interpreted broadly by the Courts to cover Jews and Sikhs<sup>50</sup>, for example. In *Nyazi v Rymans Ltd*<sup>51</sup> however, the English Employment Appeal Tribunal rejected the argument that Muslims fell within the coverage of the *Race Relations Act 1976* (UK) finding that Muslims are defined mainly by religion and lack characteristics of other ethnic groups. Whether Australian Courts would find Muslims as falling within an ethnic group remains open for debate.

Against the backdrop of recent events such as the World Trade Centre bombings and the Madrid, Bali and London bombings, the importance of Australia addressing this gap in our Federal legislation to ensure a national framework of laws relating to religious discrimination and vilification, cannot

be underestimated. This is particularly important in light of the ICERD Committee's most recent observations on Australia in March 2005 that prejudice against Arabs and Muslims in Australia has increased 52. In this regard, full compliance with Australia's human rights commitments necessitates the enactment of Federal legislation to make discrimination on the grounds of religion and religious belief unlawful.

### **No entrenched guarantee**

Australian law does not contain a formal entrenched guarantee against racial or religious discrimination and vilification which could override any conflicting provisions in Federal or State laws.

Although the Federal Government has the ability under section 51(xxix) of the Constitution to incorporate any international convention into domestic law (and thereby override State or Territory legislation which is inconsistent or contravenes Australia's international obligations to prevent racial and religious discrimination), this method of imposing Federal legislative coverage does not in itself provide an entrenched guarantee against discrimination. Irrespective of the subject matter, Federal legislation remains an ordinary piece of legislation vulnerable to being repealed or overridden by future governments. Constitutional reform to entrench a Bill of Rights (including protections against racial and religious discrimination), has been recommended by the ICERD Committee<sup>53</sup>. To-date the Federal Government has overwhelmingly responded negatively to this recommendation, holding the view that any such Bill of Rights may restrict, rather than enhance, enshrined rights.<sup>54</sup>

### **Australia's reservation to Article 4(a) of the ICERD: lack of criminal offence for instances of racial superiority and incitement of race violence**

Although in most States and Territories (except Tasmania and Northern Territory)<sup>55</sup> serious acts of racial hatred or incitement to racial hatred are criminal offences, this is not the case within the Federal sphere<sup>56</sup>. As noted above in this report, on ratification of the ICERD, Australia placed a reservation in relation to Article 4(a) which stated Australia was not in a position to treat as offences all the matters covered by the Article<sup>57</sup>.

As recently as March 2005, the ICERD Committee noted Australia was yet to remove its reservation to Article 4(a) of the Convention. Australia's reluctance to impose criminal sanctions for such acts seems at odds with the current international position. Countries such as Canada, the United Kingdom,

New Zealand and various European nations have enacted legislation that proscribes incitement of racial hatred and hostility.<sup>58</sup> This action is necessary before Australia can be said to be in full compliance with its international obligations to prevent discrimination.<sup>59</sup>

## **Broad interpretation of exemptions under the RDA**

Under the RDA, the racial hatred provisions make it unlawful to carry out public acts that are reasonably likely to offend, insult, humiliate or intimidate another person or group of people because of the race, colour or national or ethnic origin of the other person or group of people.<sup>60</sup> Under these provisions it is only necessary for a complainant to show that race was a factor underlying the doing of the impugned act. There is no requirement that a complainant demonstrate there was an intention to offend or insult. Rather, an objective test is applied to determine whether the act was reasonably likely to offend a person with the same racial or ethnic attributes of the complainant.

At first glance it would appear that this approach has far-reaching capability in relation to the protection of an individual's right to non-discrimination on the ground of race. The existence of statutory exemptions, however, and the development of jurisprudence in relation to the interpretation of those exemptions has resulted in the creation of broad categories of exclusion from liability. For instance, artistic, academic acts or performances or debate and discussions of matters of public interest will not be unlawful where they are done reasonably and in good faith<sup>61</sup>. Australian courts have consistently construed these exemptions widely to ensure the right to freedom of free speech and expression is not impinged on.

The decision of *Bropho v HREOC & Ors*<sup>62</sup> concerned an application made under the RDA regarding the publishing of a cartoon in a Western Australian newspaper. The cartoon mocked the recovery process of the head of an Aboriginal leader (which had been on display in a museum in England) by members of the Nyoongar community. The publication of the cartoon followed a much publicised debate about which members of the community should be entitled to retrieve and return the head.

The Federal Court of Australia (**FCA**) held that the proscriptions contained in the RDA under the racial hatred provisions created exceptions to the general principle of freedom of speech and expression<sup>63</sup>. Against this background, it found that the exemption from liability against anything said 'reasonably and good faith' should be construed broadly<sup>64</sup>.

While the FCA acknowledged that but for the application of the exemption, acts of the relevant nature may breach the provisions of the RDA, it considered the proper application of the 'reasonableness' and 'good faith' criteria endeavoured to minimise any harm the act would inflict<sup>65</sup>.

In *Kelly-Country v Beers*<sup>66</sup>, the Federal Magistrates' Court (**FMC**) was required to consider whether a stand-up comedy act in which the performer dressed up as an Aboriginal man and made jokes involving members of the community, including Aboriginal people, was in breach of the RDA. The Court took the view that the words 'offend, insult, humiliate, intimidate' cover a multiplicity of circumstances<sup>67</sup> and in determining the meaning of the expressions regard must be given to the objectives of the legislation and its

social context, including its underpinnings in the ICERD<sup>68</sup>. The Court noted the type of conduct envisaged by the ICERD to be prohibited is extreme conduct based on ideologies of racial superiority and institutionalised racial discrimination. The Court held the performance was comedic in intention and, viewed objectively, an Aboriginal person would not believe the performance was intended to have the effect of seriously undermining tolerance within society by inciting racial hatred.<sup>69</sup>

In *Bropho* and *Kelly-Country*, the Courts' reluctance to find a breach of the RDA stemmed from a perceived lack of severity of the conduct described in those cases and the broad interpretation of the exemption provisions giving effect to freedom of speech.

Article 4 of the ICERD allows signatory States to strike a balance between the need to prohibit racial hatred and vilification and the need to protect freedom of speech. In Australia, the Courts' broad interpretation of the exemption provisions have weakened the effectiveness of the RDA as a means of ensuring non-discrimination on the basis of race by restricting the right to freedom of speech in only the most serious of cases<sup>70</sup>, for example, in circumstances where the conduct involved the distribution of anti-Semitic material<sup>71</sup> or claims that the Holocaust did not occur<sup>72</sup>.

### **Judicial pronouncements**

Even in circumstances where international law has not, by legislation, been incorporated into domestic law, judges and other decision-makers may rely on human rights principles to influence their decisions and develop the common law<sup>73</sup>. Such application of human rights principles is central to strengthening Australia's adherence to its human rights obligations.

For example, the decision in *Mabo v Queensland (No 2)*<sup>74</sup> provides one of the most notable illustrations of the High Court of Australia developing the common law in response to the broadening reach of international human rights law. Australia's refusal to recognize the rights and interests in land of indigenous Australians was described by Brennan J as an "unjust and discriminatory doctrine" that could no longer be accepted in the light of Australia's accession to the Optional Protocol to the ICCPR<sup>75</sup>. Brennan J noted "a common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration<sup>76</sup>."

### **The use of international conventions: legitimate expectations and *Teoh***

Traditionally the use of international conventions has been in the context of statutory interpretation. That is, where there is an ambiguity in a statute or subordinate legislation, a construction is adopted that complies with Australia's obligations under international instruments<sup>77</sup>. However, the decision of the High Court in *Minister for Immigration v Ah Hin Teoh*<sup>78</sup> (***Teoh***) extended the significance of the ratification of international instruments.

Teoh concerned a review of deportation orders made by a delegate of the Immigration Review Panel. Mr Teoh was a Malaysian citizen living in Australia and married to an Australian citizen. Mr Teoh had 3 children with his wife and also acted as a father to four children from his wife's previous de facto relationship. Mr Teoh had applied for a grant of resident status. While the application was being processed, Mr Teoh was convicted of importation and possession of heroin. He was sentenced to six years imprisonment.

Due to these events, Mr Teoh's application for permanent residency was refused on the ground he could not meet the good character requirement. Mr Teoh applied for a review of the decision but the Immigration Review Panel rejected the application. The recommendation of the Panel was adopted by a delegate of the Minister and a deportation order was made against Mr Teoh.

Mr Teoh applied for a review of the decision in the FCA and subsequently an appeal to the Full Federal Court was lodged. The Full Federal Court found that Australia's ratification of the Convention on the Rights of the Child gave rise to a legitimate expectation in parents and children that actions which affected their interests would be conducted in a manner that reflected the principles of the convention. This finding was appealed by the Federal Government to the High Court of Australia.

The core of the High Court's decision stems from its consideration of the role of international conventions in generating a legitimate expectation in individuals that the terms of conventions ratified by Australia will be adhered to in its administrative decision making.

Mason CJ and Deane J held that:

"...ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly where the instrument evinces internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights. Rather ratification of a convention is a positive statement by the Executive Government to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a **legitimate expectation**, absent statutory or executive indication to the contrary, that **administrative decision – makers will act in conformity with the convention.**"<sup>79</sup>

Toohy J agreed and observed that the submission that decision-makers need pay no regard to Australia's international obligations was unattractive<sup>80</sup>.

While their Honours were at pains to explain that the existence of a legitimate expectation does not compel a decision-maker to act in the way expected, their Honours held that it does produce a requirement (under notions of procedural fairness) that the person affected would be provided with notice if the decision-maker intended not to adhere to the terms of the convention and an adequate opportunity to put forward a case against this course of action.<sup>81</sup>

Further, it was not viewed as necessary that the person seeking to rely upon such a legitimate expectation actually have the expectation themselves, but rather that the existence of the expectation be reasonable in the circumstances.<sup>82</sup>

The significance of the *Teoh* decision lies in its creation of an important procedural mechanism for the protection of human rights in Australia. Given the reluctance of the Federal Government to fully implement human rights treaties into domestic law, the majority's finding of a "legitimate expectation" provides a means by which Australia's entry into international instruments can have some direct significance to Australian citizens.

### **The response to Teoh**

The finding in *Teoh* provoked a quick response from the Federal Government indicating its intention to override *Teoh*'s effect. A joint statement issued by the Minister for Foreign Affairs and the Attorney-General on 10 May 1995 (Joint Statement) expressed the Federal Government's concern that: "The High Court gives little if any guidance on how decision-makers are to determine which of those treaty provisions will be relevant and to what decisions the provisions might be relevant, and because of the wide range and large number of decisions potentially affected by the decision, a great deal of uncertainty has been introduced into government activity. It is not in anybody's interests to allow such uncertainty to continue."<sup>83</sup>

Further:

"Entering into an international treaty is not reason for raising any expectations that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law. Any expectation that may arise does not provide a grounds for review of a decision. This is so, for any existing treaties and for future treaties that Australia may join."<sup>84</sup>

Subsequently on 28 June 1995, legislation was introduced into Parliament to reverse the position created by *Teoh*. The *Administrative Decisions (Effect of International Instruments) Bill 1995* (ADEII Bill) stated that:

"The fact that Australia is bound by, or a party to, a particular international instrument, or that an enactment reproduces or refers to a particular international instrument, does not give rise to a legitimate expectation, on the part of any person that:

an administrative decision will be in conformity with the requirements of that instrument; or

if the decision were to be contrary to any of those requirements, any person affected by the decision would be given notice and an adequate opportunity to present a case against the taking of such a course."<sup>85</sup>

The ADEII Bill lapsed and was reintroduced to Parliament in 1997 and 1999 in identical forms. The ADEII Bill lapsed again prior to the 2001 election and has not been reintroduced. Whether the basis for the Government's reluctance to reintroduce the ADEII Bill to-date is a consequence of its acceptance that such a bill would be inconsistent with Australia's international legal obligations or because it has faced such difficulty in its attempts to pass the ADEII Bill on three successive occasions is unclear. Notwithstanding this, *Teoh* and the doctrine of legitimate expectations currently remains part of Australian law and courts and tribunals continue to apply the test without any apparent difficulty.<sup>86</sup>

### **The future of *Teoh***

This is not to say that *Teoh* is without its critics. The decision has come under intense scrutiny from some commentators and more recently by the High Court in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*<sup>87</sup> (Lam).

Although in *Lam*, *Teoh* was not relied upon by the parties in argument and the question in that case requiring consideration did not touch on the issue of legitimate expectations arising from treaty ratification, the High Court took the opportunity to strongly criticise *Teoh*. Potentially these criticisms foretell significant changes to, or limitations being placed on, the role of legitimate expectations should *Teoh* come under direct consideration by the High Court<sup>88</sup>.

McHugh J and Gummow J's decision attacked the position adopted by Mason CJ and Deane J in *Teoh* that ratification of an international convention by the Government is an expression of intention that the Government will act in accordance with the convention's terms. McHugh J and Gummow J suggested that:

"It is one thing for a court in an application for judicial review to form a view as to the expectations of Australians presenting themselves at the gates of football grounds and racecourses. It is quite another to take ratification of any convention as a 'positive statement' made 'to the Australian people' that the executive government will act in accordance with the convention and to treat the questions of the extent to which such matters impinge upon the popular consciousness as beside the point."<sup>89</sup>

Callinan J also raised concerns about *Teoh*, particularly in respect of the fact that it is not necessary for the person seeking to rely upon the legitimate expectation to have actual knowledge of the convention from which the expectation arises:

"If a doctrine of 'legitimate expectation' is to remain part of Australian law, it would be better if it were applied only in cases in which there is an actual expectation, or that at the very least, a reasonable inference is available that had a party turned his or her mind consciously to the matter in circumstances only in which that person was likely to have done so, he or she would

reasonably have believed and expected that certain procedures would be followed.”<sup>90</sup>

Hayne J’s decision also suggested that *Teoh* may need to be re-examined and potentially refined:

“There are questions which invite attention to the more fundamental question posed by McHugh J in *Teoh*, of whether legitimate expectation still has a useful role to play in this field of discourse now that it has served its purpose in identifying those to whom procedural fairness must be given as including more than persons whose rights are affected.”<sup>91</sup>

Whether *Teoh* will remain a device through which the entering into of international instruments by Australia can have some direct significance to Australian citizens in the future remains to be seen.

### **Fulfilling the right to non-discrimination on the basis of race or religion**

It is fair to say that rights without remedies are of little value. Both the ICCPR and the ICERD impose positive obligations on States to ensure that effective and enforceable remedies are available to individuals where their right to non-discrimination has been violated<sup>92</sup>. The availability of such remedies is a key component to assessing whether a State is fulfilling its obligations under international human rights law.

Although the ICCPR and the ICERD do not prescribe the types of remedies that should be available in respect of violations of particular rights, both instruments expressly provide for an individual to have a right for a claim to be determined by a competent judicial, administrative or legislative body.

As addressed previously, the primary avenue for seeking redress in Australia at the Federal and State level is through a complaint lodgement process with a specialist anti-discrimination body. This is followed by an investigation of the complaint by the relevant body to determine whether it is within the jurisdiction of that body and raises issues of discrimination, then conciliation (where appropriate) and, in some circumstances, a hearing before a specialist tribunal or court.

Within the legislative schemes, reliance is placed on the use of conciliation and mediation as the primary method for resolution of discrimination complaints. As identified in Part 5 and Part 6 of this report:

In 2004, 42% of complaints made to HREOC were conciliated and 25% of those complaints resolved successfully;

In 2004 in Victoria, 35% of complaints made to the VEOHRC were referred to conciliation, with 50% of those conciliated complaints resolved.

Similarly, of the 315 complaints referred to Victorian Civil and Administrative Tribunal's (VCAT) Anti-Discrimination List (ADL), 76% of those complaints were successfully resolved at mediation.

Evaluating the operation of discrimination complaint handling is difficult due to the confidentiality obligations that necessarily attach to the process of conciliation, the limited number of reported tribunal decisions and the low number of cases which have been subject to formal adjudication by the Courts. Nonetheless, a number of general observations can be made regarding the manner in which Australian law addresses discriminatory practices. These observations are set out below.

### **Low rate of compensation for rights violations**

Although a significant number of complaints are referred to conciliation under the RDA, EOA and RRTA, due to the confidentiality of those processes, there is limited publicly available information disclosing the outcome of those conciliations and whether complainants received appropriate remedies.

At present HREOC is the only administrative body that publishes details on conciliated outcomes in its annual reports. Although there is a variety of potential settlement options, the data released indicates that the resolution of complaints at conciliation is usually achieved on the basis of a private apology coupled with a financial payment. On occasion, where the complaint involves an employer or the provision of goods or services through a business, agreement is also reached for the respondent to change its policies and practices.

The publicly available data indicates that significant monetary settlements are rare. The median financial payment received by complainants to HREOC in 2004 was \$5,250 ( a reduction of \$3,750 from the media of \$9,000 in 2001). Although the level of monetary compensation received is not necessarily indicative of the appropriateness of the remedy, the low rate of compensation received by a complainant does raise the question of whether conciliation as the primary mode of dispute resolution for discrimination complaints is the most suitable mechanism for providing complainants with a remedy where they have been the subject of serious forms of racial and/or religious discrimination.

Alternatively, the fact that the vast majority of cases resolve at the conciliation stage, with a private apology being the most common form of remedy, may be indicative of a system successfully addressing discrimination issues and allowing complainants to achieve their desired resolution without recourse to the courts.

### **Failure to provide enforceable remedies for discrimination on the grounds of religion in the Federal sphere**

In the Federal sphere, redress for violations is limited. Only those individuals whose right to non-discrimination on the basis of race has been violated can

seek an enforceable legal remedy. As highlighted previously, the RDA's gaps in coverage in relation to religious or ethno-religious groups means that there is a lack of avenues through which an individual can obtain an enforceable remedy to prevent, stop or seek compensation for discrimination on the ground of religion.<sup>93</sup>

Although the ICCPR and the Religion Declaration are appended to the HREOCA, HREOC's power to remedy violations of these instruments is limited. Under the HREOCA, the Human Rights Commissioner is empowered to conciliate acts of discrimination based on religion in the area of employment or occupation. The Human Rights Commissioner has also been given specific powers of conciliation in relation to a breach of any human rights in the ICCPR, including the right to freedom of religion and belief.

While the conciliation process does provide an opportunity for an aggrieved party to raise a complaint and seek a resolution, if a complaint cannot be resolved by conciliation, the complainant has no recourse under the HREOCA to a judicial hearing and determination. In this regard, it is not possible for individuals to sue directly based on the rights contained in the ICCPR and the Religion Declaration to seek a legally enforceable remedy.

Further, even in circumstances where a conciliated outcome is achieved, HREOC cannot make determinations which are binding and conclusive.<sup>94</sup> The weakness in this form of remedy is apparent, in that a respondent's failure to implement a conciliated result may exacerbate the complainant's sense of grievance.

Australia's failure to give effect to the ICCPR (and therefore the inability of individuals to invoke the ICCPR in Australian courts to redress violations of ICCPR rights in relation to religion) was noted during Australia's oral presentation and discussion of Australia's fourth periodic report to the Human Rights Committee on 20 and 21 July 2000. In particular, Ms Medina Quiroga (Chile and Committee Chair) concluded that:

"Article 2 does not give a discretion to fail to give effect to the Covenant...Regardless of the explanation that some of the Covenant issues fall within the business of the States, Article 2 requires legislation which offends Covenant rights to be overridden."<sup>95</sup>

Similarly, Mr Bhagwati (India) noted "*great concern*" that the ICCPR is not enforceable in Australian Courts and questioned how Australia was complying with the requirements of Article 2 if "*only a patchwork*" of ICCPR rights are guaranteed by law<sup>96</sup>.

### **Difficulty in proving complaints of race discrimination**

Even in circumstances where an individual can apply to the FCA or FMC to have a complaint heard and determined in relation to discrimination on the grounds of race, there are significant evidential burdens imposed on a complainant to prove racial discrimination. In HREOC's submission to the

CERD on Australia's combined 13th and 14th report under the ICERD, HREOC identified that no cases of racial discrimination (as compared to racial hatred) have been successfully litigated in the court system since 2001. The difficulty faced by complainants has been a reluctance shown by the Courts to draw an inference of racial discrimination without direct supporting evidence. For example:

In the decision of *Chau v Oreanda & Ors*<sup>97</sup>, the Applicant alleged racial discrimination following his employer's failure to pay him sick leave and, ultimately, his dismissal from employment. The Federal Magistrates' Court held that although the Applicant was "*obviously a person of Chinese extraction*" and was "*obviously treated less favourably*" than another employee in a similar position, the Applicant was unable to identify specific and direct incidents as having a racial connection and therefore the Applicant was unable to satisfy the requirements of the RDA.

This issue again arose in the decision of *Oberoi v HREOC*<sup>98</sup>, in which the Applicant, of South Asian ethnicity, alleged racial discrimination against an officer of HREOC following the Commission's decision to decline to investigate his complaint. The Applicant argued the Court could infer racial discrimination from the cumulative effects of the actions of the Commission with the result being the Applicant did not get an impartial and independent decision.

- Although, the Court quoted with approval the High Court's view in *TNT Management Pty Ltd v Brooks*<sup>99</sup> that even where direct proof is not available, an inference may be drawn if the circumstances give rise to a "*reasonable and definite inference*"<sup>100</sup>, it found in this case it was unable to draw a conclusion from the material provided by the Applicant that met this level of certainty.

In *Sharma v Legal Aid Commission Queensland*<sup>101</sup> the Full Federal Court acknowledged that "*it is unusual to find direct evidence of racial discrimination*". Further, there "*may be cases in which the motivation may be subconscious*" and "*in which the proper inference to be drawn from the evidence is that, whether or not the employer realised it at the time or not, race was the reason it acted as it did*". Nevertheless, noting that such inferences are not to be made lightly, the Full Federal Court upheld the decision of the trial judge that the Applicant had not satisfied his burden of proof.

These cases illustrate that although the Courts have recognised the difficulty faced by complainants in bringing direct evidence in support of a claim of race discrimination, there has been reluctance to depart from the current burden of proof in civil proceedings. As a consequence, complainants face substantial difficulties in mounting a successful race discrimination claim – the indirect effect of which is denial of access to an effective remedy for the violation of human rights protected by the ICERD.

## Summary

Australia's Federal and State legislative framework provides a foundation for the protection of human rights. The anti-discrimination and anti-vilification laws enshrined in the RDA, HREOCA, RTTA and relevant state legislation are important tools in setting public standards and provide a platform to advocate against all forms discrimination – including discrimination on the basis of race and religion. These laws are also central in providing Australians with the ability to access both judicial and non-judicial remedies in circumstances where discriminatory conduct is experienced.

Yet, Australia's domestic implementation of its treaty obligations is not without its flaws. The observations outlined above demonstrate Australia's current legislative position has clear deficiencies.

Perhaps the most obvious omission is the lack of protection against religious discrimination as contained in the ICCPR. At a time where religion and ethno-religious issues are playing a major role on the world's stage, these matters are also being confronted in Australian communities. As the gradual use of the RRTA in Victoria as an avenue for remedying religious vilification demonstrates, there is a growing need for protection and access to redress where a person is exposed to discriminatory conduct or vilification on the basis of religion, religious belief or ethno-religious background.

The failure of Australia to domestically implement the ICCPR means that at present there is no mechanism available to individuals to enforce their ICCPR rights, remedy violations and ensure violators are held accountable for their actions. This is a serious deficiency in Australia meeting its international human rights obligations.

Ultimately, the lack of a comprehensive system in Australia for the protection of the right to non-discrimination on the basis of race and religion means that many groups, such as indigenous people, immigrants, refugees, asylum seekers and religious minorities, are vulnerable to human rights violations without any means of redress.

## 5 Australian Legal Frameworks

There is substantial overlap between Commonwealth and State laws in the area of equal opportunity. Both have legislation dealing with racial discrimination currently in force. When I heard about the new laws I thought, 'it's going to make things right' I suppose... It's far from it. (Interviewee F) I don't think the law functions in the way that it should. (Interviewee F) You would think that with the Racial Vilification Act you have to be famous to get anywhere. And the little people don't matter. But I would like to think that one day maybe there's a chance. You hope. I don't like giving up. I'm not a quitter. I've got to keep going. I'm torn but I'm going to keep going. (Interviewee G)

## **5.1 Equal Opportunity Act 1995 (Vic) – ‘Discrimination’ Based on Race**

### **5.1.1 Conduct which is unlawful under the legislation**

In general terms, the *Equal Opportunity Act 1995* (EOA) defines discrimination as the less favourable treatment by reason of an attribute and in an area covered by the act.

Section 6(k) of EOA prohibits discrimination on the grounds of race. Discrimination on the basis of race occurs under the EOA where a person treats or proposes to treat a person less favorably than a member of a different race, on the ground of an actual, imputed, or presumed race or racial characteristic (sections 7 and 8).

Both direct and indirect discrimination on the basis of race are unlawful under the EOA.

#### **Definition of ‘race’**

The EOA does not attempt an exhaustive definition of race. Under section 4(1), race includes descent or ancestry, colour, nationality or national origin and ethnicity or ethnic origin.

The definition also includes circumstances where two or more distinct races are collectively referred to as a race. In such circumstances, the definition encompasses each of those distinct races and that collective race.

#### **Areas of discrimination**

Discrimination laws prescribed by the EOA apply to public behaviour and not to private conduct. Public areas regulated by the EOA include employment, partnerships, professional and other organisations, qualifying bodies, employment agencies, education, provision of goods or services, disposal of land, accommodation, clubs or community service organisations, municipal or shire councils and sport.

### **5.1.2 Direct discrimination**

Section 8(1) provides that direct discrimination occurs where a person is treated or proposed to be treated less favourably than a person not of that race, or of a different race, in the same or similar circumstances.

In the VCAT decision *Capodicasa v Herald and Weekly Times Ltd & Ors*<sup>102</sup>, the Tribunal pointed out that the treatment must be “less favourable” as opposed to different.

## **Factors Bearing No Relevance In Identifying Direct Discrimination**

The EOA removes the requirement of intent for direct discrimination. Under section 8(2)(a) it is irrelevant whether that person was aware of the discrimination or considered the treatment less favourable.

Section 8(2)(b) also provides that it is irrelevant whether or not race is the only or dominant reason for the treatment, as long as it is a substantial reason.

### **5.1.3 Indirect discrimination**

Under section 9(1) of EOA, indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice that someone of a particular race cannot comply with when compared to a higher proportion of people not of that race, or of a different race, and where it is not reasonable.

In determining a breach, section 9(2) provides that all the relevant circumstances of the case must be considered, including the consequences of failing to comply with the requirement, condition or practice, the cost of alternatives and the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice.

The EOA acknowledges that indirect discrimination can occur without any intention or motivation on the part of the discriminator to disadvantage a particular individual or group. In determining whether a person indirectly discriminates the issue of whether or not that person is or was aware of the discrimination is irrelevant: Section 9(3).

### **5.1.4 Exceptions to racial discrimination**

The EOA does allow for racial discrimination to occur in certain circumstances. These include:

In employment

An employer may discriminate against an employee or prospective employee on the grounds of race where: the employment involves the care, instruction or supervision of children and the employer genuinely believes that the discrimination is necessary to protect children. Racial discrimination is also allowed where employment is for personal services in the home; welfare services that exist for the benefit of a specific racial group or in small businesses where the employer has less than 5 employees.

Enrolment into schools set up for children from a specific racial group  
Accommodation

Clubs that exist principally to prevent or reduce disadvantage suffered by people of that racial group to preserve a minority culture.

## **5.2 Racial and Religious Tolerance Act 2001(Vic)**

### **5.2.1 Conduct which is unlawful under the legislation**

The RRTA makes it an unlawful to vilify a person on the grounds of race (section 7) or religion (section 8) subject to specific exceptions.

Vilification is defined under sections 7 and 8 as conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, another person or class of persons because of their race or religion. Engaging in the prohibited conduct may give rise to a civil complaint.

Conduct covered by the RRTA includes use of the internet or e-mail to publish or transmit statements or other material. Conduct may be constituted by a single occasion or by a number of occasions over a period of time and may occur in or outside Victoria.

In determining whether an offence has been committed, it is irrelevant that the offender made an incorrect assumption about the race or religion of the victim.

Section 15 also prohibits a person from requesting, instructing, inducing, encouraging, authorising or assisting another person to contravene sections 7 and 8.

#### **Definition of ‘race**

Section 3 provides a non-exhaustive definition of “race” to include colour, descent or ancestry, nationality or national origin and ethnicity or ethnic origin and circumstances where two or more distinct races are collectively referred to as a race.

#### **Definition of ‘religious belief or activity’**

Section 3 provides that “religious belief or activity” means holding or not holding a lawful religious belief or view, or, engaging in, not engaging in or refusing to engage in a lawful religious activity.

### **5.2.2 Offence of serious racial vilification**

The RRTA creates the offence of serious racial (section 24) or religious vilification (section 25). Sections 24 and 25 define serious vilification as intentionally engaging in conduct that a person knows is likely to incite: hatred against another person or class of people and threaten or incite others to threaten, physical harm towards another person or class of people or the property of another person or class of people; or serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

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The definition of 'person' includes a body corporate for the purpose of serious vilification.

The type of conduct covered by the RRTA includes use of the internet or e-mail to publish or transmit statements or other material. Conduct may be constituted by a single occasion or by a number of occasions over a period of time and may occur in or outside Victoria.

The penalties are prescribed as 300 penalty units, in the case of a body corporate and imprisonment for six (6) months or 60 penalty units or both in any other case.

### **5.2.3 Public conduct exceptions**

The RRTA attempts to strike a balance between the right to freedom from vilification and the right to freedom of expression by providing for certain exceptions. The exceptions are engaging in conduct or discussion reasonably and in good faith in:

the performance, exhibition or distribution of an artistic work; or

the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in for any genuine academic, artistic, religious scientific purpose or any purpose that is in the public interest; or

making or publishing a fair and accurate report of any event or matter of public interest.

### **5.2.4 Private conduct exception**

Section 12(1) provides that a person does not contravene sections 7 or 8 where it can be shown that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties intended it to be heard or seen only by themselves. Section 12(2) provides, however, that section 12(1) does not apply to conduct in any circumstances in which the parties ought reasonably to expect that it may be heard or seen by someone else.

## **5.3 *Racial Discrimination Act 1975 (Cth)***

### **5.3.1 Conduct which is unlawful under the legislation**

Under section 9 of the RDA, it is unlawful for a person to do any act involving a 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 equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

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Where:

a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances;

the other person does not or cannot comply with the term, condition or requirement; and

the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

### **Areas of discrimination**

#### **Rights to equality before the law**

Section 10 entitles people to the right to equality before the law. State, Territory and Commonwealth laws that do not provide a person of a particular race with the same rights as others, are extended so that any rights granted by the laws apply equally to persons of the particular race.

#### **Access to places and facilities**

Section 11 makes it unlawful for a person:

to refuse another person access to or use of any place, vehicle or facilities;

to refuse another person access to or use except on terms less favourable than others, any place, vehicle or facilities;

by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person.

#### **Land, housing and other accommodation**

Section 12 makes it unlawful for a person:

to refuse to dispose of land or accommodation to a second person;

to dispose of such land or accommodation to a second person on less favourable terms and conditions than those which would otherwise be offered;

to treat a second person looking to acquire land or accommodation less favourably than other persons in the same circumstances;  
to refuse to permit a second person to occupy land or accommodation; or

to terminate any interest in land of a second person or the right of a second person to occupy land or accommodation by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

### **The provision of goods and services**

Section 13 makes it unlawful for a person who supplies goods or services to the public:

to refuse to supply those goods or services to another person; or

to refuse to supply those goods or services to another person except on less favourable conditions than those upon which they would otherwise supply those goods or services;

by reason of the race, colour or national or ethnic origin of that other person or of any relative or associate of that other person.

### **The right to join trade unions**

Section 14 makes it unlawful for a person to prevent or hinder another person from joining a trade union by reason of the race, colour or national or ethnic origin of that other person.

### **Employment**

Under section 15, it is unlawful for an employer:

to refuse or fail to employ a second person on available work for which the second person is qualified;

to refuse or fail to offer or afford a second person the same terms and conditions of employment and opportunities for training and promotion as are made available for others having the same position and qualifications; or

to dismiss a second person from their employment;

by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

### **Incitement to unlawful acts**

It is unlawful for a person to incite, or assist or promote, the doing of an act unlawful by reason of Part II of the RDA.

## **Commission of an act that amounts to ‘racial hatred’**

The RDA also prohibits offensive behaviour based on racial hatred. Unlawful racially offensive behaviour can include public acts based on the race, colour, national or ethnic origin of a person or group of people which are likely to offend, insult, humiliate or intimidate. Unlawful offensive behaviour might include:

writing racist graffiti in a public place;

making racist speeches at a public rally;

placing racist posters or stickers in a public place;

making a racially abusive comment in a public place, eg. shops, workplace, public transport, parks;

publishing offensive racist comments in a newspaper or other publication. The act must have, when considering all the circumstances, caused a person or a group of people to feel offended, insulted, humiliated or intimidated. If the act is relatively trivial, it is probably not unlawful.

### **5.3.2 Direct and indirect forms of discrimination**

Discrimination as an unlawful act is usually described as direct or indirect.

Unlawful direct discrimination occurs when a person is treated less favourably, because of a particular characteristic, comparative with a person without that characteristic.

Indirect discrimination is more difficult to identify. Indirect discrimination occurs, say, when an employer imposes a condition which, on its face may not appear to be discriminatory but, when implemented has the result of disproportionately excluding or favouring a particular group.

### **5.3.3 Exceptions**

The RDA makes provision for ‘special measures’ which, whilst falling within the definition of racial discrimination, are nevertheless permitted if they fall within the provisions of paragraph 4 of Article 1 of the ICERD. Article 1.4 of the ICERD provides:

Special measures are taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups of individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives

for which they were taken have been achieved. That is, special measures must:

provide a benefit to some or all members of a group who share a common race, colour, descent, national origin or ethnic origin;

have the sole purpose of securing the advancement of the group so they can enjoy human rights and fundamental freedoms equally with others;

be necessary for the group to achieve that purpose; and

stop once their purpose has been achieved and not set up separate rights permanently for different racial groups.

The concept of special measures operates only as a defence to a complaint alleging racial discrimination and does not prevent such a claim being made.

Furthermore, the racial hatred provisions provide that the following things are not unlawful if “done reasonably and in good faith”:

an artistic work or performance;

an academic publication, discussion or debate;

a fair and accurate report on a matter of public interest;

a fair comment if the comment is an expression of a person's genuine belief.

## 6 Complaint Mechanisms

### **6.1 Role of Victorian Equal Opportunity and Human Rights Commission in Administering the *Equal Opportunity Act* and *Racial and Religious Tolerance Act***

The Equal Opportunity Commission Victoria (EOCV) was established on 1 March 1994, replacing the former office of the Commissioner for Equal Opportunity. As of 1 January 2007, as noted above in this report, the EOCV changed its name to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), reflecting its additional responsibilities under the Victorian Charter of Human Rights and Responsibilities. VEOHRC acts as a contact for advice on how to proceed under the various discrimination legislation in force.

The VEOHRC consists of 5 members, one of which is the Chief Conciliator. The Chief Conciliator performs the function of conciliation or delegates the power accordingly.<sup>103</sup> The other 4 are persons appointed by the Governor in Council on the nomination of the Minister: Section 163. Section 161 sets out the function to be performed by the VEOHRC as: the establishment of policies and issuing of guidelines and directions on the manner in which conciliation procedures under the Act should be conducted; the receipt and investigation of complaints regarding the manner in which conciliation procedures under the Act are conducted establishing and undertaking information and education programs; and any other functions conferred by the Act or any other Act.

#### **VEOHRC and the RRTA**

Before the RRTA was enacted, vilification complaints in Victoria could only be dealt with under Commonwealth legislation and were referred to the HREOC in Sydney. Complaints are now handled by the VEOHRC under the EOA. The RRTA adopts the complaints procedures available under the EOA, also enabling a complainant to bring a claim before VCAT: Sections 19-23 RRT

#### **6.1.1 Complaints procedure - Making a complaint**

Section 105 provides that the complaint must be in writing and delivered by hand, facsimile or other electronic transmission or post. A complaint must set out details of the alleged contravention. Where the EOA covers the complaint, the VEOHRC must assist a complainant in formulating his or her complaint: Section 106. General VEOHRC practice in this regard includes a meeting with the Advice and Referral Officer and the provision of an interpreter or other assistance at no cost to the complainant. The limitation period for making a complaint is 12 months. Complaints not lodged within 12 months of the act of discrimination may be declined: Section 108(1)(c)

## **Assessment by the VEOHRC**

The VEOHRC must notify the respondent in writing of the complaint as soon as practicable after it is received: (Section 107).

## **Investigation**

Section 108(1A) vests the VEOHRC, a member or a VEOHRC staff member with the power to order by written notice, a person to attend before the VEOHRC for the purpose of discussing the subject matter of the complaint or to produce any documents that are relevant to the complaint. Complaints are investigated by an officer from the VEOHRC, who gathers relevant information and reports to the VEOHRC. Investigators must keep the complaint confidential and act impartially. An Investigator will inform the respondent about the details of the complaint and discuss the matter with them. Depending on the circumstances the respondent may be required to:

provide information to the Investigator over the phone; and/or

send a written response to the Investigator addressing the complaint allegations: Section 108.

The Investigator may also visit the site of the alleged discrimination and/or interview witnesses. Based on the information gathered by the Investigator, the Commission may refer the matter to conciliation or decline the complaint.

## **Referral to Conciliation**

If it appears that unlawful discrimination or vilification has occurred, efforts are made to settle the complaint by confidential, informal and impartial conciliation.

## **Conciliation Inappropriate**

Section 113 sets out the procedure for dealing with circumstances where conciliation might be inappropriate. Under sub-section (1), the VEOHRC must notify the complainant and the respondent in writing where it does not consider it reasonably possible that a complaint may be conciliated successfully. Within 60 days after receiving the notice, the complainant, by written notice, may require the VEOHRC to refer the complaint to the VCAT for hearing. The VEOHRC must comply with any such notice from the complainant under section 113(2). Where the 60 days notice period is not observed by the complainant, the VEOHRC may dismiss the complaint and, by written notice, notify the complainant and the respondent that the complaint is dismissed.

## **Expedited Complaints**

Section 119 provides that a complainant or respondent may make a written application to have the complaint expedited to conciliation. The VEOHRC has the power to fast track or expedite a complaint where:

the Commission believes the matter may be resolved by conciliation;

there are special circumstances requiring a speedy resolution of the complaint; or

the complaint relates to a policy decision of the respondent, the implementation or proposed implementation of which is alleged to be discriminatory: Section 120.

Under section 122, the Commission must refer an expedited complaint to the Chief Conciliator, and the Chief Conciliator must commence conciliation of the complaint, as soon as practicable after the Commission or the Tribunal has determined that it is an expedited complaint.

## **Deemed to have 'no merit'**

Section 108(1) permits the VEOHRC to decline a complaint where it considers that the complaint is:

frivolous, vexatious, misconceived or lacking in substance;

involves subject matter that would be more appropriately dealt with by a tribunal (other than VCAT) or a court;

involves subject matter that has been adequately dealt with by a tribunal or court; or

relates to an alleged contravention of the EOA that took place more than 12 months before the complaint was lodged. Any decision to decline the complaint on the basis of section 108(1) must be notified to the complainant and respondent in writing within 60 days after the day the complaint was lodged.

Within 60 days after receiving the VEOHRC notice declining to entertain a complaint, the complainant, by written notice, may require the VEOHRC to refer the complaint to VCAT for hearing: section 108(2). If the complainant does not notify the VEOHRC in accordance with section 108(2), the VEOHRC may dismiss the complaint and the complainant may take no further action under the EOA in relation to the subject matter of the complaint: Section 108(4). The VEOHRC must, by written notice, notify the complainant and the respondent of the dismissal as soon as possible after a dismissal: Section 108(5).

### **6.1.2 Conciliation procedure**

Section 114(1) provides that the Chief Conciliator must make all reasonable endeavors to conciliate a complaint referred to him or her under section 112 or 122. The Chief Conciliator may, by written notice, require any person to attend before him or her for the purpose of discussing the subject matter of the complaint and/or produce any documents specified in the notice: Section 114(2).

#### **Role of Conciliator**

The VEOHRC is not a tribunal or court, nor does it have the power to prosecute or make judgments. The role of the Conciliator is facilitative rather than regulatory, that is, to assist the parties to reach a mutually agreeable solution. The VEOHRC does however have the power to compel attendance and the production of documents with respect to the conciliation: Section 114.

#### **Use of Lawyers**

Complaint resolution by the VEOHRC is free as part of its statutory duty to provide assistance. There is usually no need for a lawyer, particularly as anything said in conciliation is inadmissible if the complaint proceeds to a VCAT hearing.

#### **Role of Lawyers**

The VEOHRC has internal policy guidelines regarding the role of lawyers. Even though there is usually no need for a lawyer, the VEOHRC accepts them readily at the election of the complainant or respondent for the purpose of conciliation, subject to conformity with VEOHRC internal guidelines.

The guidelines generally limit the use of lawyers to:

The making of opening statements on behalf of their clients where both parties are represented, or by consent where only one party is represented;

Providing advice and assistance to their clients with respect to understanding the issues, negotiating the remedies and settlement of the complaint.

Lawyers are prohibited, however, from questioning the other party directly (questions must be addressed to the chair/conciliator) or engaging in any formal cross-examination-type conduct. The precise nature of the role will differ with each complaint as the VEOHRC adopts a case-by-case approach to conciliation. Its overriding concern, however, is to adopt procedures that encourage parties to speak for themselves.

## **Conciliation Agreements**

Where agreement is reached with respect to the complaint, either party may request a written record of the agreement. This is to be prepared by the Chief Conciliator within 30 days after agreement is reached. The record must be signed by or on behalf of each party and certified by the Chief Conciliator and a copy of the signed and certified record given to each party by the Chief Conciliator: Section 115(1).

Any party, after notifying the other party in writing, may lodge a copy of the signed and certified record with VCAT for registration: Section 115(2)

Registration may be declined where VCAT considers that it may not be practicable to enforce or supervise compliance with a conciliation agreement. The refusal to register the record does not affect the validity of the agreement: Section 115(4)

## **Where Conciliation Fails or is Inappropriate**

Section 117(1) provides that where the Chief Conciliator does not consider it reasonably possible that a complaint may be conciliated successfully or has attempted unsuccessfully to conciliate the complaint, he or she must notify the complainant, and the respondent in writing and notify the VEOHRC. The complainant, by written notice, may require the VEOHRC to refer the complaint to VCAT for hearing within 60 days after receiving a sub-section (1) notice. Section 117(3) requires the VEOHRC to comply with a notice from the complainant and refer the matter to VCAT.

## **Termination of complaint and referral to VCAT**

The Anti Discrimination List (ADL) in the human rights division of VCAT hears and determines complaints under the EOA and the RRTA.

The ways in which a complaint can be referred are:

where the VEOHRC declines a complaint or determines that the complaint is non-conciliable: Section 108;

if the Minister has referred the matter to VCAT where the matter is deemed an issue of important public policy: Section 111;

where complainants require the VEOHRC to refer their complaints to VCAT: Section 113; or

by the Chief Conciliator after attempts to conciliate are unsuccessful: Section 117.

In addition, VCAT hears applications:

made by the respondent to have the complaint struck out on the basis that it is frivolous, vexatious, misconceived, lacking in substance or an abuse of process: Section 109; and

for interim orders to prevent a party to a complaint from acting prejudicially to conciliation or negotiation or to VCAT's ultimate decision.

### **Evidence of Conciliation Inadmissible**

Section 116 provides that anything said or done during the conciliation discussions is confidential and cannot be used in evidence before VCAT or any other legal proceedings relating to the subject matter of the complaint.

#### **6.1.3 Types of settlement**

In our minds we were thinking that a lot of people who come to this country don't even know the black history of this country. Other people were saying, let them get cross cultural training, so that they can know about our culture and where we come from. I don't mind chucking that in there. But I don't want that to be it. It's just wrong. It's education basically. If his parents taught him that blacks are all dirty and disgusting and violent and abusive and druggies then he might never change. But a part of the process may be to sit down and tell him our history and where we come from, and we don't need it, and you don't need to be like that. I think it would make a change. It's a start anyway. And then hopefully they can educate their kids... (Interviewee G)

The purpose of conciliation is for the complainant and respondent to reach an agreement about resolving the complaint. The conduct of conciliation is not bound by the ordinary rules of evidence and procedure. The types of settlement therefore will depend on the circumstances, on what the complainant is seeking, and on what the respondent is willing to offer.

VEOHRC does not have the power to make orders or award compensation. Settlement will vary depending on the wants, needs and offers made by the parties and can include:

an apology (verbal or written, private or public);

financial compensation;

a job reference or reinstatement;

access to a previously denied job opportunity or service;

an agreement to change or stop behaviour;

an agreement to put equal opportunity policies in place;

equal opportunity training

If something happens and people felt that the perpetrator was genuinely sorry then we would be content with that. But we put in complaints because we know that they are not genuinely sorry. So someone has to deal with it. It's your law, you deal with it. (Interviewee F)

If he had of been sorry on the night then that would have been enough for me. I would never have put in a complaint to the Equal Opportunity Commission. Look if he had said 'I really didn't think about what I said and I totally understand why you are upset and I'm so sorry,' that would have been enough. It would have been the end of it. But if 'sorry' isn't genuine then it isn't enough. (Interviewee F)

## **6.2 Role of Victorian Civil and Administrative Tribunal in Administering EOA and RRTA**

VCAT administers the EOA and the RRTA (together, Acts) within the guidelines of the Victorian Civil and Administrative Tribunal Act 1998 (Vic) (VCAT Act).

### **6.2.1 Complaints procedure**

Matters arising under the Acts may be referred to VCAT for compulsory conferences, mediation or a full hearing (in addition to forms of dispute resolution otherwise available under the Acts).

The parties may settle their proceeding at any time and VCAT may make appropriate orders if and when this occurs.

Parties may, but are not generally entitled to, be represented by lawyers in VCAT proceedings.

There is no specific provision for follow-up alternative dispute resolution if mediation is unsuccessful.

When making a decision under the RRTA, VCAT balances the RRTA's competing objectives, namely, the focus on "serious" conduct (eg racial or religious vilification) with the right to freedom of expression.

Exemptions granted by VCAT are generally limited to the absolute minimum necessary to achieve the desired purpose.

VCAT encourages a non-adversarial approach to dispute resolution under the relevant legislation.

VCAT's ADL hears cases arising under the Acts. No application fees are charged for such cases. In 2004-2005 30 VCAT members were allocated to this list. 104 VCAT must act fairly and according to the substantial merits of the case, and is bound by the rules of natural justice: Sections 97 and 98(1)(a) VCAT Act.

Parties to a VCAT proceeding may be assisted by an interpreter or other person necessary or desirable to make the proceeding intelligible to that party unless VCAT directs otherwise: Section 63 VCAT Act. Parties are generally not entitled to be represented by professional advocates (including lawyers): Section 62 VCAT Act, however, children, certain public entities and officials, credit providers and insurers may be represented by a professional advocate. Otherwise, a party may only be so represented if another party is represented by a professional advocate, all parties consent to the representation, or VCAT permits or directs that the person may be represented: Section 62 VCAT Act. Parties generally bear their own costs unless VCAT orders otherwise: Section 109 VCAT Act.

### **6.2.2 Dispute resolution**

Once at VCAT, matters may be addressed using up to 3 additional forms of dispute resolution: conference, mediation and a VCAT hearing.<sup>105</sup> In practice, however, in order to promote efficient case management some relatively straightforward cases proceed directly to hearing. It should also be noted, that exemption applications are not appropriate for resolution prior to the VCAT hearing.

#### **Compulsory conferences**

VCAT or the Principal Registrar may require that parties to a VCAT proceeding attend one or more compulsory conferences before VCAT hears the proceeding. The conference may be before a VCAT member or before the principal registrar: Section 83(1) VCAT Act. A party may object to the member who conducted the conference also hearing the proceeding: Section 86 VCAT Act. Compulsory conferences are governed by Section 83-85 of the VCAT Act, and are designed to identify and clarify the issues in dispute, promote settlement, identify the questions of fact and law that VCAT is to decide, and allow directions to be given in relation to the proceeding. Procedure is at the discretion of the person conducting the conference; unless this person directs otherwise the conference must be held in private.

VCAT may require a party to attend a compulsory conference in person or may require that party's personal representative to attend if they have authority to settle the proceeding. Evidence of anything said or done during a compulsory conference is inadmissible in a VCAT hearing unless:

all parties agree to the evidence being given;

it relates to directions or reasons for directions given at a conference; or

it is relevant to a proceeding for an offence relating to the giving of false or misleading information, a proceeding for contempt or an order relating to non-attendance at a compulsory conference.

## **Mediation**

Mediation is governed by Sections 88-92 of the VCAT Act. VCAT or the Principal Registrar may refer a proceeding or part of it to mediation by a person nominated by VCAT or the Principal Registrar with or without the parties' consent. If a VCAT member acts as the mediator that member cannot then hear the proceeding. The VCAT member or Principal Registrar may require a party to attend a mediation in person, or may require that party's personal representative to attend if they have authority to settle the proceeding. Evidence of anything said or done in the mediation is inadmissible in a VCAT proceeding unless all parties agree to the evidence being given. The mediator must notify the Principal Registrar of whether the matter settles at mediation.

## **VCAT hearing**

If matters before VCAT do not settle or are not otherwise resolved in dispute resolution, they proceed to a full hearing before VCAT. VCAT is not bound by the rules of evidence, although it generally chooses to abide by them.<sup>106</sup> VCAT may inform itself as it sees fit (Section 98(1)(c) VCAT Act) but must also allow parties a reasonable opportunity to call or give evidence and to examine, cross-examine or re-examine witnesses: Section 102(1) VCAT Act. Evidence may be given orally or in writing, or, if VCAT requires, on oath or by affidavit: Section 102(3) VCAT Act. VCAT must conduct its proceedings with as little formality and technicality, and as much speed, as the VCAT Act, RRTA, EOA and a proper consideration of the matters before it permit: Section 98(1)(d) VCAT Act. VCAT hearings must generally be held in public, although VCAT may direct that a hearing be held in private or that material raised in a hearing not be published: Section 101 VCAT Act. VCAT may conduct all or part of a proceeding by telephone, video or other telecommunications conference, or may conduct a proceeding "on the papers", without physical appearance by the parties or their representatives: Section 100 VCAT Act.

### **6.2.3 VCAT's powers relating to complaints Settlement**

Parties may agree to settle the proceeding at any time, and if they do VCAT may make orders to give effect to that settlement: Section 93 VCAT Act. This power may be exercised by any member (including if that member is acting as a mediator) or by the principal registrar if they are presiding at a compulsory conference: Section 93(2) and (3) VCAT Act. A settlement offer may be made with or without prejudice: Section 113 VCAT Act, and must be open for acceptance either until the expiry of a nominated period of at least 14 days, or until immediately before VCAT makes its orders on the matter in dispute: Section 114 VCAT Act. If a party accepts an offer but does not comply with its terms, VCAT may make an order giving effect to the terms of the offer, or otherwise make orders in favour of the party not in breach of the offer: Section 115 VCAT Act.

## **Interim Orders**

Under Section 131 of the EOA, VCAT has the power to make interim orders “to prevent any party to the complaint from acting in a manner prejudicial to negotiations or conciliation or to any decision or order the Tribunal might subsequently make”. An application for an interim order may be made by a complainant or the VEOHRC, provided that the application is made before the complaint is referred to VCAT.

When deciding whether or not to grant an interim order, VCAT must have regard to:

whether the complainant has established a prima facie case;

any possible detriment/advantage to the public interest in making the order;  
and

any possible detriment to the complainant's case if the order is not made.

## **Final orders**

Under Section 136 of the EOA, VCAT may find a complaint or any part of it:

proven, and order that the respondent stop breaching the relevant Act, compensate the complainant for loss, damage or injury and/or do anything required to redress any loss, damage or injury suffered by the complainant;

proven, but decline to take any further action in the matter; or

not proven, and make an order that the complaint or part of it be dismissed.

VCAT may summarily dismiss a proceeding that it considers unjustified and may also summarily dismiss a proceeding for want of prosecution: Sections 75 and 76 VCAT Act.

When making the determinations outlined above, VCAT may grant an injunction or make a declaration on such conditions as it thinks fit: Sections 123, 124 and 130 VCAT Act.

## **6.3 Role of Human Rights and Equal Opportunity Commission in Administering RDA**

According to HREOC's enabling legislation, it has a variety of roles, including undertaking any functions conferred on it by the RDA. In addition, HREOC's functions include, amongst other things, to:

inquire into, and attempt to conciliate complaints of unlawful discrimination;  
and

inquire into any act or practice, including any systemic practice, that may constitute discrimination.

### **6.3.1 Complaints procedure**

Complaints must be made in writing to HREOC. HREOC provides support for people who require translation or other help in making a written complaint. If the complaint is covered by both State and Federal laws, the complainant must elect the jurisdiction under which they wish to lodge a complaint.

#### **Assessment under the RDA**

HREOC does not investigate all complaints. The complaints must be about an issue that is covered by federal anti-discrimination or human rights laws. If HREOC considers it has the power to investigate the complaint, an Investigation/Conciliation Officer will contact the complainant.

The Investigation/Conciliation Officer will contact the complainant on behalf of the President of HREOC and may request more information if necessary. The Officer will also contact the respondent and will:

advise them that the complaint has been made;

provide them with a copy of the complaint; and

ask them to respond.

#### **Deemed to have 'no merit'**

If there is not enough evidence to support the complaint, the President may decide to stop the investigation and terminate the complaint. HREOC will advise the complainant of this decision and provide reasons. If the complainant disagrees with that decision, they may apply to the FCA or the FMC within 28 days of receiving the Notice of Termination. Otherwise, if the President thinks there is enough evidence to support the complaint, HREOC will try to conciliate the complaint.

### **6.3.2 Conciliation procedure**

The RDA provides no definition of conciliation and only limited direction as to the process that is envisaged. It has therefore been up to HREOC to develop their dispute resolution practices. HREOC tries to help the complainant find an agreement with the respondent that will resolve the complaint in a fair way. This may be done by bringing the parties together in a "conciliation conference". The Investigation/Conciliation Officer will set the standards for the conference and will discuss these with both parties before the conference.

## **Role of conciliator**

The conciliator has a role in not only advising or determining the process by which conciliation is undertaken. The conciliator may also provide input in relation to the content of the dispute, that is, how the issues raised in the complaint appear to relate to the law and in relation to the outcome. Such input would generally take the form of providing information to both parties about possible settlement options and facilitating the resolution process to ensure parties are able to make informed choices about settlement terms. For example, the conciliator's role may include providing information about how other factually similar matters have been resolved or determined and where relevant, such as where parties are unrepresented, providing general information about how compensation may be calculated or how other alleged loss may be remedied.

The form of the conciliation process is determined by the conciliator with reference to the preference of the parties, the issues raised by the complainant and the geographical location of the parties.

## **Form of conciliation**

According to HREOC, there are 5 different forms of conciliation, as follows:

**Face-to-face process** – all stages of the process, including negotiation are conducted with the parties in a face-to-face meeting. Parties will, however, have private meetings with the conciliator and/or their advisers;

**In-person shuttle process only** – A shuttle process involves the parties being at the same location but remaining separated with the conciliator conveying messages and resolution proposals between the parties;

**Combination of face-to-face and shuttle process** – it is not uncommon for the negotiation component of a face-to-face conciliation meeting to be conducted in shuttle form;

**Telephone shuttle** – this involves the conciliator having separate telephone discussions with the parties and conveying messages and resolution proposals between the parties. This may occur over a period of days or weeks;

**Teleconference** – this involves a telephone link up of the parties which is conducted along the lines of a face-to-face meeting and may include some periods of private telephone discussion between the conciliator and the parties.

For example, a pure shuttle format may be used where the matter is highly sensitive and/or there is significant anger or hostility between the parties. Whilst the number of RDA complaints is small, the apparent preference for telephone shuttle can be explained by the nature of RDA complaints and the outcomes sought (see part 7.4 of this report). Conciliators advise that in

relation to racial hatred complaints involving one-off altercations between individuals, it is often the case that the parties do not wish to meet to discuss the matter and respondents are willing to consider resolution proposals such as written apologies, which are commonly sought by complainants. At the conference, the parties have a chance to discuss the problems and look for solutions. It is not necessary for the parties to be represented by lawyers.

If the complainant and respondent reach an agreement, HREOC will help write up the agreement and close the file. If the parties cannot agree, the complaint will be terminated by the President as it is unable to be conciliated. The complainant may then make an application to the Court to have the allegations heard by the Court.

### **Termination of complaint and referral to Federal Court or Federal Magistrates' Court**

Complaints that cannot be resolved by conciliation or are considered inappropriate for conciliation are terminated by the President of the Commission. The President may terminate a complaint for a number of reasons if it is satisfied that:

the complaint is trivial, vexatious, misconceived or lacking in substance;

the complaint was lodged more than 12 months after the alleged unlawful discrimination;

the alleged discrimination is not unlawful;

some other more appropriate remedy in relation to the subject matter of the complaint is reasonably available to each affected person;

there is no reasonable prospect of conciliation; or

where the subject matter of the complaint involves issues of public importance that should be considered by the FCA.

Once the complainant receives the Notice of Termination from the President, the complainant has 28 days to make an application to the FCA or the FMC to have the allegations heard.

If a Court finds for the complainant, it may make an order against the respondent, such as making the respondent do the following things:

pay money as compensation for what has happened;

provide a service to the complainant;

stop the discrimination.

If a Court finds for the respondent, it will dismiss the complaint and may order that the complainant pay the costs of the respondent.

## 7 Complaint Processes in Practice

### 7.1 Participant Responses

Interviewees were generally unhappy with and did not have confidence in the complaints process. In some cases, interviewees felt further discriminated against during the process, discouraging them from making further complaints or recommending the process to others. ...just the list. Just the thing to say this is what you need to do. If I know that I need to run around straightaway and get a lawyer. I'll go get a lawyer. But I didn't know that I have to wait. 'Here are your options on what you could ask, would you like to sue them for money, would like a public apology?' Just your options on what you could do. Basically I didn't know, you know, I didn't want to be like other people and say get them for their money. That is just like a cop out, if they just paid us off. Like people around the world will not know what the pub is like. (Interviewee G)

#### 7.1.1 Knowledge of the VEOHRC and HREOC

Ten (10) of the participants said they had heard about the VEOHRC and five (5) said they had heard about the HREOC. However there was some confusion as to the differences between the Commissions. Three (3) participants indicated that they had filed a formal complaint because of racial or religious discrimination. Of the organisations surveyed, three (3) said their clients were not aware of the VEOHRC, however most were aware of the HREOC.

#### 7.1.2 Complaints

When asked who they complained to, responses included the police, internal investigation unit of the police, Victorian Ombudsman, shop management, VEOHRC and VCAT.

All participants had knowledge about how and where to complain from a community legal centre or from other members of their community.

### VEOHRC Complaints

In describing her decision and the process of making a complaint to the VEOHRC, one interviewee said;

"There was over 30 Aboriginal people there, only one person has put in a complaint, and me and my boyfriend are the second and third. No one would do it (complain) because they're saying they can't be bothered, because the law just ... it doesn't protect us." (Interviewee G)

Yeah the whole process even at EOCV, we were disgusted with the mediators, we were disgusted they made the mistake of saying 'poor Mr.

[other party] is so sorry what do these women want' sort of thing. It was really atrocious. Because he was saying to them 'I'm really sorry, I've told these women I am sorry for what I have done.' He was playing the victim basically. The mediators are supposed to be impartial but they proved that they weren't being. I didn't feel safe in the process at all. (Interviewee F)

### **Comments on process**

Some interviewees discussed possible improvement to systemic responses and processes whilst others talked about community and individual responses.

I would have liked my court costs covered, my neighbour fined and the assault properly investigated and dealt with by police. (Interviewee A)

When you have knowledge of legal systems and processes you feel empowered. You have the ability to respond and defend yourself, whereas a lot of other people I'm sure don't do anything. (Interviewee E)

Yeah that's something I really need to say that... Most black fellas don't complain. And they... have no faith in the system. (Interviewee F)

I just wanted to pull out because I'm sick of it and you have people saying you won't get nowhere and you're not doing well. I'd like to think I am different to other people and just still go ahead and see how it goes. (Interviewee G)

I want to do this because I'm strong on youth and we got a lot of young people coming up behind us. I want to know the process so if they ever come across the same thing I can tell them what to do. (Interviewee G)

I heard a story about an Aboriginal women who wanted a glass of water and the pub refused her, because I think water is for free. She took it to the Equal Opportunity and got a really good case. So you hear these good things. That's in the back of my mind – maybe I could be like that lady and get a really good case. Try not to worry about all the ones that say not to worry. (Interviewee G)

But I don't really have a lot of faith in the law. (Interviewee G)

I went to EOC first. I don't know the process, so I was actually waiting for Equal Opportunity to contact me to tell me when I needed to get a lawyer, but then one day this lady [from the commission] rang me- just the tone of her voice, it was very rude. I had spoken to her before and I was shocked that she was... I couldn't understand her words, but she was more or less saying, 'Well we've put the complaint towards the pub and a lawyer there wants to know if you have a lawyer.' I didn't know, I actually thought because she's equal opportunity I figured that she might have been equal for everyone but from the tone of her voice made me think that... See I figured that someone from the EOCV will say this is the process, you put in your complaint, you put it towards these people and then somehow later on the track you'll have to

contact your lawyer, but they didn't say that. And so I didn't know whether to go straight to VALS at the start, or later. (Interviewee G)

Yeah, I really felt, just the way she spoke to me it really caught me off guard. Honestly, I felt like she was speaking down to me and I didn't like it one bit. I don't know if I had a bad day or she caught me at a bad time but just her tone of voice didn't get me right. And I'm good at picking up on that kind of stuff. And she hasn't called me back ever since. (Interviewee G)

Actually, when they speak to me I feel like they don't know what they are doing. I wonder how long have they been there for, how many times this has happened. I really think you should know this off the top of your head, they should know. (Interviewee G)

Yeah, and the process is yeah so, that lady I felt like she was sticking up for the other side. She wasn't clear in her words she kept using big words and sometimes I don't understand them. Because of the tone of her voice, usually I ask questions but I didn't ask her. (Interviewee G)

But see I have one lady saying that's wrong they shouldn't do that but then you have another one from the same organisation that speaks down you. Then I sort of think well wait a minute they are supposed to be equal. Take each side as it comes, don't even pick a side they are supposed to just do their job. (Interviewee G)

### **Reasons for choosing not to make a complaint**

Those who did not complain had the following to say:

A lot of the women who come to me don't want to make a complaint – I am no different to them – I think it is a waste of time when our political leaders do not support us. (Org 3)

People, particularly women in their community are reluctant to speak out about these issues - which means, it is harder to pursue these because there is so little support. Police should take more responsibility perhaps it should be an offence. (Interviewee D)

I talked to my friends and stuff and the thing about it is that it really isn't the sort of thing that you would complain about. I mean who would you complain to? No we don't have a means of dealing with just general, personal interactions that we have that involve racism. I don't know that we should or not, don't know what we could do. These private interactions are just that, only between punters on the tram. (Interviewee E)

I think this government's policy encourages racism. It's very hard but, we Africans we never complain...I don't know what to do about this really. It's so stressful. (Phone 1)

## **Knowledge of availability of legal remedies**

Interviewees were often unsure of the legal remedies available to them. You have to take full responsibility for it. The EOC doesn't check back up with you. (Interviewee F)

I would have expected that if I had rung the Equal Opportunity that they would tell me what I need to do. But I've just been sitting there waiting. (Interviewee G)

I was shocked that the EOC process wasn't as I thought it was. If someone has broken the law, they will deal with the law. Even if there was support from the EOCV to write up our complaint, I remember that being a task in itself. I remember very clearly to begin with they asked us what we wanted as an outcome. I was like hang about, it sounds like an easy thing to do but we had no idea. We wanted someone to fix the problem not knowing that was part of the process, that they wanted us to fix the problem pretty much, it was just bizarre. It becomes fuzzy between you having to take responsibility for it all and almost to provide all the proof that it happened. I didn't feel empowered at all. (Interviewee F)

## **Support mechanisms**

Assistance with complaint formulation and resolution is free in fulfilment of the VEOHRC's statutory duty to assist. This includes the provision of translation services as required. That being said, participants reported that their experiences weren't necessarily that straight forward.

I had to initiate everything, it seemed to be us pushing our own case... and look the whole process, it seemed to me from day one that the whole process just wasn't user friendly and we battled the whole way through. I think I expected that this is the new law and someone has broken the law so he is going to have to deal with the law. But it seemed to be us that had to push our case the whole time. As a matter of fact when we went to the Equal Opportunity Commission to put a complaint, we had support of a lady from the Victorian Aboriginal Legal Service at the time. The other friend dropped off half way through the process, it became too hard for her. I don't think we would have been able to go through without the support of the Legal Service. (Interviewee F)

It took me months, it took me ages, just to get the right words and things like that." [for the EOCV complaint]. We just got a letter the other day, I think they've just checked out the complaint, the pub are refusing that all that stuff happened, and then now they were saying let's go to conciliation. (Interviewee G)

When dealing with broader notions of support, the VEOHRC is active in the provision of education services. One of the VEOHRC's major functions is to undertake education and information programs through the provision of information sessions, workshops and equal opportunity consultancy.

A lot of our people probably...well I didn't myself, I didn't know what I needed to put in the complaint, or how much information, or even my writing skills or things like that, and I think everyone else had those fears as well- what do I put down, how do I start...so I tried to set up equal opportunity to come out and have a group meeting and have a powerpoint presentation, to tell everyone how to go about it, but no one would just come together. No they were going to, but we were too small, they wouldn't come, they wouldn't just do it. (Interviewee G)

The community needs to be educated about racism to avoid fear and how to complain so that discrimination ceases. (Interviewee B)

### **Use of lawyers**

Although there is usually no need for a lawyer, one interviewee expressed the following:

I went through with the whole thing but like I said, without the support of VALS worker I don't know if I would've been able to. And I felt very strongly I wanted to take it all the way. If these mediators weren't being unbiased, I mean something has to be done, wishing that somebody else would take it from me and do it. Even now talking about it I can feel it washing over me that sensation of anger and frustration. (Interviewee F)

### **Cost**

Complaint resolution at the VEOHRC is free and there is no need for a lawyer. Making or defending a complaint at VCAT may however be subject to legal costs.

### **VCAT Complaints**

One (1) participant told us that the VCAT process lead to an order that a written public apology was made in a local paper and that a small amount of financial compensation was awarded:

So the outcome as far as that was concerned was good. Except that I still did not feel that he was truly sorry. The whole way through was a fight, the whole way through was an absolute battle, a real battle. I wouldn't do it again. (Interviewee F)

This same participant reported that the outcome at VCAT went some way to making her feel better about the complaint:

[The Member] said 'hang on [defendant] you have done something wrong, you broke the law.' And just that, him being told that made me feel a lot better about the whole thing. But when we decided and signed off on the outcome, it was me that had to make the phone call to him. If I didn't follow through then nobody would have known and it would have just been forgotten about. (Interviewee F)

## **HREOC Complaints**

No comment can be made about HREOC complaints as all participants in the Project who complained, did so to the VEOHRC.

### **7.2 The Victorian Equal Opportunity and Human Rights Commission in Practice**

In 2004-05, the VEOHRC (then the EOCV) reported receiving 2876 complaints and responded to 8690 enquiries. Web activity was recorded at 101,527 hits.<sup>108</sup>

Of the 8690 enquiries made in person, by telephone or writing, a total of 654 concerned racial and/or religious discrimination and vilification issues. Noteworthy is the decline from 2002-03 figures which peaked at 1028 enquiries.

#### **7.2.1 Number of complaints made to the VEOHRC regarding racial discrimination and racial/religious vilification Racial and Religious Discrimination**

In 2004-05, a total of 291 complaints were made to the VEOHRC on the grounds of race and religious belief or activity.<sup>109</sup>

This comprises 10.4% of the total complaints made for 2004-05 and the fourth most frequented grounds of complaint. Ahead of racial complaints is disability (26.3%) sexual harassment (13%) and victimisation (10.6%). Most complaints occur in the areas of employment (73.7%) and the provision of goods and services (16.6%).<sup>110</sup>

#### **Racial and Religious Vilification**

As Table 2 shows, a total of 62 complaints concerning racial and/or religious vilification were made for the reporting year of 2004-05. (see page 48)

Under the RRTA there was one high profile first hearing of a complaint by VCAT in *Islamic Council of Victoria v Catch the Fire Ministries Inc.*<sup>111</sup> In that decision, VCAT held that Catch the Fire Ministries had vilified Muslims in 2004-2005 and ordered for a published apology and undertakings that the respondent would not engage in further vilification or incitement.

#### **Number of complaints deemed to have 'no merit'**

In 2004-05, 2876 complaints were lodged with VEOHRC. The Annual Report notes that at the time of reporting 1157 files had been finalised. Of those finalised, 34% were declined by the Commission on the basis of no merit. (see Table 3 page 48)

If a complaint is declined, the VEOHRC will inform everyone involved, explaining the reasons for its decision. Very little information is available as to

the reasons why the VEOHRC declines a complaint in the first instance as lacking merit, presumably because of the confidentiality attaching to such correspondence.

### **7.2.2 Resolution of complaints - Complaints resolved in conciliation**

Table 4 appearing in the Annual Report shows that of the matters referred to conciliation, 50% were resolved, while the remaining 50% were regarded as non-conciliable

#### **Complaints referred to VCAT for judicial determination**

The *Victorian Civil and Administrative Tribunal Annual Report 2004-05* (VCAT Annual Report) reports that the total number of complaints referred to the VCAT ADL under the Equal Opportunity and Discrimination provisions at 315, compared with 400 complaints in 2003-04.<sup>112</sup> Of those 315, 11% concerned race as compared to 10% in 2003-04.

As at 30 June 2005, 134 complaints were pending under the RRT Act, compared with 153 on 30 June 2004.

Of the total number of complaints referred to the ADL, 69% concerned employment related complaints and 15% concerned the provision of goods and services.

In successful conciliation cases, it seems that often the complainant will accept an apology and sometimes a small sum will be involved. In this sense, it seems that the conciliation process is very successful in assisting these matters to settle at little or no expense to the respondent.

The 2002/2003 Annual Report states that lower resolution rates for race discrimination appear to be linked with difficulties in demonstrating a link between their race and the alleged less favourable treatment and the associated limited case precedent in this area.

#### **Ability for follow-up if conciliation is unsuccessful**

According to HREOC's 2002/2003 Annual Report, 17% of finalised complaints under the RDA were terminated on the grounds of no reasonable prospect of reconciliation. Further, 25% of racial hatred complaints were terminated on the grounds of no reasonable prospect of reconciliation.

#### **Cost**

There is no cost involved in making a complaint. If legal representation is desired, however, this will present a cost to the complainant. Complainant legal representation is still a minority – around 20% of complainants under the RDA were legally represented in 2004 – so this expense is by no means a necessity.

#### **7.4.4 Number of complaints referred to Federal Court of Australia or Federal/ Magistrates Court for judicial determination**

There was no information available about the number of terminated complaints under the RDA that were pursued in the FCA and FMC. There was, however, information about the number of terminated complaints under all legislation that were pursued in the FCA and FMC in the HREOC Five Years on Report.

**8 Recent Case Law Pertaining to Racial and Religious Discrimination** This section of the report considers the major themes and trends to arise from several recent cases pertaining to discrimination and vilification legislation. With a view to considering the future operation of each Act.<sup>115</sup>

#### **8.1 RRTA: Balancing Competing Rights: Freedom of Speech and Protection from Vilification**

Whilst VCAT has been steadfast in its commitment to dealing with serious contraventions of the RRTA, it has also emphasised the need to balance the RRTA's competing objectives: namely, the need to prohibit serious behaviour in breach of the RRTA and the need to maintain freedom of expression. In determining what is 'serious behaviour', McKenzie DP in *National Italian Australian Foundation v Herald and Weekly Times Pty Ltd & Andrew Bolt (Andrew Bolt case)* [at 16]<sup>116</sup> that: [s]ection 7 is aimed at race based conduct which incites particularly strong feelings or reactions against an individual or group of that race. While the section does not refer to 'extreme circumstances', it is intended to apply only to very serious cases indeed. This is shown by the strong language used, "hatred", "revulsion", "ridicule" or "contempt" – but even more so by use of the qualifiers such as "serious" and "severe".

*Khalil v Sturgess* [2005] VCAT 2446 (*Khalil*) provides a very clear example of the type of conduct which will amount to serious vilification. In that case the complainants were subjected to sustained and explicit vilification, including verbal abuse. Details of the conduct found to constitute vilification in this case are set out in part 8.6 of this report.

The importance of balancing the RRTA's competing objectives has been emphasised in several cases. For instance, in the *Andrew Bolt case* McKenzie DP noted [at 28]:

The submissions of the parties raise the question whether s 7 should be read narrowly because it limited freedom of speech, or broadly because the RRTA like other anti-discrimination legislation is remedial and beneficial in nature. [...] Section 4(1), in brief, emphasises the societal values of freedom of expression and the importance of maintaining the right of discussion on matters of public interest, to comment on matters of artistic expression, discuss religious issues and have academic debate so long as these discussions and comments do not vilify or marginalise a particular person or group.

Balance of interests as one of the RRTA's key objects. That section requires that the objects are to be taken into account in interpreting the RRTA. One of those objects is also to maintain the right to engage in robust debate on issues of public interest or to comment on matters of artistic expression or other academic issues, but in a way that does not vilify or marginalise any person or class of persons.

The Explanatory Memorandum of the RRTA describes the objective of the Act as to prevent racial and religious vilification which is damaging to the cohesion and harmony of Victoria's culturally diverse community. It makes it clear that the conduct concerned includes conduct which maligns, abuses or seriously derogates other people because of their race or religious beliefs or practices. It states that such conduct can include intimidation, damage to property, graffiti and matters over the internet.

## **8.2 Exemptions from the Prohibition on Racial Discrimination**

VCAT has dealt with a number of exemption applications under the EOA in recent years: see for example, *Re Mornington Baptist Church Community Caring Inc* [2005] VCAT 2438 (*Mornington Baptist Church*); *Philippine Australian Sports Association of Victoria v Tolentino and Basketball Australia* [2001] VCAT 22 (*Tolentino*); *Cestui Que Vie Pty Ltd trading as Entre Nous (exemption)* [2003] VCAT 1688 (*Cestui Que Vie*); and *ADI Limited (Exemption)* [2004] 1963 (*ADI*).

While VCAT has demonstrated a preparedness to grant applications for exemption, such as in the *ADI* and *Cestui Que Vie* cases, it has rejected several applications that it considered too broad. The case law suggests that VCAT will only grant exemptions where the exemption sought (being an application to discriminate lawfully against a certain group of people) is limited to the minimum necessary to achieve the desired purpose.

Applications for exemption that are unnecessarily broad in scope will not be granted (see for example, in the *Mornington Baptist Church* and *Tolentino* cases), however, VCAT has shown a willingness to grant exemptions even in such cases provided that the applicants resubmit a sufficiently limited application.

## **8.3 Awareness of the Legislative Requirements under the Acts**

The cases reviewed demonstrated that complainants have sometimes misunderstood the scope of the Acts. This is particularly the case in relation to the RRTA. As the discussion above indicates, the Acts seek to recognise and strike a balance between the right to free speech and to freedom from vilification. Difficulties arise when the parties to a complaint admit no compromise between these rights. For example, the respondents in the *Catch the Fire* case maintained that their conduct, which VCAT found breached the RRTA, was a valid exercise of their right to free speech. In their application to the Supreme Court of Victoria for review of VCAT's decision the respondents questioned whether the RRTA is constitutionally invalid on the grounds that it

infringes the implied freedom of political communication under the Commonwealth Constitution.

#### **8.4 Conduct of Cases Under the Acts**

General observations can be made about the conduct of the cases reviewed in this report.

#### **8.5 Use of Dispute Resolution**

Although there are a variety of dispute resolution options available under the RRTA, this does not mean that parties will necessarily be inclined to use them, or to settle their complaint other than at a VCAT hearing. For example, Higgins J in the *Catch the Fire* case noted [at 32] that the parties had taken an adversarial approach to conducting that case. Conducting complaints in an adversarial way is itself contrary to the purpose of the RRTA insofar as it seeks to foster tolerance.

Publicity around hopeless cases is not, however, the only potential cause of a lack of confidence in the RRTA. Rather, when parties have unrealistic expectations about the operation of the RRTA the fact that the RRTA does not meet those expectations may also cause a lack of confidence in the legislation. For example, the publicity in relation to the *Catch the Fire* case may fuel a misperception of what the RRTA actually does, and the extent to which it limits free speech.<sup>117</sup> While clearly the public is entitled to form its own opinion on the RRTA, and many legitimate complaints can and have been made about the policy behind the RRTA, public education about the contents of the RRTA might help to ensure that such opinions are at least well informed.

#### **8.6 Case Law Pertaining to Discrimination or Vilification Under State Law Complaint Resolution**

*Fletcher v Salvation Army* [2005] VCAT 1523

The complainant, a prisoner who was a traditionalist witch and Wiccan alleged that a Christian education program named 'Alpha' which was operated by the Salvation Army within the prison system was in breach of the EOA and the RRTA, as it implied that witches were "Satanists" and that they must be avoided by Christians.

The case was summarily dismissed, with the Tribunal noting that the claim came "nowhere near the mark" of the level required to satisfy the RRTA  
*Falun Dafa Association of Victoria Inc v Melbourne City Council* [2003] VCAT 1955

The Falun Dafa Association of Victoria Inc claimed that the Melbourne City Council (MCC) had breached the EOA by refusing to allow it to take part in the Moomba Parade on the basis of its political affiliation.

It was found that MCC had breached the EOA and directly discriminated against Falun Dafa, however permanent injunctive relief was denied as there was found to be no risk of the MCC excluding Falun Dafa again

*ADI Limited (Exemption)* [2004] VCAT 1963 (5 July 2004)

ADI manufactured various armaments and defence items, and had contracts with the Australian Government through the Department of Defence. To access the United States technology necessary to do this, ADI had to enter into contracts or obtain licences under US law that required that the technology could not be made available to nationals of certain countries. ADI sought an exemption for conduct which would allow them to comply with these requirements (for example, not to employ nationals of certain countries).

The exemption was granted as it was deemed to be in the public interest to do so. Conditions were placed on ADI's exemptions

*Kahlil v Sturgess* [2005] VCAT 2446

The complainants, Samy and Zeinab Khalil, alleged that neighbours Lisa Sturgess and Roy Wallace had racially vilified them in contravention of the RRTA by making numerous verbal, racially offensive statements about them, sometimes in their presence, or that of their children, friends, family or the public. The respondents encouraged their children to make similar comments. Complaint founded on basis that the comments were made on the grounds of the Khalils' colour and Arabic origin, loudly enough that they were intended to be heard by all in the vicinity. The respondents were ordered to issue a written apology in an agreed format in the first 30 pages of the Herald Sun, and to pay damages totalling \$7,000.

### **Complaint Resolution**

*National Italian Australian Foundation v Herald and Weekly Times Pty Ltd & Andrew Bolt* [2005] VCAT 2704

The National Italian Australian Foundation (NIAF) lodged a complaint alleging that Andrew Bolt and the Herald and Weekly Times (HWT) had breached ss 7 and 17 of the RRTA by writing and publishing an article by Mr Bolt on the kidnapping of an Italian journalist, suggesting that Italians were panicky, feckless and reckless.

The complaint was initially denied by VEOHRC on the ground that it was frivolous, vexatious, misconceived or lacking in substance. NIAF then required the VEOHRC to refer the complaint to VCAT and the respondents applied to VCAT to strike-out or dismiss the complaint on the ground that it was frivolous, vexatious, misconceived or lacking in substance. Complaint dismissed.

*Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254

Mr Judeh, a Palestinian, alleged that he had been racially vilified under the RRTA by the respondent, the Jewish National Fund of Australia Inc (JNF), by a monthly advertisement in the Australian Jewish News (AJN) newspaper that promoted the idea of leaving bequests to “the continuing development of Israel”. The advertisement included which did not identify Palestine, and Mr Judeh submitted that publishing the advertisement therefore constituted conduct that “incites hatred against, serious contempt for, or revulsion or severe ridicule of” Palestinians, by denying the existence of Palestine.

The complaint was dismissed, determining that the publishing of an advertisement with a map, without any specification as to geographic or demographic features or of the location of specific racial groupings was incapable of constituting the conduct prohibited by the RRTA.

*Re Mornington Baptist Church Community Caring Inc [2005] VCAT 2438*

The Mornington Baptist Church Community Caring Incorporated (MBCCCI), which operated outreach and community care projects in the Mornington area, applied to VCAT for an exemption under the EOA to allow it to employ only persons who had certain Christian beliefs. MBCCCI’s rules required that its membership comprise people with certain Christian beliefs, but although MBCCCI was aligned with the Baptist Church, it was not officially part of the Church. MBCCCI argued that the exemption should be granted because the projects in question were originally initiated by the Church and the exemption was appropriate given that people employed by MBCCCI were required to represent the Church.

The application was dismissed on the grounds that the exemption was inappropriate given that MBCCCI operated programs for people without regard to their religion and that a diversity of beliefs might be beneficial in that context. MBCCCI was free to apply for a more limited exemption that might, for example, allow MBCCCI to ask employees not to criticise the Baptist faith during their employment and to require them to explain information about the Baptist faith to MBCCCI’s clients.

*Philippine Australian Sports Association of Victoria v Tolentino and Basketball Australia [2001] VCAT 22*

The Philippine Australian Sports Association of Victoria (PASAV) sought an exemption under the EOA to permit it to restrict the number of non-Filipinos who played in its basketball competition. It claimed an exemption was appropriate because Filipinos would otherwise have difficulty being selected, since they are generally shorter than non-Filipinos. It also argued that the exemption would help to preserve the Filipino character of its competition, give Filipino Australians a chance to play competitive basketball (the Philippines’ national sport) and mix with other Filipinos, and promote fitness.

The application was dismissed because the exemption sought would constitute less favourable treatment of non-Filipinos on the ground of race, ethnic or national origin or descent. PASAV could apply for a more limited

exemption to allow it to impose player height restrictions or to advertise to attract Filipino Australians to PASAV or the basketball competition.

### **Complaint Resolution**

*Francis v YWCA Australia (Anti Discrimination)* [2006] VCAT 2456

The YWCA sold and distributed T-shirts bearing the slogan “Mr Abbott, get your rosaries off my ovaries,” during the time that the Commonwealth Parliament was considering legalisation concerning the abortion inducing drug “RU486”. Mrs Francis, a devout Catholic, brought a claim against the YWCA under the RRTA, alleging that the distribution of the t-shirts amounted to conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of Catholics.

The application was struck out on the basis that there was no reasonable prospect of it succeeding. It was acknowledged that the slogan may be offensive to Catholics, but noted that the t-shirts were not likely to incite hatred against, serious contempt for or revulsion or severe ridicule of Mr Abbot, Mrs Francis or any other Catholic.

*Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510

The Islamic Council of Victoria (ICV) lodged a representative complaint on behalf of its members against an evangelical Christian church called the Catch the Fire Ministries Inc (Catch the Fire), Daniel Nalliah (Director, President and Pastor of Catch the Fire) and Daniel Scot (a Pastor of Catch the Fire). The ICV claimed that statements made by Scot at a seminar, an article by Nalliah published on Catch the Fire’s website, and other material on Catch the Fire’s website were in breach of the RRTA as they constituted incitement against Muslims.

It was found that the respondents had breached the RRTA, and were ordered to jointly publish an apology on Catch the Fire’s website, in The Age and in The Herald Sun. The respondents were also ordered to provide an undertaking that they would not make, publish or distribute statements to the same or similar effect as the statements found to have breached the RRTA.

*Appeal decision – Catch the Fire Ministers v Islamic Council of Victoria* [2006] VSCA 284

Catch the Fire, Nalliah and Scot appealed from VCAT’s decision (above) to the Court of Appeal of the Supreme Court of Victoria. The appellants argued that VCAT erred in its construction of the RRTA and its findings on the evidence, that the RRTA was in breach of the implied freedom of political communication under the Commonwealth Constitution (and therefore constitutionally invalid), and that VCAT lacked the power to make the orders it made (or, alternatively, that those orders were not open on the facts).

It was agreed that the appeal should be allowed on the grounds that VCAT had erred in its construction of the RRTA – in particular, the Court held that

VCAT had incorrectly applied the test for incitement under the RTA, and found that the requirement that incitement occur “on the ground of religious belief” does not necessitate a causal connection between the religious belief and the inciting conduct. The Court of Appeal remitted the matter to be reheard by a differently constituted Tribunal without the hearing of new evidence.

## **Summary**

A review of the Acts and relevant case law suggests that there is a misunderstanding in the community about the content and scope of the Acts (especially in relation to the RRTA), and the exact conduct they prohibit. One possible way of addressing this misunderstanding might be to conduct public education campaigns about the content and operation of the Acts. This recommendation is further explored in Part 10 of this report.

### **8.7 Complaints to HREOC Racial Hatred Complaints Complaint Resolution**

The Complainant, of Spanish origin, alleged that he was subjected to offensive comments based on his race when he attended a local club. Specifically he claimed that when speaking in Spanish with a family member the Respondent called him a ‘wog’ and told him to speak English and said ‘go back to your country’. The Respondent claimed he did not recollect the incident as he had been drinking on the day in question.

The complaint was resolved by the complainant accepting an apology from the respondent.

The Complainant, of Aboriginal decent, claimed that during her employment in an administrative position with a large transport company she was subjected to acts of racial hatred by unidentified staff. Specifically, the Complainant claimed that someone left written messages on her desk saying ‘black bitch’, amongst other things. The Complainant resigned from her employment following the alleged incident. The company stated that an investigation was conducted but the responsible staff member could not be identified.

The complaint was resolved through conciliation with the complainant accepting an ex gratia payment of \$3,000 and the company’s commitment to revise its harassment policy within 6 months and introduce cross cultural training within 12 months.

The Complainant, of Indian decent, is employed as a carer at a community aged care centre. The Complainant complained that a resident of the centre subjected her to racial abuse on several occasions, including in the presence of other staff members, calling her a ‘black bitch’, amongst other things and suggesting that she return to India. The Complainant stated that she was offended, insulted, humiliated and intimidated because of these comments about her racial background. The Respondent acknowledged his comments were affective and hurtful and he apologised for his behaviour. He claimed that when the comments were made he was experiencing personal difficulties.

The complainant accepted a written apology from the respondent to resolve her complaint.

Complainant assists her husband delivering mail in a rural area. Complainant says one day she picked up some mail that she thought was for collection from the Respondent's mail box. The Complainant found that it wasn't outgoing mail but it was a letter that had been redirected from one Respondent to another Respondent with the words 'the dumb Asian mail delivery got it ...'

Terms of settlement included apology private.

Complainant outlines a life of racial harassment by his neighbour. He says this has been based on his Greek background by calling him 'wog', 'dirty wog' mimicking his accent and commenting to his niece 'you've got one eyebrow'.

Apology private undertaking to cease any action.

The Complainant says he was racially abused by the Respondent owner of accommodation facilities. Complainant was with a group of people who had made a booking with the Respondent's lodge. Complainant says when the group complained that the booking was not what they asked for the Respondent Owner became hostile and would not return Complainant group's deposit. Complainant says Respondent Owner then said to him 'get out of here you black bastards'. Complainant says his group was stunned and then Respondent said 'it's okay it's all over the TV ... he should be used to it'.

Private apology.

### **Complaint Resolution**

The Complainant had tense relations with a Respondent neighbour. Complainant claimed that during a recent incident Respondent neighbour vilified the Complainant calling him a 'typical South African bast...' who thought he could do what he wanted. Complainant says Respondent was protesting the Complainant had his own car in his own driveway and Respondent reported he couldn't access his garage. Complainant says Respondent's comments were heard by other neighbours. Complainant was highly insulted.

Private apology.

Complainant says her neighbour called her 15 year old daughter a 'black nigger' out the front of their home.

Private apology.

Complainant complains that she has had a long standing dispute with neighbour in public housing apartment about noise. Complainant claims this is based on race because Complainant mimics her and says go back to Vietnam. Complainant has made a complaint to department.

Policy change, change in practice.

Complainant claims her 14 year old daughter of Asian background has been ostracised at school and heard another student say 'not more f..... Asians'. Complainant claims her daughter does not wish to attend school, is depressed and suicidal. Complainant has in 1999 a complaint proceeding before State Tribunal about similar issues in State Education.

Private apology, financial compensation of \$5,000.

Complainant is of Somalian descent. Complainant claims Respondent newspaper has reported on an altercation the Complainant had which led to the cancellation of his taxi licence. Complainant claims in response to article respondent published on its web site that was racially discriminatory as it referred to 'these people' who are abusive and who one doesn't feel safe with. Complainant claims 'these people' refer to people from Africa and is racially vilifying.

Private agreement terms not disclosed to HREOC, compensation in the order of \$30,000.

Complainant and his wife attended Respondent club recently. Complainant says when he was in the toilet talking with his friends in Spanish a customer racially abused him and called him a 'f..... wog' and told him to speak English. It appears this customer was asked to leave by management. Complainant says he and his family then left.

Private apology.

Complainant claims that a letter published in Respondent quarterly magazine constitutes racial hatred of Jews. The letter suggests 'Israel was responsible for planning September 11 and Bali bombings'.

A public apology and a policy change and change in practice.

## **6 Race Discrimination Complaints Complaint Resolution**

Complainant who is Aboriginal was asked to leave Respondent's hotel because he was not wearing shoes. Complainant left. Complainant claims non aboriginal people were in the hotel without shoes on.

Complainant satisfied with response.

Complainant claims he went into Respondent's hotel to buy some matches and the Publican said 'no, don't you know how to get a stick and rub it together'. Complainant said a group of patrons laughed and the Complainant left the hotel. Complainant says he is of Aboriginal background and claims racial discrimination.

Private apology.

Complainant inspected a property for rent through the Respondent real estate agency and completed a tenancy application. Complainant claims that Respondent made unreasonable demands of Complainant before it would consider Complainant's application. Complainant claims this was because of his Aboriginal background. Complainant attended another agent later who found him a property within a week.

Provision of goods and services for facilities.

Complainant is a student of Respondent college. Complainant is of Lebanese background, who claimed he had been picked on and belittled by Respondent teacher because of his ethnic background. Complainant claims Respondent criticised his lunch, told him to go back to his hole and that if he wanted to be a 'dirty Lebanese kid' don't come to this school. It appears Complainant was expelled from school.

Respondent agreed to change of policy and change in practice.

Complainant is Aboriginal and has a psychiatric disability. Complainant claims that Respondent supermarket security staff over scrutinise Aboriginal shoppers and the Complainant in particular. Complainant is a long term resident of the town and well known to people. Complainant had heated discussions with Respondent about this and was told she was banned for life.

Respondent agreed to policy change and change in practice.

Complainant claims she asked Respondent car dealership to stop debiting her account for car repayments and take money from her husband's account. It appears Respondent debited Complainant's account for one further payment and when Complainant attempted to have money re-credited Respondent employee racially abused her over the telephone calling her a 'black slut' and saying 'all you Aboriginal sluts never work'.

Financial compensation in the order of \$200.

Complainant who is of Polish background claims that he and a friend whilst playing a game of bridge at the Respondent club were asked by the director of the club not to speak Polish. Complainant claims that he and his friend spoke in Polish again and were humiliated by the director in that he banned them from the next bridge session.

Complainant satisfied with response.

Complainant is Torres Strait Islander and has mobility disabilities and uses a wheelchair. Complainant claims the Respondent supermarket manager always 'stalks' him when he is shopping and he is subject to excessive bag searching. Complainant claims he has never seen a 'white' person have their bag searched. Complainant claims race and disability discrimination.

Private apology.

Complainant, of South Sea Islander and Aboriginal background, was subject to comments by a taxicab driver along the lines of 'I don't like those Islanders from Vanuatu and the Abos aren't much better'. Complainant wrote to the taxi company to seek apology.

Private apology.

### **Complaint Resolution**

Complainant said he was sexually harassed in his employment with Respondent as a foreman and discriminated against on the basis of an Indian background. Complainant says he started an apprenticeship with Respondent 10 years ago. Complainant says respondent foreman sexually harassed him and referred to him in racially discriminatory language. Complainant resigned.

Financial compensation in the order of \$10,000.

Complainant claims a co worker threatens and abuses him and calls him a Muslim terrorist and tells him they will fight his Afghan friends. Complainant claims Respondent boss has been unsupportive and told him he can leave if it he doesn't like it.

Private apology, financial compensation in the order of \$1,000. Reference provided from HREOC, staff training and development program.

Complainant claims race and religious discrimination over a number of years in his employment as a tradesman in the State Transport Authority. Complainant claims his work has been criticised and he has been harassed and belittled by his supervisors because of his Jewish ethnic origin.

Development of action plan and financial compensation in the order of \$13,500.

The Complainant, who is Aboriginal, claimed that while visiting a local police station as part of his work role, he was offended and humiliated when he overheard police officers making negative remarks about Aboriginal people. The police station confirmed that it undertook an investigation which supported the Complainant's allegation and recommended disciplinary action be taken against the officers who made the remarks.

The complaint was resolved at a conciliation conference on the basis of a personal apology from the officer concerned and an ex gratia payment of \$2,000 and a statement of regret provided by the department.

The Complainant, of Ethiopian origin, claimed he was discriminated against because of his race during his employment with the Respondent manufacturing company. The Complainants allocations involved name calling in a discriminatory fashion. The Complainant also claimed he was over scrutinised compared to other employees and was rarely acknowledged by

co-workers and managers. The company denied that the Complainant had been discriminated against because of his race.

The parties agreed to participate in a conciliation process which was successful. The complaint was resolved with an agreement that the company would pay \$10,000 compensation and provide a verbal reference to prospective employees. The company also agreed to provide anti-discrimination training for its staff.

## 9 Responses to Racial and Religious Discrimination and Vilification

The issues of racial and religious vilification have been the subject of much analysis and concern in Australia over the past decade, but as Pederson, Walker and Wise suggest, “theorising about an issue is all very well, but... we need to move beyond this to social action.”<sup>118</sup> Community organisations, academic research projects, and government bodies have responded to these issues in diverse ways.<sup>119</sup> This part of the report looks at a number of projects in Australia and other settler-colonial nations that are addressing issues of racial and religious vilification. It is not intended to be a comprehensive list of the many, diverse projects taking place but rather as a range of responses and initiatives. It is important to note that no single project will erase racial and religious vilification or undo their harm, but social change is created through the application of myriad projects and initiatives. As Pederson, Attwell and Heveli argue, we need bottom-up strategies (such as individual people speaking up) and also top-down strategies (the support You have more power than we do. If we talk, speak out, the manager say ‘I’m so sorry’ then it happen again. Same situation. It happens many time...everyday. (Group 1)

The instance we were talking about on the tram, that was a very horrible incident and it was a very nice thing to have someone else intervene and tell that guy he was being racist. It was actually a very supportive kind of act. I mean, you just don’t feel alone. I suppose with these kinds of things... it just shouldn’t of happened ...first thing is it shouldn’t happen so it’s a bit hard to say well you know what would be a way of making that situation better. Because it’s inherently crap and it should never happen. (Interviewee E) of those in authority) to challenge racism, in order to become a just and accepting multicultural society.

<sup>120</sup> Many of the projects mentioned in this part of the report have involved extensive research to identify the extent of racism in Australia and the effects this has on communities, however, this research has not always been followed up with work towards actual social change. Other projects have been more pro-active, with education campaigns, cross-cultural awareness activities, workplace seminars, youth music projects, and creative use of the media. It is not always possible to quantify changes in racial perceptions, so it is difficult to know how effective such campaigns are or to make confident conclusions and recommendations. Nevertheless, raising consciousness around racism and religious vilification and challenging discrimination in diverse ways, is necessary. Outside of organised projects, public responses

to visible discrimination, such as verbal harassment on the street, have been predominantly negative. Respondents in this project recount experiences of overt racial and religious vilification in public spaces that is ignored by onlookers, heightening feelings of distress and isolation.

It is not realistic to believe that everyone wants to reduce discrimination, or that it is seen as an important issue to everyone in the community to divert resources and time into. It has been argued that many people benefit from inter-group tension, and “any attempt to reduce prejudice and racism is likely to encounter resistance if sections of the community believe they stand to lose something.”<sup>121</sup> The social and political context of racial and religious vilification need to be considered, for example the Australian government’s explicit misrepresentation and abusive treatment of asylum seekers, and the corresponding negative attitudes held towards asylum seekers by Australians. Individual racist attitudes are not separable from the social, structural and political situation surrounding them.<sup>122</sup>

## **9.1 Community Responses (Local and National)**

The western suburbs region of Melbourne is an area in which issues around race, culture, religion and discrimination take some primacy. Migrant and refugee communities in the area have continued to grow (and transform) over the past 50 years. Manufacturing industries and low-cost housing historically played a significant role in choices to settle in the area for migrants from all over the world, including people from Italy, Greece, Vietnam, India, Turkey, China, El Salvador, Ethiopia, Lebanon, India, China, and so on. Census’ details as of 2001 indicated around 45% of people residing in the Inner Western Region<sup>123</sup> were of non-English speaking backgrounds.<sup>124</sup>

The western suburbs are also a region historically and presently associated with long-term poverty, high unemployment, and other indicators of disadvantage. A significant antiracism culture has emerged in response, manifesting in a wide range of activities, events, projects, collectives that address both directly and indirectly on racism and its by-products. Some of these organisations are government/ council funded, others independently funded. Some are locally based, while others focus just some of their activities in the local area. Some community groups are providing support to specific CaLD communities, while others are focused on providing support according to migrants/ asylum seekers more generally. For some collectives, an anti-racism, positive reinforcement platform is a central component of activities, for others it is integrated into broader policy and community objectives. Commitment to racial harmony and equality of opportunity for all residents is a central component of a great deal of this activity. A significant part of the attraction for new and non-residents to the area is in fact this culture of diversity. Community education initiatives promoting inclusion and multiculturalism have a particularly significant role in setting the scene for future relations between residents.

While it is outside the scope of this report to provide an exhaustive analysis of anti-racism culture in the western suburbs, the following table provides a snapshot of the diversity of activity in the local area impacting on racism:

### **Migrant/ Asylum Seeker focused groups**

Adult Multicultural Education Services (AMES) & AMES Settlement

Asylum Seeker Assistance Scheme

Asylum Seeker Resource Centre

Footscray Multicultural Liaison Unit

Migrant Resource Centre - North West Region Inc

New Hope Foundation – Refugee Resource Centre

Westgate Migrant Resource Centres

Western Region Ethnic Communities Council (WRECC)

Multicultural Victoria

Racism No Way program (Department of Education & Training) •

### **Community Arts, Festivals & Activities**

Footscray Community Arts Centre

Melbourne's Living Museum of the West

Snuff Puppets

Trocadero Arts Space

Refugee Week

Chinese New Year Celebrations

East Meets West Lunar Festival

Quang Minh Temple Festival

Big West Festival

## **CaLD Community Groups**

Albanian Australian Community Association Inc

Australian SAAY Harari Association

Australian Vietnamese Chamber of Commerce and Industry

Australian Vietnamese Women's Welfare Association

Australian Croatian Community Services

Australian Croatian Association

Australian-Polish Community Services (APCS)

Circolo Pensionati Italiani Di Footscray Inc

Croatian Senior Citizens Group of Footscray

Elderly Filipino Association of Australia

Elpitha Group

Ethiopian Community Association in Victoria

Famiglia Istriana

Filipino Community Council of Victoria, Inc

Filipino Elderly Get Together Association Inc

Filipino-Australian Senior Citizens Advisory Council in Australia Inc

Footscray Anglican Sudanese Welfare Committee

Greek Orthodox Church Holy Trinity Elderly Citizens Group

Horn of African Communities Network

Indo-Chinese Planned Activity Groups

Latino-American Women's Association of Victoria

Macedonian Pensioners Association Footscray

Macedonian Senior Citizens Group Zlatno Sonce of Footscray Inc

Macedonian Women's Pensioners Association of Footscray

Philippine Cultural Society for Elders Inc  
Polish Association of Kingsville and Ladies Auxiliary Inc  
Polish Senior Citizens Club Footscray  
Republic of Vietnam RSL Sub Branch  
River Nile Learning Centre  
Russian Senior Citizens Club of Yarraville  
Spanish and Latin American Welfare Centre (CELAS)  
Serbian Social Services and Support  
Somaliland Community Association of Australia (Vic) Inc  
Sudanese Australian Integrated Learning (SAIL) Program  
Sudanese Settlement Office  
The Sudanese Mothers Union  
The Western Suburbs Greek Elderly Citizens Club  
Tigrian Community Association in Victoria  
Vietnamese Chinese Elderly Association of the West  
Vietnamese Community in Australia – Victorian Chapter  
Vietnamese Community Mutual Assistance Association  
Victoria Vietnamese Veterans Association of Victoria

Community responses to racial and religious vilification, discrimination and harassment both locally and nationally have been diverse and grass-roots. Often having more engagement with communities who are suffering from racism, or having grown out of experiences of discrimination (for example the Immigrant Women's Speakout Association), these projects tend to be more practical and small-scale than massive nation-wide research projects enacted by government bodies. These projects by virtue of being community-based, and with minimal funding, are often not publicised or reviewed in the way government projects are, so they are harder to find and review, but arguably have a more significant impact on people's lives. Some examples include:

The Western Region Football League (WRFL) & Flemington Junior's Football Club (FJFC), whose special achievements in 2006 were recognized in the AFL's Multicultural Programs Awards for contribution to 'multicultural

development at grassroots football level'. Among other activities, the WRFL re-launched the 'Multicultural Football in the West' campaign in 2006, establishing the FootyLinks program in conjunction with the Western Bulldogs and multicultural service providers in the western region, a program aimed at engaging newly arrived African youth in the Western region. The FJFC were rewarded for promotion of diversity in their own club, and for encouraging other clubs in the league to follow suit. Letters were forwarded to all other clubs in the league in relation to racial abuse, the effects of racism on players, and the desirability of embracing cultural diversity. "Kick On" day was held at the Flemington Flats to promote football and racial harmony, match visits were organized, and registration fees for new players were offset by the Club as part of its promotion of cultural diversity in football.

Maribyrnong Council has shown consistent commitment to an inclusive agenda that embraces multiculturalism. Since 2003, the Safer Communities Policy and Action Plan commits Council to consultation with CALD communities, in recognition of the principle that freedom from persecution, racial discrimination and vilification and fear of such are central concerns in developing safer communities. Funding of \$850,000 has recently been granted to the Multicultural Schools Gardens Project, integrating the creation of 'market' gardens into local school curriculums with members of CALD communities to attend and teach children about their gardening and food preparation techniques. Council has also recently funded a public art project constituting a 20 m wide text based stencil with the words "The West Welcomes Refugees". The site is Albert Street Bridge, Footscray where graffiti with same words was situated. The text of the planned work will detail stories of local refugees and their experiences in the West.

The location of Maribyrnong Detention Centre (MDC) is close to the main shopping complex of the western suburbs, Highpoint. Community members make regular visits to detainees to show their support and offer friendship. The MDC has also been the site of protests and vigils over the years, where Melbourne residents have congregated to show their opposition to government's immigration policies. The proximity of detainees to local residents and city life forms part of the unusual cultural landscape of the western suburbs as a locus for both racist policy and anti-racist sentiment.

In late 2003, the Western Suburbs Community Coalition Against Racism (WSCCAR) organized a community rally against police racism and violence in the CBD and marching to Footscray Police Station. Around 350 people attended the rally, predominantly community members from the Horn of Africa. Organized by Somali and Eritrean youth and the Socialist Alliance, the rally responded to an incident wherein a Somali youth was beaten unconscious by eight members of Footscray police over an alleged ticket infringement.<sup>125</sup> Other allegations and experiences of violence and racism by transit and police officers towards local African residents fuelled participation in the rally, which included women, children and businessmen. Bystanders were said to be supportive, and the rally proceeded peacefully with the aims of addressing police racism and violence, as opposed to being hostile towards police.<sup>126</sup>

In NSW in 2002, the Ethnic Affairs Commission of NSW funded the Immigrant Women's Speakout Association to develop and run a four month project to work in educational, interactive and non-threatening ways with young and older migrant and refugee women on dealing with racism. Ten workshops were conducted and 1 informal discussion session, with three of these sessions being dedicated to young women. Women from a diversity of cultural backgrounds took part, including those from Vietnam, Sri Lanka, Bosnia, Russia, Afghanistan, Lebanon, Chile, Macedonia, Croatia, Egypt, East Timor, Korea, Cambodia, Pakistan, Iran, Iraq and Australian born women (both NESB and Anglo/Celtic backgrounds). The project focused on Bankstown, Fairfield and Parramatta in metropolitan Sydney and the Illawarra.<sup>127</sup> Two areas of discussion were highlighted as issues of considerable concern: the media and employment. In both of these arenas the impact of stereotyping was highlighted and the project included media exercises to rework these images. Recommendations included human rights education for immigrant communities, and information dissemination to encourage cultural diversity awareness. The Immigrant Women's Speakout Association found that living in the intersection of gender and race oppression, women from non-English speaking backgrounds and Indigenous women experience layers of disadvantage, including a sense of alienation, police harassment, poor health and employment access, and harassment.<sup>128</sup>

The 'Gender and Racism' project enacted by The Women's Rights Action Network Australia (WRANA), a national organisation that exists to challenge these issues, aimed to highlight issues of discrimination at the intersection of racism and sexism as experienced by women in Australia. Using data collected from women through public consultations, submissions and existing research in the area, WRANA produced a report depicting intersectional discrimination issues in Australia. Six major themes emerged from the research, including education, economy, poverty, health, human rights, and institutional mechanisms. WRANA suggest a variety of human rights documents and instruments need to be used to address these intersectional, multilayered issues. WRANA produced a Gender and Racism Kit to follow-up the project, with practical strategies for women's organisations to address issues of sex / race intersectional discrimination.<sup>129</sup>

A project aimed at reducing discrimination amongst young people, is the 'Peace Potion' project, enacted by Visible Ink: Young People Defining Brisbane and the Multicultural Youth Network Queensland (MYNQ) in 2005. The Peace Potion process engaged approximately 50 young people from Indigenous, Polynesian and Sudanese communities in creating hip-hop music and an accompanying break-dance/graffiti filmclip that dealt with issues of peace, culture, conflict and honour. Participants worked with arts-workers and cultural consultants throughout the project to develop the project. Outcomes included the establishment of a group of young people who are actively working towards the development of a peaceful community through peer-advocacy, non-violent responses to conflict, and creating positive images of marginalised communities.<sup>130</sup> In Melbourne, a similar project utilising hip-hop culture and community cultural development was the 2004 Youth Anti-Racism Rap Competition. The project was run by the Western Young People's

Independent Network in conjunction with local community organisations Women's Health West, Melbourne City Mission, Maribyrnong Council Youth Services, and young people from Melbourne's Western region, to celebrate United Nations International Day for the Elimination of Racial Discrimination.<sup>131</sup> Young people were asked to perform rap pieces that they had composed on issues of anti-racism, human rights and social justice. It was anticipated that the Youth Anti-Racism Rap Competition would encourage refugee and migrant young people to raise issues that affect their lives and educate others against racism in a positive way, in a public space. Audience responses and local news coverage of the event were overwhelmingly positive, which is important given that racism is so often an issue in the media.

## **9.2 Government Responses**

Government bodies such as the HREOC, Anti-Discrimination Council, Australian Arabic Council, Aboriginal and Torres Strait Islander Commission and National Multicultural Advisory Council, with access to resources and funding, have done extensive research on the experience of racial and religious vilification in Australia. For example in 2001 HREOC held 15 National civil society consultations on racism across Australia. The consultations found that racism and racial discrimination were widespread and normalised, as one Indigenous woman stated, "We just live with racism every day. It's like getting up, washing your face and having a cup of tea." The sources of racism identified were colonialism, ignorance and fear of cultural difference, and unacknowledged power and privilege. In 2005, to mark the anniversary of the RDA, the 'Voices of Australia' project, coordinated by the Race Discrimination Unit of HREOC, collected, recorded and published the stories and experiences of Indigenous Australians, migrants, refugees and Anglo-Celtic Australians over the last 30 years in hard copy, electronic publications and audio CD format, which can be accessed as an educational resource to help combat racial discrimination and promote respect.<sup>132</sup> It is difficult to determine how frequently these resources are accessed, or what impact they may have in reducing discrimination, however the creation of these resources support HREOC's commitment to cross-cultural education and awareness.

In 2002, HREOC held a National Conference on racism, 'Beyond Tolerance,' to open-up dialogue around issues of racial and religious vilification and to create national recommendations. Recommendations included a voluntary ethical code of conduct and self-regulatory measures for the media to follow, including policies and practices aimed at: combating racism; promoting a fair representation of social diversity; combating the dissemination of racial hatred; promoting respect among all peoples and avoiding stereotyping; a need to focus on and analyse whiteness, white racism and white privilege as the sources of oppression and disadvantage in Australia; the formation of cross-community initiatives and coalitions of people of goodwill, and the need to recalibrate anti-racial vilification policy and law.<sup>133</sup> Since that conference, HREOC has launched a number of initiatives to support these recommendations, including the 2003 Isma project. Isma (which is the Arabic

term for 'listen') was created in response to increasing hostility towards diverse communities of Arab and Muslim Australians.<sup>134</sup> Consultations were held with over 1400 people from across Australia, with Arab and Muslim Australians, as well as with federal, state and territory government agencies and non-government agencies. The report found that racial and religious vilification are systemic issues. It also found that most survey respondents did not formally complain about their experiences of racism, abuse or violence because they did not feel that the complaint would result in a useful outcome; they did not want to make trouble or draw attention to themselves, their family or community; they did not know who to report to; they were afraid of backlash; or the incident was not covered by law.<sup>135</sup> Recommendations from the Isma project included departmental policy change, educative forums, legislative changes in anti-discrimination laws, positive community education campaigns and greater understanding between communities and government agencies that will help eliminate discrimination and vilification against Arab and Muslim Australians.

Following on from Isma HREOC initiated the 'Muslim Women's Project' 2006, to increase an understanding among Muslim women about human rights principles and the domestic framework for promoting racial, religious, and cultural and gender equality in Australia, as well as existing legal protections against discrimination and vilification. The project aims to improve the capacity of individuals and communities to respond to discrimination through anti-discrimination legislation.<sup>136</sup> The 'Unlocking Doors; Muslim Communities and Police Tackling Racial and Religious Discrimination and Abuse' project was also launched in 2006, aiming to facilitate dialogue between Muslim communities and police, and build on the capacity of police to respond to incidents of racial or religious discrimination and abuse. The project was conducted in NSW and Victoria, and was intended to assist in identifying gaps in existing resources and provide direction for the development of new resources and initiatives targeted both to the broader non-Muslim community and Muslim communities and police on discrimination and vilification.

In 2002 the Queensland Anti-Discrimination Council implemented an 'Anti-Racism Project' in response to religious and racial conflicts in Brisbane after the events of 11 September 2001.<sup>137</sup> The project was forward-looking, incorporating a four-year anti-racism strategy which outlined how the Brisbane City Council could work internally and externally with other organisations to address racism at different levels within communities, schools, sporting organisations, libraries and institutions. The final stage of the project was a "Hand-in-Hand" Pilot Project, developed in response to racial tension amongst culturally and socio-economically diverse communities. Focus groups, structured as information and consultation sessions, were conducted with a total of 64 people from Somalia, Vietnam, Former Yugoslavia, Iraq and Afghanistan, to research and identify ways of dealing with racism at a grassroots level. Participants in the focus groups were given information from the Anti-Discrimination Commission of Queensland on their roles and responsibilities, the different types of discrimination and where to lodge a complaint relating to discrimination. The Hand-in-Hand project also developed tangible, realistic recommendations to increase cross-cultural awareness,

anti-racism education and access to services. For example, an increase in resources for people of non-English speaking backgrounds at the Brisbane City Library, the establishment of local advocacy networks, and the provision of cross-cultural awareness training at services such as Centerlink. Since the 'Anti-Racism Project,' the Queensland Anti-Discrimination Council has launched a number of campaigns, including "'It's Not All Black and White: An African Story;'" 'It's Ok to Complain;' and 'Islam in Brisbane.' See the Appendix 2 for more information.

In 2005 the NSW Anti-Discrimination Board tabled ways to challenge and subvert discrimination and ways that anti-discrimination bodies such as the VEOHRC and HREOC could be more accessible and effective. Practical strategies like instituting time-frames for complaint handling, ensuring access to resources in community languages and providing cross-cultural training to staff, have the potential to prevent or ease some of the frustrations experienced by people accessing such services.<sup>138</sup>

The Australian Arabic Council (AAC) argues that although initiatives such as legislation to deter and punish those who cloak their ignorance in racism should be encouraged, programs must also be in place to address the fundamental causes of racism. Reforms and programs are required in the most important areas relating to racial vilification, such as schools, policing and government. The AAC argues it is important that all related institutions work for the eradication of vilification and the increased education of our community to affect social-cultural change in attitudes and behaviours. They suggest education is the key to encouraging an understanding of ethnic and religious groups and their positive contribution to Australian society, as well as addressing the incidents and effects of racial vilification.

### **9.3 Academic/Scholarly Responses**

Scholarly approaches to reducing racial and religious discrimination are predominantly based on controlled research of a select number of participants or people in a confined geographical area and often involve extensive discussion of the existence of racism, as opposed to the means of challenging it. For example in 2001, the University of New South Wales and Macquarie University conducted *The Racism Project*, telephone surveying 5056 people in NSW and QLD to develop a measure of the attitudes that respondents held towards cultural diversity, cultural privilege, the extent of racism, and tolerance of specific cultural groups. The project created a database and highlighted that racist attitudes are positively associated with age, non-tertiary education, and to a slightly lesser extent with those who do not speak a language other than English, the Australia-born, and with males.<sup>139</sup> Such research does not always translate to social change, however activism and academia can feed into each other in productive ways.

In 1999, a group of scholars from the Australian Multicultural Foundation interviewed 120 young people from six different ethnic and cultural backgrounds across metropolitan Melbourne, including Vietnamese, Somalian, Turkish, Pacific Islander, Anglo Australian and Latin American

backgrounds.<sup>140</sup> The young people spoke about the difficulties of migration, of leaving familiar homes and cultures, differences in language, religion and community values, of living in low-income households, in low-income areas, the lack of adequate social services, employment opportunities and recreational venues, and the perception that many young people across the diverse communities and neighbourhoods engaged in various forms of illegal activity. Most of the young people had a mainly negative relationship with authority figures such as the police and security guards, primarily due to their perceptions of unfair treatment, harassment, constant surveillance and intervention by such figures. All of the groups criticised the media for presenting biased opinions and portraying ethnic stereotypes. This research project was able to use in-depth interviews to create youth-directed recommendations for change, including the need for more support services, youth employment programmes, greater dialogue between youth and authority figures, and positive strategies which provided young people with constructive ways in which to use their time and energy.

Luke McNamara in *Criminalising Racial Hatred: Learning from the Canadian Experience*, warns against the continuing expansion of the range of anti-vilification laws, and suggests an examination of the operation of existing racial vilification provisions can more effectively inform decisions on further law reform, and assess the role of law as an instrument for dealing with racist violence, racial harassment and racial vilification.<sup>141</sup> In Australia, although racial and religious discrimination are legislated against, the accessibility of the legislation and capacity for bodies like the VEOHRC to successfully resolve complaints, is limited.<sup>142</sup> Martin Flynn has suggested that the legislation fails to eliminate statistical inequality partly because of barriers to its accessibility, including information barriers, physical barriers of time and place, language/cultural barriers, complexity of legal barriers, and barriers linked to power and politics. These issues were identified as long ago as 1995, and remain in place, suggesting that little attention is given to implementing the RDA effectively. This is a common issue in settler-colonial nations, as legislation appears to protect individuals and communities from discrimination, but fails to create tangible change.<sup>143</sup>

Given the issues associated with law reform, or a reliance on the legal system for liberation from oppression, suggested responses to prejudice often place responsibility in the hands of individuals. Bernard Guerin in *Combating prejudice and racism: New interventions from a functional analysis of racist language*, suggests that by linking violence to societal laws and rules that are verbal, violence can be dealt with without resorting to violence itself as the intervention.<sup>144</sup> Guerin argues that law reform and activism have erased the visibility of racism but not its effects, and language could be effectively employed in everyday social situations to challenge racist language. Although Guerin's approach is somewhat abstract and vague, a similar response to everyday bigotry' is "Speak Up: 101 Tools for Tolerance: Simple Ideas for Promoting Equity and Celebrating Diversity."<sup>145</sup> This project, developed by the Southern Poverty Law Centre in the United States, encourages people to fight hate, and promote tolerance within their own community, family, or workplace. The online resource offers practical responses to racism, religious

vilification, sexism, and homophobia, based on interviews with hundreds of people about their experiences of bigotry, and what they said or wished they had had the courage to say. The resource is accessible and interpersonal, making it a valuable tool for anyone wishing to challenge racial and religious vilification.

Conversely, changing stereotypes and reducing prejudices, as researched by Miriam Hill and Martha Augustinos, are notably difficult.<sup>146</sup> This research reports on a three day cross-cultural awareness program aimed at reducing prejudice toward Aboriginal Australians conducted for employees in a public service organisation. Prejudice was reduced significantly after the program, with less negative stereotyping, but returned to its normal level after 3 months. Only high-prejudice participants experienced long-term prejudice reduction. The education campaign looked at colonisation and dispossession, stereotyping and prejudice, and an analysis of participants' own beliefs and how they were formed and how they play out in incidents of racial discrimination. An evaluation questionnaire was used to assess outcomes. Hill and Augustinos conclude that more research is necessary to reduce prejudice and negative stereotyping. While this is not necessarily a helpful conclusion, their research is interesting in its analysis of the difficulties of prejudice reduction over an extended period of time.

More examples of responses to racial and religious discrimination are provided in the 'Anti-racism database' (Appendix 2).

## **Summary**

While all of the initiatives discussed above are commendable, a key issue in responses to racism seems to be in the 'follow through' or long term viability of projects. Many of the above projects have had a limited duration or have pointed to a need for further action that has not necessarily been undertaken in a comprehensive way. This raises the issues relating to the adequacy of funding and support for anti-racism projects. See part 10 of this report for more discussion on developing sustainable responses.

**CIAL** Based on our research we find the following:

People do experience racial and religious discrimination, vilification and harassment in the western suburbs of Melbourne. These experiences are not isolated incidents and they are by no means occurrences to be taken lightly or viewed as non-serious. Discrimination, vilification and harassment are experienced by people in their interpersonal interactions with other community members, in their dealings with authority figures and in their interactions with providers of goods and services.

As noted towards the beginning of this report, the western suburbs region has a very high level of cultural and linguistic diversity. It is therefore important to acknowledge the high level of harmonious and non-discriminatory interaction that takes place. While our research has identified that racial and religious discrimination and vilification do occur, we also wish to recognise the potential

for such harmonious and non-discriminatory interactions to become more widespread. Our research and our discussions with project participants also suggest that media coverage has a tendency towards being prejudicial with respect to race and religion. Furthermore, our findings raise the concern that prejudicial media coverage actually has the effect of fuelling further racial and religious discrimination in the community. This can also be exacerbated by inflammatory commentary from government and other leaders, at a Federal, State and local community level. We have also found that the existing legal framework and complaints mechanisms aimed at dealing with discrimination and vilification, are not always adequate

## **10.1 Conclusions**

### **10 Conclusion and Recommendations**

Australian legislation does not meet international human rights standards in terms of the degree of protection it offers citizens and legal redress in relation to these issues is quite limited. Complaints processes can be complicated and unappealing and the remedies available to complainants are limited and often non-binding. A further impediment to redress is that people who experience racial and religious discrimination and vilification are often uninformed about the avenues for complaint and the processes involved.

In response to the problem of racial and religious discrimination many non-legislative government and non-government initiatives have emerged. These predominantly community-based groups and projects also exist in recognition of the fact that legal, complaint-driven responses are not all that is required to fully confront the issues of racial and religious discrimination. While such initiatives are to be commended, our research indicates that long-term and widespread support (both financial and otherwise) for these projects is lacking. Projects are often conducted on a sporadic or ad hoc basis. What is missing is a response to racial and religious discrimination that is both strong and sustained and that operates at a variety of levels (institutional, local community etc).

### **10.2 Recommendations**

Project participants contributed their own ideas about how things could be improved and what could be done to overcome discriminatory behaviour. These can be summarized into the following five areas:

raising community awareness

improving access to information

improving media responses

increasing responsiveness and cultural awareness within complaint agencies

law reform

WSLS acknowledges that there is no one strategy than can overcome all of these issues, rather a commitment from individuals, groups, the media and all levels of government is required. What we would like to see is a range of approaches to dealing with the issues that also look at the problems from different perspectives.

Critical success factors include working at the grass roots level, education, working in partnership and having a coordinated approach.

For longer term change, there needs to be acknowledgement that there is a problem with racism in our community, not only in the western suburbs of Melbourne, that it is having a detrimental impact on the health and well being of the whole community, not only those directly affected. The voices of those who have been discriminated against need to be heard and their suggestions noted. As shown in the statistics and stories recorded in this report, many complainants do not want monetary compensation. They want to be able to go about their daily lives, being treated the same as everyone else and not being discriminated against or vilified in any way. The strategies need to be sustainable for long term change to occur.

A positive beginning is the recent enactment of the *Victorian Charter of Human Rights and Responsibilities Act* (the Charter) in 2006. The Charter has “established a ‘dialogue model’ of human rights protection which seeks to ensure that human rights are taken in to account when developing, interpreting and applying Victorian law and policy”.<sup>147</sup> These rights encompass the ‘right to equality before the law’, the ‘right to protection from torture and cruel, inhuman or degrading treatment’ and ‘freedom of thought, conscience, religion and belief’. Although the Charter does not provide for an individual to be able to seek redress for a breach of the Charter, it will “affect the way legislators and bureaucrats go about their work; it will give the courts the power to identify legislation which breaches basic human rights and have the Parliament consider whether it wishes to persist in those breaches”.<sup>148</sup>

There is still no intention by the Federal Government to enshrine human rights protection at a national level. While this is the case it will require a state and territory response.

To return to the participant’s responses to the Project and to learn from their experiences, each of the five areas listed above is dealt with in more detail. These areas are clearly in line with the results of the legal and other research.

### **10.2.1 Community awareness**

Responses need to address the complexities of discrimination, for example gender, appearance, religion, that require different strategies for different groups.

Information sharing about different cultures and religions removes fear of difference. The range of cultural events that occur for example Harmony Day, where government departments, statutory bodies and community agencies

work together to celebrate diversity, should be applauded. Such events, however, tend to be supported by members of the community who are already open to learning and sharing knowledge and ideas. The challenge is to find ways to encourage involvement by those who would not ordinarily choose to participate in such activities.

Ensuring cross cultural activities occur in all schools would at least ensure all children receive education and information about many cultural groups and a sense their community supports diversity.

The community should be educated about racism and in particular Muslims. Schools should educate children, show statistics as children often only know what their parents and the media tell them. (Interviewee B)

I think particularly for people of the dominant culture... they have a very poor understanding of how these things work. I think that they don't understand the subtleties of racism or the nuances. They might kind of see that it's a bit wrong but not necessarily be able to appreciate the distress. Like for example the cumulative effects of racism. The fact that you react quite strongly to something that appears to be quite a small thing. But if you experience [racism] over a long period of time you have a heightened reaction to it. (Interviewee E)

It all starts from the elders. We learn from each other. When we talk about our life, same. (Group 1)

When we come together to talk, different ideas come out. Today we try to do a collection of experiences. Come up with some sort of solutions. Because these are real. (Group 1)

It is also important that schools conduct cross-cultural activities in a way that does not adversely 'exoticise' certain cultures or further marginalise groups and organisers must be sensitive to this possible side-effect. Furthermore, in school settings a consciousness of racial and religious diversity is required at all times, particularly if there is going to be a gradual elimination of racist attitudes on a widespread level. There should be training for educators that is aimed at achieving this kind of on-going awareness and sensitivity.

At an individual level, some participants spoke of the difficulty of addressing individual or one-on-one interactions:

It's really hard with the kind of on the street attitudes people have... it's hard to know how to fix that. You could say education, I don't think sanctions are gonna help, I don't think punishing is gonna help. But I think it's also a lot about systemic issues. I'm personally a big fan of the idea of transforming social relations and working on people that you know and come in contact with. That will ultimately have some impact and I'm very inclined to speak up...to raise with people that their behaviour is unacceptable. It's not anything to do with cultural politics, race, but just decent kind of humanity. (Interviewee E)

If racism is publicly named, community members could be encouraged to informally respond to derogatory comments made by friends and family.

Although given in a Victorian Rights Oration in 2003, Professor Lowitja O'Donoghue's 10 point plan still has resonance.

**Accept personal responsibility for change, no matter how small.** Don't assume that someone else will do it. Don't be complacent. Even small things like refusing to laugh at a racist joke can make a difference.

**Reflect on your own behaviour.** Reflect on the cultural practices or beliefs that you find confronting or difficult. It is healthier to name and discuss the issues that you find difficult, than it is to try and be saintly.

**Identify what you have got to give.** It may be time. It may be specific expertise. It may be a shoulder to cry on, or a sympathetic ear. It may be money. Everyone can do something and this may change at different times of your life.

**Act in your own context.** For example, has anyone in your workplace raised the desirability of a workplace code of values and ethics? If not, perhaps you could do it. Once people have discussed desirable ways in which people should treat each other in the workplace, it is a short step to raising human rights more broadly.

**Collaborate.** There is strength in partnerships and strategic alliances.

**Join. Network. Lobby. Advocate.** Tell politicians what you think. To recycle an old slogan: Keep the bastards honest. Sign petitions. Write letters. If you can, make use of the Internet and email to reach people.

**Treat everyone with respect.** Respect is more important than compassion or sympathy, because respect is based on familiarity and understanding. And respect ensures that people retain their dignity.

**Be inclusive.** Once you have a good relationship with people, it becomes easier to think about how social justice and human rights issues can be raised.

**Maintain your rage.** Also maintain your hope, your optimism and your sense of humour.

**And finally, celebrate your successes.** Not only does this make you feel good but it also energises you for more work!<sup>149</sup>  
Raising community awareness also entails greater support (both moral and financial) for grass roots campaigns and projects that aim to change attitudes and raise awareness. Similarly there should be great support for CaLD community groups so that they can raise their profile in a positive way.

### **10.2.2 Access to information**

There needs to be greater education about existing laws that protect the community from discrimination and vilification. This includes information about how and where to complain and the types of remedies available.

Both VEOHRC and HREOC identify educating community about the law and the processes involved in accessing the law as one of their objectives. An increase in resources to enable that information to reach the community at large is required. This, however, cannot be the role of the Commissions alone. Government departments, public authorities and community agencies need to share that responsibility. Training community agencies would be a way of ensuring that the necessary information is disseminated.

Maybe police, or government, he will realise this. If you know somehow, someone will help us. We need to lose, 'you don't belong here.' We need information how to deal and where to go. (Group 1)

...region has a lot of new and increasing people from different back ground. Legal service has got to open up and say, 'we are here.' They are not filling up the community with their services. (Group 1)

One way of increasing the dissemination of information about the law would involve more widespread and closer partnerships between CaLD community groups and agencies and the Commissions, community agencies, public authorities etc who are able to provide that information. For such partnerships to be effective, there will need to be an extension of resources and a commitment to maintaining those relationships into the long-term future.

### **10.2.3 Media responses**

The media, both print and electronic, could take a more active role in encouraging acceptance of difference within the community by telling positive stories of people working and living together in harmony.

The media can be enlisted to assist spreading the message that laws exist to protect people from discrimination and that penalties would apply to those who do not abide by those laws. Alternatively, the media could be used to lead a major campaign that highlights the detrimental impacts of racial discrimination on the community at large.

Interviewees suggested that exposing people in positions of power could be part of the media's role. For example:

Our leaders need to start saying things that are inclusive of everyone; leaders should not attack their own citizens, residents. Leaders should not stir things up. The media also plays a role in creating the problems and could be part of the solution to overcome this kind of behaviour. All of this would have more weight than the written law. (Org 3)

One interviewee (D) said she felt strongly that religious and other discrimination is a big issue within the community - that it shouldn't be allowed. She said the media should do more to stop hatred, suggesting the media unfairly labels Muslims and depicts them in negative way (usually in relation to crime). These views were shared by a number of participants, who were largely critical of the media's role in fostering disharmony and racial/religious intolerance. One response to this issue could be the establishment of a media watchdog organisation that is specifically aimed at monitoring racist media reporting and raising the problems of such reporting with the media outlets responsible for the prejudicial coverage. Ideally, in the long-term, being able to offer a constant response to prejudicial media reporting will minimise the incidence of such reporting.

Individuals and organisations could also be more active in countering negative and racist media representations by responding with alternate views.

#### **10.2.4 Complaint agencies**

One participant suggested that cross-cultural training needed to be ongoing for police and workers involved in complaints organisations.

Should've got other party to stop behaviour. The other people got away with a lot of bad things ... Lawyers weren't responsive. (Interviewee A)

Perhaps if they made the Equal Opportunity Commission more accessible to people who have English as a second language. Perhaps offering guest speakers to groups to give a broad overview of how the commission can help people. (Org 1)

Police should listen and respect. Police should be impartial and not call people discriminatory names like "wog". Police should be accountable for their actions. The complaint resolution process [eg courts] shouldn't cost so much. (Interviewee A)

Valuable feedback from people who have experienced the process is useful to ensure difficulties with process are overcome and that secondary discrimination on this basis does not occur. Complaint agencies need to undertake processes of self reflection in relation to their processes, including more critical evaluation relating to enquiry and complaints statistics than is currently occurring.

Our discussions with project participants also suggest that law enforcement authorities need to have a greater awareness about this aspect of the law. When people do approach the police about instances of racial and religious vilification or harassment, it is imperative that the police are able to respond and refer those people appropriately. It is crucial that, after reporting an incident to the police, people do not leave feeling that they have hit a dead-end.

### **10.2.5 Law reform**

Changes could be made to the existing laws that have the result of implementing Australia's obligations under international conventions, in particular the ICERD. A national human rights instrument which enabled individuals to bring an action for a breach of those rights, is long overdue.

Until then, Victorians have access to limited human rights protections under the Charter. Although it does not provide a mechanism for a person to bring a cause of action or seek a remedy for a breach of their rights, that breach could be raised as an additional claim in a legal matter that is already before the courts or tribunal.

The introduction of remedies into the Charter when that legislation is reviewed in four years could bring relief to those experiencing racial and religious discrimination.

Further changes could be made to existing laws described in the body of this report that could result in HREOC and VEOHRC decisions being 'enforceable or binding'. This would send a serious message to perpetrators that discriminatory behaviour is not acceptable and will be dealt with seriously.

Changes to the evidentiary burden in complaints processes could ease the effects of secondary discrimination on complainants.

### **10.3 Where to From Here**

WSLS acknowledges that to achieve any of the above requires considerable resources, acknowledgement that there is a problem and a willingness and commitment from all levels of government to bring about real change.

WSLS is committed to being involved in a second stage of this project and to continue to work collaboratively with government and community groups to ensure there is effective change so that the incidence of racial discrimination and religious vilification is minimised.

WSLS will meet with relevant government and community organisations to discuss the findings and recommendations of the Project and will seek further funding from a range of sources so that we may continue to work on the issues that have been identified with the ultimate aim of bringing about these changes.

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Jude McCullough suggests that, "the effects of dispossession, the stolen generation and racism continue to contribute to Indigenous ill-health, substance abuse, family violence and breakdown." Other resulting factors of colonisation are Indigenous people being among the poorest of the community, and more often than non-Indigenous people to be homeless, unemployed, dependent on welfare, or on no income at all. Jude McCullough 'Mandatory sentencing creating an incarcerated generation' (2000) 47 *Arena Magazine* 34+

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61 Section 19D *Racial Discrimination Act* 1976 (Cth).

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64 Ibid, 19.

65 Ibid, 23.

66 *Kelly-Country v Beers* (2004) 207 ALR 421.

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90 *Ibid*, 174.

91 *Ibid*, 121.

92 Article 2(2) of the ICCPR and Article 6 of the ICERD.

93 This means that the primary responsibility for compliance with international obligations in relation to a person's right to redress where they have suffered discrimination on the grounds of religion and belief rests with the States. In Victoria in 2004/2005, the VEOHRC reported 119 enquiries by telephone or in writing in relation to religious belief and 34 enquiries in relation to religious vilification, 106 complaints filed under the EOA on the grounds of religious activity and 62 complaints filed under the RRTA on the ground of religious vilification.

94 *Brandy v Human Rights and Equal Opportunity Commission* (1995) HCA 10.

95 *Ibid*

96 *Ibid*.

97 *Chau v Oreanda & Ors* (2001) FMCA 114.

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99 *TNT Management Pty Ltd v Brooks* (1979) 23 ALR 345.

100 *TNT Management Pty Ltd v Brooks* (1979) 23 ALR 345, 52.

101 *Sharma v Legal Aid Commission Queensland*, Unreported, 4 December 2001.

102 (1998) VADT 14 (11 September 1998) "..... s17(1) uses the words "less favourable". It does not use "unfair", "unequal", or "different". Different treatment may not always be less favourable. Equal treatment may not always be as favourable treatment. This Complainant must show that the unimpaired person would have treated better than he was".

103 in practice, the conciliation power is delegated to VEOHRC Senior Complaints Resolution Officers under section 112.

104 VCAT 2004-05 Annual Report, 24.

105 VCAT 2004-05 Annual Report, 25.

106 *Islamic Council of Victoria v Catch the Fire Ministries Inc* (2004) VCAT 2510 (22 December 2004) 82.

107 VEOHRC Annual Report: 8.

108 VEOHRC Annual Report: 1.

109 185 complaints were made on the grounds of race and 106 on the grounds of religious activity, *Victorian Equal Opportunity & Human Rights Commission Annual Report, 2004-05* at page 30. The report shall be cited as "VEOHRC Annual Report".

110 VEOHRC Annual Report: 31.

111 2004] VCAT 2510 (22 December 2004).

112 All statistics quoted in this section are taken from VCAT Annual Report: 24.

113 VCAT 2004-05 Annual Report, 5. However, it is important to note that the ADL deals with various types of discrimination, not exclusively discrimination on the grounds of race and/or religion.

114 VCAT 2004-05 Annual Report, 24.

115 this review of recent case law is not exhaustive, and the observations we make are relevant only to the specific cases reviewed in this report. We note that the most substantial issue to arise under the EOA related to the issue of exemptions: the substantive case law in relation to complaints did not raise issues of equivalent magnitude. Therefore, our analysis as it relates to the EOA focuses principally on the issue of exemption applications.

116 In this report all references are to a numbered paragraph within a judgment unless indicated otherwise.

117 See, for an example of such publicity, Andrew Bolt, 'More Weasel Words', *Herald Sun*, 2 December 2005 at

[http://www.heraldsun.news.com.au/common/story\\_page/0,5478,17427573%25E25717,00.html](http://www.heraldsun.news.com.au/common/story_page/0,5478,17427573%25E25717,00.html).

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124 S Leber & H Rodd, *Beyond Gangs, Drugs and Gambling* retrieved from <<http://home.vicnet.net.au/~skcc/mrcfweb/bydgangs.htm>> at 8 January 2007.

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Personal Details

Age

Gender

Which ethnic group do you belong to?

How long have you lived in this community? (catchment area)

### **Preamble**

The law says racial or religious discrimination, harassment or vilification is treating someone unfairly or unfavorably because of their actual or assumed race or religious belief or activity. Race includes colour, descent, nationality, ancestry, ethnic background or any characteristics associated with a particular race

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**Discrimination** is the unfair treatment of someone because of their race or religion.

**Harassment** is behaviour that is unwelcome, offensive, intimidating, humiliating or embarrassing.

**Vilification** is saying things about a person's race or religion that could incite others to hate them.

We are interested in hearing about your or a family members experiences of racism and religious discrimination.

Are or were you aware that the law in Australia says that it is illegal to discriminate on the basis of race or religion?

Have you ever experienced racial or religious discrimination or harassment when dealing with people in positions of authority? If so, could

- 1.
- 2.

### **Interview Questions**

#### **Appendix 1**

Racial and Religious Vilification

Discrimination and Harassment Project

you please describe your experiences? Do you believe that you were discriminated because of your race or because of your religion?

#### **2.1 Police**

If so, when did it happen? Where did it happen?  
How did you react or what did you do about it?  
Did you complain? If so, who did you complain to? If not, why didn't you complain?  
What would you like to have done? (solutions)

**2.2 Schools**

If so, when did it happen? Where did it happen?  
How did you react or what did you do about it?  
Did you complain? If so, who did you complain to? If not, why didn't you complain?  
What would you like to have done? (solutions)

**2.3 Employers**

If so, when did it happen? Where did it happen?  
How did you react or what did you do about it?  
Did you complain? If so, who did you complain to? If not, why didn't you complain?  
What would you like to have done? (solutions)

**2.4 Others**

If so, when did it happen? Where did it happen?  
How did you react or what did you do about it?  
Did you complain? If so, who did you complain to? If not, why didn't you complain?  
What would you like to have done? (solutions)  
Have you ever experienced racial or religious discrimination or harassment when trying to access services? If so, could you please describe your experiences?

**3.1 Renting / Buying / Selling a house**

If so, when did it happen? Where did it happen?  
How did you react or what did you do about it?  
Did you complain? If so, who did you complain to? If not, why didn't you complain?  
What would you like to have done? (solutions)

**3.2 Shops / Restaurants**

If so, when did it happen? Where did it happen?  
How did you react or what did you do about it?  
Did you complain? If so, who did you complain to? If not, why didn't you complain?  
What would you like to have done? (solutions)

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**3.3 Government Departments e.g. Centrelink, Education, Human Services, etc**

If so, when did it happen? Where did it happen?  
How did you react or what did you do about it?  
Did you complain? If so, who did you complain to? If not, why didn't you complain?  
What would you like to have done? (solutions)

**3.4 Financial Services e.g. Banks**

If so, when did it happen? Where did it happen?  
How did you react or what did you do about it?  
Did you complain? If so, who did you complain to? If not, why didn't you complain?  
What would you like to have done? (solutions)

**3.5 Health Care**

If so, when did it happen? Where did it happen?  
How did you react or what did you do about it?  
Did you complain? If so, who did you complain to? If not, why didn't you complain?  
What would you like to have done? (solutions)

**3.6 Transport, Trains, Trams, etc**

If so, when did it happen? Where did it happen?  
How did you react or what did you do about it?  
Did you complain? If so, who did you complain to? If not, why didn't you complain?  
What would you like to have done? (solutions)  
Have you ever experienced racial or religious discrimination or harassment from members of your local community? If so, can you please describe your experiences?

**4.1 Neighbours**

If so, when did it happen? Where did it happen?  
How did you react or what did you do about it?  
Did you complain? If so, who did you complain to? If not, why didn't you complain?  
What would you like to have done? (solutions)

**4.2 Using local facilities e.g. park**

How did you react or what did you do about it?



Is there anything else you would like to say?

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### **Project/organisation Website Description**

Western Suburbs

Legal Service:

Racism in Schools

wsls@vicnet.net.au Concerned about the level of racist comment made by secondary aged students and the apparent lack of awareness amongst the students of racial discrimination and an individual's and society's responsibilities, the Western Suburbs Legal Service conducts education sessions in secondary schools in the western suburbs of Melbourne. Activities include consciousness raising, education around the legal framework, role plays, and critical reflection.

*Racism No Way* www.racismnoway.com.au

This program promotes a consistent national response to racism in Australian schools. A series of resources and practical strategies are provided for school and community use.

### **Education**

#### **Appendix 2**

Anti-racism Database

### **Project/organisation**

#### **Website**

#### **Description**

Moving Forward

<http://www.adcq.qld.gov.au/pubs/movingforward.html>

This project researched the positive measures 11 government and non-government schools have taken to promote harmony, respect, understanding and fairness between school and community members.

Multicultural Practice in Victorian Schools: Perspectives Program

<http://www.eduweb.vic.gov.au/edulibrary/public/teachlearn/student/lem/Mpolicy.pdf>

This project takes a whole-school approach to tackling racism.

Resources for a Better Country

[www.acwa.asn.au](http://www.acwa.asn.au)

This site provides links to the Cabramatta High School Anti-racism Project.

The school conducted an anti-racism workshop with Vietnamese students to

create awareness of racism and explore non-violent measures to deal with it. Students role-played what they could do when confronted by racist remarks. The school also holds an annual Cooperation Day to celebrate and unite different cultures. Students learn about and experience aspects of other students' rich cultures.

Under the Skin (Australia)

<http://education.qld.gov.au/soc-sci/soc-grp/race-rel/under-skin/>

These anti-racism materials promote best-practice models in the classroom setting.

Centre for Workplace, Communication and Culture

<http://www.edoz.com.au/cwcc/docs/Projects/late2/desc55.html>

The Victorian Commission ran a postcard campaign for Years 10 and 11 students (aged 15–17 years) to open up discussion about 'the values of diversity and tolerance in Australian society'. Students were asked to complete open-ended sentences on one of two postcards and mail them in. The opening words on one postcard were 'Being Australian means ...' and on the other were 'If I could make a difference I'd ...'

The response to the campaign was phenomenal and the material provided a window on a generation about to come of age as active community participants and voters.

Education Queensland

[www.bullyingnoway.com.au](http://www.bullyingnoway.com.au)

This website was developed as a response to racism and to encourage students to take action for peace. It can help school communities develop safe, supportive and nurturing environments.

### **Community responses**

#### **Project/organisation**

#### **Website**

#### **Description**

Racial Respect

[www.racialrespect.org.au](http://www.racialrespect.org.au)

This national organisation is concerned with issues related both to immigration and Aboriginal Australia. It recognises Australia's racial diversity and is committed to combating racism .

#### **Project/organisation**

#### **Website**

#### **Description**

Immigrant Women's Speakout Association: Anti Racism Project

<http://www.speakout.org.au/antrac.htm>

In 2002 the Immigrant Women's Speakout Association ran a 4 month project to work in educational, interactive and non-threatening ways with young and older migrant and refugee women on dealing with racism. Ten workshops were conducted and 1 informal discussion session, 3 of these sessions being dedicated to young women. Women from a diversity of cultural backgrounds took part, including those from Vietnam, Sri Lanka, Bosnia, Russia, Afghanistan, Lebanon, Chile, Macedonia, Croatia, Egypt, East Timor, Korea, Cambodia, Pakistan, Iran, Iraq and Australian born women (both NESB and Anglo/Celtic backgrounds). Areas of concern were identified for further projects to be developed, including the media and employment.

Women's Rights Action Network (WRANA): Gender and Racism Project

<http://www.wrana.org.au>

The Gender and Racism project aimed to highlight issues of discrimination at the intersection of racism and sexism as experienced by women in Australia. Using data collected from women through public consultations, submissions and existing research in the area, WRANA produced a report depicting intersectional discrimination issues in Australia. Six major themes emerged from the research, including education, economy, poverty, health, human rights, and institutional mechanisms. WRANA suggest a variety of human rights documents and instruments need to be used to address these intersectional, multilayered issues. WRANA produced a Gender and Racism Kit to follow-up the project, with practical strategies for women's organisations to address issues of sex / race intersectional discrimination.

The Australian Community Action Kit on Racism (Australia)

<http://www.alhr.asn.au/rak/rakintro.html>

The Australian Community Action Kit on Racism aims to highlight the impact of racism on ordinary people, promote understanding and tolerance and rights of others, and share ideas on how to work with groups and communities around Australia and worldwide.

Australians Against Racism

<http://www.australiansagainstracism.org/>

Australians Against Racism (AAR) was established following an increase in the number of incidents of open hostility and aggression in Australia towards asylum seekers. AAR aims to halt the abuse of asylum seekers in detention centres, the community and the Pacific by lobbying the government and raising awareness through the media, the arts and the legal system.

AAR projects include advertisements, school projects that celebrate diversity, a legal research project on racial vilification legislation, and a project that involves visiting Afghanistan to ensure funds raised are used where they are most needed.

The Australia is Refugees school project encourages Years 6 and 7 students to submit the story of someone with refugee experience. Prizes are offered for the top stories.

Living in Harmony

<http://www.harmony.gov.au/>

This initiative of the Commonwealth Government through the Department of Immigration, Multicultural and Indigenous Affairs promotes community harmony, community grants programs and partnerships programs.

### **Project/organisation**

#### **Website**

#### **Description**

Visible Ink: Young People Defining Brisbane & Multicultural Youth Network Queensland (MCYNQ)

<http://www.visible-ink.org>

The Peace Potion project (conducted annually from 2004) engages approximately 50 young people from Indigenous, Polynesian and Sudanese communities in creating a hip-hop song and accompanying break-dance/ graffiti filmclip that deals with issues of peace, culture, conflict and honour. Participants worked with arts-workers and cultural consultants throughout the project to develop the project.

Western Young People's Independent Network

<http://home.vicnet.net.au/~wypin/aboutwypin.htm>

The Western Young People's Independent Network is a group of young people of refugee and migrant backgrounds aged 12–25 living in the western region of Melbourne. Their anti-racism programs include a performance by young refugees. The performance, which has been staged in many schools, deals with the barriers that refugee and migrant young people experience, such as racism, isolation and confusion about their cultural identity. It challenges ignorance and intolerance. It is also a voice for and affirmation of the experiences of the performers and other young people.

Australians for Native Title and Reconciliation (ANTaR)

<http://www.antar.org.au>

Australians for Native Title and Reconciliation is an independent, national network of mainly non-Indigenous organisations and individuals working in support of justice for Aboriginal and Torres Strait Islander peoples in Australia. ANTaR coordinates a major community education and awareness campaign on native title and reconciliation.

Edmund Rice Centre Projects

<http://www.erc.org.au>

This advocacy centre conducts and encourages research into the causes of poverty and inequity in society, especially as it relates to young people and Indigenous Australians. Projects such as Lets Talk and Between Borders offer immersion/exposure experiences in Australian Indigenous communities, Asia, the Middle East, Africa and South America.

### **Government responses**

#### **Project/organisation**

##### **Website**

##### **Description**

Anti-Discrimination Commission Queensland: Anti-Racism Project

<http://www.adcq.qld.gov.au/newsletter/issue15/article6.html>

In 2002 the Queensland Anti-Discrimination Council implemented an 'Anti-Racism Project' in response to religious and racial conflicts in Brisbane post the events of September 11. The project was forward-looking, incorporating a four-year anti-racism strategy which outlined how the Brisbane City Council could work internally and externally with other organisations to address racism at different levels within communities, schools, sporting organisations, libraries and institutions.

#### **Project/organisation**

##### **Website**

##### **Description**

Humans Rights and Equal Opportunity Commission

<http://www.humanrights.gov.au/>

Reports and resources can be downloaded through the website, such as:

The 2003 Isma project - Arabic for listen – whereby consultations were held with over 1400 people from across Australia, with Arab and Muslim

Australians, as well as with federal, state and territory government agencies and non-government agencies. The report found that racial and religious vilification are systemic issues, but most survey respondents did not formally

complain about their experiences of racism, abuse or violence

"I want respect and equality": a summary of consultations with civil society on racism in Australia

The “Voices of Australia” project resources: In 2005, to mark the anniversary of the Racial Discrimination Act (RDA), the ‘Voices of Australia’ project, collected, recorded and published the stories and experiences of Indigenous Australians, migrants, refugees and Anglo-Celtic Australians over the last 30 years in hard copy, electronic publications and audio CD format, which can be accessed as an educational resource to help combat racial discrimination and promote respect.

Face the Facts – information to challenge prevailing myths surrounding immigration, refugees and Indigenous peoples and counters misleading and inaccurate information that leads to racial intolerance.

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Australian Arabic Council (AAC)

<http://www.aac.org.au/resources.php>

The Australian Arabic Council argues that although initiatives such as legislation to deter and punish those who cloak their ignorance in racism should be encouraged, programs must also be in place to address the fundamental causes of racism. Reforms and programs are required in the most important areas relating to racial vilification, such as schools, policing and government. The AAC argues it is important that all related institutions work for the eradication of vilification and the increased education of our community to affect social-cultural change in attitudes and behaviours. They suggest education is the key to encouraging an understanding of ethnic and religious groups and their positive contribution to Australian society, as well as addressing the incidents and effects of racial vilification.

LawLink: NSW Anti Discrimination Board

[http://www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_annual\\_report\\_2004\\_2005](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_annual_report_2004_2005)

In 2005 LawLink tabled ways to challenge and subvert discrimination, and ways that anti-discrimination bodies such as the EOCV and HREOC could be more accessible and effective. Practical strategies like instituting time-frames for complain handling, ensuring access to resources in community languages, and providing cross-cultural training to staff have the potential to prevent or ease some of the frustrations experienced by people accessing such services.

### **International anti-racism organisation / initiatives**

#### **Project/organisation**

#### **Website**

#### **Description**

Human Rights Documentation Centre (HRDC): The United Nations Research Institute for Social Development (Worldwide)

[www.hrdc.net](http://www.hrdc.net)

HRDC conducts ‘in country’ training programs for national human rights organisations and activists. In coordination with or through sponsorship from a local organisation, HRDC staff help train local human rights activists so that they are more effective in their home country. Training programs include in-depth training on international humanitarian law and strategies for creating and strengthening national human rights institutions.

Speak Up

(USA)

[http://www.tolerance.org/speakup/pdf/speak\\_up\\_full\\_document.pdf](http://www.tolerance.org/speakup/pdf/speak_up_full_document.pdf)

Speak-Up is an online resource that encourages everyone to speak up against everyday bigotry. In the making of this book, the Southern Poverty Law Center gathered hundreds of stories of everyday bigotry from people across the United States, and present the stories anecdotally, organised into categories of family; friends and neighbours; at work; at school; and in public. It gives practical examples of how to speak up, and what challenges people have faced.

101 Tools for Tolerance: Simple ideas for promoting equity and celebrating diversity (USA)

<http://www.tolerance.org/teach/index.jsp>

This web project of the Southern Poverty Law Centre encourages people to fight hate and promote tolerance. It suggests 101 tools to promote tolerance.

World Racism (worldwide)

[www.worldracism.com](http://www.worldracism.com)

This comprehensive site has useful links, covering many issues related to racism.

Race Action Net (UK)

<http://www.raceactionnet.co.uk>

RaceActionNet brings together expertise and practical experience in tackling neighbourhood racial harassment and racist attacks. The RaceActionNet website disseminates good-practice examples of innovation in dealing with racism. It facilitates a growing network of practitioners and policy makers from organisations and agencies across the UK.

Best Practices in Long-term Anti-racism Strategies (Canada)

[www.amssa.org](http://www.amssa.org)

This research project of the Affiliation of Multicultural Societies and Service Agencies of British Columbia looks at best practices for long-term anti-racism strategies that can be implemented by communities and organisations.

Project Change – Anti-racism Initiative (UK)

[www.projectchange.org](http://www.projectchange.org)

Project Change seeks to expand public recognition of racism's social and economic costs. It connects diverse community leaders and assists them in developing multicultural leadership capacities that both complement and transcend their racial and ethnic constituency interests. In communities where it is active, Project Change models and promotes much-needed common ground and multicultural partnerships.

The World Association of Community Broadcasters (AMARC) (Europe)

<http://www.amarc.org/>

This alliance of European community and free radio stations that run programs by and for migrant groups proposed practical projects for international cooperation which grew in strength and impact in 1997 during the European Year Against Racism. These projects and actions extended from broadcasting anti-racism jingles, spots and announcements, to developing and translating training materials, building links with anti-racism organisations and offering community radio groups news services and support on legal and civil rights in relation to migration, employment and racial discrimination.

**Project/organisation**

## **Website**

### **Description**

*Colorlines* magazine (USA)

[www.colorlines.com](http://www.colorlines.com)

ColorLines is the first national, multiracial online magazine devoted to covering the politics and creations of communities of colour.

Yes, I Can Make a Difference!: Student Projects — Respect for Human Differences at Franklin School (USA)

<http://www.newton.mec.edu/Franklin/Yes/projects.htm>

This project developed resources to help children learn ways to oppose racist actions and attitudes. These resources include sets of mini-lessons using appropriate children's literature and related media, and books for use with adults and the community.

South Asia Human Relations Documentation Centre (India)

<http://www.hrdc.net/sahrdc/publications/>

*A Step in the Rights Direction* is a human rights education manual for use in high schools. Its aim is to heighten young people's awareness of human rights and to foster their sense of inquiry and responsibility. This manual is an attempt to implement the goals of the Indian Government's National Curriculum Framework of 1986, which are to arouse social consciousness, instil democratic values and achieve social justice, equality and national integration.