



Inequality Pandemic

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As a member of the NSW Parliament, Jenny has played a key role in a number of significant reforms - including the decriminalisation of abortion, an apology to the 78ers for the violence at the first Mardi Gras, securing protections for renters during the COVID-19 pandemic, amplifying the voices of sexual harassment and assault survivors, and successfully advocating to ensure that NSW's daily press conferences were translated in real-time into multiple languages.

Jenny is a passionate activist, campaigner, feminist and equality advocate - and as far as she is aware, is the first woman of Chinese Australian heritage to be elected to the lower house of any parliament in Australia (she is happy to be corrected if this isn't the case!).

While in many ways the risks associated with the global COVID-19 pandemic have been a great equaliser that has seen all of humanity face the prospect of infection or death, the way Australian governments have responded to the pandemic has further entrenched existing inequalities. Australia's failure to enshrine its international human rights obligations in domestic law or to address underlying issues of racism and discrimination sits at the core of these problems, which have been amplified during the pandemic.¹

This article seeks to demonstrate that while COVID-19 does not discriminate, the actions of Australian governments in implementing pandemic response measures demonstrated clear discrimination against people based on their ethnicity, race and citizenship. In addition, these measures exacerbated existing inequities faced by migrant communities and people of colour. To demonstrate the discrimination and inequity of these measures, three aspects of the pandemic response — namely repatriation and quarantine, financial supports, and marginalised workers — will be assessed to examine the way our governments have failed to meet their moral and legal obligations of ensuring that those who live on our shores are treated equally, and with dignity and respect.

I Repatriation and Quarantine

In February 2020, the first repatriation flight from Wuhan, China — carrying 243 Australian citizens — transited through RAAF Base Learmonth in Western Australia where passengers were moved onto smaller planes and then flown to Christmas Island Immigration Detention Centre.² Later, as the virus spread to 'Western' countries, Australian citizens returning from overseas were quarantined in city hotels and serviced apartments. The difference in treatment is stark.

While there may have been a justification for initially closing the borders with China while the situation was assessed and preparations were put in place for quarantine and testing measures based on health advice, the implications and political positioning of the decision to initially use the Christmas Island Immigration Detention Centre for those coming from China cannot be ignored.

This decision to use Christmas Island for these initial repatriation flights from China of *Australian citizens* was made in the context of Australia's long-standing and racially charged political debates around border control, refugee and asylum seeker policy, and 'yellow peril' invasion.³ This move set the stage for measures which sought to entrench long-standing xenophobia — exploited most recently by One Nation representatives⁴ and conservative newspaper outlets⁵ — and for the Australian government to seek to exploit the situation by establishing a sense of authority and control in the midst of such uncertainty. This political decision created

a direct link between those coming from China — ground zero of the pandemic — and the incarceration of refugees and asylum seekers enshrined in domestic laws, thus conflating border security with refugee policy.⁶ National security has always been an electorally beneficial space for conservative governments to improve their standing domestically.⁷

Over a year later in April 2021, Australian citizens and permanent residents seeking to return from India were subjected to even harsher penalties when the Australian government made it illegal for them to attempt to return home.⁸ It is most notable that the Australian government only chose to impose a country-wide ban on India, despite significant uncontrolled outbreaks in the United States and the United Kingdom ('UK') in the intervening period.⁹

The Australian government's India border closure was enacted on 3 May 2021 using the human biosecurity emergency powers provided by s 477 of the *Biosecurity Act 2015* (Cth) ('*Biosecurity Act*').¹⁰ The legality of this ban was challenged in the Federal Court of Australia just two days after it came into force, with the applicant arguing that the Commonwealth was acting outside of its powers and that the Minister for Health and Aged Care's declaration was in breach of an implied common law freedom to return home.¹¹ The Court disallowed this challenge, arguing that the national interest trumped individual rights, such as the right to return to your country of citizenship.¹²

While this finding by the Federal Court may have vindicated the Australian government's action as legal, it begs the question of how the law, allowing such action, measures up against Australia's international obligations, and indeed, its own domestic racial discrimination protections.¹³

Despite the fact that Australia is party to the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'), as well as the *International Convention on the Elimination of All Forms of Racial Discrimination*,¹⁴ successive governments have failed to enshrine the rights they protect in domestic law.¹⁵ These pandemic measures around repatriation and quarantine implemented by current Australian Prime Minister, Scott Morrison, strongly echo the words of former Liberal Prime Minister, John Howard, who decreed 'we will decide who comes to this country and the circumstances in which they come.'¹⁶ This statement articulating nationalist sentiment with racist undertones was printed in mainstream newspapers the day before the federal election in October 2001, and was linked directly to election commitments to enact harsh domestic refugee laws which were, and still are, in breach of international conventions to which Australia is a party.¹⁷

Looking at the chartered flights moving in and out of Australia throughout the period of bans on international travel, it is hard not to perceive economic and racial privilege at play. For example, the Australian cricket team was flown out of India to the Maldives, former Prime Minister Tony Abbott took trips back and forth to the UK, British business magnate come reality TV host, Lord Sugar, was flown in to shoot Australia's *Celebrity Apprentice*, and many more celebrities travelled in and out to shoot movies.¹⁸ Even more stark was the fact that some crew members were able to disembark the Ruby Princess and be flown home on charter flights (by their mainly Western governments), while others on board this ship and countless others were left stranded and sick at sea.¹⁹

Given this context, it is difficult to not interpret the treatment of people returning from China and India, compared with those coming from other countries, as anything other than politically motivated racial discrimination.

II Financial and Other Supports

While the virus does not discriminate, the measures and protections provided by Australia to keep people safe have been determined by the colour of your passport — your nationality or visa status. Equally, the impact of COVID-19 on those from marginalised communities was stark, with an increased risk of infection and spread of the virus in some communities because of government failures to address inequities in areas including health, housing, education etc.²⁰

The COVID-19 pandemic brought some pre-existing inequalities in Australia, especially between citizens, non-citizens and people of colour, into sharp relief.²¹ This was particularly noticeable when it came to the financial support measures introduced. The first round of JobSeeker payments in 2020 imposed strict conditions on various visa holders, based on the length of time they had been on permanent

resident visas or other specified visa subclasses, which meant that many people in these categories were ineligible to apply for this support.²²

Access to JobKeeper payments — another government pandemic measure — also highlighted pre-existing inequalities. The discriminatory measure mandated that casual employees had to be either Australian residents, New Zealand citizens in Australia who held a subclass 444 special category visa, or migrants who were eligible for the JobSeeker payment.²³ Additionally, employees were only eligible if they had been employed by the same employer for at least 12 months.²⁴ Everyone else was left with no support. Many non-citizens — who weeks before the pandemic had been paying income tax — found themselves out of work due to enforced closures and lockdowns, and unable to access income support due to their visa status.

In Australia, as in many other countries, it is short-term visa holders and migrants who are most at risk of obtaining insecure, precarious employment, where underpayment and wage theft is endemic. A report by Unions NSW published in 2020 showed that 9 out of 10 job ads posted in a language other than English were advertising wages below the legal minimum.²⁵ A more recent report by Unions NSW focused on the unequal access that temporary migrants receive to essential services, highlighting the impact of visa status and nationality on work hours, housing, food insecurity and financial support.²⁶ The precarious and insecure situation faced by people on temporary visas prior to this crisis was already severe, and during the pandemic, became unbearable.

During the pandemic, citizens were supported by JobKeeper and JobSeeker payments that were denied to others. As Berg and Farbenblum highlight, 'Australia is a global outlier in its callous treatment of temporary migrants during the pandemic', with temporary visa holders receiving wage subsidies in countries such as the UK, New Zealand, Canada and Ireland.²⁷

Many people were left without even the most basic needs of food and shelter. This discrimination breached a number of Australia's international human rights obligations and principles,²⁸ as set out in the *ICESCR*, the International Labour Organisation standards on labour migration, and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.²⁹ As Berg and Farbenblum point out, the approach of 'advising temporary visa holders to go home does not diminish these obligations. Nor does it absolve Australia of its moral obligations to these people it encouraged to greatly invest in studying and working here'.³⁰

Avenues for informal, cash-in-hand and casual work also dried up, or were pushed even further underground, increasing safety risks and further reducing workplace protections.³¹



iii Marginalised Workers

The fact that non-citizens cannot vote — and are therefore not viewed as constituents by the political class — means that the power and impact of their collective actions are limited. For those who are not Australian citizens, there are structural and legislative factors that cause and compound this inequality, many of which came to light in response to the pandemic. The pandemic may be global; however, the responses of governments have been hyper-local and extremely parochial.

The confronting images of lines of people (citizens, as non-citizens are not eligible for benefits) waiting at Centrelink offices could not be ignored. In contrast, lines of international students at charity food outlets and the desperate calls for assistance from groups and organisations supporting temporary visas, were met with a cruel and unrealistic response from Prime Minister Scott Morrison — ‘it’s time to go home’.³² A survey conducted by the Migrant Workers Justice Initiative found, among other very real economic challenges, that respondents:

could not ‘make their way home’ when restrictions were being put in place to contain the virus — as Morrison had recommended — because flights were unavailable (20%) or unaffordable (27%). Others could not return because their country’s borders were closed (10%).

But for the majority, leaving Australia was not an option because of the great investment they said they had made in their studies (57%), their work and their futures in Australia (31%).

Half of our respondents also chose not to leave because they might not be able to return to Australia soon, or at all, and this was a risk they could not take.³³

Discrimination against international students, resulting in a material impact on their financial security and wellbeing while in Australia, is nothing new, with long-standing and discriminatory bans on international students accessing travel concessions in NSW being one clear example.³⁴

The limit on international students working only 20 hours per week has forced many into the gig-economy or cash in hand jobs, which has resulted in routine exploitation and underpayment.³⁵ This often occurs precisely because employers know that these particular workers cannot complain without risking their visa, and hence, their studies. This is structural exploitation and discrimination,³⁶ and it affects both international students and many migrants.

It is notable that when the Australian government made the announcement to ease the restrictions on working hours for international students working in specific sectors, they did so, ‘[t]o support the supply of certain services during the COVID-19 pandemic’ rather than to ease the financial pressures on international students.³⁷

In a similar vein, some of Australia’s big universities — and some state governments — went to great efforts to advance plans to secure safe pathways for international students to return to our shores, driven by economic priorities. However, a big question remains as to what, if any, support will be offered once these students return. In NSW, surely removing the discriminatory ban on travel concessions would be a good place to start?

The lack of respect for, and the commodification of, non-citizens, which uses them as essential workers or fuelers of the economy while failing to offer them any protections as members of our society, is a risk to their own health and wellbeing, as well as a failure to meet our international obligations. The inequality is evident to anyone looking at who is driving the delivery trucks, delivering the takeaway, providing security at detention centres, cleaning in healthcare facilities, working in aged care homes or providing in-home care or childcare. The demographics of these often very low-paid, highly insecure and casualised workforces — which were also the areas of work that were deemed essential to keep everything ticking along during COVID-19 — are very clearly non-white, migrants and non-citizens.³⁸

iv Conclusion

Perhaps this all resonates more with me than others because of my background and my position, yet it is also precisely because of my background and my role as a

lawmaker — what I look like, my Chinese surname, my Chinese-Malaysian heritage and my intimate view of political manoeuvres — that I think it is crucial to highlight the inherent racism and discrimination embedded in the actions of the Australian government throughout its pandemic response.

In my workplace, the NSW Parliament, most of the people who look like me — and those who reflect the diversity of our community — are not those sitting in the chamber; they are the ones serving the food, cleaning the offices, and keeping things moving along.

Whether it is because of the individual impacts related to economic security and wellbeing³⁹ or societal ruptures that have ramifications for domestic and international trade and political relations, the existence of structural discrimination on the basis of race and visa status must be addressed.

In order to do this, it must be acknowledged that the existence of racism, discrimination, inequality and inequity; is a direct result of our legislative framework and government policies.

In the context of the COVID-19 pandemic in Australia, this has resulted in discriminatory repatriation and quarantine measures, and unequal availability of financial supports and access to essential health and safety measures. Additionally, the *value* of international students and migrants has been perilously positioned as their ability to provide essential services, rather than viewing them as equal members of society.

Choices to restrict freedom of movement and take a tough stance on border control must be seen as just that, choices — choices that in turn have an impact on the standing and perception of governments, including aiding or hindering their ability to advance their domestic agenda. Similarly, the negative ramifications of racism and discrimination on communities and individuals has a social and economic cost that must begin to be factored into the equation, particularly in the context of the pandemic.⁴⁰

Multiculturalism is more than a neat row of white plastic 'ethnic' food stalls, and non-citizens and migrants are more than just a resource to be considered or drawn upon when assessing economic productivity. The way that diverse communities have been commodified — and are politically erased — results in the discrimination they face being largely invisible in regular times.

However, these issues have become much more visible as a result of Australia's response to the pandemic, which has enforced and continues to exacerbate underlying inequality and discrimination. The question remains whether the move from crisis to the 'new normal' will see this trajectory altered or maintained.

There are many unavoidable symptoms and long-term effects of COVID-19, however, inequality is not one of them.

References

* This article was written with research assistance from senior electorate officers, Cathy Peters and Mithra Cox.

- 1 While outside the scope of this article, issues of race, discrimination and inequality in Australia can and must be linked back to the invasion and colonisation of this country. I acknowledge that I write this on stolen land that was never ceded and pay respect to Elders past, present and emerging. Aryati Yashadhana et al explain the intersection between existing inequalities and the current pandemic risks: 'The COVID-19 pandemic has highlighted the need for a renewed focus to ensure that health and privilege should not be mutually exclusive. The political, social, and cultural determinants of health are stacked against Indigenous Australians and Indigenous peoples globally; this multiplies the risk to, and vulnerabilities of these communities to infection and mortality from COVID-19': Aryati Yashadhana et al, 'Indigenous Australians at Increased Risk of COVID-19 Due to Existing Health and Socioeconomic Inequities' (2020) 1 *The Lancet Regional Health Western Pacific* 1, 2.
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- 3 Isabella Kwai, 'An Outbreak of Racist Sentiment as Coronavirus Reaches Australia', *The New York Times*, (Online Jan 31, 2020) <<https://www.nytimes.com/2020/01/31/world/australia/coronavirus-racism-chinese.html>> (emphasis added).
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- 5 Sharri Markson, 'Shocking Scale of China's Cover-Up Exposed: What Really Happened in Wuhan' (Sept 27, 2021) *news.com.au* <<https://www.news.com.au/entertainment/books-magazines/books/doctors-courage-and-official-cover-up-exposed-in-exclusive-extract-from-what-really-happened-in-wuhan/news-story/45679ce050df46cc7c7112036c966bb2>>.

- 6 As Furlong and Finnie write '[h]istorically, Australia has prided itself in its multiculturalism; however, there has been evidence of an increase in racial microaggressions and xenophobia during this pandemic. The Australian senator, Pauline Hanson, founder of right-wing party "One Nation", has been quoted: "any attempts to attack or criticise people for referring to COVID-19 as 'Chinese Virus' should be pushed back". They go on to provide other examples from mainstream media outlets, including the 'Herald Sun ... framing the coronavirus on its front page with a communist star and a surgical mask while alluding to China's native pandas in the provocative headlines of "Chinese virus pandemonium"' and the Daily Telegraph on the same day 'published an article "China kids stay home"'': Yulia Furlong and Tanya Finnie, 'Culture Counts: The Diverse Effects of Culture and Society on Mental Health Amidst COVID-19 Outbreak in Australia' (2020) 37(3) *Irish Journal of Psychological Medicine* 237, 238.
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- 8 Katharine Murphy, Paul Karp and Mostafa Rachwani, 'Covid Crisis: Australians Trying to Return Home from India Face Up to \$66,000 Fine or Five Years' Jail', *The Guardian* (online, 1 May 2021) <<https://www.theguardian.com/australia-news/2021/apr/30/australian-government-may-make-it-a-for-citizens-to-return-from-covid-ravaged-countries>>.
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- scheduled unless they were exempt persons (examples of exempt persons include flight personnel, diplomats, defence force personnel): at cls 6–7.
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 - 12 Anne Twomey, 'Part of the Legal Challenge to the India Travel Ban has been Comprehensively Defeated: Here's Why', *The Conversation* (online, 10 May 2021) <<https://theconversation.com/part-of-the-legal-challenge-to-the-india-travel-ban-has-been-comprehensively-defeated-heres-why-160624>>. It is worth noting that citizenship itself is not directly addressed in the Australian Constitution. Helen Irving states that "the Constitution of the Commonwealth of Australia makes no mention of Australian citizenship. There is no definition of citizenship, no provision governing the acquisition of citizenship, and no express legislative head of power with respect to "citizenship". The single use of the term "citizen" is to be found in s 44 which lists the grounds on which a person is incapable of standing for, or sitting in, the Commonwealth Parliament. This provision, however, makes reference to foreign, not Australian, citizenship": Helen Irving, 'Still Call Australia Home: The Constitution and the Citizen's Right of Abode' (2008) 30(1) *Sydney Law Review* 131, 131.
 - 13 Similar questions could, and should, be asked regarding domestic law that allows for the ongoing inhumane mandatory detention of asylum seekers and the implementation of the punitive measures under the Northern Territory Intervention.
 - 14 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 1 (entered into force 4 January 1969).
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 - 34 The NSW Parliament enacted the *Transport Administration Amendment (Travel Concession) Act 2006* (NSW), relating to government subsidised travel schemes. The government then developed regulations which discriminated against full fee-paying overseas students by limiting their access to free or concessional travel passes. This legislation applied despite any approval or direction of the Minister or the provisions of the *Anti-Discrimination Act 1977* (NSW) ('*Anti-Discrimination Act*'). International students could not use the *Anti-Discrimination Act* to challenge this discriminatory and racist action, which is what they had done prior; in 2006, international students from Sydney University challenged this practice and won. The NSW Administrative Decisions Tribunal ruled that denying international students the same travel concessions as domestic students was discrimination based on their race. Rather than complying with this decision, the NSW Parliament instead passed legislation to exempt travel concessions from the *Anti-Discrimination Act*: see *Sydney University Postgraduate Representative Association (SUPRA) v Minister for Transport Services* [2006] NSWADT 83, citing *Rail Safety Regulation 1999* (NSW) cl 8; *Rail Safety (General) Regulation 2003* (NSW) cl 5; *Passenger Transport (Bus Services) Regulation 2000* (NSW) cl 26.
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 - 38 It is worth noting that the reliance on these individuals and their communities became very clear when the NSW government implemented a harsh lockdown on certain 'areas of concern' in South Western and Western Sydney in July 2021. Initially, this lockdown was going to restrict all non-essential frontline workers from leaving their local government area, but this was quickly overturned when large food retailers, factories and other industries highlighted the reliance of the whole of greater Sydney on the work conducted by those living in these communities. See 'This is Who is Allowed to Travel for Work if You Live in the Fairfield, Canterbury-Bankstown and Liverpool LGAs' *ABC News* (online, 19 July 2021) <<https://www.abc.net.au/news/2021-07-18/who-in-sydney-is-an-authorised-worker/100302384>>.
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 - 40 Future legislative and policy reforms must recognise the disproportionate negative impact this pandemic and governments' responses to it have had on sections of our community. As Biddle, Gray and Lo conclude, '[a] strong argument can be made ... for continuing to track outcomes for Asian-Australians separately from the rest of the population, investigating in more depth what the causes of this divergence are': *ibid* 12.