



## Crimes Act Amendment (Incitement to Violence) Bill 2005

Katrina Gunn  
Law and Bills Digest Section

### Contents

Purpose. . . . .	2
Background. . . . .	2
Constitutional basis . . . . .	2
Legislating to prevent religious violence and religious hatred. . . . .	5
Telecommunications offences . . . . .	5
Anti-terrorism incitement provisions . . . . .	6
Victoria – Racial and Religious Tolerance Act 2001 . . . . .	7
United Kingdom – ‘religiously aggravated’ offences and the Racial and Religious Hatred Bill . . . . .	9
Issues - public and private communications . . . . .	9
A case example - the publication of caricatures of Islam's Prophet Muhammed. . . . .	10
Main Provisions . . . . .	11
Concluding Comments. . . . .	12
Endnotes. . . . .	13

## Crimes Act Amendment (Incitement to Violence) Bill 2005

**Date Introduced:** 5 December 2005

**House:** House of Representatives

**Portfolio:** Attorney-General's Department

**Commencement:** Royal Assent

### Purpose

The Crimes Act Amendment (Incitement to Violence) Bill 2005 (the Bill) is a private members Bill introduced by the shadow attorney-general, Ms Nicola Roxon MP.

The purpose is to criminalise threats or the incitement of violence against racial or religious groups. Criminal liability will attach only to specific forms of behaviour – threats to cause physical harm, threats to cause physical damage, and incitement to commit violence or damage property. The Bill proposes criminal penalties of up to two years imprisonment for both religious and racially based offences if a causal connection between the conduct and element of race, colour, religion, or national or ethnic origin is proved.

According to the [Explanatory Memorandum](#), the Bill is designed to address perceived shortcomings in the *Anti-Terrorism Act (No. 2) 2005*.

### Background

#### Constitutional basis

The Bill is drafted in a similar style to Part IIA of the *Racial Discrimination Act 1975* (the RD Act). However, unlike the RD Act, it imposes criminal liability on acts motivated by religious, as well as racial hatred.

The RD Act covers race, colour, and ethnic or national origin, and was enacted on the basis of the Commonwealth's race, immigration and external affairs powers. Specifically, Australia is a party to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

The Commonwealth's power to legislate on religious matters derives from its external affairs power. Australia is a party to the International Covenant on Civil and Political Rights (ICCPR) of which Article 18 enshrines the principle of freedom of religion. Other ICCPR articles also support the right to freedom of religion and belief:

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- advocacy of religious hatred which amounts to incitement to discrimination, hostility or violence must be prohibited by law (ICCPR article 20)
- everyone is entitled to equality before the law and equal protection of the law without discrimination on the ground of religion among other grounds (ICCPR article 26), and
- minority groups are entitled to profess and practise their own religion (ICCPR article 27).<sup>1</sup>

At present, the Human Rights and Equal Opportunity Commission (HREOC) administers a number of acts including, amongst others, the RD Act and the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act). The HREOC Act gives HREOC responsibility in relation to seven international instruments ratified by Australia including the ICCPR. Along with the ICCPR, other of those instruments form the basis for protecting religious freedom including:

- the International Labour Organisation Discrimination (Employment) Convention ILO 111
- the Convention on the Rights of the Child (articles 14.1, 14.2 and 18.1)
- the Declaration of the Rights of the Child, and
- the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

Although, with the exception of the Religion Declaration, all these treaties have been ratified by Australia and so bind Australia in international law, and though such ratification has been found by the High Court to give rise to a legitimate expectation that decision-makers do not violate the provisions of these treaties,<sup>2</sup> these treaties do not have the force of domestic law. The result is that, unlike the RD Act which provides that the International Convention on the Elimination of All Forms of Racial Discrimination is part of Australian domestic law, there is no Commonwealth law of which the main purpose is to prevent religious discrimination and ensure religious freedom.

In its [\*Human Rights Brief No. 3: Freedom of religion and belief\*](#), HREOC explains its powers to act on the basis of these instruments under the HREOC Act:

The ICCPR, the Religion Declaration, CROC and ILO 111 are all either scheduled or declared instruments under the Human Rights and Equal Opportunity Commission Act. This gives HREOC power to investigate complaints that these instruments have been violated by or on behalf of the Commonwealth or a Commonwealth agency but only in the exercise of a discretion or an abuse of power. Where legislation requires rights protected by these instruments to be set aside, HREOC can only advise the Parliament that the legislation should be amended. HREOC can also advise Parliament on action that should be taken to promote compliance with these instruments. Human rights complaints which cannot be resolved by conciliation do not proceed to a hearing and determination but may, after appropriate inquiry, be

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

made the subject of a report to the Attorney-General for tabling in Parliament. HREOC has no authority over the courts.

Beyond this, HREOC states that the RD Act provides some scope, albeit limited, to prevent discrimination on the basis of religion:

The RDA provides some limited protection against discrimination on the basis of religion. If a religious group can also be classified as an 'ethnic' group, the RDA may cover direct and indirect discrimination and vilification under the racial hatred provisions of the Act. Even if a religious group cannot be classified in that way, the RDA arguably covers discrimination on the basis of religion in certain circumstances such as indirect race discrimination.<sup>3</sup>

HREOC also notes the difficulties involved in achieving a balance between freedom of expression and freedom of religion:

There is an inherent complexity in reconciling the right to freedom of expression (ICCPR article 19) with the right to freedom of religion and belief. However, freedom of expression is not an absolute right. It carries with it special duties and responsibilities and may be subject to restrictions necessary to ensure respect for the rights and reputations of others and to protect national security, public order, public health and/or public morals. More generally, ICCPR article 5 limits the exercise of all Covenant rights and freedoms by reference to the rights and freedoms of others. Article 20 makes clear that freedom of expression cannot justify incitement to religious hatred.<sup>4</sup>

As there is no act to ensure religious freedom, to fully effect Article 18 of the ICCPR, HREOC advocates the enactment of a federal Religious Freedom Act so as to prevent discrimination and vilification on the ground of religion.<sup>5</sup>

It should be noted that Chapter V, section 116 of the Constitution specifically prohibits the Commonwealth from legislating in respect of religion where, amongst other matters, it would prohibit the free exercise of any religion. This would not limit the Commonwealth's power to legislate with respect to prohibiting violence motivated by religious hatred. Indeed, the power has been interpreted to mean that religious belief cannot be used to undermine society, as the protection provided by section 116 has been described by the High Court as:

not absolute. It is subject to powers and restrictions of government essential to the preservation of the community. Freedom of religion may not be invoked to cloak and dissemble subversive opinions or practices and operations dangerous to the common weal.<sup>6</sup>

At the state level, religious discrimination has been made unlawful in Victoria, Queensland, Western Australia, the Northern Territory, and the ACT. Religious freedom is protected in the Tasmanian Constitution but it has never been judicially considered.<sup>7</sup> The New South Wales *Anti-Discrimination Act 1977* does not make religious discrimination

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

unlawful but, like the RD Act (Cth), the definition of ‘race’ is broadly defined so as to include ethno-religious background and therefore some acts of religious discrimination come within its ambit. Victoria has gone further in legislating to prevent religious hatred. The Victorian *Racial and Religious Tolerance Act 2001* is discussed later.

## Legislating to prevent religious violence and religious hatred

### Telecommunications offences

The Commonwealth has used other of its constitutional powers to legislate to prevent acts of hatred or violence which may have a religious or racial basis, namely the telecommunications power (section 51(v) of the Constitution). In the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2005, the Government introduced new provisions into Division 474 of the *Criminal Code Act 1995*. Under the Criminal Code Act, it is now an offence to use a telecommunications network for ‘a serious offence’ (section 474.14), or to use a carriage service to make a threat to kill or cause serious harm even if the person being threatened did not fear that the threat would be carried out (section 474.15). These offences are punishable by a maximum penalty of 10 years and 7 years imprisonment respectively.

It is also a crime to use a telecommunications/carriage service in a way ‘that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive’ (section 474.17). This provision, punishable with a maximum of 3 years imprisonment, is one of the charges brought against some of those involved in the Cronulla riot.<sup>8</sup> In determining what material is offensive, the matters to be taken into account include ‘the standards of morality, decency and propriety generally accepted by reasonable adults’ (section 473.4). The Bills Digest No 13 2004-2005, available at <http://www.aph.gov.au/library/pubs/bd/2004-05/05bd013.pdf>, provides commentary on these new provisions in the *Criminal Code Act 1995*. Two points raised in that Bill Digest are relevant to this discussion, namely whether:

- it is appropriate to deal with racial and religious vilification in a general provision dealing with content that may be ‘morally’ offensive, and
- by not limiting the offence to ‘any form of communication to the public’ and so including private communications, the provisions operate to restrict freedom of expression and invade privacy.

In contrast, this Bill is for the specific purpose of dealing with racial and religious hatred and would not apply to acts done in private. However, what acts are private may not always be obvious. This issue is discussed later in this Bill Digest.

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

### Anti-terrorism incitement provisions

Currently, under federal law, section 11.4 of the *Criminal Code Act 1995* makes incitement an offence where a person urges the commission of an offence against the law of the Commonwealth and intends that the offence incited be committed. Therefore, it is necessary to prove a particular intention and the act of incitement alone is not an offence unless it relates to an offence.

A questionable aspect of the new sedition law on incitement (section 80.2 of the Criminal Code) is that it removes the requirement to prove that the person urging violence has any particular intention, such as exists under section 11.4 and which existed under the previous sedition laws (previous ss 24A to 24F of the *Crimes Act 1914*). Concerns were raised that this could interfere with freedom of speech.<sup>9</sup> For further discussion see [Bill Digest Anti-Terrorism Bill \(No 2\) 2005](#), No. 64 of 2005-2006.<sup>10</sup>

One of the limitations of section 80.2 is that it relates only to incitement which threatens the peace, order or good government of the Commonwealth. Dr Ben Saul of the University of New South Wales acknowledges that those involved in the Cronulla riot could be prosecuted under section 80.2 because of ‘the scale of the violence, the involvement of national racist organisations, and the damage to Australia’s international reputation’.<sup>11</sup> However, in supporting the Bill, he maintains that it is more appropriate that incitement to racial or religious violence should be prohibited under an anti-vilification law rather than controlled or prevented under sedition or anti-terrorism laws.

While hate speech is repugnant, few Australians think of such conduct as seditious, and even fewer would think that it should be dealt with under terrorism laws.<sup>12</sup>

Linking the prevention of religious hatred with anti-terrorism laws runs the risk of associating particular religious or ethnic groups with terrorism.<sup>13</sup> Indeed, a recent survey amongst Victorian children revealed that more than half viewed Muslims as terrorists.<sup>14</sup>

This leads to a key issue: whether it is appropriate to deal with religious and racial hatred by means of the criminal law. In a paper title ‘Are we crossing the Line? Forum on National Security Laws and Human Rights’, Dr Penelope Matthew expressed great concern at the dramatic shift in how government is choosing to address violence.

The new sedition offence of “urging violence within the community” deserves greater thought and debate. In particular, the quick move in the context of terrorism to criminal law, and away from the framework of the Human Rights and Equal Opportunity Commission with its emphasis on conciliation and education ought to be debated properly, especially since the defences relating to the sedition offences are narrower than those available under the existing racial vilification provisions.<sup>15</sup>

It may be less likely that a prosecution would be sought under the sedition laws in a situation like that in Cronulla where arguably it was a matter more appropriately dealt with at the State and local levels.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Dr Ben Saul also points out additional disadvantages of section 80.2 of the Criminal Code: it is directed at incitements which urge *other* groups to violence and does not include incitements aimed at provoking individuals or groups not mentioned in the new provisions nor does it criminalise *actual* group violence.<sup>16</sup> This Bill would address the first of these problems but not the latter.

Importantly, under the Bill there would be no need to prove that incitement urged the commission of an offence against Commonwealth law (as with section 11.4 of the Criminal Code) or that it threatened the Commonwealth (as with section 80.2 of the Criminal Code).

Moreover, the Bill maintains the requirement to prove intention in the form of intention to incite violence or damage. This may limit concerns that these provisions might curtail freedom of speech as, for example, a critical analysis of a religion which did not intend to incite violence or damage would not come within the ambit of the proposed provisions.

### Victoria – Racial and Religious Tolerance Act 2001

The difficulties involved in legislating to prevent racial hatred have been given prominence by developments in Victoria. In 2001, Victoria introduced the *Racial and Religious Tolerance Act 2001* (RRT Act (Vic)) which is a civil law aimed at preventing religious intolerance. The operation of this Act, although it does not criminalise acts of religious hatred, does provide insights into the difficulties involved in defining the limits of acceptable behaviour so as to determine what constitutes vilification. The RRT Act (Vic) is comparable to the federal RD Act with the exception that vilification on the grounds of religion is also a basis for complaint.

The RRT Act (Vic) makes unlawful racial or religious vilification if:

- race or religion is a substantial ground for the vilification
- the act is not intended to be private and the parties to such conduct did not reasonably expect it to be heard or seen by someone else, and
- it does not come within any of the exemptions, such as a ‘genuine’ artistic purpose engaged in reasonably and in good faith (see sections 7 to 12).

Offences of serious racial or religious vilification can only proceed with the written consent of the Director of Public Prosecutions (see sections 24 and 25).

In the most notable case to date, *Islamic Council of Victoria v Catch the Fire Ministries Inc* (Final) [2004] VCAT 2510 (22 December 2004),<sup>17</sup> the Victorian Civil and Administration Tribunal held that two pastors from the Catch the Fire Ministries had breached section 8 of the RRT Act of which subsection (1) provides:

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

A person must not, on the ground of religious belief or activity of another person or class of persons engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

Judge Higgins held that the two pastors had vilified Muslims in a seminar, newsletter and article. The acts of vilification included comments that the Qur'an promotes violence, killing and looting, and do

mestic violence.

He ordered that the pastors must make public apologies on their website, in their newsletter and in *The Age* and the *Herald Sun*, and must not repeat the comments anywhere in Australia.<sup>18</sup> He also commented:

...the legislation which was introduced by parliament is comparatively new. Furthermore, it is legislation which is not easy to interpret and apply. The circumstances where a person desires to, and does express an opinion upon a subject matter constitutes his prima facie right to freedom of expression. The difficulty with regard to the legislation is that it is not an easy task to determine whether an individual has gone too far, and has breached the relevant provisions of the Act...

Furthermore, there is no case law in this State which assists a citizen to determine when "the line has been crossed".<sup>19</sup>

The pastors have been granted leave to appeal to the Supreme Court of Victoria.<sup>20</sup>

Following the decision in *Islamic Council of Victoria v Catch the Fire Ministries Inc*, many church leaders expressed concern to the Victorian government that the legislation was not achieving its aims; some leaders opposed the legislation, others have supported it but suggested that amendments needed to be made, and those defending the law 'stress that the act deals with public behaviour not beliefs, nor what is said in private'.<sup>21</sup>

The *Explanatory Memorandum* notes that there are two key differences between the Bill and the Victorian RRT Act:

this Bill will only prohibit threats of and incitements to violence on religious grounds, not a broader prohibition on inciting hatred. This means that there is no doubt that mere criticism of a religion will not be caught by this Bill, and

this Bill only provides criminal offences not civil remedies. This means that it will provide no opportunity for religious groups to sue each other in civil courts or tribunals. Only the police and prosecutors will bring prosecutions.

This Bill focuses on criminalising acts of religious or racial hatred that result in physical injury or property damage or any act of incitement which is 'reasonably likely' to lead to such acts. It does not criminalise 'mere criticism'. As such, it is narrower in its focus than the Victorian legislation and arguably, will not be open to the criticisms that have followed

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



the introduction of the Victorian legislation. However, the Victorian experience is useful in revealing the difficulties drawing the boundary between criticism and vilification, a term which, in the Victorian Act, includes ‘conduct that incites hatred’ whether or not that hatred manifests itself in acts of violence.

### United Kingdom – ‘religiously aggravated’ offences and the Racial and Religious Hatred Bill

In 2001, the United Kingdom created new religiously aggravated offences relating to wounding, assault, damage, harassment and threatening or abusive behaviour, all contained in the *Crime and Disorder Act 1998* as amended by the *Crime and Security Act 2001*. These measures require that the “basic” offence be proved eg. wounding, that the offender demonstrated hostility to the victim based on the victim’s race or religion, and that the offence was motivated wholly or partly by that racial or religious hostility. If proven, an increased penalty is imposed. The measures did not address incitement.

However, a Bill recently passed by the UK Parliament does address incitement. It was the latest of three attempts to criminalise religious hatred in the United Kingdom. All met with considerable resistance. The first two attempts were unsuccessful. The latest, the Racial and Religious Hatred Bill, was only passed after significant amendment.<sup>22</sup> The Bill sought to extend the racial hatred offences in Part III of the *Public Order Act 1986*. The Explanatory Note explains that the purpose was to extend the protection afforded mono-ethnic religious groups such as Jews and Sikhs preventing racial incitement to all faith communities that do not share a common ethnic ground.

In its original form, the scope of the Bill was very broad. The Explanatory Note stated:

The Bill also clarifies that for material to be likely to stir up racial or religious hatred it need only be shown that it was likely to be seen or heard by a person in whom it is likely to stir up racial or religious hatred.<sup>23</sup>

Opponents argued that the broad drafting would have allowed the prosecution of persons who had no intention of inciting hatred. The Bill was heavily criticised on the basis that it would curtail freedom of speech, in particular it would stifle criticism and humour.<sup>24</sup>

The UK Government suffered a significant defeat when the House of Lords forced amendments that mean only “threatening words” will be banned, not those which are only abusive or insulting and intention to stir up hatred must be proved; ‘proselytising, discussion, criticism, insult, abuse and ridicule of religion, belief or religious practice would not be an offence.’<sup>25</sup>

### Issues - public and private communications

For the purposes of new sections 62 and 63, only acts of incitement that are done ‘otherwise than in private’ (section 62(1)) will attract liability. Such acts are those done in

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

a public place or within sight or hearing of people in a public place or words, sounds images or writing to be communicated to the public. 'Communicated to the public' will include communication through words, sounds, images or writing available to be accessed on the internet. A 'public place' includes any place to which the public have an express or implied right of access.

Thus a communication accessible on a public website would clearly come within the ambit of the incitement offences. However, a personal email may not although it could be argued that a personal email read in a public place i.e. some workplaces, might be within the scope of sections 62 and 63. More pointedly, in light of the recent race riot in Cronulla and the use of text messages, ostensible private communications, e.g. from one friend to another friend, may fall within the ambit of new sections 62 and 63. It may be a question of whether the sender intended the message to be spread to persons unknown to him or her, or alternatively whether the message was read in a public place and made accessible to others and not just the intended recipient.

The view of the Federal Magistrates Court in *McLeod v Power* [2003] FMCA 2 (14 January 2003) in its application of the equivalent sections in the RD Act provides some guidance whilst looking to Parliament to provide a clear framework for implementation:

A private conversation does not become a public one merely because it takes place in a public street or in a place to which members of the public have a right to admission or access. Again, whether or not an act occurs "otherwise than in private" depends on the context of the situation and must be interpreted from the overall intention of the legislature in enacting Part IIA of the RDA.<sup>26</sup>

As previously noted, the Criminal Code Act provides for prosecution of acts of incitement if a telecommunications/carriage service is used and makes no distinction between private and public communications. Therefore, a private SMS message that incited religious violence could possibly be prosecuted under the Criminal Code telecommunication provisions but, depending on the circumstances, might not be covered by the provisions in this Bill.

### A case example - the publication of caricatures of Islam's Prophet Muhammed

The recent publication of these cartoons in a number of countries, including publication of some of the cartoons by Queensland's Courier Mail, has caused offence to many Muslims. How might publication be treated under the various laws discussed above? The following provides a brief overview of possible courses of action, and limitations.

The telecommunciations offences would be relevant where the material were communicated via a telecommunications/carriage service regardless of whether that communication was public or private, for example, on a newspaper's website or in a private email. For example, under section 474.17 of the Criminal Code, the person could

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

be found guilty of using a carriage service to menace, harass or cause offence. What the person intended would not be relevant; the test is whether ‘reasonable persons’ regarded the material as menacing, harassing or offensive.

The general incitement offence (section 11.4 of the Criminal Code) would not be relevant because it is strongly arguable that there was no intention to urge that an offence be committed against the Commonwealth. Similarly, the incitement provision in the anti-terrorism laws (section 80.2 of the Criminal Code) would only be relevant if the cartoons threatened the peace, order and good government of the Commonwealth.

Under the Victorian RRT Act, those who published the cartoon could claim the conduct fell within one of the section 11 defences, such as that the publication was for a genuine artistic purpose or in the public interest (subsection (b)(i)). Alternatively, they could claim that the cartoons were published as ‘a fair and accurate report’ of the events and matters of public interest happening in other countries (subsection (c)). These are strong defences but arguably the cartoons are so inflammatory that based on the *Catch the Fire* case an action under the RRT Act might be pursued. If successful, civil remedies would apply.

The United Kingdom *Racial and Religious Hatred Act 2006* would apply but it would need to be proved that hatred was likely to be stirred up (not just that it was possible) and that this was the intention. However, the amendments forced by the House of Lords make it very unlikely that publication would constitute a criminal offence because the cartoons would need to be ‘threatening’ and clearly intended to incite hatred.

Under this Bill, it would be even more difficult to prove intention than under the UK Bill because under this Bill, there must be an intention to incite violence or damage that was ‘reasonably likely’ to incite violence or damage. It might be difficult to prove that the purpose of the publication in newspapers in Australia was intended to do this.

## Main Provisions

**Schedule 1 of Item 3** inserts a **new Part IVA** into the *Crimes Act 1914*. The new Part covers certain offences based on racial and religious hatred.

**New section 57** stipulates that an act which is done:

- (a) for two or more of the following reasons - race, colour, religion, or national or ethnic origin; and
- (b) that reason is a substantial reason, even if not the dominant reason, for doing the act

will be taken to be done because of the person’s race, colour, religion or national or ethnic origin.

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

Those acts include threats to cause physical harm because of race, colour, or national or ethnic origin (**new section 58**), or religion (**new section 59**), and can result in a maximum of two years imprisonment. Threats to property because of the same reasons are also prohibited and can result in a maximum of one year imprisonment (**new sections 60 and 61**).

Incitement to commit violence or damage property on the basis of race, colour, or national or ethnic origin (**new section 62**) or religion (**new section 63**) are acts also punishable by up to one year imprisonment. It must be proven that such an act is reasonably likely to incite violence or property damage. If an act is done in private, these sections will not apply. An act is taken not to be done in private if it:

- causes words, sounds or images or writing to be communicated to the public
- is done in a public place, or
- is done in the sight or hearing of people who are in a public place.

The sections specifically provide that the term ‘communicated to the public’ includes but is not limited to information accessible on the internet.

## Concluding Comments

In addressing religious hatred, the Bill does confront a form of divisiveness that has not previously been directly addressed by Parliament. The Bill would directly implement the relevant ICCPR articles into Australian law. The Bill would also properly distinguish between anti-terrorism measures and the prevention of violence motivated by religious hatred.

At a practical level, in attaching criminal liability to acts of racial and religious hatred, it would provide greater powers for law enforcement authorities to act on threats and incitement before violence occurred where racial or religious hatred was a substantial cause. Moreover, it recognises the substantial reason for the crime without having to seek recourse to other legislative options which do not and which impose other requirements. For example, incitement must occur via a carriage service (telecommunication provisions), or incitement must lead to another Commonwealth offence (general incitement provision), or incitement must pose a threat to the Commonwealth (sedition provisions). Alternatively, the RD Act is not specifically directed at preventing religious hatred and provides for civil remedies only.

However, the Victorian experience and the opposition to the United Kingdom Bill strongly suggest that there needs to be widespread community consultation in order to reach an appropriate balance or consensus. The anger over the publication of cartoons offensive to many Muslims is a strong indication of how such issues can become extremely divisive. Though this Bill is drafted more narrowly than either of those Acts, the purpose of the

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

incitement provisions need to be made very clear in order to alleviate any concerns that they may affect freedom of speech.

And if the Bill does proceed, to be effective, there may need to be firmer guidance as to what constitutes private and public communications. Most problematic is maintaining criminal liability based on evidence of private communications under the telecommunication provisions in the Criminal Code Act when under this Bill, the same would appear not to be possible. It is difficult to see how these different approaches could be reconciled.

## Endnotes

---

- 1 HREOC's *Human Rights Brief No. 3* (last updated October 1999) available at [http://www.hreoc.gov.au/human\\_rights/briefs/brief\\_3.html#1](http://www.hreoc.gov.au/human_rights/briefs/brief_3.html#1) (accessed 28 February 2006).
- 2 *Ah Hin Teoh* (1995) 128 ALR 353.
- 3 HREOC's *Human Rights Brief No. 3*, op cit.
- 4 *ibid.*
- 5 See Human Rights and Equal Opportunity Commission, Article 18 – Freedom of Religion and Belief (1998), [http://www.hreoc.gov.au/pdf/human\\_rights/religion/article\\_18\\_religious\\_freedom.pdf](http://www.hreoc.gov.au/pdf/human_rights/religion/article_18_religious_freedom.pdf)
- 6 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 per Rich J at 149-150; for discussion see Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (2<sup>nd</sup> edition, Federation Press, 1998) p.1006.
- 7 See fn 42, HREOC, *Human Rights Brief No. 4 Lawful limits on fundamental freedoms*, available at [http://www.hreoc.gov.au/human\\_rights/briefs/brief\\_4.html#hr4.42](http://www.hreoc.gov.au/human_rights/briefs/brief_4.html#hr4.42) (accessed on 28 February 2006).
- 8 For press reports, see Kelly Mills, Police close in on hate text culprits, *Australian*, 20 December 2005, [http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressclp&Criteria=CITATION\\_ID:QIBI6%3B](http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressclp&Criteria=CITATION_ID:QIBI6%3B), *Australian IT* (AAP), Charges over riot SMS, 22 December 2005, <http://australianit.news.com.au/articles/0,7204,17639589%5E26199%5E%5Enbv%5E15306-15319,00.html>, and *Sydney Morning Herald* (AAP), Hate text suspect faces court, 27 January 2005, <http://www.smh.com.au/news/national/hate-text-suspect-faces-court/2006/01/27/1138319425239.html>
- 9 See Dr Ben Saul, Briefing on Sedition Offences in the Anti-Terrorism Bill 2005, Gilbert-Tobin Centre of Public Law, University of New South Wales, 1 November 2005, p.2. .
- 10 [Bill Digest Anti-Terrorism Bill \(No 2\) 2005](http://www.aph.gov.au/library/pubs/bd/2005-06/06bd064.pdf), No. 64 of 2005-2006 available at <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd064.pdf>.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- 11 Dr Ben Saul, It's essential to clean up this mess, *Sydney Morning Herald*, 14 February 2005, p.17,  
[http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressclp&Criteria=CITATION\\_ID:8N9I6%3B](http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressclp&Criteria=CITATION_ID:8N9I6%3B)
- 12 *ibid.* For detailed discussion, see Dr Ben Saul, Speaking of Terror: Criminalising Incitement to Violence, available at  
[http://www.gtcentre.unsw.edu.au/Publications/docs/pubs/seditionLegalBriefing\\_Nov2005.pdf](http://www.gtcentre.unsw.edu.au/Publications/docs/pubs/seditionLegalBriefing_Nov2005.pdf)  
(accessed 17 February 2006).
- 13 Dr Ben Saul, Speaking of Terror: Criminalising Incitement to Violence, *op cit.*, p.6.
- 14 Chee Chee Leung, Schoolchildren case judgement on Muslims, *Sydney Morning Herald*, p. 3, available at [http://parlinfoweb.parl.net/parlinfo/Repository1/Media/npaper\\_3/LSNI60.pdf](http://parlinfoweb.parl.net/parlinfo/Repository1/Media/npaper_3/LSNI60.pdf)
- 15 Paper delivered at the Anti-Terrorism Bill 2005 – Forum at ACT legislature 31 October 2005 available at [http://www.hreoc.gov.au/speeches/other/20051031\\_national\\_security\\_forum.html](http://www.hreoc.gov.au/speeches/other/20051031_national_security_forum.html)  
(accessed 17 February 2006).
- 16 Dr Ben Saul, Briefing on Seditious Offences in the Anti-Terrorism Bill 2005, Gilbert-Tobin Centre of Public Law, University of New South Wales, 1 November 2005, p.2.
- 17 The case is available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/vic/VCAT/2004/2510.html?query=^catch%20the%20fire>, and the decision on remedy, *Islamic Council of Victoria v Catch the Fire Ministries Inc* (Anti-Discrimination – Remedy) [2005] VCAT 1159 (22 June 2005) at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/vic/VCAT/2005/1159.html?query=^catch%20the%20fire>
- 18 See decision on remedy, *Islamic Council of Victoria v Catch the Fire Ministries Inc* (Anti-Discrimination – Remedy) [2005] VCAT 1159 (22 June 2005), *ibid.*
- 19 *ibid.*, para. 5 per Judge Higgins.
- 20 Barney Zwartz, Pastors can appeal over vilification claims, *Age*, 20 August 2005, p.3.
- 21 Helen Szoke, Why vilification is such a blight on a fair and decent society, *Age*, 23 June 2005,  
[http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressclp&Criteria=CITATION\\_ID:HUFG6%3B](http://parlinfoweb.aph.gov.au/piweb/TranslateWIPILink.aspx?Folder=pressclp&Criteria=CITATION_ID:HUFG6%3B); see also Barney Zwartz, Hatred law needs overhaul: churches, *Age*, 31 March 2005, p.8.
- 22 A copy of the UK Bill and the Explanatory Notes are available at <http://www.publications.parliament.uk/pa/cm200506/cmbills/011/06011.i-i.html> and <http://www.publications.parliament.uk/pa/ld200506/ldbills/015/en/06015x--.htm> respectively.
- 23 Explanatory Note, para 4, at <http://www.publications.parliament.uk/pa/ld200506/ldbills/015/en/06015x--.htm>.
- 24 For further commentary, see Dominic Casciani, Q & A: Religious Hatred Law, *BBC News*, 9 June 2005, at [http://news.bbc.co.uk/2/hi/uk\\_news/3873323.stm](http://news.bbc.co.uk/2/hi/uk_news/3873323.stm) (accessed on 20 January 2005), New effort to ban religious hate, *BBC News*, 11 June 2005, at [http://news.bbc.co.uk/1/hi/uk\\_politics/4075442.stm](http://news.bbc.co.uk/1/hi/uk_politics/4075442.stm) (accessed on 20 January 2005), and Will

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- Hutton, A gagging order too far, *Observer* (Guardian Unlimited website) <http://observer.guardian.co.uk/comment/story/0,6903,1509735,00.html> (accessed on 2 February 2005); and The Pluralism Project website at <http://www.pluralism.org/news/intl/index.php?xref=UK+Religious+Hatred+Bill&sort=DESC> (accessed 14 February 2005).
- 25 Ministers lose religious bid, *BBC News*, 1 February 2006, available at [http://news.bbc.co.uk/1/hi/uk\\_politics/4664398.stm](http://news.bbc.co.uk/1/hi/uk_politics/4664398.stm) (accessed 14 February 2006)
- 26 *McLeod v Power* [2003] FMCA 2 (14 January 2003) per Brown FM at para. 51

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

---

© Copyright Commonwealth of Australia 2006

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

This brief has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Information and Research Service, nor do they constitute professional legal opinion.

---

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2430.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*