

Background paper on
Australia's response to articles 19 and 20 of the ICCPR

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Australia's ratification of the ICCPR and its effect on domestic law

The ICCPR came into force for Australia in 1980.² Multilateral human rights treaties are not self-executing in Australia, which means implementation requires the passage of domestic legislation at a national level. Despite the passage of some federal legislation implementing some elements of the ICCPR (including the *Human Rights (Sexual Conduct) Act 1994* (Cth); *Racial Hatred Act 1995* (Cth); *Australian Law Reform Commission Act 1996* (Cth); *Human Rights Commission Act 1981* (Cth)), the ICCPR has not been implemented comprehensively in Australian domestic law. Australia thus lacks a comprehensive national statute enshrining many of the rights encoded in the ICCPR.³ This fact was noted, and criticised, by the Human Rights Committee in its concluding observations to Australia's most recent Periodic Report.⁴ Australia also lacks a constitutional bill of rights, deferring instead to the mechanisms of responsible government and parliamentary oversight to secure human rights protection.

When Australia ratified the ICCPR in 1980, it attached a reservation to article 20. This reservation stated that,

Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.⁵

When Australia had earlier ratified the ICERD in 1974,⁶ it also placed a reservation on article 4(a). However, then it had presented a slightly more optimistic view of the likelihood of implementing legislation prohibiting racial hatred stating that,

The Government of Australia ... declares 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. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the

2 The ICCPR entered into force for Australia on 13/11/1980, except article 41, which came into force for Australia on 28 January 1993.

3 Many States and Territories within Australia's federal system of government have implemented anti-discrimination laws, anti-vilification laws, and in some cases charters of rights. I will focus here on the national government, since that is relevant to the United Nations' consideration of the adequacy of Australia's response to its obligations under the ICCPR.

4 Human Rights Committee, Consideration of Reports Submitted by States Parties Under article 40 of the Covenant, Concluding Observations of the Human Rights Committee, 7 May 2009, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/422/14/PDF/G0942214.pdf?OpenElement>, accessed 31 May 2011.

5 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec, accessed 31 May 2011.

6 The CERD entered into force for Australia on 30/10/1975, except article 14, which came into force for Australia on 4 December 1982.

Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a).⁷

However moves to legislate in a manner that would ensure compliance with either article 20 of the ICCPR or article 4(a) of the ICERD, and thus enable Australia to remove either of these reservations, have been unsuccessful. Despite several attempts during the 1980s and 1990s to implement legislation that would respond to the relevant obligations, the federal *Racial Hatred Act* (Cth) was only passed in 1995. The operation of this legislation is discussed in further detail in a separate section below. As this legislation introduced a civil mechanism, and did not include criminal sanctions, it cannot be described as having fulfilled Australia's obligations under article 20 of the ICCPR.

Therefore, and as was noted in Australia's Fifth Report under the ICCPR submitted in July 2007, Australia's reservation to article 20 is ongoing.⁸ During discussions with the Human Rights Committee on this report, the Australian government stated that it had 'no intention at the current time to withdraw Australia's reservations to article ... 20'.⁹ In its concluding observations to this report, the Human Rights Committee expressed its 'regret' at the lack of hate speech prohibitions that would fulfil article 20 of the Covenant, and urged the federal government to pass such a law.¹⁰

Freedom of speech in Australian law

Freedom of speech is not protected explicitly either in the Australian constitution, or in federal statutory law. Instead, Australia has relied on a common law tradition to protect freedom of speech, augmented since 1992 by a doctrine of an implied constitutional freedom of political communication. This doctrine states that Australia's constitutional arrangement implies protection of speech on political matters, but still permits restrictions to occur when those restrictions are 'reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'.¹¹ The extent of protection of freedom of speech within this framework has been described as 'partial and unsatisfactory'¹² and 'delicate'.¹³

7 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec, accessed 31 May 2011.

8 Australia's Fifth Report under the ICCPR, *Common Core Document*, 25 July 2007, p. 5, available at: <http://www.dfat.gov.au/hr/reports/icescr-iccpr/index.html>, accessed 30 May 2011.

9 Human Rights Committee, Replies to the List of Issues (CCPR/C/AUS/Q/5) to be taken up in connection with the consideration of the Fifth Periodic Report of the Government of Australia, 5 February 2009, at [10], <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/404/90/PDF/G0940490.pdf?OpenElement>, accessed 31 May 2011.

10 Human Rights Committee, Consideration of Reports Submitted by States Parties Under article 40 of the Covenant, Concluding Observations of the Human Rights Committee, 7 May 2009, at [26], <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/422/14/PDF/G0942214.pdf?OpenElement>, accessed 31 May 2011. The concluding observations also note that the HRC felt that the report by the Australian government did 'not meet the requirements of article 40 of the Covenant regarding the provision of sufficient and adequate information' (at [2]).

11 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, at 567.

Emerging charters of rights in some sub-national jurisdictions protect freedom of speech explicitly, while permitting reasonable and lawful limits.¹⁴ The provisions in these charters mirror those in article 19 of the ICCPR.

The new criminal ‘urging violence’ offence of 2010

In 2010 a new federal criminal offence was enacted that prohibits the urging of hatred on specified grounds that is intended to produce violence. The *National Security Legislation Amendment Act 2010* (Cth) introduced a criminal offence of ‘urging violence’ against groups, and against members of groups, in the community.

The 2010 legislation had its origins in an offence introduced in 2005 in the *Anti-Terrorism Act (No 2) 2005* (Cth).¹⁵ The 2005 legislation had introduced an offence of ‘urging violence within the community’ under the rubric of ‘sedition’.¹⁶ This provision for the first time in Australian federal law introduced a criminal offence that prohibited the urging of violence against particular groups distinguished by characteristics common to international human rights law. However, the offence was confusingly constructed around the idea of sedition, as a corollary to a threat to the government.¹⁷ The relevant section stated that,

A person commits an offence if:

- (a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and
- (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

Following considerable criticism, in 2010 the legislation was amended. The term ‘sedition’ was repealed, and four new criminal provisions were enacted. The first and second concerned urging violence against groups, and the third and fourth concerned urging violence against members of groups. The first and second provisions were differentiated according to whether or not the violence urged would threaten the peace, order and good government of the Commonwealth, as were the third and fourth. All four provisions remain in Chapter 5 of the *Criminal Code*, which is devoted to the ‘security of the Commonwealth’. I will focus here on the second and fourth provisions, as they are the ones not directly linked to threatening the peace, order and good government of the Commonwealth.

12 Katharine Gelber, ‘Pedestrian Malls, Local Government and Free Speech Policy’, *Policy and Society* 22(2), 2003: 44.

13 Michael Chesterman, *Freedom of Speech in Australian Law*, Aldershot, Ashgate, 2000.

14 See *Human Rights Act 2004* (ACT), ss16, 28; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 15.

15 Schedule 7.

16 *Criminal Code*, s80.2(5).

17 See Katharine Gelber, ‘The False Analogy Between Vilification and Sedition’, *Melbourne University Law Review* 33(1), 2009: 270-291. This article details the considerable opposition to the legislation prior to its enactment, and the undertaking of a review into the legislation after it was enacted.

The second¹⁸ provision now states,

80.2A Urging violence against groups

...

- (2) A person (the first person) commits an offence if:
- (a) the first person intentionally urges another person, or a group, to use force or violence against a group (the targeted group); and
 - (b) the first person does so intending that force or violence will occur; and
 - (c) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion.

Penalty: Imprisonment for 5 years.

The fourth¹⁹ provision now states,

80.2B Urging violence against members of groups

...

- (2) A person (the first person) commits an offence if:
- (a) the first person intentionally urges another person, or a group, to use force or violence against a person (the targeted person); and
 - (b) the first person does so intending that force or violence will occur; and
 - (c) the first person does so because of his or her belief that the targeted person is a member of a group (the targeted group); and
 - (d) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion.

Penalty: Imprisonment for 5 years.

To date, no prosecution under these provisions has yet been invoked. There is thus no corresponding judicial interpretation of these provisions to present to these proceedings.

These are the only criminal provisions in Australian federal law that relate to racial hatred. These provisions do not cover the field suggested by article 20. They criminalise only advocacy (although the term 'urging' is used instead) that urges violence, and not advocacy that incites discrimination, or advocacy that incites hostility.

There are also a number of inconsistencies between the criminal urging violence offence and the requirements of article 20. I will turn to them here.

Identified groups

In the 2010 federal criminal legislation, the identified groups on the basis of which a criminal offence may occur include race, religion, nationality, national or ethnic origin or political opinion. This stands in contrast to article 20 of the ICCPR, which specifies only national, racial or religious hatred. The additional category of 'political opinion' in the Australian federal legislation arguably reaches beyond the intent and spirit of the relevant provision in the ICCPR.

The inclusion of political opinion in the Australian legislation can be explained by its origins in the sedition legislation of 2005. Further, the 2010 legislation retained the offences that connect urging violence within the community with threatening the government. Thus, the confusion created in 2005 between an offence that captures the spirit of article 20 and by contrast an offence directed against governmental authority, remains in the legislation as amended in 2010.

18 *Criminal Code*, s80.2A(2).

19 *Criminal Code*, s80.2B(2).

Intent

The newly enacted federal law includes an intent requirement. This arguably enacts a higher threshold than that intended by article 20, which requires State Parties to prohibit advocacy of national, racial or religious hatred *that constitutes* incitement to discrimination, hostility or violence.

Also in contrast to the newly enacted federal criminal law on urging violence, the civil racial hatred legislation enacted in 1995 (discussed below), which creates a civil remedy for acts that are ‘reasonably likely’ to offend, insult, humiliate or intimidate, does not require intent.²⁰ Rather, the application of that provision relies on whether an act is ‘reasonably likely’ to do those things, and this is evaluated by considering the response of a ‘reasonable person’. It is not necessary to demonstrate that a person *was* offended, insulted, humiliated or intimidated, only that it was reasonably likely that the act would do so.

Express laws prohibiting racial hatred

Federal racial hatred law (civil)

The *Racial Hatred Act 1995* (Cth) introduced a provision into the *Racial Discrimination Act 1975* (Cth), which prohibits an act that is ‘reasonably likely’ to ‘offend, insult, humiliate or intimidate’ a person or group, where the act is a public act that is done on the ground of the race, colour, or national or ethnic origin of the person.²¹ The legislation contains exemptions for acts done in good faith, exemptions which are designed to ensure a balance between protecting freedom of speech and responding to racial hatred.

The law provides for a civil complaints mechanism to the Australian Human Rights Commission. The lower threshold for utilisation of the civil provisions means they are quite frequently utilised. Between 1996 and 2010 approximately 1232 complaints were received by the Australian Human Rights Commission.²² The Commission investigates and assesses complaints, and has the power to conciliate a remedy such as an apology or agreement to desist. If the conciliation process is unsuccessful, complainants may take their cases to the Federal Magistrates Court or the Federal Court for judicial decision.

Religion is not included as a ground in the federal civil legislation. When the legislation was introduced, the Explanatory Memorandum to the Bill specified that it was intended to be inclusive of groups such as Jews, Sikhs and Muslims under the nomenclature of ‘ethnic origin’. However, a test case at the federal level has not yet occurred to establish this.²³

20 Luke McNamara, *Human Rights Controversies: The Impact of Legal Form*, Routledge-Cavendish, Oxon, 2007, p. 228.

21 *Racial Discrimination act 1975* (Cth), s18C, with exemptions for acts done in good faith outlined in s18D.

22 These figures were sourced from Annual Reports available at http://www.hreoc.gov.au/about/publications/annual_reports/index.html. The authority changed its name from the Human Rights and Equal Opportunity Commission to the Australian Human Rights Commission in 2009.

23 Katharine Gelber, ‘Religion and Freedom of speech’, in Hosen & Mohr (eds) *Law and Religion in Public Life: The Contemporary Debate*, Routledge, 2011, p. 101.

State/Territory anti-hatred provisions (criminal and civil)

Australia has a federal system of government. Every state²⁴ and the Australian Capital Territory²⁵ possess civil provisions prohibiting racial hatred, typically called anti-vilification laws. Race is defined differently in each jurisdiction, but tends to be inclusive of descent, ethnicity, nationality and ethnic origin. There are other grounds covered in some – but not all - jurisdictions including religion, sexuality, transgender status, HIV/AIDS status, and disability.²⁶ The first anti-vilification law in Australia was enacted in 1989 in New South Wales. Federally and in Tasmania, only civil provisions have been enacted, whereas in Western Australia only criminal provisions are in force.²⁷ In all other states and in the ACT both civil and criminal provisions apply, although the criminal provisions have almost never been enforced successfully. There has been only one successful criminal prosecution under racial hatred law in Australia: in Western Australia, in 2005.²⁸

In most jurisdictions the wording of the civil offence is that it is an offence to ‘incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons’ on the specified ground/s. Criminal provisions have an understandably higher threshold and tend to require either a public act which incites, or an act with intention to incite, hatred, serious contempt or severe ridicule of a person on the specified ground by means which threaten physical harm to person(s) or property, or which incite others to do so, or which constitute a threatening act. Western Australia is different: it has created two-tiered offences based on the existence or otherwise of intent, and including content intended, or likely, to incite racial animosity or racial harassment; possession of material for dissemination with intent, or likely, to incite racial animosity or racial harassment; conduct intended, or likely, to racial harass; and possession of material for display with intent, or likely, to racially harass.²⁹

In New South Wales, the interpretation of ‘race’ by the courts has included ethno-religious groups. This has given some coverage to religious identities, where there is a strong association between a person’s religious beliefs or practices and their nationality or ethnic identity. This interpretation does not provide comprehensive coverage for religion as a ground in those jurisdictions that do not specify religion; these are New South Wales, South Australia, Western Australia, and the Australian Capital Territory. Religion is only expressly included as a ground in Queensland (‘religion’), Tasmania (‘religious belief or affiliation or religious activity’) and Victoria (‘religious belief or activity’).³⁰

24 *Anti-Discrimination Act 1977* (NSW, ss 20B-20D, 38R-38T, 49ZS-49ZTA, 49ZXA-49ZXC); *Anti-Discrimination Act 1991* (Qld), ss 124A, 131A; *Racial Vilification Act 1996* (SA), *Civil Liability Act 1936* (SA) s 73; *Anti-Discrimination Act 1998* (Tas), ss 17(1), 19; *Racial and Religious Tolerance Act 2001* (Vic); *Criminal Code* (WA), ss 76-80H.

25 *Discrimination Act 1991* (ACT) ss 65-67.

26 Katharine Gelber, ‘Hate Speech and the Legal and Political Landscape’, in Gelber & Stone (eds) *Hate Speech and Freedom of Speech in Australia*, Federation Press, Sydney, 2007, p. 6.

27 Katharine Gelber, ‘Religion and freedom of speech’, op cit, p. 96.

28 Luke McNamara, *Human Rights Controversies*, op cit, p. 234; Katharine Gelber, ‘Hate Speech and the Australian Legal and Political Landscape’, op cit, p. 8.

29 Katharine Gelber, ‘Religion and freedom of speech’, op cit, p. 97.

30 Katharine Gelber, ‘Religion and freedom of speech’, op cit, p. 102.

Judicial interpretation of the balance between free speech and racial hatred provisions

As noted the interpretation and application of the new federal criminal ‘urging violence’ offences have yet to be judicially determined by a court. There has to date been no prosecution launched under these provisions.

Under the federal civil racial hatred law, a small number of cases have been referred to the courts for determination. This has permitted the Federal Court to consider the question of whether the racial hatred laws excessively restrict freedom of speech, and ought therefore to be considered invalid as an infringement of the implied constitutional doctrine of freedom of political communication. The Federal Court has found that the racial hatred law is a valid and proportional infringement on freedom of speech, and that this is especially the case given the exemptions permitted under the law. This was the judgment made in 2002 *Jones v Scully*,³¹ a case concerning the distribution of pamphlets containing virulent anti-Semitism.

A similar decision concerning the validity of racial hatred laws in the sense of not overly regulating freedom of speech has occurred in a state jurisdiction. In Victoria, the *Catch the Fires* case was referred to the Victoria Civil and Administrative Tribunal concerning comments made and a newsletter distributed by a Christian organisation. The material depicted Muslims as *inter alia* encouraging domestic violence, promoting violence, lying and planning to take over Australia. After nearly six years, an initial finding that the material constituted vilification was overturned, primarily on the ground that a differentiation was required between vilifying belief (which was considered permissible conduct) and vilifying believers (which was considered prohibited conduct).³² Nevertheless, an attempt was made to argue to the Tribunal that the legislation impermissibly infringed on the implied constitutional freedom of political speech. This claim failed.³³ The racial hatred provisions have therefore been found to be a constitutionally valid limitation on freedom of speech.³⁴

Another test to the racial hatred laws’ constitutional validity arose in *Toben v Jones*, a case concerning anti-Semitic and Holocaust Denial material distributed on the internet. In that case the defendant, Fredrick Toben, argued that the racial hatred provisions exceeded the terms of article 4(a) of the ICERD, which was the basis upon which the Commonwealth had enacted the law. Thus, and to the extent that it exceeded the scope of article 4(a), it was invalid as it represented an excessive use of executive power that was not mandated by the ICERD.³⁵ The Court rejected this argument, affirming that the law was within the executive’s power to make under the constitutional external affairs power,³⁶ as it was ‘reasonably capable of being considered as appropriate and adapted to implementing a treaty to which Australia is a party’. The Court noted that the law did not

31 *Jones v Scully* [2002] FCA 1080.

32 Lawrence McNamara, ‘Salvation and the State: Religious Vilification Laws and Religious Speech’, in Gelber & Stone (eds) *Hate Speech and Freedom of Speech in Australia*, Federation Press, Sydney, 2007, pp. 145-169.

33 Katharine Gelber, ‘Hate Speech and the Australian Legal and Political Landscape’, *op cit*, p. 4.

34 This proposition has not yet been tested in the High Court of Australia.

35 *Toben v Jones* (2003) 199 ALR 1.

36 *Australian Constitution*, s 51(xxix).

fully implement article 4, because it did not contain criminal provisions. This fact was not ‘fatal to the validity of the law’, however. The Court noted also articles 2 (prohibition of racial discrimination) and 7 (measures to combat prejudice and discrimination, and promote tolerance) of the ICERD, and article 20 of the ICCPR as relevant obligations under which the executive had the power to enact the racial hatred laws. The Court concluded that it was consistent with the ICERD and the ICCPR that a country should ‘legislate to “nip in the bud” such offences before they can ‘grow into incitement or promotion of racial hatred or discrimination’.³⁷

Current issue: risks to free speech in counter-terrorism legislation

In Australia, many newly enacted counter-terrorism laws impact on freedom of speech.³⁸ These include that a terrorist act has been defined as including an intent to advance a ‘political, religious or ideological cause’;³⁹ the introduction of a penalty of five years’ imprisonment for lawyers who communicate unauthorised information obtained during a person’s detention, and for people who fail to give information when detained;⁴⁰ creating a criminal offence of the ‘advocacy’ of terrorism;⁴¹ creating a criminal offence of the collection of documents connected with a terrorist act;⁴² and making it a criminal offence for a person subjected to a preventative detention order, or their lawyer, to disclose to others that they are the subject of such an order or that they have been detained.⁴³ Additionally, the national classification regime was amended to ban material that ‘advocates’ the carrying out of terrorist acts. Advocacy was defined as material that ‘directly or indirectly counsels or urges’ or ‘provides instruction’ on performing a terrorist act, or directly praises the doing of a terrorist act ‘in circumstances where there is a substantial risk’ that doing so may lead a person ‘regardless of his or her age or any mental impairment’ to engage in a terrorist act.⁴⁴ This overrides the usual ‘reasonable adult’ test upon which the classification regime rests.

Current issue: using the courts as a platform for more hatred

Recalcitrant purveyors of hate speech in Australia have found themselves facing the courts to answer civil vilification matters. It appears that in these cases, prosecution may be of little benefit to

³⁷ *Toben v Jones* (2003) 199 ALR 1, at 10-11, see also 20-36.

³⁸ Katharine Gelber, *Speech Matters: Getting Free Speech Right*, University of Queensland Press, St Lucia, 2011, p. 60. A report of the International Commission of Jurists in 2009 expressed grave concern in relation to speech-limiting provisions that have been introduced in the context of counter-terrorism laws. They were highly critical of vaguely-worded offences which, in their view, weaken the nexus between an expression and a subsequent danger of a criminal act being undertaken. They concluded that such provisions violate international norms concerning freedom of speech and its acceptable limits (International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, 2009, p. 129).

³⁹ *Criminal Code*, s100.1(1).

⁴⁰ *Australian Security Intelligence Organisation Act 1979* (Cth), ss34ZS, 34L.

⁴¹ *Criminal Code*, s102.1(1A).

⁴² *Criminal Code*, s101.5.

⁴³ *Criminal Code*, ss105.34-105.41.

⁴⁴ *Classification (Publications, Films and Computer Games) Act 1995* (Cth), s9A as amended.

the targets of the hatred. At the same time, the high profile media coverage given to these cases tends to provide the purveyor of the hate speech with an additional platform from which to express their views. There are two recent examples.

The first is that of Fredrick Toben, a committed Holocaust Denier. In 1996 an initial complaint was lodged against Mr Toben in the Human Rights and Equal Opportunity Commission. In 2000 the Commission substantiated the complaint and ordered the offending material to be removed from Mr Toben's web site. He did not comply. A further order was made in 2002, and he again did not comply. In November 2006, contempt of court proceedings were commenced against Mr Toben, and by 2009 a total of 24 findings of criminal contempt had been made against him. In August 2009, Mr Toben was jailed for three months for contempt of court.⁴⁵ He was described as 'all but invit[ing]' the court to sentence him to a jail term.⁴⁶

More recently a well-known conservative media commentator, Andrew Bolt, has been heard in the Federal Court on a vilification charge. Bolt had described some Indigenous community activists as 'white Aborigines' and suggested they had adopted a 'professional' Indigenous persona for monetary and personal gain. An initial complaint to the Australian Human Rights Commission predictably failed to achieve a resolution, and the matter was referred to the Federal Court. Hearings were heard in March 2011, and the judgment has not yet been announced. Nevertheless, the conduct of the hearing achieved widespread media coverage and provided Mr Bolt with numerous opportunities to gain publicity for his opinions.⁴⁷ In my view it is likely Mr Bolt will win the case, with the expressions either considered not to pass the vilification threshold or, if they do, considered to fall within an exemption for matters of public debate.

Current issue: extending anti-vilification laws to religion

There have been reports of increased incidences of expressions of hatred on the ground of religion in Australian society. These have included a report by the Human Rights and Equal Opportunity Commission in 2004 into national consultations on eliminating prejudice against Arab and Muslim Australians, which reported frequent and regular vilification amongst these groups in the community. A range of community organisations reported that such incidences had increased since September 2001, with Muslim women wearing headscarves being particularly at risk.⁴⁸ A separate report released in 2003 by the New South Wales Anti-Discrimination Board reported vilification of Muslims and people of Middle Eastern descent in the news media.⁴⁹ The Executive Council of Australian Jewry publishes an annual report on anti-Semitism in Australia.⁵⁰

45 Katharine Gelber, *Speech Matters*, op cit, pp. 92-93.

46 Steven Lewis & Peter Wertheim, 'Voice to be held in contempt', *The Australian*, 18 August 2009, p. 12.

47 eg Norrie Ross, 'Activist gives evidence in race case', *Herald-Sun*, 29 March 2011, p. 16;

48 Human Rights and Equal Opportunity Commission, *Isma 8 – Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians*, HREOC, Sydney, 2004, Chapter 2, esp. pp. 51-52, available http://www.hreoc.gov.au/racial_discrimination/isma/report/index.html, accessed 2 June 2011.

49 NSW ADB, *Race for the Headlines: Racism and Media Discourse*, ADB, Sydney, 2003.

50 See www.ecaj.org.au.

In spite of these documented incidences of hatred on the ground of religion, community support for hatred laws on that ground is mixed. Those states that currently do not include religion as a specified ground in anti-vilification laws have stated openly they are reluctant to include it.⁵¹ The Australian Human Rights Commission recently conducted an inquiry into ‘Freedom of Religion and Belief in 21st Century Australia’.⁵² The report of this inquiry noted a great deal of concern among both secular and religious voices in Australia at the development of anti-vilification legislation on the ground of religion, believing that in the arena of religion great care needed to be taken when drafting punitive legislation. It may be that because anti-vilification laws in Australia emphasise civil, conciliation mechanisms and the civil mechanisms rest on a lower threshold than would be required to prosecute a criminal offence, this poses particular risks for the misapplication of such laws on the ground of religion. This suspicion has been augmented by the *Catch the Fires* case in Victoria, which took six years to resolve and in which an initial finding of vilification was later overturned.

Current issue: implementing the ICCPR

In December 2008, the Australian government instigated a National Consultation on Human Rights, the largest ever public consultation in Australian history. The Report of that Consultation recommended a range of measures to enhance human rights protection in Australia, including enhanced parliamentary scrutiny of bills prior to enactment to assess their impact on human rights. It also recommended the enactment of a statutory bill of rights which ought to include the ICCPR rights, and ought to include a limitation clause for derogable civil and political rights.⁵³ The model suggested was that already being implemented in some regional jurisdictions within Australia, discussed above. However, when the Australian government responded to the Report by releasing a new human rights framework on 21 April 2010, it decided not to pursue the opportunity of implementing such a bill.⁵⁴

Concluding remarks

The Australian government has not comprehensively implemented the terms of the ICCPR. It has recently indicated that it has no intention to remedy this lack.

Australia does not have an explicit protection for freedom of speech, which would implement article 19, in either constitutional or statutory law. However, protection is afforded free speech from a common law tradition, combined with a limited and implied constitutional doctrine of freedom of political communication. All the anti-hatred provisions discussed in this background paper appear to be compatible with both article 19, and these domestic mechanisms for free speech protection. At the sub-national level, where charters of rights are being introduced the freedom of expression provisions in them tend to reflect the terms of article 19.

51 Katharine Gelber, ‘Religion and Freedom of speech’, op cit, p. 102.

52 Gary Bouma; Desmond Cahill; Hass Dellal & Athalia Zwart, *Freedom of Religion and Belief in the 21st Century*, Australian Human Rights Commission, Sydney, March 2011, p. 32, available http://www.humanrights.gov.au/frb/Report_2011.pdf, accessed 2 June 2011.

53 National Human Rights Consultation, *National Human Rights Consultation Report*, NHRC, Canberra, September 2009, p. xxxiv-xxxv, available http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloads, accessed 2 June 2011.

54 See http://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationAustralias_Human_Rights_Framework.

Australia has not comprehensively implemented article 20, and retains a reservation to it. A new federal criminal law in 2010 goes some way towards implementing one element of article 20; namely, the element that deals with the advocacy of violence. However, the law's efficacy in achieving this goal is limited by the fact that the offence includes 'political opinion' as a specified ground, thus leading to confusion over its application and scope. Additionally, this new criminal law does not create offences for the advocacy of hostility or the advocacy of discrimination, as envisaged by article 20.

At both federal and regional levels, almost all⁵⁵ Australian jurisdictions possess a civil prohibition on vilification. In all jurisdictions where anti-vilification laws exist, race/ethnicity/national identity is a ground. Religion is only covered explicitly in some jurisdictions. Although some of the regional jurisdictions do possess criminal racial hatred provisions, the emphasis in implementation has been on the civil mechanisms. These tend to invoke a conciliation procedure, aimed at achieving a remedy such as an apology or an agreement to desist. The civil mechanisms possess an understandably lower threshold than criminal sanctions. These means they are more frequently invoked. At the same time, however, it means that extending the civil mechanisms to cover the gap in Australia's framework to ensure comprehensive coverage for religion as a ground does not have widespread community support.

55 The exception is the Northern Territory.