Anti-Discrimination Board of NSW
Answers to Questions on Notice

Inquiry into racial vilification law in NSW

The Anti-Discrimination Board (**Board**) thanks the Committee for the opportunity to appear before the Inquiry. The Board provides the following response to the questions on notice.

Were any of the 27 attempted prosecutions repeat offenders?

Of the 27 matters referred by the Board to the Attorney-General as potentially constituting serious vilification, none of them involved respondents who were '*repeat offenders*' under the Board's jurisdiction – i.e., the Board had not referred any previous instances of serious vilification under the *Anti-Discrimination Act 1977* (NSW) ("**ADA**") involving those individuals to the Attorney- General.

Whether concerns over vilification law have been raised in any of the Anti-Discrimination Board's annual reports as required under section 122 of the ADA during the Board's current presidency?

The President gave evidence to the Committee that the issue of vilification is a regular topic of discussion with the Board's advisory groups (these advisory groups fall within the 'Consultations' section of its Annual Report). The Board has regularly reported these discussions in its annual reports during the tenure of its current President, Stepan Kerkyasharian AO.

In addition, the Board's most recent Annual Report referred to the fact that "*due to budget constraints there has been a significant impact on our ability to deliver on our statutory functions to conduct inquiries, review legislation and develop human rights policies and programs*" (2011-2012 Annual Report, page 5).

A summary of the vilification issues (other than complaint and inquiry statistics) raised each year in the Board's Annual Report appears below, with copies of the relevant text provided at Appendix A.

Annual Report Year	Issue	Section / Page(s)
2011-2012	Time limits for prosecution brought to attention of Attorney-General	Complaint outcomes, page16-17
	Articles unlikely to be covered by current provisions – issue will be raised with Attorney-General for review	Consultations, page 27
2010-2011	Current provisions make it difficult for a complaint of serious vilification to succeed, as they require threatening physical harm	Consultations, page 25

2009-2010	Inadequacy of current legislative provisions relating to homosexual vilification in NSW	Consultations, page 27
	Vilification laws under review by Attorney-General	Consultations, page 28
2008-2009	Shortage of reliable data on homosexual vilification to determine the extent of the issue	Consultations, page 26
	Vilification laws under review by Attorney-General	Consultations, page 27
2005-2006	Decisions made in the ADT regarding homosexual vilification	Consultations, page 29
2004-2005	Reference to Attorney-General's Working into the effectiveness of the criminal laws proscribing serious vilification	Statutory Board, page 2
	Discussion of vilification cases in ADT	Consultations, page 31

The Board has also attempted to draw attention to deficiencies in vilification law on numerous occasions. In 2004, the then Attorney General set up a Working Group to review the effectiveness of the criminal laws prohibiting serious vilification. The Working Party, which submitted its report in 2005, included representatives from the Board, Attorney-General's Department, NSW Police, the Office of the Director of Public Prosecutions, and academics. It was comprised of the following members:

- Mr Peter Werthelm, AM, Geoffrey Edwards & Co
- Ms Vicki Sarfaty, Attorney General's Department of NSW
- Mr Julian Baker, Ministry of Police
- Ms Jackie Fitzgerald, NSW Bureau of Crime Statistics and Research
- Dr Katharine Gelber, School of Politics and International Relations, University of New South Wales
- Associate Professor Luke McNamara, Faculty of Law, University of Wollongong
- Ms Irene Nemes, Faculty of Law, University of New South Wales
- Mr Daniel Noll, Criminal Law Review Division, Attorney General's Department of NSW
- Ms Beatrice Scheepers, Office of Director of Public Prosecutions
- Mr David Toolan, Senior Programs Officer (Gay, Lesbian and Transgender Issues), NSW Police
- Ms Elizabeth Wing, Manager, Enquiries and Conciliation, Anti-Discrimination Board

In December 1991 the New South Wales Law Reform Commission carried out a comprehensive review of the entire ADA, including the vilification provisions, submitting its detailed report and recommendations in November 1999.

During the current Presidency, the Board has raised issues relating to vilification laws with successive Attorneys-General and the Department of Attorney General and

Justice (**DAGJ**) during this period. Examples include, but are not limited to, the following:

Date	Correspondence to	Issue raised
Dec 2012	Legislation Policy and Criminal Law Division, DAGJ	Time limits for prosecution; absence of prosecutions since vilification provisions enacted
Nov 2012	Legislation Policy and Criminal Law Division, DAGJ	Time limits for prosecution; complexity of elements; unlikelihood of successful prosecution; absence of prosecutions since vilification provisions enacted; ineffectiveness of current regime; need for NSW and Cth governments to enact legislation to reflect the intention of ICERD.
June 2012	Attorney-General	Time limits for prosecution; potential legislative anomaly between ADA and the *Criminal Procedure Act 1986*
Nov 2011	Attorney-General	Time limits for prosecution; potential legislative anomaly between ADA and the *Criminal Procedure Act 1986*
Sept 2011	Attorney-General	Procedural issue arising when Board refers a serious villfication complaint to the Attorney General.
March 2010	Legislation Policy and Criminal Law Division, DAGJ	Practical difficulties establishing vilification or discrimination on ground of ethno-religious background.
Aug 2009	Attorney-General	Request of Board's Lesbian, Gay and Bisexual Consultation to extend coverage of vilification laws to situations involving 'serious detriment' instead of actual or explicitly threatened violence.
Sept 2008	Attorney-General	Elements of racial vilification law; absence of prosecutions; working party recommended reform of vilification provisions in 2005
June 2008	Attorney-General	ADB unable to take action in relation to potential vilification without a complaint from an aggrieved individual. Neither Attorney-General nor ADB can initiate complaints
Aug 2007	Attorney-General	Elements of racial vilification law; absence of prosecutions.
Aug 2007	Attorney-General	Need for reform of vilification law; difficulty of establishing elements of offence; working party made recommendations for reform of vilification provisions
Aug 2007	Minister for Police	ADB unable to take action in relation to potential vilification without a complaint from an aggrieved individual. Difficulty of establishing authorship of online material; ADB cannot initiate complaint.

I note that you mentioned ethno-religious aspects earlier in your address. Could you (...) define 'racial vilification" and "serious racial vilification"?

a) ADA coverage of "ethno-religion"

Firstly, the Board would like to clarify that the ADA currently includes the concept of

"ethno-religious origin" within its definition of race. The ADA defines race as including "*colour, nationality, descent and ethnic, ethno-religious or national origin*" (section 4). The Act was amended in 1994 to include ethno-religion with the intention that this term would include groups such as "Jews, Muslims and Sikhs", as evidenced by the second reading speech on the *Anti-Discrimination (Amendment) Bill 1994* by the then Attorney-General, who said:

> *"The effect of the latter amendment is to clarify that ethno-religious groups, such as Jews, Muslims and Sikhs have access to the racial vilification and discrimination provisions of the Act. At present, it is not clear whether such groups are covered by the racial vilification and discrimination provisions, although this would appear to be the position at common law. The amendment will make it clear that vilification or discrimination against a person on the basis of ethno-religious origin falls within the protections against racial discrimination and racial vilification currently contained in the Act. The amendment is in line with existing judicial authority from both New South Wales and overseas which indicates that ethno-religious background is included in the legal concept of race.*
>
> *I should make it clear to honourable members that this amendment is not intended in any way to interfere with religious freedoms, and that the extension of the Anti-Discrimination Act to ethno-religious groups will not extend to discrimination on the ground of religion. At present, section 56 of the Act specifically exempts religious practices, in accordance with the Government's policy that anti-discrimination laws should not interfere with fundamental religious freedoms. The proposed amendment to the definition of race will not allow members of ethno-religious groups such as Jews, Muslims and Sikhs to lodge complaints in respect of discrimination on the basis of their religion, but will protect such groups from discrimination based on their membership of a group which shares a historical identity in terms of their racial, national or ethnic origin. Accordingly, the amendment will not prevent religious schools, for example, from employing suitable staff on the basis of their membership of a particular religion".*"[1]

b) Defining "racial vilification" and "serious racial vilification"

The Board views racial vilification as conduct which creates, promotes or expresses hatred, animosity, contempt or serious ridicule of a racial group, or a member or members of a racial group.

It is our view that the offence of serious racial vilification should apply to the most extreme examples of such conduct.

The case of *Kazak v John Fairfax Publications Limited*[2], sets out the ordinary, dictionary definitions of certain elements of vilification, as follows:

> *"hatred" means "intense dislike; detestation" (Macquarie), "a feeling of hostility or strong aversion towards a person or thing; active and violent dislike" (Oxford);*
>
> *"serious" means "important, grave" (Oxford); "weighty, important" (Macquarie);*
>
> *"contempt" means "the action of scorning or despising, the mental attitude in which something or someone is considered as worthless or of little account"*

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[1] JL Hannaford MLC, Hansard, 4 May 1994 www.parliament.nsw.gov.au
[2] *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77, at [40]

(Oxford); the feeling with which one regards anything considered mean, vile, or worthless (Macquarie);

"severe" means "rigorous, strict or harsh" (Oxford); "harsh, extreme" (Macquarie);

"ridicule" means "subject to ridicule or mockery; make fun of, deride, laugh at"(Oxford); "words or actions intended to excite contemptuous laughter at a person or thing; derision" (Macquarie)."

The Board's view is that, as far as possible, the law governing racial vilification should be expressed in ordinary terms, which can be easily understood by all members of our community. This will enable the law not only to more widely serve an educative role, but will also reduce unnecessary and expensive legal argument in our courts and tribunals.

The Board is of the view that the approach used in the Western Australia[3] uses simple, accessible language in its definitions of racist harassment and incitement to racial hatred.

What is the Board's view on the following draft clause, which is proposed as a potential option for amending s20D?

20D Serious Racial Vilification

A person must not by a public act, promote or express hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground of the race of the person or members of the group that is intended, or reasonably likely in the circumstance of the case to:

a. *Threaten physical harm towards, or towards any property of, the person or group of persons, or*

b. *Incite others to threaten harm towards, or towards any property of, the person or group of persons, or*

c. *Cause a person to have a reasonable fear for their own safety or security of property or for the safety or security of property of their family.*

1. The Board has significant concerns with the proposed clause, which offers little improvement upon the current section 20D and does nothing to reduce one of its major failings – its complexity.

2. The proposal appears to be an attempt to remove the problematic "means" test from the current definition of section 20D by replacing it with two new elements, being one of intent, and one of effect.

   The Board is of the view that most of the elements in the "fear test" above would already be covered by apprehended violence laws, for which Police do not have

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[3] *Criminal Code Act Compilation Act 1913* (WA), Chapter XI — Racist harassment and incitement to racial hatred

to prove a racial element. In the Board's experience those who incite and stir up racial hatred often stop short of actual threats of harm and violence, particularly in written attacks. However, words such as "the *Final Solution*", "*cutting out the rot*" or "*seeing this through to the end*" (actual words from a complaint), when in the context of aggressive, vilificatory statements, are all capable of implying serious threats and should be capable of prosecution. The fact that an individual intentionally (or recklessly) incites or promotes racial hatred ought to be sufficient for penalties to apply.

3. The proposed clause also appears to remove both the penalties for the offence and the requirement that the Attorney General consent to prosecution. The Board has already expressed its support for removing the requirement for consent, but wishes to ensure that financial and custodial penalties for serious racial vilification are maintained and, ideally, strengthened.

4. Case law in relation to section 20C of the ADA has effectively extended the meaning of "*public act*" in vilification law to include conduct that is *observable by the public*, however this extended meaning is not apparent from the draft clause and would not be readily understood by a lay person reading the legislation.

   Any amendment of section 20D should be drafted to affirm the jurisprudence in this area, to ensure that acts which are conducted in private, but which are observable by the public, would be covered by the prohibition on hate speech.

   The expression '*public act*', if not clarified, is likely to remain the subject of extensive legal debate, and consequent legal costs, about whether particular conduct was public or private. The Board remains of the view, as set out in our original submission, that the better approach is that used in the *Racial Discrimination Act 1975* (Cth) and the Western Australian Criminal Code, which respectively refer to an act, or conduct, that is "otherwise than in private".

5. Whilst the draft clause introduces the concept of intention, the Board remains of the view that "intention *or recklessness*" should be the required test for the mental element of the offence. This test is considered suitable for many crimes, such as murder and criminal damage. The Board is of the view that the test for racial vilification should be similarly drafted.

   Further, the concepts of intention or recklessness also have well-established jurisprudence, which will easily be understood by police and prosecutors.

6. The Board notes the inclusion of the members of a person's family, and supports the intention underlying this expanded provision. However the Board would prefer the use of the terms 'relative' and 'associate', as the ADA already contains definitions of both of these terms. The term 'family' could potentially exclude claims from individuals who share strong ties which are akin to family, but which may not be legally recognised as such. Examples might include:

   - certain Aboriginal kinship relationships (relative);
   - a flatmate who shares a home with a person targeted by racial vilification, but who is not of the same racial group. The flatmate would have equal reason to fear a mob incited to hatred and violence as the person whose race was targeted (associate); or
   - a person accompanying children (unrelated to the person) who were known to be of a particular race would reasonably be intimidated by

individuals displaying banners promoting hatred for that race (associate).

7. The Board submits that the expanded definition of race (to include presumed race) should appear at the beginning of Division 3A, within which the racial vilification provisions appear, rather than within section 4(1) of the ADA. Amending section 4(1) would have the effect of expanding the definition of race throughout the ADA, including sections dealing with certification of special needs programs by the Attorney General (s126A) and Public Sector Equal Opportunity Management Plans (s122A-S). Such an expansion would render parts of the ADA nonsensical and is clearly inappropriate.

   In order that any expansion of the definition of race is effective, amendment of section 88 of the ADA will also be necessary. Section 88 requires a vilification complainant to have "*the characteristic that was the ground for the conduct that constitutes the alleged contravention*", or to plausibly claim to have that characteristic. A person vilified on the ground of their presumed race would not satisfy the requirement of section 88.

8. The proposed clause does not deal with the mechanism by which the President or Board would refer complaints for investigation and prosecution. Any amendment should:

   - remove the 28-day time limit within which the President may refer a complaint;
   - extend the 6-month limit within which criminal proceedings must be commenced to correspond with offences incurring similar penalties;
   - enable the Police (or another appropriate body) to investigate the offence and prepare a prosecution brief;
   - enable the President or Police to initiate a prosecution without requiring an individual complainant to identify themselves as a victim and bear the costs and consequences of pursuing a complaint (again, this will impact upon s88 of the ADA);
   - clearly define all the elements of the offence to incorporate jurisprudence in the area (albeit in relation to section 20C) and, in particular, clarify where the public/private divide lies.

Although not specifically sought, the Board would like to offer the following further submissions:

Civil Penalties

Whilst the Board broadly supports the idea of a 3-tiered approach including civil prohibition, civil penalties and criminal proscription, as proposed by Professors Rice and Rees in their submission to the Inquiry (submission #36), the Board is of the view that a prosecutorial role would not fit well with its current role and functions. The Board operates a conciliation model, in which fair, open communication with both complainants and respondents is essential. The Board is trusted as offering genuinely impartial information and procedures and the President has no power to determine whether unlawful discrimination has occurred. If unable to be resolved through conciliation, complaints are referred to the Tribunal for formal hearing and determination.

The Board's current model ensures that our services remain accessible to all

members of our community; there are no costs involved, parties may lodge complaints in any language, including Braille, and parties do not require legal representation. This accessibility is key as we often work with people from disadvantaged or marginalised sectors of our community. The Board is concerned that a prosecutorial role could undermine its ability to conciliate complaints in a fair manner, and may result in decreased trust in the Board's impartiality.

Education

Many submissions and witnesses mentioned the importance of education in relation to racial vilification laws. It is essential that laws, which define the standards expected from members of our society, are widely known and understood.

The Board is aware that racist harassment and vilification is widespread within our community – a state of affairs confirmed by the evidence of a number of witnesses before the Committee. Unfortunately, the Board's ability to perform its educational role within the Community, informing the citizens of New South Wales about their rights and responsibilities under anti-discrimination law, is limited by the Board's current budgetary constraints.

The Board welcomes this Inquiry and thanks the Committee for its interest in this area and its commitment to improve protections for the citizens of New South Wales.

Anti-Discrimination Board of NSW
22 April 2013