AUSTRALIAN DISCRIMINATION LAW EXPERTS GROUP

Submission of the Australian Discrimination Law Experts Group

to the

Legal Affairs and Safety Committee, Parliament of Queensland, Inquiry into Serious Vilification and Hate Crimes

26 July 2021

This submission is made on behalf of the undersigned members of the Australian Discrimination Law Experts Group, a group of legal academics and practitioners with significant experience and expertise in discrimination and equality law and policy.

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry, by contacting Bill Swannie on [redacted] or [redacted]. This submission may be published.

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1. Summary

This submission is made in response to the Inquiry into Serious Vilification and Hate Crimes (the **Inquiry**) being undertaken by the Legal Affairs and Safety Committee of the Parliament of Queensland (the **Committee**). It responds to paragraphs 2(a) and (f) of the terms of reference dated 21 April 2021:

(a) consider the Options Paper: *Serious vilification and hate crime: The need for legislative reform*

(f) consider the appropriateness of the conciliation-based anti-discrimination framework (s 124A of the Act)'.

The Australian Discrimination Law Experts Group (**ADLEG**) has contributed to several recent parliamentary inquiries into anti-vilification laws in Australia, including in relation to the *Racial Discrimination Act 1975* (Cth) (**RDA**),[1] the *Anti-Discrimination Act 1977* (NSW)[2] and the *Racial and Religious Tolerance Act 2001* (Vic) (**RRTA**).[3] We believe that the findings and recommendations of the recent Victorian inquiry into anti-vilification laws can assist the Inquiry being conducted by the Committee. This is particularly because the anti-vilification provisions in the QADA are very similar to the equivalent Victorian provisions in the RRTA.

The terms of reference for the Inquiry refer to the Options Paper on *Serious vilification and hate crimes – The need for legislative reform* (the **Options Paper**).[4] The Options Paper highlights the increasing prevalence and seriousness of various forms of vilification in Queensland, and the underreporting of incidents of vilification. It considers possible reasons for underreporting, such as members of targeted communities not being aware of legal protections. We strongly recommend the Committee inquire broadly into the effectiveness of current anti-vilification laws in Queensland, including the reasons (legal and non-legal) for underreporting.

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1 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the* Racial Discrimination Act 1975 *(Cth) and related procedures under the* Australian Human Rights Commission Act 1986 *(Cth), Inquiry Report* (2017).

2 Legislative Council, Portfolio Committee No 5 – Legal Affairs, Parliament of New South Wales, *Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020*; Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Racial vilification law in NSW,* Report 50 (2013).

3 Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-Vilification Protections* (Parliamentary Paper No 207, 2021).

4 Cohesive Communities Coalition, *Serious Vilification and Hate Crimes – Need for Legislative Reform* (undated) <https://betterlawsforsafeqld.com.au/wp-content/uploads/2020/09/SeriousVilificationAndHateCrime_CohesiveCommunitiesCoalition-1.pdf>.

The evidence set out in the Options Paper demonstrates a clear need for review and possible reform of the relevant provisions in the *Anti-Discrimination Act 1991* (Qld) (**QADA**). It also demonstrates a need for increasing awareness of these laws, particularly in communities targeted by vilification.

This submission addresses five key areas:

- a human rights analysis of anti-vilification laws;
- substantive changes to the law;
- the serious vilification provisions;
- remedies and redress; and
- community education.

2. A human rights analysis of anti-vilification laws

Whether by civil or criminal prohibition, anti-vilification laws perform the important function of protecting people from speech and other communicative acts that cause them harm, denigrate them, are likely to lower their status in the eyes of other members of the community, and can lead, directly or indirectly, to verbal and/or physical assaults on them. Prominent authors, such as Jeremy Waldron, argue that protection from vilification is necessary to protect personal dignity and autonomy.[5] Protection from vilification is a human right, as it protects a person's equality and human dignity, and their ability to participate in public life fully and equally with others.[6] Protection from speech that constitutes incitement to discrimination or racial hatred is also required by the relevant international human rights conventions that have been ratified by Australia.[7]

The QADA contains civil anti-vilification laws (in section 124A), which enable a person 'subjected to the alleged contravention' to make a complaint to the Queensland Human Rights Commission, and to seek legal redress for the contravention.[8] The QADA also provides a criminal offence (in section 131A), which is prosecuted by the police. Both provisions seek to protect personal dignity or autonomy.

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5 See generally Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012).

6 See *Anti-Discrimination Act 1991* (Qld) Preamble: 'The international community has long recognised the need to protect and preserve the principles of dignity and equality for everyone.' See, *International Covenant on Civil and Political Rights*, articles 2, 19(3) and 26.

7 See *International Covenant on Civil and Political Rights* art 20.2: 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' *Convention on the Elimination of all forms of Racial Discrimination* art 4(a): States parties '[s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination…'

8 See *Anti-Discrimination Act 1991* (Qld) ch 7.

Freedom of expression is an important human right.[9] However, this is not a non-derogable right. Its exercise 'carries with it special duties and responsibilities', and it is subject to such restrictions as are necessary for respect of the rights or reputations of others'.[10] Many laws limit freedom of expression, including for example defamation laws and summary offence laws concerning offensive speech. Such laws are well- accepted, based on the need to protect reputations against false and demeaning attacks, and the general public from anti-social conduct. Anti-vilification laws perform a similar role, often for groups whose members have very little social power or influence. They reflect an understanding that there is a public good in protecting the whole of society from anti-social behaviours that target people on the basis of personal characteristics over which they have little or no control.

Vilifying speech denigrates particular individuals or groups on the basis of protected characteristics, such as their race, religion, sexuality, disability or gender identity. Vilification exposes members of target groups to insecurity and potential fears for their safety and consequent denial of their right to participation in society on an equal basis. Individuals and groups who are targeted by vilification frequently have no platform through which to respond to vilifying materials published and promoted about them. This absence of a platform for reply means that the 'marketplace of ideas' or public discourse in general cannot be relied on to establish the falsity or lack of validity of vilifying material. Anti-vilification laws are thus a necessary restriction on freedom of expression to ensure as respect of the rights of others.

The QADA provides defences to unlawful vilification which operate to allow freedom of vilifying speech in a wide range of prescribed circumstances.[11] These defences ensure that the protection against vilification is kept in balance with freedom of expression.

The civil and criminal anti-vilification provisions in the QADA only regulate 'public' conduct, and do not regulate private conversations, and their impact on freedom of expression is therefore limited. The focus on 'public' conduct is especially apt because vilification is particularly harmful when directed by prominent and powerful speakers, such as radio presenters and newspapers towards minority racial groups, such as Aboriginal people and Torres Strait Islander peoples,[12] and members of minority races, ethnic groups, or religions. The recent Victorian parliamentary inquiry highlighted the role of the media in promoting negative and stereotypical attitudes concerning race.[13]

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9 *Human Rights Act 2019* (Qld) s 21.

10 *International Covenant on Civil and Political Rights* art 19.3.

11 See *Anti-Discrimination Act 1991* (Qld) s 124A(2).

12 See [redacted], in which a prominent newspaper columnist was found to have vilified a number of Indigenous Australians.

13 Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-Vilification Protections* (Parliamentary Paper No 207, 2021) 71–7.

3. Substantive changes to the law

A. Prohibited grounds of vilification

The QADA currently prohibits vilification on the grounds of race, religion, sexuality and gender identity. These grounds are some but not all the grounds on which discrimination is prohibited. In a society committed to equality and equal opportunity, there is no valid basis for protecting only some minorities and disempowered groups from vilification and not others. Therefore, for consistency and equity, further inquiry should determine whether protection should be extended to all attributes protected by the QADA.[14]

Recommendation 1: That the prohibition of vilification in the *Anti-Discrimination Act 1991* (Qld) be extended to include all attributes listed under section 7 of the *Anti-Discrimination Act 1991* (Qld).

Defining vilification

For both civil and criminal prohibitions, the QADA defines vilification in terms of *incitement*. Conduct is unlawful only if it is a public act that 'incite[s] hatred towards, serious contempt for, or severe ridicule of, a person or group of persons' on one or more of the prohibited grounds.

This 'incitement' approach to defining vilification is substantively the same as that contained in the Victorian RRTA and similar laws in NSW,[15] SA,[16] Tasmania,[17] WA,[18] and the ACT.[19] This approach can be compared to the 'harm' approach in both section 18C of the RDA and an alternative provision in the Tasmanian Act.[20] The incitement approach is concerned with conduct that stirs up hostile feelings in others against a person or groups. The harm approach is concerned with conduct that causes a person to feel offended, humiliated, intimidated, insulted or ridiculed.

The drafting of the incitement provisions in the QADA and other jurisdictions except WA appears to require an aggrieved person to prove actual incitement, that is, that conduct did stir up hostile feelings in others: 'A person must not, by a public act, incite hatred …' The impossibility of

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14 *Anti-Discrimination Act 1991* (Qld) s 7.

15 *Anti-Discrimination Act 1977* (NSW) s 20C.

16 *Civil Liability Act 1936* (SA) s 73(2)

17 *Anti-Discrimination Act 1998* (Tas) s 19(1).

18 *Criminal Code* (WA) s 77.

19 *Discrimination Act 1991* (ACT) s 567

20 *Anti-Discrimination Act 1998* (Tas) s 17(1).

proving this has long been recognised,[21] and the accepted interpretation of these provisions is that they require proof of the *likelihood* that conduct *would* stir up hostile feelings in others.[22]

As a recent report of a Victorian Parliamentary committee has pointed out—commenting on the civil prohibition—the drafting of the incitement provisions 'is somewhat divorced from the reality of public understanding of the term',[23] focusing as it does on a hypothetical third party. The Committee noted that it sets a difficult standard for complainants to satisfy,[24] with very few complaints being made under these laws, and even fewer succeeding at hearing.[25]

The Victorian Committee recommended an amendment to make it clear that what is to be proved is likely, not actual, incitement.[26] But, at the same time, the Committee emphasised the need for laws to protect victims of vilification, and to focus on their perspective and interests. That is, the Committee turned its attention from the incitement approach to the harm approach.[27] As civil vilification laws seek to protect personal dignity and autonomy, they should be victim-focused, rather than requiring the incitement of a third party. In other words, they should provide protection from specific harms to identifiable personal interests, and in particular the interests of members of target groups. Accordingly, the Committee recommended a new civil harm-based provision to assess harm from the perspective of the target group.[28]

The Tasmanian 'harm' provision—section 17(1)—and the federal provision—section 18C of the RDA—would seem to provide an appropriate model.

The Victorian Committee, however, examined the terms in which 'harm' is detailed in section 18C, and the related caselaw. The Committee concluded that 'the divergence between the common meaning of the elements of section 18C and how the provision has been interpreted makes it challenging to educate the community about the law'.[29] The Committee recommended a harm-based test, 'which comprises elements that more clearly describe prohibited and permissible

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21 Simon Rice, 'Racial vilification: The missing words' (1995) 20(6) *Alternative Law Journal* 304.

22 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 734 [13.2.66]; and see *Sunol v Collier* (No 2) (2012) NSWCA 44, [41]; *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) 15 VR 207, [160].

23 Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-Vilification Protections* (Parliamentary Paper No 207, 2021) 114.

24 Ibid.

25 Ibid 111.

26 Ibid 118.

27 Ibid xiii.

28 Ibid 120.

29 Ibid 121.

conduct than those in section 18C of the RDA',[30] identifying conduct 'that a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing of a person or a class of persons'.[31]

Therefore, we **recommend** that the definition of vilification in section 124A—the civil prohibition—be amended to be similar to the language of section 18C of the RDA, noting the observations and recommendations of the Victorian Committee. The advantage of doing so is that it defines vilification in terms of the effect of the communications on the *targets of the* speech, rather than the response of an audience. Further, this definition more closely serves the human rights rationale for these provisions, which is to protect a person's right to live in the community safely and without unreasonable threats. Court interpretation of this phrase has made it clear that only seriously harmful speech will be caught.[32]

Recommendation 2: That the definition of vilification in section 124A be amended to be similar to the language of section 18C of the **RDA**, noting the observations and recommendations of the Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-Vilification Protections* (Parliamentary Paper No 207, 2021.

B. Serious vilification

Term of reference 2(a) is to consider the Options Paper: *Serious vilification and hate crime: The need for legislative reform.* The Options Paper addresses 'Under-utilisation of existing offence' and recommends removal of the requirement for approval of the Director of Public Prosecutions or Attorney-General in order to commence prosecution under section 131A.

In 2013, a NSW parliamentary committee reported on the offence of serious racial vilification in section 20D of the NSW *Anti-Discrimination Act 1977*. The Committee's inquiry was prompted by concern that there had been no prosecutions, and the Committee reported specifically on 'the effectiveness of section 20D of the *Anti-Discrimination Act 1977* (NSW). Consideration is given to the argument that the absence of prosecutions under the provision undermines its effectiveness'.[33]

Some submissions to the NSW inquiry were that the absence of prosecutions had multiple negative consequences: it signifies that the provision is ineffective; it leads to lack of public confidence in the provision; it signifies that racism is tolerated in New South Wales; it suggests (against the evidence) there have been no occurrences of racial vilification worthy of prosecution; it signals that those who incite racial hatred are beyond the reach of the criminal law; it makes plain that the provision does

30 Ibid 122.

31 Ibid 123.

32 [redacted]

33 Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Racial vilification law in NSW* (Report 50, 2013) 23.

not meet community expectations; it undermines the educative and symbolic value of the provision.[34]

Other submissions were less concerned by the absence of prosecutions, saying that it was evidence of the provision's success as a deterrent, that the law is being obeyed; and that other mechanism in the Anti-Discrimination are effective.[35] Further, it was submitted to the Committee that, quite apart from whether there were any prosecutions, the provision performs an important educative and symbolic function in society.[36]

The NSW Committee agreed that the offence of serious racial vilification 'has an important educative and symbolic function' and that the provision 'enshrines in law that the Parliament does not tolerate racial hatred, and sends a message to the community about appropriate behaviour'.[37] Nevertheless, the Committee was of the view that the provision 'must also have a real world application and be able to be applied by the courts',[38] and it made recommendations to remove barriers to the practical application of the provision.

We draw attention in particular to three inter-related recommendations. One was the same as is recommended by the Options Paper in Queensland; to repeal the requirements for the President of the NSW Anti-Discrimination Board to directly refer serious racial vilification complaints to the Attorney General, and for the Attorney General's consent to prosecutions of serious racial vilification. Related to this, the NSW Committee recommended that the President of the NSW Anti-Discrimination Board be empowered to directly refer serious racial vilification complaints to the NSW Police Force; that the NSW Police Force be empowered to prepare a brief of evidence for the Director of Public Prosecutions, following a referral; and that the NSW Police Force provide training to its members about the offence of serious racial vilification.

The NSW Government's response repealed the serious vilification offence provisions in the NSW *Anti-Discrimination Act 1977* and inserted a new offence in the *Crimes Act 1900*: section 93Z, 'Offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status'. The effect of this response has been to 'normalise' serious vilification as a criminal offence to be dealt with in the usual way, with the approval of the Director of Public Prosecutions.[39] However, recent events have reinforced the importance of the NSW Committee's recommendation that police be trained about the offence of serious racial

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34 Ibid 23–24.

35 Ibid 25.

36 Ibid 26–28.

37 Ibid 28.

38 Ibid 29.

39 *Crimes Act 1900* (NSW) s93Z(4).

vilification: two convictions under section 93Z were annulled because police had failed to obtain the consent of the Director of Public Prosecutions before proceeding with the prosecution.[40]

The NSW reforms were commended to the Victorian Committee,[41] with a reservation about the scope of the prohibition being too narrow. The Victorian Committee considered it 'undesirable [as NSW does] to restrict the content of criminal offences only to conduct that threatens or incites violence against another person or a group of persons', and proposed to legislate in terms that are substantially the same as section 131A(1) of the QADA.[42]

Recommendation 3: Considering the NSW and Victorian inquiry reports and the NSW experience, we recommend that:

(a) section 131A(2) of the *Anti-Discrimination Act 1991* (Qld), requiring a Crown Law Officer's written consent before a proceeding is started for the offence of serious vilification, be repealed;

(b) the Human Rights Commissioner be empowered to directly refer serious racial vilification complaints to the Queensland Police Service;

(c) consideration be given to section 131A of the *Anti-Discrimination Act 1991* (Qld) and inserting in Part 4 of the *Criminal Code 1899* (Qld) a new offence of serious vilification;

(d) members of the Queensland Police Service be trained about the offence of serious vilification.

C. Remedies and redress

We emphasise the significant evidence of underutilisation of the offence provision, section 131A, and problems with commencing an action for redress under that section, as set out in the Options Paper.[43] The Options Paper also suggests several new forms of redress for vilification, including 'civil hate crime injunctions', 'protective orders', and a 'hate crime scrutiny panel'.[44] We do not, however, regard these changes as necessary, and we consider that the forms of redress currently available to the Queensland Civil and Administrative Tribunal (**QCAT**) under the *Queensland Civil and Administrative Tribunal Act 2009* (**QCAT Act**) are adequate.

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40 Christopher Knaus and Michael McGowan, 'NSW police botch the only two race hate prosecutions under new laws', *The Guardian* (online, 2 March 2021) <https://www.theguardian.com/australia-news/2021/mar/02/nsw-police-botch-the-only-two-race-hate-prosecutions-under-new-laws>.

41 Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-Vilification Protections* (Parliamentary Paper No 207, 2021) 160–162.

42 Ibid 166.

43 Cohesive Communities Coalition, Options Paper, above n 4, 18–19.

44 Ibid 6.

QCAT currently has power to grant an injunction,[45] and to make a declaration.[46] If QCAT finds a complaint proven, it may make any of the following orders:

(a) an order requiring the respondent not to commit a further contravention of the Act against the complainant or another person specified in the order;

(b) an order requiring the respondent to pay to the complainant or another person, within a specified period, an amount the tribunal considers appropriate as compensation for loss or damage caused by the contravention;

(c) an order requiring the respondent to do specified things to redress loss or damage suffered by the complainant and another person because of the contravention;

(d) an order requiring the respondent to make a private apology or retraction;

(e) an order requiring the respondent to make a public apology or retraction by publishing the apology or retraction in the way, and in the form, stated in the order;

(f) an order requiring the respondent to implement programs to eliminate unlawful discrimination;

(g) an order requiring a party to pay interest on an amount of compensation;

(h) an order declaring void all or part of an agreement made in connection with a contravention of this Act, either from the time the agreement was made or subsequently.

The 'protective orders' recommended in the Options Paper would potentially cause confusion by blurring the distinction between civil remedies and criminal penalties. These orders:

> … would not need an overt criminal offence to be triggered, but would address repeated behaviour of a concerning nature. It would not need to be proven beyond reasonable doubt, as with criminal offences.[47]

Similarly, the 'civil hate crime injunction' proposed in the Options Paper 'does not need to prove evidence beyond a reasonable doubt'.[48] It appears to be a civil order with criminal law penalties.

We acknowledge the difficulties of leaving enforcement solely to individuals who are likely to be the targets of vilification, who often do not have the resources to bring legal claims effectively, ie, with expert advice and representation. This could be addressed by providing a fund to support litigation of strategic cases in this area, to which protective costs provisions could be attached, so as to enable less risky enforcement by better advised and represented complainants. Since the difficulties of establishing substantial damage in vilification claims limits the damages that are

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45 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 59.

46 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 60.

47 Cohesive Communities Coalition, Options Paper, above n 4, 17.

48 Ibid 23

available as an incentive to claim, an alternative form of support for litigation such as this would be necessary to support enforcement of the law.

Recommendation 4: That no changes be made to the types of remedies available for vilification under the *Anti-Discrimination Act 1991* (Qld) and the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

D. Community education

One key reason for low levels of reporting of vilification not discussed in any detail in the Options Paper is a lack of awareness of current laws, particularly amongst groups targeted by vilification. This was a clear finding made recently by a Victorian parliamentary committee,[49] and in 2017 by the Parliamentary Joint Committee on Human Rights.[50] The Committee noted that 'communities targeted by … vilification were not aware of the laws or the process for making a complaint.'[51] There were 'common and significant misunderstandings' about the laws in the community.[52]

This finding highlights the importance of the provision of education and information concerning vilification laws, particularly to members of groups subject to such conduct. Provision of relevant information in community languages ensures that the law is accessible for all members of society, and in particular for those whom it is intended to protect. Providing information enables people whose rights are breached to seek appropriate legal redress.[53]

Community engagement, education programs and awareness raising may also deter would-be-vilifiers from engaging in such conduct, by making people more aware of vilification laws and the consequences of breaching them. Community education regarding vilification laws also serves the broader purpose of reinforcing norms of behaviour by clarifying what types of conduct are (and are

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49 Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-Vilification Protections* (Parliamentary Paper No 207, 2021) 121.

50 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the* Racial Discrimination Act 1975 *(Cth) and related procedures under the* Australian Human Rights Commission Act 1986 *(Cth), Inquiry Report* (2017) [2.41], [2.130].

51 Ibid [4.11].

52 Ibid [2.114]. There are similar findings in a Queensland context and with respect to Aboriginal and Torres Strait Islander peoples' awareness of discrimination law, including vilification provisions. See, for example, Chris Cunneen, Fiona Allison and Melanie Schwartz, *The civil and family law needs of Indigenous people in Queensland* (James Cook University, 2014) <https://www.indigenousjustice.gov.au/resources/the-civil-and-family-law-needs-of-indigenous-people-in-queensland/>.

53 See, for example, Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-Vilification Protections* (Parliamentary Paper No 207, 2021) 76–99.

not) socially acceptable. Improved community education would also promote the sense, particularly in members of target communities, that making a complaint is worthwhile.[54]

Recommendation 5: That a review be undertaken of current community education programs regarding vilification laws in Queensland, with a particular focus on whether the Queensland Human Rights Commission currently has adequate powers and resources in this regard.

54 The Options Paper highlights that members of target communities do not currently feel confident that making a complaint is worthwhile (at 11).