30 May 2023

Ms Kathryn O’Sullivan

Committee Secretary

Legal Affairs and Safety Committee

***By email:*** ***LASC@parliament.qld.gov.au***

Dear Ms O’Sullivan

**INQUIRY INTO THE CRIMINAL CODE (SERIOUS VILIFICATION AND HATE CRIMES) AND OTHER LEGISLATION AMENDMENT BILL 2023**

At the public hearing on 29 May 2023, I took on notice a question from the Chair that I understand enquired whether there are authorities that can require online vilifying material to be taken down.

Under Commonwealth legislation, the eSafety Commissioner has powers to direct an online service or platform to remove illegal and restricted content. The *Online Safety Act 2021* (Cth) defines this content has either Class 1 material or Class 2 material. Class 1 material includes material that ‘promotes, incites, or instructs in matters of crime or violence’. Some vilifying material may fall within that category.

Where the civil remedy for vilification is pursued through to the tribunal stage, if the tribunal decides that the respondent has contravened the *Anti-Discrimination Act 1991* (the AD Act) the tribunal may make a variety of orders that are set out in section 209 of the AD Act. These include 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.

An example of this is the decision of the Queensland Civil and Administrative Tribunal in *Australian Muslim Advocacy Network & Islamic Council of Queensland v Anning* [[2021] QCAT 452](https://archive.sclqld.org.au/qjudgment/2021/QCAT21-452.pdf) (17 September 2021). The complaint of vilification concerned material published on the respondent’s Facebook page. The tribunal ordered the respondent to remove or cause to be removed certain publications on his Facebook page.

If a complaint of vilification included the platform or service provider as a respondent, it is possible that the tribunal might make an order requiring the platform or service provider to remove content.

I would like to also take this opportunity to clarify two other matters that arose at the public hearing and in submissions to the Committee.

The first of those relates to the proposed increase in the penalty for serious vilification to three years imprisonment. The Explanatory Notes state that the increase to the maximum penalty reflects the seriousness of this type of offending and the community’s denunciation of such conduct.

The issue about the inability of police to obtain a warrant to access stored communications, such as a text message, is outlined in the Briefing Paper of 24 April 2023 by the Department of Justice and Attorney-General. The Briefing Paper is published on the Committee’s website for this Inquiry.

The Briefing Paper refers to comments made in the Committee’s report on its Inquiry into serious vilification and hate crimes, and explains that a stored communications warrant may be issued under the *Telecommunications (Interception and Access) Act 1979* (Cth) only in respect of offences where the maximum penalty is at least three years imprisonment. The Briefing Paper states that in light of the commentary in the report and in order to reflect the seriousness of the offending and the community’s denunciation of such conduct, clause 7 of the Bill increases the maximum penalty to three years imprisonment.

The second matter concerns suggestions that conduct that would be proscribed by the proposed new offence of publicly displaying prohibited symbols, may also be captured by the offences of serious vilification, resulting in a duplication of offences. The crux of the proposed new offence is publicly displaying a prohibited symbol. However, for serious vilification, the public act must incite hatred, serious contempt, or severe ridicule in a way that includes threatening harm to person or property, or inciting others to threaten harm to person or property.

An example given at the public hearing was flying a flag of the Nazi symbol that was observable by the public (assuming that symbol will be prohibited). That would constitute an offence of the proposed new section 52D of the *Criminal Code*, but on its own it would not satisfy the element of incitement in a way that threatens harm to person or property, or inciting harm to person or property.

I trust this further information assists the Committee in its Inquiry. If I can assist any further, please contact Julie Ball, Principal Lawyer, at [phone number and email address redacted].

Yours sincerely

**SCOTT MCDOUGALL**

**Human Rights Commissioner**