9 December 2016

To: Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100,
Parliament House
CANBERRA ACT 2600

By fax: 02 6277 5767
And by email: 18Cinquiry@aph.gov.au

Dear Colleague

Re: Submission on the *Racial Discrimination Law Amendment (Free Speech) Bill 2016 ("the Bill")*

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BACKGROUND

1. I write to you to as the President on behalf of the Association of Labor Lawyers QLD (Inc) ("LLQ").

2. LLQ is a group of lawyers, professionals, students and advocates who aim to assist in the implementation of progressive platforms and policies which help to achieve social justice, and as a body of lawyers, we are also concerned with the Rule of Law and the protection of Human Rights.

3. The proposed amendments by the *Racial Discrimination Law Amendment (Free Speech) Bill 2016* ("the Bill") to the *Racial Discrimination Act 1975* (Cth) ("*Racial Discrimination Act*"), Part IIA and more specifically section 18C, is of considerable concern to LLQ. Our members feel so strongly about the need to protect Part IIA and section 18C of the *Racial Discrimination Act* that we provide this written submission to the Parliamentary Joint Committee on Human Rights.

GENERAL

4. LLQ supports the Australian Labor Party in its opposition of amendment to Part IIA of the *Racial Discrimination Act*.

5. As stated by The Honourable Senator Patrick Dodson, Shadow Assistant Minister for Indigenous Affairs and Aboriginal and Torres Strait Islanders:[1]

"*What* [we] *see today is the ideological creep back to bigotry and to racism. It is fine if you sit in some leafy suburb and never rub shoulders with people who are battling to interpret and navigate their way through modernity in this land of Australia, with its highly-sophisticated culture and its complexities of protocols and procedures and social ethos. We have to understand that* ***today is not the day to be changing this section of the Racial Discrimination Act. It is not the day. We see every night on the***

[1] The Senate Hansard, 24 November 2016

news the bigotry, the racism, the hatred and the killings that take place in the Middle East, borne out by different interpretations that people extract from words…."

…

*"**Words do matter, and how we use words is critical in the way we go about our business and in the way we go about our communication**. Have no doubt that racism is something that is not growing wild out there in the fields; it is actually tended in a flower box sitting on the window sills of flats and houses. That matter is something that we as all Australians should be working to get rid of so that the freedom that is spoken about by Senator Leyonhjelm can in fact be enjoyed by all citizens."*

…

*"**If this nation cannot stand up for the weakest, the poorest and those who are most vulnerable because of their race, their ethnicity or their beliefs, then we have become a very sad replication of what democracy is about…"*** (emphasis added).

6. It is particularly concerning to LLQ that some who support the Bill have spoken in parliament in a manner that is suggestive of adverse views against minority groups and minority interests, and as stated by The Honourable Senator Nicholas McKim the Member for Tasmania for the Greens:[2]

"For people who want reform of 18C to style themselves as self-appointed warriors of freedom of speech in this country is simply dishonest. ***They are not campaigning for freedom of speech; they are campaigning for freedom from consequence****…"* (emphasis added).

7. It is our view that it is easy to be a proponent of infringement of free speech when one comes from a position of power and seek to speak against minority groups, compared to those who are from the minority groups who are adversely affected by such comments and who must fight for their right to be heard. It cuts against the values of our Australian community to not support those whom the *Racial Discrimination Act* seeks to protect.

SUMMARY OF OUR LEGAL POSITION

8. The Bill in proposing to remove the words "offend" and "insult", does not properly consider that "offend" and "insult" are used in other legislative contexts, and are not novel to the law in Australia.
9. They are words when used in context attract the application of community standards in legislative interpretation, and reading the words as applying to a person who is "upset" or takes umbrage with what is said, is not the way the courts have applied the *Racial Discrimination Act*.
10. The *Racial Discrimination Act* has operated effectively for decades where the Courts have consistently applied community standards to consider the application of the Act – something that protects those affected by inappropriate matters as the Act should do.
11. The Queensland computer lab case referred to by some as a basis to justify improper application of the *Racial Discrimination Act* and to warrant amendment of the Act is largely unfounded. The proper consideration of the facts of that case raises clear discriminatory and race related statements

[2] The Senate Hansard, 24 November 2016

including the words "*white supremacist*" and "*niggers*", words that are clearly offensive and properly objectionable and within the *Racial Discrimination Act*.

12. Removal of the words "offend" or "insult" from the *Racial Discrimination Act* risks paving the way for such matters to become rife in our Australian communities.
13. In our view, the *Racial Discrimination Act* does not unreasonably infringe speech in its present form, and the section 18D defences are adequate.
14. We defer to the position of the Australian Labor Party on the role of the Australian Human Rights Commission and note the role of the Commission to support, assist, promote and at times be pro-active, in the interest of Human Rights matters.
15. Finally, should the Australian Labor Party consider reform of the *Racial Discrimination Act* or the Australian Human Rights Commission is necessary, we support that position, trusting, as always, that any such reform will be in the interests of the community and those affected.

TERM OF REFERENCE 1 – AMENDMENT CONSIDERATIONS

16. The Private Members Bill, the *Racial Discrimination Law Amendment (Free Speech) Bill 2016 (Cth)* ("the Bill"), proposes to amend section 18C by the removal of the words "offend" and "insult", or, by the terms of reference, amend Part IIA of the Act.
17. The words "offend" and "insult" have long been utilised in the legislative and common law context and have a long-standing application in the legal sphere.
18. Where used, determining what "insults" or "offends" depends on the context of the act or conduct involved, and will frequently import community standards in assessing same.
19. To assist the Committee by analogy, in Queensland, "offend" or "insult" is used in a variety of settings to assess criminality of conduct, the application of some criminal defences and even contempt of court proceedings. For example:
    19.1. The offence of causing *Public Nuisance* can be established by "offensive" behaviour. By way of example, swearing may constitute "offensive" behaviour, however, not everyone who swears will commit an offence as it must be considered in the context in which it occurs;[3]
    19.2. There are several criminal offences that involve elements or components of being armed with an "offensive" weapon. Not all items a person wields is considered a weapon, however, depending on the context in which the act occurs, an otherwise innocuous item can be an "offensive" weapon;[4]
    19.3. Offences that relate to those against morality, such as *Child Exploitation Material* (child pornography) offences can be established where the material is taken / portrayed "in an offensive or demeaning context". In this way, a child photographed in swimmers posing in particular ways may still constitute an offence as it should by assessing it against community standards;[5]

[3] S 6, *Summary Offences Act 2005 (Qld)*, website, Office of the Queensland Parliamentary Counsel, Queensland Legislation, https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/SumOffA05.pdf accessed 7 December 2016
[4] In the *Criminal Code 1899* (Qld) section that include "offence weapon" are s 56B *going armed to parliament,* s 61 *Riot*, s 314A *Unlawful Striking Causing Death;* s 339 *Assault Occasioning Bodily Harm*, s 340 *Serious Assault*; s 411 *Robbery*; s 412 *Attempted robbery*; s 417A *Taking Control of Aircraft*; s 419 *Burglary*; s427 *Unlawful entry to a vehicle to commit an indictable offence*); website, Office of the Queensland Parliamentary Counsel, Queensland Legislation https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CriminCode.pdf accessed 7 December 2016
[5] Chapter 22, of the *Criminal Code 1899* (Qld), website, Office of the Queensland Parliamentary Counsel, Queensland Legislation https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CriminCode.pdf accessed 7 December 2016

19.4. It is a criminal offence to perform an act that is indecent and intended to "insult" or "offend". For example, flashing of genitalia in a public place would usually establish this offence;[6]

19.5. The criminal defence of prevention of repetition of "insult" and provocation comprising "insults" incorporates community standards of what is an insult. What suffices in each context varies from case to case;[7]

19.6. It applies in assessing the classification of films and whether they "offend" against the standards of moral, decent and properly reasonable adults;[8]

19.7. It applies in registering names for business if a name is likely to "offend a reasonable person";[9]

19.8. It applies in school settings where a person must not "insult" a staff member of a State educational institution;[10]

19.9. It may be a contempt of a tribunal or other regulatory body to "insult" the entity or office member;[11]

19.10. It is an offence of obstruction to "insult" an authorised airport officer;[12] and

19.11. Many more examples in Queensland, as well as other States and Territories.

20. Similar and overlapping matters were noted in Report Number 129 of the Australian Law Reform Commission, *"Traditional Rights and Freedoms— Encroachments by Commonwealth Laws"*[13] on a national level too.[14]

21. The courts of Australia, have for decades in the States and Territories consistently applied the *Racial Discrimination Act* with regard to the context in which the act or conduct occurs, and with regard to the objective community standards of the group targeted or affected.

22. The test applied goes beyond a person being merely "upset" or a person taking umbrage with something that is said, and like the criminal conduct importing similar terms outlined above, tests of what act or conduct comprising "insults" or that "offends" is objectively applied by the Court in considering the *Racial Discrimination Act* with regard to the group affected.

23. As noted in the Australian Law Reform Commission Report *"[t]hose with concerns about the potential scope of s 18C often place little emphasis on how the provision has been interpreted in practice by the courts. Broad meanings of 'offend' have been rejected by Australian courts. For example, in Creek v Cairns Post Pty Ltd, Kiefel J* [now Chief Justice] *held that the section requires the harm to be 'profound and serious effects not to be likened to mere slights'."*[15]

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[6] Section 227 of the *Criminal Code 1899* (Qld), website, Office of the Queensland Parliamentary Counsel, Queensland Legislation https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CriminCode.pdf accessed 7 December 2016

[7] Sections 268, 269 and 270 of the *Criminal Code 1899* (Qld), website, Office of the Queensland Parliamentary Counsel, Queensland Legislation https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CriminCode.pdf accessed 7 December 2016

[8] Section 44 *Classification of Films Act* 1991 (Qld), website, Office of the Queensland Parliamentary Counsel, Queensland Legislation https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/ClassFilmsA91.pdf accessed 7 December 2016

[9] Section 3 of the *Associations Incorporation Regulation 1999* , website, Office of the Queensland Parliamentary Counsel, Queensland Legislation https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/A/AssocIncorpR99.pdf accessed 7 December 2016

[10] Section 333 of the *Education (General Provisions) Act 2006* (Qld) website, Office of the Queensland Parliamentary Counsel, Queensland Legislation https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/E/EducGenPrA06.pdf accessed 7 December 2016

[11] Various boards of inquiry including the *Transport (Rail Safety) Act 2010* (s 228), *Gas Pipelines Access (Queensland) Act 1998* (s 46), *Explosives Act 1999* (s 75), *Building Units and Group Titles Act 1980* (s 105) etc

[12] Section 81 of the *Airport Assets (Restructuring and Disposal) Act 2008* (Qld) https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/A/AirportAsA08.pdf accessed 7 December 2016

[13] Report 129, website, Traditional Rights and Freedoms - Encroachments by Commonwealth Laws [2015] ALRC 129, Australian Law Reform Commission Reports, AustLII, http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/lawreform/ALRC/2015/129.html?stem=0&synonyms=0&query=FCA%202011%201103%20or%202011%20FCA%201103 accessed 6 December 2016

[14] See footnote 12, ALRC Report at paragraph 4.52 *"Many laws that restrict freedom of speech can be seen as pursuing these objectives. For example, many criminal laws—and incitement offences—clearly protect the rights of others, including the right not to be a victim of crime. Some criminal laws, such as counter-terrorism laws, are concerned with the protection of national security or public order."*

[15] See footnote 12, ALRC Report at paragraph 4.189

24. And, it must be noted that the Australian Law Reform Commission has said that it "*has not established whether s 18C of the [Racial Discrimination Act] has, in practice, caused unjustifiable interferences with freedom of speech."*[16]
25. In our view, the *Racial Discrimination Act* in its current form properly protects against speech or conduct that would otherwise be damaging and divisive to our multicultural Australian community, and the defences under section 18D of the *Racial Discrimination Act* enable appropriate speech for the other proponents otherwise.
26. In our view, amendment is not necessary.

The Queensland computer lab case

27. The Queensland case that appears to have attracted some to argue that it justifies a basis for restrictions in the *Racial Discrimination Act* if anyone takes "offence" or gets "upset" by statements is *Prior v Queensland University of Technology & Ors (No.2)*[17]*.*

28. *Prior* should be properly considered on the facts and it must be noted that it was not the act of asking the students to remove themselves from the computer lab area dedicated to indigenous students alone that attracted section 18C of the *Racial Discrimination Act*, but rather, the subsequent conduct and posts of students online that is more concerning, including:
    28.1. *"Just got kicked out of the unsigned Indigenous computer room. QUT stopping segregation with segregation...?"*
    28.2. *"I wonder where the white supremacist computer lab is.."*
    28.3. *"...it's white supremacist, get it right. We don't like to be affiliated with those hill-billies."*
    28.4. *"Chris Lee today's your lucky day, join the white supremacist group and we'll take care of your every need!"*
    28.5. Posts on the "QUT Stalker Space" Facebook page in the following *"ITT niggers"*
29. While acknowledging this matter may well be subject of an appeal, it seems on its face that in the proper context there can be little argument justifying the use of these terms and little argument against the application of the *Racial Discrimination Act* in such matters.
30. It would be an affront to the Australian community that such words and conduct could escape legal action or remedy at the Commonwealth level if the words "offend" or "insult" are removed from the *Racial Discrimination Act,* and, if removed, may pave the way for other damaging and divisive matters in the future.
31. Allowing persons to engage in such speech that would in our view be outside of the current restrictions imposed by the *Racial Discrimination Act* would be divisive and harmful to our community.
32. We value our multicultural society and support in principle the human rights (including free speech) of those minority groups, with the defences under section 18D for the proponents otherwise.

TERMS OF REFERENCE 2 to 4 – The Australian Human Rights Commission

33. We support the Australian Labor Party in its approach to these terms of reference, and note the following matters to assist the Committee broadly.

[16] See footnote 12, ALRC Report at paragraph 4.207
[17] [2016] FCCA 2853 (4 November 2016), website, **http://www.austlii.edu.au/au/cases/cth/FCCA/2016/2853.html** accessed 6 December 2016

34. The Australian Human Rights Commission as established under Commonwealth legislation is an independent body entrusted with addressing Human Rights matters.
35. The decisions made by the Australian Human Rights Commission to assess matters, afford procedural fairness / natural justice, or deem matters as vexatious or frivolous is an important function of the Commission and ought to be maintained with integrity.
36. “Soliciting” complaints, by correspondence, contact, or the like, is no different in principle from advertising on rights, or having an on-line portal for complaints, and in either case is an important part of the discharge of the Commission’s function.
37. Likewise, the Commission ought not be prevented from being pro-active in investigating or being involved in relevant Human Rights matters.

CONCLUSION

38. We respectfully submit that the matters outlined above be considered by the Committee in the enquiry.

Yours Sincerely,

Kylie Hillard
President
Association of Labor Lawyers QLD (Inc)