



Uniting Church in Australia
ASSEMBLY

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Submission to Parliamentary Joint Committee on Human Rights

Inquiry into Freedom of Speech in Australia

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1 | Introduction

The Uniting Church in Australia Assembly is the national council of the Uniting Church in Australia (UCA). The Uniting Church has a long history of support for human rights, going back to its formation in 1977. Today, as the third largest Christian denomination in Australia, the Uniting Church celebrates its continued work in the area of Indigenous reconciliation in partnership with its Aboriginal and Torres Strait Islander members, its multicultural membership and its commitment to building and maintaining deep and robust relationships with people of other faith traditions.

The Assembly welcomes the opportunity to contribute to this inquiry. Given the short timeframe, this submission draws heavily from previous submissions made by the Assembly and its justice policy and advocacy unit, UnitingJustice Australia: the Assembly submissions to the Attorney-General's Department consultation on the Exposure Draft of the *Freedom of Speech (Repeal S. 18C) Bill 2014*¹ and the *Australian Human Rights Commission Religious Freedom Roundtable*,² and the *UnitingJustice Australia submission to the Australian Human Rights Commissioner's consultation on 'Rights and Responsibilities 2014'*.³

The Uniting Church seeks to bring God's vision of a reconciled and renewed world into the present, to reflect God's love for everyone, work for justice and peace and follow the example and teachings of Jesus Christ who taught what it means to love one's neighbour and one's enemy and who himself challenged the systems and structures of oppression in his society. In all of this, we are called to act with integrity, ensuring that our words and our deeds are aligned.

In the *Statement to the Nation* made by the Inaugural Assembly in 1977, the Uniting Church committed to a continued involvement in social and national affairs and affirmed the Church's "eagerness to uphold basic Christian values and principles, such as the importance of every human being".⁴

The cultural diversity of the Uniting Church was affirmed in the statement adopted by the Fourth Assembly in 1985, *The Uniting Church is a Multicultural Church*.⁵ This statement remembers that Jesus Christ "made peace between people of every race, culture and class" and states that such unity is "a goal to be achieved as we commit ourselves to one fellowship to achieve justice, affirm one another's cultures, and care for any who are the victims of racial discrimination, fear and economic exploitation".

1 April 2014, available at <http://www.unitingjustice.org.au/human-rights/submissions/item/948-exposure-draft-freedom-of-speech-repeal-s-18c-bill-2014>

2 October 2015, available at <http://www.unitingjustice.org.au/human-rights/submissions/item/1103-religious-freedom-inquiry>

3 November 2014, available at <http://www.unitingjustice.org.au/human-rights/submissions/item/981-rights-and-responsibilities>. UnitingJustice Australia is the justice policy and advocacy unit of the Uniting Church in Australia Assembly.

4 <http://www.unitingjustice.org.au/uniting-church-statements/key-assembly-statements/item/511-statement-to-the-nation>

5 <http://www.unitingjustice.org.au/society-religion-and-politics/uca-statements/item/509-the-uniting-church-is-a-multicultural-church>

Within the Uniting Church there are many culturally diverse congregations reflecting the great diversity of our nation. In addition, there are 191 culturally and linguistically diverse groups who worship in 26 languages other than English, not including Indigenous languages.

For over three decades, the Uniting Church has been committed to confronting racism whenever it emerges in Australian society, including within our own church and associated entities. To that end, we have engaged in research (in multiple university settings) and invited international leaders in the field of intercultural peace-building to lecture and conduct workshops in Australia. The Uniting Church requires of its own leadership a degree of competency in intercultural awareness and a commitment to developing cultural intelligence.

The Uniting Church continues to see reconciliation with Indigenous peoples as essential to the life and health of the Church and Australian society more broadly. The Uniting Aboriginal and Islander Christian Congress (UAICC), established in 1985, leads the Church in ministry and solidarity with Aboriginal and Torres Strait Islander peoples. At its Seventh Assembly in 1994, the Church formally entered into a relationship of Covenant with its Aboriginal members, recognising and repenting for the Church's complicity in the injustices perpetrated on First Peoples, and pledging to move forward with a shared future.⁶ The UAICC's generous response to this statement, among other messages, called upon the broader Church to take up the mission of reconciliation.⁷ In 2012, the Church approved a new preamble to its Constitution to recognise Aboriginal and Torres Strait islander peoples as the First Peoples of land. We hope and work for a nation that acknowledges and protects the rights of the First Peoples.

Christian support for human rights rests on the understanding that the community flourishes when all people are included and accorded the dignity and respect they deserve as beloved children of God. Human beings are made in the image of God, and as such are precious, capable of marvellous things, and entitled to dignity, compassion and respect. It is the responsibility of all of us as individuals and as a community to seek the common good: to help build a just, peaceful, inclusive and prosperous society, where all people are valued, where the First Peoples of this land are respected and honoured, where people do not have their identity determined by others, where civil liberties are taken seriously and where the diversity of religions, languages and cultures is regarded as a great gift; where everyone has a home, decent work, access to a good education and good healthcare, and the opportunity to live meaningful lives free from fear, prejudice and violence. In the context of public policy and international humanitarian affairs, the Church supports the development of policy and legislation which upholds the rights of all people to participate in the community and public life, be treated with respect and accorded dignity without discrimination.

The Uniting Church's support for human rights was fully articulated in our 2006 statement on human rights, *Dignity in Humanity: Recognising Christ in Every Person*.⁸ In part, this statement reads:

The Uniting Church in Australia believes that human beings are created in the image of God who is three persons in open, joyful interaction. The image of God that is reflected in human life, the form of life that corresponds to God, is the human community—all people—finding its life and sustenance in relationship.

Thus, the Uniting Church believes that every person is precious and entitled to live with dignity because they are God's children, and that each person's life and rights need to be protected or the human community (and its reflection of God) and all people are diminished.

6 <http://www.unitingjustice.org.au/justice-for-indigenous-australians/uca-statements/item/492-covenanting-statement>

7 <http://www.unitingjustice.org.au/justice-for-indigenous-australians/uca-statements/item/493-uaicc-response-to-the-covenanting-statement>

8 <http://www.unitingjustice.org.au/human-rights/uca-statements/item/484-dignity-in-humanity-a-uniting-church-statement-on-human-rights>

In addition to laying out the theological basis of our commitment to human rights, this statement committed the Uniting Church to an ongoing assessment of Australian Government policy and practice against our international human rights commitments under United Nations treaties, and encouraged agencies and other groups within the Church to advocate for social policy consistent with these obligations:

We affirm our support for the human rights standards recognised by the United Nations. Everyone has a birthright to all that is necessary for a decent life and to the hope of a peaceful future. This birthright is expressed in UN human rights instruments which describe human rights as civil, political, economic, social and cultural rights. These instruments provide a valuable framework for assessing political, economic and social systems and are an important tool for peace.

The international human rights instruments to which Australia is a party recognise the importance of non-discrimination in the realisation of the rights they describe. The Uniting Church believes that discrimination—in all its forms—is both a cause and consequence of poverty and social exclusion, and is a denial of human dignity.

It is in light of these beliefs, affirmations and commitments that the Uniting Church Assembly is concerned that any watering down of Sections 18C and 18D of the *Racial Discrimination Act 1975* (RDA) will reduce the protection under law of the dignity and rights afforded to vulnerable groups in Australia, such as Aboriginal and Torres Strait Islander peoples, and those from culturally and linguistically diverse backgrounds.

The Uniting Church in Australia Assembly does not believe that Sections 18C and 18D of the *Racial Discrimination Act 1975* pose unreasonable restrictions on freedom of speech and therefore we do not believe they should be amended.

In relation to frivolous, misconceived and vexatious complaints and complaints lacking in substance, we believe they should be dismissed at the earliest possible opportunity.

The Uniting Church in Australia Assembly recommends minor amendments to Part IIA of the RDA and the *Australian Human Rights Commission Act 1986* to allow the Australian Human Rights Commission President to dismiss clearly frivolous, misconceived and vexatious complaints without having to thoroughly inquire into the complaint.

2 | Protection of Rights and Freedom in Australia

Human rights are derived from our status as human beings in society. They describe the inherent and inalienable right of all people to live with dignity, free of persecution and violence, with access to all that is necessary for a decent life. Human rights are not granted by governments, but they are protected and promoted by government policy and practice. Respect for human rights is needed to create a just and peaceful world founded on a common humanity. Human dignity can only be protected if human rights are protected and the responsibility of all nations and people to protect the rights and freedoms of all others is met. The United Nation's human rights treaties are a reflection and expression of these principles.

The Uniting Church believes that the Australian Government, in its law-making, policy and practice, must uphold, protect and promote all of the human rights contained in the UN human rights instruments which Australia is party to. These include the following:

- *International Covenant on Civil and Political Rights (ICCPR)*
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*
- *Convention on the Elimination of All Forms of Racial Discrimination (CERD)*

We also believe that Australia must uphold in domestic law the commitments made by signing the Universal Declaration on the Rights of Indigenous Peoples (UNDRIP).

We acknowledge that human rights can and should be protected in many ways—through law, government policy and practice and through the community as an expression of the mutual responsibility we have to uphold the dignity of every person.

At the federal level, human rights protections are severely lacking. In Australia there is no Commonwealth law that sets out fundamental human rights and freedoms. Australia remains the only liberal democratic nation in the world where this is the case. There is a collection of legislation that protects some important elements of the human rights agreed to by nations at the international level, however this does not comprehensively or adequately provide the protection of rights and freedoms to which all members of the Australian community are entitled. These pieces of legislation include the RDA which partially implements CERD.

In the Australian Constitution, there are a few civil and political rights protected, including the right to vote (Section 41 gives the limited right to vote in Commonwealth elections if enrolled for State elections, while Section 25 actually allows states to disqualify people from voting on the basis of race⁹), the right to trial by jury (but only for the breach of a Commonwealth law, not a state law—so is very limited), a limited expression of freedom of religion and an implied right to freedom of political communication

⁹ The UCA supports the removal of Section 25 of the Constitution <http://www.unitingjustice.org.au/justice-for-indigenous-australians/uca-statements/item/970-recognition-of-indigenous-peoples-in-the-australian-constitution>

(which has been interpreted by the High Court from the notions of representative and responsible government).¹⁰

For these reasons, the Uniting Church supports the development of a national Human Rights Act that would implement our commitment to the Universal Declaration of Human Rights, ICESCR and ICCPR.¹¹ Such an instrument would, therefore, necessarily, include substantive protection for freedom of speech and freedom of religion, protection currently lacking in Commonwealth law.

10 Human Rights Law Resource Centre (2009), 'The National Human Rights Consultation—Engaging in the Debate', pp. 22–3, <http://www.hrlrc.org.au/files/hrlrc-the-national-human-rights-consultation-engaging-in-the-debate.pdf>

11 Uniting Church in Australia Assembly (2008), *Uniting Church Response to Human Rights Legislation*, Assembly Standing Committee Resolution 08.24, <http://www.unitingjustice.org.au/human-rights/uca-statements/item/482-a-uniting-church-response-to-human-rights-legislation>

3 | The Nature and Impact of Racism in Australia

Racism may be defined as

“avoidable and unfair phenomena that lead to inequalities in power, resources and opportunities across racial or ethnic groups. It can be expressed through beliefs and stereotypes, prejudices and discrimination, and occurs at many social levels, including interpersonally and systemically, and as internalised racism.”¹²

Racism may occur surreptitiously by way of social exclusion or indifference. It may also take the form of overt prejudice through name-calling, taunting or insults. There is also systemic racism which may be experienced by exclusion from services or opportunities on the basis of an individual's race, colour, national or ethnic origin, religion or belief; for example, in relation to employment opportunities or access to education. Regardless of its manifestation, the Uniting Church firmly believes that racism is a deliberate attempt to harm people and their place in the community and that it serves only to diminish us as a society.

There is a considerable body of evidence, both here in Australia and internationally, that establishes a causal connection between racism and negative health and wellbeing for people targeted for racism.¹³ Research has also demonstrated that simply witnessing or hearing racial hatred can lead to a bystander adopting prejudiced and racist attitudes.¹⁴ In addition to the negative health impacts, racial hatred also prevents targets from fully participating in a democratic society; the protection of racial hatred under the guise of freedom of expression silences vulnerable individuals and groups who do not feel empowered to speak up in their own defence.

With nearly 30 per cent of the Australian population born overseas, there is an ever-pressing need to combat the rising levels of racist hatred and vilification to ensure an inclusive and harmonious society.¹⁵ The 2011 *Challenging Racism* project compiled surveys on racism conducted since 2000. Overall, the findings were disturbing:

- approximately 85 per cent of respondents believe that racism is a current issue in Australia;
- approximately 20 per cent of respondents had experienced forms of race-hate talk (verbal abuse, name-calling, racial slurs, offensive gestures etc.);
- approximately 11 per cent of respondents identified as having experienced race-based exclusion from their workplaces and/or social activities;

12 Berman, G. & Paradies, Y. (2010). "Racism, disadvantage and multiculturalism: towards effective anti-racist praxis," *Ethno Racial Studies*, 33: 214–232

13 See, for instance: <http://www.vichealth.vic.gov.au/Publications/Freedom-from-discrimination/Mental-health-impacts-of-racial-discrimination-in-culturally-and-linguistically-diverse-communities.aspx>, <http://apt.rcpsych.org/content/7/5/343.full>, and <https://www.humanrights.gov.au/news/speeches/social-determinants-and-health-indigenous-peoples-australia-human-rights-based>

14 Nelson, J., Dunn, K. & Paradies, Y. (2011). "Bystander Anti-Racism: A Review of the Literature," *Analyses of Social Issues & Public Policy*, 11(1): 268

15 Australian Bureau of Statistics (30 March 2016), 'Overseas born Aussies highest in over a century', Media Release, <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/3412.0Media%20Release12014-15>

- 7 per cent of respondents identified as having experienced unfair treatment based on their race; and
- 6 per cent of respondents reported that they had experienced physical attacks based on their race.¹⁶

The project report also documented that 27.9 per cent of Australians acknowledged holding racist attitudes towards Aboriginal Australians, based on the proportion of Australians who stated that they would be concerned if a relative were to marry an Indigenous person.¹⁷

Aboriginal and Torres Strait Islander people are particularly at risk of adverse physical and mental health effects as a result of persistent racism. Studies have demonstrated clear links between race-based discrimination and depression and anxiety, as well as smoking, substance use, psychological distress and poor self-assessed health status.¹⁸

Aboriginal and Torres Strait Islander people who had experienced discrimination were more likely to report high to very high levels of psychological distress (44 per cent compared with 26 per cent) and to be in fair to poor health (28 per cent compared with 20 per cent). They were also more likely to engage in binge drinking (42 per cent compared with 35 per cent) and to have recently used illicit substances (28 per cent compared with 17 per cent).¹⁹

Racial discrimination also negatively impacts a person's level of trust in others. Aboriginal people who have experienced discrimination are less likely than those who have not experienced discrimination to trust the police, their local school, their doctor and/or hospital and other people in general.²⁰

Recently, we have seen, both here and in other countries, the destabilising effects of a 'permission-giving' for racist speech by some political leaders, media and opinion-makers. Around the world, social cohesion is being threatened as individuals and groups take up an 'us' and 'them' stance based on race.

At the end of his visit to Australia, the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Mutuma Ruteere, made these comments that reflect our own concerns about the current situation in Australia:

I am concerned about some remarks made by elected politicians about newly-arrived migrants, and in particular against Muslims. I have been made aware that xenophobic hate speech has been on the rise, leading to the creation of a negative perception of migrants, particularly Muslims and persons of African descent. I also heard of continuing fears, threats and incidents of anti-semitism faced by members of the Jewish community in Australia. While I applaud the Prime Minister's recent unequivocal statement against racism, I note with concern that some populist politicians, cheered on by sections of mainstream media, continue to stereotype and fan hostility against certain categories of migrants. I call upon mainstream political leaders to denounce and censure this kind of divisive and racist rhetoric particularly when made by members of their own political parties and urge those sections of the media to resist the tempting descent into racist, and xenophobic stereotyping rhetoric and scapegoating.²¹

16 http://www.uws.edu.au/_data/assets/pdf_file/0007/173635/NationalLevelFindingsV1.pdf and reported in Australian Human Rights Commission (2012), *Face the Facts—Some Questions and Answers about Indigenous Peoples, Migrants and Refugees and Asylum Seekers*, p. 35, <https://www.humanrights.gov.au/our-work/race-discrimination/publications/face-facts-2012>

17 Awofeso, N. (2011). "Racism: A major impediment to optimal Indigenous health and health care in Australia," *Australian Indigenous Health Bulletin*, 11(3)

18 See for example, the Lowitja Institute's Policy brief, 'Racism Undermines Health' (March 2008), <http://www.lowitja.org.au/sites/default/files/docs/Racism-policy-brief-march-2008.pdf>

19 Australian Bureau of Statistics (2010). "The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples," <http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter450Oct+2010>

20 *ibid.*

21 United Nations Press Statement (5 December 2016), <http://un.org.au/2016/12/05/press-statement/>

The Uniting Church Assembly maintains that,

Racism and racial vilification are a serious threat to social cohesion and have a significant effect on the health and wellbeing for those who experience them. The protection of racial hatred under the guise of freedom of expression silences vulnerable individuals and groups who do not feel empowered to speak up in their own defence. Aboriginal and Torres Strait Islander peoples are particularly at risk of adverse physical and mental health effects as a result of persistent racism in Australia. Studies have demonstrated links between race-based discrimination and depression and anxiety, as well as smoking, substance abuse, psychological distress and poor self-assessment health status. It is not enough to suggest that governments have no need to legislate against racial vilification because people must stand up for themselves or because community standards will serve to moderate and address racism in society. Human rights law is a critical tool in the protection of people who are marginalised and vulnerable and in articulating shared values and community standards about how we relate to each other in the face of our differences.²²

The Uniting Church believes that having strong and clear laws in place, such as the current legislative protections contained in s. 18C, serve as a powerful deterrent against those who wish to license hate, while providing a valuable empowerment mechanism for those who are targets of racism.

We are, therefore, opposed to any attempts to weaken the current legislation as this may lead to a further increase in the number of complaints on the basis of racial vilification. Of even greater concern is the number of individuals who would remain silent without effective protection and a strong stance against racism from our Government and all politicians.

²² UnitingJustice Australia (November 2014), submission to the Australian Human Rights Commissioner's consultation on 'Rights and Responsibilities 2014', p. 11, <http://www.unitingjustice.org.au/human-rights/submissions/item/981-rights-and-responsibilities>

4 | Freedom of Expression in Australia

Much of the recent discussion in support of amending or removing ss. 18C and 18D of the RDA focuses on popular misconceptions around freedom of expression. One of these misconceptions is the “marketplace of ideas” theory, which argues that the truth will emerge when there is an open and robust competition of ideas. It is an enticingly simple theory: that truth will win out in the end and that justice will prevail. It is also fundamentally flawed, as it operates on the presumption of an equal ‘marketplace’ where all participants are not only equipped with the skills to debate their point, but where they are empowered to do so and provided with an appropriate arena.

In reality, those who are targets of racial vilification are usually minority groups who are vulnerable to systemic discrimination and its widely felt impacts. The theory fails on another key point, as it assumes that there is some truth to racist statements and that such racism and hatred of others will contribute to real truth. Rather, racial vilification deliberately obscures the truth through bigotry, prejudice, blatantly false information or ignorance. Such racist hatred does not add to the wellbeing of society, nor does it contribute to a truthful community.

Other than the implied Constitutional guarantee of free political speech, freedom of speech is not guaranteed under Australian law.²³ Any existing rights have always been subject to qualification as demonstrated by laws against contempt of court, sedition, defamation, obscenity, sexual harassment and blackmail to name a few. That these laws exist is evidence of the legitimacy for limiting freedom of expression to ensure a healthy and effective democracy. However, there is no doubt that freedom of expression—including freedom of speech—is an essential part of a flourishing Australian society; and indeed, protecting these rights is an important aspect of our obligations under international law.

Article 19(2) of the ICCPR states that “Everyone should have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds”.²⁴ However, these rights are tempered by section 19(3) which states:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- a) For respect of the rights or reputations of others

Further, it is made clear in section 20(2) of the ICCPR that the right to freedom of expression is not absolute:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

²³ https://www.dfat.gov.au/facts/democratic_rights_freedom.html

²⁴ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

The ICERD also obliges State parties to make laws that prohibit discrimination and racial hatred.²⁵ Article 4 states:

State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:

- a) shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- b) shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- c) shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Importantly, the right to be free from discrimination is also recognised in Article 2 of the UNDRIP which states:

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.²⁶

The Committee of the *National Inquiry into Racist Violence*, which was announced in 1988 in response to an increase in racial hatred and violence found that the right to free speech must be balanced against the right to be free from racial vilification. The Committee's report noted, in part:

The right to free speech needs to be weighed against the value placed on the rights of people from different backgrounds to enjoy their lives free of harassment or violence. The evidence presented to the Inquiry indicates that some people are deliberately inciting racial hostility and, particularly in the case of racist graffiti and poster campaigns, getting away with it.²⁷

In its submission of the Human Rights Commissioner's 'Consultation on Rights and Responsibilities 2014', UnitingJustice Australia wrote:

While freedom of expression, when properly understood, is an essential part of a flourishing society, and protecting this right is an important aspect of our obligations under international law, the exercise of freedom of expression should not be used to harm others, or create an environment where racial vilification or discrimination is acceptable. Indeed, the right to freedom of expression has always been subject to qualification as demonstrated by laws against contempt of court, sedition, defamation, obscenity, sexual harassment and blackmail to name a few.²⁸

What is clear from this outline of our human rights obligations is that freedom of expression is not absolute and must be qualified by competing rights or other issues.

25 www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf

26 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>

27 Human Rights and Equal Opportunity Commission (1991), 'Report of the National Inquiry into Racist Violence in Australia,' p. 200, <http://www.humanrights.gov.au/publications/racist-violence-1991>

28 op.cit., p. 11

5 | Should Sections 18C and 18D be Reformed?

Peter Wertheim, in his paper presented at a conference to mark the 49th anniversary of the RDA, quoted from an Australian Law Commission 1992 report, ‘Multiculturalism and the Law’. It is worth quoting that paragraph here in full:

In a multicultural society people are entitled to be protected against serious attempts to undermine tolerance by creating or playing on racial hatreds between groups. Laws prohibiting such conduct protect the inherent dignity of the human person. Peace and social order are underwritten by values such as equality of status, tolerance of a wide variety of beliefs, respect for cultural and group identity and equal opportunity for everyone to participate in social processes which are respected and protected by the law. Laws prohibiting racial vilification indicate a commitment to tolerance, help prevent the harm caused by the spread of racism and foster harmonious social relations.²⁹

It was in 1994, two years after this Australian Law Commission report, that the existing federal racial vilification provisions were introduced through the *Racial Hatred Bill 1994 (Cth)*, largely in response to what the Hon. Michael Lavarch, then Attorney-General, described as unacceptable levels of racial hatred and violence. As Lavarch noted in his second reading speech to Parliament:

It needs to be recognised that racial hatred does not exist in a vacuum or for the intellectual satisfaction of those feeling it. Racial hatred provides a climate in which people of a particular race or ethnic origin live in fear and in which discrimination can thrive. It provides the climate in which violence may take place. It is of itself a threat to the wellbeing of the whole community as well as to individuals or groups in the community. It needs to be confronted.³⁰

The RDA provides a civil prohibition—not a criminal one—against racial vilification, meaning individuals cannot be prosecuted or convicted for a crime of racial vilification under Commonwealth law. As it stands, complainants must bring their case to the Australian Human Rights Commission (AHRC) and only a small number of cases proceed to be heard by the courts (see section 7 below for more detail).

Section 18C of the RDA states that it is unlawful to commit a public act that is reasonably likely to “offend, insult, humiliate or intimidate another person or a group of people; and the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.”³¹

Arthur Moses SC, in a brief prepared for NSW Premier Barry O’Farrell in 2014 on proposed changes to the RDA in the Exposure Draft *Freedom of speech (Repeal S. 18C) Bill 2014*, noted that the proposal to repeal s. 18C would “radically narrow the protection that Australian citizens will receive from racial vilification” and would “undermine the very purpose [of the RDA]”. He argued that the “new legislative right to engage in racial vilification in the course of public discussion would, for instance, open the door

29 Australian Law Reform Commission, *Multiculturalism and the law, Report No. 57 (1992), par. 7.44*, quoted in Peter Wertheim, ‘Freedom and Social Cohesion: a law that protects both’, in *Perspectives on the Racial Discrimination Act: Papers from the 40 years of the Racial Discrimination Act Conference*, Australian Human Rights Commission (August 2015), p. 91, <https://www.humanrights.gov.au/our-work/race-discrimination/publications/perspectives-racial-discrimination-act-papers-40-years>

30 <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=1;query=AuthorSpeakerReporterId%3ALG4;rec=6>

31 http://www.austlii.edu.au/au/legis/cth/consol_act/rda1975202/s18c.html

to Holocaust deniers to publish their opinions on websites and on social media in the course of ‘public discussion’³².

Section 18C has consistently been read by the courts in light of section 18D, which provides an exemption for artistic work, scientific debate, and fair comment on and fair reporting of a matter of public interest, provided that they have been undertaken in good faith and in a reasonable manner. Sections 18C and 18D were introduced in response to the recommendations of federal inquiries including the *National Inquiry into Racist Violence* and the *Royal Commission into Aboriginal Deaths in Custody*.³³

The Uniting Church Assembly believes that it is important to acknowledge that many people in Australia operate from a position of privilege and are not able to accurately or fairly assess the serious impact of racial hatred on an individual who is different from them. As already noted above, the unacceptably high levels of systemic and continued racism and the often devastating impacts on the wellbeing of individuals are well documented. Reducing the protections against racial vilification will risk further alienating people who have been targets of racial hatred.

Attorney-General Brandis has said that the words “offend”, “insult” and “humiliate” “describe what has sometimes been called hurt feelings”, and “it is not, in the Government’s view, the role of the state to ban conduct merely because it might hurt the feelings of others.”³⁴ However, the courts have consistently emphasised that the legislation states that an act is only unlawful if it is proven reasonably likely, in all the circumstances, to cause serious harm.

The Assembly believes that it is extremely unfortunate that three recent high profile cases (those relating to columnist Andrew Bolt, cartoonist Bill Leak and a group of students from QUT) have been used by some political and media interests to give the impression that all that is required to make a complaint to the AHRC and see it proceed to the Federal Court, is feeling hurt or slightly offended. We are also concerned about the high profile complaint made by Senator David Leyonhjelm which we believe was mischievous and unhelpful to the public conversation about the nature of racism in Australian society.

Contrary to popular opinion (fuelled in part by these cases), the bar is set very high by the courts in relation to complaints made on the basis of s. 18C.

In the case of *Eatock v Bolt*, Justice Bromberg wrote,

The definitions of “insult” and “humiliate” are closely connected to a loss of or lowering of dignity. The word “intimidate” is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence. The word “offend” is potentially wider, but given the context, “offend” should be interpreted conformably with the words chosen as its partners.³⁵

The Australian Law Reform Commission (ALRC) report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, states that

Those 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 held that the section requires the harm to be ‘profound and serious effects not to be likened to mere slights’.³⁶

32 <http://www.smh.com.au/federal-politics/political-news/barrister-warns-barry-ofarrell-of-holocaust-denial-risk-under-george-brandis-changes-20140406-366r8.html>

33 <https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth>

34 <http://www.abc.net.au/news/2014-03-25/racial-discrimination-act-changes-george-brandis/5343464>

35 *Eatock v Bolt* [2011] FCA 1103, 28 September 2011, [265], <http://www.austlii.edu.au/au/cases/cth/FCA/2011/1103.html>

36 ALRC Report 129 (December 2015), par. 4.189, p. 115, <https://www.alrc.gov.au/publications/freedoms-alc129>

In the end, the ALRC Report did not establish “whether s. 18C of the RDA has, in practice, caused unjustifiable interferences with freedom of speech” and concluded that a more thorough review may be of benefit.³⁷

The terms of reference for this inquiry by the Parliamentary Joint Committee on Human Rights does not meet the recommended criteria of such a review as described by the ALRC which explicitly stated “should not be done in isolation” from consideration of other forms of vilification and

might best be done in conjunction with a more general review of vilification laws that could consider not only existing encroachments on freedom of speech, but also whether existing Commonwealth laws effectively discourage the urging of violence towards targeted groups distinguished by race, religion, nationality, national or ethnic origin or political opinion.³⁸

The Uniting Church Assembly would welcome the opportunity to contribute to such an extensive and deep review at a time in the future when racial tensions are less threatening to social cohesion in Australia, and when public conversations about racism are considerably less politicised.

The United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Mr. Mutuma Ruteere, said this about the current public debate on the merits of s. 18C:

While I understand there is debate within society at large about removing, amending or maintaining this provision, section 18 C) sets the tone of an open, inclusive and multicultural Australia which respects and values the diversity of its peoples and protects indigenous and migrants against bigots and extremists who have become more vocal in Australia and other parts of the world. Removing this provision would undermine the efforts undertaken by the various levels of Governments for an inclusive Australia and open the door to racist and xenophobic hate speech which has been quite limited thanks to this provision. In my conversations with civil society, community and indigenous organizations, as well with State Governments, I found unambiguous support for this section and therefore call upon for this section to remain so that the Human Rights Commission, as well as the Courts, can continue to play their role in interpreting its provisions.³⁹

The *Mapping Social Cohesion Report 2016* recorded an increase in the number of people identifying racism as the most important problem facing Australia from 1.5% in 2015 to 4.1% in 2016. This is the highest percentage on record and as the Report indicates, a statistically significant change.⁴⁰ Any attempt to water down the current prohibitions on racial vilifications contained in the RDA is ill-timed, to say the least.

The Uniting Church in Australia Assembly believes that Sections 18C and 18D of the *Racial Discrimination Act 1975* (RDA) are critical for the protection of people against racial vilification and that taken together they do not pose unreasonable restrictions on freedom of speech. We do not believe they should be amended.

37 *ibid.*, par. 4.207, p. 119

38 *ibid.*, par. 4.212, p. 119

39 United Nations Press Statement (5 December 2016), <http://un.org.au/2016/12/05/press-statement/>

40 Scanlon Foundation, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2016*, p. 23, available <http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf>

6 | Treatment of Complaints by the AHRC

In 2014–15, the AHRC finalised 405 complaints under the RDA, 12 of which proceeded to court.⁴¹ “In 2015–16, the Commission finalised 86 complaints about racial hatred”, only one of which went to court.⁴² In relation to s. 18C,

In 2015–16, the Commission received 77 complaints under section 18C, and 52 per cent of racial vilification complaints were resolved at conciliation. During this year, 12 per cent of complaints were withdrawn and only one complaint of racial hatred proceeded to court.⁴³

As the AHRC explained in a public statement on 7 November, it is important to be clear about the role of the Commission. The Uniting Church Assembly is concerned about the spreading of misinformation in regards to race discrimination complaints, including the use of loose language by the Prime Minister giving the impression that the AHRC “brings” cases to court.⁴⁴ As the *Australian Human Rights Commission Act 1986*, Section 46PO(1) makes clear, it is the person affected whose complaint has been terminated by the AHRC President who can apply to the Federal Court or the Federal Circuit Court to have their case heard.⁴⁵ On 7 November 2016, the AHRC issued a statement describing its role in handling complaints:

At no stage does the Commission initiate or prosecute a complaint. If the Commission receives a complaint in writing alleging a discriminatory act, the Act provides that the Commission must investigate the facts and attempt to conciliate the matter.

The Commission’s focus is on resolving disputes so parties can avoid court proceedings. Of complaints where conciliation was attempted, 76% were successfully resolved in 2015–16.

Only 3% of complaints finalised by the Commission were lodged in court. For example, of the over 80 complaints finalised under the racial hatred provisions of the Racial Discrimination Act last year, only one proceeded to court at the initiation of the complainant.

In the 2015–16 reporting year the average time it took the Commission to finalise a complaint was 3.8 months. In that same reporting year, 94% of surveyed parties were satisfied with the Commission’s service.

The Commission has no judicial powers, and it makes no legally binding determinations as to whether unlawful acts have occurred. The Commission has no statutory power to prevent a complainant proceeding to court once the Commission terminates the complaint.

41 Australian Human Rights Commission (2015), ‘Freedom from Discrimination: Report on the 40th Anniversary of the Racial Discrimination Act’, p. 21, <https://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial>

42 Australian Human Rights Commission, ‘Race Hate and the RDA’ (8 September 2016), p. 1, <https://www.humanrights.gov.au/our-work/race-discrimination/projects/race-hate-and-rda>

43 Australian Human Rights Commission, ‘Race Hate and the RDA’ (8 September 2016), p. 2, <https://www.humanrights.gov.au/our-work/race-discrimination/projects/race-hate-and-rda>

44 Reported by ABC News (8 November 2016), <http://www.abc.net.au/news/2016-11-08/malcolm-turnbull-announces-racial-discrimination-act-inquiry/8004640>

45 http://www.austlii.edu.au/au/legis/cth/consol_act/ahrca1986373/s46po.html

The Commission has provided advice to successive governments and Attorneys-General on amendments to the *Australian Human Rights Commission Act*. In particular, the Commission has asked for amendments to streamline the process by raising the threshold for accepting complaints.⁴⁶

The Uniting Church Assembly believes that frivolous, misconceived and vexatious complaints and complaints lacking in substance should be dismissed at the earliest possible opportunity to ensure the resources of the AHRC are directed to complaints that have merit. The President of the Commission should have the authority to terminate frivolous, misconceived and vexatious complaints under Part IIA of the RDA. The complainant should have the right to appeal against the complaint being dismissed to the Federal Court, but should be required to provide security for costs in making such an appeal.

The above is likely to require amendment to the *Australian Human Rights Commission Act 1986* which currently reads (Part II, Division 2, Section 11):

- f) *to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:*
- i) *where the Commission considers it appropriate to do so—to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry;*

Further, Part IIB, Division 2, Section 46PF Inquiry by President, requires:

1. *Subject to subsection (5), if a complaint is referred to the President under section 46PD, the President must inquire into the complaint and attempt to conciliate the complaint.*

However, the President already has the power under Section 46 PH to dismiss complaints where “the President is satisfied that the complaint was trivial, vexatious, misconceived or lacking in substance”. So only minor amendments seem necessary to allow the President to dismiss complaints for these reasons without having to thoroughly inquire into the complaint.

By comparison, the *Victorian Equal Opportunity Act 2010* allows the Victorian Equal Opportunity and Human Rights Commission to discontinue or decline to provide dispute resolution services to any complaint where “having regard to all the circumstances, the Commission considers it is not appropriate to provide or to continue to provide dispute resolution” (Section 116(e)).

The Uniting Church in Australia Assembly recommends minor amendments to Part IIA of the RDA and the *Australian Human Rights Commission Act 1986* to allow the Australian Human Rights Commission President to dismiss clearly frivolous, misconceived and vexatious complaints without having to thoroughly inquire into the complaint.

⁴⁶ Australian Human Rights Commission (7 November 2016), statement, ‘Racial Discrimination Complaints’, <http://www.humanrights.gov.au/news/stories/racial-discrimination-complaints>

7 | Concluding Remarks

The idea of human rights is built on a shared understanding that oppression, persecution, discrimination, poverty and violence diminish us all and that to overcome these we must work together which a shared vision of a better society. A commitment to human rights takes seriously that no person is of inherently less value than anyone else. In this it reflects the Christian understanding that every human being is a child of God and loved by God.

The Uniting Church Assembly believes that freedom from racial discrimination and vilification must be vigorously protected by law and promoted by government and civil society as an essential part of a healthy, diverse and vibrant society.

The links between tolerance of racially-biased comments and racially-connected violence are well documented. This reminds us of the importance of standing up to bullying and naming racism when we hear it. Allowing people to denigrate others is not the sign of a free society, but rather speaks to a society that tolerates bullying and the dehumanising of people. When individuals are targets of racial vilification, their dignity is diminished; by our values, traditions and beliefs, we find this wholly unacceptable.

The Uniting Church in Australia is committed to standing against racism in all its forms and to positively contributing to a nation that is inclusive and harmonious. We believe that diversity strengthens us: as individuals, in the life of our Church, and our society as a whole.

The Uniting Church Assembly does not believe that freedom of speech is unduly threatened by ss. 18C and 18D of the RDA. We urge the Parliamentary Joint Committee on Human Rights to find that at this critical time, when social cohesion is threatened by increasing racial tensions, ss. 18C and 18D of the RDA should remain unchanged.