

Submission to the Exposure Draft

The Attorney-General's Proposed Amendments to the *Racial Discrimination Act 2013*

From the authors, writers, journalists, editors, publishers, directors, artists, filmmakers,
academics and supporters in Appendix A

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Contents

Summary.....	3
Background	3
Freedom of Speech in Australia	4
The Importance of Freedom of Speech	4
Balancing this Freedom with Protection against Discrimination	6
The Current Racial Discrimination Act.....	10
The Proposed Amendments:	11
Subsections 1 and 2:	12
Subsection 3	18
Subsection 4	21
Appendix A – List of Supporters	24
Media Contacts:.....	32

Summary

1. This submission is made by the undersigned parties and individuals in Appendix A who consist of Australian authors, writers, journalists, editors, publishers, directors, artists, filmmakers, academics and supporters.
2. Our submission is divided into two parts:
 - The first part deals with the issue of **freedom of speech** and its legislative protections under the current Australian law and the proposed amendments.
 - The second part deals with the more specific issue of **racial discrimination**, and whether Australians are offered adequate protections from race-based discrimination or vilification if the amendments were to be effected.
3. Part 1 discusses the adequacy of current protections, while Part 2 analyses the proposed amendments clause by clause.
4. Our submission urges the Australian Government not to proceed with the proposed amendments to the *Racial Discrimination Act 1975* (the Act), as we submit that the current Act already sufficiently establishes a fair balance between upholding freedom of speech while maintaining important protections against racial discrimination.

Background

5. On 25 March 2014, the Australian Government approved amendments to the Act. An Exposure Draft of the proposed amendments was also published on the same day, seeking submissions from all stakeholders.
6. The amendments seek to remove sections 18B–E of the Act, currently under ‘Part IIA–Prohibition of offensive behaviour based on racial hatred’, and to replace them with new provisions:
 - confining racist behaviour to vilification and intimidation;
 - providing a different standard of who determines whether an act is likely to ‘vilify’ or ‘intimidate’; and
 - wider exemptions from racial discrimination than under the current Act.

7. The Attorney-General stated in Parliament that:

“It is certainly the intention of the government to remove from the Racial Discrimination Act those provisions that enabled the columnist Andrew Bolt to be taken to the Federal Court merely because he expressed an opinion about a social or political matter. I will very soon be bringing forward an amendment to the Racial Discrimination Act which will ensure that that can never happen in Australia again—that is, that never again in Australia will we have a situation in which a person may be taken to court for expressing a political opinion.”¹

Freedom of Speech in Australia

The Importance of Freedom of Speech

8. As Australian authors, writers, journalists, editors, publishers, artists, filmmakers and academics, we understand how important it is to protect freedom of speech in Australia. Our art, books, articles, films, speeches and publications owe their existence to this freedom.

9. Dr Anita Heiss wrote:

“I am a writer, so my life is about words and the impact they have on individuals, communities and whole societies. I know only too well the power of language and the role of books in educating, informing and bringing different communities together, just as the power of the word in any medium – the press, books, poem, play or song – can be someone’s salvation or nemesis.”²

10. Author Kim Scott submits:

“Words can be used for us to help one another make a path toward justice and liberation for all, or to remain in the ruts of a never-ending circle around the ruins and the wounded of old battles.”

11. Dr Donna McDonald submits:

“Writers understand the dangers of those silences that arise from holding back our experiences, and that forestall the rights of others to speak out and write against preconceptions and stereotypes about race, disability, diversity, poverty and all the complex issues of our world.

¹ (Senator Brandis, Queensland–Deputy Leader of the Government in the Senate, Vice-President of the Executive Council, Minister for Arts and Attorney-General). Monday, 24 March 2014, Questions without Notice, Hansard, p. 36

² Anita Heiss, *Am I Black Enough For You?*, Bantam, p. 133.

As a deaf writer, I especially understand this. Indeed, for many years I had contributed to that silence. My very silence about my deafness was my story. But it had acted as a brake of sorts. For too long, I buried the chance to write and speak out for a better understanding of the complex lives of deaf people as we negotiate the claims and demands of the hearing world.

Both silence and words have power. Whoever we are, wherever we come from, and whatever our experiences are, we all have the responsibility to withstand efforts to prevent us from saying what needs to be said. And we also have the responsibility to choose our words carefully so that they enlarge our understanding of humanity, not diminish it.”

12. Rowena Lennox submits that:

“Words and language are among the most powerful means we have to describe reality and create reality. Even a subtle shift of tone or a seemingly innocuous word can change the way a person is perceived, or the possibilities a person can imagine.”

13. Similarly, Belinda Collins, author, submits:

“Our words have power over people. The words we choose to use can unite, inspire and uplift or they can belittle, scar and shatter. Words stay with their audience long after they have left the mouth or the hand of the author.”

14. Writer Paul Mitchell submits:

“If writers didn’t believe words could affect people deeply, then we wouldn’t be writers in the first place. A carefully chosen word of encouragement can change a life. The reverse, unfortunately, is also true.”

15. Author Sheryl Gwyther writes:

“As an author, I know how the power of words can be used to heal *and* destroy. To attempt to destroy someone’s character, self-belief, community standing, self-worth, and to humiliate by ‘expressing an opinion’ (and in Bolt’s case, a blatantly false, deliberately misleading opinion) has nothing to do with freedom of speech, and should be exposed for its inflammatory and provocative *raison d’être*. There is no capacity for this in freedom of speech.”

16. Author Sulari Gentill submits that:

“As a writer and a lawyer I have a deep and abiding respect for the power of words. Through them, we connect to others, to ideas, to causes greater than ourselves; we create the road upon which we may walk in another’s shoes; we explain, we defend, we educate, we communicate and spread both the best and the worst of humankind.”

17. Dr Jessica White submits:

“As someone who works daily with the crafting and consumption of words, I am sensitive to their power to transport, whether into realms of delight or despair. If words did not have power, that schoolyard taunt, ‘Sticks and stones will break my bones but words will never hurt me,’ need never have originated. Its existence, and use as a salve by teachers to their charges, signals the viciousness of language. It is crucial that the negative potential of words is managed, whether in the school yard or the public arena, so as to avoid intolerance and inequality.”

18. The right to freedom of speech is enshrined in the *International Covenant on Civil and Political Rights* and the *Convention on the Elimination of All Forms of Racial Discrimination*. Australia is a signatory of both treaties.

Balancing this Freedom with Protection against Discrimination

19. We understand that to protect such freedoms, there must be open and honest debate. As Justice Bromberg decided in *Eatock v Bolt*³, freedom of speech must be balanced with exercising this freedom in a fair, reasonable and appropriate way so as not to impinge on other freedoms.

20. The pivotal issue in *Eatock v Bolt* was not whether Mr Bolt’s article was an expression of opinion, but whether the factual allegations on which that opinion was based were accurate, and Justice Bromberg found that they were not. His Honour decided that Mr Bolt’s contravention of s18C of the Act concerned:

“... the manner in which the articles were written, including that they contained errors of fact, distortions of the truth and inflammatory and provocative language.”⁴

21. Justice Bromberg’s conclusion was unambiguous and emphatic: “Untruths are at the heart of racial prejudice and intolerance”:

“I have taken into account that the articles may have been read by some people susceptible to racial stereotyping and the formation of racially prejudicial views and that, as a result, racially prejudiced views have been reinforced, encouraged or emboldened. In the balancing process, I have also taken into account the silencing consequences upon freedom of expression involved in the Court making a finding of contravention.”⁵

³ [2011] FCA 1103, 28 September 2011.

⁴ [2011] FCA 1103, 28 September 2011, at para. 23.

⁵ [2011] FCA 1103, 28 September 2011, at para. 25.

22. Anita Heiss writes about her decision to be a plaintiff in the case of *Eatock v Bolt*:

“It was about the history of negative stereotyping of Aboriginal people in the media, the lack of fair response for us against such appalling journalism, and our rights particularly under the law, to self-identification ... I wanted the publication of under-researched, race-based misinformation to end.”⁶

23. Similarly, Kerry Reed-Gilbert submits:

“As Chairperson of First Nations Australia Writers Network (FNAWN) I understand the necessity of being heard within the four corners of the world. To be able to bring to the world our stories is one that is our right, and that story has the right to be honoured and respected, not degraded by people’s bigotry and racial vilification.”

24. Arnold Zable submits:

“The first duty of a journalist is to get the facts straight. To have oneself misrepresented to readers, especially on issues of race, is humiliating, offensive, hurtful and degrading. When mud is thrown, some of it inevitably sticks. To present these distortions in provocative opinion pieces is to add salt to the wounds. There must be some protection against such stereotyping prejudices, and cavalier half-truths and untruths. Freedom of speech does not mean freedom to vilify, falsely malign and discriminate.”

25. Kerry Reed-Gilbert further submits:

“Every day in this country an Aboriginal person is racially vilified in some way, shape or form. Whether it is picking up the newspaper and reading some stereotyping view, turning the television on or somebody questioning a person’s Aboriginality because of the colour of their skin. There has to be a mechanism in place that prevents Aboriginal people being mentally tortured by the racist views of some community members such as Andrew Bolt and the like.”

26. Author Rosie Scott submits:

“I believe that free speech is the cornerstone of genuine democracy, but when writers publish disinformation dressed up as fact, lies as truth, slander as objective evaluation, racial discrimination as comment and call it free speech, they are devaluing its very essence and betraying all those who’ve fought for it.”

27. Author Kim Scott submits:

“Freedom of Speech allows the possibility of moving beyond historically locked, adversarial positions; it can (less usefully) be used to strengthen stalemate and perpetuate disadvantage and ignorance.”

⁶ Anita Heiss, *Am I Black Enough For You?*, Bantam, p. 167-169.

28. Author Alex Miller submits that:

“A first-world nation is expected to protect its vulnerable minorities with a greater degree of care than it is to license the voices of powerful spokespersons from the majority, such as Andrew Bolt. Respect for its minorities is the measure of a civilised society.”

29. Professor Nicholas Jose submits that:

“It is a fundamental misunderstanding and distortion of the idea of freedom of speech to equate it with open slather in the public arena. Freedom of expression entails responsibility to accuracy, truth and the constructive use of the power of communication in any medium for the public good. Freedom of expression is not a licence to disseminate falsehood, prejudice, negative stereotyping or bigotry.”

30. Dr Thomas Cho, author, submits that:

“The rapid proliferation of utterances in social media channels and in the workings of the 24-hour news cycle can give the impression that words are somewhat fleeting and ephemeral. However, one need not be a writer to know that some words have a longevity that can endure for generations and lifetimes. Some words become esteemed at a canonical level and are incorporated into the most proudly repeated stories that a nation tells about itself. Other words prove their speakers to be on the wrong side of history. Take, for example, Arthur Caldwell’s 1947 remark in Parliament that ‘Two Wongs do not make a white’, which has gone on to be studied at university level courses in Australian history in light of Caldwell’s advocacy of the White Australia policy. Words can elevate; words can wound. Australia’s history is filled with words that speak to the racial politics of the time, reminding us that there are racially inflected words we will say in the future that will have considerable consequences for how our nation sees itself and treats its people.”

31. Dr Thomas Cho, author, further submits:

“Importantly, the right to freedom of speech has never been a licence for completely unrestricted expression of thought. Australia has always balanced freedom of speech with other concerns, as enshrined, for example, in laws to protect copyright and to prevent defamation and libel – incidentally, all laws that rightfully shape the professional lives and standards of academics, artists, publishers, writers and journalists. This submission is testament to the existence of respected practitioners from these professions who believe that it is right to balance freedom of speech with not only concerns such as copyright, but with the pivotal protections that Australians deserve from racial discrimination.”

32. Author Sara Foster submits:

“As a writer I may take years to complete my work because I understand precisely what power lies within my words, and therefore I spend time choosing them with the greatest of care and consideration. For a healthy society we need to make sure that the term ‘freedom of speech’ is not misappropriated. It is surely up to the laws that protect freedom of speech to also protect those targeted by the guise of ‘free speech’, and to be able to hold people accountable for all forms and levels of discrimination.”

33. Author Belinda Collins submits:

“We simply must strive to create an environment where those we have welcomed to our shores, and indeed, those who were here before us, feel safe to be who they are, without feeling slighted or persecuted because another person has a false, uneducated view of their culture or race.”

34. Author and lawyer Sulari Gentill submits that:

“Extreme libertarian doctrine has been used and manipulated to allow and even encourage the marginalisation of some sections of society with disastrous human consequences. Australia is not, has never been, and should never be a society of unfettered rights. In the same way that we do not see laws against assault as denying freedom of movement, it is spurious to claim that laws against vilification and bigotry deny freedom of speech. I want my sons to grow up – as I did – knowing, that though they may, by virtue of their skin colour, occasionally encounter racially based assault, Australian law will protect them, regardless of whether that racially based assault is physical, verbal or written.”

35. Author Hop Dac Nguyen submits:

“While it is important to protect the candid discussions between consenting adults, it is worth being reminded that this candidness can’t be assumed from the outset, that appropriate speech must be considered and boundaries acknowledged. This is a basic social consideration whether in a one-on-one interaction or publicly. Freedom of speech as a tenet should not assume that the neutral Australian position is shared by everyone (including as consumers of media), because it is not generally assumed that everyone is allowed to share in it. This misunderstanding is the basic mistake of discrimination.”

36. Rowena Lennox submits her concerns about access of freedom of speech:

“Our freedom of speech in Australia is a tremendous privilege, like all great rights, it comes with responsibility. The awareness that life is not fair, that not all members of the Australian community have the same access to public discourse or the legal system, or

enjoy the same privileges or are tolerated the same way is necessary when exercising our freedom of speech.”

The Current Racial Discrimination Act

37. We submit that the current Act already sufficiently establishes a fair balance between upholding freedom of speech while maintaining important protections against racial discrimination.

38. The current Act makes it unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to racially offend, insult, humiliate or intimidate another person or a group of people.⁷ However, section 18D exempts ‘anything said or done reasonably and in good faith’.

39. In *Eatock v Bolt*, Justice Bromberg repeatedly reinforced that 18D protects any opinion, however obnoxious or offensive, provided it is genuinely held, for academic, artistic or scientific purpose, or in the public interest, or in publishing a fair and accurate media report:

“It is of importance that on social and political issues in particular, people should be able to express their opinions. Those opinions will at times be ill-considered. They may be obstinate, exaggerated or simply wrong. But that, of itself, provides no valid basis for the law to curtail the expression of opinion.”⁸

40. Justice Bromberg himself noted that even the Australian Press Council’s Principles recognise that freedom of speech “is to be utilised fairly and with reasonable sensitivity.”⁹

41. There appears nothing to suggest that inherent flaws in the construction or judicial interpretations of the Act have hindered freedom of expression in Australia.

42. What *Eatock v Bolt* established is that if a person has the good luck, privilege and talent to hold such a large public platform, they also have ensuing responsibilities not to use that power in a misleading and untruthful way to racially vilify minority groups.

⁷ *Racial Discrimination Act 1975* (Cth), s. 18C(a).

⁸ [2011] FCA 1103, 28 September 2011, at para. 353.

⁹ [2011] FCA 1103, 28 September 2011, at para. 419.

43. Dr Debra Adelaide discusses her support of the current Act:

“As an author and academic I am all too aware of the power of language to influence political ideas. Recent reports of the CIA’s strenuous efforts to publish and promote Boris Pasternak’s novel *Doctor Zhivago* to the people of the USSR is yet again evidence of that. Australia can boast something very special: freedom of expression but also protection for groups or individuals at risk of vilification. The RDA must not be changed to enable potential hatreds and prejudices to be aired and individuals to be vilified under the spurious guise of open political debate: we already have that.”

44. We submit that the current protections in the Act adequately strike a balance between upholding freedom of speech while protecting the rights of people from being racially discriminated.

The Proposed Amendments:

45. The Exposure Draft repeals sections 18B–E of the Act, and inserts a new section (‘the amended draft’):

Subsection 1. It is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely:

to vilify another person or a group of persons; or

to intimidate another person or a group of persons;

and

the act is done because of the race, colour or national or ethnic origin of that person or that group of persons.

Subsection 2. For the purposes of this section:

vilify means to incite hatred against a person or a group of persons;

intimidate means to cause fear of physical harm:

to a person; or

to the property of a person; or

to the members of a group of persons.

Subsection 3. Whether an act is reasonably likely to have the effect specified in sub-section (1)(a) is to be determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community.

Subsection 4. This section does not apply to words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.

46. Each subsection of the proposed amendments is discussed below:

Subsections 1 and 2:

47. Subsection 1 of the amended draft sets the threshold for discrimination at a higher bar than the current Act. It confines the definition of discrimination to acts that ‘vilify’ or ‘intimidate’ in contrast to acts that ‘offend, insult, humiliate or intimidate’ in the current Act.

48. The government claims that by setting the bar high and including the unlawful act of vilification, these amendments actually increase protections against racial discrimination. The Oxford English Dictionary defines ‘vilification’ as ‘speaking or writing about in an abusively disparaging manner’, and it appears that *Eatock v Bolt* has already established that vilification is unlawful under the current Act:

“Racial vilification will usually involve negative attacks on another person, not based on what that person has said or has done but principally because of negative characteristics (real or imagined) which are ascribed to the group to whom that person belongs ... That kind of stigmatisation and its insidious potential to spread and grow from prejudice to discrimination, from prejudice to violence, or from prejudice to social exclusion, is at the fundamental core of racial vilification. In a free and pluralistic society, every citizen is entitled to live free of inequality of treatment based upon a denial of dignity of the kind that ‘recognition respect’¹⁰ confers.

...

These are the underlying values which, in my view, s 18C is directed to protect. They are consonant with the commitment to equal dignity for all persons upon which CERD is based and which the RDA was enacted to give effect to.”¹¹

49. Accordingly, we submit that there is no need to amend sub-section 1 to include the offence of vilification. This is because this offence is already covered by the current Act.

¹⁰ “It is important to distinguish between two senses of respect that might be in play here: what Stephen Darwall has called “appraisal respect” (in which one’s estimation of people varies by their merits, their virtues and vices, their crimes, their views and so on) and “recognition respect” (which is fundamental to the dignity of persons and invariant in the face of differential merit, even commanding how people are to be treated when they are guilty of terrible crimes).”: [2011] FCA 1103, 28 September 2011 at para. 224.

¹¹ [2011] FCA 1103, 28 September 2011 at paras. 225–226.

50. Further, we do not support the definition of ‘vilification’ under the proposed amendments to mean ‘to incite hatred against a person or a group of persons’. We believe that this shifts the onus of the burden of proof to the person/s discriminated against, to show that the discriminator aimed to ‘incite hatred’. It takes away the focus on the effect of the discrimination on the person/s discriminated against, and focuses on the intention of the alleged discriminator.
51. The new proposed definition of ‘vilify’ is not confined to ‘speaking or writing’, but could include a larger range of actions. In fact, we believe that broadening out this definition may have the consequence of diluting a claim against verbal or written vilification.
52. This leads us to discuss the meaning of ‘intimidate’ under the Act, which is defined as causing fear of physical harm to a person, or to the property of a person or to the members of a group of persons. Coupled with the wider definition of ‘vilification’ under the proposed amendments, for a person experiencing discrimination, these unlawful acts set a very high threshold of proving ‘discrimination’.
53. For example, Person A may declare that they did not aim to ‘incite hatred’ against Person B. Moreover, they can claim that Person B was not threatened or intimidated in any way since they were not physically harmed and no damage was done to their personal property.
54. We believe that the exclusion of ‘offend, insult, humiliate or intimidate’ from the proposed draft removes important protections from discrimination. These words were removed because the Attorney-General determined that:
- “Those three words – offend, insult and humiliate – describe what has sometimes been called hurt feelings ... 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.”¹²
55. After the *Eatock v Bolt* decision, when trying to defend themselves by exercising their freedom of speech, many of the indigenous Australians in Mr. Bolt’s articles received death threats and Dr Heiss’s harassment continued on the release of her memoir in 2012.¹³ As the consequences of *Eatock v Bolt* demonstrate, racist speech or writing or actions designed to ‘offend, insult and humiliate’ a person have far-reaching ramifications for a person’s reputation and mental wellbeing.

¹² George Brandis, quoted in ‘Racial Discrimination Act changes to include offence of vilification’, *The Guardian*, 25 March 2014.

¹³ Anita Heiss, *Am I Black Enough For You?*,

56. Dr Anita Heiss writes that although the *Eatock v Bolt* decision was personally significant for all the plaintiffs:

“Victory did not remove the trauma of the previous two years, or undo the damage done to race relations in Australia.”¹⁴

57. Author Kim Scott submits:

“There are minority groups who have been offended, insulted and humiliated in the process of our society’s establishment and, still carrying the legacy of that trauma, are of course more susceptible to further hurt and damage.”

58. Professor Nicholas Jose submits that those in the group subject to vilification are the most important witnesses to the damage caused by such vilification, whether intended or not.

59. Author Sulari Gentill submits:

“Removing the words ‘offend, insult and humiliate’ significantly dilutes the protections of the Act. Vilification, as defined in the section, relates only to words and acts which incite hatred. And yet inciting condescension, mockery and ridicule are just as, if not more, damaging. Bigotry is not always about hate. If I could incite you to dismiss, mock, fear or underestimate a person based on their ethnic origin, will I not do as much damage as if I simply encourage you to hate them?”

60. Kerry Reed-Gilbert submits her views on insidious and deeply entrenched racism:

“Victory in this case did not stop racism being directed at Aboriginal people, it just went more underground. I will face racism in this country until the day I die, and so will every other Aboriginal person from the time they are born till their death. This country allows that to happen now, what would it be like to be an Aboriginal person in this country when we have no legal representation to fall back on?”

61. Dr Thomas Cho submits that:

“The sense of ‘mereness’ that the Attorney-General ascribes to the experience of ‘hurt feelings’ from race-based discrimination departs sharply from the thoroughly documented impact of racism on health, including mental health. As noted by the Victorian Health Promotion Foundation (VicHealth):

¹⁴ Anita Heiss, *Am I Black Enough For You?*, p. 331.

‘The link between poorer physical and mental health and self-reported perceptions or experiences of racism is well-documented. Racism can affect mental health through a range of pathways. In particular, there is a risk that targets of racism will develop a range of mental health problems such as anxiety and depression.’¹⁵

“Using an evidence-based approach, VicHealth has long identified reducing race-based discrimination as a public health and wellbeing priority. Importantly, the Attorney-General’s proposed removal of ‘offend, insult and humiliate’ from the act is at odds with the scope of not only VicHealth’s definition of race-based discrimination, but much research on racial discrimination.

“This includes a significant 2008 Australian-focused study that, incidentally, shows racial discrimination to be far from an anomaly in Australia. In this study, 47% of people born in non-English speaking countries reported experiencing race-based discrimination (compared with 20% of those in the sample who were Australian-born), with 14% reporting experiences of race-based discrimination in the last 12 months (compared with 7 per cent of the Australian-born).¹⁶

“Raising the threshold for discrimination would leave the law at variance – and simply out of step – with important and well-established insights on the scope and extent of racial discrimination, as attained through research and subsequently adopted by respected agencies throughout Australia and the world.”

62. Author and editor Lian Low submits:

“I believe that the proposed changes to the Racial Discrimination Act are highly unnecessary. It worries me greatly that enabling these changes will mean that communication that is expressed as hatred is legally protected by the Australian legal system. This is how I interpret the ramifications of removing ‘offend, insult and humiliate’ from the Act.

“The basis of speech that ‘offends, insults and humiliates’ stems from ignorance, not as Senator Brandis puts it, as ‘hurt feelings’. There is a huge difference between being hyper-sensitive and being the victim of ethnic and racial hatred. The proposed changes gives licence to treat a person without accountability or seeing their humanity.

“Perhaps the legal limits of freedom of speech should be measured when the Independent Member for Oxley, Pauline Hanson, made her maiden speech in Parliament in 1996. She was an exemplar of someone who had expressed highly inflammatory political opinions without legal persecution.

¹⁵ Victorian Health Promotion Foundation, *Mental Health Impacts of Racial Discrimination in Victorian Culturally and Linguistically Diverse Communities. Experiences of Racism Survey: A Summary*, November 2012, p. 3.

¹⁶ Andrew Markus and Arunachalam Dharmalingham, *Mapping Social Cohesion: The Scanlon Foundation Surveys*, Monash Institute for the Study of Global Movements, Monash University, Melbourne, 2008.

“As a new migrant to the country, I was shocked by Hanson’s maiden speech assertion about Australia being ‘swamped by Asians’ and ‘Aboriginals received more benefits than non-Aboriginals’¹⁷. Had there not been a robust *Racial Discrimination Act* in place, who knows what sort of civil unrest could have resulted from her assertions?”

63. Filmmaker Miro Bilbrough submits:

“I believe that the removal of the terms ‘offend, insult, humiliate’ from the Act paves the way for a normalising of verbal or written racial aggression that is anathema to the health and wellbeing of a country I have chosen to call home. What repels me most is that such attacks are, at heart, always an attempt to exclude, disqualify and, above all, *silence* other members of the community – based on the colour of their skin. It’s a sickening impulse, and one that strikes directly at the egalitarian ethos Australians take great pride in.”

64. Arnold Zable submits:

“As a writer and activist I have received my fair share of hate mail. These have included vicious anti-Semitic tirades, based on the most insidious conspiracy theories, and in several cases, tirades that have even been illustrated by ugly, stereotypical representations typical of the worst and most disturbing of anti-Semitic caricatures. No matter how immune I have become to such hate and prejudice, it can still shake me to the core. To read such mail, in the first instance, is to feel violated and humiliated. It reawakens an ancestral fear of not belonging, of being the ‘Other’.

“I am privileged to have a voice, and of being able to defend myself. But just to know that I live in a society that has put together an Act that acknowledges this sense of violation, and that recognises that such vile offence, insult and humiliation, and caricature can be so damaging, is a comfort in itself, as it is far more so, for many others less able to speak out for themselves. This sense of violation and hate, this sense of humiliation and racism has for too long been experienced in particular by Aboriginal people. I just cannot fathom why this amendment to the RDA is being proposed.”

65. Author Paul Mitchell states that:

“In my family home, we do not allow words that are likely to offend, insult or humiliate other family members. Through a process – in which all family members have engaged – we’ve learnt what this means in regard to sexuality, religion, race, disability, etc. If we can do it in our family home, we can do it in our community.”

66. Dr Adam Aitken submits:

“I am a writer of Asian and Anglo-Australian descent who has experienced quite damaging physical, verbal and psychological abuse in my life as a migrant in Australia (since arrival in Perth in 1968). The definition of racial abuse needs to include physical

¹⁷ Pauline Hanson’s maiden speech in the house of representatives, <http://tinivurl.com/ntrzzvo> (Retrieved April 9, 2014).

AS WELL AS psychological harm and damage. In my case, words did cause me a level of mental distress well beyond simple ‘hurt feelings’. I believe that any medical assessment of my racial abuse traumas could demonstrate that mental distress has led to physical stress.”

67. Author Hop Dac Nguyen similarly highlights the consequences of words intended to ‘offend, insult and humiliate’:

“As an Asian-Australian who grew up in country Western Australia in the 1980s and 1990s, I experienced regular name-calling, contempt and intimidation, and was generally made to feel unwelcome in what should have been my home. This constant reminder of my lack of worth, and the general feeling that I was disagreeable simply by my presence, was done with words, uttered from the mouths of the kids I went to school with, people who attended our church and strangers in passing cars who worked in shops and on the street. In many ways, the worst racism is an environmental problem that children (like me back then) experience on a daily level, being reminded about how unwanted, unwelcome and unliked we are. By being seen to allow that environment to remain, and indeed, to prosper, then I have no doubt that this government will be encouraging a growing disconnect between the Australian-ness that people like myself identify with, and the discouragement to appreciate that very identity from some of the people in our communities.”

68. Kerry Reed-Gilbert submits:

“In this country other cultures are allowed to be Chinese-Australian, Irish-Australian etc. Their cultural and religious details are collected, acknowledged and respected. I find that in this country – our country – that respect and honour is not given to Aboriginal people and due to government laws and media portrayals, we are the ‘Other’. The ‘Other’ who are devalued and disregarded continually by those who now call this country home. With the proposed amendments to this Act, Aboriginal people will become a bigger target for others to vilify.”

69. Belinda Collins submits that:

“Where we are born is not our choice – through no action of my own I was born a white Australian. What right do I have to abuse that privilege and offend, insult or humiliate any other person just because they weren’t born into the same family as me? Words don’t need to vilify to scar. Repeated insults, repeated humiliation can shut down dreams and aspirations and stop our fellow Australians from creating the lives they desire for themselves and their children.”

Subsection 3

70. Subsection 3 is, in our view, one of the most problematic and pernicious sections of the proposed amendments. The first part states that whether something is ‘reasonably likely’ to racially vilify is to be determined by the standards of an ‘ordinary reasonable member of the Australian community’. It appears to take into account that people have differing levels of sensitivity and that racial discrimination must be measured in accordance with a degree of reason and common community standards.
71. But then it firmly states that what is reasonably likely to racially vilify is to be determined ‘not by the standards of any particular group within the Australian community’. This subsection is baffling because it assumes ‘an ordinary reasonable member of the Australian community’ *does not belong to any particular group* within the Australian community. It assumes our Australian identities are universal, not unique.
72. With this assumption then, comes the logical conclusion that if the ‘ordinary reasonable member of the Australian community’ does not belong to any group, then they have no ethnicity, or race, or culture beyond the undefined ‘Australian’ one. The proposed amendments do not define what the ‘Australian community’ means, nor does it discuss the characteristics of a member of this community. Because it is not defined, we are all assumed to be Australian. In which case, it is logically impossible to racially vilify or discriminate against *anyone*, because we are all assumed to be the same, and it would be akin to vilifying ‘an ordinary reasonable member of the Australian community’.
73. However, the same logic does not apply for those who identify as ‘Other’ – on ethnic, cultural, or racial grounds: it appears that it is fine to discriminate against them because their standards are not those of the ‘ordinary Australian community’. *Their* standards are different, clannish, groupish, insular and ‘*particular*’. Particular in this case, in light of the Attorney-General’s comments, means over-sensitive, petty and reactionary.
74. Author and Walkley award-winning journalist Melissa Lucashenko submits:
- “If the so-called ‘reasonable’ standards in question are not meant to reflect any particular group in Australian society, then they absolutely should not reflect the narrow and unrepresentative views of those white Australians who live in blissful ignorance of how racial vilification affects many, many Australians. Just because a complacent and powerful segment of the population is able to ignore or marginalise our experience doesn’t make it ‘reasonable’.”

75. Dr Amanda Curtin, author, submits that:

“The coded targeting of Subsection 3 is shameful. Who are these ‘ordinary Australians’ who do not belong to any ‘particular group’? We are a nation of immigrants, differentiated only by the recency of our arrival.”

76. Similarly, author Hop Dac Nguyen submits:

“This section is incredibly problematic in its assumption of what an ordinary Australian is, without giving that definition. How does an ordinary Australian determine for themselves if this is them? If he or she were to look at the mainstream media for guidance, for example, then they would assume that the ordinary, default Australian position is a white one. This sub-section is inherently flawed from the outset because its position is entitled, inconsiderate, paternalistic and non-inclusive.”

77. Arnold Zable submits that:

“It has taken so long, so many struggles, so many conflicts, to create a potentially dynamic, multi-faceted, post-White Australian multicultural Australia which can potentially hold its head high in the global community of nations. So many trials and tribulations to achieve what author Gwenda Tavan has aptly titled as ‘the long, slow death of White Australia’.

“It has taken so long to create the understanding that a harmonious society is based on mutual recognition and acceptance of difference within an overall body politic that unites us all. It has taken so long to begin to realise that there is no easily identifiable ‘ordinary’, ‘reasonable’, ‘mainstream’ Australian. So long to recognise that Aboriginal people hold a special place in our society, and to recognise the deep psychic wounds inflicted upon them through dispossession and continued bigotry and racism. And to realise that a sense of wellbeing and belonging in this complex society depends upon mutual recognition, and an exchange of our countless unique stories, on listening to each other with respect, empathy and compassion.

“These are precious and fragile understandings so long fought for, so easily undermined, understandings that need to be nurtured and protected rather be subject to the prejudices and simplistic notions of what constitutes the ‘ordinary’ and the mainstream. Sub section three of the amended draft reduces this dynamic complexity, the very diversity that makes us potentially great as a nation, to ill-defined, vague notions of community standards and so-called ‘reasonableness’.”

78. The Attorney-General declared in Parliament that: “People do have a right to be bigots, you know. In a free country, people do have rights to say things that other people find offensive, insulting or bigoted.”¹⁸

79. The Oxford English Dictionary defines bigotry as “Intolerance towards those who hold different opinions from oneself”. It appears to us that this kind of thinking is exactly what subsection 3 hopes to achieve – circular, exclusionary, and defeating the purpose of the *Racial Discrimination Act 1975*.

80. Journalist Waleed Aly wrote about the standard of judgment proposed in subsection 3:

“What race is this hypothetical ‘ordinary reasonable member of the Australian community’ meant to be, exactly? If you answered that they have no particular race, then you’ve just given the whitest answer possible. It’s the answer that assumes there is such a thing as racial neutrality. Of course, only white people have the chance to be neutral because in our society only white is deemed normal; only whiteness is invisible.

...

“If the ‘ordinary reasonable Australian’ has no race, then whether or not we admit it, that person is white by default and brings white standards and experiences to assessing the effects of racist behaviour. Anything else would be too particular.

“This matters because – if I may speak freely – plenty of white people (even ordinary, reasonable ones) are good at telling coloured people what they should and shouldn’t find racist, without even the slightest awareness that they might not be in prime position to make that call.”¹⁹

81. Erica Wagner, Publisher of Books for Children and Young Adults at Allen & Unwin submits that granting the right for anyone to engage in ‘bigotry’ can lead to severe and unfortunate consequences:

“Books are one of the best ways people can ‘walk in another’s shoes’ and develop compassion and empathy for others. Do we want to bring up our children so that they ‘have the right to be bigots’ or do we want them to develop into caring, compassionate members of society, able to imaginatively place themselves in another’s shoes and sincerely consider the feelings of others? Shame and humiliation are powerful human emotions and our courts are full of stories of crimes that can be traced back to the very ‘feelings’ that are being dismissed in this proposed amendment.

“Would it not be better to help young people understand the power of words – why certain words can be so hurtful and damaging, and how to persuasively construct an

¹⁸ Senator Brandis, Queensland–Deputy Leader of the Government in the Senate, Vice-President of the Executive Council, Minister for Arts and Attorney-General, Questions without Notice, Monday, 24 March 2014, Hansard, p. 36

¹⁹ Waleed Aly, ‘Brandis’ race hate laws are whiter than white’, *The Age*, 27 March 2014.

argument with eloquent language and clear thinking, not shying away from difficult topics but telling the truth with honesty and kindness so that we can begin to develop a more sophisticated and nuanced conversation about things that are complicated and hard to talk about.”

Subsection 4

82. Subsection 4 provides an exemption from the Act for ‘sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.’

83. We object to the wording of the proposed amendments in subsection 4 because they remove the requirements of ‘good faith’, ‘public interest’, ‘genuine belief’, ‘fair and accurate’ reporting and reasonableness from s 18D of the current Act.

84. The removal of these words above from the current Act supports the Attorney-General’s general policy of granting everyone the right to be ‘bigots’.

85. Author and journalist Bianca Nogrady submits that while considering the bigger issue of racial vilification and bigotry:

“As someone whose family tree was brutally pruned during the Holocaust, I know that bigotry is not harmless. It is the tip of the sword. I hope with all my heart that our politicians show themselves to be better than this.”

86. Dr Mireille Juchau, author, submits in support that:

“With holocaust survivors in my family it is personally alarming to me that these changes are being proposed. Insidious and creeping changes to the law have real effects on people’s lives and psychological wellbeing.”

87. Author Kim Scott submits that:

“The requirements of ‘good faith’, ‘fair and accurate’ and ‘public interest’ must be paramount in public discussion claiming to be about political and social improvement.”

88. Author Hop Dac submits that:

“The genuine concern of subsection 4 is the empowering effect it will allow people to do as they please using the broad premise of work being made in the ‘public discussion of any political, social, cultural, religious, artistic, academic or scientific matter’. Without the provisos listed above in item 42, Subsection 4 becomes, perhaps cynically but within the scope of reason, an enabler of socially destructive provocations dressed up disingenuously as dialogue.”

89. Similarly, Kerry Reed-Gilbert submits her view that these amendments were proposed:

“For one reason and one reason alone: that the Government’s mate Andrew Bolt lost his case and this Act is now being amended so that the mates can attack Aboriginal people, the target for their racial vilification. The mates will now be able to say what they want, when they want and there will be no protection for Aboriginal people at all.”

90. Professor Nicholas Jose submits that:

“It is precisely in the public arena, in all forms of expression, that it is imperative for the responsibility that comes with freedom of expression to be exercised so that a space is preserved for a civil, open, informed and moderated discussion. To allow an exemption to those norms and ethical practices that admits hate speech and related abusive or malicious utterance is a travesty of freedom of expression and damaging to the public interest. The pen is indeed powerful. That’s why I, as an author, acknowledge the ethical responsibility that comes with my freedom to write and regard its maintenance in law as fundamental to the kind of society I want to live in.”

91. Roberta Ivers submits:

“As a book editor I work daily with writers’ words, opinions and interpretations. It’s a part of my skill-set to recognise where faithful description, opinion and interpretation merge, and to sift through it in order to help make an expression stronger, clearer or more elegant. A bigoted opinion is ignorant: unobservant and unfaithful to reality – and yet Mr Brandis wants us to accept bigotry as acceptable ‘political’ discussion. What kind of discussion that is related to the governance and leadership of a nation – a nation of immigrants since 1788 or earlier – can make our national story stronger, clearer and more elegant? Bigotry should not be accepted as ‘political’ discussion, as if somehow dispensed from any consequence. It’s simply ill-informed, ugly ignorance – which can wound or kill – and itself needs governance and leadership.”

92. Author David Nyuol Vincent submits:

“I’m totally disgusted how even in Australia today one person (Bolt) could influence a significant change to the law of the land that will have a huge and negative repercussion to many. As a newly arrived member of this society and a refugee activist, I am just left flabbergasted, afraid and unsure how I can carry on with my work and feel safe and protected.”

93. Mr Bolt writes that “even academics and artists now spurn the chance to be people of our better future – people of every ethnicity but none.”²⁰ We, the undersigned authors, writers, journalists, editors, publishers, directors, artists, filmmakers, academics and supporters make this submission endeavouring to be ‘people of our better future’, but are firmly unapologetic for being born into our race, ethnicity and culture.

94. All of us – and we respectfully include you, Mr Brandis – are part of an ethnic or cultural group, whether we choose to acknowledge it or not. We understand that your purported ‘ordinary reasonable member of the Australian community’ under your proposed amendments will be the moral barometer of measuring racial vilification and intimidation. Yet we also understand that you have expressly given these ‘ordinary reasonable members of the Australian community’ the right to be bigots. The African American writer James Baldwin wrote in *The Fire Next Time*:

“How can one respect, let alone adopt, the values of a people who do not, on any level whatever, live the way they say they do, or the way they say they should?”

95. We have never felt our freedom of speech threatened by the current *Racial Discrimination Act 1975*. We firmly oppose the proposed amendments to the Act. We submit that we will endeavour to do all we can in our respective fields to ensure that Australia does not become a country that condones ‘bigotry’ – unsubstantiated and untrue racist comments and discourse that incite hatred towards others.

²⁰ Andrew Bolt, ‘The New Tribe of White Blacks’, *The Herald Sun*, 21 August 2009.

Appendix A – List of Supporters

We, the undersigned authors, writers, journalists, editors, publishers, directors, artists, filmmakers, academics and supporters lend our support to this submission and urge the Government not to proceed with the proposed amendments to the *Racial Discrimination Act 1975*:

1. Dr Anita Heiss (author)
2. Ms Alice Pung (author)
3. Meredith Curnow (publisher, Knopf, Vintage)
4. Janet Hutchinson (editor)
5. David Whish-Wilson (author)
6. Kerry Kilner (academic)
7. Bruce Pascoe (author)
8. Susan Johnson (author)
9. Donna McDonald (author)
10. Dr Evelyn Juers (author and publisher)
11. Angela Savage (author)
12. Bianca Nogrady (author and journalist)
13. Alison Lyssa (author)
14. Bronwyn Mehan (publisher)
15. Michelle de Kretser (author)
16. Dr Debra Adelaide (author and academic)
17. Dr Jared Thomas (author)
18. Sheryl Gwyther (author)
19. Fiona Katauskas (cartoonist)

20. Melissa Lucashenko (Walkley award-winning writer and novelist, Brisbane)
21. Professor Terri-ann White (Publisher, UWA Publishing)
22. Dr Mireille Juchau (author)
23. Tara Wynne (literary agent)
24. Dr Amanda Curtin (author)
25. Justine Larbalestier (author)
26. Krissy Kneen (author)
27. Rosie Scott (author)
28. Kristina Olsson (author)
29. Catherine Hill (editor, Random House Australia)
30. Alison Urquhart (publisher)
31. Sam Twyford-Moore (Director, Emerging Writer's Festival)
32. Hoa Pham (author and psychologist)
33. Dr Moni Lai Storz (Founder and Artistic Director of the Australasian Chinese Theatre and Film Company, playwright, poet & novelist)
34. Julie Bail (writer)
35. Jenny Valentish (author)
36. Emily Maguire (author)
37. Margaret Mayhew (academic and artist)
38. Clare Forster (literary agent and former book publisher)
39. Kate Callingham (General Manager, Emerging Writers' Festival)
40. André Dao (Editor-in-Chief, *Right Now*).
41. Dr Thomas Cho (author)

42. Sara Foster (author)
43. Chris Womersley (author)
44. Kim Scott (author)
45. Paul Macgregor (Convenor, Melbourne Chinese Studies Group)
46. Eugenia Raskopoulos (artist)
47. Dr Merlinda Bobis (writer and Senior Lecturer, University of Wollongong)
48. Inez Baranay (writer)
49. Ailsa Piper (writer)
50. Barbara Brooks (author)
51. Foong Ling Kong (editor and publisher)
52. Professor Alberto Gomes (academic)
53. Dr Sophie Couchman (Honorary Research Fellow, La Trobe University)
54. Linda Jaivin (author and translator)
55. Linda Funnell (editor)
56. Dr Caroline Lenette (Lecturer, Griffith University)
57. Andy Quan (author)
58. Annette Shun Wah (writer, broadcaster, producer)
59. Kerry Reed-Gilbert (Chairperson, First Nations Australia Writers [FNAWN])
60. Ms Belinda Collins (author)
61. Dmetri Kakmi (author and editor)
62. Kim Falconer (author)
63. Elisabeth Storrs (author)
64. Samantha Trenoweth (author)

65. Alexandra Nahlous (editor)
66. Airlie Lawson (author)
67. Kelly Lefever (writer)
68. Alex Miller (author)
69. Carmel Bird (writer)
70. Sally Rippin (author)
71. Nick Feik (Editor, *The Monthly*)
72. Imogen Kandel (Senior Publicist, Black Inc.)
73. Saskia Beudel (author)
74. Arnold Zable (author and Vice Chancellor's Fellow, University of Melbourne)
75. Jenna Williams (Community Worker and co-founder of the 100 Story Building)
76. Jessica Tran (co-founder, 100 Story Building)
77. Lachlann Carter (co-founder, 100 Story Building)
78. Chester Eagle (writer and publisher, Trojan Press)
79. Bruno Lettieri (convenor of Rotunda in the West, Victoria University)
80. Sulari Gentill (author)
81. Hariklia Heristanidis (author)
82. Professor James Arvanitakis (academic)
83. Dr Jessica White (author)
84. Maxine Beneba Clarke (writer)
85. Dianne Blacklock (author)
86. Ms Lian Low (Prose Editor, *Peril* – Asian Australian arts and culture magazine) on behalf of our editors and board members
87. Julien Leyre, (translator)

88. P.M. Newton (author)
89. Katherine Howell (author)
90. Miro Bilbrough (filmmaker)
91. Jessie Cole (author)
92. Joanne Burns (author)
93. Michelle Cahill (Poet and Essayist, Editor, *Mascara Literary Review*)
94. Loma Bridge (editor and author)
95. John Newton (writer and journalist)
96. Phillipa McGuinness (publisher)
97. Jane Novak (Text Publishing)
98. Dr Michelle Dicinoski (writer)
99. Professor Nicholas Jose (author)
100. Mona Zahra Attamimi (writer)
101. Hop Dac Nguyen (author and editor)
102. Paul Mitchell (writer)
103. Dr Adam Aitken (Lecturer)
104. Anne Deveson AO (writer, broadcaster and filmmaker)
105. Meredith Jaffé (editor)
106. Pamela Hewitt (accredited editor)
107. Greg Baum (journalist and writer)
108. Jacob Tolo (curator)
109. Keren Lavelle (writer and editor)
110. L. Elaine Miller (writer and editor)

111. Chi Vu (writer)
112. Amra Pajalic (author)
113. Rani Pramesti (actor and theatre maker)
114. Suneeta Peres da Costa (author)
115. David Nyuol Vincent (author and refugee advocate)
116. Sally Rippin (author and illustrator)
117. Maria Tumarkin (author)
118. Rowena Lennox (writer and editor)
119. Jenevieve Chang (performer, storyteller)
120. Kirsty Murray (author)
121. Randa Abdel Fattah (author and lawyer)
122. Hanifa Deen (author and journalist)
123. Donna Ward (writer and editor)
124. Fran Bryson (literary agent and author)
125. Ali Gumillya Baker (artist and educator)
126. Roberta Ivers (editor and author)
127. Anne Deveson please (author)
128. Lyn White (children's book editor, EAL teacher)
129. Natalie Harkin (Academic, Poet, Narungga)
130. Hoang Tran Nguyen (artist)
131. Eva Cox AO (writer)
132. Dr Annabel Smith (author)
133. Karin Petersen-Schaefer (author)

- 134. Dr Kathryn Heyman (author)
- 135. Domenico de Pieri
- 136. Stefano de Pieri (writer)
- 137. Donata Carrazza (writer)
- 138. Amrita Dasvarma, Activist and Community Worker
- 139. Paddy O'Reilly (author)
- 140. Ivor Indyk (Giramondo Publishing Company, UWS Writing & Society Research Centre)
- 141. Fiona McGregor (writer and artist)
- 142. Lisa Heidke (author)

Allen & Unwin writers:

- 143. Kylie Ladd
- 144. Rebecca Starford
- 145. Meredith Burgmann
- 146. Jane Gleeson-White
- 147. Paul Livingston
- 148. Lenny Bartulin
- 149. Sofie Laguna

Allen & Unwin and Murdoch Books staff:

- 150. Jane Palfreyman (Publisher, A&U)
- 151. Annette Barlow (Publisher, A&U)
- 152. Alexandra Christie (Publishing Coordinator, Murdoch Books)
- 153. Rebecca Slater (Publishing Coordinator, A&U)

- 154. Miranda van Asch (International Agencies Director, A&U)
- 155. Siobhan Cantrill (Senior Editor, A&U)
- 156. Lillian Kovats (National Account Manager, A&U)
- 157. Kathryn Knight (Editor, A&U)
- 158. Eva Mills (Publisher, A&U)
- 159. Nadia Junaideen (Rights and International Sales Associate, A&U)
- 160. Lizzy Walton (Publisher, A&U)
- 161. Angela Handley (Senior Editor, A&U)
- 162. Erica Wagner (Publisher, A&U)
- 163. Lara Wallace (Publicist, A&U)
- 164. Belinda Lee (Editor, A&U)
- 165. Deb Stevens (Account Manager, A&U)
- 166. Rebecca Kaiser (Editorial Manager, A&U)
- 167. Karen Williams (Marketing Director, A&U)
- 168. Michelle Ashman (Account Manager, A&U)
- 169. Clare Bolton (Bloomsbury and International Agencies Manager, A&U)
- 170. Sophie Pusz (National Account Coordinator, A&U)
- 171. Andy Palmer (Publicity Director, A&U)
- 172. Matt Hoy (Sales Director, Murdoch Books)
- 173. Henrietta Ashton (Publishing Coordinator, A&U)
- 174. Louise Cornege (Publicity Manager, A&U)
- 175. Angela Namoi (Rights and International Sales Director, A&U)
- 176. Wenona Byrne (Rights and International Sales Manager, A&U)

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Or if you would like to contact any of the supporters in Appendix A for media or publicity, please email them directly through their agents, universities, publishers etc.