‘Why free speech comes at a price: Reflections on race, civility and the law’

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Acknowledgment of the true owners

When preparing for today I read a little about the Wurundjeri people of the Kulin Nation, and came upon this observation in Don Garden’s *History of Victoria*: ‘a large proportion of colonists moved from a sense of superiority to a feeling of contempt’.

It was 150 years before expression of racial contempt became unlawful, and it was not only in that intervening period but, despite the law, it is still the case that the Wurundjeri people, and all of Australia’s indigenous peoples, are subjected to contempt, perhaps more subtly than before, but no less demeaning and hurtful for that.

In recognition of the price they continue to pay for the loss of their land, and their continuing struggle for recognition, I acknowledge the true owners and custodians of this land, and pay my respects to their Elders.

Sir Charles Sladen

I am honoured to be giving the inaugural presentation in this new series of Research Seminars presented by Deakin University School of Law in association with Sladen Legal.

My reading on Sir Charles Sladen tells me that he was ‘tall, handsome and of great personal charm’, but that he was ‘neither a brilliant thinker nor a ready

speaker'. We all know lawyers whose success is built as much on their charm as on their intellect.

Although not brilliant, Sir Charles was both methodical and principled, admirable traits in a lawyer, especially in one who turned politician. His strength was his 'analysis of the principles and details of proposed legislation', and I imagine he would have been intrigued by the principles and details of the proposed racial vilification legislation I will talk about presently. Indeed such legislation may well have attracted the keen scrutiny of a man who is said to have 'lived for the public good, and inspired others with the same high purpose'.

These Research Seminars are open to the public, and will be captured on video and posted online, specifically to generate discussion and debate, so it is apt that the series begins with a perspective on the vexed issue of free speech.

Princess and the pea

From another time and in another culture, Hans Christian Andersen's test for the most sensitive of creatures, a real princess, was whether she was uncomfortable sleeping on a pile of soft mattresses under which was a pea.

Australia is a very comfortable place to be. Comfortable like a pile of soft mattresses.

Australians, in their comfort, fail the pea test. Under the mattresses is the small, hard, persistent pea of racism and, if we are aware of it, we fail to acknowledge it.

We don't allow the persistence of racism to disturb our comfort. Ours is an unthinking, unearned comfort, in the spirit of the intended irony of Donald Horne's 'Lucky Country' by which he wanted to say that we did not so much make our society as ride our luck, based on inherited British origins and the blessing of natural resources.

Horne's view was that we "have never 'earned' our democracy; we simply went along with some British habits". One of those habits was to assert the

supremacy of white, if well tanned, skin, and Anglo-European culture, if not especially cultured.

The racist pronouncements of our public leaders, well into the 20th century, are notorious, as is our history of racist law and policy. Most of that is indeed history, behind us now as formal fact. What we thought was a necessary protective cover over the comfortable mattress of Australia life has been stripped away, in large part by anti-discrimination laws and the modern sensibilities and policies that produced them.

But underneath still lies the hard pea – if I could re-write the fairy tale I'd call it a jagged rock – of racism, and we, as a society, remain largely insensitive to it.

The insensitivity comes in part from the satisfaction we justifiably feel that racist law and policy *is* behind us, that we have anti-discrimination laws, that we commonly condemn open racism, and that we are, formally, an equal society. But it is that satisfaction that leaves us insensitive to the persistence of racism.

'Racism'

My pea under the mattress is the casual racism that our Race Discrimination Commissioner, Tim Soutphommasane, has been drawing attention to. It is the unthinking and unconscious racism of ostensibly neutral practices and policies, of off-hand remarks and asides, of customs and habits which persist under formal guarantees of equality.

Even the words 'racism' and 'racist' – let alone their full import – are confronting and controversial. In legal proceedings an allegation of racism is commonly required to be proven very conservatively, on evidence of the highest probative value, because of the widely accepted moral turpitude implied by such an allegation.

But precisely because we are talking of morality, we need to be direct about it. Tim Soutphommasane has spoken about 'the moral quality of any honest

conversation about racism'. There is, he says, 'something moral, because the question of racism involves how we treat others. When an act of racism occurs, it harms the social standing that another person or group of people enjoy. It can also harm the freedom and well-being of its target. Any society concerned with combatting racism will necessarily be interested in promoting certain dispositions among its members: tolerance and decency, respect and fairness'.

I will return soon to the important point he makes about the harm that racism causes.

But for the moment I am dwelling on our discomfort in suggesting that there is racism about, let alone that a person is racist. Condemnation is so quick and absolute that – precisely because we do not tolerate the idea of racism – there is no room to dwell on the idea of race, to explore its continuing presence, to suggest that it might take forms and occur in places that we fail to see.

The protestation 'I'm not a racist, but …' – rarely stated but often implied – is an attempt to make a finer distinction than the prohibited idea of racism allows. It tries to say that there is a view of race that is to be condemned – and that is racism – but there is also a view of race that warrants public discussion, that should be permitted without being caught up with the prohibited idea of racism.

Our terminology is inexact, and we are impatient with the time necessary to explain ideas that cannot be captured in a word. So much is taken to be implied by the terms racism and racist that there is no room for related discussion, or to introduce nuance and refinement into ideas of race, difference and society.

So when I say that the pea under the mattress of Australia life is racism to which we are insensible, I expect a hostile reaction. We know about racism and we don't tolerate it. Whatever issues we are still working through in our transition from a British outpost to an international society between the Pacific Islands and Asia, we say quickly and forcefully 'we are not racist', at least not in the to-be-condemned-for-intolerance sense of the word.

Racist name calling

In a recent column in the Sydney Morning Herald, Mike Carlton recalled his grandmother, born in the late 1800s, speaking disparagingly of chinks, chows, japs, dagoes, wogs, balts, reffos, abos, and niggers. We have put that behind us now. The NSW Opposition leader Bob Carr was right when he said of the proposed racial vilification law in 1989, 'What will disappear … will be the racist slurs such as coon, boong, slopehead and slant eye. These racial epithets will be thrown into the trash can of history where they belong'.

We generally accept this limit on free speech; we know that it is racist, in a morally wrong sense, to essentialise a person by reference to their skin colour and ethnic appearance. In this way we can say we are not racist. This is an important step on the road past tolerance, to understanding and acceptance of difference. We learn more from example than we do from any other influence, and to not identify a person by slang reference to skin colour and ethnic appearance is an example that will affect the perceptions of generations to come.

To a large extent we can thank the fact, if not the operation, of anti-discrimination laws for this evolution. But it may be that all anti-discrimination laws have done is encourage us to avoid overt conduct while failing to address the cultural values that sustain a more deeply held racism.

Limits of law

Law has a small but significant – or is that significant but small? – part to play in achieving social change. It has only as much to contribute to securing preferred behaviour in relation to race as it does to securing any desired change in public behaviour.

While it is a holy grail of law reform to be able to say when and how a law is effective in achieving change, there is no doubt that law is not the whole of the answer. More often, law is looked on, with some justification, as a cumbersome and unrefined way of achieving change, and there is greater

enthusiasm for more direct and accessible strategies, most commonly the news media and education. It is education that is most commonly burdened with achieving behavioural change, from school civics curricula to public information campaigns. Again, it is unremarkable to observe that no one strategy works alone.

Lasting social change requires a wide range of complementary strategies. Community-wide attitudinal change is driven by many factors, two of which are the legislative setting of standards, and enforcement of those standards.

In a representative democracy, we can fairly accept that legislation does express community standards or aspirations. At the same time, legislation backs up its symbolic power with enforcement, offering recourse for those affected by breaches of community standards. It is commonplace that laws express and enforce standards that require fairness, reasonableness, care, honesty, disclosure, compliance and so on, in all areas of life, such as employment, services, trade, sales, administration, and corporate conduct. It is commonplace too that the parliament places the interpretation and circumstantial application of these laws, and their enforcement, in the hands of courts and tribunals.

Over time, laws and their enforcement achieve high levels of compliance, when complemented by other mechanisms for change such as public policy and practice, political and community leadership, public education and awareness campaigns, education and training of professionals and the bureaucracy, and community education and development.

Faith in legislation to achieve social change is largely misplaced. Law commonly addresses the symptoms, not the causes of social phenomena. The causes are dealt with by way of policies, programs, appropriations, education, and communications.

Limits of anti-discrimination law

In light of this, anti-discrimination laws carry an unrealistic burden of achieving social change. They provide little more than a remedial mechanism for individual grievance, with the undoubted symbolic value of taking a public policy position against racist conduct. The unrealistic nature of the expectation was seen very early on. Writing in 1975, on the enactment of the new federal *Racial Discrimination Act*, UNSW academic Brian Kelsey said that the Act 'exhibits no evidence of the required reappraisal of basic postulates, cultural or legal, and in fact makes no *effective* [his emphasis] provision for implementation of the [Race] Convention in Australia'.

Kelsey pointed out that a complaints-based procedure is 'directed towards racial discrimination in its narrowest sense … it needs to be understood that [a]cts of individual race discrimination are only a reflection of institutional racialism, which is not a series of acts, rather a total act of one group vis-à-vis another … It is difficult', he said, 'to envisage the *Racial Discrimination Act* making any significant contribution to the elimination of … racial attitudes'.

Because anti-discrimination laws focus our attention 'almost exclusively on overt, explicit, and formal inequality', they cut off any larger learning process. Instead of confronting and addressing entrenched values, anti-discrimination laws invite us to play a game of complying with and policing prescriptive rules, of debating about who did what to whom and why, usually some years ago by the time the matter gets to court.

Racial vilification laws

Within anti-discrimination laws, the provisions that target vilification are different. They are amendments to the original *Racial Discrimination Act* that Kelsey so strongly criticised, and are an attempt to do what Kelsey said the Act does not do, making a contribution 'to the elimination of racial attitudes'.

Vilification laws dig a little deeper, and try to expose racist attitudes that simply exist, unconnected with treatment of workers or circumstances of

providing accommodation and so on. They attempt to do more than ensure people are not treated unfavourably because of their race; they try to ensure that people are not actually caused mental harm because of their race.

In a general overview, it is impossible to speak simply about 'our' racial vilification laws in a federation, because we have eight of them. As it happens they are very similar, a point I will explore in more detail in a minute. But they illustrate one of the few advantages of our having nine concurrent governments: they can learn from each other, politics allowing.

Our early anti-discrimination laws did not incorporate protection against vilification. The NSW legislation – on which all other legislation in Australia except 18C is modelled – was the first, in 1989. Other States and the ACT followed, but were given real impetus by the fact if not the form of the federal amendments in 1995.

Limits on free speech

Laws that prohibit racist speech clearly limit free speech. The current debate is essentially over the degree to which speech ought be limited: what can be said before a line is crossed? The sooner the line is crossed, the sooner there is an encroachment on freedom of speech. The line is a fair way away for the States and ACT, concerned as they are to prevent speech that incites some or all of hatred, serious contempt, revulsion and severe ridicule. The federal provision, section 18C, seems to draw the line relatively close; it is concerned to prevent speech that may offend, insult, humiliate or intimidate. But the line drawn by 18C, and a resulting encroachment on free speech, is not as close as it may seem.

The Attorney-General, Senator Brandis, has an enthusiasm for what he calls 'traditional rights'. These are the 'fundamental common law rights' that some members of the High Court choose to protect under the 'principle legality'. Under that principle the courts will not interpret legislation as abrogating or contracting fundamental common law rights unless that was clearly parliament's intention.

Senator Brandis has asked the Australian Law Reform Commission to review all Commonwealth legislation to report on laws that unreasonably encroach on traditional rights. A question for the Commission will, therefore, be whether 18C is such a law.

There is some guidance on this question in the 2013 High Court case of *R v Monis*, where the court had to consider whether the law against using a postal service to cause offence encroached on the fundamental common law rights of free speech.

Justices Crennan, Kiefel and Bell JJ noted that legislation concerned with the regulation of communications usually attempts to strike a balance between competing interests, in that case free speech and not being subject to offensive conduct. A law against using a postal service to cause offence finds that balance, they said, when offensiveness is understood to be at the higher end of the spectrum; 'Words', they said, 'such as "very", "seriously" or "significantly" offensive are apt to convey this.' Which is just what we find in the case law on 18C: 'To "offend, insult, humiliate or intimidate" are profound and serious effects, not to be likened to mere slights', said Kiefel J in *Creek v Cairns Post*, endorsed by Hely J in *Jones v Scully*, who also cited the then Attorney-General's second reading speech for 18C to the effect that the language 'deals with serious incidents only'.

So, that much of Australian Law Reform Commission's vast task of reviewing Commonwealth laws I presume to have done for them. Section 18C, as the courts have consistently interpreted it, does not unreasonably encroach on the 'traditional' right of free speech. A more detailed analysis would explain how any encroachment is even more limited by the generous interpretation given to s 18D, the provision that creates extensive exceptions that allow racist conduct even when it is at the higher or more serious end of the spectrum. Indeed, discussion of the scope and effect of 18C is never complete without taking into account the broadly permissive exceptions allowed by 18D.

International Human Rights Law

It is odd that we are discussing racial vilification laws by reference to fundamental common law rights when there is no such right that protects against racist conduct. Section 18C gives effect to Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*, specifically the obligations to take measures that prohibit racial discrimination, to combat prejudices which lead to racial discrimination, and to promote tolerance. Section 18C's undoubted limiting of free speech must be assessed in that context.

Not, however, by Senator Brandis. In a 2010 Senate Legal and Constitutional Affairs Legislation Committee hearing into proposed human rights scrutiny legislation, the then Shadow Attorney-General declared that he is 'very sceptical of the wholesale invocation of the international jurisdiction surrounding [the human rights treaties] …', preferring 'the accumulation of rights through both the common law and statutory protection going back literally centuries'.

In the brief analysis I just gave, I have deferred to the Attorney-General's preference and have assessed 18C by reference to the common law going back literally centuries, by suggesting how the High Court would deal with it under the principle of legality.

But despite the Attorney-General's scepticism, Australian legislation is now assessed, in a parliamentary joint committee, by reference to the human rights treaties and, were 18C to be subject to such scrutiny, it would be endorsed again, as protecting the right to be free of racial discrimination in terms that are a reasonable, necessary and proportionate encroachment on the right to freedom of expression.

Focus on harm

The trade-off in 18C is the loss of a degree of free speech, for the sake of protecting against racist harm.

Speaking on the NSW Bill in 1989, Bob Carr said that 'This legislation … gives a legal voice to victims who can articulate their hurt'. In fact, that is just what the NSW legislation – or any of the consequent State and ACT legislation – does *not* do. It does not give a legal voice to victims. It condemns those whose conduct is likely to incite hatred, but is silent as to the effect of that conduct on the victim. If a person is attacked by racist speech, they have a remedy only if they can show that others are likely to have been moved to hatred, serious contempt or severe ridicule. That depends on a very particular set of circumstances, and the case law shows it is a high bar to get over.

Uniquely in Australia, the federal provision – the infamous s18C – is concerned with how racist speech makes a victim feel.

An ethic of care

This shift in perspective, from perpetrator to victim, is consistent with an ethic of care, an idea founded in feminist legal theory, where justice is done not solely by reference to the degree of departure from an authoritarian norm, but by reference to the harm that is caused by that departure. Where law once exercised only responsibility to prevent conduct, increasingly it is exercising care for those who are harmed. In criminal law, impact statements give voice to the victim, recognising that regulated conduct does not happen in isolation but is part of a network of relationships and has consequences for others.

I am unsure when and to what extent an ethic of care in legal regulation is always apt. But it holds the promise of a significant advance on the dispassionate, declaratory nature of law, and suggests a more contemporary sensibility, responding to what *has* happened as well as what *ought not* to have happened.

This is the special character of 18C, which we risk losing. It does not regulate racist conduct from above and outside by declaration of wrongdoing, but from within, by responding to harm that the regulated conduct has caused.

The ‘ethic of care’ characterisation is, I acknowledge, a gloss on 18C well after its enactment. In fact, 18C reads as it does by accident; the current wording was intended to be a criminal provision, and parliamentary amendments saw the provision retain its wording and its ‘racial hatred’ heading, but shift from being enforced by criminal sanction to being enforced by civil complaint.

With those origins, it is unremarkable that 18C is concerned with causing offence. Criminal provisions commonly outlaw the causing of offence. Summary offence laws prohibit offensive conduct, gambling laws allow a casino to remove a person who ‘behaves in a manner likely to cause offence’, it is illegal to use a postal service to cause offence’, and so on.

However it came about, 18C is a statement of recognition and remedy for harm caused. In that way, it is anomalous as a racial vilification provision because its operation turns on there being harm to the victim rather than on there being a type of conduct by a perpetrator. Its anomalous nature makes it vulnerable to attack, and in contemporary drive for national uniformity the numbers are against it.

Alternatively, however, it could show a way for others to follow. I chair the ACT Law Reform Advisory Council, and in the Council’s current review of the ACT Discrimination Act a possible reform is to adopt the 18C approach to regulating racist conduct. The ACT may pass the Commonwealth heading in the opposite direction.

Loss of focus on harm in amendments

The idea of preventing harm is central to section 18C, and to what we are giving up some degree of free speech for. Despite the federal vilification provisions’ constitutional validity, their tightly circumscribed limitation on free speech, their compliance with fundamental common law rights and international human rights, and their long history of unremarkable and effective operation, they might be repealed in their current form, in the name of free speech.

To replace 18C with some version of the 'incitement' model of the States and the ACT resiles from respecting the harm caused to a victim, and reasserts an exclusive, authoritative determination, by a neutral bystander, that conduct is wrong. A victim's real and reasonable sense of offence becomes irrelevant, and the standard for racist conduct is set and assessed by those who have never and perhaps could never themselves be subjected to such conduct.

Those who enjoy freedom of expression must be aware of the harm that can be caused by it. Free speech regulators must be aware that members of a racial minority can and often do live all day, every day, conscious – and made conscious – of their different culture and heritage, their different skin colour, their different accent, practices, customs and preferences.

No member of the Australian racial majority can understand what it is to have one's life defined by one's difference. When that difference is characterised as a deficiency – a sign of inferiority – offence is a real sense that is qualitatively different from any idea of offence that the majority can have. Only this week Beyond Blue commenced a powerful media campaign to alert people to subtle and unconscious racism, to show us that just because we know not to demean a person with a slang reference to their race doesn't mean that we don't still feel and act on an irrational sense of difference.

For almost 20 years, federal racial vilification law has been admirably respectful of people's lived reality of racial difference. As the Beyond Blue campaign says, "No-one should be made to feel like crap just for being who they are". That is exactly what 18C tries to address. Advocates of speech that would be unlimited by anything like 18C, and beyond the extensive free speech permit of 18D, need to be honest and say that it is good for society, good for social cohesion, public health, and a productive and happy community, to make someone 'feel like crap just for being who they are'.

Victoria's admirable but curiously named *Charter of Human Rights and Responsibilities* reflects a common demand from rights sceptics that a claim for a right must be accompanied by the acceptance of a reciprocal responsibility.

Many of those same rights sceptics claim the right to freedom of speech, for which the reciprocal responsibility is, at least, to do no harm.

This is only John Stuart Mill's foundational liberal concept, the harm principle. While Mill allowed for the causing of offence, his conception of offence did not come close to comprehending what we now understand to be the demeaning, hurtful, seriousness of racial offence. It was one thing to allow speech that caused offence in robust drawing room debate among Whigs and Tories of the mid-19th century; it is another altogether to allow speech that causes offence to disempowered racial minorities in the pervasive world of global and social media.

Submission numbers

Recent law reform activity gives us some idea of how many are for causing harm through speech, and how many are against. I can announce today, for the first time, what the Attorney-General knows to be the numbers for and against.

In March and April this year the proposed vilification amendments were the subject of public submissions, called for by the Attorney-General. The Attorney-General has since declined to publish the submissions, even if the submitter gave consent. Only slightly distracted by the irony of his not publishing submissions to a free speech inquiry, I set about discovering what the submissions said. My initial freedom of information request was declined on the basis that it was beyond the Department's resources to copy all 5,000+ submissions. In fact I didn't really want to see all the submissions, I just wanted to know if they were for or against the proposed amendments.

So, I asked instead for the Department's own collations, summaries, analyses, reports and similar documents relating to the submissions prepared by the Department. I recently received those documents.

There are slightly different ways of counting the submissions. The Department classified and counted those for and those against, but a complication is that some submissions would go further than the proposed amendment and would

repeal vilification protection altogether, meaning that they oppose the amendment, but not because they support maintaining the protection. Another complication is that some submissions were endorsed by multiple parties, meaning that a submission could be counted as one or, say, as 21.

So, with these complications in mind, here are the figures that Senator Brandis has not yet announced:

- counting only the number of different submissions received, and not any multiple endorsements of those submissions, there are 4,104 submissions, of which 67% – two thirds – oppose the amendment. 29% support the amendment and 4% would repeal 18C.
- counting the number of submissions received and their multiple endorsements, there are 5,725 submissions, of which 76.5% – over three quarters – oppose the amendment. Only 20.5% support the amendment and 3% would repeal 18C.

With these numbers in mind, I note recent comments by Senator Brandis in the latest Victorian Bar News. 'Most submitters', he says, 'understood the Government's concern that section 18C as currently worked is too restrictive of free speech'. He goes on to say that it is 'clear from the submissions … that many thoughtful people agree with the Government's view that the provision should be reformed'. I have difficulty understanding the Attorney-General's sense of what constitutes 'most' and 'many'.

Simple numbers in the Attorney-General's own process of inquiry make the case that the public is opposed to change, without having to invoke as well the size and standing of opponents, such as state governments, local councils, and representatives of indigenous, Jewish, Arab, Chinese, Greek, Armenian, Lebanese and Muslim communities.

We have to wait and see what the Attorney-General will make of these actual numbers. It may be wise in any event for the Attorney-General to pause in his reform process until after the Australian Law Reform Commission has

reported; it would be odd – but not unprecedented, as Victorians know – for a government to ask for a law reform inquiry and then to act in advance of knowing what the inquiry has to say.

In the meantime, Australia needs to have an open, honest, confident racism discussion. Such a discussion needs leadership. We, and those who lead us, need to face up to exactly the sentiments that the Beyond Blue campaign is confronting us with.

Until we do that, we will continue to fool ourselves, thinking that discrimination and vilification laws are sufficient to guarantee a truly equal society, that if we do not say racist things we are not racist.

We need to start feeling the pea, the jagged rock, under the comfortable mattress if we are ever to, as Donald Horne put it, earn our democracy.