George Brandis' Racial Discrimination Act changes create the whitest piece of proposed legislation I've encountered

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Illustration: Simon Letch

Perhaps the most remarkable thing about George Brandis' now infamous comment this week that Australians "have the right to be bigots" is that it was so unremarkable. Sure, it's a grating soundbite, but as a matter of substance it's entirely obvious. Of course we have a right to be bigots. We always have.

That's the point that has been buried here. Nothing in the Racial Discrimination Act as it presently stands precludes bigotry. In fact I'll go a step further: you're even allowed to express your bigotry. Happens all the time. Read a newspaper. Bigoted views are published there several times in an average week.

Two things flow from this. First, that critics of the Racial Discrimination Act are simply wrong to suggest that our free speech is so curtailed that we can't risk saying anything offensive. The courts have long made clear that the Act only contemplates serious cases. The caricature that we're placed at the mercy of the most delicate people's sensibilities is nothing less than a gross misrepresentation of the law.

Second, that supporters of the Racial Discrimination Act are wrong if they insist it provides anything like substantial protection against racism. I've copped my share of racial abuse both in public and in private, and section 18C wasn't ever going to do a damn thing about it.

So in the current furore, it's worth remembering that we're not exactly playing for cut-throat stakes. To be clear, the Abbott government's proposed legislation really would allow for almost any racist speech you can imagine. Any "public discussion of any political, social, cultural (or) religious" matter will be exempt, no matter how boneheaded, dishonest or odious.

Precisely how it is possible to racially vilify someone without discussing a "social" matter is beyond me. But for all that, Australia will not simply explode in a blaze of white supremacy upon the repeal of these provisions (which is far from inevitable in any case).

Rather, there is something else at stake here that is much bigger than any particular legislative provision. I'm not so much concerned by section 18C or its repeal, but by the mythology on which that repeal is apparently based. Unspoken at the heart of this debate is a contest over the way race relations works in this country – and on whose terms.

That's what struck me most about the proposed legislation. It's just so … well, white. In fact it's probably the whitest piece of proposed legislation I've encountered during my lifetime. It trades on all the assumptions about race that you're likely to hold if, in your experience, racism is just something that other people complain about.

Subsection (3) – mostly ignored to this point – is perhaps the most subtly revealing. Earlier subsections make it unlawful to do something that is "reasonably likely" to vilify or intimidate someone on the basis of race. But reasonably likely according to whom? Who gets to decide whether something is intimidating or vilifying? Subsection (3) provides the answer.

Whether something is "reasonably likely" to vilify is "to be determined by the standards of an ordinary reasonable member of the Australian community" it begins. Fair enough. But then it adds in the most pointed way: "not by the standards of any particular group within the Australian community." That's code. It means, not by the standard of whatever racial minority is being vilified. Not the ordinary reasonable wog, gook or sand-nigger; the ordinary reasonable Australian. And 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.

Every other race is marked by its difference, by its conspicuousness – by its non-whiteness. White people are not non-Asians or non-blacks. They aren't "ethnic" as the term is popularly

used. 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.

This is particularly problematic with the proposed offence of racial “intimidation”. To “intimidate” is “to cause fear of physical harm” according to the draft Act. Now our ordinary reasonable white person is being asked to tell, say, black people whether or not they are “reasonably likely” to be fearful of physical harm. Black people – reasonable ones – might actually be fearful, but ultimately a hypothetical white person will decide that for them.

I have no doubt the Abbott government doesn’t intend this. It doesn’t need to. That’s the problem. This is just the level of privilege we're dealing with. This is what happens when protection from racism becomes a gift from the majority rather than a central part of the social pact. It’s what happens when racial minorities are required to be supplicants, whose claims to social equality are subordinate to those of powerful media outlets outraged they might occasionally have to publish an apology.

And it’s what happens when lawmakers and the culturally empowered proceed as though ours is a society without a racial power hierarchy simply because they sit at the top of it.

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