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# This is free speech on steroids

By Simon Rice

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**Holocaust denier Fredrick Toben would never have breached federal racial vilification law under the Federal Government's proposed changes - that's how weak they are, writes Simon Rice.**



PHOTO: Fredrick Toben argued on his website that there was serious doubt that the Holocaust occurred. (ABC News)

Senator George Brandis cannot be serious about his proposed racial vilification law. Despite reports that the [draft exposure bill is already watered down](#), I suspect it is a tactic; it is still so extreme that when it is wound back further, opponents will embrace the concessions as a victory, even though what remains will be a significant loss of protection against racist speech.

So we have to look at the proposed racial vilification law in two stages: what it means as it is drafted, and what the underlying intention is.

As it is currently drafted, Brandis's proposal prohibits a very narrow range of conduct, and allows a breathtakingly wide range of exceptions. Read the [prohibition together with the exception](#), and almost anything goes. This would be the closest we've come to unconstrained racist speech in 20 years - since before the current law was enacted.

Our current federal racial vilification law prohibits conduct (such as speech) that is done because of a person's race and that causes them harm: offence, insult, humiliation and intimidation. The proposed new law drops most of that and, instead, prohibits conduct that is likely to "incite hatred" or "intimidate".

The effect of this is that the proposed law does not prohibit race-based conduct that incites, for example, serious contempt or severe ridicule of a person, or revulsion towards them. Nor does it prohibit race-based conduct that causes offence, insult or humiliation.

A spectator [who shouts racist abuse from the crowd at a sportsperson on the field](#) may offend, insult, or humiliate the sportsperson, and others may adopt the spectator's race-based contempt or ridicule. But because the conduct is unlikely to intimidate or to incite others to 'hate' the sportsperson, it is within Brandis's idea of 'free speech'.

Similarly, a [train passenger who shouts racist abuse](#) at a person may not be intimidating the person, and may not be likely to incite others to 'hate'. Their conduct will probably offend, insult or humiliate the person, and could encourage others to adopt similar views of race-based contempt or ridicule, but that would be within Brandis's idea of 'free speech'.

However the actual cases play out in particular circumstances, the public policy message of the proposed law is that negative - seriously negative - race-based speech is usually OK.

That describes the narrowness of the prohibition. Wait until you see the breadth of the exception.

Our current federal racial vilification law (and state and territory racial vilification laws) have a wide exception that allows prohibited conduct if it is done reasonably and in good faith, in artistic work, public

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discussion, and reporting on and commenting on matters of public interest. The proposed new law allows prohibited conduct simply if it is done in the course of public discussion. (Oddly, it doesn't make an exception for artistic work, so artists, actors, and some authors would be less free to express themselves than would columnists and bloggers).

The proposed exception is not limited. It allows race-based conduct in public discussion (by, for example, columnists, bloggers and public officials) that is unreasonable, in bad faith, dishonest, inaccurate or irrational, *even if* it could intimidate or incite hatred. In public discussion, absolutely nothing is prohibited by the proposed law.

Fredrick Toben [breached the current racial vilification law](#) by saying on his website that there is serious doubt that the Holocaust occurred, that it is unlikely that there were homicidal gas chambers at Auschwitz, that Jews who are offended by and challenge Holocaust denial are of limited intelligence, and that some Jews, for improper purposes, including financial gain, have exaggerated the number of Jews killed during World War II and the circumstances in which they were killed.

There is no doubt that Toben was expressing his views in the course of participating in public discussion of a political, social, cultural and religious matter. That is conduct within the proposed exception. That is conduct that Brandis would allow. ([Even withstanding his denials that this is the case.](#))

This is free speech on steroids. This is why I suspect that the draft released by Senator Brandis (which he says he personally drafted) is a stalking horse.

As it is drafted, the proposed law is a mutant version of the existing state and territory racial vilification laws, which do prohibit incitement rather than the causing of harm, but which also place limits on the exceptions. If the extreme nature of the proposed reforms was wound back to this approach, the reforms would be defensible, although it still raises the question, why change the law at all?

The Herald Sun/Andrew Bolt case may have been the catalyst for these changes, but Bolt is only one of many people whose conduct overstepped the bounds set by the racial vilification laws; the difference between him and the others is that he is the only one to have successfully turned his case into a campaign for 'free speech'.

Of all the racial vilification cases, Bolt's is the only one to make it onto the policy platform of a political party. And Bolt's is the [only case that Brandis cited](#) when asked why his proposal is necessary.

So if we look past the current drafting, to whatever form a new racial vilification law will finally take, the underlying intention may be simply to allow speech about race, regardless of all but the most extreme adverse consequences. This is certainly consistent with Brandis's support for people's "right to be bigots".

But I may be wrong, and Brandis's intention may really be to allow completely unrestrained race-based comments in public discussion, and racial abuse in public places. We probably have to take him at his word: that is, the proposal that he himself has drafted.

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