

What does it mean to 'offend', 'insult' 'humiliate' and 'intimidate'? Section 18C of the *Racial Discrimination Act (Cth)* and the problem of harm

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1. Introduction

- Section 18 C of the Commonwealth *Racial Discrimination Act (Cth)* makes it unlawful to “offend, insult, humiliate or intimidate” another person or a group of people because of their race.
- The inclusion of these words in the offence, it is argued, is not only too broad and too vague, but also unduly restricts freedom of speech.

1. Introduction

- My claim is that critics of section 18C have failed to adequately define and interpret these terms within the appropriate context and so have distorted what is at stake in the debate; namely, that the offending or insulting speech is not only also racist speech, but is also speech that *does* certain things when uttered in certain contexts.

1. Introduction

- In this paper, I take up this definitional challenge with reference to Joel Feinberg's discussion of harm and its relation to hurt and offense.
- While the terms offend, insult, humiliate and intimidate mean different things and do not necessarily cause *harm*, words are, as philosophers of language have demonstrated, very complicated things.

1. Introduction

- I argue that because there are compelling reasons for restricting speech that causes harm more generally, and because racist speech that offends, insults, humiliates and intimidates, can also cause harm (as I will demonstrate), there is nothing unduly restrictive about s18C in its current form.

2. Section 18C of the Racial Discrimination Act: content, scope and problems

- Section 18C of the *Racial Discrimination Act* states:
- It is unlawful for a person to do an act, otherwise than in private, if:
- the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

2. Section 18C of the Racial Discrimination Act: content, scope and problems

- (2) For the purposes of subsection (1) an act is taken not to be done in private if it:
 - causes words, sounds, images or writing to be communicated to the public; or
 - is done in a public place; or
 - is done in the sight or hearing of people who are in a public place.

2. Section 18C of the Racial Discrimination Act: content, scope and problems

- In this section '*public place*' includes any place to which the public have access as of right or by invitation, whether express or implied, and whether or not a charge is made for admission to the place.

2. Section 18C of the Racial Discrimination Act: content, scope and problems

- Section 18D provides the following exceptions:
- Section 18D does not render unlawful anything said or done reasonably and in good faith:
 - (a) in the performance, exhibition or distribution of an artistic work; or
 - (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
 - (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the [person](#) making the comment.

2. Section 18C of the Racial Discrimination Act: content, scope and problems

- Three main concerns with this legislation have been identified in the legal literature:
 - 1. the first is that s18C is indeterminate.
 - 2. Fails to establish a relationship between the words and harm;
 - 3. Inappropriately concerned with regulating emotions.

3. The concept of harm

- The concept of harm has been extensively addressed in Joel's Feinberg's four-volume work, *The Moral Limits of the Criminal Law*.
- The most distinctive feature of this account is the definition of harm in terms of setbacks or impediments to a person's interests

3. The concept of harm

- Feinberg distinguishes between harms (as setbacks or impediments to interests) and other forms of offence or discomforts, such as hurts and irritations. These include experiences of tolerable pain and other unpleasant experiences.
- Receiving a rude comment or other forms of verbal abuse may be offensive and distressing, but not necessarily harmful.

3. The concept of harm

- Hurt and harm are thus different concepts: being hurt involves the perception of suffering in some way, either physically or emotionally or perhaps in other ways.
- Being harmed, by contrast, involves the limitation of abilities, and/or a reduction in options or opportunities. It is defined counterfactually in the sense that being harmed involves being prevented from doing things you could have done had you not been harmed.

3. The concept of harm

- Hurt and harm are, however, interrelated. If the hurt or unpleasant experience is intense enough, severe or prolonged, it could interfere with the person's ability to make progress towards her interests. In these cases, the person is *both* hurt and harmed.
- Feinberg is keen to distinguish between hurts and harms as part of a wider project of determining the limits to the law and by implication, government interference. He suggests that while the law should be used to prevent or compensate for harms, it should not be used to prevent or compensate for hurt feelings.

3. The concept of harm

- Given this account of harm, and the differences between harm and offence, it is possible to argue that the terms 'offend, insult, humiliate and intimidate' are conceptually different.
- However, against the backdrop of inequality and racism, the differences between each of these verbs are less apparent. What may seem like mere hurts or slights can, and are in fact, experienced as severe kinds of mental distress that act as impediments to the vilified person's legitimate interests.

3. The concept of harm

- In this section, I have attempted to define harm in terms of damage to a person's interests. But can offensive and insulting racist speech damage a person's interests, and if so, how?
- Words are complex things. They can *be* several things and *do* several things at once. For example, a speech act can be political speech, the expression of a personal viewpoint, offensive, *and* racist.

4. *Words, context, and the question of harm*

- Philosophers of language have drawn attention to the relevance of context in determining the meaning of an utterance and in determining what that utterance does or achieves.
- At a fundamental level, context includes such things as the time, the location, the speaker, the hearer, the audience, and the preceding discourse.
- Context is also a relational concept encompassing the social actors and their relationships, and may include social conventions.
- A racist utterance will be harmful to its addressee if the context renders it so.

4. Words, context, and the question of harm

- Context can be both macro and micro. Macro contexts refer to the overall social and political environment in which an utterance takes place.
- Micro contexts refer to more personal human interactions where the social actors have more clearly defined relationships, such as in workplace environments.

4. Words, context, and the question of harm

- Irrespective of the kind of relationship between individuals, each person will have various interests in different contexts.
- In public contexts like using public transport, walking down the street, doing their shopping, or participating in public life more generally, individuals will have an interest in a safe and tolerable living environment, where they can go about their business without feeling threatened or intimidated.

4. Words, context, and the question of harm

- In liberal societies, these are liberties an individual should expect as part of their general welfare interests.
- In micro contexts, such as in schools, universities and workplaces, individuals will have an interest in education or employment, and an interest in equal treatment to others.

4. Words, context, and the question of harm

- In societies where racism is prevalent, and where some minority or oppressed groups have suffered or continue to suffer from various kinds of inequality and disadvantage, it is possible that the offending, insulting, humiliating and intimidating speech will adversely affect their welfare interests, thereby harming the person or the group.
- Because welfare interests are preconditions for personal interests, their personal interests are likely to suffer as well. Given that these setbacks to interests occur because of the actions of others (i.e., the speaker), some form of legal regulation may be justifiable.

4. Words, context, and the question of harm

- Racist utterances are typically directed at marginalized or oppressed groups or persons. They cause harm (understood as an impediment to interests) because they are often experienced against a background context of racism, discrimination, and inequality.

4. Words, context, and the question of harm

- Given that we all have welfare interests in a secure and tolerable living environment, racist utterances that occur in macro contexts such as on public transport, in the street, or in other public places cause harm because they render the environment unsafe and intolerable for its victims, thereby undermining or blocking an individual's interest in enjoying public places on equal terms to others.

4. Words, context, and the question of harm

- Racist utterances that occur in micro contexts such as one's place of education, such as at school or university or one's workplace are harmful because they block an individual's interest in securing an education or ensuring assurances to equal treatment at work.

5. Conclusion

- Despite the *RDA* failing to define the key terms and their relation to harm, it should become clearer from this analysis that words are complicated things: they can mean and do multiple things at once, depending on the context.

5. Conclusion

- In societies where racism and discrimination are prevalent, it is likely that a racist utterance will be offensive, insulting, humiliating and intimidating to its addressee. It is also likely that the speech will cause harm, because it will block or impede the person's rights to a tolerable and safe living environment, to an education, or to employment on equal terms to others.

5. Conclusion

- In *Eatock v Bolt*, the Federal Court demonstrated an appreciation of this complexity, arguing that:
- “The definitions of ‘insult’ and ‘humiliate’ are closely connected to a loss of or lowering of dignity. The word ‘intimidate’ is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence. The word ‘offend’ is potentially wider, but given the context, ‘offend’ should be interpreted conformably with the words chosen as its partners” (at 267).