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NO CASES, NO WORRIES? SOUTH AUSTRALIA'S RACIAL VILIFICATION LAWS AND THE NEED FOR REFORM

'It may be true that morality cannot be legislated, but behaviour can be regulated. The law may not change the heart, but it can restrain the heartless.'[1]

I Introduction

Since the atrocities of World War II, the power of hateful speech to cause immense harm has been widely recognised and accordingly legislated against in jurisdictions around the world.[2] The *International Convention on the Elimination of All Forms of Racial Discrimination* obliges States to criminalise the publication of racially prejudicial content and 'pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms'.[3] Racial vilification is a form of racial discrimination,[4] and has long been recognised as a conduit through which racist and discriminatory ideology proliferates.[5]

Racial vilification is commonly defined as 'offensive and abusive comments or acts which express, demonstrate or incite hatred and contempt for individuals on

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1 Martin Luther King, 'An Address before the National Press Club' in James M Washington (ed), *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr* (Harper Collins, 1986) 100, cited in Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32(2) *Federal Law Review* 225, 225 ('So Far So Good?').

2 See: Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) 8; Katharine Gelber, 'Freedom of Political Speech, Hate Speech and the Argument from Democracy: The Transformative Contribution of Capabilities Theory' (2010) 9(3) *Contemporary Political Theory* 304, 305; Human Rights and Equal Opportunity Commission, 'An International Comparison of the Racial Discrimination Act 1975' (Background Paper No 1, 2008) 7–15.

3 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 2, 4.

4 Bill Swannie, 'Speech Acts: Is Racial Vilification a Form of Racial Discrimination?' (2020) 41(1) *Adelaide Law Review* 179, 216.

5 Richard Delgado, 'Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling' (1982) 17(1) *Harvard Civil Rights-Civil Liberties Law Review* 133, 135.

the grounds of their race or ethnicity'.[6] It also includes conduct which promotes or expresses racial superiority.[7] South Australia regulated racial vilification in 1998 by introducing criminal sanctions in the *Racial Vilification Act 1996* (SA) ('*RV Act*')[8] and the tort of racial victimisation now found in s 73 of the *Civil Liability Act 1936* (SA) ('*CL Act*').[9] These laws have not been engaged in the nearly 25 years since their enactment,[10] which, unfortunately, is not reflective of an absence of racism in South Australia.[11] While it is widely recognised that addressing racism requires a multi-faceted approach, effective laws are appropriate and much needed for the protection of members of society who are vulnerable to racist attacks.[12] While the scope of this comment is limited to the public expression of racial hate, it is important to note that the kind of harm inflicted by racial hate speech is experienced equally by victims of 'expressive conduct capable of, or intended to, instill or incite prejudice'[13] on the basis of attributes of identity such as gender, sexuality, disability, religion or ethnicity as these are considered 'neither self-induced … nor alterable'.[14] Accordingly, the analysis in this piece has direct application to the argument that any reform to South Australia's hate speech laws should consider including protection for members of other identifiable groups as is the case in other Australian jurisdictions.[15]

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6 Tasmanian Law Reform Institute, *Racial Vilification and Racially Motivated Offences* (Final Report No 14, April 2011) 1.

7 Swannie, 'Speech Acts: Is Racial Vilification a Form of Racial Discrimination?' (n 4) 216.

8 *Racial Vilification Act 1996* (SA) s 4, as enacted ('*RV Act*').

9 *Civil Liability Act 1936* (SA) s 37 ('*CL Act*'), as inserted by ibid s 7, as enacted. *CL Act* s 37 was redesignated as s 73 by the *Law Reform (Ipp Recommendations) Act 2004* (SA) s 68.

10 Katharine Gelber and Luke McNamara, 'The Effects of Civil Hate Speech Laws: Lessons from Australia' (2015) 49(3) *Law and Society Review* 631, 641 ('Lessons from Australia'); Hagar Cohen and Scott Mitchell, 'Hate Crime Laws Rarely Used by Australian Authorities, Police Figures Reveal', *ABC News* (online, 3 May 2019) <https://www.abc.net.au/news/2019-05-03/hate-crimes-rarely-prosecuted-in-australia/11055938>.

11 Andrew Markus, *Mapping Social Cohesion*: *The Scanlon Foundation Surveys 2020* (Report, 2020) 86 ('*Mapping Social Cohesion*'); Johanna Wyn, Rimi Khan and Babak Dadvand, *Multicultural Youth Australia Census Status Report 2017/18* (Report, November 2018) 17; Kevin M Dunn, Abbie White and Vidhu Gandhi, *Understanding Racism and Cultural Diversity: 2007 South Australia Racism Survey* (Final Report, 2010) 32.

12 Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-Vilification Protections* (Parliamentary Paper No 207, March 2021) 61 ('*Victorian Inquiry*'); Meagher, 'So Far So Good?' (n 1) 225.

13 Gelber (n 2) 305.

14 Delgado (n 5) 136.

15 See, eg: *Discrimination Act 1991* (ACT) s 7; *Criminal Code 2002* (ACT) s 750; *Anti-Discrimination Act 1977* (NSW) ss 38S, 49ZT, 49ZXB; *Crimes Act 1900* (NSW) s 93Z; *Anti-Discrimination Act 1991* (Qld) s 124A; *Anti-Discrimination Act 1998* (Tas) s 19.

Part II of this comment will demonstrate the need for reform of South Australia's hate speech laws. It will do so by showing how the current laws are ill-matched to the nature of the conduct they seek to control or remedy. It will discuss the need for effective laws and briefly outline key issues with the current laws. Part III will consider the right of free speech and the constitutional implications of laws that limit expression in Australia for the purpose of calibrating the discussion on suggested reforms. It will also discuss the success of criminal hate speech laws in other jurisdictions and their relevance to South Australia to determine whether reforms should focus on the civil or criminal law. Part IV will discuss possible ways to address the gaps in South Australia's laws with reference to the laws in other Australian jurisdictions.

II The Need for Reform

A *Why the Expression of Racial Hate Should Be Regulated by Law*

Historically, hate speech was recognised as harmful only to the extent that it could cause physical violence by inciting a third party to such action.[16] However, it is now widely recognised that hateful speech or expression constitutes harm in and of itself both to victims and society.[17] With reference to the devastating effects of racism in the 20th century, Rose LJ emphasised the importance of supressing racism:

> One of the most important lessons of this century … is that racism must not be allowed to flourish. The message must be received and understood, in every corner of society, in our streets and prisons, in the services, in the workplace, on public transport, in our hospitals, public houses and clubs, that racism is evil. It cannot coexist with fairness and justice. It is incompatible with democratic civilisation.[18]

Racism marginalises large sections of society to the extent that citizens from certain racial or ethnic backgrounds often feel unable to meaningfully participate in the community.[19] These members of society are often limited in the exercise of their fundamental freedoms, such as where they live, work or how they practice their religion or traditions.[20] This particularly impacts the civic engagement of people from ethnic minorities, putting at risk the democratic legitimacy of

[16] Waldron (n 2) 168; Bill Swannie, 'Are Racial Vilification Laws Supported by Free Speech Arguments?' (2018) 44(1) *Monash University Law Review* 71, 97 ('Free Speech Arguments').

[17] Katharine Gelber and Luke McNamara, 'Evidencing the Harms of Hate Speech' (2016) 22(3) *Social Identities* 324, 325 ('Evidencing the Harms').

[18] *R v Saunders* [2000] 1 Cr App R 458, 461 (Rose LJ).

[19] Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (Report, 27 March 1991) 260 ('*Racist Violence Report*').

[20] Ibid 261.

public discourse.[21] The message of racial hate and consequential fear of violence undermines the sense of social assurance from which members of society derive their dignity.[22] It promotes conflict and animosity which fractures society and creates power imbalances between various groups of people.[23] This further impairs the ability of victims to actively engage in society in the civic sense and thereby realise democratic self-determination.[24] In addition, victims of racial hate speech experience well-recognised psychological harms that have long-term consequences,[25] including: post-traumatic stress disorder;[26] hypertension;[27] a higher risk of developing mental illnesses;[28] and a higher risk of developing suicidal tendencies.[29] Furthermore, exposure to racial hate often results in a loss of self-worth and the development of avoidance and internalisation tendencies.[30] Accordingly, there are three clear reasons why the expression of racial hate should be regulated by law: (1) to remedy personal losses and harms; (2) to promote democratic legitimation in a diverse society; and (3) to curb the incubation of discriminatory ideology.

While some may not consider racism to be a serious problem in South Australia, a survey report from the Scanlon Foundation found an increase in the experience of racial discrimination in South Australia from 11% in 2019 to 13% in 2020.[31] Furthermore, the last two years have seen a proliferation of online racial vilification as a consequence of the COVID-19 pandemic.[32] To this end, there is an obvious need for more effective laws which both send a strong message to the community regarding racial vilification and provide victims of racism with access to meaningful remedies.[33]

Australian jurisdictions began regulating racial vilification in the late 1980s. This was partly in response to the National Inquiry into Racist Violence in Australia by the

21 Gelber (n 2) 320; *Victorian Inquiry* (n 12) 41–3.

22 Waldron (n 2) 5.

23 Swannie, 'Free Speech Arguments' (n 16) 96.

24 Ibid 87; Gelber (n 2) 320; *Victorian Inquiry* (n 12) 41–3.

25 Delgado (n 5) 146.

26 Mari J Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87(8) *Michigan Law Review* 2320, 2336.

27 Ibid.

28 Delgado (n 5) 137–9.

29 Ibid. For a comprehensive summary of the individual harms of racist attacks, see Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences* (Final Report No 14, April 2011) 28–9 ('*Racial Vilification*').

30 Matsuda (n 26) 2337.

31 Markus (n 11) 86.

32 Matteo Vergani and Carolina Navarro, *Barriers to Reporting Hate Crime and Hate Incidents in Victoria: A Mixed-Methods Study* (Research Report, Centre for Resilient and Inclusive Societies, 30 June 2020) 4.

33 Human Rights Law Centre et al, Submission No 47 to Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (31 January 2020) 4.

Human Rights and Equal Opportunity Commission,[34] which ran from 1988 to 1991, and a rise in the circulation of 'virulent' racist content by extreme right wing organisations.[35] The final report of the National Inquiry recognised the need to address racism in order to continue developing as a 'just society'.[36] The South Australian Parliament was unable to pass its racial vilification and victimisation laws until 1996 despite debate commencing in 1994.[37] While perhaps the most conservative and constrained regime in Australia, the laws were eventually passed, potentially owing to a contemporaneous increase in the activities of local far-right extremists.[38] Regretfully, despite incorporating both criminal and civil provisions that make racial vilification unlawful, the laws have not been used since their introduction.[39] This failure is suggested to be due to the narrow scope of these laws which fail to respond to the nature of the harm caused by hate speech and its impact on victims.[40]

B *Current Law*

Section 4 of the *RV Act* makes it an offence to engage in public conduct that incites 'hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race' by threatening, or inciting others to threaten, physical harm to the person, group, or their property.[41] An instance of such conduct would need to be reported to the police who would then make a decision on whether to investigate. A prosecution requires the written consent of the Director of Public Prosecutions ('DPP').[42] The maximum penalty for a natural person found guilty is $5,000, or imprisonment for 3 years, or both.[43] Furthermore, the court may award punitive damages against a person convicted in favour of either the target of the conduct or a representative group of the target not exceeding $40,000 in total, taking into account any civil damages that may have been awarded for the same conduct.[44]

Section 73 of the *CL Act* makes 'an act of racial victimisation' that results in 'injury, damage or loss' or 'distress in the nature of intimidation, harassment or humiliation'

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[34] *Racist Violence Report* (n 19).

[35] Gelber and McNamara, 'Lessons from Australia' (n 10) 634.

[36] *Racist Violence Report* (n 19) 259.

[37] South Australia, *Parliamentary Debates*, Legislative Council, 13 April 1994, 407 (Carolyn Pickles). See also above nn 8–9.

[38] South Australia, *Parliamentary Debates*, Legislative Council, 13 April 1994, 407 (Carolyn Pickles).

[39] Gelber and McNamara, 'Lessons from Australia' (n 10) 641; Cohen and Mitchell (n 10).

[40] Katharine Gelber and Luke McNamara, 'Private Litigation To Address a Public Wrong: A Study of Australia's Regulatory Response to "Hate Speech"' (2014) 33(3) *Civil Justice Quarterly* 307, 313–14 ('Private Litigation').

[41] *RV Act* (n 8) s 4.

[42] Ibid s 5.

[43] Ibid s 4.

[44] Ibid s 6.

actionable as a tort.[45] An act of racial victimisation is a 'public act inciting hatred, serious contempt or severe ridicule of a person or group of persons on the ground of their race'.[46] This does not include the 'publication of a fair report', the publication of material that would be subject to the defence of absolute privilege, or a reasonable act done in good faith for purposes in the public interest.[47] Compensatory damages may be awarded for racial victimisation, however, the limit is fixed at $40,000 and must take into account any damages awarded as a result of criminal proceedings.[48] A person who has suffered detriment would need to commence a civil action in the District Court to obtain a remedy under these provisions.[49]

Importantly, for conduct to 'incite', it does not need to be proven to have actually incited another individual, only that it is capable of doing so.[50] However, the conduct must reach the relevant audience and be capable of encouraging or spurring others to the requisite emotive state in the context of its expression.[51] Accordingly, conduct that is only directed at a victim and is not capable of inciting others in the circumstances is not likely to be actionable under these provisions.[52]

C *The Nature of Hate Speech Harm*

The nature of the harms of hate speech described above provide insight into why these laws have not been successful.[53] The most serious harms are not usually the result of isolated incidents, but occur due to the cumulative effect of the regular experience of epithets and slurs that are an affront to the dignity and self-esteem of targeted persons.[54] The inherent long-term harms involve internalising the message of hate, isolation and non-acceptance.[55] This can have a generational effect whereby the internalised views of parents are passed on to children which reduces social mobility and cross-cultural interaction within a social sphere.[56] These views can

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45 *CL Act* (n 9) ss 73(1)–(2).

46 Ibid s 73(1) (definition of 'act of racial victimisation').

47 Ibid.

48 Ibid ss 73(3)–(5).

49 Ibid s 73(2); Equal Opportunity Commission of Western Australia, 'Racial and Religious Vilification' (Consultation Paper, August 2004) 36.

50 *Burns v Radio 2UE Sydney Pty Ltd* [2004] NSWADT 267, [13].

51 *Sunol v Collier [No 2]* (2012) 260 FLR 414, 422 [28] (Bathurst CJ) ('*Sunol*').

52 *Bennett v Dingle* [2013] VCAT 1945, [45]–[47] (Member French) ('*Bennett*').

53 Gelber and McNamara, 'Private Litigation' (n 40) 315.

54 Gelber and McNamara, 'Evidencing the Harms' (n 17) 336–7; Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488, 503 ('Mapping the Gaps').

55 Gelber and McNamara, 'Evidencing the Harms' (n 17) 336–7; Vergani and Navarro (n 32) 13.

56 Delgado (n 5) 136–43; Matsuda (n 26) 2369; *Racist Violence Report* (n 19) 261.

often lead to a mistrust of public authorities in target groups.[57] Consequently, victims are not likely to report instances of racial vilification and even less likely to have the means and confidence to commence a civil action for the tort of racial victimisation.[58]

D *Issues*

When considered in light of the nature of the harms of racism, the gaps in the South Australian laws become apparent. Victims are often reluctant to report instances of racial vilification to police due to the fear of retribution, discriminatory treatment or a view that such reporting is pointless.[59] Such fears are not necessarily unfounded, particularly in light of the instances of racial abuse by police being reported in the last few years.[60] Furthermore, the physical harm requirement is a high and uncertain threshold to meet which has resulted in a reluctance of police to investigate instances of racial vilification, choosing instead to prosecute alleged conduct under existing, well established offences.[61]

The civil laws are likely to have remained unused due to the high burden placed on complainants to commence a civil action in court and the fact that the primary remedy available is damages.[62] As mentioned, the predominant harm of racism in South Australia is the cumulative build-up of what may be considered minor epithets or discrimination.[63] To undertake the immense financial and psychological costs of engaging in civil litigation for what may be considered minor forms of conduct, and where damages are limited, is neither feasible nor inviting.[64] Such an undertaking is likely to be incomprehensible for most who have suffered harm to self-esteem, confidence and dignity. In addition, the standing requirements for a civil action permit only the injured party to bring a claim which places the entire burden of enforcement on victims.[65]

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57 Vergani and Navarro (n 32) 14.

58 *Victorian Inquiry* (n 12) 190–3.

59 Vergani and Navarro (n 32) 13, 18.

60 Richard Davies, 'SA Police Officer Investigated for Racist Messages to Sudanese-Australian Q+A Guest Nyadol Nyuon', *ABC News* (online, 17 June 2020) <https://www.abc.net.au/news/2020-06-17/police-officer-investigated-for-racist-messages-to-qanda-guest/12366574>; 'Investigation Underway into Social Media Video Showing Police Striking Aboriginal Man', *ABC News* (online, 16 June 2020) <https://www.abc.net.au/news/2020-06-16/black-lives-matter-advocates-demand-investigation-into-video/12358796>.

61 Dan Meagher, 'So Far No Good: The Regulatory Failure of Criminal Racial Vilification Laws in Australia' (2006) 17(1) *Public Law Review* 209, 214 ('So Far No Good'); Equal Opportunity Commission of Western Australia (n 49) 35.

62 Gelber and McNamara, 'Private Litigation' (n 40) 314.

63 Gelber and McNamara, 'Mapping the Gaps' (n 54) 501.

64 *Racist Violence Report* (n 19) 277.

65 Gelber and McNamara, 'Mapping the Gaps' (n 54) 492; Gelber and McNamara, 'Private Litigation' (n 40) 328.

Finally, the requirement of incitement fails to take into account the direct harms of racism.[66] In assessing whether racial vilification has occurred, the direct effect of the conduct vis-à-vis the victim has no relevance.[67] Proponents of this requirement claim that speech alone cannot cause harm to a person without taking a particular path through the mental medium of the victim's mind.[68] In this way, the speaker cannot be responsible for the harm caused. These views, however, are not reflected in the modern understanding of the harms associated with racism.[69] Furthermore, they are unpersuasive as the extent of almost all harm suffered by persons at the hands of others depends, to some extent, on victims' subjective, personal idiosyncrasies and the context in which the harm is occasioned as opposed merely to the objective nature of the act.[70] Even with the availability of meaningful dispute resolution processes, if the requirement of incitement were to remain, laws regulating the expression of racial hate would continue to be unable to provide redress for, and prevent instances of, racial vilification.[71]

III Reforming the Law

A *The Right of Free Speech*

Any discussion of reforming laws that limit speech should not be undertaken without recognising the fundamental importance of free speech. The right of free speech is typically understood in negative terms — that the freedom to speak or promote ideas should not be the subject of regulation by any ruling authority.[72] Freedom of speech is integral to a person's right of self-fulfilment and expression.[73] It critically protects the free flow of information and ideas that inform political debate and has

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66 *Victorian Inquiry* (n 12) 118.

67 *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207, 233 [76] (Nettle JA) ('*Catch the Fire Ministries*').

68 Waldron (n 2) 168, citing C Edwin Baker, 'Harm, Liberty, and Free Speech' (1997) 70(4) *Southern California Law Review* 979, 991–2.

69 See generally: Waldron (n 2); Gelber and McNamara, 'Evidencing the Harms' (n 17); Matsuda (n 26); Delgado (n 5).

70 For example, a punch thrown to the head during a boxing match may occasion limited harm due to the physical fortitude of the receiver and result in no criminal or civil liability for the causer due to the context of the match. However, the same act, caused against a frail person on the street, may occasion death or debilitating injury resulting in serious criminal (and potentially civil) liability attaching to the offender.

71 See: *Bennett* (n 52); *Sisalem v The Herald & Weekly Times Ltd* [2016] VCAT 1197; *Catch the Fire Ministries* (n 67); *Victorian Inquiry* (n 12) 112–18.

72 *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 65 [145] (Heydon J) ('*A-G (SA)*').

73 Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 78 [4.3] ('*Traditional Rights and Freedoms*').

been described as the 'lifeblood of democracy'.[74] In the United States, freedom of speech is viewed as essential to the proper development of a democratic society in that the best test for the validity of an idea is whether it can 'get itself accepted in the competition of the market'.[75] Free and equal access to the market of public discourse is 'central to the legitimacy of public decision-making and the values of self-government'.[76] Furthermore, to the extent that the right of free speech operates to prevent the 'government from suppressing the speech of any particular person', 'it ensures that everyone is treated with "equal concern and respect"'.[77] In this way, it can be seen that the right of free speech is fundamentally important both to the individual in terms of self-fulfilment and individual autonomy, and society as a whole by ensuring its democratic legitimacy is not undermined through unwarranted interference with the 'marketplace of ideas'.[78]

The precise content of the traditional right of free speech has been difficult to define and continues to be debated.[79] At common law, it has not been recognised as an absolute right.[80] Traditional torts such as libel, slander, incitement, obscenity and sedition evidence the common law's recognition that certain harms associated with speech outweigh the cost of limiting speech in certain circumstances.[81] Even in the United States, the harms of certain speech are recognised and regulated in circumstances of incitement to imminent unlawful action.[82] Furthermore, in the international context, art 19 of the *International Covenant on Civil and Political Rights* recognises that the right of free speech 'carries with it special duties and responsibilities'.[83] In addition, art 20 prohibits '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.[84]

Freedom of expression is fundamental to a well-functioning democracy and individual autonomy. However, once it is accepted that unrestrained speech inhibits a well-functioning democracy and individual autonomy, the extent to which freedom of speech should be regulated can be calibrated against the harms certain speech may inflict. With respect to the social harms of hate speech identified above, Katharine Gelber has argued that the regulation of speech which endangers the

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74 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 126 (Lord Steyn).

75 *Abrams v United States*, 250 US 616, 630 (Holmes J) (1919).

76 Swannie, 'Free Speech Arguments' (n 16) 84.

77 Ibid 106, quoting Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 273.

78 Swannie, 'Free Speech Arguments' (n 16) 105–6. See also Waldron (n 2) 155–7.

79 Swannie, 'Free Speech Arguments' (n 16).

80 *Traditional Rights and Freedoms* (n 73) 78 [4.4].

81 Ibid.

82 *Brandenburg v Ohio*, 395 US 444, 447–9 (1969).

83 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19.

84 Ibid art 20.

development of individual capabilities to participate in the process of democratic legitimation is justified.[85]

Regarding the role of free speech in promoting individual autonomy, it is incongruous to say that one person's autonomy should be permitted at the expense of another's. Indeed, this is illustrated by the saying 'the freedom to swing my arm ceases the moment it connects with your nose'.[86] In this way, the freedom of one person to speak should not extend to limiting the expression of another.[87] The common law freedom of speech is accustomed to adopting exceptions to the freedom where certain speech is demonstrated to be harmful. Therefore, given the individual harms of racial vilification outlined above, it is appropriate for the law to recognise the direct harms of hate speech. The common law freedom of speech does not inhibit this recognition, but provides a basis to calibrate the appropriate level of regulation.

B *Constitutional Issues*

In Australia, free speech is not subject to express constitutional protection. However, the High Court has implied a constitutional protection for the freedom of political communication from ss 7 and 24 of the *Constitution*, which require that government representatives be 'directly chosen by the people'.[88] While the content, and indeed the existence, of the implied freedom remains the subject of judicial conjecture,[89] the High Court has held that the implied freedom prevents the legislature from making laws which burden the expression of political communication where such laws are not justified by being appropriate and adapted to a legitimate purpose which is not incompatible with the system of government prescribed by the *Constitution*.[90] This, however, does not extend to a personal right of communication and the extent to which laws may be held to be invalid is decided 'by reference to the need to maintain the system of representative government which the *Constitution* mandates'.[91]

Any laws which directly limit public expression will likely burden the implied freedom of political communication due to the wide net cast by what is considered

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85 Gelber (n 2) 320.

86 Zechariah Chafee Jr, 'Freedom of Speech in Wartime' (1919) 32(8) *Harvard Law Review* 932, 957, cited in Frederick Schauer, 'On the Distinction between Speech and Action' (2015) 65(2) *Emory Law Journal* 427, 449. While this is the earliest scholarly reference to the saying known to the author, there is no apparent consensus on its exact origin.

87 See above Part II.

88 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557–62 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

89 See, eg, *Libertyworks Inc v Commonwealth* (2021) 391 ALR 188, 267–9 [298]–[304] (Steward J).

90 *Clubb v Edwards* (2019) 267 CLR 171, 186 [5] (Kiefel CJ, Bell and Keane JJ), 225 [162] (Gageler J), 259–60 [256] (Nettle J), 304 [387] (Gordon J), 327 [454] (Edelman J) ('*Clubb*').

91 *A-G (SA)* (n 72) 89 [220] (Crennan and Kiefel JJ).

'political communication'.[92] In *Clubb v Edwards*,[93] while the laws under consideration were not expressly targeted at communications concerning government and political matters, the fact that they '*may* apply to such communications' was sufficient to find that the implied freedom was burdened.[94] Therefore, any proposal to reform racial vilification laws should ensure that the laws are appropriate and adapted to their purpose.[95] The need to address the harms of racial vilification and the legitimacy of this purpose is readily demonstrated by voluminous available evidence of the direct impact of racist expression on victims.[96]

The protection of people and society from the harms described above is likely to be regarded as a purpose that is compatible with the constitutionally prescribed system of government. With respect to laws which proscribed homosexual vilification, in *Sunol v Collier [No 2]*,[97] Bathurst CJ observed 'that debate, however robust, [does not need] to descend to public acts which incite hatred, serious contempt or severe ridicule of a particular group of persons'.[98] In this regard, while laws prohibiting racial vilification may 'not [be] directed to communications which the freedom seeks to protect',[99] it is possible that they *may* burden such communications.[100] However, if the arguments with regard to democratic legitimation are accepted, then it can be seen that proscribing certain speech may have a positive effect on the exercise of 'a free and informed choice' by advancing the speech and views of sections of the community who are subjugated as a result of hate speech.[101] In this context, the view expressed by the Supreme Courts of Tasmania, Victoria and Queensland that laws regulating hate speech do not burden the implied freedom but actually promote political speech on the whole, has force.[102]

However, the New South Wales Supreme Court found that such laws do in fact burden the implied freedom due to the wide net cast by what is considered 'political communication'.[103] The fact that hate speech laws have not been tested in the High

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92 *Sunol* (n 51) 424 [42] (Bathurst CJ).

93 *Clubb* (n 90).

94 Ibid 194 [43] (Kiefel CJ, Bell and Keane JJ, Gageler J agreeing at 229 [174]) (emphasis added).

95 Ibid 186 [5] (Kiefel CJ, Bell and Keane JJ), citing *McCloy v New South Wales* (2015) 257 CLR 178, 193–5 [2].

96 See, eg: Matsuda (n 26) 2340; Delgado (n 5) 137; Gelber and McNamara, 'Evidencing the Harms' (n 17) 324; *Racial Vilification* (n 29) 28–9.

97 *Sunol* (n 51).

98 Ibid 426 [52] (Bathurst CJ).

99 *A-G (SA)* (n 72) 90 [221] (Crennan and Kiefel JJ).

100 See, eg, *Sunol* (n 51) 425 [44] (Bathurst CJ).

101 *Lange* (n 88) 560.

102 *Catch the Fire Ministries* (n 67) 246 [113] (Nettle JA); *Owen v Menzies* (2012) 265 FLR 392, 415 [72] (McMurdo P, de Jersey CJ agreeing at 395 [2]); *Durston v Anti-Discrimination Tribunal [No 2]* [2018] TASSC 48, [48]–[49] (Brett J).

103 *Sunol* (n 51) 424 [42] (Bathurst CJ).

Court furnishes this task of law reform with some uncertainty in the context of constitutional validity. Indeed, the High Court has not considered the concept of 'net burden' and accordingly, a prudent approach to the law reform process should be adopted. Therefore, on the premise that hate speech laws do indeed burden the implied freedom, careful consideration should be given to ensuring they are appropriate and adapted to their purpose of curbing social racism and remedying the associated harms. To this end, they must be suitable, necessary and adequate in the balance.[104] Given the importance of the purpose they fulfil and provided they are suitable and necessary, the laws likely have a large scope for burden before they would be inadequate in the balance, as the Court will only find laws which are suitable and reasonably necessary to be invalid at this stage in 'extreme circumstances'.[105]

C *Criminal or Civil*

As has been described, the public and individual harms of racism are extensive. They limit the capacity of affected individuals to seek meaningful remedies or stand up for themselves. The purpose of the criminal law is to address public wrongs that are socially harmful or widely considered to be morally wrong.[106] Criminal laws would therefore seem to be an appropriate way to deal with racist expression. The United Kingdom, Canada and Germany all rely on criminal laws to curb racist expression.[107] In the United Kingdom, it is an offence to wilfully stir up, or engage in conduct that is likely to stir up, racial hate.[108] Notably, there is no physical harm requirement in these laws. The relative success of the United Kingdom laws makes the prospect of focusing on criminal law reform particularly inviting.[109] However, the key question to ask when engaging in a comparative law exercise is not 'what' but 'why'.[110] The United Kingdom's success is partially attributable to the widespread training of police to be proactive in detecting, reporting on and investigating racism,[111] and partially

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104 *Clubb* (n 90) 186 [6] (Kiefel CJ, Bell and Keane JJ).

105 *Palmer v Western Australia* (2021) 388 ALR 180, 254 [288] (Edelman J). See also *Clubb* (n 90) 344 [497] (Edelman J).

106 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 28–32, 35–8.

107 Gelber (n 2) 305, citing *Public Order Act 1986* (UK) ss 18–23; *Criminal Code*, RSC 1985, c C-46, ss 318, 319; *Strafgesetzbuch* [Criminal Code] (Germany) §§ 86, 86A, 130.

108 *Public Order Act 1986* (UK) s 18.

109 Kay Goodall, 'Challenging Hate Speech: Incitement to Hatred on Grounds of Sexual Orientation in England, Wales and Northern Ireland' (2009) 13(2–3) *International Journal of Human Rights* 211, 227.

110 Mathias Siems, *Comparative Law* (Cambridge University Press, 2nd ed, 2018) 24.

111 *Racist Violence Report* (n 19) 242–3, 249–50. Notably, the United Kingdom has gone to great efforts to change perspectives and culture within its police force and has resultingly changed the public perception of them which has increased reporting: Kyle Hudson and Craig Paterson, 'Implementing Police-Led Responses to Hate Crime: A Case Study of One English Northern Town' (2020) 16(1) *British Journal of Community Justice* 21, 24, 26–7.

attributable to community education and anti-racism initiatives.[112] Furthermore, the nature of racism in the United Kingdom at the time of implementing these laws was overt, systematic, physically violent and destructive.[113]

The criminal law may struggle to regulate subtle, casual, and insidious instances of racism such as those common in Australia because criminal laws by their nature require bright lines of delineation to promote certainty.[114] Indeed, in other Australian jurisdictions, civil provisions, which allow greater flexibility in terms of dispute resolution processes, targetable conduct and remedies, have enjoyed markedly greater success than criminal provisions.[115] The civil law does not depend upon the police as the gatekeepers of justice, but has the capability to facilitate actions brought by representative groups and the investigation of racism by specialist bodies.[116] Furthermore, the dispute resolution process can be tailored to address the nature of the wrong and the harms it causes to victims while the criminal law is primarily concerned with remedying public wrongs by punitive means.[117]

For these reasons, the remainder of this comment focuses primarily on reforming the civil provisions in South Australia. Due to the nuanced nature of racism in South Australia, it is argued that a competent civil regime would be more effective at both curbing public racism and providing more meaningful remedies for victims. In this way, the civil laws potentially present a more ‘useful way of setting a standard for public debate’.[118] However, in recognising that strong criminal laws have a significant symbolic value for targeted communities,[119] the discussion below briefly considers changes that should be contemplated in the *RV Act* in order to facilitate its use.

IV Options for Reform

A *Public Body To Resolve Complaints*

South Australia is the only jurisdiction in which civil vilification laws require complainants to bring an action for damages in tort. As mentioned, this places a ‘heavy

[112] Hudson and Paterson (n 111) 27; *Racist Violence Report* (n 19) 245.

[113] *Racist Violence Report* (n 19) 245; Philip NS Rumney, ‘The British Experience of Racist Hate Speech Regulation: A Lesson for First Amendment Absolutists?’ (2003) 32(2) *Common Law World Review* 117, 124.

[114] Ashworth and Hoarder (n 106) 64–5; Goodall (n 109) 224; Gelber and McNamara, ‘Mapping the Gaps’ (n 54) 503–4, 511.

[115] Gelber and McNamara, ‘Lessons from Australia’ (n 10) 635, 638, 649.

[116] *Victorian Inquiry* (n 12) 135–7.

[117] Gelber and McNamara, ‘Mapping the Gaps’ (n 54) 509.

[118] Gelber and McNamara, ‘Lessons from Australia’ (n 10) 656, 659.

[119] David Nash and Chara Bakalis, ‘Incitement to Religious Hatred and the “Symbolic”: How Will the Racial and Religious Hatred Act 2006 Work?’ (2007) 28(3) *Liverpool Law Review* 349, 364.

enforcement burden' on victims of racist speech.[120] Furthermore, this restricts the available remedies to damages — however, damages are often inadequate and undesirable in this context.[121] In each other Australian jurisdiction with civil anti-vilification laws, complaints are dealt with by the respective Human Rights Councils or Anti-Discrimination Commissions who are empowered to conduct conciliations, order apologies and issue pecuniary compensation orders or injunctions.[122] One option for South Australia would be to expand the powers and jurisdiction of the Equal Opportunity Commission to cover instances of public discrimination and vilification as is the case in Victoria.[123] This may alleviate resourcing concerns with adopting the Tasmanian or New South Wales model whereby a separate body would be required to be set up as a Commission for Anti-Discrimination.[124] Interestingly, when the tort of racial victimisation was created, the opposition party's Bill gave the Equal Opportunity Commission these very powers, however, it was rejected by the government at the time who took the view that 'ordinary courts of law should have jurisdiction in this important area'.[125] This view has arguably caused the laws to remain in their state of disuse.

Having the option to bring complaints may still leave the benefits of racial vilification laws unevenly distributed towards those who have the confidence and resources to bring disputes.[126] The Tasmanian model has remedied this issue by empowering the Anti-Discrimination Commissioner to initiate investigations and bring claims on behalf of a discriminated group where there are reasonable grounds for doing so.[127] This is particularly important for instances of racial expression which may be more public and general; or where the target group does not know their rights to bring a claim or are under an apprehension of being labelled as troublemakers.[128] Such an approach was recommended for Victoria in the recent Inquiry into Anti-Vilification Protections ('Victorian Inquiry') and has received support in principle from the Victorian Government.[129] Should South Australia empower an agency to

[120] Gelber and McNamara, 'Private Litigation' (n 40) 308–9.

[121] Gelber and McNamara, 'Mapping the Gaps' (n 54) 509.

[122] See: *Australian Human Rights Commission Act 1986* (Cth) div 1; *Discrimination Act 1991* (ACT) s 68(2); *Anti-Discrimination Act 1977* (NSW) pt 9; *Anti-Discrimination Act 1991* (Qld) ch 7; *Racial and Religious Tolerance Act 2001* (Vic) pt 3; *Anti-Discrimination Act 1998* (Tas) pt 6. Noting that Western Australia and the Northern Territory do not have civil provisions regulating public racial vilification.

[123] *Victorian Inquiry* (n 12) 135.

[124] *Anti-Discrimination Act 1977* (NSW) pt 8; *Anti-Discrimination Act 1998* (Tas) pts 3–4.

[125] South Australia, *Parliamentary Debates*, House of Assembly, 29 November 1995, 782 (Dean Brown, Premier).

[126] Gelber and McNamara, 'Lessons from Australia' (n 10) 649.

[127] *Anti-Discrimination Act 1998* (Tas) ss 6–7, 60(2), (5).

[128] Vergani and Navaro (n 32) 5; Gelber and McNamara, 'Mapping the Gaps' (n 54) 507.

[129] *Victorian Inquiry* (n 12) 137; Department of Justice and Community Safety (Victoria), 'Victorian Government Response into Anti-Vilification Protections' (Media Release, September 2021).

receive complaints of public racist expression, it is recommended that further consideration be given to whether that institution should also have the capacity to conduct investigations on its own initiative and what other powers and responsibilities it should have.

B *Wider Standing*

Placing the onus of initiating a civil complaint on the victim has been described as 'one of the fundamental weaknesses of antidiscrimination and antivilification laws'.[130] South Australia is the only Australian jurisdiction that restricts the standing to bring a civil complaint only to the person who has suffered detriment.[131] In the context of the nature of the harms caused by racial abuse — the associated tendencies of internalisation, the harm to self-esteem and the resulting mistrust in public institutions — victims are not well placed to litigate instances of racial victimisation and should not be charged with the responsibility of maintaining racial tolerance in South Australia.[132] Accordingly, South Australia should consider opening its standing limitations in accordance with other Australian jurisdictions to: a person on behalf of a named person; a representative body on behalf of a named person; or joint complainants.[133]

Counter arguments might suggest this will 'open the floodgates' and overwhelm the dispute resolution system. However, these arguments were present when the laws were first enacted and are 'unpersuasive'.[134] Furthermore, allowing wider standing has not led to high levels of baseless complaints interstate.[135]

C *The Requirement of 'Incitement'*

The requirement of proving that the conduct was capable of spurring an ordinary reasonable member of the target audience towards hatred or severe ridicule is a high burden and likely contributes to the lack of engagement of South Australia's laws.[136] As mentioned, the impact of the conduct on the victim is irrelevant insofar

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[130] Evidence to Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, Melbourne, 25 June 2020, 10 (Alistair Lawrie).

[131] *CL Act* (n 9) s 73(2). Cf *Australian Human Rights Commission Act 1986* (Cth) ss 46P(2), 46PB; *Human Rights Commission Act 2005* (ACT) s 43(1); *Anti-Discrimination Act 1977* (NSW) s 87A; *Anti-Discrimination Act 1991* (Qld) s 134; *Racial and Religious Tolerance Act 2001* (Vic) s 19; *Anti-Discrimination Act 1998* (Tas) ss 60–60A.

[132] Gelber and McNamara, 'Private Litigation' (n 40) 316, 328; *Victorian Inquiry* (n 12) 190–1; Vergani and Navarro (n 32) 13–14.

[133] See above n 131.

[134] Gelber and McNamara, 'Mapping the Gaps' (n 54) 509.

[135] Gelber and McNamara, 'Lessons from Australia' (n 10) 641.

[136] *Catch the Fire Ministries* (n 67) 210 [8] (Nettle JA); *Burns v Sunol* [2016] NSWCATAD 16, [37]–[45] (Principal Member Britton, Members O'Halloran and Murray); *Victorian Inquiry* (n 12) 112–13.

as proving the breach.[137] Therefore, this test provides no remedy for conduct that is directed at, and harms, an individual where a third person is not likely to be 'incited'.

The gaps in this threshold are aptly illustrated by a display of far-right extremism at a popular tourist location in Victoria in January 2021. A group of neo-Nazis paraded the area chanting offensive, antisemitic slurs while waving Nazi banners.[138] Despite the frightening and deeply offensive nature of this conduct, it is unlikely that an affected person, who would have had standing to bring a claim, would do so. This is because it is unlikely that anyone within the audience could reasonably have been incited to sympathise with the views being expressed by this extreme behaviour.[139] The Victorian case of *Bennett v Dingle* ('*Bennett*')[140] confirms this position. In *Bennett*, serious racial abuse that was directed at a Jewish man was held to be unlikely to be considered by others as 'anything more than venting' and therefore incapable of incitement.[141]

The Commonwealth and Tasmanian laws do not encounter this difficulty as they make it unlawful to engage in conduct which could reasonably be expected to offend, humiliate, intimidate, insult or ridicule a person on the ground of their race.[142] The Victorian Inquiry recommended this course be adopted by creating a new civil, harm-based provision while retaining the incitement provisions and lowering the test from 'conduct that incites' to 'conduct that is likely to incite'.[143] The Victorian Government has expressed in principle support for this recommendation.[144] Such an approach is an important step in departing from the former understanding of the harms of hate speech — that words are not harmful by themselves — and recognising

137 *Catch the Fire Ministries* (n 67) 233 [76] (Nettle JA).

138 See: Benedict Brook, '"Heil Hitler": Nazis Invade Tourist Town of Halls Gap, Victoria', *News.com.au* (online, 29 January 2021) <https://www.news.com.au/national/victoria/news/heil-hitler-nazis-invade-tourist-town-of-halls-gap-victoria/news-story/0dd95e91f0e1d376af16bedcb965f02c>; Alexander Darling, Sarah Jane Bell and Matt Neal, 'Calls for Cross-Burning Neo-Nazis Camped in the Grampians to Be Classified as Terrorist Group', *ABC News* (online, 28 January 2021) <https://www.abc.net.au/news/2021-01-28/calls-grampians-far-right-group-labelled-terrorist-organisation/13098762>.

139 Christopher Knaus, 'Daniel Andrews Warns of Rising Antisemitism after Neo-Nazi Gathering in Victorian National Park', *The Guardian* (online, 28 January 2021) <https://www.theguardian.com/australia-news/2021/jan/28/daniel-andrews-warns-of-rising-antisemitism-after-neo-nazi-gathering-in-victorian-national-park>.

140 *Bennett* (n 52).

141 Ibid [44]–[47] (Member French) (emphasis omitted).

142 *Racial Discrimination Act 1975* (Cth) s 18C; *Anti-Discrimination Act 1998* (Tas) s 17(1).

143 *Victorian Inquiry* (n 12) 116–20.

144 Department of Justice and Community Safety (Victoria) (n 129); Jaclyn Symes, 'Strengthening Anti-Hate Protections in Victoria' (Media Release, 2 September 2021).

the deep individual and community impacts of racism.[145] South Australia should consider adopting this approach. However, in doing so, the exceptions to the current law under s 73 of the *CL Act* should be preserved. This will ensure that the laws are proportionate and go no further than is reasonably necessary to fulfill their purpose, and therefore retain their constitutional validity.[146]

D *Further Considerations: The Racial Vilification Act*

A primary reason why criminal provisions under the *RV Act* have not been used is that, as pointed out by Dan Meagher, the laws do not go much further than what would already be prosecutable under the well understood offences of affray, common assault or threatening to destroy or damage property.[147] In order to send an effective message to the community that racial vilification is not acceptable, criminal sanctions must be used, not merely enacted.[148]

In addition, the requirement of obtaining the written consent of the DPP before a prosecution can commence removes the crime from 'the ordinary workings … of the prosecution' which involves a 'significant and unjustifiable expense'.[149] This adds to the reluctance of authorities to engage in prosecutions under the *RV Act*. The requirement was included for the purpose of preventing 'trivial or vexatious disputes [from] clogging the Courts'.[150] Clearly, such a concern was not warranted in light of the absence of any prosecutions under the *RV Act* since its enactment.[151] Accordingly, any reform to the *RV Act* should ensure that complaints are able to be received and investigated according to the ordinary processes of prosecuting authorities.

The physical harm requirement in the South Australian laws does not permit prosecution for displaying or advocating racially hateful ideologies or material unless it could amount to threatening, or inciting others to threaten, physical harm.[152] The Victorian Inquiry found similar provisions to be undesirable.[153] In this way, there are no options for authorities to remove or stop the public display or advocacy of racist material.[154]

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145 Swannie, 'Free Speech Arguments' (n 16) 97.

146 *Sunol* (n 51) 426 [51] (Bathurst CJ).

147 Meagher, 'So Far No Good' (n 61) 214.

148 Ben White, 'The Case for Criminal and Civil Sanctions in Queensland's Racial Vilification Legislation' (1997) 13(13) *Queensland University of Technology Law Journal* 235, 242.

149 Meagher, 'So Far No Good' (n 61) 215.

150 South Australia, *Parliamentary Debates*, House of Assembly, 29 November 1995, 782 (Deane Brown, Premier).

151 Gelber and McNamara, 'Lessons from Australia' (n 10) 641; Cohen and Mitchell (n 10).

152 *RV Act* (n 8) s 4.

153 *Victorian Inquiry* (n 12) 162–4.

154 See, eg, ibid 99.

Finally, the current wording of the *RV Act* leaves the mental element uncertain. Since clarity and precision is a key issue with the use of the laws,[155] the mental element should be clearly identified as either intent or recklessness. There are cogent arguments that the laws should adopt a lower threshold of recklessness because, as recognised by the Victorian Inquiry,[156] proving intent to vilify 'will always be difficult' in the absence of a confession.[157]

V Conclusion

This comment has demonstrated the vital importance of effective laws that curb racism and provide redress for victims. It has focused on the provision of remedies to victims of public racist attacks in the civil sense by addressing the gaps in South Australia's current law. In doing so, it is acknowledged that law is but a limited contributor to the development of a tolerant and harmonious society and a multi-faceted approach is required to properly combat racism.[158] However, this comment has demonstrated the integral role of the law in addressing racism and identified a clear need for reform in South Australia. It proposes that South Australia should have a public body to handle complaints of racial vilification in order to ease the enforcement burden on victims. Consideration should be given to whether this body would be empowered to investigate and bring claims on its own initiative for instances of general vilification. To further ease the burden on victims, the laws should also allow for wider standing so that a person may bring a claim on behalf of another person harmed by racial vilification.

Furthermore, this comment identified that the requirement of incitement for the tort of racial victimisation in s 73 of the *CL Act* fails to recognise and provide a remedy for the direct harms of racial vilification. To this end, South Australia should proscribe conduct which is likely to offend, insult, ridicule or humiliate a person on account of their race or ethnic background. The incitement provisions are important and should be retained, as identified by the Victorian Inquiry, but the test should be lowered from 'conduct that incites' to 'conduct that is likely to incite'.[159]

Finally, this comment touched on potential reforms to the *RV Act* which could promote the prosecution of offences for racial vilification. First, the requirement of obtaining written consent from the DPP should be removed in order to streamline the process of prosecuting an offence. Second, the requirement of 'incitement' should be removed for the reasons identified above. Third, the mental element of the offence should be clarified as 'recklessness' in order to adopt an appropriate

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155 Meagher, 'So Far No Good' (n 61) 216.

156 *Victorian Inquiry* (n 12) 166.

157 Meagher, 'So Far No Good' (n 61) 216.

158 Meagher, 'So Far So Good?' (n 1) 225.

159 *Victorian Inquiry* (n 12) 116–20.

threshold and promote certainty. These proposals should be developed further through a robust community consultation process and further research.[160]

Recognising that '[t]he racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted' illuminates the urgency of the need for reform.[161] Unfortunately however, this topic may presently be 'too cold' to attract the requisite political interest in reforming these laws.[162] Consequently, reform is unlikely to be considered by the legislature until the issue gains sufficient community attention as it did in Victoria early last year.[163] Inevitably, such attention is only achieved when it is too late in the day. The public manifestation of racism is the result of the incubation of racist ideology through the 'communication of racism' which increases the incidence of racial violence.[164] During this incubation process, the deep and systemic harms have already impacted communities through cumulative exposure to the 'more subtle and sophisticated' forms of hateful expression.[165] Despite this, while law reformers must be bold, they must also be realistic.[166] Therefore, the value of this comment is found in the provision of key starting points with regard to reforming South Australia's hate speech laws. When the time comes, it is hoped that this contribution will enable an expedient start to the reform process.

160 Sarah Moulds, 'Community Engagement in the Age of Modern Law Reform: Perspectives from Adelaide' (2017) 38(2) *Adelaide Law Review* 441, 442; Roslyn Atkinson, 'Law Reform and Community Participation' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 160.

161 Delgado (n 5) 135.

162 Justice Michael Kirby, 'Law Reform: Ten Attributes for Success' (Speech, Law Reform Commission of Ireland, 17 July 2007) 13 <https://cdn.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_17jul07a.pdf>.

163 Ibid. See, eg: Brook (n 138); Darling, Bell and Neal (n 138).

164 Rumney (n 113) 127–9.

165 Gelber and McNamara, 'Mapping the Gaps' (n 54) 503.

166 Kirby (n 162) 12.