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To the Honourable Anthony North KC

Victorian Law Reform Commission Referral – Recklessness

Thank you for the opportunity to provide comments on the Victorian Law Reform Commission's (**VLRC**) Issues Paper regarding Recklessness.

We note at the outset that the Commission's terms of reference primarily focus on the meaning of recklessness in pt 1, div 1(4) of the *Crimes Act 1958* (**Crimes Act**). Those offences include the offence of recklessly causing serious injury, which was the subject of *Re Director of Public Prosecutions Reference No of 2019* (**the DPP Reference case**).

However, the Commission's Issues Paper also asks us to consider the meaning of recklessness and allied concepts in other statutory contexts (ie sexual offences in pt 1, div 1(8A)-(8F) of the Crimes Act).

Our submission focuses on the desirability of changing the test for recklessness in the specific context of pt 1, div 1(4) of the Crimes Act. Where necessary to respond to specific questions, or give context, we have referred to recklessness and allied concepts as they operate in other areas of Victorian law.

Question 1: Are there problems with the current common law definition of recklessness as it applies to offences in Victoria?

Yes. We consider there are five problems, which loom particularly large in the specific context of pt 1, div 1(4) of the Crimes Act.

First problem – test akin to intent

The first problem with the probability test is that it sets a threshold that falls just shy of that required to demonstrate actual intent.

The gap between intention and foresight of a probability is so narrow, courts have occasionally stated that a person who acts knowing that grievous bodily harm would probably result does in fact act intentionally.[1] There are even some Victorian offence provisions which already deem awareness of a likely or probable outcome to constitute knowledge or intent.[2]

Victoria's current common law definition of recklessness theoretically distinguishes between foresight of probability and intention. But the practical reality is that they are almost equivalent. Any distance between them does not reflect the difference in objective gravity between offences which are differentiated only by the applicable *mens rea*, as is the case for the causing injury offences in the Crimes Act.

Second problem – no firm basis in legal principle

The second problem is that the expansion of the probability test beyond the boundaries of homicide offences lacked a firm basis in principle.

The probability test stems from *R v Crabbe* (***Crabbe***),[3] a 1985 High Court case concerning the offence of murder. The outcome in *Crabbe* hinged on a moral equivalency justification — that an unintentional killing where the risk was glaringly obvious was just as blameworthy as an intentional killing.[4] In the specific context of murder, the two mental states are 'comparable in heinousness'.[5]

Murder sits in a special category. The gravity of that offence justifies the imposition of a more demanding test for recklessness.[6] Setting a less demanding 'possibility' test for murder would seem to 'obliterate almost totally the distinction between murder and manslaughter'.[7] In our view, the application of *Crabbe* recklessness to the offence of murder is unobjectionable.

However, it is now generally accepted (including by the High Court) that the moral equivalency rationale at the heart of *Crabbe* provided no basis for extending the probability test to other less

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[1] *R v Hyam* [1975] AC 55, 82 (Viscount Dillhorne); *R v Crabbe* (1985) 156 CLR 464, 469 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).
[2] *Crimes Act 1958* (Vic) s 21A(3)(a); *Pollution of Waters by Oil and Noxious Substances Act 1986* (Vic) ss 8(3)(b), 18(3)(b), 23D(8).
[3] (1985) 156 CLR 464.
[4] Ibid 469 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).
[5] *Boughey v The Queen* (1986) 161 CLR 10, 42-43 (Brennan J).
[6] *Royall v The Queen* (1990) 172 CLR 378, 455-6 (McHugh J).
[7] *La Fontaine v The Queen* (1976) 136 CLR 62, 76 (Gibbs J).

serious offences.[8] For lesser crimes, a probability test 'is by no means required … as a matter of law, of logic or of common sense'.[9]

In the specific context of pt 1, div 1(4) of the Crimes Act, differing maximum penalties demonstrate this point.

- Causing serious injury intentionally in circumstances of gross violence is punishable by up to 20 years' imprisonment;[10] recklessly doing so carries a 15-year maximum.[11]
- Causing serious injury intentionally is punishable by up to 20 years' imprisonment;[12] recklessly doing so carries a 15-year maximum.[13]
- Causing injury intentionally or recklessly is one offence but the maximum penalty is different depending on the fault element (10 or five years' imprisonment respectively).[14]

Accordingly, unlike intentional murder and reckless murder, these intentional and reckless forms of the offences cannot fairly be considered 'comparable in heinousness'.

Third problem — a compounding error

The third problem with the current probability test is that, as history has shown, it has spread well beyond its intended parameters.

Historically, a possibility test for recklessness applied in Victoria to malicious wounding or malicious infliction of grievous bodily harm offences.[15]

But in 1989, the Victorian Court of Criminal Appeal handed down *R v Nuri* (***Nuri***).[16] This was the beginning of the extension of the probability test in Victoria in a way unsupported by principle. This trend would continue in subsequent decisions.

Nuri concerned the offence of engaging in conduct which placed or may have placed a person in danger of death.[17] Unlike *Crabbe*, it was not a case about the distinction between a probability or possibility test. But the Court nevertheless stated, citing *Crabbe*, that 'presumably conduct is relevantly reckless if there is foresight on the part of an accused of the probable consequences of his actions and he displays indifference as to whether or not those consequences occur'.[18]

This observation was obiter, and not buttressed by any detailed consideration of the rationale underpinning *Crabbe*, or any reference to earlier Victorian (and High Court) authorities which had previously applied a possibility test. Nor was there any recognition of the fact that the

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[8] *Aubrey v The Queen* (2017) 260 CLR 305, 329 [47] (Kiefel CJ, Keane, Nettle and Edelman JJ); *Re Director of Public Prosecutions Reference No 1 of 2019* (2021) 392 ALR 413, 414 [1] (Kiefel CJ, Keane and Gleeson JJ), 428 [57] (Gageler, Gordon and Steward JJ), 431 [66] (Edelman J).
[9] *R v Coleman* (1990) 19 NSWLR 467, 476 (Hunt J, Finlay and Allen JJ agreeing).
[10] *Crimes Act 1958* (Vic) s 15A.
[11] Ibid s 15B.
[12] Ibid s 16.
[13] Ibid s 17.
[14] Ibid s 18.
[15] *R v Smyth* [1963] VR 737, 739 (Sholl J); *R v Kane* [1974] VR 759, 760 (Gowans, Nelson and Anderson JJ); *R v Lovett* [1975] VR 488, 493 (Harris J). See also *R v O'Connor* (1980) 146 CLR 64, 85 (Barwick CJ).
[16] [1990] VR 641.
[17] *Crimes Act 1958* (Vic) s 22.
[18] *R v Nuri* [1990] VR 641, 643 (Young, Crockett and Nathan JJ).

reasoning in *Crabbe* was expressly directed towards reckless murder, which was deemed in *Crabbe* to be just as morally blameworthy as an intentionally killing.

But in 1995, the seeds sown in *Nuri* took root in *R v Campbell* (***Campbell***).[19] *Campbell* concerned the offence of recklessly causing serious injury. The Victorian Court of Appeal extended the probability test to this offence, stating that the 'spirit' of *Crabbe* supported the extension of the test.[20] The majority declined to follow the Victorian cases which had previously endorsed a possibility test, concluding that, because *Nuri* used a probability test in a 'kindred section … it must be the case that all relevant sections in the group bear the same interpretation'.[21]

After *Campbell*, Victorian courts have applied a probability test for recklessness to some other statutory offences including:

- reckless conduct placing another at a workplace in danger of serious injury;[22]
- aggravated burglary (although not always, as discussed further below);[23] and
- blackmail.[24]

The Judicial College of Victoria's *Criminal Charge Book* now asserts that the *Campbell* test applies to 'all Victorian offences involving recklessness'.[25] As will be discussed below, this has not been consistently the case.[26]

Just as *Nuri* had no principled basis for extending the probability test to offences other than murder, neither did *Campbell*. However, the High Court's decision in the DPP Reference case — influenced as it was by the passage of time and legislation — means that it may now be impossible to rectify the error without legislative intervention.[27]

Fourth problem – practical realities

The fourth problem is particular to the offences against the person in pt 1, div 1(4) of the Crimes Act. It concerns the circumstances in which these offences are most commonly committed.

The unfortunate reality is that many of the offences contained in pt 1, div 1(4) of the Crimes Act are committed by people in the heat of the moment, often while affected by alcohol or otherwise acting irrationally. Paradigmatic examples are:

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[19] [1997] 2 VR 585.
[20] Ibid 593 (Hayne JA and Crockett AJA).
[21] Ibid.
[22] *Orbit Drilling Pty Ltd v R* (2012) 35 VR 399, 404-5 [21]-[22] (Maxwell P, Bongiorno JA and Kyrou JJA).
[23] *R v Taylor* (2004) 10 VR 199, 211 [42] (Charles and Nettle JJA); *R v Chimirri* [2010] VSCA 57 [37] (Neave and Redlich JJA, Hollingworth AJA); *R v Verde* (2009) 193 A Crim R 211, 215 [21] (Nettle JA).
[24] *R v Kalajdic* [2005] VSCA 160 [31] (Buchanan JA).
[25] Judicial College of Victoria, *Criminal Charge Book*, Recklessness [7.1.3] <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4469.htm> [last accessed 17 February 2023].
[26] It is worth noting that, even in 1996, *Campbell* does not appear to have universally been applied by judges of the Victorian Court of Appeal. In May 1996, nine months after *Campbell* was handed down, Hayne JA (who was part of the *Campbell* majority) commented in the sentence appeal *R v Walker* that, by pleading guilty to recklessly causing serious injury,[26] the appellant 'acknowledged that he was reckless as to the *possibility* of serious injury being done to the victims' (emphasis added): *R v Walker* (Unreported, Supreme Court of Victoria, Court of Appeal, 31 May 1996) 10. In the same case, Justice Southwell also considered that the plea of guilty to recklessly causing injury involved an admission that the appellant was 'reckless as to the *possibility* of the use of weapons to attack people in the house' (emphasis added).
[27] (2021) 392 ALR 413, 429 [59] (Gageler, Gordon and Steward JJ), 441 [101] (Edelman J).

- a punch thrown during an alcohol-fuelled argument; or
- a kick levelled at a prone figure following an alcohol-fuelled argument.

In the case of the reckless endangerment offences,[28] again, a split-second decision can have catastrophic consequences.

In the above scenarios, a jury might well conclude that the accused was aware of the *possibility* that their actions would cause the requisite outcome. But it may be a bridge too far for a jury to conclude that the same accused was aware of the *probability* that their actions would cause the requisite outcome.

The behaviour and circumstances of a victim, in these circumstances, is also relevant.

For example, consider a victim who is punched, falls to the ground and strikes their head. The result is a catastrophic brain injury, of which the initial punch was a substantial and operating cause. The natural reaction of a person who falls to the ground is to cover their head. The accused might well say, 'I did not consider a serious injury to be *probable*, because I assumed the victim would not fall or, if they did, would protect their head'. But in the context of an alcohol-fuelled altercation in which both parties are intoxicated, the victim may well not take the same protective measures. The risk is therefore greater.

Similar reasoning applies to a kick levelled at a prone person. The kick is directed at the ribs of the prone victim, but the victim writhes on the ground in a way that results in the accused's foot striking their head. Again, the accused might well say, 'I did not consider a serious injury to be probable, because I assumed the kick would land in their midsection'.

But in both scenarios, the consequence for the victim is very grave indeed. Head injuries in particular can have lifelong consequences for victims.

Fifth problem — impact on cases and victims

The fifth problem is, again, largely particular to the offences against the person in pt 1, div 1(4) of the Crimes Act, and related to the fourth problem. The problem is that the current definition requires our office, and Crown Prosecutors, to make difficult decisions to resolve cases in a way that means legal culpability does not always reflect moral culpability.

The hypothetical examples provided by our office, and raised in the Commission's Issues Paper,[29] are based on fact patterns observed by our prosecutors. The first and second examples, in particular, are all too common.

The probability test means that Crown Prosecutors and the Director of Public Prosecutions are commonly faced with difficult choices, including whether to discontinue a charge, or resolve a prosecution on a basis that does not necessarily adequately reflect the gravity of the harm done to victims. The following are not uncommon occurrences.

- A charge of recklessly causing serious injury or recklessly causing injury is discontinued because of concerns within our office and Crown Chambers regarding whether we can prove awareness of the probability of the relevant outcome.

[28] *Crimes Act 1958* ss 22, 23.
[29] Victorian Law Reform Commission, *Recklessness: Issues Paper* (January 2023), 12.

- A charge of recklessly causing serious injury or recklessly causing injury is withdrawn by the informant prior to committal because of advice from our office regarding whether we could prove awareness of the probability of the relevant outcome.
- A prosecution involving a charge of recklessly causing serious injury resolves on the basis of a plea of guilty to recklessly causing injury, or negligently causing serious injury, because of concerns within our office and Crown Chambers regarding whether we can prove awareness of the probability of the relevant outcome.
- A charge of reckless conduct endangering life/serious injury is withdrawn prior to committal, or discontinued ahead of a trial, because of concerns regarding whether the prosecution could prove awareness of the probability that their conduct will or may place another person in dangerous of death/serious injury.

Axiomatically, an offender who pleads guilty to or is found guilty of an offence of causing injury recklessly can only be sentenced for that offence, even if the actual consequence was a serious injury.[30] A sentencing judge, in dealing with such an offender, is not bound to disregard the actual impact on the victim; indeed, they are bound to take it into account.[31] But it is ultimately the charged offence which determines relative gravity and culpability.[32]

In our experience, it is not uncommon for a victim who sustains a serious injury, but sees the case resolve on the basis of a charge other than recklessly causing serious injury, to feel a significant sense of grievance about the result. Given the ordinary understanding of recklessness — which can indicate conduct which is negligent, careless, rash or incautious[33] — it can be very difficult for victims to accept that a person who foresees the possibility of an outcome, and acts anyway, may not legally be held responsible for that outcome.

[30] *Harrington v R [2017] VSCA 307* [27] (Maxwell P, Redlich JA).
[31] Ibid [27]-[28].
[32] Ibid [26].
[33] *Banditt v The Queen* (2005) 224 CLR 262, 275 [36] (Gummow, Hayne and Heydon JJ).

Example 1 — R v Wilson

The hypothetical examples referred to in the Commission's Issues Paper focused primarily on scenarios involving alcohol-fuelled violence. But that is not the only context in which the *Nuri/Campbell* test has contributed to outcomes which, in our view, were regrettable.

***R v Wilson* [2005] VSCA 78**

The two accused, W and C, were in 2003 convicted following a County Court jury trial of offences including armed robbery and, importantly, reckless conduct endangering life.

The Crown case was that W and C entered a restaurant during the evening, wearing balaclavas. C was armed with a .45 calibre pistol; W was armed with a .22 calibre rifle fitted with a silencer.

At least seven customers and six staff members were present in the restaurant at the time.

W and C ordered the staff and customers to get down on the floor, and W fired five shots, two of which were fired into the kitchen area and went between two kitchen workers.

W and C appealed against their convictions. A central issue on appeal regarding the reckless conduct charges was whether the jury was entitled to be satisfied, beyond reasonable doubt, that W and C had foreseen that a probable consequence of the conduct was serious injury to the victims, or danger to the victims in the sense of exposure to an appreciable risk of serious injury.

In the absence of evidence that C discharged his pistol, or that C foresaw W would probably discharge his rifle, C's conviction on the reckless conduct charge was quashed, and a verdict of acquittal entered.

The outcome with respect to W's appeal was arguably more problematic. In his record of interview, W was asked what he thought was going to happen with the rounds when he fired them, and said he 'figured' they would go into the floor or into the bar, but not far at all. He acknowledged that it was a reasonable assumption the rounds he fired might have ricocheted and gone anywhere in the restaurant, and might even have hit somebody. But he was not specifically asked about his foresight.

The Court of Appeal concluded it was not open to the jury on the evidence to infer, beyond reasonable doubt, *subjective* foresight on W's part that an appreciable risk of serious injury was a *probable* consequence of firing his rifle twice, particularly when he had not been asked about this and had not said anything about it in the record of interview.

In our view, *R v Wilson* may have been decided differently with respect to accused W, if not for the application of the *Nuri/Campbell* test.

Example 2 — exposing road users to danger

There are a number of serious driving offences in the Crimes Act which require proof of a proscribed outcome— death or serious injury.[34] However, it is not uncommon for a motorist to be charged with reckless conduct endangering serious injury to other road users who were in fact not injured. It can be difficult to prove that offence in those circumstances, as the below hypothetical (based on fact patterns observed by our prosecutors) demonstrates.

Reckless conduct endangering other motor users

A is driving in a northerly direction on a country road at night, in the wet, at a speed of 80kmh in a 60-zone. Only one of A's headlights is working; A is aware of this. A has a front-seat passenger, B.

As A approaches an intersection from the south, C is approaching the same intersection from the east, to A's right. C has right of way, and A is required to give way to C. A does not see C, fails to give way, and collides with C's car. C's car leaves the road and collides with a tree, causing significant damage to the front passenger-side.

A is uninjured. C and B each suffer whiplash, and superficial cuts and bruises.

A charge of dangerous driving or culpable driving causing death, contrary to s 319 of the Crimes Act, would not be open with respect to the danger caused to B and C by A's driving, because of the absence of a serious injury.

In any subsequent prosecution for reckless conduct endangering serious injury, the Crown might have difficulty proving that A was subjectively aware of the *probability* that their conduct would or might place B and C at risk of serious injury.

That difficulty is particularly acute in the case of B, who was a passenger in A's car. An appreciable risk of serious injury to B would also be an appreciable risk of serious injury to A. A trier of fact might well infer that A would not have proceeded in the way they did if they had been aware their driving would probably place *themselves* at risk.

Alternative summary offences including dangerous driving, careless driving, and exceeding the speed limit would likely be available under the *Road Safety Act 1986* and *Road Safety Road Rules 2017*. But these alternative offences arguably do not reflect the moral culpability and the degree of risk A's driving posed to B and C.

A possibility test might well make a meaningful difference in the above scenario.

[34] *Crimes Act 1958* ss 318-319.

Example 3 — driving offences connected with emergency workers

The Crimes Act contains a number of serious driving offences connected with emergency workers which, while not contained within pt 1, div 1(4), bear some resemblance to the reckless endangerment offences.[35]

Several of the offences require proof of recklessness as to:

- the circumstance that the victim is an emergency worker, custodial officer or youth justice custodial worker; [36] and
- the result that the victim is exposed to a risk to safety.

Reckless driving endangering emergency services worker

A drives a stolen car into a petrol station. Police Car 1 follows A into the petrol station, and pulls up behind A's car with lights and sirens flashing. Meanwhile, Police Car 2 is moving in to block A's exit from the petrol station.

A accelerates away from Police Car 1, and attempts to exit the petrol station. A sees Police Car 2 moving to block his exit, but assumes he will manage to escape before Police Car 2 blocks his exit.

A misjudges Police Car 2's speed, and rams into the driver-side door of Police Car 2.

In the above circumstances, it may be difficult to prove beyond reasonable doubt that A was aware of the probability that, by accelerating out of the petrol station, he would expose the driver of Police Car 2 to a risk to safety.

There may well be alternative offences available, such as dangerous or careless driving (or even dangerous driving causing serious injury, if that was the outcome of the collision with Police Car 2). But these alternative offences arguably do not reflect the moral culpability and the degree of risk A's driving posed to the occupants of Police Car 2.

[35] *Crimes Act 1958* ss 317AE-317AF.

[36] Section 317AE(2)(b) provides for certain circumstances in which an accused is 'taken to know' that the victim is an emergency services worker, custodial worker or youth justice custodial officer, including (but not limited to) where they are in the vicinity of an emergency services vehicle with lights or sirens on. However, the County Court has interpreted these deeming provisions as not operating if the accused was not aware of those circumstances (ie they did not see the lights or hear the sirens): *Director of Public Prosecutions v Saurini* [2022] VCC 1712. Accordingly, the question of whether an accused is aware of the probability that the victim is an emergency services may still arise even if the circumstances in s 317AE(2)(b) are technically enlivened.

Example 4 — Recklessly endangering persons at workplaces

While the *Occupational Health & Safety Act 2004* (**OH&S Act**) is beyond the scope of the Commission's terms of reference, s 32 of that Act does demonstrate how far the *Nuri/Campbell* error has spread into Victorian law.

Section 32 makes it an offence to recklessly engage in conduct that places or may place another person who is at a workplace in danger of serious injury.[37] This requires proof of an awareness of the probability that the accused's conduct placed or might place another in danger of serious injury.[38]

The requirement to prove subjective recklessness under the *Nuri/Campbell* test means that a s 32 offence (which is punishable by imprisonment for up to five years or 1800 penalty units) can potentially be harder to prove than workplace manslaughter, which requires proof of negligence, breach of an applicable duty, and causation.[39]

In the experience of our office, cases are rarely prosecuted under s 32.[40] This is perhaps not surprising given that these offences will often occur in a commercial context, where it is almost inconceivable that a business will be conducted in circumstances where the operators are aware of the probability their conduct would or might place another in danger of serious injury.

In one case which did proceed to trial, involving the death of a man following a fault with a breathing mask in hyperbaric oxygen chamber, the two accused were acquitted following a judge-alone trial on the s 32 charges.[41] Those charges were not made out, in large part because the Court was not satisfied the prosecution had proved either:

- the objective fault element (that a reasonable person in the position of the Accused knew they were probably placing the deceased at risk of serious injury);[42] or
- the subjective fault element (that the Accused subjectively knew they were probably placing the deceased at risk of serious injury).[43]

[37] *Occupational Health & Safety Act 2004* s 32.
[38] *Orbit Drilling Pty Ltd v R* (2012) 35 VR 399, 404-5 [20]-[22] (Maxwell P, Bongiorno JA and Kyrou AJA).
[39] *Occupational Health & Safety Act 2004* s 39G.
[40] But see *Orbit Drilling Pty Ltd v R* (2012) 35 VR 399; *Director of Public Prosecutions v Hooper & OxyMed* [2021] VCC.
[41] *Director of Public Prosecutions v Hooper & OxyMed* [2021] VCC.
[42] Ibid [442], [475]-[482] (Judge Fox).
[43] Ibid [443]-[448], [483]-[487].

Question 2: Should the Crimes Act be amended to include a definition of recklessness applicable to offences against the person in Part 1, Division 1(4), and if so, what definition should be adopted?

Yes. In our view, the definition of recklessness in pt 1, div 1(4) of the Crimes Act should provide that a person is reckless as to a result or circumstance if they were aware of the possibility that:

- their actions would bring about the result; or
- the circumstance existed; and

having regard to the risk their actions were unreasonable.

Source of the formulation

This definition is based on that adopted in the common law of New Zealand and the United Kingdom, in that it distinguishes between results and circumstances.[44] That is necessary given that some offences contained in pt 1, div 1(4) require proof of knowledge or recklessness as to the circumstance that the victim was an emergency worker, youth justice custodial worker, or a custodial worker.[45]

In each jurisdiction, this formulation has proven to be sufficiently flexible to cater for a broad range of offences.

- The leading New Zealand case of *Cameron v R* (***Cameron***) was a drug trafficking case.[46] The issue was what it meant for an accused to be reckless as to whether a substance was a controlled drug. New Zealand courts have subsequently applied the *Cameron* test to dangerous driving,[47] and reckless conduct in respect of an OH&S duty.[48]
- In the United Kingdom, the Judicial College considers it 'likely that this subjective definition of recklessness applies for all offences of recklessness unless Parliament has explicitly provided otherwise'.[49]

Unreasonableness

Importantly, like the New Zealand and United Kingdom models,[50] our proposed definition includes an express unreasonableness element. This would provide an additional safeguard (above and beyond the 'lawful excuse' exception to many of the pt 1, div 1(4) offences). It avoids over-criminalisation of acts which are socially acceptable but inherently risky — whether that be contact sport, driving, or juggling.[51]

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[44] *Cameron v R* [2018] 1 NZLR 161, 195 [73] (William Young J); *R v G* [2004] 1 AC 1034, 1057 [41]-[42] (Lords Bingham and Browne-Wilkinson), 1063 [57]-[60], [62] (Lords Steyn and Hutton), 1065-6 [70] (Lord Rodger).
[45] *Crimes Act 1958* s 31(b)-(ba).
[46] [2018] 1 NZLR 161.
[47] *Green v Police* [2017] NZHC 1475 [31], [33] (Whata J).
[48] *WorkSafe New Zealand v Waste Management NZ Ltd* [2021] NZDC 12388 [86]-[88] (Hastings J). An application for leave to appeal against this District Court decision was dismissed: *WorkSafe New Zealand v Waste Management NZ Ltd* [2021] NZHC 3444.
[49] Judicial College, *Crown Court Compendium Pt 1* (June 2022), 8-6 [3].
[50] And the Commonwealth definition: see *Criminal Code Act 1995* (Cth) sch, s 5.4
[51] *Re Director of Public Prosecutions Reference No 1 of 2019* (2021) 392 ALR 413, 432-4 [70]-[75] (Edelman J); *Aubrey v The Queen* (2017) 260 CLR 305, 330 [49] (Kiefel CJ, Keane, Nettle and Edelman JJ).

The express incorporation of an objective 'unreasonableness' element is also broadly consistent with the New South Wales common law definition of recklessness.[52] In that jurisdiction, the scope of possibility is implicitly limited by an objective element of unreasonableness or 'social utility'.[53] In *Aubrey v The Queen* (***Aubrey***), the High Court majority, when considering the meaning of recklessness in New South Wales, held that 'the reasonableness of an act and the degree of foresight of harm required to constitute recklessness in so acting are logically connected'.[54] But the Court also said that juries are ordinarily able, as a matter of common sense and experience, to take the social utility of an act into account when determining whether it was reckless without the need for particular directions.[55]

Jury directions

In our view, the incorporation of an express unreasonableness element into Victorian legislation would not necessarily overcomplicate jury directions. Indeed, it may not always require an explicit direction at all.

In the United Kingdom, a jury direction about the meaning of recklessness should be consistent with *R v G*,[56] and *may* (but does not necessarily have to) include an express reference to unreasonableness. For example, a model charge with respect to assault occasioning actual bodily harm contemplates that the jury would only be directed regarding unreasonableness if that aspect of the definition was in issue. The model charge is as follows.[57]

Example 3: Assault Occasioning Actual Bodily Harm

Throwing a glass in the course of a disturbance in a public house:

The prosecution must prove that D:

(a) threw a glass; **and**

(b) when D did so,

(i) D intended that the glass should hit someone; **or**

(ii) D was aware of the risk that the glass would hit someone and took that risk {Only if in issue: when it was unreasonable to do so in the circumstances that were known to him/her}; **and**

(c) the glass hit W, causing W to suffer some personal injury (however slight).

In NSW, juries are not generally directed to consider the social utility or unreasonableness of the accused's act in determining whether the accused was reckless. Rather, they are simply directed to consider whether the accused realised their act may possibly cause the result.

NSW jurors considering reckless offences against the person such as recklessly causing grievous bodily harm and reckless wounding are directed as follows (our emphasis in bold).

> *In this charge the Crown must prove beyond reasonable doubt that [the accused] inflicted [grievous bodily harm/a wound] upon [the victim] and was reckless when inflicting that injury. The element of recklessness is made out if you are satisfied beyond reasonable doubt that [the accused] at the time of the infliction of the injury realised that [he/she] may*

[52] *Aubrey v The Queen* (2017) 260 CLR 305, 330 [49] (Kiefel CJ, Keane, Nettle and Edelman JJ); *R v G* [2004] 1 AC 1034, 1057 [41]-[42] (Lords Bingham and Browne-Wilkinson), 1063 [57]-[60], [62] (Lords Steyn and Hutton), 1065-6 [70] (Lord Rodger).
[53] Victorian Law Reform Commission, *Recklessness: Issues Paper* (January 2023), 8.
[54] (2017) 260 CLR 305, 330 [49] (Kiefel CJ, Keane, Nettle and Edelman JJ).
[55] Ibid 331 [50].
[56] [2004] 1 AC 1034, 1057 [41]-[42] (Lords Bingham and Browne-Wilkinson), 1063 [57]-[60], [62] (Lords Steyn and Hutton), 1065-6 [70] (Lord Rodger).
[57] Judicial College, *Crown Court Compendium Pt 1* (June 2022), 8-8.

possibly *[cause/inflict] actual bodily harm to the [alleged victim] by [his/her] actions yet [he/she] went ahead and acted as [he/she] did.*[58]

As his Honour Justice Edelman noted in *Aubrey*, a New South Wales jury would not necessarily need to be directed about unreasonableness unless such a direction was necessary to ensure the accused received a fair trial.[59]

For many acts commonly captured by offences sitting within pt 1, div 1(4) of the Crimes Act, the unreasonableness of the actions will not be in issue. It will rarely if ever be reasonable to take the risks associated with punching someone in the head, or kicking a prone person, or firing a rifle into a commercial kitchen.

This would not be the only scenario in which the jury would not need to be directed about an element of a statutory offence which is not in issue.[60] If the unreasonableness of the act is not in issue, then it would not be necessary to direct the jury accordingly.[61]

The Commonwealth 'substantial risk test'

In our view, two aspects of the Commonwealth definition are useful: the express distinction between circumstances and results;[62] and the requirement that it be unjustifiable for the accused to take the risk.[63]

However, the Commonwealth's touchstone for liability — is too amorphous. While many commentators agree that a 'substantial risk' can include a 'possible risk', it has also been described as 'a possibility, chance *or likelihood*'.[64]

Applying a Commonwealth-style substantial risk test runs the risk of perpetuating the *Nuri/Campbell* error. We also consider that the notion of a possible risk will be easier for jurors to understand than a substantial risk.

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[58] NSW Judicial Commission, *Criminal Trial Courts Bench Book*, Recklessness (Malice) [4-097] (last accessed on 15 February 2023).
[59] *Aubrey v The Queen* (2017) 260 CLR 305, 331 [50] (Edelman J).
[60] For example, for the offence of rape, the act of sexual penetration must be conscious, voluntary and deliberate. But that will only form part of the jury directions if the evidence or arguments have placed intention or voluntariness in issue: Judicial College of Victoria, 'Charge: Rape (From 1/07/15)', *Criminal Charge Book*, [7.3.2.1] <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#56174.htm> [last accessed 27 February 2023].
[61] *Jury Directions Act 2015* s 5(4)(a).
[62] *Criminal Code Act 1995* (Cth) sch, s 5.4.
[63] Ibid s 5.4(1)(b), 2(b).
[64] *Hann v Director of Public Prosecutions (Cth)* (2004) 88 SASR 99 [22]-[26[(Gray J); *Channel Seven Adelaide Pty Ltd v Australian Communication and Media Authority* (2014) 223 FCR 65, 76-7[55] (Flick J).

Question 3: What are the strongest arguments for or against adopting a legislative definition, and the particular definition you support?

There are seven strong arguments for adopting a possibility test in pt 1, div 1(4) of the Crimes Act.

Culpability. Offences which are all too often committed in the heat of the moment, with catastrophic consequences, would be dealt with in a way that ensures legal culpability matches moral culpability.

Consistency with other jurisdictions. Victoria would move into step with other jurisdictions — particularly in the context of offences against the person involving injury. Our proposed formulation is broadly in line with the common law in New South Wales,[65] the Australian Capital Territory,[66] the United Kingdom,[67] and New Zealand.[68] It is also consistent with South Australia's statutory offences of causing serious harm and causing harm.[69]

Simplicity. Our preferred formulation would be easy for jurors to understand and apply. Contrary to the suggestion in the Commission's Issues Paper,[70] we do not consider that the concept of a possible risk will be vague, or difficult for juries or the general public to interpret. Possibility is a relatively simple concept: it means an outcome might occur,[71] and does not require satisfaction that the outcome is likely.[72] It most instances, it should be a simple task for trial judges to direct jurors in accordance with our proposed formulation. Consequential changes to the Judicial College of Victoria's model charge for the offence of recklessly causing serious injury would be minimal. The resulting model charge would, in our view, be no more complex than the current model charge.

Unlikely to require juries to apply different thresholds at trial. One potential disadvantage of a possibility definition, identified in the Commission's Issues Paper, is that a lower threshold may require juries to apply different thresholds for reckless murder and recklessness in relation to other offences against the person.[73]

This situation is unlikely to arise very often. In Victoria, it is uncommon (though not prohibited) to include other charges on an indictment for murder.[74] It should only be contemplated where there are cogent reasons for doing so.[75] But if a charge of reckless murder is indicted alongside another offence involving an element of recklessness, the

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[65] *Aubrey v The Queen* (2017) 260 CLR 305, 329-31 [46]-[50] (Kiefel CJ, Keane, Nettle and Edelman JJ), 331 [53] (Bell J).
[66] *R v Daniel* [2021] ACTSC 64 [30]-[31] (Loukas-Karlsson J); *R v Byrne* [2013] ACTSC 246 [30] (Murrell CJ).
[67] *R v G* [2004] 1 AC 1034, 1057 [41], [42] (Lords Bingham and Browne-Wilkinson), 1063 [57]-[60], [62] (Lords Steyn and Hutton), 1065-6 [70] (Lord Rodger). *R v G* did not expressly grapple with the possibility versus probability debate, but the House of Lords did describe the rest as whether the accused was aware of 'a' risk that the result would occur. It has subsequently been interpreted as applying a possibility test: see, for example, *Cameron v R* [2018] 1 NZLR 161, 195 [73] (William Young J).
[68] *Cameron v R* [2018] 1 NZLR 161, 195 [73] (William Young J).
[69] *Criminal Law Consolidation Act 1935* (SA) ss 23-24.
[70] Victorian Law Reform Commission, *Recklessness: Issues Paper* (January 2023), 8.
[71] *R v Coleman* (1990) NSWLR 467, 475. See also *Aubrey v The Queen* (2017) 260 CLR 305, 329 [47] (Kiefel CJ, Keane, Nettle and Edelman JJ).
[72] *R v Crabbe* (1985) 156 CLR 464, 469-70 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).
[73] Victorian Law Reform Commission, *Recklessness: Issues Paper* (January 2023), 8.
[74] *R v Wright and Haigh* [1983] 1 VR 65, 67 (O'Bryan J, Young CJ and Murphy J agreeing); *Fleming (a pseudonym) v The Queen* [2021] VSCA 206 [91]-[101] (Priest, Kyrou and Niall JJA).
[75] *Fleming (a pseudonym) v The Queen* [2021] VSCA 206 [101] (Priest, Kyrou and Niall JJA).

need to explain the different tests for recklessness may not be objectionable. It simply reflects the principle that those offences should have a different standard of recklessness, 'as a matter of logic, law and common sense'.[76] We also note that trial judges presiding over murder trials are expected to avoid using the word 'reckless', so as not to confuse the jury.[77] Accordingly, it seems highly unlikely trial judges would be directing juries along the following lines: 'in relation to the murder charge on the indictment, recklessness means awareness of a probability, but in relation to the recklessly causing serious injury charge, recklessness means awareness of a possibility'.

There may be other situations in which our preferred formulation would require a jury to grapple with both a possibility test and a probability test. Complicity may present some complexity, because of use of the word 'probable' in s 323(1) of the Crimes Act. However, a secondary party will often be less culpable than the principal, so it is not unreasonable for the test for accessorial liability to be calibrated more narrowly. And given the Crown does indict reckless murder on a complicity basis, a formulation of complicity which makes those inherently complex cases easier for juries to grapple with is perhaps warranted.

Not overly inclusive. Our particular definition will not result in overcriminalisation of socially useful but inherently risky activities, for the reasons outlined above in response to question 2.

Distinct from negligence. The Issues Paper raises the possibility of the distinction between reckless and negligent offending being obscured by lowering the threshold.[78] We think this is unlikely. We are not proposing a formulation of recklessness which lowers the threshold to that of negligence. There is still a critical distinction between the fault elements: one is primarily subjective; the other is objective.[79] Our formulation of recklessness is still harder to prove than negligence, because it will require proof of a subjective state of mind.

Principled. Our proposed formulation will correct a long-standing error of law that always lacked a proper principled basis.

Question 4: Are you aware of any problems with obtaining relevant evidence about the alleged offender's state of mind?

In the absence of admissions, proving an accused's state of mind depends on inferences. A jury can only draw an inference adverse to an accused if it is the only inference reasonably open.

As noted above, many of the offences contained in pt 1, div 1(4) of the Crimes Act are committed by people in the spur of the moment, often while affected by alcohol or otherwise acting irrationally.

A jury might readily draw an inference, based in particular on the accused's conduct in the circumstances, that the accused was aware of the *possibility* that their actions would cause an

[76] (1990) 19 NSWLR 467, 476 (Hunt J, Finlay and Allen JJ agreeing).
[77] *La Fontaine v The Queen* (1976) 136 CLR 62, 77 (Gibbs J). See also Judicial College of Victoria, *Criminal Charge Book*, Recklessness [7.1.3] <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4469.htm> [last accessed 17 February 2023].
[78] Victorian Law Reform Commission, *Recklessness: Issues Paper* (January 2023), 8.
[79] Ibid.

outcome. But it may be a bridge too far for a jury to infer, in the absence of admissions, the same accused was aware their actions would *probably* cause that outcome.

Even in those rare cases in which an accused admits they foresaw a consequence, the natural inclination of a person to minimise their own conduct means their subjective awareness will more often be expressed in terms of a possibility — 'might have' or 'could have', rather than 'was likely to', or 'probably would'. As the law stands, admissions of that nature may very well not prove recklessness. The outcome in *R v Wilson*, described above in response to question 1, demonstrates the difficulties in relying on responses given in records of interview to prove foresight of probable consequences.[80]

Question 5: What are your views on the approach and reasons for using 'probably' to express the fault element for recklessness in Part 1, Division 1(8A)-(8F) of the Crimes Act?

Parliament's intention in using 'probable' in those offences[81] was most likely to ensure consistency with the *Nuri/Campbell* understanding of recklessness in Victoria. That is presumably also one reason Victoria's statutory complicity provisions use the language of probability.[82]

As noted elsewhere in our submission, that *Nuri/Campbell* understanding is the product of error. It is notable that in other jurisdictions where that error did not take root, recklessness as a fault element for sexual offences requires only proof of awareness of a possibility of a circumstance (ie absence of consent).[83] The same is true for complicity via joint criminal enterprise in other jurisdictions, where the question is whether the crime committed fell within the scope of the joint criminal enterprise agreed upon as a possible incident of carrying out the offence the subject of the joint criminal enterprise.[84]

One of the guiding principles underpinning the 2015 sexual offence reforms was the need for a clearer approach to drafting offences, particularly in the context of sexual offence provisions 'notable for their complex and varying drafting styles'.[85]

A similar rationale underpinned the decision to use 'probability' in the complicity provisions.[86] The complicity provisions also reflect the notion that the moral culpability of the secondary party is often less than that of the principal. In the case of murder, that distinction can take on special significance.[87]

We are conscious that the sexual offence and complicity provisions in the Crimes Act are complex, and have been the subject of considerable change in recent years. At this time, we do

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[80] *R v Wilson* [2005] VSCA 78 [18] (Batt JA, Buchanan and Vincent JJA agreeing).
[81] *Crimes Act 1958* ss 43, 44, 45, 47, 48, 49F, 49G, 49P, 51B, 51C, 51D, 51H, 52D, 53B, 53C, 53D, 53E, 53G
[82] Department of Justice, Criminal Law Review, *Complicity Reforms* (2014) 11.
[83] *Banditt v The Queen* (2005) 224 CLR 262, 275 (Gummow, Hayne and Heydon JJ), 293 (Callinan J).
[84] *McAuliffe v The Queen* (1995) 183 CLR 108, 114-5 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ); *Miller v The Queen* (2016) 259 CLR 380, 401-2 [41]-[43] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).
[85] Department of Justice and Regulation, Criminal Law Review, *Victoria's New Sexual Offence Laws, An Introduction* (2015) 8-9.
[86] Simplification of Jury Directions Project, *A Report to the Jury Directions Advisory Group*, August 2012 80-6 [2.213]-[2.239].
[87] Ibid 74 [2.195].

not advocate for further reform to the probability fault element as it appears in pt 1, div 1(8A)-(8F) of the Crimes Act, or in the pathways to secondary liability in s 323.

Question 6: What are the advantages/disadvantages of ensuring that recklessness is consistently defined in the Crimes Act, or other Victorian statutes?

Consistency would be preferable — if it was achievable.

But the reality is that recklessness is not consistently defined in the Crimes Act, or other Victorian statutes. The probability test, while clearly dominant, has not been universally applied by superior courts in Victoria. Inconsistency has prevailed. In our view, this is a legacy of the misapplication of the *Crabbe* test in *Nuri* and *Campbell*.

The below examples show that, if Parliament were to legislate for a definition of recklessness in pt 1, div 1(4) of the Crimes Act that differed from the test in (for example) pt 1, div 1(8A)-(8F) or ss 323, the resulting inconsistency would be no more stark than the inconsistency that already exists in Victorian law.

Inconsistency across the Crimes Act and other Victorian statutes

The Crimes Act already contains an offence with its own statutory definition of recklessness: the offence of culpable driving causing death.[88]

Section 318 provides that the culpability of a person can be proved via one of four pathways: negligence; under the influence of drugs or alcohol; or recklessness. For the purposes of s 318 a person drives recklessly 'if he consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person *may* result from his driving' (emphasis added).[89]

This offence-specific definition of recklessness was introduced in 1967.[90] The decision to specifically define recklessness was done on the recommendation of the Chief Justice's Law Reform Committee, which considered it 'desirable to include in relation to these two expressions [recklessly and negligently] a statement of what is meant by them in terms which appear to us to be capable of common-sense application'.[91]

The use of the verb 'may' in s 318(2)(a) means that the state of mind necessary for the reckless form of culpable driving is not the same as for reckless murder.[92] It is a lower threshold.

Victoria's statute books also include some nationally consistent laws which include recklessness as a *mens rea* element for offences. Some of those clearly apply the Commonwealth's 'substantial risk' test;[93] but for other national laws enacted in Victoria, it's not entirely clear whether the Commonwealth test or the Victorian *Nuri/Campbell* test would apply.[94]

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[88] *Crimes Act 1958* (Vic) s 318.
[89] Ibid s 318(2)(a).
[90] *Crimes (Driving Offences) Act 1967* (Vic).
[91] *Bouch v R* (2017) 80 MVR 85, 112-13 [114] (Priest JA).
[92] *R v Pasznyk* (2014) 43 VR 169, 179 [49] (Priest JA).
[93] *Marine (Domestic Commercial Vessel National Law Application) Act 2013* (Vic) ss ss 8(1)(a)-(c), 9, 13(2), 15(2), 18(2), 20(2), 22(2), 24(2), 26(2), 161(2). See also Explanatory Memorandum, Marine Safety (Domestic Commercial Vessel) National Law Bill 2012 (Cth), 47.
[94] *Co-operatives National Law Application Act 2013* (Vic) ss 196(1)-(3).

Additionally, as noted above, there are some offence provisions in Victoria which deem awareness of a probable or likely consequence to be coterminous with intent or knowledge.[95]

Inconsistency in applications by Victorian courts

Additionally, even after *Nuri* and *Campbell*, Victorian courts have on occasion suggested the proper meaning of recklessness in the criminal law is foresight of possibility.

- **Aggravated burglary:** Victorian courts do not appear to have consistently applied a probability test to the offence of aggravated burglary. That offence can be established by proof that, at the time of entry to the premises, the accused knew that a person was present in the building 'or was reckless as to whether or not a person was then so present'.[96] The Court of Appeal has on several occasions (albeit in sentence appeals, with no detailed consideration of the issue) described this element as involving recklessness as to the *possibility* of a person being present.[97] On another occasion, the Court of Appeal appears to have proceeded on the basis (again, without detailed consideration of the issue) that *Nuri/Campbell* recklessness applies to this element.[98] The Judicial College of Victoria recommends that trial judges charge juries that the test for aggravated burglary offences is foresight of probability, not possibility.[99]
- **Threat to kill:** This offence requires proof either that the accused intended that the threat would be carried out, or was reckless as to whether or not that victim would fear the threat would be carried out.[100] The Court of Appeal applied a possibility test in 2012.[101] And 22 years earlier (albeit in a case decided pre-*Campbell*), the Court of Criminal Appeal held that *Nuri* had no application to the offence of threat to kill.[102]
- The 2011 Court of Appeal case of *Director of Public Prosecutions v Marijancevic* concerned the admissibility of evidence obtained improperly or in contravention of an Australian law.[103] A relevant consideration was whether the impropriety was deliberate or reckless.[104] Both at trial and on appeal, the parties accepted that recklessness, in this context, involved 'some advertence to the *possibility* of a breach of the obligation and a conscious decision or a "don't care" attitude to proceed regardless of that *possibility'* (our emphasis).[105] The Court agreed that this 'accords with the conventional understanding of recklessness within the criminal law'.[106]

A desire to strive for definitional harmony is laudable. But the gradual expansion of the *Nuri/Campbell* error has not achieved consistency. In the circumstances, the (possibly

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[95] *Crimes Act 1958* (Vic) s 21(3)(a); *Pollution of Waters by Oil and Noxious Substances Act 1986* (Vic) ss 8(3)(b), 18(3)(b), 23D(8).
[96] *Crimes Act 1958* (Vic) s 77(1)(b).
[97] *Maslen v R* [2018] VSCA 90 [32] (Priest and McLeish JJA); *Le v R* [2010] VSCA 199 [4] (Harper JA); *Bonacci v The Queen* (2012) 224 A Crim R 194, 196 [9] (Neave, Mandie and Harper JJA).
[98] *R v Verde* (2009) 193 A Crim R 211, 215 [21] (Nettle JA). See also *R v Chimirri* [2010] VSCA 57 [37].
[99] Judicial College of Victoria, *Criminal Charge Book*, Charge: Aggravated Burglary Where Person Present [7.5.5.5] <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#5145.htm> [last accessed 22 January 2022].
[100] *Crimes Act 1958* (Vic) s 20.
[101] *Macfie v R* [2012] VSCA 314 [22] (Harper JA).
[102] *R v Sofa* (Unreported, Victorian Court of Criminal Appeal, 15 October 1990, Crockett, O'Bryan and McDonald JJ) 12.
[103] (2011) 33 VR 440.
[104] *Evidence Act 2008* (Vic) s 138(3).
[105] *Marijancevic* (2011) 33 VR 440, 454 [47] (Warren CJ, Buchanan and Redlich JJA). See also *Matthews v SPI Electricity Pty Ltd (Ruling No 31)* (2013) 42 VR 513, 562 [223]-[224] (J Forrest J); *R v Mokbel* (2012) 35 VR 156, 189 [356]-[357], 190 [359] (Whelan J).
[106] *Marijancevic* (2011) 33 VR 440, 462 [85] (Warren CJ, Buchanan and Redlich JJA).

unattainable) goal of consistency is not a sufficient justification to let the *Nuri/Campbell* error go unchecked in pt 1, div 1(4) of the Crimes Act.

Question 7: Should the common law continue to apply in relation to a legislative definition of recklessness, or should its operation be excluded?

As noted above in our response to question 2, we prefer a shorter definition like that contemplated in paragraph 94 of the Commission's Issues Paper, with possibility as the touchstone, and an unreasonableness element.

If the question of what constitutes a 'possibility' is undefined, we expect that appellate courts will fill that gap in accordance with how possibility (in the context of recklessness) has been long understood at common law. That is, it requires awareness that an outcome might occur, but not awareness that the outcome would likely occur.[107]

Question 8: If a new statutory definition of recklessness for offences against the person is adopted that incorporates a lower threshold, will the associated penalties and minimum terms of imprisonment need to change, and if so, how?

Penalties and minimum terms are, ultimately, questions for Parliament.

However, the majority in *DPP Reference No 1* stated that:

> The DPP's reliance on a policy preference for consistency in the meaning of like provisions in different States as a reason for this Court to alter the meaning of s 17 of the Crimes Act is misplaced. The maximum penalty for committing the s 17 offence in Victoria is 15 years' imprisonment, while the maximum penalty for the equivalent New South Wales offence is currently ten years' imprisonment. Each State has taken a different view on the criminality to be ascribed to the conduct.[108]

The difference in penalties between New South Wales and Victoria for the offences of recklessly causing grievous bodily harm and recklessly causing serious injury provides little justification for retaining a definition of recklessness which is the product of legal error, and unsupported by a principled foundation.

The higher penalty in Victoria for the offence of recklessly causing serious injury arguably also reflects the fact that the Victorian offence currently requires proof of foresight of serious injury; the New South Wales offence only requires proof of foresight of actual bodily harm. If our formulation is adopted, it will still be much harder to prove the Victorian offence of recklessly causing serious injury than the New South Wales equivalent.

But in any event, the argument carries even less weight when one looks at the penalties in other jurisdictions which apply a possibility test for these offences.

- In South Australia, where recklessly causing serious harm to another requires awareness of a substantial risk that the conduct *could* result in serious harm,[109] the maximum penalty is 15 years for a 'basic' offence, or 19 years for an aggravated offence.[110]

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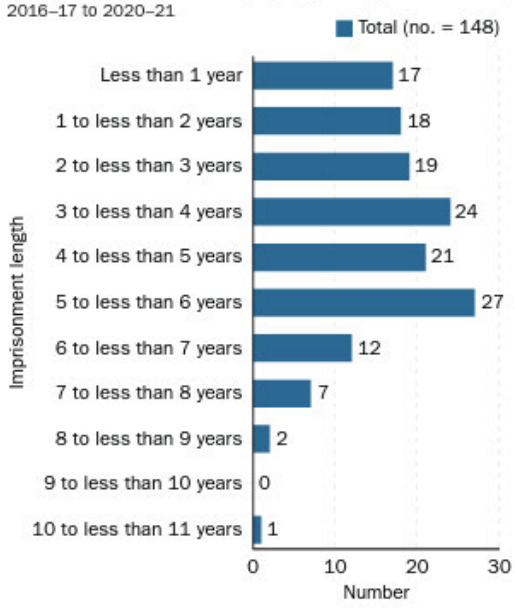
[107] *R v Coleman* (1990) NSWLR 467, 475; *R v Crabbe* (1985) 156 CLR 464, 469-70 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).
[108] (2021) 392 ALR 413, 429 [58] (Gageler, Gordon and Steward JJ).
[109] *Criminal Law Consolidation Act 1935* (SA) s 21 (definition of 'recklessly').
[110] Ibid s 23(3).

- In the Australian Capital Territory, where recklessly inflicting grievous bodily harm requires foresight of the possibility of grievous bodily harm,[111] the maximum penalty is 13 years — just shy of the Victorian offence — or 15 years for an aggravated offence against a pregnant woman.[112]

For completeness, we also note that, of those persons sentenced in Victoria between 2016-17 and 2020-21 for the principal offence of causing serious injury recklessly, an offence punishable by up to 15 years' imprisonment, the average sentence length for that offence was consistently between roughly three and four years.[113]

The following graph shows the approximate 'spread' of sentences for offences of recklessly causing serious injury imposed by Victoria's County and Supreme Courts over that period.[114] There appears to be a concentration of offences attracting penalties of between 3-6 years' imprisonment (48 per cent).

Figure 3: The number of people sentenced to imprisonment for causing serious injury recklessly by length of imprisonment term, 2016–17 to 2020–21



A likely consequence of Victoria adopting a lower threshold for recklessness is that more offences involving less morally culpable accused would be captured by this offence. Those offenders would be more likely to receive sentences of imprisonment at the lower end. Accordingly, one possible outcome would be a greater spread of sentences towards the lower end.

Such a change would be unlikely to increase the number of sentences imposed at the higher end of the sentencing range.

Question 9: If a new statutory definition of recklessness for offences against the person is adopted, what will be the consequences for the justice system?

[111] *R v Daniel* [2021] ACTSC 64 [30]-[31] (Loukas-Karlsson J); *R v Byrne* [2013] ACTSC 246 [30] (Murrell CJ).
[112] *Crimes Act 1900* (ACT) s 25.
[113] Sentencing Advisory Council, *Sentencing Snapshot – Causing Serious Injury Recklessly*, December 2021, 4.
[114] Ibid.

An important consequence will be the correction of a long-standing error of law, in a way that better ensures legal culpability reflects moral culpability.

It would also lead to outcomes which are more aligned with community and victim expectations about the justice system outcomes for offences against the person, particularly those that result in serious injury.

Question 10: What guiding principles could be used to review the use or proposed use of recklessness as a fault element in Crimes Act offences other than offences against the person?

This submission is focused primarily on the offences against the person in pt 1, div 1(4) of the Crimes Act. That was the context of *Nuri*, *Campbell*, and the DPP Reference case.

We also note that the Commission's terms of reference are focused on those offences against the person.

But we remain of the view that *Nuri* and *Campbell* do not provide a sound legal basis for importing a blanket probability test across all Victorian statutory offences.

In our view, the fundamental guiding principle for the use of recklessness as a fault element in other Crimes Act offences should be that recklessness means awareness of a possibility, unless there are cogent reasons to depart from that position for a particular offence.

Thank you again for the opportunity to provide comments on this important Issues Paper. If you have any further questions, please contact Principal Solicitor Louis Andrews via email at louis.andrews@opp.vic.gov.au.

Yours faithfully,

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