8 March 2023

Victorian Law Reform Commission
Level 3
333 Queen Street
Melbourne Victoria 3000 Australia

Attention: The Commission

Submission on the issue of recklessness in Victoria

---

1. Submission on recklessness

As was noted in the Victorian Court of Appeal, for around 24 years the probability test of "recklessness" was applied in Victorian courts without attracting any judicial or academic criticism.[1]

Relevant to that absence of criticism, is the fact five successive Directors of Public Prosecutions did not see the need to challenge the settled meaning of recklessness (probability test). Indeed, the only Director who has seen fit to challenge the probability test for recklessness is the current Director of Public Prosecutions. However that challenge through the courts failed in the County Court, Court of Appeal and the High Court of Australia.

Even in making that challenge, the Director seemed to acknowledge that adopting a mere possibility test of recklessness in Victoria would lead to injustice and accordingly advocated for an additional break on criminal liability (the absence of social utility). Again, so much was noted in the Court of Appeal.[2]

---

[1] *DPP Reference No. 1 of 2019* [2020] VSCA 181, paragraph [52] as per Priest J and [144] as per Kaye J.
[2] *DPP Reference No. 1 of 2019* [2020] VSCA 181, paragraph [125].

One of the most senior and respected judges in this state described the potential replacement of the probability test for recklessness with a mere possibility test in these terms at [146] that:

> "Finally, abrogation of the test of the foreseeability of the probability of a consequence, and replacement of it by a test of the foreseeability of the possibility of that consequence, would, without more, constitute a very substantial reduction of the degree of culpability necessary to constitute criminal liability under s 17 and related provisions of the *Crimes Act.* The test of probability is, of itself, logical and readily understood. It requires that the accused person has foreseen that a particular consequence was more likely than not to ensue from his or her conduct. By contrast, foreseeability of a mere possibility would, without any qualification, impose criminal liability on ordinary everyday actions performed with the foresight of the possibility — no matter how slight or remote— of a particular consequence."

The recognition of the injustice that the mere possibility test of recklessness would bring, was no doubt tied to the recognition of just how central a place the concept of recklessness has in the criminal justice landscape in Victoria. The centrality of recklessness can be seen in (a) the fact it is an element of so many offences (b) those offences have maximum penalties calibrated to the probability test of recklessness (c) that some of those offences involve mandatory sentencing outcomes and (d) that some of those offences have major consequences under the present fraught *Bail Act*.

In this submission we will attempt to demonstrate that centrality and submit that as so much of the architecture of the criminal law in this state was founded on the probability test of recklessness that it would indeed lead to manifest injustice to replace that test with a test involving mere possibility.

While preparing the written and oral argument for the High Court, it became necessary to examine every instance within our criminal laws where recklessness was an element or sub element of a crime. It quickly became apparent that the concept of recklessness was deeply entrenched in our legal system and any change to the meaning of recklessness, involving the adoption of a mere possibility test, would create unjust and unfair changes that would unduly widen the scope of criminal liability in this state. The legislature should be under no illusion as to the massive shift that this would represent within our justice system.

The lowered standard of recklessness would not simply change laws relating to recklessly causing serious injury or other serious crimes tried and determined in the County Court and the Supreme Court. It would effect some of our most commonly charged offences including for assaults, threats to inflict serious injury, recklessly cause injury and the like.

A rising tide lifts all boats. The proposal would fundamentally lower the threshold for laws that are regularly charged against First Nations people, people with cognitive or mental health issues, woman, people with unstable housing and employment and children. There are potential similarities to how the bail reform changes disproportionately impacted at risk people. These changes have been described by Coroner McGregor as an "unmitigated disaster" within our criminal justice system in the Coroners Court finding into the death of Veronica Nelson. It is the at risk who most often pay the price of these wholesale changes to criminal policy.

For example, threats to kill or inflict really serious injury under ss 20 and 21 of the *Crimes Act 1958* (Vic) are common charges against people because they involve the utterance of threats. Commonplace charges such as unlawful assaults would also be easier to prove against accused people.

The introduction of a mere possibility test would have the effect of funnelling people into the prison system. For it can be seen that within the *Sentencing Act 1991* (Vic) and the offences for which a prison term must be imposed (save for the demonstration of a special reason) there are a host of offences which involve recklessness.

In this context it is to be noted that the Court of Appeal has found that one of the categories constituting a special reason under the *Sentencing Act 1991* (Vic) (substantial and compelling circumstances which are exceptional and rare) is "almost impossible to satisfy".[3] This was recognised in a case involving an offender who was "barely eighteen" at the time of the offending.

[3] *Buckley v The Queen* [2022] VSCA 138.

Further still there are those offences for which a minimum non-parole period must be set. Again it can be seen that a number of these offences involve recklessness. Indeed some of these offences involve multiple layers of recklessness.

Where parliament has set these minimum non-parole periods against the settled meaning of recklessness (probability test) the injustice of now applying those mandatory non-parole periods against a greatly watered down meaning of recklessness (mere possibility) is patent.

To assist the Victorian Law Reform Commission ('VLRC') these submissions will highlight where the recklessness element is located within our laws. We will submit that these changes are unnecessary and additionally fraught with risk especially to people already at risk. The current sentencing regime is finely calibrated with the *Crimes Act 1958* (Vic) and so the risk is if the scope of criminal liability is widened more people will be captured by mandatory sentencing in a way not foreseen by parliament. To change this keystone of criminal law would fundamentally alter the sentencing landscape to become more punitive. Further at the time of writing, it would co-exist with a bail system which is the strictest in the country with its structural issues radically exposed by the death of Veronica Nelson.

2. Mandatory sentencing and youth crime

The *Children and Justice Legislation Amendment (Youth Justice Reform) Bill 2017* (Vic) led to stricter penalties for certain youth crimes. The second reading speech states as follows:

> "The bill will also increase the consequences for serious youth offending. It will create two categories of offences to reflect their seriousness. Category A offences deal with murder, attempted murder, arson causing death, culpable driving causing death, manslaughter, child homicide, causing serious injury intentionally in circumstances of gross violence, commonwealth terrorism offences, aggravated home invasion and aggravated carjacking. Category B offences deal with areas like rape, rape by compelling sexual penetration, causing serious injury recklessly in circumstances of gross violence, home invasion and carjacking.
>
> The bill obviously also provides for dual-track sentencing. The dual-track system will allow adult courts in certain circumstances to sentence young offenders aged 18 to 21

> years to a custodial sentence in a youth detention facility rather than an adult prison. The bill will limit the ability for serious young offenders aged between 18 and 21 years to be sentenced to a period of detention in a youth justice facility. Where an offender is convicted of a category A offence or a category B offence after having previously been convicted of a category A or B offence, the option of youth detention will no longer be available as a right.
>
> Instead, if a custodial sentence is imposed, it must be served in an adult jail unless the court is satisfied that exceptional circumstances exist."[4]

Further, the Bill provides that,

> "A detainee aged 18 years or over sentenced for causing serious injury recklessly against a youth justice custodial worker will be sentenced to a minimum of two years imprisonment for that offence. There will be higher statutory minimum sentences applied for the more serious offences of causing serious injury intentionally or of causing serious injury recklessly or intentionally in circumstances of gross violence."[5]

Should the concept of recklessness be expanded within the *mens rea* element, the flow on effect for youth crime could (a) cause young offenders to be convicted of Category B offences (b) potentially funnel them into serving their sentence in an adult gaol and/or (c) subject them to mandatory detention for a minimum of two years. It is important to view offences like causing serious injury recklessly in circumstances of gross violence within the framework of the broader criminal law. For example, a young offender who is part of a group could be found guilty on a complicity basis of causing serious injury recklessly in circumstances of gross violence *even though* they might have foreseen the mere possibility of it occurring but not the probability of it occurring. That same young person under the proposed changes would be subject to either increased penalties, gaol in an adult prison or mandatory minimum sentences of two years.

---

[4] Victoria, *Parliamentary Debates,* Legislative Assembly, *Children and Justice Legislation Amendment (Youth Justice Reform) Bill* 2017, Tuesday, 8 August 2017, p. 3874.
[5] Ibid.

This is but one example of how the proposed change would drastically increase the scope of criminal liability *in combination* with laws involving harsher or mandatory sentences that were not considered by parliament at the time of enactment.

3. Reckless endangerment

The case of *DPP v Reid* [2020] VSCA 247 involved a Crown appeal for, amongst other charges, reckless endangerment in the context of serious driving offences. At paragraph [101] the Priest JA, Forrest JA and Weinberg JA state that:

> "The sentences imposed on each of the two charges of reckless endangerment pose really difficult problems. That offence covers a broad range of circumstances. It can be committed where the conduct in question results in quite serious physical injury to the person or persons who are endangered. It also embodies conduct which does not lead to anything other than apprehension, or distress, on the part of those victims but it applies, as well, to conduct that is viewed as endangering others who are not identified, and who may never have come forward. They may not have sustained any physical or psychological injury. Indeed, they may not even have appreciated that they were ever at risk."

The proposed changes would invariably expand criminal liability for an offence that already poses "really difficult problems" in its current application in criminal law. It is submitted that the current definition of recklessness strikes a balance by requiring a probability outcome within the mind of an accused person for charges such as reckless endangerment. To lower it to the mere foresight as to the mere possibility of endangerment is a drastic and unjust expansion of the current law.

4. Standard sentence regime and recklessness: s 3(2)(a)(ii)

Within s 3 (2)(a)(ii) of the *Crimes Act 1958* (Vic) the standard sentence for murder is 30 years if the Crown is able to prove beyond reasonable doubt that "at the time of carrying out the conduct the accused knew or was reckless as to whether that person was a custodial officer or an emergency worker." To change the law of recklessness would result in a

material increase in the standard sentence from 25 years to 30 years, if there is a mere *possibility* in the accused's mind that the deceased person was an emergency worker.

5. Discharging a firearm reckless to safety of a police officer: s 31C

s 31C(1)(c) contains a similar provision as s 3(2)(a)(ii) where the recklessness element attaches to whether the victim is or is not a police or protective services officer.

6. Aggravated burglary: s 77 (1)(b)

The recklessness element is also found within the person present aspect of the aggravated burglary found in s 77(1)(b). The wording of the section is as follows,

> "at the time of entering the building or the part of the building a person was then present in the building or part of the building and he or she knew that a person was then so present or was reckless as to whether or not a person was then so present."

In adopting a mere possibility test the impact would be that almost every burglary offence would become an aggravated burglary if a person is present.

It is important to note that aggravated burglary is the type of criminal charge that has multiple other lesser alternative offences.[6] The issue with this is the drastic change in sentencing outcomes for an accused due to the disparity between a trespass and criminal damage and an aggravated burglary. Further, the scope of affected cases is difficult to ascertain because these charges are often at the Magistrates' Court level and the data is restricted for these sorts of offences where alternative charges proceed and aggravated burglary charges are withdrawn.

7. Proceeds of crime and recklessness: s 195A(2)(a)

[6] For example, criminal damage and trespass or a regular burglary charge. It is therefore unreliable to rely on sentencing statistics or other such statistics because aggravated burglaries may have been (a) not considered at charge stage (b) withdrawn as an alternative charge before plea of guilty to lesser charges. It is reasonable to expect that should the recklessness test be expanded as to the mere possibility that someone might be home; that there would be an increase in the charging of this more serious charge as the net of culpability expands.

At the time of writing there is little assistance in case law that touches on s 195A(2)(a) proceeds of crime and recklessness. This is most probably due to the reality that the majority of these charges are dealt with in the Magistrates' Court under the summary jurisdiction.

However, the wording of the section itself creates a self-evidently dramatic expansion of the law should the lower test for recklessness be applied. The section reads as follows:

> (2) A person is guilty of an offence and liable to level 5 imprisonment (10 years maximum) if— (a) the person deals with property being reckless as to whether or not the property will become an instrument of crime; and (b) the property subsequently becomes an instrument of crime.

8. Other crimes; betting

The recklessness aspect is found within s 195C(a), s 195D(1)(a), s 195E, s 195F of the *Crimes Act 1958* (Vic). These are the broad betting provisions designed to stop corruption gambling and sporting industries. These are relatively wide sections in and of themselves. The wording of s 195C is a useful example of its width:

> "A person must not engage in conduct that corrupts or would corrupt a betting outcome of an event or event contingency— (a) knowing that, or being reckless as to whether, the conduct corrupts or would corrupt a betting outcome of the event or the event contingency; and (b) intending to obtain a financial advantage, or to cause a financial disadvantage, in connection with any betting on the event or the event contingency."

The maximum penalty for this offence is level 5 imprisonment (10 years maximum). If the recklessness aspect if changed to the lower standard, in our submission, a massive increase in the scope of criminal liability for offences such as these would result.

9. Violent disorder: s 195I

The offence of violent disorder is another example of an offence that is extremely serious and is calibrated on the current law relating to recklessness. It provides either a 10 year or 15 year maximum depending s (3)(a) and s (3)(b). The offence reads as follows:

> (1) Violent disorder occurs where 6 or more persons (the participants) who are present together use or threaten unlawful violence with a common goal or intention and the conduct of them, taken together, causes injury to another person or causes damage to property. (2) For the purposes of subsection (1)— (a) violent disorder may occur in private as well as public places; and (b) it is immaterial whether or not the participants use or threaten unlawful violence simultaneously; and (c) the common goal or intention may be inferred from the conduct of the participants. (3) A participant in violent disorder commits an offence and is liable to— (a) level 5 imprisonment (10 years maximum); or (b) level 4 imprisonment (15 years maximum) if, at the time of committing the offence, the participant is wearing a face covering used primarily— (i) to conceal the participant's identity; or (ii) to protect the participant from the effects of a crowd-controlling substance. (4) A person is guilty of an offence under subsection (3) only if the person intends to use or threaten violence or is reckless as to whether the person's conduct involves the use of violence or threatens violence.

Currently, a person would only be found guilty of a violent disorder offence on a recklessness basis if they foresaw the *probability* of the use of violence or threatened violence. However, by merely changing the definition of recklessness to a foresight as to a mere possibility of violence – it is easy to see how this law could then be used to criminalise peaceful protestors in a crowd that becomes unruly. The consequences of this expansion on the right to protest or within other factual scenarios is difficult to quantify.

10. Bushfire laws: s 201A

This law is particularly concerning when combined with a lower standard for recklessness. It is a law that carries with it 15 years maximum. It reads as follows:

> "(1) A person who— (a) intentionally or recklessly causes a fire; and (b) is reckless as to the spread of the fire to vegetation on property belonging to another— is guilty of an offence and liable to level 4 imprisonment (15 years maximum)."

This was of particular concern in the Second Reading speech within the *Crimes (Property Damage and Computer Offences Bill)* 2003 (Vic) at p.1100 where Mr. McIntosh (Nationals) stated:

> "At a briefing we were informed by the government representatives – and this matter was raised specifically – that the common-rule laws in relation to recklessness will apply. However, I am concerned that is not clear from a reading of this legislation that the common law will be actually or expressly applied. It is important to put on the record the government's intention to specifically preserve the common-law rules in relation to recklessness and determining the mental element of an offence under this legislation…." [7]

There is an significant difference between acts or omissions that would *probably* cause a bushfire as to acts or omissions that could *possibly* cause a bushfire. Moreover, this is an example of a law that was passed with the *explicit* reference to the common law branch of law that underpins recklessness in this state. The difficulty arises where someone who accidentally starts a fire would now be criminally liable as opposed to the current law which requires a higher threshold. For example, someone who accidentally sets fire to their house whilst using a barbecue that then spreads to the next house is unable to be controlled and causes a bushfire. Such a person would now be captured under this new altered law.

11. Computer offences (s 247C(c) and s 247D(c)) and contamination offences

The computer offences with s 247C and s 247D are extraordinarily wide themselves, with similar sections being successfully challenged in the United States.[8] Section 247C deals with "unauthorised modification" of data:

---

[7] Victoria, *Parliamentary Debates,* Legislative Assembly, *Crimes (Property Damage and Computer Offences Bill),* 29 April 2003. Second Reading Speech, see particularly p. 1100 in relation to backburning provisions.

[8] *Van Buren v United States* 593_US (2021).

> "A person who— (a) causes any unauthorised modification of data held in a computer; and (b) knows that the modification is unauthorised; and (c) intends by the modification to impair access to, or to impair the reliability, security or operation of, any data held in a computer or is reckless as to any such impairment— is guilty of an offence and liable to level 5 imprisonment (10 years maximum)."

And s 247D criminalised unauthorised impairment of electronic communication:

> "A person who— (a) causes any unauthorised impairment of electronic communication to or from a computer; and (b) knows that the impairment is unauthorised; and (c) intends to impair electronic communication to or from the computer or is reckless as to any such impairment— is guilty of an offence and liable to level 5 imprisonment (10 years maximum)."

The problematic nature of these two sections are self-evident. By lowering the standard upon which the reckless test applies, it would further exacerbate the problematic and excessive width of these criminal offences that are arguably already outdated. For example, s 474C (with a lower standard) could apply to an employee who didn't make a backup copy of a file and accidentally deleted it within a computer. This would expose said employee to a criminal penalty with a statutory maximum of 10 years imprisonment.

Similarly, s 250(1) introduced the notion of recklessness in the *Crimes (Contamination of Goods) Bill 2005* (Vic) whereby the parliament directly discussed the meaning of recklessness and referenced *R v Nuri* [1990] VR 641.[9] If the redefining of recklessness is to proceed forward, there needs to be a debate about each law that was created by previous parliaments and the desirability of those laws being altered in such a fundamental way. This is especially important with laws such as s 250(1)(a) – (b) where "public alarm or anxiety" could be proven in the information age with something going viral online. An innocuous tweet or TikTok that causes such societal "anxiety" could expose someone to Level 5

[9] Victoria, *Parliamentary Debates,* Legislative Assembly, 4 October 2005, Second Reading speech of *CRIMES (CONTAMINATION OF GOODS) BILL* 2005, p. 1144

imprisonment or fine.[10] This is one such example how the algorithms present in modern social media technology could expose someone to extraordinarily serious charges due to an obnoxious, immature tweet or TikTok.

12. Mandatory sentencing and driving offences involving emergency workers: s 317AC

This is a perfect example of the dual effect of how lowering the standard for recklessness increases the net of liability that will expose more people to mandatory sentencing. Within s 10AE(1) of the *Sentencing Act 1991* (Vic) a term of imprisonment with a non-parole period of at least 2 years is required by statute. With s 16(3D) creating a further requirement for cumulation.

The issue with section is the nebulous language "a risk to safety" being very broad in its application and width. There is no requirement of an injury to occur, as is made clear by Kyrou, Emerton and Sifris JJA in *Hutchison v The Queen* [2021] VSCA at [69] where the Court of Appeal stated unequivocally "[i]n our view, these provisions simply make it clear that no injury is required for the offences to be complete." One example of a person facing mandatory imprisonment under a lowered recklessness test would be a plain clothed police officer at the scene of an accident standing in the "vicinity"[11] of a police vehicle walking out onto the road whereby that officer is nearly struck by a car who travels past a few metres away. The officer is uninjured. Such a defendant would be likely found guilty, and unless "special reasons" are found would be facing a non-parole period of 2 years.

13. Aggravated offence of intentionally or recklessly exposing a emergency worker to risk by driving: s 317AD(1)(a) and s 317AF

The offence of exposing an emergency worker to risk by driving becomes "aggravated" when under this section "the motor vehicle driven by the person in the commission of the offence against s 317AC is stolen and person knows that, or is reckless as to whether, the motor vehicle is stolen". This is another example of how the legal concept of recklessness, if lowered, would increase the criminal liability net and funnel people towards mandatory

[10] Noting that the territorial nexus for these offences are expanded to include acts outside of Victoria, under s 252.
[11] S 317AC(2)(b)

sentences when s 10AE(1) and s 16(3D) of the *Sentencing Act 1991* (Vic) are triggered. This can mean that first time offenders face a minimum of 2 years non-parole period that is *cumulative* on other sentences.

Another section is s 317AF which inputs a reckless component into s 1(a) as to whether the motor vehicle is stolen. Within s 317AF(1) there is the general concept of recklessness as well. It is listed as a "category 2" offence which under s 5(2H) of the *Sentencing Act 1991* (Vic) requires a custodial element to be imposed unless special circumstances exist. Foresight as to the mere possibility that the car is stolen (for example a passenger being picked up in a car with no plates and charged on a complicity basis) is particularly concerning considering the sentencing outcomes that flow from being found guilty of same.

14. Presumed cumulation in recklessly exposing an emergency worker to risk by driving: s 317AE(1)(b) and s 317AE(1)(c)

It is important to read these emergency worker driving sections as a whole, because they would almost certainly be charged as alternatives. It is common and proper for prosecutions to have a "head charge" with lesser alternatives that follow. However, these lesser charges such as the one found in s 317AE still carry with it a presumption of cumulation within s 16(3D) of the *Sentencing Act 1991*. Mandatory sentencing with lesser alternatives still requiring cumulation skews the decision-making process for a defendant; where many rational actors would not want to risk mandatory gaol time and would potentially plead guilty to this lesser alternative. These proposed changes would further exacerbate the "choke points" in the trial system and the inefficiencies within it, because (a) there would be a lowering of the standard of proof for recklessness and (b) there would be an unfair the decision-making process of an accused person. This would create an imbalanced system with a test that is far too low compared to the sentencing outcomes that flow.

There is also a presumed cumulation for recklessly damaging an emergency vehicle under s 317AG which has a presumption of cumulation as well. Therefore, the damage to an emergency worker vehicle would form a cumulative sentence on the *other* emergency worker driving charges discussed in this section which also have mandatory sentencing.

15. Unlawful assaults

Perhaps at this juncture it is useful to depart from the *Crimes Act 1958* (Vic) and discuss how other aspects of the law could be affected by the proposed changes. Between 2018 and 30 June 2021 there was a total of 22,045 unlawful assault court outcomes in the Magistrates' Court of Victoria alone. The number of unlawful assaults that were charged but never proven would undoubtedly be higher. Unlawful assault is a traditionally easy offence to prove, as it requires the accused to put the complainant in fear of the use of force but does not require actual force to be used.[12] One of the elements of assault with an application of force requires either intentionality or recklessness. Under Part 7.4.8 paragraph [9] the Judicial College notes that:

> "For the application of force to have been "reckless", the accused must have realised that his or her conduct would *probably* result in force being applied to the complainant's body (*R v Crabbe* (1985) 156 CLR 464; *R v Nuri* [1990] VR 641; *R v Campbell* [1997] 2 VR 585)."

Any change to the statutory definition of recklessness presumably would either alter the common law for unlawful assault or, even worse, cause a split between the statutory and common law unlawful assault regimes. Thus, any proposed changes to the definition of recklessness will have a larger flow on effect to crimes where *Crabbe, Nuri* and *Campbell* previously stood as good law. The alternative is that the common law remains the same but that is likely to create a confusing divergence in the law between a common law assault and any other crime in the *Crimes Act 1958* (Vic). By lowering the standard for summary level crimes, this will create large ineffective systemic changes that will funnel more low-level offenders into the criminal justice system.

16. Other crimes commonly charged in the *Crimes Act 1958* (Vic)

The following is a list of charges that would be materially affected by the lowered standard of recklessness. These are:

i. Causing serious injury recklessly: s 17

[12] *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439

ii. Causing injury recklessly: s 18
iii. Offence to admit certain substances: s 19
iv. Threats to kill: s 20(b)
v. Threats to inflict serious injury: s 21(b)
vi. Conduct endangering life: s 22
vii. Conduct endangering persons: s 23
viii. Setting traps to kill: s 25
ix. Setting traps to cause serious injury: s 26
x. Assault: s 31(2)(b)

Some of these charges are most commonly found in the Magistrates' Court level of our legal system. Especially recklessly causing injury, threats to kill, threats to inflict serious injury, conduct endangering life or person and assaults. It cannot be over emphasised <u>just how common</u> these charges are in the summary jurisdiction. By lowering the standard of recklessness hundreds of thousands of cases will be materially altered creating additional delays in an already burdened system crippled by COVID-19 delays and backlog.

17. <u>Recklessly cause serious injury in circumstances of gross violence: s 15B</u>

Potential issues with a lower standard of recklessness within s 15B are found within the case of *Samantha Irene Johns v The Queen* [2020] VSCA 135. That case involved a woman who drove her Toyota Camry into the oncoming truck of a person known to her. At [39] the Court of Appeal citing *Campbell* and *Crabbe* held in rejecting the appeal against conviction that:

> "Although the risk of injury to the driver of the car was obvious and, it may be thought, likely to be of a greater magnitude than the risk to the driver of the truck, the issue for the jury was not which of the two drivers bore the greatest risk of injury. <u>The issue was whether the applicant knew the truck driver would probably be seriously injured.</u> The jury was correctly directed that this involved an assessment of <u>whether they were satisfied beyond reasonable doubt that the applicant knew that serious injury was probable or likely."</u>

The section operates hand in hand with s 10 of the *Sentencing Act 1991* (Vic) which requires a non-parole period of 4 years to be fixed under s 11 of the Act. If an emergency worker is a

victim, a non-parole period of 5 years. These sections both have the "special reasons" proviso.

Within s 15(2)(a)-(c) there are three pathways to this mandatory sentencing outcome. These are:

> "(a) the offender planned in advance to engage in conduct and at the time of planning—
>
> (i) the offender intended that the conduct would cause a serious injury; or
>
> (ii) the offender was reckless as to whether the conduct would cause a serious injury; or
>
> (iii) a reasonable person would have foreseen that the conduct would be likely to result in a serious injury;"

and/or that:

> "(b) the offender in company with 2 or more other persons caused the serious injury;
>
> (c) the offender entered into an agreement, arrangement or understanding with 2 or more other persons to cause a serious injury;"

Within s 15B(2)(a)(ii) there are problems with it's construction and how it sits within the *Crimes Act 1958* (Vic). For example, the charge of causing serious injury intentionally carries with it Level 3 (20 years maximum) imprisonment along with the requirement for an "intention" to cause serious injury. Except when applying to emergency workers, that section does <u>not</u> have mandatory sentencing. However, s 15B(2)(a)(ii) requires "planning to engage in conduct" but a reckless element as to whether it would cause "serious injury". If you import the mere possibility test into s 15B(2)(a)(ii) there is a real potential for a disconnect between the operation of the sentencing provisions between the offence of intentionally causing serious injury and the s 15B(2)(a)(ii) offence in circumstances where the criminality involved in the intentionally cause serious injury offence would be much greater.

Changing the goal posts of recklessness would further exacerbate these structural issues within the *Crimes Act* and would involve a particularly harsh operation of the law when compared to its statutory alternatives. It is insufficient to rely on the largesse of a prosecutor to pick the appropriate alternative and is an example of the disjointed structural difficulties found within the *Crimes Act*.

18. Other statutes that would be altered

The following additional sections would change should there be lowered standard of recklessness.

Statute	**Provision using 'reckless' or 'recklessly'**
Aboriginal Heritage Act 2006	s 147A, 79G
Accident Towing Services Act 2007	s 215
Assisted Reproductive Treatment Act 2007	ss 35, 38
Associations Incorporation reform Act 2012	s 83
Bus Safety Act 2009	s 66
Children, Youth and Families Act 2005	ss 119, 488DB
Occupational Health and Safety Act 2004	s 32
Crimes Act 1958	ss 319B(2)(a)(iii), s 319C(1), s 319C(2)(b)

One example from these other areas of legislation comes from the *Occupational Health and Safety Act 2004* (Vic). That Act introduced a reckless endangerment offence. At that time the Attorney-General made it clear that for that offence "the same standards, tests and penalty" would apply as for the reckless endangerment offence that the Court of Appeal considered in the case of *Nuri*.

19. Conclusion

Our criminal justice system is one that is a finely calibrated mix between common law and statute. Those statutes were enacted by parliament on an existing understanding of recklessness. Such proposition is made clear upon inspecting the Hansard records. This was the "re-enactment presumption" aspect of the argument that was relied on within *DPP*

Reference No. 1 of 2019. In fact, each change and indeed the relatively recent changes in the *Crimes Act 1958* (Vic) either explicitly or implicitly endorsed the current test for recklessness. Dissatisfaction with the test does not seem to have ever been uttered in parliament.

As previously stated, the only dissatisfaction uttered with the current recklessness laws is from the Director of Public Prosecutions. The attempt to change the criminal justice landscape through the courts was ultimately unsuccessful at each stage.

A change to one of the building blocks of our justice system will have substantial flow on effects across a large majority of our offences. The divergent concepts of recklessness are not new to the law, as can be seen in Sir Owen Dixon's writings on the subject in *Jesting Pilates*. Victoria, through successive parliaments, has chosen a more rigorous standard for recklessness to apply. This rigorous standard comes with higher, and sometimes, mandatory penalties.

The proposed changes would have an overall deleterious effect on a justice system already overburdened by constant changes to the *Crimes Act, Sentencing Act* and the *Bail Act*. It would have a disproportionate impact on people most at-risk and marginalised in our society. It will lead more people to be imprisoned in a corrections system that is already overpopulated.

Given the injustice otherwise involved, any replacement of the probability test with a mere possibility test would have to coincide with a complete overhaul of the *Crimes Act 1958,* (Vic), *Sentencing Act 1991* (Vic), *Bail Act 1977* (Vic) and other Acts where offences involving recklessness and their associated penalty provisions appear.

It is submitted that such a radical overhaul of the criminal justice system is unnecessary and no good reason has been advanced in support of such a dramatic overhaul.

The adoption of a "substantial and unjustified risk" test will involve all of the same problems that we have attempted to set out.

Whilst the expansion in criminal liability may not be as significant with the adoption of such a test – the fact remains that so much of the architecture of the criminal law of this state has been created on the basis of the settled and well understood meaning of recklessness (probability test). The replacement of that test with a vaguer, less precise and less rigorous test could only occur with the same overhaul of the criminal justice system. Without the corresponding overhaul the scope for widespread injustice would remain. Again no good reason for such an overhaul on this alternate basis has been demonstrated.

The VLRC should recommend that the probability test for recklessness, which has operated in this state so many years without criticism, should be retained.

Dated: 8 March 2023

Dermot Dann KC

Felix Ralph