The meaning of 'recklessness' in Victorian criminal law

1. The Supreme Court provides the following comments on the Victorian Law Reform Commission's (VLRC) issues paper regarding recklessness.

Meaning of recklessness

2. The question whether the *Crimes Act 1958* (the Act) should be amended to change the meaning of recklessness in relation to the offences in Part I, Division 1(4) (the relevant offences) is a policy question for government on which the Court does not take a position as was made clear in *Director of Public Prosecutions Reference No 1 of 2019*.[1]

3. In that case in the course of interpreting the meaning of recklessness, Priest JA and Kaye JA set out a number of practical advantages of continuing to follow the '*Campbell* test'. Priest JA said:

> there are at least six sound reasons for adhering to the *Campbell* test.
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> First, the test is — without intentionally being pejorative — consistent with the 'spirit' of the decision in *Crabbe*, in that it reflects the common law notion of recklessness in murder, the offence in s 17 arguably being the next most serious non-fatal offence against the person. So far as possible, it is desirable to promote consistency between common law and statutory offences; so that, if more than one construction of a statute creating an offence is open, that consonant with the common law is to be preferred. Moreover, I consider that, in many circumstances, the offence of recklessly causing serious injury will be committed in circumstances which are (or, at least, are not far removed from) the moral equivalence of the offence of intentionally causing serious injury. That provides a solid basis for demanding that the offence in s 17 must require foresight of the probability that serious injury will result from the relevant act (or omission).
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> Secondly, and closely allied to the first consideration, adopting the same test for recklessness in offences under s 17 as for reckless murder, avoids the possible inconvenience flowing from a jury being asked to consider two different forms of recklessness, in the event that reckless murder and recklessly causing serious injury are charged on the same indictment.
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> Thirdly, the test in *Campbell* has stood the test of time. The law is well-settled. Thus, *Campbell* has been satisfactorily applied for many years, without attracting any criticism, judicial or academic. That alone provides compelling justification for leaving it undisturbed. With similar considerations in mind, Bell J observed in *Aubrey* that it is a large step to depart from a decision which has been understood to settle the construction of a provision, particularly where the effect of that departure is to extend the scope of criminal liability.
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> …

[1] [2020] VSCA 181 (the DPP Reference case).

> Fifthly, longstanding experience has demonstrated that the *Campbell* test is straightforward and relatively simple for juries to apply. The test is purely subjective — did the accused foresee the probability that serious injury would result from his act (or acts) or omission (or omissions)? — and has no complicating objective components. In the Court's experience, it is a test easily grasped by juries.
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> Finally, to adopt the test for recklessness as now urged by the Director would be to significantly extend the scope of criminal liability for the offence under consideration. Quite plainly, to posit that an accused might fall to be convicted of the offence under s 17 if, without more, he or she foresaw the mere possibility (no matter how slight) of serious injury resulting from his or her act (or omission) is to greatly extend the reach of the offence as it has been understood to this point.

4. In addition to the second reason set out by Priest JA, possible inconvenience may also flow from a jury being asked to consider two different forms of recklessness if an accused is charged with two counts of a reckless form of offence, one alleged to have been committed while the *Campbell* test applied, and the other alleged to have been committed after a new test has commenced.

5. Kaye JA said:

> the settled practice in Victoria was to direct juries as to foreseeability in terms of the awareness of the probability that the requisite injury would occur.
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> Following, and in accordance with *Campbell*, that practice has been consistently maintained in Victoria. As Priest JA has pointed out, at no time, in the 25 years that have followed the decision in *Campbell*, has there been any criticism of, or dissatisfaction with, the test stated by the Court in that case. The directions given to juries, in terms of *Campbell*, have been simple, logical and straightforward.
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> 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.

6. Consistent with jury directions on the *Campbell* test being 'simple, logical and straightforward', it has been extremely rare for appeals to include a ground alleging error in the trial judge's charge on recklessness.[2]

7. In terms of whether the fault element of recklessness in the relevant offences should include an objective component, the Court notes that the plurality in the DPP Reference case said:

> When and how a 'reasonableness' element is appropriately included in the definition of a criminal offence is a question of policy, not of interpretation. Given that criminal responsibility ordinarily rests on what an accused person actually knew or intended or foresaw, rather than on what a reasonable person would have

[2] *Paton v R* [2011] VSCA 72 is an example of such an appeal.

> known or intended or foreseen, the introduction of an objective test is always a matter requiring careful consideration.
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> If the Director's proposal were to be adopted, the question would be not whether the accused was aware that it was unreasonable in the circumstances to take the risk of causing serious injury but whether — viewed objectively — it was unreasonable to have done so. Whether that test should be introduced is a matter for Parliament to decide.

8. In the Court's experience multi-factorial tests, while not uncommon, pose greater challenges for judges instructing juries and for juries in understanding and applying those instructions.

Flow on effects for the justice system

9. As the VLRC has noted in the paper, amendments that lower the threshold for recklessness may have significant flow on effects for the justice system. This includes more prosecutions, more convictions, and more appeals.

10. In the DPP Reference case the plurality said:

> the change which is sought in the definition of recklessness — from awareness of the probability of serious injury to awareness of the possibility of serious injury — would expand the potential scope of criminal liability under s 17. It would, in all likelihood, be a very substantial expansion.

11. The complexity of any legislative amendments may also contribute to an increase in appeals and, in turn, retrials. Complexity can lead to error when directing juries, and make it difficult for juries to grasp the law to be applied. The effects of complexity in the law should be given close consideration when developing recommendations as to the meaning of recklessness.

Statutory definitions and the common law

12. In terms of how to implement any recommended change to the meaning of recklessness, the Court raises the following matters for consideration.

13. Depending on how it is drafted, a statutory definition of recklessness may exclude the common law, or capture the common law at a certain point in time and preserve it in statutory form, immune to subsequent developments. Amendments could also be drafted in a way that applies the common law including as it develops in future.

14. If a 'possibility test' were adopted and a statutory definition inserted to achieve that, there is a risk that the definition could limit the extent to which developments in the common law may apply in Victoria. For instance, if the common law as stated in *Aubrey v R* developed to include an express objective component, would that development be accommodated by a statutory definition that, on its face, is purely subjective?

15. If the VLRC considers that the meaning of recklessness should be changed to require foresight of the possibility of harm, the Court suggests consideration be given to a legislative amendment that would apply the common law as developed from time to time.

16. The Court assumes that any legislative amendments would apply to offending alleged to have occurred after the amendments commence.

Jury directions

17. Once the VLRC has arrived at recommendations regarding the meaning of recklessness, the Court suggests consideration be given to a model jury direction reflecting the recommended meaning of recklessness. This will be of particular assistance to the courts if the VLRC recommends that recklessness should include an objective component and the Act is amended accordingly. In the DPP Reference case, the plurality said:

> no direction regarding reasonableness or social utility has ever been given to a Victorian jury dealing with a charge of recklessly causing serious injury. Juries are simply directed to apply the *Campbell* interpretation in deciding whether the element of recklessness has been proved.
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> To accept the amended proposition advanced by the Director would require this Court — in effect — to create a new model direction for juries, embodying a reasonableness test which reflected paras 48 and 49 of *Aubrey*.

18. The plurality also said, after noting that a change from a 'probability test' to a 'possibility test' would expand the potential scope of criminal liability:

> great care would be required to define the matters which a jury should take into account in deciding whether, in the circumstances, it was unreasonable for the accused person to have taken the risk of causing serious injury.

Guiding principles

19. It will be important for any guiding principles to be clear in terms of their purpose and uses. The VLRC may wish to consider whether the guiding principles should include a statement to the effect that when drafting offence provisions involving a fault element of recklessness, it should not be assumed that courts will have regard to the guiding principles when asked to interpret the provisions. Ambiguities should be resolved in the provisions rather than relying on extraneous materials or guiding principles to give clarity to the provisions.
20. In terms of the potential principles, the Court considers that a principle to the effect that recklessness should be used consistently with everyday usage may understate the role and complexity of recklessness in the criminal law. The Court notes that in the DPP Reference case, the plurality said:

> The history of judicial expositions of the meaning of recklessness reveals, however, that it is simply not possible to be categorical about its meaning. On the contrary, as the speech of Lord Bingham in *R v G* demonstrates, there have over the years been dramatic divergences of view and differences of opinion at the highest judicial levels about the meaning to be attributed to the concept of recklessness in criminal law, both generally and in particular statutory contexts. And the question continues to be debated in the United Kingdom, both in academic work and in law reform inquiries.

21. The Court suggests that any principle about reducing inconsistency in legislation should recognise that there are circumstances where inconsistency may be preferable to the complexity caused by changing the meaning of a well-understood statutory term.

22. In relation to the principle that there should be clarity about the subjective and objective components of recklessness, the Court would support principles promoting clarity. The Court considers that if the principle is not intended to mean that recklessness must include an objective component, it should be drafted in a way that avoids creating that impression.