LAW INSTITUTE VICTORIA

Recklessness

Victorian Law Reform Commission

Prepared by: Law institute of Victoria
Date: 10 March 2023

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Introduction

The Law Institute of Victoria (**LIV**) is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 18,000 members. The LIV has a long history of contributing to, shaping, and developing effective legislation.

The LIV welcomes the opportunity to provide the Victorian Law Reform Commission (**VLRC**) with a submission on its Issues Paper on Recklessness (the **Issues Paper**).

This submission has been prepared by the LIV's Criminal Law Section (**CLS**). It first provides the LIV's General Comments on the subject matter of the Issues Paper, and then responds to each of the Issues Paper's discussion questions.

General Comments

The LIV acknowledges that the VLRC has been asked by the Attorney General to review and report on how the concept of 'recklessness' is understood in the *Crimes Act 1958* (Vic) (**Crimes Act**), and in particular, to:

- consider whether the Crimes Act should be amended to include a definition of recklessness applicable to Victorian offences against the person and, if so, what definition should apply; and
- develop a set of guiding principles that could be used to review the use or proposed use of recklessness as a fault element in other categories of Crimes Act offences.

The LIV notes that recklessness is an important element of several of Victorian criminal offences against the person, relevantly including for the purposes of this submission the offences of homicide, causing serious injury, and causing injury, contained in Part I, Division 1(4) of the Crimes Act.

The Crimes Act does not define recklessness in relation to these offences; rather, the term takes its meaning from the common law. Under the common law, recklessness is defined with reference to the 1997 Victorian Supreme Court of Appeal decision in *R v Campbell*,[1] in which it was held that recklessness exists where a person foresees the probability of causing a particular offence but they nevertheless proceed (the **Probable Harm Test**).

The LIV notes that this definition stood unchallenged and largely uncriticised until 2019, when the Director of Public Prosecutions (**DPP**) referred a question as to the correctness of *R v Campbell* to the Victorian Supreme Court of Appeal, the decision of which the DPP ultimately appealed to the High Court of Australia. Both the Victorian Supreme Court of Appeal and the High Court determined that *R v Campbell* remains good law in Victoria and that any change to the definition of 'recklessness' in the context of the Crimes Act offences against the person must be decided by Parliament. Following the High Court's decision, the DPP referred to the VLRC the task of reviewing the definition of recklessness as it is understood in the Crimes Act with a view to considering, among other things, whether recklessness should be defined according to a lower threshold, such that it would occur where a person foresees the *possibility* of causing a particular offence but nevertheless proceeds.

For many of the same reasons articulated by Priest JA in the Victorian Supreme Court of Appeal, the LIV holds the view that the Probable Harm Test is fit-for-purpose, appropriate, and commensurate with the degree of culpability ascribed to recklessness offences. While the LIV does not support codifying a definition of recklessness, it would not oppose codification of the common law position (i.e., the Probable Harm Test). If codification were to establish a lower threshold for establishing recklessness, the LIV would oppose it.

[1] [1997] 2 VR 585.

Discussion Questions

1. Are there problems with the current common law definition of recklessness as it applies to offences against the person in Victoria? In answering this question, you may wish to consider:

- **is the test of foresight of probable harm unjustifiably high for offences against the person?**
- **Are there behaviours that should be criminalised under Part I, Division 1(4) of the *Crimes Act 1958* (Vic)?**

Are there problems with the current common law definition of recklessness as it applies to offences against the person in Victoria?

To respond to this question, the LIV considers it imperative to first examine what the current common law definition of recklessness as it applies to offences against the person is, and the context behind the VLRC Review.

What is the common law definition?

In Victoria, 'recklessness' in the context of offences against the person is defined by the common law with reference to the foresight of probable harm test, or the Probable Harm Test.

The Probable Harm Test was authoritatively formulated by High Court in the 1985 case of *R v Crabbe*,[2] in which the Court clarified 'what mental element is necessary to constitute the crime of murder … when [the accused] … lacks … actual intent to kill or to do grievous bodily harm'.[3] In other words, it established the common law rules applicable to the mental element in cases of 'murder by recklessness'.[4]

Noting that different views had been previously expressed by the High Court on whether the requisite mental element was 'knowledge of the *probability* that [the] acts will cause death or grievous bodily harm … or whether knowledge of a *possibility* is enough', it was ultimately determined in *R v Crabbe* that the correct standard is knowledge of the *probability* that an act will cause death or grievous bodily harm:[5]

> The conclusion that a person is guilty of murder if he commits a fatal act knowing that it will probably cause death or grievous bodily harm but (absent an intention to kill or do grievous bodily harm) is not guilty of murder if he knew only that his act might possibly cause death or grievous bodily harm is not only supported by a preponderance of authority but is sound in principle.

In reaching this conclusion, the High Court noted that this view was already accepted by the Full Court of the Supreme Court of Victoria.[6]

The LIV notes that while the precedent established by *R v Crabbe* technically applies only to murder, it soon came to be applied to the definition of recklessness in the context of all offences against the person in Victoria.

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[2] (1985) 156 CLR 464.

[3] Ibid [6]-[7].

[4] The phrase 'murder by recklessness' was, and remains to be, used to describe cases of murder in which the accused lacks actual intent. This reference is taken from *Nydam v R* [1977] VR 430, 436.

[5] Ibid [8] (emphasis added).

[6] Ibid [7], citing *R v. Jakac* (1961) VR 367; *R v. Sergi* (1974) VR 1; *Nydam v. The Queen* (1977) VR 430; *R v. Windsor* (1982) VR 89.

For example, in the 1990 case of *R v Nuri*,[7] the Full Court of the Supreme Court of Appeal applied *R v Crabbe* to section 22 of the Crimes Act, a general endangerment offence of reckless conduct endangering life:[8]

> The expression "recklessly" may not give rise to difficulty. It has for long been employed in statutory offences. *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: see R v Crabbe (1985) 156 CLR 464; 59 ALR 417*.

Several subsequent cases in the 1990's followed *R v Nuri* in applying *Crabbe* to offences against the person other than murder, including, for example *R v McCarthy*[9] and *Filmer v Barclay*.[10] In the latter, McDonald J applied *R v Nuri* to find that '[to] establish that the conduct … is engaged in recklessly it must be proved that the accused engaged in the same having foreseen or realised that the probable consequences of engaging in such conduct would result in another person sustaining serious injury'.[11]

An important development occurred in 1997 with *R v Campbell*,[12] a case involving an appeal against a conviction for recklessly causing serious injury under section 17 of the Crimes Act. The relevant ground of appeal contended that the trial judge misdirected the jury on the meaning of 'recklessly' by stating that it could be established if the relevant act was done with knowledge that serious injury *might* occur.

The Full Court found that 'the appropriate test to apply is that it is possession of foresight that injury probably will result that must be proved' per *R v Crabbe*.[13] In applying *Crabbe*, the Court explicitly acknowledged that, even though *R v Crabbe* specifically concerned murder, 'the same principles are relevant' to other offences - an approach it noted was applied by the Court of Criminal Appeal in *R v Nuri*.[14] The Court went on to explain that section 17 '[was] one of a group of sections' involving recklessness in the context of offences against the person, and that '[i]t cannot be supposed that the legislature intended that there be, or that the courts would interpret the relevant sections so as to produce, a different requirement concerning the extent of "the intent" with regard to each of those sections'. This finding was consistent with the Crown's own submissions, in which it conceded that was improbable that the term 'recklessly' in section 17 was intended to have a different meaning from the meaning ascribable to it in other sections of the Crimes Act.[15]

In reaching its decision, the Court rejected the Crown's contention that the correct test for recklessness was the possible harm test, which it said had been applied in the 1960s and 1970s cases of *R v Smyth*,[16] *R v Kane*[17] and *R v Lovett*,[18] because:

> These are relatively old cases and concerning the now repealed offences of unlawful and malicious wounding or unlawful and malicious infliction of grievous bodily harm. *The spirit of the decision in* Crabbe *indicates that such cases should not be applied to the offence of recklessly causing injury*. Nuri *used a test of "probability" in a kindred section to this case and it must be the case that all relevant sections in the group bear the same interpretation*.[19]

Since *R v Campbell,* the Probable Harm Test enunciated in *Crabbe* has been consistently applied to offences against the person in Victoria. For example, in the 2008 case *R v Abdul-Rasool*,[20] Redlich JJA stated '[t]he

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[7] [1990] VR 641.

[8] Ibid, 643 (emphasis added).

[9] (unreported, Court of Criminal Appeal, 4 November 1993) Teague J.

[10] [1994] 2 VR 269.

[11] Ibid, 276.

[12] [1997] 2 VR 585.

[13] Ibid, 592-593.

[14] Ibid, 593.

[15] [1997] 2 VR 585, 592.

[16] [1963] VR 737.

[17] [1974] VR 759.

[18] [1975] VR 488.

[19] Ibid, 593 (emphasis added).

[20] (2008) 18 VR 586.

definition of recklessness in violent non-fatal offences follows the definition set out in *R v Crabbe'*.[21] Further, in the 2010 case of *Ignatova v R*[22]*,* the court found that 'it is possession of foresight that injury probably will result that must be proved', and that 'conduct is reckless if the accused foresees the probable consequences of the action and 'displays indifference as to whether … those consequences occur'.[23]

Context behind the Review: DPP Reference No 1 and Aubrey

That the Probable Harm Test applied to offences against the person, beyond homicide, was uncontroversial and unchallenged until *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181 (**DPP Reference No 1**). In DPP Reference No 1, the DPP referred to the Supreme Court of Appeal of Victoria the question of the correctness of *R v Campbell* in light the 2017 High Court decision in *Aubrey v the Queen* (2017) CLR 305 (**Aubrey**). More specifically, the DPP asked for confirmation whether:

(a) Consistent with the decision of the High Court in Aubrey, the correct interpretation of 'recklessness' for offences other than murder (and, in particular, the offence of recklessly causing serious injury) is that an accused had foresight of the possibility of relevant consequences and proceeded nevertheless, having regard to the social utility of the action;
(b) Further, that the approach in [*R v*] Campbell requiring proof of foresight of the probability, or likelihood, of (serious) injury is inconsistent with Aubrey and should no longer be followed.

Before examining the Supreme Court's opinion on the referral, it is imperative to first turn to Aubrey to understand the questions posed by the DPP.

In Aubrey, five Justices of the High Court considered whether 'it is sufficient to establish that an accused acted recklessly within the meaning of s 5 of the *Crimes Act 1900* (NSW), and thus maliciously within the meaning of that section and s 35, for the Crown to establish that the accused foresaw the possibility (as opposed to the probability) that the act … would result in the … contract[ion] of the grievous bodily disease[]'.[24]

In considering the question, the majority (comprising Kiefel CJ, Keane J, Nettle J, and Edelman J) noted that in Victoria, 'an offence of reckless infliction of grievous bodily harm necessitates proof of foresight of the probability … as opposed to the possibility, of grievous bodily harm' per *R v Campbell*. The majority went on to explain the reasoning for the decision in *R v Campbell*, stating that:[25]

> Hayne JA and Crockett AJA invoked what they described as "[t]he spirit of the decision in *Crabbe*" … to conclude that proof of an offence of reckless infliction of grievous bodily harm requires proof of foresight of a probability of injury. In *R v Crabbe*, this Court held that for an accused to be convicted of common law murder, it was necessary for the Crown to prove at least that the accused foresaw the probability, as opposed to the possibility, of death or grievous bodily harm. In light of that, Hayne JA and Crockett AJA reasoned that it could not be supposed that the legislature intended that the courts would interpret relevant sections as producing a different requirement of recklessness for offences other than murder.

The majority found that this line of reasoning did not apply to the meaning of recklessness in the context of offences against the person in the *Crimes Act 1990* (NSW), upholding the New South Wales Court of Criminal Appeal decision in *R v Coleman*,[26] because of how the Act's provisions were drafted and because of the Act's legislative history.[27] Consequently, in the specific context of the New South Wales legislation, the High Court unanimously (including Bell J)[28] found that it was sufficient to establish recklessness for the Crown to establish that the accused foresaw the *possibility* that the act would result in the contraction of the grievous bodily

[21] Ibid [67].

[22] [2010] VSCA 263.

[23] Ibid [36]-[37].

[24] *Aubrey v the Queen* (2017) CLR 305 [5]-[6].

[25] Ibid [45].

[26] *R v Coleman* (1990) 19 NSWLR 467.

[27] *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181 [46].

[28] Ibid [53].

disease. In reaching this conclusion, the majority importantly noted that 'the requirements in States other than New South Wales may vary according to the terms of each State's legislation. But, so far as ss 18 and 35 of the [New South Wales] Crimes Act are concerned, the reasoning in Coleman was correct'.[29]

Returning to DPP Reference No 1, it is important to bear in mind that:

(a) Aubrey is *not* authority for the proposition that the interpretation of 'recklessness' for offences other than murder in Victoria is that an accused had foresight of the possibility of relevant consequences and proceeded nevertheless, having regard to the social utility of the action;
(b) The approach taken in *R v Campbell* regarding the application of the Probable Harm Test is *not* inconsistent with Aubrey; and
(c) Aubrey is *not* good authority for the proposition that the decision in *R v Campbell* is wrongly decided and should not be followed.

In DPP Reference No 1, the Supreme Court concluded that *R v Campbell* remained good law in Victoria and that '[U]nless and until it is altered by legislation, the meaning of 'recklessly' in s 17 of the *Crimes Act 1958* is that stated by the Court of Appeal in *Campbell*', and that it was '[un]necessary to reach a concluded view about whether *Campbell* was rightly or wrongly decided'.[30]

The Court's reasoning for this opinion rested on several propositions, including that:[31]

(a) The Victorian Parliament adopted the *Campbell* definition of recklessness by operation of the re-enactment principle by 'first, ... increasing the maximum penalty for the offence and, secondly, [by] … creating a new 'gross violence' version of the offence', which both reflected that 'the Parliament … accepted the correctness of the *Campbell* interpretation'; and
(b) the formulation of 'recklessness' which the Director wished the Court to adopt in place of the *Campbell* interpretation included an 'unreasonableness' qualification which, by its nature, could only be effectuated by legislation.[32]

Unsatisfied, the DPP appealed to the High Court in *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741 (**DPP No 1 (2)**).

The majority, comprising Justices Gageler, Gordon, Steward, and Edelman, found that the Victorian Supreme Court had answered the Director's point of law questions correctly. In particular, it was agreed that the re-enactment presumption applied, demonstrated by subsequent legislative '…amendments [that] could only be understood on the basis that the legislature was aware of, and accepted, the *Nuri* interpretation for the mental element of recklessness'.[33] The joint judgment of Justices Gageler, Gordon, and Steward, also highlighted '[o]ther considerations [that] reinforce the conclusion that the foresight of probability test in *Campbell* should stand unless addressed by the legislature in Victoria', including that:[34]

> *Campbell* was decided in 1995, more than 25 years ago, and since that date it has been consistently followed in Victoria. This Court is reluctant to depart from long standing decisions of State courts upon the construction of State statutes, particularly where those decisions have been acted on in such a way as to affect rights. That is especially so here, where unfairness would follow if the meaning of recklessness was changed retrospectively by this Court with the result that potentially criminal conduct which occurred before this Court's decision – if that conduct has not yet been charged, or if it has been charged but not tried – would attract the lower standard of recklessness contended for by the DPP and where the DPP conceded that the decision of this Court on s 17 of the Crimes Act would have a "flow on effect" for other offence provisions in Victoria.

[29] Ibid [47].

[30] Ibid [6], [17] (Maxwell P, McLeish JA, and Emerton JA), [2] (Priest JA), [126] (Kaye JA).

[31] Ibid [6], [18]-[30].

[32] Ibid [6], [31]-[51].

[33] *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741 [50] – [59] (**DPP No 1 (2)**).

[34] Ibid [59].

Following the High Court's decision in DPP No 1 (2), the DPP referred to the VLRC the task of reviewing the definition of recklessness as it is understood in the Crimes Act.[35]

Are there any problems with the Victorian approach to the definition?

Following extensive research and consultations with its members, the LIV is of the firm view that the Victorian approach to the definition of recklessness in the context of offences against the person is appropriate and fit-for-purpose, and that it should not be changed.

That said, the LIV recognises that part of the role of the VLRC in conducting this Review is to consider whether 'there are sound reasons for expanding the scope of offences involving recklessness' in accordance with submissions by the DPP in DPP Reference No 1 and No 1(2) (together, **the DPP Reference Cases**).[36] For this reason, the LIV considers it useful to examine the problems that the DPP has raised with the Victorian approach and explain why it does not share the DPP's views.

Having reviewed the various submissions of the DPP in the DPP Reference Cases and relevant parts of the Issues Paper, the LIV notes that the following problems have been said to exist with the Victorian approach:

(a) That the threshold for establishing recklessness is too high such that it creates a lacuna;[37]
(b) That it is difficult to prove the mental element of recklessness;[38]
(c) That it is difficult to apply;[39] and
(d) That the term recklessness is defined inconsistently in Victorian legislation.[40]

The LIV considers and responds to each of these in the following paragraphs.

(a) The threshold issue

The DPP has stated that the threshold for establishing recklessness is too high, such that 'it creates instances in which offenders who clearly have caused the result, and by common estimation would be deemed to have been 'reckless' as to its causation, escape proper liability for causing that result'.[41] It has been proposed that lowering the recklessness threshold will, by expanding the scope of relevant offences and criminalising behaviour that is not currently an offence, make it easier for the prosecution to prove recklessness and hold such people to account. It has also said that a lower threshold may be more appropriate given that offences against the person carry less blame than offences like murder, and that having a lower threshold may make the distinction between reckless and intentional offending clearer.[42]

On the first point, that the threshold for establishing recklessness is too high, the LIV acknowledges that the threshold for establishing recklessness is high. However, it submits that it is not inappropriately or unduly high, but rather, that the threshold is set appropriately high considering the criminal penalties and degree of criminal culpability attached to recklessness offences.

On the second point, that the threshold is resulting in offenders who have 'clearly … caused the result, and by common estimation would be deemed to have been 'reckless' as to its causation, escap[ing] proper liability for causing that result', the LIV submits that neither it nor its members – who comprise experienced, expert professionals - have knowledge of this outcome occurring in reality. It also notes that the DPP has not provided

[35] Victorian Law Reform Commission, Recklessness – Terms of Reference <https://www.lawreform.vic.gov.au/publication/recklessness-terms-of-reference/>.

[36] Victorian Law Reform Commission, Recklessness: Issues Paper (Issues Paper, December 2022) [42].

[37] Ibid [40]; Director of Public Prosecutions Reference No 1 of 2019—Appellant's Submissions (Court File, 29 January 2021) 15.

[38] Issues Paper, above n 36 [45].

[39] Ibid [48]

[40] Ibid [10].

[41] Issues Paper, above n 36 [40]; Director of Public Prosecutions Reference No 1 of 2019—Appellant's Submissions (Court File, 29 January 2021) 15.

[42] Ibid, 8.

any real-life examples of it occurring in reality. Additionally, in considering the hypothetical examples supplied by the Office of Public Prosecutions 'to illustrate where recklessness is not likely to be met under the current probability test but may be made out under a possibility test',[43] the LIV notes that in every example, alternative charges would be available to hold the offender to account. For example, if a person cannot be held to account for recklessly causing serious injury because the evidence is insufficient to prove that they foresaw the probability of serious injury, they may nevertheless be convicted of intentionally causing injury, negligently causing injury, or common assault. This conclusion accords with the views and experience of LIV members, who report that it is inconceivable that a person would escape liability for committing a criminal act merely because a specific recklessness charge could not be proven, as alternative charges would always be available.

Accordingly, given:

(a) the absence of evidence supporting the claim that 'clearly' guilty offenders are escaping liability; and
(b) the fact that alternative charges would be available to the prosecution in any conceivable scenario;

the LIV does not accept the claim that the current threshold for recklessness is allowing 'clearly' guilty offenders to escape liability. Accordingly, the LIV does not consider this to provide a proper basis for law reform.

At this juncture, the LIV would like to express concern with the apparent premise underlying this point, that the high threshold for establishing recklessness is making it too difficult for the prosecution to convict 'clearly' guilty people. The LIV respectfully submits that people should only be charged with and convicted of committing a criminal offence on the basis of clear, compelling evidence. If the evidence is not sufficient to support an inference person was reckless in the relevant sense, charges should not be brought simply because the police or prosecution believe a person is 'clearly' guilty.

On the third point, that a lower threshold may be more appropriate given that offences against the person carry less blame than offences like murder, the LIV submits that it is not helpful to attempt to decide what the appropriate evidentiary threshold is for establishing recklessness in the context of a particular offence with reference to how much blame attaches the particular offence.

Finally, as to the contention that having a lower threshold may make the distinction between reckless and intentional offending clearer, the LIV submits that lowering the threshold would probably have the opposite effect by significantly expanding the meaning of 'recklessness'. The LIV submits that this is because there is a wide gulf between a person who does an act knowing that it will probably occur and a person who does an act knowing that it may possibly occur. Further, expanding the scope of the offence will make the offence more complex because the concept of 'possible harm' is not currently defined in Victorian law, nor has it been (recently) applied in Victorian case law, and it is inherently vague.

(b) Difficult to prove

The LIV notes that the DPP has stated that it is difficult to prove the mental element of recklessness.[44]

On this point, the LIV reiterates a critical point raised by its members: that prosecutorial difficulties in establishing recklessness do not stem from the fact that it imposes too high of a threshold, but rather, that they arise because charges of recklessness are brought in cases where they are not sustained by any evidence and where alternative, applicable charges are ignored.

By way of illustrative example, the LIV refers to the case of *R v Ignatova,* which involved a count of causing serious injury intentionally or in the alternative, of recklessly causing serious injury. Ms Ignatova was convicted of the latter but then subsequently acquitted by the Supreme Court of Appeal. In the Court of Appeal's judgment, it was unanimously held that it was not open to the jury to find Ms Ignatova guilty as the Crown had not adduced 'evidence from which the applicant's state of mind could be inferred beyond reasonable doubt',

[43] Issues Paper, above n 36 [47].

[44] Ibid [45].

leaving 'no basis for the conclusion that the applicant foresaw the probability that the child would be injured'.[45] It was however found that the evidence would have supported Ms Ignatova's conviction on other grounds had she been charged with them, namely, for negligently causing serious injury to her daughter:

> A number of inferences about the applicant's state of mind could have been drawn from the fact that the child was burnt when the applicant used the shower hose to clean her. Ms Ignatova might have negligently failed to test the temperature of the water. She might have tested it and mistakenly considered that the temperature was not hot enough to burn the child. She might also have tested the water but not foreseen the possibility that a change in water pressure would increase its temperature so that the child would probably be burnt. All of these hypotheses would have supported … [a] conviction for the offence of negligently causing serious injury, but not … for recklessly doing so.

The LIV also refers to this case because it illustrates the unfairness that would result from the lowering of the threshold to establish recklessness to make it easier to prove. In the same circumstances, if a foresight of possible harm test were to be introduced, it is conceivable that Ms Ignatova would have been convicted of recklessly causing serious injury to her daughter. Applying the examples listed by Neave JA (above), for example, Ms Ignatova might satisfy the test of foreseeing a possibility of harm to her daughter in circumstances where she tested the water and formed the view that it was fine, but a fluctuation in water pressure increased the temperature without her noticing. In such circumstances, Ms Ignatova's moral culpability would not match the gravity of the offence she would be convicted of, and would, in the LIV's view, result in injustice.

(c) Difficult to apply

The DPP has suggested that the distinction between intentional and reckless offending may be obscured when the definition of recklessness requires foresight of probable harm, making the concept difficult to apply by juries.[46] This point was raised by the DPP in DPP Reference No 1 but subsequently discounted by Priest JA:[47]

> 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.

(d) Inconsistently defined

Finally, the DPP has raised that that the term recklessness is defined inconsistently in Victorian legislation.[48] The LIV does not consider this to be inherently problematic in accordance with the views of the Victorian Supreme Court of Appeal in DPP Reference No 1, in which Priest JA stated that:

> … the principle established by *Campbell* has been applied daily in the criminal jurisdiction of all courts in the hierarchy. As far as I can tell, in the years since it was decided there has been no academic or judicial criticism of its application and operation …[49]
>
> 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.[50]

For this reason, the LIV does not accept the contention that the inconsistent definition of 'recklessness' between different pieces of Victorian legislation and between offences is inherently problematic and/or a justification for the lowering of the recklessness threshold.

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[45] *R v Ignatova* [2010] VSCA 263 [40]-[41].

[46] Ibid [48].

[47] *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181 [124] (Priest JA).

[48] Issues Paper, above n 36, [10].

[49] *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181 [53] (Priest JA).

[50] Ibid [122].

Is the test of foresight of probable harm unjustifiably high for offences against the person?

The LIV submits that the test of foresight of probable harm is not unjustifiably high for offences against the person, but rather, that it is justifiably high and commensurate with the degree of moral culpability captured by the recklessness offences, as has been articulated above.

Are there behaviours that should be criminalised under Part I, Division 1(4) of the Crimes Act 1958 (Vic)?

The LIV considers that Part I, Division 1(4) of the Crimes Act contains a comprehensive set of offences against the person, and it is not aware of a need to create any new criminal offences under it. It is the LIV's view that any new criminal offences should only be created where there is a clear, demonstrable need for it.

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

3. What are the strongest arguments for or against adopting a legislative definition of recklessness for offences against the person in Part I, Division 1(4) of the Crimes Act?

Owing to their similarly, the LIV has elected to respond to Questions 2 and 3 concurrently.

The LIV submits that the Crimes Act should not be amended to include a definition of recklessness applicable to offences against the person in Part I, Division 1(4) of the Crimes Act, for the reasons articulated above in response to Question 1. However, should the VLRC form the view that a statutory definition should be adopted, the LIV submits that the current common law Probable Harm Test should be codified.

4. For the purposes of charging offences that have recklessness as an element, are you aware of any problems with obtaining relevant evidence about the alleged offender's state of mind?

The LIV is not a prosecutorial agency and so has limited insight into the problems experienced by prosecutors in obtaining relevant evidence about the state of mind of alleged offenders.

That said, the LIV considers that the main issues with obtaining relevant evidence of an offender's state of mind would likely be the accused's right to silence and the privilege against self-incrimination – both of which are fundamental rights that safeguard the accused's right to a fair trial and the proper administration of justice. Consequently, the LIV urges the VLRC to carefully consider any problems raised regarding obtaining evidence about an offender's state of mind in light of these rights, with a view to ensuring that they are not encroached upon.

The LIV would also like to note that problems with obtaining evidence of the accused's state of mind are not confined to recklessness offences – they are common to all offences in which an accused's state of mind needs to be proved, and are an unavoidable consequence of the nature of the element of the offence that needs to be proved. It is a cornerstone of the criminal justice system that the prosecution bears the onus of

proving the accused's state of mind by reference to cogent and compelling evidence. If there are insurmountable difficulties in obtaining such evidence, the person should not be charged with that offence.[51]

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

The LIV expresses no view on the merits or otherwise of using the word 'probably' to express the fault element for recklessness in Part I, Division 1(8A)-(8F) of the Crimes Act.

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

As articulated above in response to Question 1, recklessness is defined consistently by the common law for the purposes of the offences against the person contained in Part 1, Division 1(4) of the Crimes Act, with reference to the Probable Harm Test.

The LIV is of the view that there are many advantages to the fact that recklessness has a consistent definition in relation to these offences, several of which stem from the fact that it is promotive of the rule of law.

In this regard, the LIV notes that the rule of law requires that that people should be able to know the law and be guided by it. The LIV considers that having a consistent definition for the concept of recklessness in the context of offences against the person promotes this by making it the law less complicated than it would otherwise be if different definitions existed for recklessness in this context. This also makes it easier for juries to understand and apply the law when tasked with considering matters involving several offences against the person.

The LIV further notes that the rule of law requires a degree of stability in the law to prevent unnecessary confusion arising about what the law is and what it requires. The LIV considers that retaining the current definition of recklessness promotes this objective as the law on this point has stood unchanged and unchallenged since 1989 in Victoria with the case of *R v Nuri.* By the same token, the LIV considers reliance on different definitions would undermine the rule of law by introducing a confusingly bifurcated definition of recklessness in the context of offences against the person that would overturn decades of clear legal precedent.

7. If you support legislating a definition of recklessness for offences against the person, should the common law continue to apply in relation to that definition or should its operation be excluded?

As already stated, the LIV does not support legislating a definition of recklessness for offences against the person. If it is determined that a legislative definition should nevertheless be enacted, the LIV submits that:

(a) the definition should codify the common law; and
(b) the common law should apply to the definition (i.e., its meaning should be interpreted with reference to the common law, and the operation of the common law should not be excluded).

The LIV strongly cautions against excluding the operation of the common law definition from any statutory definition of recklessness, unless necessary to do so owing to contradictions. The LIV considers the common

[51] *R v Ignatova* [2010] VSCA 263 [41].

law to be an invaluable resource on the meaning of recklessness, comprising decades worth of cases on the highly complicated, circumstantially specific concept that have been decided by both Victoria's and Australia's highest courts and by some of Australia's best legal minds. To do away with this resource would strip the concept of useful, in-depth analyses of what it means to be 'reckless' in circumstances where criticisms of the common law, as it stands, are largely absent.

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?

At the risk of labouring the point, the LIV does not support adopting a new statutory definition of recklessness for offences against the person and it would not support adopting a new statutory definition incorporating a lower threshold for recklessness.

If, however, such a new definition were to be adopted, the LIV submits that the associated penalties and minimum terms of imprisonment would without question have to change.

The LIV notes that the penalties associated with the recklessness offences currently reflect the degree of criminal culpability associated with commission of an act in circumstances where it is *probable* that harm of the relevant kind will eventuate. If the threshold is lowered and a 'possibility' threshold were introduced, there would be a substantial reduction in the degree of culpability necessary to constitute criminal liability in relation to the relevant offences against the person, changing the very nature of the offence. As a result, current penalties would no longer be appropriate and would have to be reconsidered.

This is particularly significant in relation to offences that are Category 1 or Category 2 offences under the Crimes Act.

The LIV notes that Courts are required to impose a term of imprisonment in relation to Category 1 offences, which relevantly include:

(a) Reckless murder of emergency/custodial/ youth justice worker on duty, which has a standard sentence of 30 years under section 3(2);
(b) Reckless murder, which has a standard sentence of 25 years under section 3(2);
(c) Recklessly causing serious injury in circumstances of gross violence under section 15B(1), which has a 4 year statutory minimum non-parole period;
(d) Recklessly causing serious injury in circumstances of gross violence of an emergency/custodial/youth justice worker on duty under section 15B, which has a 5 year statutory minimum non-parole period;
(e) Recklessly causing serious injury of an emergency/custodial/youth justice worker on duty under section 17, which has a 2 year statutory minimum non-parole period; and
(f) Recklessly causing injury of an emergency/custodial/youth justice worker on duty under section 18, which has a 6 month statutory minimum term of imprisonment.

Courts are also required to impose a term of imprisonment in relation to Category 2 offences where the offender is aged over 18, subject to certain exceptions. Relevant Category 2 offences include aggravated recklessly exposing emergency/custodial/youth justice worker on duty to risk by driving contrary to section 317AF, which has a standard sentence of 10 years.

As lowering the threshold to establish recklessness would mean that the abovementioned offences would capture circumstances in which an offender's culpability is significantly diminished, the LIV submits that if the threshold is lowered it will be necessary to reconsider, in relation to each offence, whether its current Category 1 or 2 designation, mandatory non-parole or custodial sentence, and/or standard sentence, remains just in all the circumstances. The LIV considers it highly likely that current Category 1 and 2 designations, mandatory sentences, and standard sentences would no longer be justifiable and would need to be reduced.

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

The LIV notes that the consequences of adopting a new statutory definition of recklessness for offences against the person will have variable effects depending on the particular definition adopted.

Should the existing common law definition be adopted, the LIV does not anticipate any consequences for the justice system as the status quo would be maintained.

Should a definition be adopted that incorporates a lower recklessness threshold, however, the LIV considers that the following consequences could eventuate:

(a) there may be instances in which injustice arises because the lower threshold would criminalise conduct that is not currently contemplated as being an offence;
(b) it is likely a greater number of people will be brought into contact with the criminal justice system who may not otherwise have come into contact with it, which would increase the costs of the system and which might contribute to a criminogenic effect for those people;
(c) there would likely be an increase in the number of sentenced and unsentenced adult prisoners in custody, and in the number of children and young people held in custody;
(d) there would likely be an increase in congestion and delays in the courts as offences that would otherwise have been resolved at the Magistrates Court by guilty plea would be contested; and
(e) there would be strains placed on providers of free legal assistance.

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?

The LIV expresses no view in response to this question.