Criminal Bar Association
OF VICTORIA

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Hon. Anthony North KC
Chair
Victorian Law Reform Commission
By email: [redacted]

Submission on behalf of the Criminal Bar Association on the Victorian Law Reform Commission's *Recklessness Issues Paper*

Introduction

1. The Criminal Bar Association (**CBA**) welcomes the invitation from the Victorian Law Reform Commission (**the Commission**) to provide submissions on the Commission's *Issues Paper* on recklessness. Our written submission is intended to assist the Commission with its review and recommendations.

2. The CBA is the peak body for Victorian barristers practising in criminal law. We represent criminal barristers who prosecute and defend criminal prosecutions and those who have a mixed practice.

3. Our members comprise almost one quarter of all Victorian barristers. We are involved in the continuing legal education scheme of the Victorian Bar, prepare and contribute to submissions on law and policy reform, issue press releases and meet regularly with the judiciary, government and others involved in criminal justice.

4. Members of the CBA appear in criminal cases of all types, in Victoria and across all States and Territories of the Commonwealth. Such appearances involve all facets of criminal law, both State and Federal, indictable and summary. Our members are very familiar with how the justice system deals with offences involving recklessness in Victoria.

Executive Summary

5. For more than three decades, offences against the person under Victorian law have developed on the basis that proof of recklessness requires proof that the accused foresaw the *probability* of the prohibited result. Simple directions have been developed which – unlike those required by so many other offences – have been readily comprehended and applied by juries. Sentencing standards have developed on the basis of the gravity that inheres in such a mental state. Maximum, minimum and presumptive penalties have been legislated which reflect that understanding.

6. Any alteration to the meaning of recklessness would require consequent amendments not only to this body of law (to reflect actions of lesser culpability being caught by the altered offence), but also a widescale reconsideration of penalties for related offences, so as to preserve an appropriate relativity between related offences.

7. The CBA considers that the test for recklessness ought not be disturbed. The current test has the benefit of simplicity (a benefit not to be underestimated in the context of offences that judicial officers must explain to lay juries). It has the benefit of certainty and stability in the law. It has the benefit of a significant body of precedent concerning appropriate sentencing standards. It has the benefit of having operated satisfactorily for many years, without any genuine suggestion that the definition has resulted in persons escaping the reach of the criminal law, or being caught by its tentacles, in circumstances which would be generally considered unjust or inappropriate.

8. As against those benefits, the only well-founded objection to the maintenance of the current law is doctrinal purity; on that score, it must be conceded that there is some force in the contention that, three decades ago, the courts deviated from the doctrinal purity that had thence seen recklessness require proof only of foresight of the *possibility* of the prohibited result. But doctrinal purity is hardly a reason to disrupt the operation of laws that have delivered appropriate results for many years.

9. To the extent that consistency in the criminal laws of the various States is seen as a desirable goal, such a radical objective could only be achieved by a wholesale revision of the criminal laws of the various states; it is mistaken to think that Victoria cleaving to the definition of recklessness that prevails in New South Wales would bring about such a goal, given the different elements of the offences against the person in the various states. In brief:

    9.1 In Victoria, the elements of the offences against the person involve matching the mental element to the degree of injury actually inflicted. Thus, the offence of intentionally or recklessly causing *injury* requires consideration of the mental state of the accused with respect to the infliction of *injury*; whereas the offences of intentionally or recklessly causing *serious injury* require consideration of the mental state of the offender with respect to the infliction of *serious injury.* Thus, an accused's liability to punishment depends upon both the harm that was

actually caused, and the harm that the accused contemplated causing. In this way, a person's criminality is directly linked to both the person's moral culpability and to the harm they have caused.

9.2 The offences against the person in New South Wales are not constructed in this way; instead, an accused person who foresees the possibility of injury (i.e. actual bodily harm), but whose action actually causes serious injury (grievous bodily harm), is convicted of an offence of maliciously causing grievous bodily harm. This offence – a melange of the elements of recklessly causing *injury* and recklessly causing *serious injury* – attracts a maximum penalty of ten years, or precisely half way between the two Victorian offences.

9.3 The elements of the offences against the person in South Australia rest upon quite different elements.

10. Thus, a comparative analysis of the laws of New South Wales and Victoria makes it abundantly clear that merely 'cutting and pasting' the definition of 'recklessness' that prevails in New South Wales would not result in similar criminal laws applying in Albury and Moama – instead, it would result in *more disparate* treatment of equivalent conduct on each side of the Murray River.

<u>The current state of the law is appropriate and functional (Q1 and 4)</u>

11. The probability test is appropriately calibrated to capture the intended criminal culpability for the offences included in Part 1, Division 1(4) of the *Crimes Act 1958* (**the Act**). The test is *not* so high that it results in an accused person partially or fully escaping criminal liability.[1] On the contrary, both analysis of the various offences against the person and the experience of our members in criminal trials, shows that the current law results in conduct being appropriately captured by offences that are appropriately calibrated to meet the gravity of the conduct involved.

12. We note that several hypothetical case studies were mentioned in the *Issues Paper*.[2] We consider it useful to test the operation of the current law by reference to the facts in the scenarios provided.

Scenario 1: A punch causing a traumatic brain injury

13. We commence by observing that cases with analogous facts to this scenario *do* tend to result in convictions for recklessly cause serious injury. Most obviously, there was the notorious case of *Pota,*[3] which involved a one-punch assault that caused the victim to fall, hit their head on the pavement, and suffer injuries that were ultimately fatal. The

[1] Contra *Issues Paper* at [47].
[2] Contra *Issues Paper* at [47].
[3] [2007] VSCA 198

Appellant was convicted by a jury of recklessly causing serious injury. As the Court of Appeal explained, the jury was able to convict the Appellant on grounds that they were satisfied beyond reasonable doubt that the Appellant realised that his action would *probably cause serious injury, but went on regardless of that fact*.[4]

14. As noted in the *Issues Paper*, the conduct in this scenario could also be prosecuted as an intentionally cause injury (as opposed to serious injury).[5] Such a charge would still expose the offender to a maximum penalty of 10 years imprisonment. In passing sentence, a court would be obliged to take into account both the accused's proven intent and, relevantly to this scenario, the seriousness of the injury actually caused.[6] Thus, even when an offender does not *intend* or *foresee the probability of a serious injury*, where a serious injury actually results from the offender's actions that serious injury must be taken into account in sentencing.[7] As part of the sentencing exercise, the court may indeed find that the offender was aware of the *possibility* of the serious injury and sentence them accordingly.

15. The maximum penalty of 10 years imprisonment would provide sufficient punitive capacity for a sentence on these facts, given the absence of an intention to cause serious injury. It is therefore submitted that no change to the law is necessary to appropriately capture and punish such conduct.

16. Moreover, it is apparent that if the *possibility* test were applied then the reach of the offence of recklessly causing serious injury would be oppressively wide. For instance, consider if A had not punched B but had only shoved them. A jury applying the possibility test may convict A of an offence carrying a 15-year maximum penalty, on the basis that such injury was merely *possible*. This would be entirely disproportionate with their moral culpability.[8]

17. Expanding the breadth of conduct captured by this offence in this manner would also distort sentencing practices, as it would introduce instances of offending with lower culpability under the umbrella of what is currently a very serious offence; with the resulting risk that similar sentences might be imposed for offenders with starkly different moral culpability.

Scenario 2: Kicking

[4] Ibid, [19], [27].
[5] *Crimes Act 1958* s 18.
[6] *Nash v The Queen* [2013] VSCA 172, [10] per Maxwell P agreeing with leading judgement of Priest JA.
[7] *Sentencing Act 1991* s 5 (2) (daa).
[8] In New South Wales, where the possibility test applies, the maximum penalty is 10 years imprisonment: *Crimes Act 1900* (NSW) s 35 (2).

18. It is our members' experience that juries approach the appraisal of criminal liability in a sensible and realistic fashion – as they are directed to do – assessing an accused person's mental state by drawing inferences from their proven actions and the surrounding circumstances. A tribunal of fact examining an accused who had used great force to kick a prone person to the torso would be entitled to conclude that the current definition of recklessness was met. However, if the jury were not satisfied that such an offence was committed, the accused would inevitably be convicted of intentionally causing injury which, as we have observed, carries the same maximum penalty as the New South Wales offence of maliciously inflicting grievous bodily harm.

Scenario 3: Police Siege

19. This scenario (which, we emphasise, was not devised by the authors of the *Issues Paper*) misstates the test for sections 22 and 23 of the Act by saying that the Prosecution must prove that serious injury or death was a probable consequence. The Prosecution only needs to prove that the accused engaged in conduct which placed *or may have placed* another person in danger of death (for s. 22) or serious injury (for s. 23) to fulfil the fault element of the offences.

20. Further, it also conflates the fault element of recklessness, being the foresight of the probability, with the physical elements of the offending and the degree it does or may put a person in danger of death or serious injury. The Court of Appeal has specifically warned against this type of reasoning.[9]

21. On the current law, for the Prosecution to satisfy the element of endangerment as part of the offence, they only need to prove that the accused's conduct *had the potential* to place a person in danger of death or serious injury.[10]

22. In this scenario, there is no hinderance under the currently probability test for a jury, properly instructed to find that the accused discharged his weapon while under siege and that his conduct had the potential to place police officers in danger of serious injury or death. On any realistic assessment, a person who has seen police approaching the front of his or her house, who has demonstrated themselves to be determined to avoid capture, and who fires a weapon out the back of the house, will inevitably be found to have fired out the back of the house precisely because of their awareness of the likely presence of police at the back. The problem of proof postulated in this scenario does not reflect the real-world analysis of the type engaged in by juries.

No unique difficulty in obtaining evidence or applying test

[9] The Queen v Rajaa Abdul-Rasool [2008] VSCA 13 [61] per Redlich JA
[10] Ibid, [44] – [45]

23. The probability test does not present any unique difficulty in obtaining evidence.[11] State of mind is routinely proven through inference from conduct and surrounding circumstances. It has not been the experience of our members that juries have any great difficulty in drawing such inferences, including in cases of recklessness.

Should the Act be amended to include a definition of recklessness? (Q 2, 3 and 5)

24. The CBA submits that following the *DPP Reference Case*, the definition of recklessness in Victoria as it applies to crimes against the person is settled, and that legislative amendments are neither necessary nor desirable.

25. However, if an amendment was deemed necessary, the CBA submits that the existing definition be used, namely 'foresight of the probability' that the accused's conduct would result in the prohibited consequence.

26. It is further submitted that there ought to only be one definition of recklessness.

27. The strongest arguments for adopting this approach are:

    27.1 There is no compelling reason to make any fundamental changes, and each of the proposed alternatives are problematic.

    27.2 Retaining the probability test maintains continuity and certainty. It prevents a break in the chain of sentencing practices and precedent about how recklessness is determined and dealt with in Victoria. This avoids the risk of disrupting the eco-system of statue in Victoria which are already tied to the probability test.

    27.3 Altering the test will require significant consequential changes to many offences which surround offences involving recklessness. Each offence that is amended by necessity will also precipitate a loss of case law and sentencing data.

    27.4 As a result of the above, there is a greater risk of inconsistency and error in the application of any new test. This will provide a catalyst for numerous and significant transitional amendments creating ambiguity, risk of error and increased litigation in an already overburdened court system.

28. These are expanded upon below.

29. We will deal with questions 8 and 9, before returning to questions 6 and 7.

Consequences of lowered threshold (Q 8 and 9)

Penalties and minimum terms

[11] Contra *Issues Paper* [46].

30. If a lower threshold is adopted, the associated penalties and minimum terms will need to change. A lower threshold test will necessarily mean that the minimum culpability involved in committing the offence has been reduced. The penalties associated with each offence involving recklessness ought to therefore be adjusted to reflect that lowered culpability.

31. It is particularly important that minimum and standard sentences are appropriately adjusted, however the maximum penalty ought to also be adjusted, given that it is a relevant sentencing consideration in all cases.[12] Since previous increases to the maximum penalties of some offences involving recklessness were made on the basis of the probability test,[13] those penalties ought to be reconsidered if the test is altered.

32. The concomitant adjustments to the penalties for offences involving recklessness will also necessitate changes to surrounding offences. For instance, a change in the threshold will mean that it is appropriate to reduce the maximum penalty for recklessly causing serious injury from 15 years.[14] However, to maintain the coherence of the scheme of offences against the person, that would necessitate a reduction in the maximum penalty applicable to (the much less serious offence) negligently causing serious injury, which currently carries a maximum penalty of 10 years.[15]

33. The Act takes a tiered approach to offences against the person, with the result that changing the inherent criminality of, and/or the maximum penalty applicable to, any single offence may necessitate changing penalties to all other offences within the structure. Altering the definition of recklessness will have a direct impact on several offences in that structure and will have an indirect effect on all offences.

34. It is this disruption of the statutory eco-system which must be carefully thought through before any amendment is made. The CBA submits that as the probability test is not only functional, but so embedded in Victoria's statutory infrastructure that change to its meaning is undesirable and indeed – absent significant revision of all of the offences against the person – unworkable.

Broader impacts on the criminal justice system

35. Adopting a new statutory definition will immediately result in the loss of the useful guidance given by case law that is based on the current definition. Importantly, this will not only include legal precedents, but also comparative sentencing data. Such data is

[12] Sentencing Act s 5 (2)(a)
[13] See *Sentencing and Other Acts (Amendment) Act 1997* (Vic); *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic).
[14] *Crimes Act 1958* s 17.
[15] *Crimes Act 1958* s 24.

regularly relied upon as a helpful resource to sentencing Courts, as a check that ensures consistency in the application of the law – a principle of immense importance. The usefulness of that body of law is reduced when maximum penalties or sentencing regimes are changed. Changes to the definition of recklessness and consequential changes to penalties will render it entirely obsolete. For a period of years, until a similar body of law is established, sentencing outcomes will be less predictable. That would conduce to unequal treatment, which is unjust. Moreover, when sentencing outcomes are difficult to predict, lawyers are unable to confidently advise accused persons of likely outcomes, with the result that accused persons are less likely to plead guilty.[16]

36. A further short-term effect of a new definition will be an increase in litigation around the meaning and application of the definition.

37. It is difficult to predict what other consequences there will be for the justice system. While it may appear reasonable to presume that a lowering the threshold for an offence will result in higher prosecution, conviction and incarceration rates, this is not necessarily the case. As is the case with offences against the person in the Act, offences involving recklessness often form part of tiered series of offences. If the facts of a particular case do not satisfy the current definition of recklessness, this does not mean that there will be no prosecution, conviction or incarceration. Rather, it may simply be that the person is prosecuted, convicted and incarcerated for a different offence – for instance, common law assault or negligently causing serious injury.

38. It is simply not the case that the current definition of recklessness is allowing criminality to go entirely unpunished. All that can be said is that a lowered threshold may result in more offenders being captured under the banner of 'recklessness', rather than other offences. There is no reason to think that such 'rebadging' is an outcome worth pursuing, especially given the concomitant disadvantages that we have outlined.

<u>Consistency is a necessity (Q 6 and 7)</u>

39. There are no advantages to having multiple, inconsistent definitions of recklessness. If the notion of recklessness is to be addressed tabula rasa, it ought be on the basis that the word will be used with a single uniform meaning in offence-creating provisions within both the Act and other Victorian statutes. Where the legislature wishes to criminalise a state of mind that differs from such a uniform definition, then such a mental state could be specifically provided for in that statute, without using the term 'recklessness'.

[16] This consequence may be tempered by the newly reformed sentencing indication procedure. However, this procedure requires court time and resources. In contrast, where a stable history of sentencing data exists, counsel can advise accused persons of likely sentencing ranges without the need for judicial involvement.

40. In criminal trials, juries are regularly called upon to determine multiple charges. If 'recklessness' is not defined consistently, a jury may be faced with a situation where they are required to apply differing definitions to the same person's state of mind. For instance, it is foreseeable that a person's driving could result in them facing a single trial for an offence of recklessly causing injury[17] and recklessly exposing an emergency worker to risk.[18] To similar effect, a single jury might be required to consider charges of reckless murder and reckless conduct endangering life.

41. Differing definitions of the same term will create confusion, and opportunities for error in jury directions.

42. As stated, the CBA submits that the definition of recklessness ought not be disturbed by legislation. If legislation is considered necessary, the CBA recommends codifying the probability test. In that instance, the operation of the common law ought not be excluded by legislation. Since the probability test has been in operation for several decades, there exists a substantial body of law which assists in the routine application of the test. This ought not be discarded without good cause.

<u>Guiding principles (Q 10)</u>

43. Principles of criminal law need to be communicable to, and comprehensible by, the lay persons who comprise juries. It has previously been recognised that there are limits to jury comprehension and a pressing need to simplify the directions given to them.[19] The CBA therefore recommends the following guiding principles:

    43.1 Each term ought to have a single definition. It is problematic to ask a jury to consider different definitions for the same word.

    43.2 The definition ought to be simple and easy to understand.

    43.3 The definition ought to be easy to apply in practice.

    43.4 Only necessary changes should be made, and with the least disruption to legislative environment. Consideration ought to be given to whether the parliamentary objective can be achieved through other means. For instance, additional offences can be introduced to address perceived gaps in existing offences. This would preserve existing precedents, sentencing data and the longstanding rights of accused persons.

[17] *Crimes Act 1958* s 18.
[18] *Crimes Act 1958* s 317AE
[19] See *Simplification of Jury Directions Project a Report to the Jury Directions Advisory Group August 2012*, Weinberg JA, Judicial College of Victoria, Department of Justice, at [1.27]-[1.47].

Conclusion

44. Thank you for the opportunity to make this submission, and to assist in this valuable work.

45. If you have any questions or wish to clarify anything within the CBA's submissions, we are very happy to assist further.

[redacted]

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