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Victorian Law Reform Commission Recklessness: Issues Paper

Victoria Police submission

27 February 2023

Victoria Police (VP) welcomes the opportunity to provide a submission in response to the Victorian Law Reform Commission's (VLRC's) Recklessness Issues Paper.

Introductory comments

The test of foresight of probable harm adopted in Victoria (based on the Victorian Court of Appeal decision in *R v Campbell*[1]) is more onerous to satisfy than in other jurisdictions, which rely on a test of foresight of possible harm for assault type offences (other than murder) in line with the High Court of Australia decision in *Aubrey v The Queen*.[2]

The 'probability' threshold applied in Victoria can also lead to decisions that are incongruous to justice and unlikely to meet community expectations. Edelman J, in *Director of Public Prosecutions Reference No 1 of 2019* (*DPP Reference 2019*)[3], referred to an example of someone driving without headlights on a country road at midnight and hitting a pedestrian, causing serious injury. Because it would not be probable a pedestrian would be out at that time of night, they would potentially be able to escape the charge. Although there may be other charges to rely on in these circumstances, this example illustrates that the probability threshold can lead to unintended or odd consequences.

For the reasons outlined in this response, VP strongly supports amending the *Crimes Act 1958* (Crimes Act) to include a definition of recklessness based on that provided in *Aubrey* (foresight of the *possibility* of harm with an objective element of unreasonableness).

While VP notes that the VLRC's focus is on offences against the person in Part I, Division 1(4), ideally for consistency and clarity, VP recommends that the VLRC consider whether a common definition could be extended to apply to all offences in the Crimes Act where recklessness is a fault element. VP acknowledges this will require considerable analysis and consultation to avoid any unintended consequences.

Family and gendered violence

From a family violence perspective, the 'reckless' threshold is a critical and complex issue as prosecuting gendered violence as 'intent' can be very difficult to prove. VP suggests that the VLRC consider recklessness in terms of gendered crime and the unique issues and impacts in this crime theme. Approaches such as the affirmative consent model in the *Justice Legislation Amendment*

[1] [1997] 2 VR 585.
[2] [2017] HCA 18.
[3] [2021] HCA 26.

(Sexual Offences and Other Matters) Act 2022 balances the fault element in gendered crimes more appropriately.

While acknowledging it is outside of the VLRC's current Terms of Reference (TOR), VP recommends that the VLRC also consider the impact of any new 'recklessness' definition in terms of its impact on the criminal justice response to family violence, particularly, the impact on the *Family Violence Protection Act 2008* (FVP Act).

DPP v Cormick[4] complicates the previous presumption that contraventions of family violence intervention orders are a strict liability offence. As a result of these findings, s 123 of the FVP Act is now interpreted as a *mens rea* offence and lacks a reckless element. While the behaviour may constitute family violence, being unable to prove intent, and without a recklessness option, creates a gap in police response to hold perpetrators accountable for family violence. Therefore, in the context of the VLRC inquiry, if *mens rea* prevails in these scenarios, the definition of 'recklessness' will become critical in family violence contravention cases.

Questions

1. **Are there problems with the current common law definition of recklessness as it applies to offences against the person in Victoria? If so, please explain what these problems are and provide case studies or examples.**

   In answering this question, you might wish to consider:

   - **if the test of foresight of probable harm is unjustifiably high for offences against the person**
   - **if there are behaviours that are not currently criminalised but should be under Part 1, Division 1(4) of the Crimes Act 1958 (Vic).**

In some circumstances, the current threshold for proving recklessness in Victoria appears to be unjustifiably high. As illustrated by the examples provided by the OPP in paragraph 47 of the issues paper (p 12), there are scenarios where a layperson would expect those actions to be reckless to the result, but it would be impossible to show an accused had the foresight that this was a *probable* cause of their actions without admissions.

As noted in the Judicial College of Victoria's Criminal Charge Book (in the context of recklessly causing serious injury), one of the elements the prosecution has to prove beyond a reasonable doubt is that the accused was aware that their acts would probably result in the complainant being seriously injured but they decided to go ahead anyway, that is they *actually knew* it was probable or likely the complainant would be seriously injured if they acted in that way (7.4.2.5). By extension there can be difficulties proving recklessly causing injury (as an alternative to serious injury), depending on what we can say the accused foresaw.

[4] [2022] VSC 786.

This is compounded by the current definition of serious injury, as serious injury is quite a high threshold to meet. A person who foresees probably causing a life-threatening injury (which is one limb of serious injury) and acts anyway, then causes a life-threatening injury, could arguably be subject to a charge of attempted murder; this reflects the level of seriousness required to prove recklessly cause serious injury.

The Court of Appeal decision of *Ignatova v R.*[5] illustrates how the evidence required to prove a recklessly causing serious injury charge is close to or could be the same evidence required to prove an intentionally causing serious injury charge. In *Ignatova*, the applicant successfully appealed against her conviction for recklessly causing serious injury to her daughter (scalding her with hot water in the bath). Neave JA held:

> …the jury could only convict the applicant of recklessly causing serious injury if they were satisfied beyond reasonable doubt that the applicant tested the temperature of the water and foresaw the probability that it was so hot that the child would be burnt when she was cleaned. But if the applicant had tested the water and knew that it was too hot, then the count of intentionally causing serious injury should not have been withdrawn from the jury.[6]

Due to evidentiary issues, a change to the definition of recklessness would not necessarily have altered the decision in *Igntaova*, however the distinction between intentionally and recklessly is a fine one and can be problematic.

The following cases are examples of how the current definition of recklessness may have caused an undesirable outcome:

- *R v Wilson & Carman*[7] – involved an armed robbery by the applicants wherein applicant Wilson discharged a rifle in the direction of two staff members in a restaurant kitchen intending to scare them. Notwithstanding the risk of injury from the bullets ricocheting or chips from shattered plates, the convictions for reckless conduct endangering a person were quashed for both applicants, as there was insufficient evidence to satisfy the reckless element. A lay person reading the facts would likely be confused as to why this conduct was not considered reckless.
- *R v Abdul-Rasool*[8] - the applicant was distressed about her daughter who had not returned home from school several days previously and was missing. The applicant attended the school and spoke to the deputy principal. The deputy principal was aware that the child had been placed in a refuge, however, as she regarded this as confidential information, she told the applicant she did not know where her daughter was. While speaking to the deputy principal the applicant poured petrol over herself. Some petrol splashed on the deputy principal and around the office. The accused

[5] [2010] VSCA 263.
[6] Ibid [38].
[7] [2005] VSCA 78.
[8] [2008] VSCA 13.

threatened to light herself on fire and there was a possibility ignition could occur from a heater and computer in the office. Ultimately, no fire occurred. While dangerous, this was not reckless because ignition was a possibility, not a probability, and required the accused to take further action (such as, reach for her lighter or matches and ignite herself). The applicant's conviction for reckless conduct endangering life was quashed.

- *DPP v Saurini* [9] – a VP officer Senior Constable (S/C) Brown was seriously injured when unlicensed driver Mr Saurini rammed his police vehicle causing S/C Brown to be pinned between Mr Saurini's vehicle and the police vehicle. The ramming resulted in S/C Brown's leg being broken, which later became infected. The accused was charged with recklessly exposing an emergency worker to risk by driving, but was acquitted of this charge. Mr Saurini stated during his record of interview that he had no knowledge that he had hit an emergency worker; he was unaware the vehicle involved was a police vehicle and he was unaware the victim was an emergency worker. He was found guilty of negligently causing serious injury and sentenced to a two-year Community Correction Order.

With respect to driving offences, where the conduct is serious and does not result in serious injury or death, it is common to charge an offender with conduct endangering life under s 22 of the Crimes Act. As this offence has a fault element of recklessness, it requires proof of the offender's state of mind at the time of the offending; it is not based on what a reasonable person would have known, intended, or foreseen. In many cases the charge is either withdrawn or the accused pleads guilty, however, where the charge is contested, it is difficult to prove the accused person's state of mind.

Currently, there is no offence of negligent conduct endangering life/person, which creates a gap in the criminal law where someone endangers the life of someone to whom a duty of care is owed, but no physical harm is inflicted. Lowering the threshold for recklessness could address this gap in the legislation. The next most relevant offence on the continuum of road crime (where it does not result in serious injury or death) is the summary offence of dangerous driving under s 64 of the *Road Safety Act 1986*. However, considering that momentary inattention qualifies as dangerous driving, a dangerous driving charge may be insufficient to convey the relevant level of culpability.

Under s 318(2)(a)-(d) of the Crimes Act, a person drives a motor vehicle culpably if they do so recklessly, negligently, or impaired by alcohol or a drug, and attract an equivalent penalty of level 3 imprisonment or a level 3 fine or both. Unlike how recklessness is expressed in some other provisions of the Crimes Act, [10] it appears that recklessness and negligence are treated as being of equal culpability. It is possible that this disparity may potentially result in fewer prosecutions for culpable driving on the basis of recklessness, with prosecutors pursuing a charge of gross criminal negligence

[9] [2022] VCC 1054.

[10] Such as, s 3(2)(a)(ii) (punishment for murder of a custodial officer or an emergency worker on duty) – 'knew or was reckless as to'; s 81(4)(a) (the meaning of deception within the offence of obtaining property by deception) - 'whether deliberate or reckless'; and s 464ZGG(2)(b) (the offence of supplying forensic material for prohibited analysis) –'intends or is reckless'.

under the common law, which requires a lower threshold of proof and is based on an objective standard.

As noted on page 12 of the issues paper in relation to family and gendered violence, given the difficulty of proving intent, recklessness is often relied upon, reducing the potential penalty imposed for what is often serious offending. However, satisfying the probability threshold for recklessness is also problematic, particularly where non-evident serious injury is concerned, as is common in these cases. It is also challenging when the action results in serious harm, but the subjective foresight is absent. The following two scenarios illustrate the difficulties:

1. Shaken baby

   Where a person attempts to quiet or subdue a baby by shaking and often seriously harms the infant. The person's intention is not to harm but rather is to manage or stop the baby from crying, or an act of frustration. While the shaking may result in serious harm (which may not be immediately evident or take time to manifest (if it does at all)), due to an absence of the requisite intent or probable foresight, the person may be prosecuted for negligent harm which is likely to attract a lower penalty.

   The current application of *probability* seems to attract a reduction in penalties where immediate and longer-term harm is less evident, thereby under-penalising perpetrators for serious harm resulting from these actions. This is similar to cases of non-fatal strangulation.

2. Non-Fatal Strangulation

   Recklessness is particularly challenging to prove where strangulation does not involve a person placing their hands around the neck of another person, but rather using body weight, a pillow or other instrument to apply pressure to the neck, to quiet or control the victim or as a show of power. The problem is that the probability threshold requires foresight by that person at the time they are taking the action that harm is likely to result, but this may be limited where no sign of physical harm is evident.

   Serious harm is highly likely irrespective of the length and time of pressure. Perpetrators have argued in defence of a recklessness charge that no harm was visible or attempted to minimise harm where it is less obvious. The current definition of recklessness in these circumstances is not adequately holding perpetrators to account for the seriousness of harm caused and consequently minimising the severity of this harmful behaviour for victims.

VP notes that the Victorian Government has committed to develop a standalone offence for non-fatal strangulation. Subject to how this new offence is drafted, it has been asserted that there may be issues with including recklessness as a fault element in the offence, as this could inadvertently criminalise behaviours not intended or needed to be captured by such a serious offence (such as reckless high tackles causing substantial pain in the Australian Football League, or reflexology neck massage where bruising is caused). Establishing a consistent definition (that provides an objective element and includes a point of proof that the accused acted without lawful justification or excuse, as per VP's

recommendation in response to question two), could help clear the path for this serious offending to be captured under a future standalone offence.

A further issue when considering gendered crime is that perpetrators often have a comprehensive understanding of legal limitations and an awareness of the types of harmful conduct to avoid which are likely to have serious legal repercussions.

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? For example, foresight of**
    - **probable harm (with or without an objective element)**
    - **possible harm (with or without an objective element)**
    - **a substantial risk that the accused is not justified in taking**
    - **some other definition.**

Yes, the Crimes Act should be amended to include a definition of recklessness applicable to offences against the person in Part I, Division 1(4). VP strongly supports a definition of recklessness based on that provided in *Aubrey* (foresight of the possibility of harm with an objective element of unreasonableness).

Case law has cast doubt over the correctness of the recklessness threshold in *Campbell*, and this needs to be clarified by the legislature. In DPP Reference 2019, Kiefel CJ, Keane and Gleeson JJ held that the decision in *Campbell* was wrong.[11] The NSW Court of Appeal in *R v Coleman*[12] rejected the reasoning adopted in *Campbell* and instead applied the test of foresight of the possibility of harm. The High Court in *Aubrey* held the position in *Coleman* to be correct.

It is recommended that the element of recklessness that requires the prosecution to prove the accused acted without lawful justification or excuse, be incorporated into the statutory definition of recklessness. This will ensure that people employed in high-risk occupations, such as surgeons, paramedics, police officers (where they may be required to take reasonable risks), are protected from prosecution.

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?**
    - **the particular definition you support?**

The strongest arguments for adopting a legislative definition for offences against the person in Part I, Division 1(4) of the Crimes Act are:

- The correctness of the Victorian definition in *Campbell* is questionable, and as reflected in the case law referred to in question two, possibly wrong.

[11][2021] HCA 26 at [7]. Gageler, Gordon and Steward JJ did not address the correctness of Campbell. Edelman J remarked '...applying the reasoning in Aubrey it can be seen that the decision in *Campbell* was wrong. But prior to *Aubrey*...*Campbell* could not have been thought to have been plainly wrong...' [83].

[12] (1990) 19 NSWLR 467.

- It is difficult to prove foresight of probable harm under the current definition which creates undesirable results in practice
- A legislative definition would ensure better outcomes that meet community expectations.
- Consistency of approach and minimising future legal argument and appeals.
- The High Court have provided a definition of recklessness in *Aubrey* that can be legislated, and it should be robust enough to be applied to all offences containing a recklessness fault element, due to the inclusion of the objective element of the test. For example, applying the Aubrey definition of recklessness to whether an offender is reckless to whether a person is present during an aggravated burglary (s 77 of the Crimes Act) means that, even though there may be a 'bare possibility'[13] a person is home, the analysis will turn to the level of 'willingness "to run the risk",[14] this might then turn to an analysis of what steps they took to avoid this possibility.
- The current definition of recklessness is a difficult concept for juries to understand. The jury needs to determine beyond a reasonable doubt that the accused was aware that their act would probably result in the victim being seriously injured but decided to go ahead. From a practical perspective, for a jury to be satisfied beyond a reasonable doubt that the threshold was met, the jury would need to engage in the following thought process— it is not sufficient for the accused to have known that it was probable that their actions would injure the victim, the accused must have known that it was probable that their acts would injure the victim and that the jury must be satisfied that the accused *actually knew* of the probability of the victim's injury. It is not enough that the jury or a reasonable person would have recognised that likelihood in the circumstances.
- Within the context of gendered crime, a lowering of the recklessness threshold from probability to possibility, will likely make it much more challenging for perpetrators to assess which types of harm will meet particular penalty thresholds, thereby reducing the ability to use targeted harm tactics, while improving recognition and outcomes for these victims of serious harm.

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?

Where there is no relevant admission provided by an accused person, the prosecution must instead rely on overt acts and similar facts to prove the accused's recklessness at the time of the offence. It requires the prosecution to use these limited sources of evidence to prove that the accused considered and unjustifiably disregarded, that the probable consequence of their conduct would be death or serious injury to another person. The current threshold for establishing recklessness is too reliant on the accused's own admissions and would be improved not only by adopting a possibility threshold but introducing an objective element.

As referred to on page 11 of the issues paper, VP utilises the 'PEACE' model of interviewing. The police interview is a critical component of an investigation when establishing recklessness. The accused's

[13] *Aubrey* [51].
[14] Ibid [49].

state of mind at the time of committing the offence is often established through an admission or voluntary account during the interview process. For this reason, both the skills, experience and training of the investigator as well as their planning of the interview itself can often be crucial for them to be able to establish whether the accused's actions were reckless, intentional or otherwise.

Given the nuances between intentional and reckless offending, in the absence of asking questions that specifically address recklessness, questions aimed at establishing intent may fall short of satisfying recklessness or trying to establish indifference to the consequences and whether they would occur or not.

In the absence of an admission or comment by the accused or if they are not fit to be interviewed, intent or recklessness is exceedingly difficult to ascertain with police having to rely on witness observations or traditional evidence gathering techniques.

Generally, there are also difficulties in obtaining subjective evidence because of an accused's right to silence which may lead to a lack of admissions. Routinely a prosecution will rely on the adverse inferences to be drawn from the facts of the case, rather than express admissions, to prove a subjective element.

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?

With reference to the comments on page 16 of the issues paper, for some sexual offences in Part I Division 1 (8A)-(8F) of the Crimes Act the concept of recklessness remains relevant but the language of recklessness is no longer used, and it has been replaced with the term 'probably'.

It is arguable that use of the term 'probably' in this part further complicates the issues with the recklessness fault element. Unlike recklessness, 'probably' as utilised in Part I Division 1(8A)-(8F) has not been judicially considered.

Irrespective of whether 'probably' or 'recklessly' is used to describe the concept of recklessness, both set a high bar when prosecuting these offences, as it is based on the accused's subjective state of mind. To promote clarity and minimise legal argument, the language used in the Crimes Act to describe the fault element for recklessness should be consistent.

If the definition of recklessness changes, the use of 'probably' in this part should be reviewed.

6. What are the advantages/disadvantages of ensuring that recklessness is consistently defined

- **in the Crimes Act?**
- **in other Victoria statutes?**

As noted in response to question three, the advantages of ensuring that recklessness is consistently defined are to:

- promote clarity and reduce confusion when applying it across different offences;

- minimise future legal argument and appeals;
- avoid potential confusion for a jury where they are considering a number of offences involving recklessness, but the definitions vary;
- allow the development of precedent to follow one line of reasoning – for example, if the reasoning in *Aubrey* was expressly adopted as applying consistently to recklessness across all offences, each case that was decided after would follow *Aubrey* and continue a line of precedent from that point.
- from a policing and prosecutorial perspective, a consistent definition would be easier to understand and apply, thereby minimising the need for specialist legal knowledge when reviewing briefs or seeking legal advice and direction on appropriate charges.

The difficulties (rather than disadvantages) of ensuring recklessness is consistently defined in the Crimes Act and in other Victoria statutes, is that each use will need to be considered closely as to whether it is suitable to bring these offences in line with a standard definition. This will assist in avoiding unintended consequences.

VP also acknowledges with respect to the use of recklessness in murder cases, that there will still be potential multiple definitions used. If the definition in *Aubrey* was adopted, *Aubrey* still recognises the use of probability in murder cases involving recklessness. *Aubrey* also leaves open whether the probability definition would apply to an offence other than murder[15] , so there is potential for a different definition of recklessness to be held to apply to another very serious offence.

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?

Generally speaking, VP welcomes common law application as it often expands on and clarifies legislation.

If the test of recklessness is foresight of possible harm as proposed by VP and modelled on *Aubrey*, the reform should not exclude the common law from applying to relevant definitions. This will allow any development of that jurisprudence to apply equally to the jurisdictions that rely on those definitions. .

If the test of recklessness becomes foresight of probable harm (that is, modelled on *Campbell*), relevant definitions should operate to the exclusion of the common law, as precedent now suggests this test of recklessness is contrary to common law.

[15] *Aubrey* [47].

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

If the definition of recklessness is changed to incorporate a lower threshold, careful consideration will need to be given to whether associated penalties and minimum terms of imprisonment need to change. The amendment to the maximum penalty for recklessly causing serious injury (referred to in *DPP Reference 2019*) arose independently of any consideration of the recklessness threshold, to reflect community expectations.

As sentences are commensurate to the degree of moral culpability, and foresight of probable harm attracts a higher degree of moral culpability (compared with foresight of possible harm), a higher sentence would be imposed. If the recklessness threshold was lowered to foresight of possible harm, this would likely result in a lower sentence being imposed, and accordingly, the corresponding maximum penalty would also need to align with lower sentences being applied by the court.

9. **If a new statutory definition of recklessness for offences against the person is adopted, what will be the consequences for the justice system (for example, impacts on prosecution, conviction or incarceration rates)?**

If a new statutory definition of recklessness for offences against the person is adopted and the threshold is lowered to possibility, this will broaden the scope of offending captured by the new definition and make it easier for the prosecution to prove recklessness. The consequence being that this is likely to lead to an increase in the matters prosecuted and convictions. It may not necessarily result in an increase in incarceration rates, as sentences will reflect a reduction in the moral culpability as outlined in our response to question eight.

In cases where it is unclear whether an accused had foresight of probability or mere possibility, there will still be other charges that are appropriate. For example, an instance of dangerous driving where reckless conduct endangering serious injury is not authorised due to the lack of evidence relating to probability would likely still attract lesser charges of dangerous/careless driving. For assault offences, a lesser assault charge is likely to still be laid. This means the increase in charges and convictions will only really occur where the reckless charge was the only possible charge in the circumstances, which will be rare.

In road policing, no changes to the rates of prosecution are foreseeable, though a likely increase in conviction rates. Due to the absence of a suitable alternative, conduct endangering life/person seems to be universally adopted as the relevant indictable offence where people were endangered but no harm arose.

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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 potential guiding principles noted on page 20 of the issues paper are reasonable.