Youthlaw's Submission to the Victorian Law Reform Commission:

Recklessness

March 2023

Youthlaw acknowledges that our offices are located on the lands of the Wurundjeri and Wadawurrung Peoples of the Kulin Nation whose sovereignty was never ceded. We pay our respects to their Elders past and present.

This submission was authored by Matt Kearns with contributions from Tim Hutton and Sam Coleman, and is based on the recommendations and input of all Youthlaw lawyers.

About Youthlaw

Youthlaw is Victoria's state-wide free community legal centre for young people under 25 years of age. Our submissions are based on our extensive summary crime practice, particularly assisting young people with experiences of family violence, addiction, mental illness, homelessness and other trauma.

Through outreach services to youth homelessness, mental health, and alcohol and other drug services, Youthlaw assists young people with criminal matters at all metropolitan courts.

We service a highly vulnerable cohort that in many cases do not qualify for legal aid. Reckless Cause Injury charges are at the most serious end of charges that we assist with.

Response to VLRC 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.**

Youthlaw do not see a problem with the current common law definition of recklessness. From our point of view, many accused persons are being found guilty of Reckless Cause Injury (**RCI**) charges. This includes, in some circumstances, 'pleas of convenience' in the high volume Magistrates' court lists, even where robust legal advice has been given on the merits of contest. This may occur in circumstances where prosecution clearly apply an objective reasonable person lens to the accused person, rather than including a subjective element. Our clients often, due to personal circumstances and experiences, may have a very different perspective to that of a prosecutor or hypothetical reasonable person. Another example that we have encountered many times is prosecution applying a *possible* rather than a *probable* test.

Due to the time delays and multiple mentions required before a matter is ultimately considered at more than a cursory level, many of our clients choose to enter pleas to RCI.

The test is not unjustifiably high. In our practice at all metropolitan Magistrates Court venues, we see many pleas in RCI matters, where such a plea is appropriate.

We oppose the criminalisation of any behaviours that are not currently criminalised without a sound evidence base that there is a need for a new offence.

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?**

Youthlaw sees some benefit to a statutory definition of recklessness that reflects the current test (foresight of probable harm, with an objective element).

As VLRC has noted, the word 'reckless' has many uses in everyday language. Some of these uses may not be consistent with the common law definition of 'recklessness' and may confuse the meaning of the test.

We are of the view that a statutory definition of recklessness may reduce the prevalence of matters where the test is misapplied.

We have observed that police prosecutors, facing the high volumes and workloads of the magistrates court, are reluctant to withdraw charges, and that the test may be misinterpreted by both prosecutors and accused persons. This tension results in 'pleas of convenience' in circumstances where charges may not be made out if contested.

We are concerned that misapplication of the nuanced common law definition of recklessness is particularly acutely felt by the many self-represented young people in the Magistrates' Court.

A statutory definition may assist self-represented young people to identify the appropriate test and may guide all court users in the correct application of the appropriate test.

3. **What are the strongest arguments for our position?**

We acknowledge there may be challenges in adopting a legislative definition of 'reckless' as the word is used in different contexts, sometimes in relation to the same offence.

For the purpose of our submission, we comment only on the utility of a statutory definition for 'reckless' in the usage of 'causing recklessly'. Any legislative definition of recklessness for the purpose of setting a threshold in offences against the person must be careful not to impose unintended meaning to other uses in the Division.

Lowering the threshold to a negligence offence will capture a huge amount of conduct that is not currently criminalised, including conduct where injury was only slightly foreseeable but still very unlikely. Further, we fear that would almost flip the

onus in that all of a sudden every act that causes injury would be charged and it will be very hard for an accused person to defend such charge as it would be so broad (ie that the court could easily infer foresight of possible injury).

Finally, We are concerned that a lowering of the threshold will disproportionately affect young people. As the Commission notes at paragraph 53, 'the meanings of "possibility", "probability" and "substantial and unjustifiable risk" vary according to the circumstances and whether risk-taking can be characterised as reasonable in those circumstances.' A fault element adjustment from 'probable' to 'possible' will increase the scope of behaviour captured. Such an adjustment would also attenuate the relevance of the judgement of the alleged offender with respect to the reasonableness of risk-taking (i.e. relevant judgement reduced to the mere apprehension of a possibility rather than the assessment of its reasonableness and likelihood). Young people are more risk-taking than other demographics and will be therefore more vulnerable to 'over-criminalisation'[1] if the threshold is lowered.

Risks associated with a lowering of the threshold are antithetical to the authorities' clear position that young people are generally yet to have fully developed their faculties of judgement and that their culpability must be moderated accordingly.

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?

We caution against any law reform informed by the ease of obtaining relevant evidence to prove a charge. States of mind may be inferred in the prosecution of most criminal offences, and we do not see proving 'foresight of probable harm' as particularly novel.

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?

Youthlaw are not advocating for a change in the law, rather a statutory clarification of the common law for convenience and consistency reasons. As such, but that the common law should nonetheless still inform the interpretation of this definition.

[1] Findlay Stark, 'The Reasonableness in Recklessness' (2020) 14 *Criminal Law and Philosophy* 9, 10.

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?

A Minimum penalties

Youthlaw generally opposes mandatory penalties. The unjust impacts of mandatory sentences are most keenly felt by youthful offenders, who would otherwise be sentenced with a priority on rehabilitation and instead are forced into the criminogenic and traumatic prison environment.

We are particularly concerned that a lowered threshold would potentially make conduct that is not presently criminalised punishable only with a mandatory term of imprisonment.

The moral culpability of a lower threshold, for example, encompassing negligent conduct, would be of a significantly different complexion and a mandatory penalty for this offending would lead to unjust outcomes.

For these reasons, if the threshold is lowered, the mandatory penalty for recklessly causing injury of an emergency worker must be removed.

B Maximum penalties

If the threshold is lowered, maximum penalties should also be lowered. As noted by the Commission at paragraph 88, maximum penalties were increased two years after *Campbell* and maximum penalties in Victoria are generally higher than those in NSW. We see a clear correlation between the higher threshold and higher maximum penalty.

Any lowering of the threshold should also be reflected in a lower median sentence, and in our opinion, the most effective mechanism to achieve this is through a lower maximum penalty.

It is rare that someone is sentenced anywhere near the maximum penalty, however the maximum penalty remains a good indicator of the relative seriousness of the offence, and a lowering of this threshold would sent the message to judicial officers that this new offence is (or at least might be) of a lower seriousness. It might be helpful to compare the maximum penalties of intentional and reckless in s 18 and how naturally this impacts views on the relative seriousness.

C Other considerations

If the threshold for RCI is lowered to such an extent that it encompasses negligent conduct, it should be a summary offence only, to accurately reflect the lower moral

culpability and to appropriately avoid the complexities of indictable charges, including impacts on applicable bail tests.

We hear from our clients that 'injury' charges carry significant stigma and pose significant barriers to employment and community participation. For example, RCI charges may present barriers to obtaining a Working With Children Check, even where charges are ultimately withdrawn. We are concerned that a lowered threshold would result in more people being impacted by this stigma.

We further note that Youthlaw opposes a new offence with a lower threshold (for example, 'negligently causing injury'). This conduct resulting in injury is already adequately criminalised, either through assault or reckless cause injury offences. For example, even if foresight of a probability cannot be inferred, it is likely that the mental element of assault may be made out as an alternate charge in most fact-scenarios.

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)?

As the Commission has anticipated at paragraph 97 of the *Issues Paper*, there are likely to be several flow-on effects of a lowered threshold.

Strong consideration should be given as to how a lowered threshold may disproportionately criminalise young people, and in particular disproportionately affect young people from marginalised cohorts and communities, including Aboriginal and Torres Strait young people, Out of Home Care Leavers, victim-survivors of family violence and culturally and linguistically diverse young people.

We encourage ongoing and targeted consultation with services that support vulnerable young people in consideration of the down-stream impact of any lowered threshold.