RECKLESSNESS

Submission to the Victorian Law Reform Commission

1. Purpose

The purpose of this paper is to:

- Examine whether there are other examples that indicate what parliament understood about the meaning of the fault element of recklessness in offences in the *Crimes Act 1958*
- Provide further information about juror understanding about what recklessness means.

2. Background

In the High Court's decision in *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, the High Court discussed two amendments that the Victorian Court of Appeal relied upon to conclude that the Victorian legislature had intended 'recklessness' to mean probable, or foresight of the probability of a circumstance or result. The two examples concerned amendments made in 1997 involving changes to maximum penalties and offences involving gross violence from 2013.

Further to our discussions, I have identified several other legislative amendments that illuminate how recklessness has been considered by the Victorian parliament.

3. Examples of recklessness in the *Crimes Act 1958* (Vic)

3.1 Crimes Amendment (Abolition of Defensive Homicide) Act 2014

This Act included amendments that abolished liability for murder based on extended common purpose and introduced new laws of complicity (ss 323 and 324 of the Crimes Act 1958).

As the second reading speech indicates, the doctrine of extended common purpose 'is conceptually problematic and has been extensively criticised for providing that a person may be guilty of murder when they only foresaw that a person might possibly kill another person'. In relation to complicity, the second reading speech said that the new provisions provide that:

> a person is guilty of an offence that is different from the planned or agreed offence when that person foresaw the probability of the offence occurring in the course of carrying out the planned or agreed offence. Focussing on 'probability' rather than 'possibility' is consistent with general principles of criminal liability, and will result in simpler jury directions. If a person foresaw the possibility, but not the probability of a person being killed, under the new provisions, such a person could still be guilty of manslaughter, but not murder.[1]

This pithy summary of the changes indicates that probability was a driving force for the changes and is relevant to understanding the laws. While the word recklessness is not used in the legislation, the difference between probability and possibility makes clear that this is what the parliament was considering.

In *Giorgianni v The Queen* (1985) 156 CLR 473 the High Court said that a person must have 'intended' to assist, encourage or direct another person to commit an offence — recklessness would not be a sufficient fault element. The Victorian government's changes to complicity laws in this Act expanded liability to include a fault element of recklessness. The Explanatory Memorandum (at page 13) describes this extension of liability as being 'consistent with the general principles of criminal law liability'.

Clause 6 of the Explanatory Memorandum to the Bill provides as follows (emphasis added):

> New section 323(1)(b) and (d) extend paragraphs (a) and (c) *by a form of recklessness*. An accused may be liable where the offence committed differs from the offence that the accused originally encouraged etc., if *the accused foresaw the probability* that the offence would be committed in the course of carrying out the original offence.

The Bill/Act describes the fault element as 'where the person was aware that it was probable...' and these aids to interpretation make clear that parliament was considering these words as a form of recklessness. Further, the test of probability for complicity was designed to simplify the laws and be consistent with existing laws, indicating that parliament understood that recklessness involved a test of awareness or foresight of the probability of a circumstance or result. If parliament understood recklessness to involve a test of possibility, then it would have completely failed in its attempt to simplify the law and provide simpler jury directions. This can be seen in the following example.

Example

1 Legislative Council, Victoria Parliament, *Second Reading Speech* (Hon E J O'Donoghue, 25 June 2014) 2130

> Suppose that A and B agree to rob C. B is waiting outside of C's house. A enters B's house and assaults C. A (as a principal) is charged with robbery and intentionally causing serious injury and recklessly causing serious injury (RCSI) to C. B is charged with the same offences but B's liability for the causing serious injury offences is based on complicity, namely that A and B entered into an agreement to commit a robbery (which involves the threat of force). The prosecution would then argue that B was aware that it was probable that A would recklessly cause serious injury (he had a baseball bat) in the course of carrying out the offence of robbery.
>
> If recklessness involves awareness/foresight of probability, then the directions on RCSI and the complicity provisions will all align. However, if RCSI involved foresight of the possibility of harm, jury directions would be complicated. Jury directions concerning RCSI would involve foresight of the possibility of harm and directions concerning complicity would involve the probability of harm

These issues are further discussed in Criminal Law Review's report *Jury Directions: A Jury-Centric Approach*[2]. While that report specifically describes the purpose of the report to be an aid to interpretation, it only meets the criteria for aids to interpretation under the *Interpretation of Legislation Act* for the provisions of the Jury Directions Bill. The information about the reform of the law of complicity concerns an Act passed prior to this report being publicly available — it therefore appears in the report in an Appendix. Therefore, the High Court might treat it as a 'media release', as they referred to the *Criminal Procedure Act 2009 – Legislative Guide* in hearings in the case of *Baini v The Queen*.

3.2 Crimes (Property Damage and Computer Offences) Bill 2003

The Property Damage Bill uses the term reckless or recklessly in relation to computer offences and bushfire offences. The Bill does not define recklessness. All of these offences are based on Model Criminal Code offences and therefore required adaptation to fit with Victoria's laws in relation to recklessness, which differ from the 'substantial and unjustified risk' test used in the Model Criminal Code. Page 2 of the Explanatory Memorandum to the Bill provides that:

> The court will still be free to consider other circumstances where a person may not be reckless as to the spread of fire. The common law standard for recklessness will continue to apply in these situations.

[2] The report can be found at: Jury Directions Reports | Department of Justice and Community Safety Victoria, 144-53.

As the Bill was from 2003, the test of probability for recklessness was established following decisions in cases such as *Campbell* (1995) and *Nuri* (1990).

3.3 Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011

This Bill introduced indictable offences into the Crimes Act (s 319B). Failure to control dangerous, menacing or restricted breed dog that kills person. The offence in s 319B(2) includes the element that the person 'is reckless as to whether the dog is a dangerous dog, menacing dog or restricted breed dog'. The second reading speech is very brief and does not assist in determining the meaning of recklessness. However, the Explanatory Memorandum provides (emphasis added):

> The elements of the two offences are very similar. However, the second offence applies to a person who for the time being is simply in charge of or caring for a dangerous, menacing or restricted breed dog, rather than the owner of the dog. Such a person may or may not be familiar with the history of the dog. *A serious criminal offence such as this offence should apply where the person is reckless about (or aware of the probability that) the dog* is a dangerous, menacing or restricted breed dog, but not where the person is, for example, unaware of the classification or status of the dog at the end of their leash.

3.4 Crimes (Contamination of Goods Offences) Bill 2005

This Bill included an amendment to the *Crimes Act 1958* in relation to the offence of contamination of goods by extending the offence to include an element of recklessness. Recklessness is not defined in the amendments. In a very short second reading speech, the inclusion of the word 'recklessness' is described as enabling 'courts in future such cases to take into account not only an individual's knowledge of the damage his actions are likely to cause but also to have regard to what that person in the particular circumstances ought to have understood would be the consequences of his conduct'. There seems to be no basis for interpreting the word recklessness to apply as an objective test in this way. This seems to reflect a misunderstanding about the fault element of recklessness in Victorian and Australian law.

3.5 Conclusion

The above discussion supports the view that parliament operated on the assumption that the Court of Appeal's decisions that recklessness in criminal offences refers to where a person is aware or foresees that a circumstance or result is probable. This is most clearly evidence in the changes to complicity. Complicity laws apply to all indictable offences under the *Crimes Act.* Therefore, complicity laws must interact with those offences. The complicity laws clearly indicate

that parliament understood recklessness in terms of probability for the complicity laws, and unless parliament wanted to create enormous confusion, that substantive offences involving recklessness also applied a probability test. Otherwise, parliament's complicity laws would create enormous — and avoidable — inconsistency and confusion (where proababiliy would apply to recklessness in complicity and a possibility would apply to the substantive offences). The second reading speech for the contamination of goods offences is clearly wrong — recklessness could not provide an objective test without express words to that effect. However, the offence itself does not define recklessness and the second reading speech does not assist in determining whether recklessness should be interepreted as involving a probability or possibility, being the only two realistic interpretations open.

4. Juror understanding about what recklessness means

4.1 Research about recklessness

There is little research indicating what jurors understand recklessness to mean. However, some research from the USA sheds some light on the issues.

Studies from the USA have used short vignettes to assess understanding of the Model Penal Code's definitions of intention, knowledge, recklessness, and negligence[3] in either undergraduate students[4] or the general population.[5] The results of these studies have been broadly consistent. In one study, approximately 75% of people considered factual scenarios depicting recklessness or knowledge sufficient to prove that the person acted purposefully.[6] Another study found that people were good at distinguishing between intention, knowledge, recklessness, and negligence,[7] but found knowledge and recklessness the most difficult to

[3] The Model Penal Code uses 'purposely', rather than 'intentionally', but intentionally was used in the research as it is a more commonly used term in the USA. These definitions are generally consistent with those used in Australia and England and Wales. However, recklessness is defined as 'consciously disregard[ing] a substantial and unjustifiable risk': Pam A Mueller, Lawrence M Solan and John M Darley, 'When Does Knowledge Become Intent: Perceiving the Minds of Wrongdoers' (2012) 9(4) *Empirical Legal Studies* 859, 861.
[4] See, eg, Robert A Beattey and Mark R Fondacaro, 'The Misjudgment of Criminal Responsibility' (2018) 36(4) *Behavior Sciences & the Law* 457, 463
[5] See, eg, Francis X Shen et al, 'Sorting Guilty Minds' (2011) 86(5) *New York University Law Review* 1306, 1334; Mueller, Solan and Darley (n 3) 867; Matthew R Ginther et al, 'The Language of Mens Rea' (2014) 67(5) *Vanderbilt Law Review* 1327, 1350; Matthew R Ginther et al, 'Decoding Guilty Minds: How Jurors Attribute Knowledge and Guilt' (2018) 71(1) *Vanderbilt Law Review* 241, 279 ('Decoding Guilty Minds').
[6] Beattey and Fondacaro (n 4) 466. Similar results were found in another study using vignettes and civil law scenarios: Mueller, Solan and Darley (n 3) 875–7.
[7] Mueller, Solan and Darley (n 3) 875–77. See also Ginther et al, 'The Language of Mens Rea' (n 5); Ginther et al, 'Decoding Guilty Minds' (n 5).

distinguish.[8] However, in some studies, subjects chose from a list of the four different states of mind rather than considering whether one or two states of mind (eg, intention and recklessness) had been proved, as would usually occur in a trial.[9]

Research also found that the greater the harm described in the vignette (eg, homicide), the more likely it was for participants to find that a lesser state of mind was sufficient to prove 'purpose'.[10] Research suggests that when making a moral judgement about conduct, and assessing liability (including punitive damages), people treat knowing and reckless acts as if they amount to intentional acts.[11] Further, moral culpability was more important than findings of intentionality in predicting awards of punitive damages.[12]

Another study from the USA involving 186 people, using vignettes, suggests that a test that a person is *aware* that their conduct involves a serious risk of causing death, for example, is better understood than several other ways of explaining recklessness:[13] 65% of those surveyed correctly identified this level of risk involved recklessness.[14] Simplifying the definition of recklessness generally correlated with improvements in juror comprehension. Tests that involved two elements or involved different concepts were generally more difficult for people to understand.

4.2 Research about intention

Research concerning other important tests or concepts in the law also suggest that the simpler a defintion is the better juror comrephension will be.

Despite differences in methodologies used, research generally indicates that juror comprehension rates are often below, or not much better than 50%.[15] Even at the high-water

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[8] Mueller, Solan and Darley (n 3) 876. See also Shen et al (n 5) 1354. Research with university students in Canada revealed that approximately 20% of the 344 students reported difficulty understanding terms like 'intent': Michelle I Bertrand and Richard Jochelson, 'Mock-Jurors' Self-Reported Understanding of Canadian Judicial Instructions (is not Very Good)' (2018) 66 *Criminal Law Quarterly* 137, 151–3.
[9] Shen et al (n 5) 1332–3. See generally, Beattey and Fondacaro (n 4) 461–2.
[10] Beattey and Fondacaro (n 4) 466.
[11] Mueller, Solan and Darley (n 3) 875.
[12] Ibid 877.
[13] For example, it was better understood than 'conscious of the likelihood that harm will occur but simply doesn't care': Ginther et al, 'The Language of Mens Rea' (n 5) 1356. The Model Penal Code definition of recklessness is more conceptually complex than that used in Victoria and that proposed by the Law Commission. The Model Penal Code defined recklessness in terms of whether there was a substantial and unjustifiable risk that a result would occur. Commonwealth offences use the same definition of recklessness, see, eg, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Fatal Offences Against the Person* (Discussion Paper, June 1998) 53–9.
[14] Ginther et al, 'The Language of Mens Rea' (n 5) 1356.
[15] See, eg, James R P Ogloff and V Gordon Rose, 'The Comprehension of Judicial Instructions' in Neil Brewer and Kipling D Williams (eds), *Psychology and Law: An Empirical Perspective* (Guilford Press, 2005) 407, 425; Chantelle M Baguley, Blake M McKimmie and Barbara M Masser, 'Deconstructing the Simplification of Jury Instructions: How

mark, which is closer to 70%,[16] comprehension levels remain low. A study of jury deliberations in New Zealand found 'fairly fundamental misunderstandings of the law' in 35 of the 48 trials studied (73%).[17] In more than half of the trials, these misunderstandings concerned elements of the offence charged, such as the distinction between murder and manslaughter[18] and the meaning of 'intent' (eg, what is the difference between 'purpose' and 'intent' and whether 'intent' implies premeditation).[19]

4.3 Research about proof beyond reasonable doubt

Research from different jurisdictions shows that jurors commonly struggle to understand the concept of 'proof beyond reasonable doubt'.[20] For example, in New South Wales, 55% of jurors surveyed (1,178) understood 'proof beyond reasonable doubt' to mean being sure that that a person is guilty, but they were not asked to further explain this in terms of whether it meant 100% certain or something else.[21] In Queensland, when jurors surveyed were asked to explain proof beyond reasonable doubt in their own terms, 36% (11/33) described it too onerously (eg, no doubt at all).[22] In the USA, 31% of 505 mock jurors thought the instructions meant they had to be 100% certain.[23] Research in England found that a third of jurors surveyed understood the test of 'sure' to mean 100% certain, which is erroneously high.[24]

However, some jurors' understanding of 'proof beyond reasonable doubt' is erroneously low. Of the jurors surveyed in New South Wales (1,178), 22% said the phrase meant 'very likely the person is guilty' or 'pretty likely that the person is guilty'.[25] In Queensland, 31% of jurors surveyed (9/33) described 'proof beyond reasonable doubt' too lowly or not at all.[26] Similarly,

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Simplifying the Features of Complexity Affects Jurors' Application of Instructions' (2017) 41(3) *Law and Human Behavior* 284, 285.

[16] See, eg, Chantelle M Baguley, Blake M McKimmie and Barbara M Masser, 'Deconstructing the Simplification of Jury Instructions: How Simplifying the Features of Complexity Affects Jurors' Application of Instructions' (2017) 41(3) *Law and Human Behavior* 284, 285.

[17] New Zealand Law Commission, *Juries in Criminal Trials: Part Two* (Preliminary Paper No 37, November 1999) 53 [7.12].

[18] Ibid 53 [7.13]. Errors in the judge's summing up contributed to the jury's misunderstanding in two cases.

[19] Ibid 53 [7.14].

[20] See, eg, Criminal Law Review, Department of Justice, *Jury Directions: A New Approach* (Report, 2013) 89-91; Katrin Mueller-Johnson, Mandeep K Dhami and Samantha Lundrigan, 'Effects of Judicial Instructions and Juror Characteristics on Interpretations of Beyond Reasonable Doubt' (2018) 24 *Psychology, Crime and Law* 117, 118.

[21] Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials' (2008) 119 Contemporary Issues in Criminal Justice 1, 4

[22] Blake McKimmie, Emma Antrobus and Ian Davis, 'Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials' in Queensland Law Reform Commission, *A Review of Jury Directions* (Report No 66, 2009) 13.

[23] Geoffrey Kramer and Durean M Koenig, 'Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project' (1990) 23(3) *University of Michigan Journal of Law Reform* 401, 414. See also James Chalmers et al, 'Three Distinctive Features, but What is the Difference? Key Findings from the Scottish Jury Project' [2020] (11) *Criminal Law Review* 1012, 1026.

[24] John Warwick Montgomery, 'The Criminal Standard of Proof' (1998) 148 *The New Law Journal* 582.

[25] Trimboli (n 21) 6.

[26] McKimmie, Antrobus and Davis (n 22).

research in Wyoming found that almost 30% of jurors surveyed (seriously) misunderstood a true/false statement about the meaning of proof beyond reasonable doubt that asked whether a 'more likely than not' standard was correct.[27]

Research in New Zealand reported that 'many jurors' and juries surveyed were uncertain about the meaning of 'proof beyond reasonable doubt', often describing it in percentage terms and describing it as 100%, 95%, 75% and 50%.[28]

The differences in these survey results may reflect differences in the survey methods and/or differences between jurisdictions. However, the results produce a 'convergent validity'.[29] That is, a considerable proportion of jurors in each jurisdiction have difficulty understanding and applying the test of 'proof beyond reasonable doubt'.[30]

4.4 Conclusion

Accordingly, the limited available research on juror comprehension of different forms of recklessness supports the view that the simpler the defintion of recklessness, the easier it is likely to be for jurors to understand. The simplest form of recklessness tested is closest to Victopria's approach of defiinging recklessness in terms of what is probable. The difficulties jurors face in understanding legal terms should not be underestimated. Research concering related terms of the fault element of intention and standard of proof — beyond reasonable doubt — reveal the challenges that jurors face in understanding legal terms.

While Victoria's existing test of reasonableness may be easier to understand, we do not have research concerning how best to guide jurors in understanding this term. In the absence of knowing what works best, there is an increased opportunity for jurors to apply their commonsense views of what they think reckelessness should mean that may limit or influence their understanding of the judge's explanation about recklessness.

Observations of jurors demeanour, juror questions, intuition, and assessments of what we think jurors will probably (or are likely) to understand are limited. I have discussed the limitations of this form of knowledge about juror comprehension in more detail elsewhere.[31] Juror

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[27] Bradley Saxton, 'How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming' (1998) 33 *Land and Water Law Review* 59, 96–9. See also, Kramer and Koenig (n 23) 414–6.
[28] NZLC, *Juries in Criminal Trials: Part Two* (n 17) 54 [7.16]. The NZLC's Preliminary Paper does not specify what constitutes 'many jurors'. Research in Scotland indicated that 14 of 64 juries in a simulation study also misunderstood the burden of proof and thought the accused was required to prove their innocence: Chalmers et al (n 23) 1026.
[29] Phoebe C Ellsworth, 'Legal Reasoning and Scientific Reasoning' (2012) 63 *Alabama Law Review* 895, 914.
[30] *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey LC). The other aspect of the 'golden thread' of the criminal law concerns the presumption of innocence: at 480–1.
[31] Greg Byrne, 'A Pathway to Fair(er) Trials: Why We Need a Juries Advisory Council' (2021) 31(2) *Journal of Judicial Administration* 49.

comprehension is something we should know about rather than being reckless about (using the Victorian defintion of recklessness). I have also proposed that a Juries Advisory Council be established to conduct research and provide expert interdiciplinary analysis of juror comprehension issues.

While we have enough data to make choices about which form of recklessness is likely to be best understood by jurors, information about how best to convey terms like this should also be assessed if we want to have confidence that jurors are applying the law as it is intended. If jurors do not apply laws as intended, this not only affects the fairness of trials, it raises questions about the value of law reform concerning comparatively fine distictions in the law that jurors must understand and apply.

Dr Greg Byrne PSM
Legal Policy Consultant

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