## Dear Victorian Law Reform Commission:

### I Introduction

We urge retaining the common law definition of recklessness as it was in *R v Campbell*, and merely formalising that definition in s15 of the *Crimes Act 1958* (Vic). Our submission sets out our suggested definition, and how we envisage its operation, before examining the arguments made by the Director of Public Prosecutions (DPP) to the High Court, seeking to have the *Campbell* approach overturned and replaced by the New South Wales (NSW) approach. We respectfully suggest those arguments should not carry weight with the Victorian Parliament, and explain why we consider Parliament should retain the *Campbell* approach.

### II Proposed definition:

We propose including the following text in s15:

> *In this Division, a person who, without lawful justification or excuse, does an act knowing it is probable that death or injury will result, is reckless.*

Per *Campbell*, we propose applying the *R v Crabbe* definition of recklessness to all offences, not just grievous wounding or murder, so that there will be a single definition of recklessness within Division 1 of the *Crimes Act*. We note other divisions of Part 1 may require different approaches for their specific contexts. For example, s318(2)(a) in Division 9 (Driving offences connected with motor vehicles) defines recklessness as "consciously and unjustifiably [disregarding] a substantial risk

that the death… [or] grievous bodily harm upon another person may result". We do not propose changing other divisions' existing definitions.

We consider the definition should continue requiring actual knowledge by the offender. Similarly, we consider 'probable' should continue meaning the offender knew death or injury would more likely than not occur. Finally, we would retain the existing requirement of foreseeing only an injury or a serious injury (as applicable) of some kind, not the specific injuries that ensued.

We note our proposal will continue the long-standing difference between Victoria's and NSW's approaches. NSW applies the above definition to murder cases, but only requires knowledge of possible injury (a not trivial chance of occurrence) for other offences. We do not think the on-going divergence will be problematic. The High Court in *Aubrey v The Queen* confirmed the NSW approach in that state, and shortly after in *Director of Public Prosecutions Reference No 1 of 2019* decided *Campbell* remains good law in Victoria. As noted by the Victorian Court of Appeal, different states' statutes may take different approaches, and the Victorian approach has been unproblematic for 25 years.

## III THE DPP AND THE ARGUMENTS FOR CHANGE:

In its recently concluded reference case, the DPP made two core arguments for redefining recklessness as only requiring knowledge of possible harm: precedent from common law maliciousness, and the alleged burden from having a high bar to prove recklessness. We suggest the DPP's arguments do not justify redefining recklessness.

### A. *Historical parallels to maliciousness*

The DPP noted recklessness was historically a sub-type of common law maliciousness, and asserted the High Court ought to apply that historical meaning (per *Aubrey*) in preference to the current Victorian approach set out in *Campbell*. When pressed on why the NSW approach should be followed in Victoria, the DPP simply repeated it considered the *Aubrey* analysis preferable because it aligns with common law maliciousness, and with an asserted (though unevidenced) parliamentary intention.

The plurality rejected the DPP's assertion regarding parliamentary intention, finding that the better view is that Parliament was plainly aware of *Campbell* when it amended the *Crimes Act* in 1997 and 2013. Those amendments (including sentencing changes) treated reckless offences as comparably serious to intentional offences, reflecting the closeness of the definitions of intention and recklessness. The plurality considered the amendments evidenced a parliamentary intention to 're-enact' the *Campbell* definition. The DPP's argument therefore seems factually weak.

We agree with the plurality's analysis. We note the Sentencing Council of Victoria's report on introducing 'gross violence' offences concluded that the intentional and reckless versions of the injury and serious injury offences deliberately have the same range of punishments available to them, precisely because of their closeness. The Council's expectation was that intentional and reckless crimes would heavily overlap in their ranges of seriousness, even though reckless offences will tend (appropriately) to receive lower sentences.

Even if the DPP's assertion had a stronger factual basis, it still should not carry weight. Arguments from precedent and the evidenced intentions of previous drafters are appropriate for judicial decision-making. Parliament can and should decide

definitions of crimes based on what it considers ought to be criminalised now, not just what has previously been criminalised. We therefore suggest that the Commission and Parliament should give minimal weight to arguments about how recklessness has historically been defined, and instead focus on policy grounds for favouring particular definitions of recklessness.

### B. *A Burdensome Definition?*

The DPP's second argument deserves deeper consideration. The DPP argued the current definition of recklessness is very similar to the definition of intentionality, and is therefore unreasonably burdensome on Victoria. We acknowledge intending to cause harm is not far removed from having actual foresight of harm while not caring to avoid it. We are not persuaded it creates an unreasonable burden.

Having similar definitions is not necessarily problematic – as noted above, Parliament appears to have accepted that similarity, and responded by amending sentencing regimes. We consider the high bar to proving recklessness will only be a problem if it leaves a gap where harmful acts either cannot be prosecuted at all, or can only be prosecuted at the far lower level of criminal negligence when they 'deserve' a harsher punishment.

The DPP proposed expanding the definition of reckless to include actions where the offender has actual knowledge that there is a real and not trivial chance of causing injury or death. We understand the DPP's proposed definition would extend recklessness to situations of possible (not merely probable):

- serious injury where a duty of care exists (currently falling under negligently causing serious injury – s24 of the *Crimes Act*);
- serious injury where no duty of care exists (currently not prosecutable under the *Crimes Act*, though various torts may apply); and
- non-serious injury regardless of any duties of care (currently not prosecutable under the *Crimes Act*, though various torts may apply).

The extension of recklessness largely would not make currently lawful actions become unlawful, but would increase the penalties associated with those unlawful acts. Serious injury where a duty of care applies would move from Level 5 imprisonment (10 years maximum) to Level 4 imprisonment (15 years maximum). Serious and non-serious injury where no duty of care applies would become criminalised, and move directly from being civil actions to Level 4 imprisonment, an extreme shift in severity of punishment.

There are certainly situations currently not criminalised or only liable as criminal negligence which it would be intuitively attractive to capture as recklessness offences. It seems problematic that actions with a 40% chance of causing serious injury should be subject to the markedly lower penalties for criminal negligence, or potentially not prosecutable at all if no separate duty of care can be identified. A person knowingly taking such an action without very good reason would be needlessly endangering others' safety, with comparable moral status as persons taking that same action in situations where the risk is 51%. Even at lower levels of probability, such as 10-20%, there would still be knowing, non-trivial endangerment of others, which is potentially reason for Parliament to consider redefining recklessness to capture those situations.

However, despite the initial attractiveness of expanding recklessness to cover the kinds of situations noted above, we still do not support doing so.

## IV WHY THE DEFINITION SHOULD REMAIN UNCHANGED

Given the lack of academic or judicial criticism of the *Campbell* decision over the past 25 years, we suggest the DPP's argument is likely limited to edge cases, and most cases are being appropriately managed under the current regime. Drawing any line as to criminal liability for recklessness necessarily creates edge cases, where actions just below the threshold may seem more similar to the higher offence (recklessly causing serious injury) than the lower (criminal negligence). The issue the DPP notes will therefore occur regardless of where the line is drawn. In our view, the question is therefore whether there are sound policy reasons for or against moving the boundary, especially whether unintended harms would result. We suggest expanding the definition of recklessness most certainly would produce unintended harms, which would materially outweigh the minor benefits of capturing the current edge cases.

### A. *Harms from an over-inclusive definition*

It is uncontroversial that definitions of crimes need to avoid capturing ordinary social activities such as operating a vehicle or playing sport. In defining recklessness within the context of a 'possibility' standard, it would therefore be necessary to institute a legal control mechanism to restrict this scope. Indeed, the need for a controlling mechanism was a clear focus in questions from the bench in oral argument before the High Court in the recent *DPP Reference Case No 1 of 2019*, where the bench sought to draw counsel for the DPP on a possible social utility test as a limiting mechanism. The DPP struggled to articulate an appropriate test, simply repeating that it supported

the *Aubrey* approach. Edelman J severely criticised the utility approach, suggesting instead that reasonableness would be a preferable standard, though that seems to us to be inconsistent with both *Aubrey* and *Campbell*.

### B. *The inadequacy of social utility as a controlling device*

We suggest that any such mechanism is less preferable than retaining the existing definition of recklessness, because it complicates the law by introducing significant uncertainty. It is not possible for an individual to know in advance whether an action is sufficiently socially useful to justify the possible risk of harm as both risk and social value will be context dependent. It leaves defendants (and prosecutors, for that matter) hostage to unpredictable decisions by juries as to social utility.

The reliance on unpredictable jury decision-making for social utility reveals a second problem. In effect, juries would be being asked to determine as a question of fact when the legal prohibition on knowingly risking causing injury should not apply. By contrast, the controlling mechanism for negligence – the existence of a duty of care – is resolved as a question of law precisely to avoid that uncertainty.

If the DPP's expanded definition were adopted, Victoria would be relying on juries to correct a definition which on its face would be plainly over-inclusive. It would seem far more appropriate for Parliament to define recklessness in manageable terms, rather than hoping juries will correct readily-foreseeable inadequacies in the legislation. Tellingly, when pressed by the bench in oral argument as to how a social utility test might operate, the DPP could not provide a coherent response, falling back on mere repetition that it supported the *Aubrey* approach, without articulating how it foresaw such an approach operating in Victoria.

### C. *Reasonableness likewise does not resolve the issue*

In our view, Edelman J's preferred test of reasonableness also does not adequately address this issue. The example given by counsel for the DPP is useful, here – an experienced knife juggler performing publicly. Counsel for the DPP asserted that knife juggling would clearly be protected by either a social utility test, but to us that is by no means evident. How experienced must a juggler be? How do they gain that experience, save by juggling? Exactly what constitutes sufficient precautions to avoid audience injury?

While courts have experience in considering questions above from (for example) tortious negligence, the expanded definition the DPP argues for would lack the controlling features that have made liability under negligence manageable. The expanded definition of recklessness would not have a duty of care test. It would realise the concerns raised by Lord Buckmaster in *Donoghue v Stevenson* about unbounded potential liability. The burden would therefore still fall on juries to make up for the deficiencies in an over-inclusive statutory definition. We would therefore disagree with Edelman J. We do not consider reasonableness – in this context – would be any more workable than social utility as a constraint on liability. We would suggest the DPP was therefore correct to disavow a reasonableness test in oral argument before the High Court.

Pertinently, the plurality did not need to consider either reasonableness or social utility in their joint judgment. Retaining the 'more likely than not' standard for probable harm for recklessness offences avoids the need to explore those secondary, necessarily uncertain, standards as control mechanisms to limit liability.

## V CONCLUSION

We submit that the DPP's arguments to amend the definition of recklessness under the *Crimes Act* are misguided. As Priest JA noted, the *Campbell* test has been applied in Victoria easily, satisfactorily, and without judicial or academic criticism for 25 years. By contrast, expanding the definition of recklessness would produce severe uncertainty, and rely on juries making challenging, fraught decisions on unclear standards such as reasonableness or social utility to correct what would have become a plainly over-inclusive definition. We also consider, especially in light of the recent High Court decision, the DPP's assertion that recklessness 'ought' to be understood by reference to common law malice cannot be sustained. In retaining the *Campbell* test for Division 1 offences, the law maintains a sufficient and necessary distinction between offences of lower criminal culpability and criminal recklessness. We submit that the parliament should leave the definition unchanged, and merely enshrine it in legislation for avoidance of doubt.

**Yours Faithfully,**

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