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Submission to the Victorian Law Reform Commission (VLRC)

I INTRODUCTION

A *Proposed definition*

1. The Victorian Government, in response to the High Court and Court of Appeal decisions in *Director of Public Prosecutions No 1 of 2019* ('*DPP Reference*'),[1] has committed to including a statutory definition of recklessness in the *Crimes Act 1958* (Vic). This submission contends that both the New South Wales and Victorian articulations of recklessness, as raised in the *DPP Reference*, fail to adequately address the magnitude of the potential harm and the reasonableness of engaging in reckless behaviour. As rates of incarceration continue to grow in Australia, a stringent but balanced approach is necessary. Drawing inspiration from the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') and the US Model Penal Code, a new definition of recklessness in Victoria is proposed:

> For offences other than murder, an accused is said to have been reckless if they consciously and unjustifiably disregarded a substantial risk of infliction of harm upon another person.

2. This submission will proceed by outlining the historical development of recklessness, the need for a definition and current incarceration rates. This submission will analyse each element of the proposed definition separately– 'substantial risk', 'consciously' and 'unjustifiably'.

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[1] For the High Court Appeal, see *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26 ('*DPP Reference*'). For the Victorian Court of Appeal case, see *Director of Public Prosecutions No 1 of 2019* [2020] VSCA 181.

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B *Recklessness across Australian Jurisdictions*

3. There is no uniform meaning of recklessness in the criminal law context across Australia. In the absence of a statutory definition, the courts' formulation of the test for recklessness has evolved and diverged across jurisdictions.

4. The Victorian approach, affirmed by the High Court,[2] views recklessness as acting with the foresight that harm will probably result.[3] The authority for this position has been traced back to *R v Crabbe* ('*Crabbe*'), a High Court decision involving recklessness as the fault element for the common law offence of murder.[4] In Victoria, it has been held that this same common law test applies to statutory offences.[5] By contrast, jurisdictions such as NSW have distinguished between murder and statutory offences, employing the less stringent test of foreseeing the possibility, rather than probability, of the harm occurring.[6]

C *Necessity of Definition*

5. The divergence in the current state of the case law in Australia has resulted in a lack of clarity regarding the meaning of 'recklessness'. Noting there are now differing definitions with respect to recklessness between the states,[7] the Victorian government has recognised the benefit to be gained from setting out a clear legislative definition. This is also taking into account it has now been held that any change to the definition of recklessness, on the basis of the re-enactment principle, falls within the domain of Parliament, not of the courts.[8] The need for certainty is compounded by

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[2] *DPP Reference* (n 1).

[3] *R v Campbell* [1997] 2 VR 585, 592–3 (Hayne JA and Crockett AJA) ('*Campbell*').

[4] (1985) 156 CLR 464 ('*Crabbe*').

[5] *R v Nuri* [1990] VR 641, 643–4 ('*Nuri*'); *Campbell* (n 3) 592–3 (Hayne JA and Crockett AJA).

[6] *R v Coleman* (1990) 19 NSWLR 467, 476 (Hunt J); *Aubrey v The Queen* (2017) 260 CLR 305, 331 [50] (Kiefel CJ, Keane, Nettle and Edelman JJ) ('*Aubrey*').

[7] See above [4].

[8] *DPP Reference* (n 1) [59] (Gageler, Gordon and Steward JJ), [101] (Edelman J).

the slim majority in the High Court, perhaps indicating that the definition of recklessness is not settled law. Therefore, it is necessary to legislate a definition for recklessness, which also provides the opportunity to balance elements of culpability, knowledge, and any potential justification. A definition should be such that it recognises any trends towards incarceration within Victoria.

D *Trend towards Incarceration*

6. Australia wide, there has been a trend towards increasing incarceration. In the 10 years to 30 June 2019, there has been a 45% increase in the number of inmates in absolute terms, and a 25% increase in the per capita incarceration rate.[9] Where there is a change to the definition, there needs to be a balance between increasing accountability in the community for people's actions and casting the net of criminality too wide so as to arbitrarily criminalise. Greater clarity in the definition should not come at the expense of arbitrarily casting a wider net for criminality.

7. One issue of concern with respect to increasing the scope of criminality is the negative impact on incarceration rates for Indigenous Australians. As the Australian Law Reform Commission found in 2018, while Aboriginal and Torres Strait Islander adults make up approximately 2% of the Australian population, their prison population sits at the 27% mark, demonstrating a clear over-representation of incarcerated Indigenous Australians.[10]

II 'SUBSTANTIAL RISK'

[9] Mirko Bagaric, 'Incarceration Trends over the Past Decade: The Need for More Effective Risk and Needs Assessments and Rehabilitative Measures' (2020) 44(1) *Criminal Law Journal* 3, 3.

[10] Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 21.

8. In our proposed definition, the concept of 'substantial risk' is contingent on the elements of 'consciousness' and 'unjustifiability' of engaging in conduct. This definition applies across a range of offences excluding murder.[11]

9. The definition of recklessness in s 5.4 of the *Criminal Code* greatly informed our perspective as to the inclusion of 'substantial risk'.[12] This also follows the US Model Penal Code, in using 'substantial' and 'unjustifiable' as key terms.[13] Recklessness is defined through substantial risk rather than in terms of possibility or probability.[14] The *Criminal Code* does not define 'substantial', nor does it define 'risk'. The reasoning given is an attempt to distance itself from the possibility/probability approaches, as such *'terms invite speculation about the mathematical chances and ignore the link between the degree of risk and the unjustifiability of running that risk in any given situation'*.[15]

10. In line with the *Criminal Code*, the risk is substantial if a reasonable observer would have taken it to be substantial at the time the risk was taken.[16] This risk varies in rigidness with the degree of social acceptance of the conduct. If the conduct is without vindicating social value, anything in excess of 'bare logical possibility' amounts to a 'substantial risk'.[17] However, as noted in Part IV below, our analysis utilises the broader reasonableness matrix rather than employing social value.

A *Possibility*

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[11] See generally *Campbell* (n 3); *Nuri* (n 5); *Crabbe* (n 4).

[12] *Criminal Code Act 1995* (Cth) s 5.4 ('*Criminal Code*').

[13] American Law Institute, *American Model Penal Code and Commentaries* (American Law Institute, 1980) 226.

[14] Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 14.

[15] Ibid.

[16] *Criminal Code* (n 12) s 5.4.

[17] Brent Fisse, *Howard's Criminal Law* (Lawbook, 5th ed, 1990) 489–91

11. The NSW approach, requiring the prosecution to prove the accused had foresight only of the possibility of harm resulting, negates the need to establish harm of a specific type or magnitude. The prosecution simply must prove the possibility of any risk of harm from the accused's actions. This raises significant issues relating to the lower standard of culpability and low threshold of proof of the fault element for what is regarded as a serious crime. As in the Court of Appeal, the appellant implicitly conceded that injustice could occur with a lower standard of culpability like 'possibility'.[18] The Director of Public Prosecution ('DPP') advocated strongly for the inclusion of a social utility matrix, as they were aware 'possibility' alone was too low of a bar to set.

12. We have chosen not to adopt this approach as it does not appropriately reflect the level of appreciation of the risk required for moral blameworthiness and punishment resulting from such substantial wrongdoing. In NSW, the maximum penalty for causing reckless grievous bodily harm or wounding is 10 years.[19] This is a penalty which is extremely lengthy and serious, and arguably not reflected in the fault elements of the possibility approach. In turn, this approach also raises the potential risk of overcriminalisation due to the lower standard of culpability.

13. As noted in paragraphs 6–7, a lower standard could directly impact vulnerable groups like youth offenders or members of the Aboriginal and Torres Strait Islander communities, who are already disproportionately represented in the justice system.[20] There needs to be a fair labelling of the offence elements and a more rigorous proof of fault standard to reflect a crime that is highly denounced by the community.

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[18] See Acquitted Person, 'Acquitted Person's Submissions'. Submission in *Director of Public Prosecutions Reference No 1 of 2019*, Proceeding Number M131/2020, 26 February 2021, [46].

[19] *Crimes Act 1900* (NSW) s 35.

[20] Australian Bureau of Statistics, 'Prisoners in Australia', *Australian Bureau of Statistics* (Web Page, 3 December 2020) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>.

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B *Probability*

14. Victoria's position on recklessness adopts the probability approach, as reinforced by the High Court judgment in the *DPP Reference*.[21] This test sets out a mental element, requiring knowledge by the accused of a probability, not merely a possibility of harm occurring.

15. However, as it was argued by the appellant in the *DPP Reference*, probability produces a higher standard of culpability akin to an intent offence.[22] For example, causing serious injury recklessly was intended to be a less serious offence as it had a lower maximum sentence than causing serious injury intentionally. Causing serious injury recklessly holds a penalty of Level 4 imprisonment, a 15 year maximum.[23] Conversely, causing serious injury intentionally carries a penalty of Level 4 imprisonment, a 20 year maximum.[24] It may be said it was the intent of Parliament when setting a lower maximum sentence for causing serious injury recklessly to consider recklessness and intent offences as separate. Therefore, it may be validly stated any increase to probability places recklessness too close to crimes involving 'intent'.

16. However, the sentencing trends for both Victorian offences are very similar in terms of rates of imprisonment.[25] It could be argued that it is simpler to institute a probability standard, as ss 16 and 17 are not treated too dissimilarly in the sentencing process.[26] For this reason, we have chosen

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[21] See above n 2.

[22] Director of Public Prosecutions, 'Appellant's Submissions', Submission in *Director of Public Prosecutions Reference No 1 of 2019*, Proceeding Number M131/2020, 29 January 2021, [20].

[23] *Crimes Act 1958* (Vic) s 17.

[24] Ibid s 16.

[25] See 'Sentencing Snapshot 239: Sentencing Trends for Causing Serious Injury Recklessly in the Higher Courts of Victoria 2014–15 to 2018–19', *Sentencing Advisory Council* (Web Page, 28 April 2020) <https://www.sentencingcouncil.vic.gov.au/snapshots/239-causing-serious-injury-recklessly>; 'Sentencing Snapshot 238: Sentencing Trends for Causing Serious Injury Intentionally in the Higher Courts of Victoria 2014–15 to 2018–19', *Sentencing Advisory Council* (Web Page, 28 April 2020) <https://www.sentencingcouncil.vic.gov.au/snapshots/238-causing-serious-injury-intentionally>.

[26] *Crimes Act 1958* (Vic), ss 16, 17.

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to adopt a 'substantial risk' approach, as this provides a more effective mechanism for separating serious injury offences on the basis of intent and recklessness.

17. Finally, the utilisation of 'substantial risk' allows a key middle ground to be established between possibility and probability, likely mitigating the issues of both. Substantial risk must be considered in tandem with 'consciously' and 'unjustifiably'. A final judgment can only be made after all elements have been weighed appropriately.[27]

III 'CONSCIOUSLY'

18. Under the submitted definition, an accused would have to 'consciously' disregard a substantial risk of harm. Accordingly, the prosecution would need to prove the element of consciousness in recklessness to make out the offence.

19. The definition of recklessness should maintain a material difference from a negligence analysis, considering that there are both offences relating to recklessly doing something and negligently doing the same thing, with different potential penalties to recognise the difference in the seriousness of the offence.[28] In order to maintain a material difference between the concepts of negligence and recklessness, the proposed definition would maintain the subjective requirement of knowledge of the accused. The requirement will continue to be that the accused must have made a decision with an awareness of the risk in order to establish the higher level of culpability to sustain a recklessness offence. There is an issue of wilful blindness to the risk and how that would interact with the proposed definition's subjective test. It is submitted, however, that wilful blindness may be caught in the definition. This would suggest that there is a certain

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[27] American Law Institute (n 13) 237.

[28] For example, there is the offence of recklessly causing serious injury that carries a level 4 imprisonment: *Crimes Act 1958* (Vic) s 17. There is also the offence of negligently causing serious injury that has a lower level 5 imprisonment: at s 24

level of awareness and a conscious decision from an accused to not make further inquiries. Alternatively, and more likely, such conduct would be covered by criminal negligence offences employing the objective standard.[29]

IV 'UNJUSTIFIABLY'

20. For recklessness to be made out in a particular case, it must be demonstrated the accused was both aware of the risk and 'unjustifiably' disregarded it. The language of justification is used in other offences such as intentionally or recklessly causing a bushfire,[30] indicating that the courts are already familiar with the application of this concept.

21. This requirement introduces a reasonableness consideration into the assessment of recklessness. A similar proposal was made in the *DPP Reference*, where it was suggested the risk of serious injury was to be determined by reference to the circumstances, social utility of the act and whether it was thus reasonable.[31] However, this submission agrees with Edelman J and finds that social utility encourages too narrow of a focus,[32] instead preferring the more encompassing notion of justification (or lack thereof). This point is demonstrated by the facts of the recent Western Australian case of *RDS v Luplau*, in which the accused breached COVID-19 directions in order to see her terminally ill father.[33] The accused's actions clearly bear no public benefit – creating the risk of community transmission and serious injury. Nevertheless, in light of the time-sensitive and delicate nature of the situation, as well as the steps taken by the accused to minimise the risk, it is arguable that her actions were reasonable in the circumstances.

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[29] See *R v Lavender* (2005) 222 CLR 67, 107 (Kirby J).

[30] *Crimes Act 1958* (Vic) s 201A(2)(b)(ii).

[31] *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181, [42] (Maxwell P, McLeish and Emerton JJA).

[32] *DPP Reference* (n 1) [72] (Edelman J).

[33] [2021] WASC 280.

22. For this reason, social utility is not an appropriate means of assessing whether an accused was reckless.

23. The requirement for a lack of justification is also useful in the sense that it influences the likelihood of harm needed to render a risk 'significant'.[34] For example, both a speeding motorist and an emergency response vehicle might cause a road accident, but only one of them poses a substantial, unjustified risk. This element avoids the danger of increased criminalisation associated with adopting the NSW approach, as many risks that are merely possible (not probable) will not be unreasonable. Finally, whilst the introduction of a reasonableness enquiry in one sense brings recklessness closer to criminal negligence, recklessness continues to remain a more serious crime due to the need for culpability. As the Canadian and American courts (that have long included both subjective and objective tests elements in their formulation of recklessness) demonstrate, negligence and recklessness remain distinct because the latter requires a 'conscious disregard' of the risk of harm.[35]

V CONCLUSION

24. To summarise, the NSW and Victorian approaches sit at opposing common law poles of probable certainty and the possibility of a risk of harm. Ultimately, the proposed definition attempts to mitigate the issues of low culpability and hovering the line of intent. We believe this construction of the definition of recklessness strikes the appropriate balance and should be seriously considered by the VLRC.

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