

Meaning of Recklessness

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I INTRODUCTION

This submission argues that the *Crimes Act* should define recklessness as:

For a person to be convicted of recklessly causing harm in non-fatal offences, it must be proved that:

- (i) the accused person foresaw that their action would *probably* cause harm;
and
- (ii) the risk was unreasonable in the circumstances known to the accused.¹

This definition was arrived at in the following way. First, we determined that a test of probability is preferable to possibility. This is because the foresight of probability is coherent with case law, forms the foundation of certain *Crimes Act* amendments, and does not expand the scope of criminal liability.² Furthermore, we determined that a subjective assessment of the accused's state of mind must be applied due to the seriousness of the crime.³ Finally, we concluded that the definition of recklessness should incorporate an 'unreasonableness' qualification that considers an act's social utility.

II CURRENT DEBATE AND NEED FOR REFORM

The *Crimes Act* prohibits non-fatal offences against the person where the mens rea is satisfied by proof that the defendant acted recklessly in applying force to another.⁴ However, recklessness is not defined in the statute.⁵ Victorian courts define recklessness as the accused having foresight of *probable* harm arising from their actions.⁶ In contrast, NSW defines recklessness as the foresight of *possible* harm.⁷ In 2019, the Victorian Court of

¹ *Director of Public Prosecutions Reference No. 1 of 2019* [2020] VSCA 181, 11-12 [35], 14 [42].

² *Ibid.*

³ Victoria, Parliamentary Debates, Legislative Assembly, 13 December 2012, 5549.

⁴ *Crimes Act 1958* (Vic) ss 15B, 17-18; Penny Crofts et al, *Waller & Williams Criminal Law Text and Cases* (LexisNexis, 14th ed, 2020) 154; *R v Venna* [1976] QB 421.

⁵ *Crimes Act 1958* (Vic) s 15; *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCA 26, 14-15 [42], 26 [63].

⁶ *R v Nuri* [1990] VR 641, 645; *R v Campbell* [1997] 2 VR 585, 594.

⁷ *Aubrey v R* (2017) 260 CLR 305, 552[44].

Appeal was asked to determine the correct interpretation of recklessness for non-fatal offences.⁸ The Director contended that the NSW approach should be followed, and that *Campbell recklessness* should not apply in Victoria.⁹ The Court held that unless it is altered by legislation, the meaning of recklessness is that stated in *Campbell*.¹⁰ This was endorsed by the High Court.¹¹ The Rule of Law dictates that laws must be clear and certain.¹² It is necessary potential offenders are aware of what constitutes recklessness. It is thus vital that Parliament provide a clear and certain definition.

III PROBABILITY V POSSIBILITY

A Coherence

There has been strong consistency in case law regarding the application of recklessness as it relates to relevant sections of the *Crimes Act*.¹³ The prominence of foresight of probability can be traced back to *Crabbe*.¹⁴ The High Court noted that to be guilty of murder the defendant can be reckless, in that they did the act knowing it was probable that there was a substantial or real chance that death or grievous bodily harm would result from their actions.¹⁵ Their Honours held this was settled law. This decision was followed in *Nuri*.¹⁶ *Nuri* was criticised for not providing any reasoning for the construction of recklessness. However, the court stated that recklessness should be understood as foresight of the probable consequences, which has been applied for some time. This is also what the court in *Crabbe*¹⁷ found. Further, in *Campbell*¹⁸, the Supreme Court of Victoria had to determine whether the

⁸ *Director of Public Prosecutions Reference No. 1 of 2019* [2020] VSCA 81; Penny Crofts et al, *Waller & Williams Criminal Law Text and Cases* (LexisNexis, 14th ed, 2020) 154-155; *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCA 26, 14 [40].

⁹ *Director of Public Prosecutions Reference No. 1 of 2019* [2020] VSCA 81, 18 [54], 20 [59].

¹⁰ *Ibid*, 2 [6].

¹¹ *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCA 26, 14 [41].

¹² Lord Bingham, 'The Rule of Law' (2007) 66(1) *The Cambridge Law Journal* 67.

¹³ *Crimes Act 1958* (Vic).

¹⁴ *R v Crabbe* (1985) 156 CLR 464.

¹⁵ *Ibid* 467 [11].

¹⁶ *R v Nuri* [1990] VR 641.

¹⁷ *Ibid* [22]; *R v Crabbe* (1985) 156 CLR 464.

¹⁸ *R v Campbell* (1997) 2 VR 585.

use of the language of ‘possibility’ was erroneous. The court found that ‘foresight that injury will probably result’¹⁹ is the appropriate test when determining recklessness. In *Aubrey*,²⁰ the High Court cast doubt on the correctness of *Campbell*.²¹ *Aubrey*²² held that for the similar offence of maliciously inflicting grievous bodily harm under the *Crimes Act 1900* (NSW),²³ recklessness meant foresight of the possibility of harm. This test should not be applied in Victoria. NSW uses the language of ‘malice’ which is different to Victoria’s modernised language.²⁴ Further, the recent decision of *DPP*²⁵ reinforced *Campbell* recklessness.²⁶ Courts have interpreted recklessness as the foresight of probability. This provides support for our recommended definition of recklessness.

B Inconsistency

If the definition of recklessness was like the one adopted in *Aubrey*,²⁷ this would create two different definitions for recklessness. The first definition would apply to charges relating to murder as indicated in *Crabbe*.²⁸ The other definition would apply to non-fatal offences and would involve foresight of the possibility of harm. This is problematic because if a person is being charged with murder and a non-fatal offence, having to consider two different definitions may be confusing to the jury.²⁹ It has been argued that juries are able to take the social utility of an act into account when determining whether it was reckless.³⁰ However, to ensure a fair trial of an accused and consistency across the cases that are subject to recklessness, it would be best to have a consistent definition across the different offences.³¹

¹⁹ Ibid 584 [44]

²⁰ *Aubrey v R* (2017) 260 CLR 305.

²¹ *R v Campbell* (1997) 2 VR 585.

²² *Aubrey v R* (2017) 260 CLR 305.

²³ *Crimes Act 1900* (Nsw).

²⁴ Transcript of Proceedings, *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCATrans 86, 9[21].

²⁵ *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCA 26.

²⁶ *Crimes Act 1958* (Vic).

²⁷ *Aubrey v R* (2017) 260 CLR 305.

²⁸ *R v Crabbe* (1985) 156 CLR 464.

²⁹ Transcript of Proceedings, *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCATrans 86.

³⁰ *Aubrey v R* (2017) 260 CLR 305, 331 [50].

³¹ Transcript of Proceedings, *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCATrans 86.

C Building Blocks

The meaning of *recklessness* stated in *Campbell* has provided the building block for many of the *Crimes Act* provisions.³² The definition is regarded as settled law in Victoria and was the assumed definition when Victorian Parliament implemented amendments.³³ The amendments of 1997 and 2013 were based on and tailored to the level of criminality and culpability associated with a contravention of offences involving *Campbell* recklessness.³⁴ Changing the meaning of recklessness to involve foresight of possibility would be to alter the foundation on which these amendments were made, thus altering the intended operation of amended provisions.³⁵ The first amendment potentially undermined is the increase of the maximum penalty for s 17 *Crimes Act*.³⁶ Parliament recalibrated the statutory maximum after the meaning of *Campbell* recklessness became settled law.³⁷ Increasing the maximum penalty was seen as ‘necessary’ given the ‘high degree’ of culpability involved in recklessly causing harm where recklessness is defined as foresight of probability.³⁸ Adopting a test of possibility would result in the maximum penalty being incongruent with the reduced level of culpability.³⁹ This is problematic because it alters the operation of the amendment and imposes a higher penalty on offenders exhibiting less culpability. The same result will follow regarding the imposition of mandatory minimum sentences for section 15B.⁴⁰

³² C. Marshall & Associates, ‘Acquitted Person’s Submissions’, Submission in *The Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 26 February 2021, 14 [38].

³³ C. Marshall & Associates, ‘Acquitted Person’s Submissions’, Submission in *The Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 26 February 2021, 28 [66]; *Crimes Act 1958* (Vic), *Sentencing Act 1991* (Vic).

³⁴ *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCA 26, 24 [57]; *R v Campbell* [1997] 2 VR 585.

³⁵ C. Marshall & Associates, ‘Acquitted Person’s Submissions’, Submission in *The Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 26 February 2021, 14 [38]; *Crimes Act 1958* (Vic).

³⁶ *Crimes Act 1958* (Vic); *Sentencing and Other Acts (Amendment) Act 1997* (Vic) s 60, sch 1 sub-ss (10)-(12); *Director of Public Prosecutions Reference No. 1 of 2019* [2020] VSCA 181, 7 [20].

³⁷ *Director of Public Prosecutions Reference No. 1 of 2019* [2020] VSCA 181, 35-36 [104].

³⁸ *Director of Public Prosecutions Reference No. 1 of 2019* [2020] VSCA 181, 7 [21]; *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCA 26, 16[44].

³⁹ *Director of Public Prosecutions Reference No. 1 of 2019* [2020] VSCA 181, 7 [21], 16 [44].

⁴⁰ *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic); Victoria, Parliamentary Debates, Legislative Assembly, 13 December 2012, 5549; *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCA 26, 23 [55].

Finally, changing the definition of recklessness would reverse the effect of redefining 'injury' and 'serious injury' which sought to increase the non-fatal offences threshold.⁴¹ These amendments were enacted to resolve the mischief that the offences were too readily made out because the threshold for serious injury was 'very low'.⁴² This amendment was made even in light of the higher threshold of foresight of probability of injury, yet offences were seen to be engaged at too low a threshold.⁴³ Imposing the meaning of recklessness as foresight of possibility would re-lower the threshold, therefore undermining the amendments operation.⁴⁴ It may be argued that the above provisions were amended based on an incorrect meaning recklessness arrived at in *Campbell*.⁴⁵ But this does not change the fact these amendments were made in light of *Campbell* recklessness.⁴⁶ The meaning of recklessness as involving a foresight of probability should be adopted in the *Crimes Act* because these provisions were amended in light of this test, and thus to adopt the alternative would change their intended operation.

⁴¹ Victoria, Parliamentary Debates, Legislative Assembly, 13 December 2012, 5550 – 5551; *Crimes Act 1958* (Vic) ss 15, 15B, 17, 18; *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCA 26, 17-18 [46]; *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 3.

⁴² C. Marshall & Associates, 'Acquitted Person's Submissions', Submission in *The Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 26 February 2021, 9 [24]; Victoria, Parliamentary Debates, Legislative Assembly, 13 December 2012, 5550-5551.

⁴³ *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCA 26, 40 [39].

⁴⁴ *Ibid*; C. Marshall & Associates, 'Acquitted Person's Submissions', Submission in *The Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 26 February 2021, 9 [24].

⁴⁵ Director of Public Prosecutions, 'Appellant's Submissions', Submission in *The Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 29 January 2021, 24 [57].

⁴⁶ Director of Public Prosecutions, 'Appellant's Submissions', Submission in *The Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 29 January 2021, 24 [57].

D Expanding the Scope of Criminal Liability

To adopt the test of recklessness which involves foresight of possibility would significantly extend the current scope of criminal liability for non-fatal offences which currently relies on the meaning as foresight of probability.⁴⁷ Such expansion will have detrimental impacts on potential offenders and the criminal justice system. Firstly, increasing the scope of liability means that more people will be convicted and face more severe punishments. Over half of the charges for recklessly causing serious injury result in imprisonment.⁴⁸ This will increase if the broader test is adopted. Further, maximum penalties have increased,⁴⁹ and minimum mandatory penalties have been imposed.⁵⁰ Therefore, the increased number of people convicted for non-fatal offences involving recklessness would also be subject to these greater penalties.

An increase in the number of people charged and convicted for non-fatal offences will increase pressure on the criminal justice system. First, more cases will be heard in the Magistrates Court,⁵¹ and result in court delays.⁵² Additionally, an increase in total cases heard will correspond with an increase in the number of imprisonments.⁵³ This would

⁴⁷ *Director of Public Prosecutions Reference No. 1 of 2019* [2020] VSCA 81, 33 [93], 44-45 [125].

⁴⁸ Sentencing Advisory Council, *Causing Serious Injury – Recklessly and Intentionally: Current Sentencing Practices* (Report, September 2011), 9; *Crimes Act 1958* (Vic) s 17.

⁴⁹ *Director of Public Prosecutions Reference No. 1 of 2019* [2021] HCA 26, 16 [44]; *Sentencing and Other Acts (Amendment) Act 1997* (Vic) sch 1 Item 11; C. Marshall & Associates, 'Acquitted Person's Submissions', Submission in *The Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 26 February 2021, 9 [26]; *Crimes Act 1958* (Vic) s 17.

⁵⁰ *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic); Victoria, Parliamentary Debates, Legislative Assembly, 13 December 2012, 5552; *Sentencing Act 1991* (Vic) s 10; *Crimes Act 1958* (Vic) s 15B; C. Marshall & Associates, 'Acquitted Person's Submissions', Submission in *The Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 26 February 2021, 3 [5].

⁵¹ 'Sentencing Council', *SACStat Magistrates' Court Causing serious injury recklessly* (Web Page, 31 October 2019) <https://www.sentencingcouncil.vic.gov.au/sacstat/magistrates_court/6231_17.tables.html>, archived at <<https://perma.cc/3CJL-6LAJ>>; 'Sentencing Council', *SACStat Higher Courts Causing serious injury recklessly* (Web Page, 21 July 2021) <https://www.sentencingcouncil.vic.gov.au/sacstat/higher_courts/HC_6231_17.tables.html>, archived at <<https://perma.cc/HQ44-F936>>.

⁵² Victoria, Parliamentary Debates, Legislative Assembly, 13 December 2012, 5550-5551.

⁵³ Sentencing Advisory Council, *Causing Serious Injury – Recklessly and Intentionally: Current Sentencing Practices* (Report, September 2011), 9.

increase costs to the state as each additional prisoner costs \$323.45 per day.⁵⁴ Therefore, lowering the threshold for recklessness will expand the scope of criminal liability which will have significant impacts on potential offenders and the justice system.

IV OBJECTIVE V SUBJECTIVE

A Appreciation of Risk

A subjective standard should be adopted in assessing the accused's foreseeability of probable harm. This requires assessing their state of mind.⁵⁵ Courts and legislatures have adopted this approach when defining recklessness for multiple offences.⁵⁶ Offences such as reckless murder requires an awareness of the risk of death and culpable driving causing death occurs where the accused 'consciously and unjustifiably disregards the substantial risk'.⁵⁷ Additionally, criminal liability ordinarily rests on what the accused 'knew' or 'foresaw', rather than what a reasonable person foresaw. Furthermore, liability for serious crimes requires finding fault to satisfy the mens rea.⁵⁸ It is not enough that the accused acted voluntarily in a reprehensible manner, but the accused must have done so with a 'guilty mind'.⁵⁹ Therefore, the accused's appreciation of risk is paramount in establishing recklessness.

A subjective test of foreseeability takes into account relevant factors when assessing the accused's failure to foresee risk.⁶⁰ Some individuals may lack a prudent person's perception

⁵⁴ 'Corrections Statistics: Quick Reference', *Corrections, Prisons & Parole* (Web Page, 30 June 2020) <<https://www.corrections.vic.gov.au/prisons/corrections-statistics-quick-reference>>, archived at <<https://perma.cc/EF5E-K823>>.

⁵⁵ *DPP* [2020] VSCA 181, 50 [142] (Kaye JA); Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (Report, October 2011).

⁵⁶ Findlay Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge University Press, 2016).

⁵⁷ *Ibid*, 38-39; *Crimes Act 1958* (Vic) s 318.

⁵⁸ Lord Irvine, 'Intention, Recklessness and Moral Blameworthiness: Reflections on the English and Australian Law of Criminal Culpability' (2001) 23(5) *Sydney Law Review* 5.

⁵⁹ Stavros Demetriou, 'Not Giving Up the Fight: A Review of the Law Commission's Scoping Report on Non-fatal Offences Against the Person' (2016) 80(3) *The Journal of Criminal Law* 188.

⁶⁰ Cath Crosby, 'Recklessness - the continuing search for a definition' (2008) 72(4) *Journal of Criminal Law* 313.

of risk. For example, young people's perception may differ from adults.⁶¹ This raises the concern that blameworthy individuals would avoid criminal liability simply because they did not appreciate the risk.⁶² Criminal liability is required as a form of deterrence and community protection, particularly due to the effect that crimes have on victims' lives.⁶³ Nevertheless, it would be unjust to convict an individual for a serious crime when they had no awareness of the risk involved.⁶⁴ *R v G* overturned *Caldwell* for its incorporation of an objective test of foreseeability.⁶⁵ The court argued that *Caldwell* allows young people or people with mental incapacity to be criminally liable for their 'inability, through no fault of their own, to match the standard of a reasonable person'.⁶⁶ Adopting an objective test when determining the accused's foreseeability of risk would result in the expansion of criminal liability as the jury would not have to assess the accused's state of mind to determine risk foreseeability.⁶⁷ An increase in minimum sentences in the *Crimes Act* indicates the seriousness of the offence of recklessness.⁶⁸ The test needs to mirror the seriousness of the offence. Serious offences should not be readily established by the incorporation of a purely objective test. Although *Nuri* suggests a combination of subjective and objective intent to establish the accused's foreseeability of harm, it would be difficult for juries to grasp and apply such a test.⁶⁹ Thus, a subjective assessment should be adopted.

⁶¹ Ibid 320.

⁶² Ibid 315.

⁶³ Georgina Fuller, 'The serious impact and consequences of physical assault. Trends and Issues in Crime and Criminal Justice' (2015) 496 *Australian Institute of Criminology*.

⁶⁴ Alan Norrie, *Crime, Reason and History: A critical introduction to Criminal law* (Cambridge University Press, 2014).

⁶⁵ *R v G* [2004] 1 AC 1034

⁶⁶ Ibid.

⁶⁷ Alan Norrie, *Crime, Reason and History: A critical introduction to Criminal law* (Cambridge University Press, 2014), 76.

⁶⁸ *Crimes Amendment (Gross Violence Offences) Act 2013*; Parliamentary Debate 5549; M131/2020.

⁶⁹ *DPP* [2020] VSCA 181 44 [124] (Priest JA); *R v Nuri* [1990] VR 641.

B Scale of Seriousness⁷⁰

A subjective approach for assessing the accused's state of mind should be adopted because an objective approach would render an inadvertent risk-taker reckless, rather than negligent, and thus disrupt the 'ladder' of culpability embedded in the *Crimes Act*.⁷¹ The *Crimes (Amendment) Act* introduced several offences against the person that are ordered on a 'scale of seriousness'.⁷² Intention, recklessness and negligence are ranked in order of blameworthiness,⁷³ where intention has the highest level of culpability, followed by recklessness then negligence.⁷⁴ This ladder of culpability is reflected in the offence's graded structure of maximum penalties.⁷⁵ Recklessness describes the state of mind of a person who is aware of the risk that a certain consequence is likely to result.⁷⁶ Negligence involves a 'great falling short' of the 'standard of care' which a 'reasonable person' would have exercised.⁷⁷ Thus negligence involves an inadvertence of risk.⁷⁸ Lord Diplock in *Caldwell* adopted an objective approach to foresight and held that the accused is reckless if they had not given any thought to the possibility of a risk.⁷⁹ This approach renders an accused reckless where they are inadvertent to the risk of harm.⁸⁰ But inadvertence is the essence of negligence.⁸¹ Adopting an objective approach undercuts the division between reckless and

⁷⁰ *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic); Victoria, Parliamentary Debates, Legislative Council, 25 September 1985, 201.

⁷¹ *Crimes Act 1958* (Vic)

⁷² *Ibid*; Victoria, Parliamentary Debates, Legislative Council, 25 September 1985, 201.

⁷³ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014), 77-78; Victoria, Parliamentary Debates, Legislative Council, 25 September 1985, 201.

⁷⁴ *Director of Public Prosecutions Reference No. 1 of 2019* [2020] VSCA 81, 49 [140]; Victoria, Parliamentary Debates, Legislative Council, 25 September 1985, 201.

⁷⁵ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014), 77-78; Sentencing Advisory Council, *Maximum Penalties: Principles and Purposes: Preliminary Issues Paper* (Issues Paper, October 2010), 10 [3.18], 12 [3.28].

⁷⁶ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017), 215.

⁷⁷ *R v Shields* [1981] VR 717, 723-725; *Nydam v R* [1977] VR 430, 44-445; *Director of Public Prosecutions Reference No. 1 of 2019* [2020] VSCA 81 49 [140].

⁷⁸ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014), 77-78.

⁷⁹ *R v Caldwell* [1981] 2 WLR 509; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014), 74.

⁸⁰ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014), 77-78.

⁸¹ *Ibid*.

negligent conduct by rendering the inadvertent risk-taker reckless.⁸² This disrupts the 'scale of seriousness' adopted in the *Crimes Act*.⁸³ Therefore, a subjective attribution of awareness of risk should be adopted.⁸⁴

V REASONABLENESS

The definition of recklessness should incorporate an 'unreasonableness' qualification. This is a distinct test that will result in the definition encompassing separate subjective and objective elements: the subjective element of the foresight of probability and the objective element of unreasonableness. Adopting the 'unreasonableness' requirement provides a balanced approach of incorporating a subjective element of recklessness that considers the subjective intent of the accused, whilst also considering the objective reasonableness and the social utility of the act. If the accused was aware of the probability of causing harm, it is necessary to then assess whether their conduct has any social utility. *Aubrey* appreciated the importance of social utility whereby the foresight of causing harm from driving for example, carries social utility. However, the High Court decided that such an additional burden was not required since juries will apply such a test using common sense.⁸⁵ Nevertheless, similar to UK cases, 'unreasonableness' should be made an explicit requirement when establishing recklessness.⁸⁶

⁸² Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014), 77-78.

⁸³ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014), 98; Victoria, Parliamentary Debates, Legislative Council, 25 September 1985, 201.

⁸⁴ Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014), 77-78; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017), 215.

⁸⁵ *Aubrey* (2017) 260 CLR 305 12-13 [37]-[38].

⁸⁶ United Kingdom, Criminal Law Revision Committee, Fourteenth Report: Offences Against the Person (1980).

VI CONCLUSION

The VLRC should adopt our recommended definition because the definition is consistent with case law, is the basis of which *Crimes Act* provisions were amended, and to adopt the alternative of possibility expands the scope of criminal liability which is detrimental.⁸⁷

Further, a subjective approach should be adopted in assessing the accused's state of mind because of the level of seriousness of criminal offences.⁸⁸ This should be balanced with the incorporation of an objective 'unreasonableness' element.

⁸⁷ *Director of Public Prosecutions Reference No. 1 of 2019* [2020] VSCA 81, 33 [93], 44-45 [125].

⁸⁸ Victoria, Parliamentary Debates, Legislative Council, 25 September 1985, 5549; C. Marshall & Associates, 'Appellant's Submissions', Submission in *The Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 29 January 2021.

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