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I. BACKGROUND

The definition of the term recklessness in the context of the *Crimes Act 1958* (Vic) is ripe for reform.[1] Currently, recklessness is understood differently in Victoria and in New South Wales ('NSW'). In *Aubrey v The Queen* ('*Aubrey'*), the High Court of Australia defined recklessness, in the NSW context, as the accused having foresight of the *possibility* of harm.[2] Contrarily, the Victorian Court of Appeal in *R v Campbell* ('*Campbell*'), in dealing with the statutory offence of recklessly causing serious injury,[3] found the degree of recklessness required as the accused having foresight of the *probability* of harm.[4] This disagreement came to a head in the recent *Director of Public Prosecutions Reference No 1 of 2019* ('*DPP HCA*'), with the Court asked to clarify the Victorian definition of recklessness.[5] At first instance, the Victorian Court of Appeal found that 'unless and until it is altered by legislation, the meaning of 'recklessly' … is that stated by the Court of Appeal in [*Campbell*]'.[6] On appeal, the High Court of Australia by a 4:3 majority confirmed the degree of recklessness required to satisfy the definition as the foresight of the *probability* of harm.[7] However, the High Court decision raises more questions than it does answers.

Undoubtedly, both the *probability* definition and the *possibility* definition have merit. However, given the clear split on the High Court in *DPP HCA,* the time is right for a new definition of recklessness to be inserted into the *Crimes Act.*[8]. This submission argues that both the NSW and Victorian definitions for recklessness imply a mathematical measurability which is inappropriate in the context of determining reckless behaviour. Rather, a definition modelled on that of sch 1 of the *Criminal Code*

[1] *Crimes Act 1958* (Vic) ('*Crimes Act*').
[2] (2017) 260 CLR 305, 327–9 [43]–[47] ('*Aubrey*').
[3] *Crimes Act* (n 1) s 17.
[4] [1997] 2 VR 585, 593 (Hayne JA and Crockett AJA) ('*Campbell*').
[5] [2021] HCA 26 ('*DPP HCA*').
[6] *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181, 2 [6] (Maxwell P, McLeish and Emerton JJA) ('*DPP VSCA*').
[7] *DPP HCA* (n 5).
[8] *Crimes Act* (n 1).

Act 1995 (Cth) is proposed.[9] This submission contends that this definition is more flexible in its scope, simpler in its application and it betters promotes substantive justice.

II. PROPOSED DEFINITION

The proposed definition is:

> A person is reckless with respect to a situation if that person is
>
> a) aware of a substantial risk; and
> b) having regard to the specific circumstances known to the person, it is unjustifiable to take the risk.

Each of the underlined terms will be outlined.

A. AWARE

The accused person must have been consciously aware of the specific risk in the circumstances.

B. SUBSTANTIAL RISK

The use of the term substantial imports a reasonable observer enquiry into the definition. It asks: Would a reasonable person have considered the risk in the specific circumstance to be substantial?[10]

The term substantial is defined, as in many Australia legal dictionaries, as '[r]eal or of substance, as distinct from ephemeral or nominal'.[11] However, the term is intentionally vague as discussed below.

C. UNJUSTIFIABLE

Even if the risk is substantial and the accused was aware of it, if the risk taking was justifiable the accused may be discharged. The question is asked from an objective

[9] *Criminal Code Act 1995* (Cth) sch 1, s 5.4 ('*The Criminal Code*').
[10] See *Wilson v the Queen* (1991) 174 CLR 313 for a similar formulation in a different context.
[11] *Concise Australian Legal Dictionary* (LexisNexis Butterworths, 5th ed, 2015) 607.

standpoint, judging the accused by reference to the frailties of ordinary, reasonable human beings.[12]

III. MAIN ARGUMENTS

A. Possible and Probable — The Problems

Current definitions for recklessness in both NSW and Victoria suggest that risk can be assessed along some mathematical spectrum such that a jury can determine whether the serious injury was possible or probable in the context of the act.[13] It is argued that an algorithmic solution to the question of recklessness is neither feasible nor desirable. Each jurisdiction's test is considered in turn.

1. Possible

For a jury to find that an accused acted recklessly under the NSW definition, the accused must have had foresight of the *possibility* of harm.[14] In everyday usage and as the legal definition, possibility means 'the chance that something may … happen'.[15] This is a lower bar than the test of *probability*. Inherent in an infinite number of activities is at least the possibility of serious injury — driving a car at the legal speed limit, carefully handling a sharp kitchen knife and playing golf in an open field. Obviously, people are not considered to have acted recklessly when engaging in these everyday activities. The ostensible 'saving grace' in the legislation is the need for the jury to find that the act lacked social utility.[16] Activities which are considered normal, such as using a kitchen knife, are not reckless because the activity has social utility. Yet, all Australian definitions of recklessness in the context of serious injury include some element of lacking social utility or justifiability. One cannot point to this second limb (social utility) to make a case for the first limb (possibility), which cannot distinguish

[12] *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 675 (Deane J).
[13] For NSW, see *Aubrey* (n 2) 326–31 [41]–[51] (Kiefel CJ, Keane, Nettle and Edelman JJ). For Victoria, see *R v Crabbe* (1985) 156 CLR 464, 469–70 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ) ('*Crabbe*'); *R v Nuri* [1990] VR 641, 643 (Young CJ, Crockett and Nathan JJ ('*Nuri*'); *DPP VSCA* (n 6) 2 [6] (Maxwell P, McLeish and Emerton JJA); *DPP HCA* (n 5) 12 [35] (Kiefel CJ, Keane and Gleeson JJ).
[14] *Aubrey* (n 2) 326–31 [41]–[51] (Kiefel CJ, Keane, Nettle and Edelman JJ).
[15] *Merriam-Webster* (online at 9 September 2021) 'possibility'.
[16] *Aubrey* (n 2) 330 [49] (Kiefel CJ, Keane, Nettle and Edelman JJ).

reckless acts from normal acts. A definition which is not limiting in its scope is hardly a definition at all.

2. Probable

Realising the deficiencies in the current NSW test should not lead one to accept Victoria's definition for recklessness as it too falsely suggests some mathematic measurability which, upon application, does not exist and only serves to confuse a jury. Generally, something is probable if it is likely to occur, even if the occurrence is not guaranteed.[17] Therefore it is *more difficult* for a jury to be satisfied that an accused was aware of the *probability* of harm than it is to find that the accused was aware of the *possibility* of such an occurrence. Thus, the word probability implies a level of measurability which can lead to problematic conclusions. Consider the case facts in *Aubrey*: say the accused had researched extensively before engaging in unprotected sex with the complainant and discovered that there was less than a 50% chance that sex would lead to transmission of the disease.[18] Despite receiving advice from medical practitioners about the need to adopt safe sex practices to reduce the risk of HIV transmission, the accused might argue that transmission could not have been foreseen as probable.[19] Although a precise mathematic enquiry is not desirable, it is embedded in the semantics of the word probable. A better definition must direct juries to enquire about the nature of the particular action and the likelihood of risk in the context of that action. Definitions like *possible* and *probable* distract from this objective and can lead jurors down problematic rabbit holes of trying to determine the mathematical likelihood of a certain action *causing* a certain result.[20]

One ostensible strength of the *probability* test is that it carries the weight of precedent and that legislative amendments presumed the *Campbell* definition for recklessness.[21] Bemoaning the unfortunate consequences of the decision to stick with the *probability* definition for recklessness, Edelman J wrote, 'the development of the law by the

[17] *Merriam-Webster* (n 14) 'probable'.
[18] *DPP VSCA* (n 6) 26 [82] (Priest JA).
[19] For a similar example, see *DPP HCA* (n 5) 38–9 [88] (Edelman J).
[20] See Model Criminal Code Officers' Committee, 'Model Criminal Code Chapters 1 and 2 – General Principles of Criminal Responsibility' (Report, December 1992) 27.
[21] See *DPP VSCA* (n 6) 38–9 [123] (Priest JA); *DPP HCA* (n 5) 6–12 [18]–[34] (Kiefel CJ, Keane and Gleeson JJ), 39–41 [89]–[95] (Edelman J).

exercise of legislative power, in its usual prospective operation and as a product usually of careful policy consideration, is not constrained in the same way as judicial power'.[22] Edelman J's judgment thus sounds much like a call to arms for law reform through Parliament, indicating that outside the context of the courts, precedent arguments are not very persuasive.

B. A Value Judgment

A key difference in the proposed definition, as opposed to the *possibility* and *probability* definitions, is the inclusion of the reasonable observer question as part of both the substantial risk and the justifiability enquiries. Whereas the *probability* and *possibility* test are subjective in their respective analyses,[23] the questions of whether there existed a substantial risk and if so, whether the risk taker was justified in taking that risk are both objective and require 'the jury [to] make a moral or value judgment'.[24]

The importation of a value judgment into the definition provides for better flexibility in its use, encourages more diversity in its application and ensures greater simplicity for jurors.

1. Flexibility

Undoubtedly, the objective standards to be applied at each stage of the enquiry are vague. However, such ambiguity is not accidental. Indeed, Gray J of the Supreme Court of South Australia in *Hann v Commonwealth* explained that '[t]his "irreducible indeterminacy of meaning" appears to be a deliberate attempt by the legislature to provide flexibility' in the application of the definition.[25] Relevantly, recklessness is part of many different offences in the *Crimes Act*, with each offence varied in the 'context and gravity of the criminal activity'.[26] The vagueness of the term substantial allows for the application of a different degree of substantiality depending on the different offence,

[22] *DPP HCA* (n 5) 43 [101].
[23] *DPP VSCA* (n 6) 39 [124] (Priest JA).
[24] See *R v Saengsai-Or* (2004) 61 NSWLR 135, 147 [70] (Bell J).
[25] (2004) 88 SASR 99, 106 [23] ('*Hann*').
[26] Ibid.

with many academics arguing that '"substantial risk" can include "possible risk" in offences other than murder.[27]

Further, the requirement that the substantial risk be unjustifiable to constitute recklessness allows for greater temporal flexibility in the application of the test. What might be a justifiable risk in 1975 could be unjustified in 2025. Consider this: in 1975, open brain surgery was justifiable in many circumstances to treat aneurisms. Of course, the risk of the patient not recovering was substantial but this risk was justified as otherwise the patient might die. Nowadays, however, less invasive surgeries exist and as such, open brain surgery would be less justified. Critically, though, the test does not need updating as it is adaptive to changing environments, eras and conflicts.

2. Diversity and Simplicity

Although the criminal justice system has issues promoting full diversity in juries,[28] the values based test in the proposed definition helps ensure diverse reasoning and decision making. Putting the question of whether the accused was justified in taking a substantial risk to the jury means an ideally diverse set of jurors can draw on their personal values, experiences and backgrounds to inform the enquiry. Accordingly, each decision will be a real and honest reflection of an amalgamation of diverse values present in society.

Arguably, the tests for both *probability and possibility* have disguised within them a requirement of the accused to act reasonably in the circumstances. Edelman J in *DPP HCA* suggests that the reasonableness enquiry too allows jurors to include a normative consideration in their assessment of recklessness.[29] Instead of using a judicial gloss to depart from the plain meaning of the world probability, a clear definition which incorporates this normative assessment at the first stage of a recklessness enquiry should be preferred.[30]

Moreover, it is of utmost importance that 'any general codification of the criminal law should be … in terms which can be comprehended by the citizen … and by a jury of

[27] Ibid [24].
[28] See Robert Waters, 'Race and the Criminal Justice Process: Two Empirical Studies on Social Inquiry Reports and Ethnic Minority Defendants' (1988) 28(1) *The British Journal of Criminology* 82.
[29] *DPP HCA* (n 5) 33 [75] (Edelman J).
[30] See *Boughey v The Queen* (1986) 161 CLR 10, 21 (Mason, Wilson and Deane JJ).

citizens empaneled to participate in its enforcement'.[31] The unclear mathematical measurements coupled with the unwritten reasonableness enquiry might be understandable for our High Court justices but will result in confusion for jurors. On the other hand, the terms substantial and justifiable are terms that need little, if any, further explanation. Jurors are afforded a simple instruction when asked to adjudicate on the recklessness of the accused.

C. Broader Values

Having unpacked the flaws in the both the Victorian and NSW definitions in argument A, and posing normative arguments in support of a new definition in argument B, argument C canvasses the ways in which a substantial risk definition for recklessness can better promote two fundamental goals of the criminal justice system.

1. Public Perception

'Justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[32] These remarks, now almost 100 years old, are most commonly used to support the requirement for judicial independence. However, the remarks serve as a general reminder that public perception of the judicial system is paramount. In this context, justice can only be seen to be done if the public properly comprehend the offences with which accused persons are charged. It is one thing for the High Court judges to have confidence in the definitions of *probable* and *possible* but another thing entirely for the public to have confidence in the system. The simplicity of the proposed definition has the ability to enhance public confidence.

2. Consistency

The substantial risk test is one that has been properly applied in the Commonwealth context.[33] As an added benefit, adopting the proposed definition can promote consistency between Victorian and Commonwealth legislation.[34] Despite Gordon J's statement in *Strickland v Director of Public Prosecutions (Cth),* suggesting that

[31] Ibid.
[32] *R v Sussex Justices* [1924] 1 KB 256, 259 (Lord Hewart).
[33] See *Hann* (n 23).
[34] *DPP HCA* (n 5) 43 [101] (Edelman J).

consistency between the states should not be a priority in the context of making a declaration about a proper criminal test, where all else is equal, striving towards consistency between the states better promotes substantive justice and helps to maintain clarity in the law for the people to whom the law applies.[35] Thus, as an ideal, a definition which is suitable in the Victorian context *and* is consistent with the Commonwealth code, is preferred over a definition which is inconsistent with the Commonwealth code.

IV. CONCLUSION

The legal definition of recklessness has real implications on the Victorian criminal justice system, particularly in the context of offences against the person.[36] It is therefore imperative that the meaning of recklessness can be easily understood and flexibly applied to help ensure that substantive justice is achieved in each case. By codifying the proposed definition in the *Crimes Act*, the overarching goals of the criminal justice system may be better pursued.

[35] (2018) 266 CLR 325, 397 [199].
[36] *Crimes Act* (n 1) pt 1 div 1 sub-div 4.

V. BIBLIOGRAPHY

A. ARTICLES/BOOKS/REPORTS

Concise Australian Legal Dictionary (LexisNexis Butterworths, 5th ed, 2015)

Model Criminal Code Officers' Committee, 'Model Criminal Code Chapters 1 and 2 – General Principles of Criminal Responsibility' (Report, December 1992)

Waters, Robert, 'Race and the Criminal Justice Process: Two Empirical Studies on Social Inquiry Reports and Ethnic Minority Defendants' *The British Journal of Criminology* (1988) 28(1) 82

B. CASES

Aubrey v The Queen (2017) 260 CLR 305

Blackwell v The Queen (2011) 81 NSWLR 119

Boughey v The Queen (1986) 161 CLR 10

Darkan v The Queen (2006) 227 CLR 373

Director of Public Prosecutions Reference No 1 of 2019 [2020] VSCA 181

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

Hann v Commonwealth (2004) 88 SASR 99

R v Alif (2012) 274 FLR 1

R v Campbell [1997] 2 VR 585

R v Coleman (1990) 19 NSWLR 467

R v Crabbe (1985) 156 CLR 464

R v Nuri [1990] VR 641

R v Saengsai-Or (2004) 61 NSWLR 135

R v Sussex Justices [1924] 1 KB 256

Salvation Army (Vic) Property Trust v Fern Gully Corporation (1952) 85 CLR 96

Strickland v DPP (Cth) (2018) 266 CLR 325

Wilson v the Queen (1991) 174 CLR 313

Zecevic v DPP (Vic) (1987) 162 CLR 645

C. LEGISLATION

Crimes Act 1958 (Vic)

Criminal Code Act 1995 (Cth) sch 1, s 5.4 ('*The Criminal Code*').

D. OTHER

Merriam-Webster (online at 9 September 2021)