SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION

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This submission was prepared by the authors in their personal capacity. The views expressed in the submission are the authors' views alone.

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I INTRODUCTION

A Proposed definition

In response to the Victorian Government's determination that a definition of 'recklessness' should be included in section 15 of the *Crimes Act 1958* (Vic) ('*Crimes Act*'), we propose the following definition:

*Reckless: A person will be reckless if they foresaw the **probability** of serious injury and proceeded nonetheless.*

B Previous definitions

In this submission, we refer to two definitions of recklessness. The first is the Department of Public Prosecution's (DPP) definition, drawn and modified from the discussion in *Aubrey v The Queen* (*Aubrey*),[1] that for a person to be convicted of recklessly causing serious injury (RCSI), the prosecution must establish that:

> *(a) the person foresaw that his/her act might cause serious injury;*[2] *and*
> *(b) the risk of causing serious injury was, on an objective assessment of the circumstances including the social utility of the act, an unreasonable risk for him/her to take.*[3]

The DPP has advocated for the threshold of foresight to be 'possible', while also including a 'brake on liability' by incorporating the second objective limb (without which, an infinite array of scenarios where a risk of serious injury is 'possible' would result in a limitless expansion of criminal liability).[4] The DPP's argument was based on *Aubrey*, where the joint judgment held that the appropriate threshold in the context of the specific NSW statute analysed was 'possibility', but that an additional direction may be required if it is suggested that the risk is a *reasonable* one to take.[5] We refer to this definition as the 'modified *Aubrey* definition'. Contrary to this approach, we will argue that retaining the higher threshold of 'probability' is desirable and removes the requirement for a brake on liability.

The second definition referred to in our submission is drawn from *R v Campbell*:[6] for a conviction of RCSI, the prosecution must establish:

> *that the person foresaw the* ***probability*** *of serious injury and proceeded nonetheless.*[7]

We will refer to this as the *Campbell* definition. For the reasons set out below, we propose that the Government legislate in line with the *Campbell* definition.

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[1] [2017] HCA 18 ('*Aubrey*').
[2] This has also been interpreted as a person foreseeing the 'possibility' of serious injury.
[3] *Director of Public Prosecutions Reference No. 1 of 2019* [2020] VSCA 181 [42] ('*DPP Reference — Court of Appeal'*).
[4] See *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, 30 [70] (Edelman J) ('*DPP Reference — High Court'*).
[5] This additional limb was not specifically applied in *Aubrey* as the case only rested on whether the jury was satisfied that the appellant was the source of the complainant's infection: at [51].
[6] [1997] 2 VR 585 ('*Campbell*') (emphasis added).
[7] *DPP Reference — Court of Appeal* (n 3) [2], summarising the definition put forward at [492] in *Campbell*.

II POLICY REASONS BEHIND PROPOSED DEFINITION

A Desirability for subjectivity

The purely subjective *Campbell* test for RCSI is desirable from a legislative standpoint. Firstly, the high maximum sentence of 15 years for RCSI demonstrates the legislature's determination that RCSI carries with it a high degree of moral culpability. Criminal responsibility should therefore rest on what the accused *subjectively* knew or thought — not what the jury objectively imputes is reasonable or unreasonable in the circumstances (as in limb (b) of the modified *Aubrey* test). From a policy standpoint, we contend it is more *just* for such a serious conviction to rest on the accused's *actual* state of mind. If this subjectivism is overridden by a judgment by the jury of the social utility of the act, and the reasonableness of taking that risk in those circumstances, a conviction may rest on a 'nebulous judgment' of the extent of that risk as understood by a reasonable person.[8] Generally speaking, criminal responsibility rests on the subjective mind of the perpetrator and we see little exception in warranting a departure from this in cases of RCSI.[9]

Secondly, the efficacy of the *Campbell* definition for RCSI has been proven over time. As noted by Priest JA, this subjective definition is 'straightforward and relatively simple for juries to apply'.[10] According to His Honour, the test has no 'complicating objective components', and case history reveals that this test has been easily understood and applied by juries.[11]

B Desirability for consistency in test for murder and RCSI

Beyond the objective/subjective debate, we submit that the most compelling policy reason behind the *Campbell* definition is that the definition for recklessness in RCSI should be consistent with the common law definition of reckless murder. In Victoria, when reckless murder is considered by the jury, the jury must assess whether the accused committed the acts that killed the victim 'knowing that it was ***probable*** that death or really serious injury would result'.[12] The threshold of 'probable' and purely subjective nature of the test for reckless murder is consistent with the threshold and subjectivity of the *Campbell* definition.

Pragmatically, retaining this consistency would assist in the correct, consistent functioning of jury determinations. In cases where a jury must consider both charges (reckless murder and RCSI), retaining a

[8] Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 2nd ed, 2014) 87.
[9] *DPP Reference — Court of Appeal* (n 3) [44].
[10] Ibid [124] (Priest JA).
[11] Ibid.
[12] Judicial College of Victoria, 'Intentional or Reckless Murder', *eManual* (Web Page, 27 March 2019) [3.2] < https://www.judicialcollege.vic.edu.au/eManuals/CCB/4478 htm> (emphasis added).

uniform definition will minimise the risk of miscomprehension and misapplication of the recklessness test. If the objective definition were adopted, the jury would be tasked with applying a two-pronged test for RCSI, with a lower subjective threshold of the accused 'possibly' foreseeing the risk, and then a subjective definition with a higher threshold of 'probably' foreseeing the risk when determining reckless murder. We submit this is overly complicated and would require significant jury direction, which has the potential to lead to mistrials — itself, an undesirable outcome due to the potential to unnecessarily drain judicial resources.

Illustrating this point is the recent case of *Director of Public Prosecutions (Vic) v Gargasoulas*,[13] in which the defendant was found guilty of six counts of murder and 27 charges of reckless conduct endangering life — a similar recklessness-based charge.[14] It would have been confusing for the jury and may have complicated jury directions if the judge was required to explain two separate definitions of recklessness in this case.

Second, this proposed consistency of definitions supports the broader objective of promoting understanding of the law, and thus trust in it. By retaining the same standard for recklessness between the two crimes, the essential elements of the crimes are easier for the broader public to understand. This understanding can engender certainty and trust in the laws themselves and the way they are applied in the judicial process.

C Desirability for consistency need not extend beyond this

We recognise that in other contexts involving recklessness in the *Crimes Act*, elements of objectivity are present. For example, for dangerous driving, 'all the circumstances of the case' are taken into account.[15] Additionally, for recklessly causing a bushfire, a partial negative definition exists such that a person can escape liability if their conduct was 'justified in the circumstances'.[16] We contend that it is more likely that defendants will be accused of both reckless murder and RCSI, than for example, arson and RCSI, and therefore the desirability of having a consistent definition for reckless murder and RCSI outweighs the desirability of consistency across provisions in the *Crimes Act*.

It will also likely be contended in other submissions that Victoria should advance a definition of recklessness in line with that of NSW, such that 'probability' should be replaced with 'possibility' in line with the High Court's interpretation in *Aubrey*. This contention will likely be based on the desirability of

[13] [2019] VSC 87.
[14] Ibid.
[15] *Crimes Act 1958* (Vic) s 319(1).
[16] *Crimes Act 1958* (Vic) s 201A(2)–(3).

treating 'like provisions alike', thereby promoting trust in legal systems.[17] Noting that this is a valid policy aim, we agree with the Respondent's submissions[18] that Australia's federal structure brings with it plural criminal systems, where state legislatures are responsible for enacting criminal laws.[19] Additionally, in NSW, the definition of 'recklessness' is in the context of 'maliciously inflicting grievous bodily harm'[20] — wording which is quite different from RCSI. We contend that the policy aim of consistency *between* states should therefore not take priority as a policy point over the other arguments raised in our submission.

D Will this result in a 'lacuna' where offences do not meet the mens rea threshold of 'probable'?

To be convicted under the *Crimes Act* for causing serious injury, the prosecution must establish the requisite mental element: intention, recklessness or criminal negligence.[21] Intention and recklessness are more culpable mental states than negligence, as is reflected in maximum sentencing, where RCSI carries a maximum sentence of 15 years imprisonment, and negligently causing serious injury, a sentence of 10 years.[22] Thus, there may be circumstances where the subjective degree of foresight of the accused will not meet the threshold of 'probable' (but would have met the 'possible' threshold), and the prosecution will have to fall to a less culpable threshold in order to procure a conviction.

In his reluctant acceptance of the test in *Campbell* as the correct test in Victoria, Edelman J raises these concerns of 'surprising results' in this application.[23] He poses a hypothetical where a driver on a quiet road at midnight without headlights strikes a pedestrian: they 'would not have foreseen as probable that any person would be on the road…[and] might successfully defend a charge under s 17 [RCSI].'[24]

To counter, if the pedestrian died as a result, the driver would not meet the definition of reckless in s 318(2)(a) of the *Crimes Act* and would instead likely be found culpable by negligence in s 318(2)(b) in the alternative. So too, we would argue, that his Honour's hypothetical driver would be captured instead by s 24, negligently causing serious injury. Or if no injury or minor injury, at the very least revocation of the

[17] Appellant, 'Reply', Submission in *Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 26 February 2020 [30].
[18] Acquitted Person, 'Acquitted Person's Submissions', Submission in *Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 26 February 2020.
[19] Ibid [43].
[20] *Aubrey* (n 1)
[21] *Crimes Act 1958* (Vic) ss 17, 18, 24.
[22] *Crimes Act 1958* (Vic) s 17.
[23] *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26 [88].
[24] Ibid.

driver's licence. We submit that this is a desirable outcome. This also advances our submission that the Victorian Government should adhere to a policy of minimal criminalisation. RCSI has a high maximum penalty (15 years' imprisonment) and should not capture defendants who are not highly morally culpable (by for example intending to bring about the outcome, or being reckless as to the outcome).

Furthermore, statistics show that this offence leads to a sentence of imprisonment in 86.3% of charges.[25] An extremely high incarceration rate is unnecessary and potentially more harmful for an accused who did not foresee the *probability* of a pedestrian being on the road late at night, utilising the example of Edelman J.

Higher rates of incarceration generally are also likely to disproportionately affect Aboriginal peoples and marginalised communities. Aboriginal and Torres Strait Islander peoples in Victoria are 11 times more likely to be incarcerated than the general population.[26] It is also suggested that there is an over-policing of Aboriginal peoples, highlighted by the fact that they are 10.7 times more likely than all Victorians to be identified as an offender in public behaviour offences.[27]

III CASE STUDY – APPLYING POLICY CONSIDERATIONS TO *AUBREY*

Many of these policy considerations manifested in the outcome of *Aubrey*. Until *Aubrey*, the distinction between 'possibility' and 'probability' in case law has been immaterial.[28] It could be classified as one such 'surprising result' put forth by Edelman J.[29] Hunt J in *R v Coleman*[30] explicitly stated that 'there is no real chance that the jury would not have been satisfied that some physical harm was foreseen as a probable or likely (as opposed to possible)'.[31] Similarly, Hall J in *Blackwell v The Queen*[32] held that the accused 'realised that his act…would very *likely* cause him grievous bodily harm'.[33]

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[25] Sentencing Advisory Council, 'Causing serious injury recklessly', *SACStat Higher Courts 1 July 2015 to 30 June 2020* (Web Page) <https://www.sentencingcouncil.vic.gov.au/sacstat/higher_courts/HC_6231_17.html>.
[26] Victorian Aboriginal Legal Service, *Aboriginal Community Justice Reports: Addressing Over-Incarceration* (Discussion Paper, October 2017) 3.
[27] Ibid.
[28] See generally DPP (Vic), 'Appellant's Submissions', Submission in the *Director of Public Prosecutions Reference No 1 of 2019*, M131/2020, 20 January 2021.
[29] *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26 [88].
[30] (1990) 19 NSWLR 467.
[31] Ibid 476.
[32] (2011) 81 NSWLR 199.
[33] Ibid [172] (emphasis in original). Hall J in dissent but agreeing with the majority that the test is foresight of possibility of harm (cf. probability).

That the distinction between possibility and probability was material in *Aubrey* was not discussed in the judgment and only alluded to in the appellant's submissions.[34] Some discussion is found in *Zaburoni v The Queen*,[35] a case similar in fact involving transmission of HIV. It was held that the crown did not prove their case for intentionally transmitting HIV: 'the furthest it went was to show that the appellant foresaw there was a possibility that, by having unprotected sexual intercourse with the complainant, he would infect the complainant with HIV'.[36] The expert medical evidence suggested a 0.1% risk of transmission per encounter and an overall risk across the relationship to be 14%.[37] Both are improbable at best.

This is not to say that there were no wrongs done against the victims in these cases. There was transmission of a lifelong infection that carries a large health risk and stigmatised burden. However, a criminal response is not the answer to redressing such wrongs and has done more harm than good for the overall public health response to HIV.[38] At best, the moral turpitude of the accused would amount to no more than negligence.

These cases that fall between the thresholds of possibility and probability exemplify our concerns throughout this submission of increasing criminal liability generally.

IV Conclusion

The High Court confirmed the current definition of recklessness in Victoria for the purposes of s 17 of the *Crimes Act* is of foresight of probability of harm and not possibility.[39] The decision was by bare majority and the plurality left the window open for change by the legislature. In his single deciding judgment, Edelman J went even further to suggest that the legislature *should* adopt the *Aubrey* definition; conceding that the change cannot come from the bench and thus the current definition is correct for now.

We respectfully disagree and submit that the *Campbell* definition is preferred and should be affirmed in legislation. Throughout this submission we have looked broader and beyond the narrow judicial lens come to a different conclusion.

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[34] See MA, 'Appellant's Submissions', Submission in *Aubrey v The Queen*, S274/2016, 21 December 2016, [67].
[35] [2016] HCA 12.
[36] Ibid [69] (Nettle J).
[37] Ibid [31] (Kiefel, Bell, Keane JJ).
[38] M Kirby, 'HIV/AIDS Criminalization Deserved Retribution or Capricious Sideshow' (2007) 32(4) *Alternative Law Journal* 196. Noted well before *Aubrey*. See also Thomas Faunce and Brendan Siles, 'High Court of Australia and HIV/AIDS Disease Criminalisation: Aubrey v The Queen and Zaburoni v The Queen' (2018) 25(1) Journal of Law and Medicine 52.
[39] *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26.

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