

Submission to the Victorian Law Reform Commission *Recklessness: Issues Paper*

Background

About the Victorian Victims of Crime Commissioner

The Victims of Crime Commissioner (VOCC) is an independent statutory officer with powers to advocate for the respect, recognition, and inclusion of victims of crime in the justice system.

The Commissioner has a role in holding justice agencies and victims' services to account for their treatment of victims of crime.

Under the *Victims of Crime Commissioner Act 2015* (Vic) (VOCC Act), the VOCC is empowered to advocate for the respect, recognition and inclusion of victims of crime in the justice system by:

- investigating complaints made by victims about their treatment by justice agencies and victims' services¹
- monitoring the compliance of justice agencies and victims' services with the *Victims' Charter Act 2006* (Vic) (Victims' Charter)²
- conducting inquiries into systemic issues that affect victims of crime³
- representing the concerns of victims to government and providing advice to the Attorney-General, the Minister for Victim Support and government departments and agencies about improvements to the justice system to meet the needs of victims of crime.⁴

Introduction

Relevance of the *Victims' Charter Act 2006* (Vic)

Some of the issues that arise for victims in relation to recklessness (including where cases may not proceed or are subject to plea negotiations) directly relate to how well

¹ *Victims of Crime Commissioner Act 2015* (Vic) s25A.

² *Victims of Crime Commissioner Act 2015* (Vic) s28(1A).

³ *Victims of Crime Commissioner Act 2015* (Vic) s13(1)(b-c), 23(1).

⁴ *Victims of Crime Commissioner Act 2015* (Vic) s13(1)(a),(d).

justice agencies have regard to, and comply with, victim entitlements under the *Victims' Charter Act 2006* (Vic) (Victims' Charter).⁵

Of particular relevance to the Victorian Law Reform Commission's (VLRC) *Recklessness: Issues Paper* (Issues Paper) are Victims' Charter entitlements to:

- information about the progress of an investigation⁶
- information about the court process and entitlement to attend any relevant court proceedings⁷
- information relating to:
 - (i) offences charged against the person accused of the criminal offence
 - (ii) if no offence is charged, the reason why no offence was charged
 - (iii) any decision to substantially modify charges, discontinue the prosecution or accept a plea of guilty to a lesser charge⁸
- details about how to find the date, time and place of a hearing⁹
- information about the outcome of the criminal proceeding, including any sentence imposed.¹⁰

Following recommendations made by the VLRC in 2016,¹¹ the Victims' Charter was amended to confer additional requirements on the Director of Public Prosecutions (DPP).¹² If the DPP is prosecuting a matter, the DPP must take all reasonable steps to advise a victim of:

- the date, time and location of any contested committal hearing, trial, plea hearing, sentencing hearing and appeal hearing¹³

⁵ The *Victims of Crime Commissioner Regulations 2020* prescribes agencies to demonstrate compliance with the Victims' Charter. These agencies include specific investigatory, prosecuting and victims' services agencies including the Office of Public Prosecutions and Victoria Police.

⁶ *Victims' Charter Act 2006* (Vic) s 8.

⁷ *Victims' Charter Act 2006* (Vic) s 11.

⁸ *Victims' Charter Act 2006* (Vic) s 9.

⁹ *Victims' Charter Act 2006* (Vic) s 9(d).

¹⁰ *Victims' Charter Act 2006* (Vic) s 9(e).

¹¹ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report* (2016) 142 (recommendation 24).

¹² *Victims' Charter Act 2006* (Vic) s 9B(1).

¹³ *Victims' Charter Act 2006* (Vic) s 9A(a).

- the progress of a prosecution, including the outcome of any committal mention, contested committal hearing, initial directions hearing, trial, plea hearing, sentencing hearing or appeal hearing, or guilty plea.¹⁴

The DPP is also required to give a victim, as soon as reasonably practicable, the reasons for any decision relating to any decision to substantially modify charges, to discontinue the prosecution of those charges or to accept a plea of guilty to a lesser charge.¹⁵

While fixing aspects of the law, such as definitions or elements of offences, that may not be working well (for victims or the community more generally) is obviously vital, it should also be noted that much of victims' dissatisfaction with the justice system can be ameliorated by adherence to the Victims' Charter principles and having regard to procedural fairness. This is further discussed below.

Scope of this submission

The Issues Paper raises questions concerning the legal definition of recklessness, primarily for offences against the person in the *Crimes Act 1958* (Vic) (eg, recklessly causing serious injury). Some of these issues involve fine legal distinctions. Sometimes these distinctions are based on theoretical considerations about what it means to act recklessly or what the community believes it means to act recklessly. These are not matters that fall within the VOCC's areas of expertise.

While the VOCC does not recommend a specific definition of recklessness, or whether this should be legislated, the VOCC recommends that the VLRC consider a range of key issues for victims including:

- how victims' rights and entitlements under the Victims' Charter can be better upheld during justice processes that involve difficult decisions and complex processes, such as withdrawing of charges, discontinuances, and plea negotiations
- whether more research into victims' experiences would assist the VLRC to better understand the practical outcomes for victims
- whether the patterns observed by Victoria Police and the OPP in relation to this issue mean there is in fact a gap in the law and that some behaviours may not be receiving an appropriate justice response
- how recklessness can reflect ordinary understandings of recklessness, and therefore, better meet victim and community expectations

¹⁴ *Victims' Charter Act 2006* (Vic) s 9A(b).

¹⁵ *Victims' Charter Act 2006* (Vic) s 9C.

- other victim-related reforms that can improve victims' overall experiences of the justice process.

Overall, the VOCC advocates for an approach that creates the most clarity and certainty for victims and the broader community, meets community expectations and does not retraumatise victims.

More research is needed to understand victims' experiences of recklessness

The VOCC notes that the specific issue of recklessness (including definitional problems) has not been raised by victims of crime with the VOCC, however, this does not mean that victims are not adversely impacted by this issue.

It is the VOCC's observation that in the absence of independent legal advice and assistance,¹⁶ victims are often confused about why a case does or does not proceed (or proceeds on a lesser charge). Rather than fully understanding the legal technicalities that arise, victims will experience prosecution and investigatory issues as 'their'¹⁷ case being:

- 'dropped' by police or prosecutions
- 'downgraded' (often in circumstances where the victim believes the negotiated outcome does not match their perception of the harm).

Having regard to this, the VOCC suggests that further research needs to be undertaken to fully understand the number and nature of cases where recklessness has arisen as a specific issue impacting on prosecutions, and accordingly, victims' experiences of such cases.

The VOCC also suggests that further insight should be gathered from victims' professionals that work directly with victims on a day-to-day basis, including Victims and Witness Assistance Service and Victims Assistance Program workers who may be able to provide case studies of the direct impact on victims.

¹⁶ The VOCC has advocated for victims to have access to independent legal advice and assistance to assist them to understand complex areas of the law. See, for example Victims of Crime Commissioner, Submission No 99 to the Legislative Council and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Justice System* (September 2021) 41; Victims of Crime Commissioner, Submission No 45 to the Victorian Law Reform Commission, *Improving the response of the justice system to sexual offences* (May 2022) 34.

¹⁷ Many victims feel that despite their lack of standing in a criminal trial, that the case is 'theirs'. The VOCC notes that crimes as prosecuted on behalf of the State and victims do not have standing as a party in criminal cases.

Victim experiences of police and prosecution decisions

Regardless of the definition of recklessness, justice agencies need to better accommodate victim participation in the justice process and adhere to principles of procedural fairness. This includes providing timely and clear information, managing expectations through clear explanations of case issues as they arise, consulting with victims and providing opportunity for victims to voice their opinion.

Research clearly indicates that a victim's satisfaction with the justice process, including plea negotiations, depends significantly on how the process is conducted—that is, procedural fairness. Victims' views about the fairness of outcomes will often be influenced by their perception of procedural fairness and interactions with authorities will affect victims' sense of procedural fairness. The extent to which victims feel they are treated with dignity and respect will inform their assessment of the quality of their interactions with authorities.¹⁸

Iliadis and Flynn have identified four components of procedural fairness for victims:

- (1) To be kept *informed* about case progression before decisions are made
- (2) *Validation* through feeling believed and being treated with dignity and respect
- (3) Providing victims with a *voice* to tell their story to a receptive audience and to have their voice acknowledged
- (4) Being given some sense of *control* in relation to decisions made in their case.¹⁹

The VOCC has heard from many victims about not being given any (or sufficient) information about why matters have not progressed and feeling confused as to why cases have been 'dropped' or 'dismissed'. This can be at both the police investigation and prosecution stage.

Victims can also feel 'blind-sided' by different information provided by police versus prosecution. Victims describe police telling them their case was 'really strong', 'very strong', 'bulletproof', and that the accused 'has been charged with murder and that's what it will stay as'²⁰ only for a matter to be negotiated via a plea to a lesser charge.

¹⁸ Jo-Anne Wemmers, 'Victims' Experiences in the Criminal Justice System and Their Recovery from Crime' (2013) 19(3) *International Review of Victimology* 221, 223.

¹⁹ Mary Iliadis and Asher Flynn, 'Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victim's Right to Review Reform' (2018) 58(3) *British Journal of Criminology* 550, 551.

²⁰ Centre for Innovative Justice, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Office of Public Prosecutions, April 2019) 27.

In relation to plea negotiations specifically, victims continue to report problems with not being consulted, or not being consulted adequately. This is significant, as most cases in Victoria resolve as pleas of guilty.²¹

Victims have told the VOCC of their dismay at the lack of consultation about prosecution decisions despite entitlements under the Victims' Charter,²² including that:

- consultation with victims is not meaningful or is seen as 'tick the box'
- they experience a sense of loss at not being able to pursue the case to trial
- plea negotiations don't reflect their perceptions of the seriousness of crime, thus impacting victims' ability to make a fulsome victim impact statement.

This is confirmed by research conducted in Victoria by Freiberg and Flynn which has found that many victims felt that they had no real role in plea negotiations which gave them a 'sense of being less worthy of consideration than factors like improved efficiency in the legal system'.²³

The Centre for Innovative Justice's research about what victims wanted when the prosecution sought their views about plea resolution decisions aligned with research more generally about what victims want:

to receive answers (participation); to tell their story before a judge and jury (voice); for the full extent of the offending to be recognised (validation); for the offender to admit to the offending (offender accountability); and to speak out in order to make things better for other victims who might come forward in the future (prevention).²⁴

Key victim considerations in considering a change to the law

Some unlawful injury matters may not be receiving an appropriate justice response

The VOCC is concerned by the observations in the OPP and Victoria Police submissions to the VLRC's Issues Paper that indicate some unlawful injury matters are not receiving an appropriate justice response. It is not clear how often this is occurring, but note the OPP's assertion that this is a 'pattern'.²⁵

²¹ In Victoria's County and Supreme Courts in 2019-20, 77.6% of all matters were finalised by a plea of guilty. Of these cases, 87% of pleas were the result of negotiation between the prosecution and the defence: Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Springer International Publishing, 2021) 5.

²² *Victims' Charter 2006* (Vic) s 9B.

²³ Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Springer International Publishing, 2021) 53.

²⁴ Centre for Innovative Justice, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Office of Public Prosecutions, April 2019) 10.

²⁵ Office of Public Prosecutions, Submission No 10 to Victorian Law Reform Commission, *Recklessness* (3 March 2023) 6.

The VLRC's Issues Paper sets out scenarios where the OPP has said that the definitional difference between recklessness involving foresight of a possibility—rather than a probability—would have made a difference to the charges they proceed with.²⁶ The submission from Victoria Police to the VLRC's Issues Paper similarly cites several examples of where a changed definition of recklessness might have made a difference in a case and where the result under current law would not seem to accord with community standards.

Without having specific insight into the nature and extent of the challenges arising in these cases, the VOCC is concerned to hear Victoria Police state that 'the probability threshold can lead to unintended or odd consequences'²⁷ and to decisions that are incongruous to justice and unlikely to meet community expectations.

Furthermore, the VOCC is concerned that the DPP has indicated it is resolving cases in a way that means 'legal culpability does not always reflect moral culpability' whether through withdrawing charges, discontinuing charges or resolving a prosecution 'on a basis that does not necessarily adequately reflect the gravity of the harm done to victims.'²⁸

The VOCC notes that the OPP has indicated that the current approach to recklessness often results in victims feeling 'a significant sense of grievance about the result'.²⁹

If it is the case that there is a pattern of cases arising where there is no reasonable alternative offence that can be charged, and the police/prosecution could only charge if the definition of recklessness is lowered, this would be a significant argument in favour of making the change.

However, the VOCC notes a number of contrasting views in submissions to the VLRC that suggest that changing the law might result in significant unintentional consequences, particularly for vulnerable members of the community.³⁰

As outlined above, the VOCC suggests more in-depth research needs to be undertaken to understand the number and nature of cases where recklessness has arisen as an issue, and accordingly, victims' experiences of such cases.

²⁶ Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023) 12.

²⁷ Victoria Police, Submission No 7 to Victorian Law Reform Commission, *Recklessness* (27 February 2023) 1.

²⁸ Office of Public Prosecutions, Submission No 10 to Victorian Law Reform Commission, *Recklessness* (3 March 2023) 5.

²⁹ Office of Public Prosecutions, Submission No 10 to Victorian Law Reform Commission, *Recklessness* (3 March 2023) 6.

³⁰ Dermot Dann KC and Felix Ralph submitted to the VLRC that 'The proposed changes would have an overall deleterious effect on a justice system already overburdened by constant changes to the *Crimes Act*, *Sentencing Act* and the *Bail Act*. It would have a disproportionate impact on people most at-risk and marginalised in our society. It will lead more people to be imprisoned in a corrections system that is already overpopulated': Dermot Dann KC and Felix Ralph, Submission No 12 to Victorian Law Reform Commission, *Recklessness* (8 March 2023) 18.

Recklessness should, so far as possible, reflect ordinary understanding of recklessness

As outlined above, the Issues Paper raises questions concerning the legal definition of recklessness, primarily for offences against the person in the *Crimes Act 1958* (Vic) (eg, recklessly causing serious injury). Some of these issues involve fine legal distinctions which are not within the VOCC's expertise.

While the VOCC does not recommend a specific definition of recklessness, or whether this should be legislated, the VOCC recommends that the VLRC consider ways in which recklessness might better reflect ordinary understandings of recklessness and thus, better meet community expectations and victims' expectations.³¹

As noted by Dr Greg Byrne PSM in his submission to the VLRC's Issues Paper, the limited available research on juror comprehension of different forms of recklessness supports the view that the simpler the definition of recklessness, the easier it is likely to be for jurors to understand.³² This premise can also be extended to victims.

In this regard, the VOCC notes the OPP's observation that it can be very difficult for victims to understand decisions that do not accord with the ordinary understanding of recklessness:

Given the ordinary understanding of recklessness — which can indicate conduct which is negligent, careless, rash or incautious—it can be very difficult for victims to accept that a person who foresees the possibility of an outcome, and acts anyway, may not legally be held responsible for that outcome.³³

The VOCC notes that according to the Issues Paper, the High Court appears to accept that, except for murder, foresight of the *possibility* of harm is the correct test.³⁴ This, combined with the consistency with other jurisdictions, is persuasive.

The law and the justice system are inherently uncertain for victims and any opportunity for clarity and certainty is important. In this regard, the VOCC notes Victoria Police's submission that the current threshold for establishing recklessness is too reliant on the accused's own admissions and would be improved not only by adopting a possibility threshold but introducing an objective element. It is possible that this approach could provide more clarity and certainty for victims and the community.

³¹ As noted by Dr Steven Tudor in his submission to the VLRC, it needs to be clear that juries will understand the approach to recklessness: Dr Steven Tudor, Submission No 8 to Victorian Law Reform Commission, *Recklessness* (3 March 2023) 4.

³² Dr Greg Byrne PSM, Submission No 18 to Victorian Law Reform Commission, *Recklessness* (3 March 2023) 8.

³³ Office of Public Prosecutions, Submission No 10 to Victorian Law Reform Commission, *Recklessness* (3 March 2023) 6.

³⁴ The High Court noted however that it was not the High Court's role to substitute a different test if this was contrary to the Victorian Parliament's intention. See Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023) 5.

The VOCC is also persuaded by the OPP's observation in its submission to the VLRC that the concept of 'possible risk' would not be difficult for juries or the general public (victims included) to interpret. The OPP states that possibility is 'a relatively simple concept: it means an outcome might occur'.³⁵ As noted by Dr Steven Tudor, 'possible risk' invariably includes consideration of the degree of *probability*.³⁶ This may accord with the VLRC's observation that:

the meanings of 'possibility', 'probability' and 'substantial and unjustifiable risk' vary according to the circumstances and whether the risk-taking can be characterised as reasonable in those circumstances. This means that "it may make little practical difference" what definition of recklessness is used³⁷

It is difficult to know how jurors will apply the law and whether the difference between something being probable or possible will make a difference in what the prosecution can prove. The VLRC has observed that both 'probability' and 'possibility' could be considered vague and may be difficult for juries/the general public to interpret. If the VLRC's observation is correct, this uncertainty will remain regardless of any definitional change.³⁸

More research about what the community believes recklessness to mean would be valuable as there appears to be considerable divergence of views and the VLRC have stated in the Issues Paper that in 'everyday usage, being "reckless" can mean acting without caution and being "utterly careless" about the consequences of your actions' while the concept of 'recklessness' in the criminal law is slightly different.³⁹

Any change requires a balance of competing justice 'priorities'

One of the potential rationales for amending the law is to capture unlawful injury matters that may not be receiving an appropriate justice response currently.

As noted by the VLRC in its Issues Paper, adopting the lower threshold of possibility would:

- criminalise some behaviour that has not previously been criminalised
- make it easier to prove recklessness in cases where a particular outcome was an unlikely but possible result of the accused's actions.

The OPP's submission indicates that changing the definition of recklessness may result in more successful prosecutions, including more pleas of guilty. Whether this is advantageous from a victim's perspective requires further interrogation:

³⁵ Office of Public Prosecutions, Submission No 10 to Victorian Law Reform Commission, *Recklessness* (3 March 2023) 14.

³⁶ Dr Steven Tudor, Submission No 8 to Victorian Law Reform Commission, *Recklessness* (3 March 2023) 3.

³⁷ Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023) 13.

³⁸ Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023) 7-8.

³⁹ Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023) 3.

- **If the standard for establishing recklessness is lowered, then an accused will be pleading guilty to a less culpable form of recklessness.** This would mean that for all current cases where the accused pleads guilty, or is found guilty, the starting point would be that the offender is considered to be less culpable than under the current definition.
- **If the definition of recklessness is lowered, this may result in a lower sentence being imposed,** and accordingly, the corresponding maximum penalty would also need to align with lower sentences being applied by the court. Lowering the maximum penalty for recklessly causing serious injury would be detrimental for cases involving the worst cases of recklessly serious injury and may not meet victim or community expectations.
- **An increase in guilty pleas⁴⁰ may not be the desired outcome for all victims.** Many victims will welcome a plea of guilty in their case. However, not all victims are the same and the importance of obtaining a plea of guilty has sometimes been overestimated by the prosecution. For example, Frieberg and Flynn reported that victims sometimes expressed concern about paternalistic views of prosecutors saying that victims had been 'saved' from giving evidence when some victims wanted to give evidence, that is, to participate in the process.⁴¹

Recklessness reform involves weighing the benefits of potential increases in convictions for recklessly causing serious injury, with a lowering of the level of culpability for all people who commit that offence. This is a very difficult assessment. Victims will have differing views on the appropriate balance, most likely having regard to the specific circumstances of their case.

Accordingly, this suggests that changing the definition of recklessness involves very difficult judgements about whether it is better to change the definition to capture some additional conduct, knowing that this may result in lower sentences for the offences that are currently captured by the offence.

Addressing 'over charging'

While most likely motivated by the desire to validate and support victims, police (or other investigatory agencies) may unintentionally raise victims' expectations and victims may ultimately feel let down by a resolution decision which is at odds with their

⁴⁰ As opposed to guilty findings.

⁴¹ Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Springer International Publishing, 2021) 55.

expectations.⁴² As the VLRC concluded in its report on *Committals*, overcharging 'can have consequences that are traumatic for victims and witnesses'.⁴³

In the Department of Justice and Community Safety's *Improving victims' experiences of summary proceedings – Final Report*, 42 per cent of respondents to a survey about victims' experiences ranked "Having police explain charging practices and potential court outcomes to victims to assist them to have realistic expectations about the outcomes of cases" as a number one reform which would be beneficial for victims of crime.⁴⁴ In that report, the DJCS stated that victims often feel disengaged or disconnected from proceedings, including because of a lack of information about or understanding of the process (including regarding police charging practices).⁴⁵

In responding to the DJCS report, stakeholders broadly supported introducing a duty for prosecutors or investigators to give victims information about the resolution process, including why charges are laid and why some charges are later withdrawn. The VLRC should consider parallel reforms such as this that may frequently arise in recklessness cases.

Overarching victim reforms that would likely ameliorate poor experiences of the justice process (including the issue of recklessness)

Across various submissions and policy positions, the VOCC has advocated for a range of broad reforms that would improve victims' experiences of the justice system. The VOCC considers that some of these reforms could ameliorate victims' poor experiences of the justice process, including issues arising in relation to recklessness. These include:

- **Independent legal advice and assistance:** access to independent legal advice would likely provide victims with an avenue to seek further information and clarification when charges are withdrawn, a case is discontinued or during plea negotiations (particularly in indictable matters where victims have a right to be consulted on plea decisions)
- **Independent review of certain police and prosecution decisions:** consistent with previous reviews and inquiries, the VOCC also suggests there is scope for independent review of certain police and prosecution decisions, after internal

⁴² Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Springer International Publishing, 2021) 85.

⁴³ Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023) 84.

⁴⁴ Department of Justice and Community Safety, *Improving Victims' Experience of Summary Proceedings* (Final Report, 2021) 29.

⁴⁵ Department of Justice and Community Safety, *Improving Victims' Experience of Summary Proceedings* (Final Report, 2021) 4.

review avenues are exhausted. This may address victim concerns about the 'difficult decisions' made by prosecutors relating to resolving such cases.

- **Ensuring all victims have equal rights under the Victims' Charter:** the Victims' Charter should be amended so that all victims, regardless of crime type or jurisdiction, have the same rights and entitlements to information and consultation under the Victims' Charter.