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Submission to the Victorian Law Reform Commission

The Meaning of 'Recklessness' in Victorian Criminal Law

1. The Victorian Law Reform Commission (**VLRC**) has been asked to review and report on the concept of 'recklessness' in relation to the *Crimes Act 1958* (Vic) (***Crimes Act***), and to consider whether amendment of the *Crimes Act* to include a definition of 'recklessness' is necessary, what definition should apply, and what guiding principles should be used in the review.

2. Liberty Victoria welcomes the release of the VLRC's Issues Paper and appreciates the opportunity to make this submission.

About Liberty Victoria

3. Liberty Victoria has worked to defend and extend human rights and freedoms in Victoria for more than eighty years. Since 1936 we have sought to influence public debate and government policy on a range of human rights issues. Liberty Victoria is a peak civil liberties organisation in Australia and advocates for human rights and civil liberties. Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.

4. The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for both the prosecution and the defence. More information on our organisation and activities can be found at: https://libertyvictoria.org.au.

5. The focus of our submissions and recommendations reflect our experience and expertise as outlined above. Some of the following is drawn from work undertaken by Liberty Victoria in response to previous inquiries and proposed legislative reforms.

6. This is a public submission and is not confidential.

Endorsement of CBA submissions

7. Liberty Victoria has had the opportunity to consider the detailed submission of the Criminal Bar Association of Victoria (**CBA**), and we respectfully endorse it and its recommendations.

8. In particular, we agree that:

    (1) The common law test for recklessness of *probability*, applied without issue in Victoria for the last 26 years,[1] should not be changed;

    (2) The current test is readily understood by juries, has not been shown to cause any issues following its long-standing application,[2] and is accompanied by simple jury

[1] See *R v Nuri* [1990] VR 641, where the Victorian Criminal Court of Appeal held that the probability test applied in relation to recklessly engaging in conduct endangering life (s22 Crimes Act (Vic)). The Court of Appeal subsequently affirmed that interpretation in *R v Campbell* [1997] 2 VR 585 (***Campbell***), holding that in order for a person to be convicted of recklessly causing serious injury under s 17, the prosecution must establish that the person foresaw a probability of serious injury. In 2017*, in Aubrey v The Queen* (2017) 260 CLR 305*,* the High Court cast doubt on the correctness of *Campbell* holding that for the similar offence of maliciously inflicting grievous bodily harm under s 35(1)(b) of the *Crimes Act 1900* (NSW), recklessness meant foresight of the *possibility* of harm. This led to the DPP reference case outlined at [21]-[25] of the Issues Paper.

[2] See *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26; (2021) 95 ALJR 741. In affirming the correctness of the learned trial judge directing the jury in accordance with *Campbell,* the Court pointed to two legislative amendments that have been made to the *Crimes Act* since *Campbell* was decided relevant to s 17. Relevantly, both amendments followed expert reviews and extensive consultation with key stakeholders in the criminal justice system. There was no suggestion in those reviews or consultations that the meaning given to recklessness in *Campbell* had caused any difficulty in directions to juries: see [96]-[98] (Edelman J). Further the majority also held there could be real unfairness in departing from a long-standing

directions;

(3) One of the main arguments in favour of reform – that of greater consistency between comparable jurisdictions – is flawed given key differences between the relevant offence provisions and elements of the offences, especially between Victoria and New South Wales; and

(4) In Victoria, a range of prospective penalties have been developed and implemented with reference to the current threshold (including maximum penalties, presumptive, mandatory and standard sentences), and any amendment would necessitate a significant overhaul of penalties applicable not only to offences where 'recklessness' is the fault element but also related offences.

Impact of change on mandatory and presumptive sentences

9. Liberty Victoria is especially concerned about the impact that any change to the current threshold applicable to 'recklessness' could have on offences carrying a presumptive or mandatory minimum sentences.

10. The significant pitfalls of presumptive and mandatory sentencing have been recently considered by Michael Stanton, President of Liberty Victoria and co-author of this submission, in 'Instruments of Injustice: The Emergence of Mandatory Sentencing in Victoria' (2022) 48(2) Monash University Law Review (advance).[3]

11. Liberty Victoria endorses the observations of the Law Council of Australia that mandatory sentencing regimes:[4]

    (1) '[U]ndermine fundamental principles underpinning the independence of the judiciary and the rule of law';[5]

    (2) Are 'inconsistent with Australia's international obligations', particularly Australia's obligations with respect to 'the prohibition against arbitrary detention as contained in Article 9 of the *International Covenant on Civil and*

decision of a State court in a way that impacts the rights of the accused: see [59] (Gageler, Gordon and Steward JJ).

[3] Available online: https://bridges.monash.edu/articles/journal_contribution/Instruments_of_Injustice_The_Emergence_of_Mandatory_Sentencing_in_Victoria/22121348

[4] Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing' (Discussion Paper, May 2014) 6–7, 20–35 <https://www.lawcouncil.asn.au/publicassets/f370dcfc-bdd6-e611-80d2-005056be66b1/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf> ('*Policy Discussion Paper on Mandatory Sentencing*').

[5] *Policy Discussion Paper on Mandatory Sentencing* (n 4) 20 [63].

Political Rights ('*ICCPR*')';[6] and 'the right to a fair trial and the provision that prison sentences must in effect be subject to appeal as per Article 14 of the ICCPR';[7]

(3) Increase economic costs to the community through higher incarceration rates;

(4) Disproportionately affect vulnerable groups within the community, including First Nations Australians[8] and people with a mental illness or intellectual disability;[9]

(5) '[P]otentially results in unjust, harsh and disproportionate sentences where the punishment does not fit the crime';[10]

(6) Fail to deter crime;[11]

(7) Increase 'the likelihood of recidivism because prisoners are placed in a learning environment for crime' thereby inhibiting rehabilitation prospects;[12]

(8) '[W]rongly undermines the community's confidence in the judiciary and the criminal justice system as a whole';[13] and

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[6] *Policy Discussion Paper on Mandatory Sentencing* (n 4) 6. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

[7] *Policy Discussion Paper on Mandatory Sentencing* (n 4) 6. To this could be added, amongst other things, the human right against cruel, inhuman or degrading treatment as protected by *ICCPR* (n 6) art 7.

[8] *Policy Discussion Paper on Mandatory Sentencing* (n 4) 29 [108]. See Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, December 2017) 273–8 <https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf>, which recommended that, amongst other things, 'Commonwealth, state and territory governments should repeal legislation imposing mandatory or presumptive terms of imprisonment upon conviction of an offender that has a disproportionate impact on Aboriginal and Torres Strait Islander peoples': at 277.

[9] *Policy Discussion Paper on Mandatory Sentencing* (n 4) 29 [108].

[10] *Policy Discussion Paper on Mandatory Sentencing* (n 4) 5. See, eg, the comments of judicial officers in 'people smuggling cases' considered by Dina Yehia, 'Boat People as Victims of the System: Mandatory Sentencing of "People Smugglers": Politics or Justice?' (2016) 3(1) *Northern Territory Law Journal* 18, 26–7.

[11] *Policy Discussion Paper on Mandatory Sentencing* (n 4) 5. See the various studies to this effect cited by Anthony Gray and Gerard Elmore, 'The Constitutionality of Minimum Mandatory Sentencing Regimes' (2012) 22(1) *Journal of Judicial Administration* 37, 38 n 5.

[12] *Policy Discussion Paper on Mandatory Sentencing* (n 4) 5. See *Azzopardi v The Queen* (2011) 35 VR 43, 53–4 [34]–[36] (Redlich JA, Coghlan AJA agreeing at 70 [92], Macaulay AJA agreeing at 70 [93]).

[13] *Policy Discussion Paper on Mandatory Sentencing* (n 4) 5. See *WCB v The Queen* (2010) 29 VR 483, 490–2 [20]–[29] (Warren CJ and Redlich JA).

(9) '[D]isplaces discretion to other parts of the criminal justice system, most notably law enforcement and prosecutors, and thereby fails to eliminate inconsistency in sentencing'.[14]

12. In Victoria, the following offences involving recklessness are 'Category 1' offences:[15] meaning the Court must impose a term of imprisonment or detention:[16]

    (1) causing serious injury recklessly in circumstances of gross violence;[17]

    (2) causing serious injury recklessly to an emergency worker, custodial officer or youth custodial officer;[18]

    (3) causing injury intentionally or recklessly to an emergency worker, custodial officer or youth justice custodial worker.[19]

13. There is a very narrow exception for the offences in categories (2) and (3) above for some circumstances where an offender has impaired mental functioning causally linked to the commission of the offence.[20]

14. There are also many offences involving recklessness as a fault element where the Court must impose a specified non-parole period or minimum term of imprisonment unless a 'special reason' (a narrow exception) applies:

    (1) Causing serious injury intentionally or recklessly in circumstances of gross violence to an on-duty emergency or custodial worker - minimum non-parole period of 5 years;

    (2) Causing serious injury intentionally or recklessly in circumstances of gross violence - minimum non-parole period of 4 years;

    (3) Causing serious injury recklessly to an on-duty emergency or custodial worker - minimum non-parole period of 2 years; and

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[14] *Policy Discussion Paper on Mandatory Sentencing* (n 4) 6. But see *Magaming v The Queen* (2013) 252 CLR 381, 394–5 [40]–[41] (French CJ, Hayne, Crennan, Kiefel and Bell JJ, Keane J agreeing at 413 [100]).
[15] *Sentencing Act 1991* (Vic), s 3(1).
[16] Sentencing Advisory Council: Sentencing Schemes (Web Page, accessed 25/02/2023) https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-schemes.
[17] *Crimes Act 1958* (Vic), s 15B.
[18] *Crimes Act 1958* (Vic), s 17.
[19] *Crimes Act 1958* (Vic). s 18.
[20] Where it is established on the balance of probabilities that the offender had impaired mental functioning causally linked to the commission of the offence which substantially and materially reduced the offender's culpability, the court may impose a mandatory treatment and monitoring order ('MTMO') (a CCO with specific conditions),165 a RTO (for offenders with an intellectual disability), or a CSTO (for offenders with a mental illness): *Sentencing Act 1991* (Vic), ss 5(2GA), 44A.

(4) Causing injury intentionally or recklessly to an on-duty emergency or custodial worker – minimum period of imprisonment of 6 months.

15. As noted in the VLRC Issues Paper, there are other 'Category 2' offences (where imprisonment or detention must be imposed unless a 'special reason' applies) where the concept of recklessness is relevant to an element of the offence, such as culpable driving causing death.

16. Over the past decade, the special reasons exceptions have been made more difficult to establish through successive legislative reforms.[21] The residual special reasons exception, that there are "substantial and compelling circumstances that are exceptional and rare" and that justify making a different order, has been described by the Court of Appeal as "almost impossible to satisfy".[22]

17. Where recklessness overlaps with presumptive and mandatory sentencing provisions, any lowering of the threshold could have deleterious effects including the unjust deprivation of liberty. For example, a young adult with no prior convictions who resists what they perceive as an unlawful arrest by a police officer and swings their arm and causes a graze or bruise to the police officer may be found guilty of recklessly causing injury to an emergency worker on duty and therefore exposed to a presumptive minimum sentence of 6 months' imprisonment on the basis they had foresight of the *possibility* of harm by acting in that manner.

18. Accordingly, in light of the applicable presumptive and mandatory sentencing provisions, lowering the threshold of recklessness has the potential to result in grossly disproportionate penalties. Those penalties are also most likely to disproportionately affect vulnerable members of the community, including First Nations peoples, in circumstances where the Royal Commission into Aboriginal Deaths in Custody, over 30 years ago, recommended that imprisonment should be utilised only as a sanction of last resort.[23]

19. Liberty Victoria advocates for extreme caution in relation to any contemplated legislative reform that has the potential to erode judicial discretion and increase incarceration rates, including of particularly vulnerable cohorts.

20. For the above reasons, Liberty Victoria opposes any change to the current common law

[21] Michael D Stanton, 'Instruments of Injustice: The Emergence of Mandatory Sentencing in Victoria' (2022) 48(2) Monash University Law Review (advance).[21]
[22] DPP (Vic) v *Bowen* [2021] VSCA 355, [11] (Maxwell P, Priest, McLeish, T Forrest and Walker JJA); *Buckley* [2022] VSCA 138, [3] (Maxwell P and T Forrest JA); *DPP (Vic) v Silivaai* [2023] VSCA 19, [28] (Kyrou, T Forrest and Kennedy JJA). Cf *DPP (Vic) v Lombardo* [2022] VSCA 204, [64] (McLeish, Niall and Kennedy JJA).
[23] Royal Commission into Aboriginal Deaths in Custody (Final Report, 15 April 1991) vol 5, recommendation 92.

definition of recklessness applicable to offences against the person in Victoria. Changing the definition could have potentially unintended consequences such as obscuring the difference between recklessness and negligence, overcomplicating the definition so that it is difficult for juries to apply, losing the benefit of jurisprudence surrounding the current threshold test, and capturing some risk-taking behaviour that should not be criminalised.

21. If there is to be a change to the definition of recklessness applicable to the offences listed above, Liberty Victoria calls for the immediate repeal of presumptive and mandatory sentencing provisions for these offences.

22. Lastly, as explained in our recent submission to the Yoorrook Justice Commission on Systemic Injustice in the Criminal Justice System,[24] there are far more urgent issues creating systemic injustices that need to be addressed by Parliament. That includes the need for bail reform, raising the age of criminal responsibility, repeal of presumptive and mandatory sentencing provisions, and properly implementing the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (**OPCAT**).

23. It is respectfully submitted that, especially when contrasted with such urgent issues, changing the definition of recklessness is a solution in search of a problem – it has not been demonstrated why such a reform is necessary. Indeed, any such reform is likely to cause serious injustice and result in grossly disproportionate sentences.

24. Thank you for the opportunity to make this submission. If you have any questions, please do not hesitate to contact Michael Stanton, President of Liberty Victoria, or Sam Norton, Executive Committee Member of Liberty Victoria, through the Liberty Victoria office at info@libertyvictoria.org.au.

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[24] Available online: https://libertyvictoria.org.au/sites/default/files/Yoorrook%20Submission%20%28Liberty%20Victoria%29.pdf