

Recklessness

Issues Paper

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PROBABILITY

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Recklessness: Issues Paper

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A note on the cover design

The cover design for the *Recklessness* project refers to the tension between the concepts of 'probability' and 'possibility' by highlighting the typographic elements common to both.

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Issues Paper

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Terms of reference

Referral to the Victorian Law Reform Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000*

The meaning of 'recklessness' in Victorian criminal law

Recklessness is an element in many Victorian offences and relevant to the application of the criminal law in other ways. However, it is not consistently defined in Victorian legislation and in most instances takes its meaning from the common law.

Since the decision of the Victorian Court of Appeal in *R v Campbell*,¹ an accused is reckless if they know that a particular harmful consequence will *probably* result from their action but they proceed regardless.

This definition applies to murder, and to those 'offences against the person' in Part I, Division 1(4) of the *Crimes Act 1958* (Vic) ('Crimes Act') that include recklessness as an element ('the Victorian Offences').²

In some Australian jurisdictions, for most offences against the person involving recklessness other than murder, the accused need only foresee the *possibility* that harm might occur for recklessness to be established.

The Victorian Law Reform Commission (VLRC) is asked to review and report on how the concept of 'recklessness' is understood in the Crimes Act. In particular, the VLRC should:

- consider whether the Crimes Act should be amended to include a definition of recklessness applicable to the Victorian offences and, if so, what definition should apply; and
- develop a set of guiding principles that could be used to review the use or proposed use of recklessness as a fault element in other categories of Crimes Act offences.³

If the VLRC recommends changing the meaning of recklessness for any of the Victorian offences, the VLRC should consider whether the maximum penalties applying to those offences should also change.


In conducting this review, the VLRC should have regard to:

- the meaning of recklessness for offences in other Australian and relevant common law jurisdictions, particularly other offences against the person;
- the approach and reasons for using "probably" to express the fault element of recklessness in reforms to Part I, Division 1(8A)-(8F) of the Crimes Act;

1 [1997] 2 VR 585.

2 Sections 15A, 15B, 17, 18, 19, 20, 21, 22, 23, 25, 26, 31 & 31C ('the Victorian offences').

3 Offences in the Crimes Act that have recently been subject to review by the VLRC, such as stalking and sexual offences, are excluded from the scope of this referral.

- 
- the operation of any legislated statutory minimum terms of imprisonment;
 - the potential impacts of any recommended changes on all parts of the criminal justice system (for example, impacts due to changes in prosecution, conviction or incarceration rates).

The Commission is asked to deliver its report to the Attorney-General by 29 February 2024.

Recklessness

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- 6** **What the Commission has been asked to do**
- 6** **Definitions of recklessness**
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Recklessness

The legal concept of recklessness

Recklessness and criminal responsibility

- 1 Before an accused person can be found guilty of a criminal offence, the prosecution must prove each 'element' of that offence. An element is a component of the offence.
- 2 Elements can be 'physical elements' or 'fault elements'. Physical (or conduct) elements relate to acts or omissions.¹ The physical element of murder is an act or omission that causes the death of another person. Fault elements describe the 'fault' or wrong of an accused in relation to a physical element.² Often this is a state of mind, such as an intention to kill, or being reckless about whether your actions will result in someone being killed.
- 3 Not all criminal offences have fault elements. Strict or absolute liability offences, such as speeding offences, create criminal liability without fault.
- 4 Fault elements where the prosecution must prove that the accused had a particular state of mind, such as an intention to do something, are known as 'subjective'. Fault elements where the accused's subjective state of mind is irrelevant are known as 'objective'. Negligence offences have objective fault elements. They involve breach of a duty of care or falling short of a standard of care that a reasonable person would have exercised.
- 5 Sometimes fault elements have both objective and subjective components.
- 6 Fault elements create a range or continuum along which various states of mind are considered increasingly blameworthy. Usually, the level of criminal culpability (blame) is higher if the accused subjectively intended or meant to bring about a certain result. Criminal culpability tends to decrease as behaviour becomes less intentional or considered.
- 7 Tables 1 and 2 show how the same physical element (causing serious injury or causing injury), combined with different fault elements, creates a hierarchy of offences in the *Crimes Act 1958* (Vic), with various levels of culpability and penalties.

1 See, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomas Reuters, 4th ed, 2017) 194–196.

2 See, eg, Department of Justice (Vic), *Review of Sexual Offences* (Consultation Paper, September 2013) Glossary, 'fault element', 188.

Table 1: Causing serious injury: a range of increasingly blameworthy offences based on the accused's state of mind

Offence	Maximum penalty (years imprisonment)
Negligently causing serious injury: Crimes Act s 24	10
Causing serious injury recklessly: Crimes Act s 17	15
Causing serious injury intentionally: Crimes Act s 16	20

Table 2: Causing injury: two increasingly blameworthy offences based on the accused's state of mind³

Offence	Maximum penalty (years imprisonment)
Causing injury recklessly: Crimes Act s 18	5
Causing injury intentionally: Crimes Act s 18	10

The meaning of 'recklessness'

- 8 In everyday usage, being 'reckless' can mean acting without caution and being 'utterly careless' about the consequences of your actions.⁴ The concept of 'recklessness' in the criminal law is slightly different. For the purposes of establishing criminal responsibility, recklessness usually involves *awareness* or *foresight* 'of a risk of a prohibited consequence occurring and proceeding nevertheless to take that risk'.⁵ It is a subjective fault element, although it can have objective components (see paragraphs 34–36; 56–70).
- 9 How recklessness is defined may vary depending on the offence. Recklessness can also have varying levels of culpability. As we discuss below, for the common law offence of murder, reckless unlawful killing is treated as almost the same as intentional unlawful killing, and as similarly blameworthy.⁶

The common law threshold for establishing recklessness

- 10 Recklessness is an element in many Victorian offences. It is not consistently defined in Victorian legislation and in most instances takes its meaning from the common law.

3 The courts have held that section 18 creates two separate offences: *R v His Honour Judge Hassett* [1994] Vic SC 765, (1994) 76 A Crim R 19. There is no offence of negligently causing injury in the Crimes Act, which deals with indictable offences: *Crimes Act 1958* (Vic) s 2B. Section 7 of the *Summary Offences Act 1966* (Vic) creates 'offences tending to personal injury ...' that capture some negligent behaviour. The penalties include fines and imprisonment for up to six months.

4 *Macquarie Dictionary* (Macquarie Dictionary Publishers Pty Ltd, 6th ed., 2013) 1226.

5 Law Reform Commission of Western Australia, *A Review of the Law of Homicide: Final Report* (No 97, September 2007) 65, citing Yeo S, *Fault in Homicide: Murder and Involuntary Manslaughter in England, Australia and India* (Sydney: Federation Press, 1997) 3.

6 In the past, for some offences, recklessness could be established based on 'culpable inadvertence', or not thinking about the risk of a particular result or circumstance. Smith describes what was formerly a fault element for rape—'failure to give any thought to whether the complainant is consenting'—as 'inadvertence recklessness'. He says it makes more sense to describe this as reckless rather than negligent rape, 'because the focus is on the presence or absence of a particular mental state, rather than on whether the accused met a standard of reasonableness imposed by the law': Dale Smith, 'Reckless Rape in Victoria' (2008) 32 *Melbourne University Law Review* 1007, 1008.

- 11 Before 1986, in Victoria and comparable jurisdictions,⁷ the threshold for establishing recklessness was higher in relation to murder (foresight of probable death) than for other offences against the person (foresight of possible harm).⁸
- 12 The reason for the distinction was that the culpability for reckless murder was said by the courts to be comparable to the culpability for intentional murder.
- 13 At common law, a person who could foresee that their actions would probably kill another person but proceeded regardless, causing the death of that person, could be found guilty of murder. They could be convicted of the same offence as if they had intended to kill someone. Reckless murder was said to be morally equivalent to intentional murder.⁹
- 14 If an accused did not intend or was not reckless about killing the person who died because of their actions, the appropriate charge would be manslaughter, a less serious offence, rather than murder.
- 15 Victoria has retained the common law offence of murder and continues to treat reckless murder as very close to, or even a version of, intentional murder.¹⁰
- 16 This is not the case for other offences against the person. Separate offences exist with a fault element of recklessness rather than intention. Usually, they are characterised as less blameworthy than comparable offences where the fault element is intention.¹¹ All Crimes Act offences against the person involving recklessness have lesser penalties attached than versions of the same offence with an intentional fault element (see Tables 1 and 2).¹² This may be seen as justifying a lower threshold for establishing recklessness than that which is required for murder. A lower threshold would be foresight of possible rather than probable harm.
- 17 In 1989, however, the Victorian Court of Criminal Appeal found in *R v Nuri* that recklessness required foresight of probable rather than possible harm.¹³

7 England and New South Wales. *R v Cunningham* (1957) QB 396; *R v Crabbe* [1985] (1985) 156 CLR 464, 469 (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).

8 As we discuss below, the courts in *R v Nuri* (1989) and *R v Campbell* (1995) found that for the offences of conduct endangering life (s 22) and causing serious injury (s 17), respectively, the appropriate threshold for recklessness is foresight of probable rather than possible harm. While this has been described as a change in direction (*Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [3]-[4], [42]), there was already 'a prevailing practice for judges to direct juries, in relation to offences charged under s 17 and related sections of the Crimes Act, that in order to establish the requisite foreseeability, the prosecution would need to prove that the accused knew that the injury probably would occur': *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181, [142] per Kaye JA; see also [80] per Priest JA. This 'prevailing practice' dates from the introduction in 1985 of three new offences into the Crimes Act: causing serious injury intentionally, causing serious injury recklessly, and causing injury either intentionally or recklessly. Thus the 'change in direction' away from a 'possibility' threshold for offences against the person dates from 1986, when the amendments establishing the new offences came into force: [63], [80], per Priest JA.

9 'The conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm. Indeed, on one view, a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur.' *R v Crabbe* [1985] (1985) 156 CLR 464, 469.

10 Ibid. In New South Wales, the statutory offence of murder includes 'reckless indifference to human life' as well as intentional acts or omissions and killings that occur in relation to the commission of offences punishable by imprisonment for life or for 25 years. Other punishable homicides are 'taken to be manslaughter': *Crimes Act 1900* (NSW) s 18(1), (2). See also: *Criminal Code Act 1899* (Qld) s 302 (definition of murder, which includes unlawful killing with reckless indifference to human life), s 303 (definition of manslaughter, unlawful killings under such circumstances as not to constitute murder). The recklessness element was introduced into the Queensland Code as a mental element for murder in 2019. At the time, the Attorney-General said the amendment reflected the government's view that 'a person who acts callously knowing that death is probable is just as blameworthy as the person who intends to kill another person': Queensland, Parliamentary Debates, Queensland Parliament, 30 April 2019, 1240 [9] (Yvette D'Ath, Attorney-General).

11 In the Victorian Court of Appeal, however, recklessly causing serious injury has been described as 'morally equivalent' to, 'or, at least, not far removed from' intentionally causing serious injury (*Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181, [120] (Priest JA)). The offences of causing injury intentionally or recklessly; threat to kill (either intending or being reckless about whether the person threatened would fear the threat would be carried out); and threat to inflict serious injury (either intending or being reckless about whether the person threatened would fear the threat would be carried out) were also described as 'closely related in terms of ... levels of culpability': [141] (Kaye JA).

12 The Director of Public Prosecutions says that 'recklessly causing serious injury was always intended to be a less serious offence than intentionally causing serious injury, by virtue of the lesser culpability built into its mental element.' *The Director of Public Prosecutions Reference No 1 of 2019—Appellant's Submissions* (Court File, 29 January 2021) 6 [19]. When the offence of 'causing serious injury recklessly' was introduced to the Crimes Act in 1985 (replacing an earlier malicious infliction of grievous bodily harm offence), the Attorney-General said 'there is a sufficient difference in moral turpitude—sufficient to justify distinct defences—between one who does so intentionally in the sense of desiring to cause injury and one who does so recklessly—aware that an injury might result to another but goes ahead anyway.' Victoria, Parliamentary Debates, Legislative Council, 25 September 1985, 201 (J.E. Kennan, Attorney-General).

13 *R v Nuri* [1989] [1990] VR 641; The case involved the offence of conduct endangering life, which has a recklessness element: *Crimes Act 1958* (Vic) s 22.

- 18 In 1995 the Court of Appeal affirmed in *R v Campbell*¹⁴ that an accused is reckless if they know that a particular harmful consequence will probably result from their action but they continue regardless.¹⁵
- 19 This definition now applies to all 'offences against the person' in Part I, Division 1(4) of the Crimes Act that include recklessness as an element.¹⁶ The definition may apply more broadly to all Victorian offences involving recklessness.¹⁷
- 20 However, in New South Wales the 'foresight of probable harm' test continues to apply only to murder. For other offences against the person involving recklessness, the accused need only have foreseen the possibility that harm would occur to establish recklessness.¹⁸

The DPP Reference case

- 21 In 2021, in *The Director of Public Prosecutions Reference No 1 of 2019* (DPP Reference case), the Director of Public Prosecutions asked the High Court to review the correctness of the decision in *Campbell*, stating in part that
- the correct interpretation of 'recklessness' for offences other than murder (and, in particular, the offence of recklessly causing serious injury) is that an accused had foresight of *the possibility* of relevant consequences and proceeded nevertheless ...¹⁹
- 22 The facts in the DPP Reference case involved an accused who had been involved in a fight. Punches and kicks were traded between two men, 'culminating in the accused kicking his adversary to the head—he claimed it was in self-defence—causing the other man to fall to the ground and suffer serious injury to the skull and brain.'²⁰
- 23 The accused was charged with causing serious injury intentionally (section 16 of the Crimes Act) and in the alternative causing serious injury recklessly (section 17 of the Crimes Act). In the County Court, the judge directed the jury in accordance with *Campbell* that recklessness requires foresight of the *probability* of serious injury. The accused was found not guilty on both charges.²¹
- 24 The High Court appeared to accept that, except for murder, foresight of the possibility of harm is the correct test.²² Even so, it found that the foresight of probable harm test should stand in Victoria unless and until it is altered by Parliament.
- 25 The majority noted the probability test had been used in Victoria for decades and amendments to the Crimes Act had been made in this time. One amendment involved increasing the penalties for a range of offences, including recklessly causing serious injury. The majority approved the view that these changes could 'only be understood on the basis that the legislature [Parliament] was aware of, and accepted' the use of the foresight of probable harm test for offences such as causing serious injury recklessly.²³ They concluded it was not the High Court's role to substitute a different test.²⁴

14 *R v Campbell* (1997) VR 585. This case involved the offence of 'causing serious injury recklessly': *Crimes Act 1958* (Vic) s 17.

15 In *Campbell*, the court said that 'Nuri used a test of "probability" in a kindred section to this case and it must be the case that all relevant sections in the group bear the same interpretation': *R v Campbell* (1997) VR 585, 593.

16 Ss 15A, 15B, 17, 18, 19, 20, 21, 22, 23, 25, 26, 31 & 31C.

17 Judicial College of Victoria, *Victorian Criminal Charge Book* (Online Manual, 2022) 7.1.3 [2].

18 *R v Coleman* (1990) NSWLR 467.

19 Emphasis added. The point of law that was the subject of the DPP Reference case is set out in full in the Court of Appeal judgment in that case: *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181, [3] (Maxwell P, McLeish and Emerton JJA).

20 *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181, [56] (Priest JA).

21 *Ibid.*

22 The minority said 'There can be no doubt that the decision in *Campbell* [applying the probability rather than possibility threshold to the offence of recklessly causing serious injury] is wrong': *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [7] (Kiefel CJ, Keane and Gleeson JJ). The majority appeared to accept that 'The identified error in *Campbell*' was in fact an error, but found it 'should stand unless addressed by the legislature in Victoria' because of the 're-enactment presumption'—that is, the Victorian Parliament had amended the Crimes Act since *Campbell* and those amendments 'were based on the nature and extent of the criminality and culpability of a contravention of s 17 as stated in *Campbell*': *ibid* [57]-[58] (Gageler, Gordon and Steward JJ). Justice Edelman, who, with the majority, held that the Campbell threshold should stand, nevertheless referred to what would be 'the salutary effect of overruling *Campbell* in circumstances in which ... the result in *Campbell* is wrong': *ibid* [64].

23 *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181, [21] (Maxwell P, McLeish and Emerton JJA); *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [44] (Gageler, Gordon, Steward JJ).

24 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [57]-[59] (Gageler, Gordon, Steward JJ), [101] (Edelman J).

What the Commission has been asked to do

- 26 The Victorian Law Reform Commission has been asked by the Attorney-General to:
- review the use of recklessness in relation to offences against the person in Part I, Division 1(4) of the Crimes Act
 - consider if the Crimes Act should be amended to include a definition of recklessness for offences against the person, and if so, whether the maximum penalties for offences against the person should change
 - develop a set of guiding principles that could be used to review the use or proposed use of recklessness as a fault element in other categories of Crimes Act offences
 - have regard to:
 - the meaning of recklessness for offences in other Australian and relevant common law jurisdictions, particularly other offences against the person
 - the approach and reasons for using 'probably' to express the fault element for recklessness in reforms to Part I, Division 1(8A)–(8F) of the Crimes Act²⁵
 - the operation of any statutory minimum terms of imprisonment
 - the potential impact of any recommended changes on all parts of the criminal justice system (for example, impacts due to changes in prosecution, conviction or incarceration rates).
- 27 The Commission has been asked to deliver its report to the Attorney-General by 29 February 2024.

Definitions of recklessness

- 28 Variations on three tests for recklessness have been adopted in Australia (see Appendix for an overview of how recklessness is defined in various jurisdictions):
- probability
 - possibility
 - 'a substantial and unjustifiable' risk.
- 29 These alternatives are discussed below. Factors that might weigh in favour of or against these tests for Crimes Act offences against the person are set out under each definition.

Probability

A person is reckless if they foresee (predict) that harm will probably occur and they continue regardless.

- 30 A 'probable' result is one that is 'likely to happen'.²⁶
- 31 This should not be thought of in terms of statistical probability, such as a 'more than a 50 per cent chance'. Nor does it require an outcome that is 'more likely than not'.²⁷

Table 3: Advantages and disadvantages of the 'probability' definition

Advantages	Disadvantages
<ul style="list-style-type: none"> The threshold for establishing recklessness is relatively high, confining the scope of the test: a person will not be criminally responsible if they foresaw a possible but improbable risk of injury. The test has been applied by the courts in Victoria in relation to offences against the person for more than two decades. The language of probability has been used to replace references to 'recklessness' for some sexual offences. Retaining the probability test for offences against the person would ensure consistency with these sexual offences. 	<ul style="list-style-type: none"> The concept of a 'probable' or 'likely' risk is vague and may be difficult for juries/the general public to interpret. The concept of a 'probable' risk may imply a statistical probability such as a more than 50% chance, although the courts have said this is not how it should be interpreted.

Possibility

A person is reckless if they foresee (predict) that harm will possibly occur and they continue regardless.

- 32 An outcome that is possible is one that 'might' occur.²⁸ This is a lower threshold than an outcome that is 'likely'.²⁹

26 Judicial College of Victoria, *Victorian Criminal Charge Book* (Online Manual, 2022) 7.1.3 'Recklessness' [5] citing *R v Crabbe* (1985) 156 CLR 464. See also Joseph Lelliott et al, 'More Scope for Murder: Reckless Indifference in Queensland's Criminal Code' (2020) 44 *Criminal Law Journal* 19, 24: 'In *R v Boughey*, the High Court, referring to s 157(1)(c) of the Criminal Code (Tas), stated that probable was a synonym for "likely" and "a good chance", with "likely" meaning a risk that is "substantial" or "real and not remote". Mason, Wilson, and Deane JJ further noted that it does not matter whether or not it is less or more than a 50% chance. In *R v Faure*, the Victorian Court of Appeal stated that probability should not be approached as an "odds on" chance or as a matter of mathematical percentages. [*R v Faure* [1999] 2 VR 537, 547, 551 (Brooking JA); [1999] VSCA 166.].

27 *The Commonwealth Criminal Code: Guide for Practitioners* (2nd ed, 2002) Pt 2.2, div 5.4-A, 75.

28 *R v Coleman* (1990) NSWLR 467, 475.

29 The court in *R v Crabbe* said it is an outcome that is 'not likely': *R v Crabbe* [1985] (1985) 156 CLR 464, 470. However, a 'likely' outcome is also an outcome that is possible. If the higher threshold is met, the lower threshold will also have been met.

Table 4: Advantages and disadvantages of the 'possibility' definition

Advantages	Disadvantages
<ul style="list-style-type: none"> • This is a lower threshold for establishing recklessness than the threshold of probability, which applies to murder. Unlike reckless murder, reckless offences against the person are generally considered less blameworthy than intentional offences, so a lower threshold for establishing recklessness may be appropriate. • Having a lower threshold for recklessness may make the distinction between reckless and intentional offending clearer. 	<ul style="list-style-type: none"> • The scope of possibility may be overly inclusive, capturing risk-taking behaviour that is socially acceptable and should not be criminalised. • In NSW, the scope of 'possibility' is implicitly limited by an objective element. As well as foresight of the possibility of harm, it must have been unreasonable for the person to take the risk in the circumstances known to them.³⁰ While this addresses the problem that the possibility threshold can be overly inclusive, it also makes the definition of recklessness more complex. • The concept of a 'possible' risk is vague and may be difficult for juries/the general public to interpret. • By lowering the threshold for recklessness, the distinction between reckless behaviour and negligent behaviour may be obscured. • Requiring juries to apply different thresholds for reckless murder and recklessness in relation to other offences against the person could create confusion.

Substantial and unjustifiable risk

A person is reckless with respect to a circumstance if:

- he or she is aware of a substantial risk that the circumstance exists or will exist; and
- having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

A person is reckless with respect to a result if:

- he or she is aware of a substantial risk that the result will occur; and
- having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

The question whether taking a risk is unjustifiable is one of fact.³¹

- 33 The 'substantial and unjustifiable risk' threshold is used to define recklessness in the *Criminal Code Act 1995* (Cth).³² A similar definition is used in Victoria in relation to culpable driving. However, the Victorian culpable driving definition uses the word 'may' rather than 'will': 'a substantial risk that death or ... grievous bodily harm *may* result'.³³
- 34 The 'substantial and unjustifiable risk' test has both subjective and objective elements. While the accused must have been subjectively aware of a risk of some kind, assessing whether it was 'substantial' involves asking if a reasonable observer would have characterised it in this way. The 'reasonable observer':
- may be in possession of more information than the [accused] and will usually be endowed with far better judgement about risks...³⁴
- 35 This means an accused can be treated as having been aware of a 'substantial' risk even though they themselves viewed the risk as minor.
- 36 There is an absence of case law on how to determine if it was justifiable for an accused to take a risk in the circumstances known to them. The courts are likely to use an objective standard of what an ordinary, reasonable person would consider justifiable in those circumstances.³⁵
- 37 There is a link between the degree of risk and the unjustifiability of running that risk in any given situation.³⁶

31 *Criminal Code Act 1995* (Cth) Sch 1, ch 2, pt 2.2, div 5, s 5.4.

32 The Criminal Code Act partially codifies federal criminal law. See the Appendix for a discussion of the differences between common law and code jurisdictions in Australia.

33 *Crimes Act 1958* (Vic) s 318(2)(a).

34 *The Commonwealth Criminal Code: Guide for Practitioners* (2nd ed, 2002) Pt 2.2, div 5.4-A, 73.

35 Ibid Pt 2.2, div 5.4-C, 77. During the drafting of the Code, 'unreasonable' was proposed instead of 'unjustifiable'. However, Parliament opted to use the word 'unjustifiable' 'to avoid confusion between recklessness and criminal negligence.' Parliament of the Commonwealth of Australia, *Criminal Code Bill 1994: Explanatory Memoranda*, 15.

36 Criminal Law Officers Committee of the Standing Committee of Attorneys-General (Model Criminal Code Officers Committee), *Model Criminal Code*, 'Chapters 1 & 2: General Principles of Criminal Responsibility' (December 1992) 27.

Table 5: Advantages and disadvantages of the 'substantial and unjustifiable risk' test

Advantages	Disadvantages
<ul style="list-style-type: none"> The threshold for establishing recklessness will vary according to the context, appropriately taking into account the reasonableness of the risk-taking behaviour. The test was favoured by the Model Criminal Code committee, tasked with developing general principles of criminal responsibility for all Australian jurisdictions. The committee said the test did not imply a mathematical or statistical calculus and set an appropriate threshold for determining recklessness.³⁷ The test was adopted in the Commonwealth Criminal Code Act;³⁸ in the Northern Territory; and in the Australian Capital Territory in relation to some, but not all, offences against the person.³⁹ 	<ul style="list-style-type: none"> The test has not previously been used in relation to offences against the person in Victoria (but a similar test is used for the offence of culpable driving causing death.⁴⁰) The concept of a 'substantial risk' is vague and may be difficult for juries/the general public to interpret. This definition may create complexity as it has two limbs, one of which has both subjective and objective components (substantial risk) and one that is objective (unjustifiable in the circumstances known to the accused).

Issues with how recklessness is defined today

Is the threshold for establishing recklessness for offences against the person in Victoria too high?

- 38 Foresight of probable harm is a higher test or threshold for establishing recklessness than foresight of possible harm.⁴¹ If the test is reformed to require foresight of possible harm, this will expand the scope of the relevant offences.
- 39 Changing the test may criminalise some behaviour that is not currently criminalised and raise the degree of culpability for other behaviour by moving it up the hierarchy of offences from 'negligent' to 'reckless'. It could make it easier for the prosecution to prove recklessness in cases where a particular outcome was an unlikely but possible result of the accused's actions.⁴²

37 Criminal Law Officers Committee of the Standing Committee of Attorneys-General (Model Criminal Code Officers Committee), *Model Criminal Code*, 'Chapters 1 & 2: General Principles of Criminal Responsibility' (December 1992) 27. The definition also 'substantially follows the US Model Penal Code in using "substantial" and "unjustifiable" as the two key words': The Parliament of the Commonwealth of Australia, *Criminal Code Bill 1994: Explanatory Memoranda* (Report, 1994) 15. However, it excludes the requirement in the Model Penal Code that a person 'consciously disregards' the risk. The Model Penal Code defines 'recklessly' as follows: 'A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.': American Law Institute (US), 1962, Model Penal Code, 2.02(2)(c).

38 *Criminal Code Act 1995* (Cth).

39 See the Appendix for more detail.

40 *Crimes Act 1958* (Vic) s 318(2)(a).

41 *DPP Reference No 1 of 2019* [2021] HCA 26, [1] (Kiefel CJ, Keane and Gleeson JJ (minority)). See also *The Director of Public Prosecutions Reference No 1 of 2019—Appellant's Submissions* (Court File, 29 January 2021) 5 [16], describing 'foresight of probability' as 'plainly provid[ing] less "coverage" than the test of possibility'.

42 This was the respondent's argument in the DPP reference case: *Acquitted person, The Director of Public Prosecutors Reference No 1 of 2019 - Respondent's Submissions* (Report) 2 [2], describing the DPP's proposed 'possibility' test for the offence of causing serious injury recklessly as 'significantly expanding liability for that offence'. The DPP and the High Court accepted that this would be the result of changing the test.

- 40 In the DPP Reference case, the Director of Public Prosecutions suggested that the application of the probability test to offences against the person:
- creates instances where offenders who clearly have caused the result, and by common estimation would be deemed to have been 'reckless' as to its causation, escape proper liability for causing that result ... There is no lesser form of causing serious injury recklessly where an offender is sentenced for causing the result, a serious injury, if proof of the mental element fails.⁴³
- 41 The Director pointed out that, by comparison, the lesser offence of manslaughter is available if the mental element for murder is not proven.⁴⁴ While it is true that lesser forms of causing serious injury recklessly are not available, the offence of negligently causing serious injury might be charged as an alternative. And depending on the available evidence about the accused's mental state, other alternative charges might include intentionally causing injury, recklessly causing injury, or common assault.⁴⁵
- 42 It is our role to assess if there are sound reasons for expanding the scope of offences involving recklessness.
- 43 Previously, the Victorian Government has acted to reduce the scope of serious injury offences by narrowing the definition of serious injury. At the time, the Attorney-General said:
- [the] very low threshold for offences involving serious injury, which arose from an overly expansive definition of serious injury, has meant that cases which should be charged as causing injury and heard and determined in the Magistrates' Court are instead charged as causing serious injury and heard in the County Court. This creates delay for victims and accused and places unnecessary pressure on the County Court.
- Providing a new definition of serious injury will clarify the law and enable judges to give much clearer guidance to juries about what constitutes a serious injury. The higher threshold for serious injury will also make it easier for prosecutors to determine the appropriate offence to charge.⁴⁶
- 44 Although the Government previously sought to confine the scope of serious injury offences, the considerations that prompted that reform may no longer carry as much weight or may need to be balanced by other concerns that have arisen since. We are interested to know if there are currently any policy or other reasons to justify changing the definition of recklessness as it applies to offences against the person, including if there is a need to expand the scope of these offences. For example, does the current threshold for establishing recklessness result in some unlawful injury matters going uncharged, or being charged as a less serious offence than is appropriate?
- 45 It may be that the main problem the prosecution faces when seeking to prove recklessness is not that the threshold is too high, but that it is difficult to prove the mental element. Usually, the prosecution relies on statements provided by the accused in a police interview about what they were thinking at the time of the alleged offending. Skilled interviewing is required to elicit relevant information about an accused's state of mind. The accused also has a right to silence.
- 46 Victoria Police told us:
- The 'PEACE' interview model encourages a suspect to tell their account without interruption. The interviewer then presents the suspect with any inconsistencies. There is nothing in the process that is specifically directed towards the mental element of the offence, although the suspect's state of mind is often established through the interview process. In the absence of an admission or voluntary account, it can be difficult to obtain an admission or comment demonstrating that a suspect's state of mind met the threshold for intent or recklessness. This is further complicated by the current high 'probability' threshold for recklessness.

43 *The Director of Public Prosecutions Reference No 1 of 2019—Appellant's Submissions* (Court File, 29 January 2021) 15, footnote 43.
 44 *Ibid.*
 45 See the appellant's submissions to the Court of Appeal in the DPP Reference case: *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181, [107] (Priest JA).
 46 Victoria, Parliamentary Debates, Legislative Assembly, 13 December 2012, 19 (Robert Clark, Attorney-General). See also *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, 17 [46] (Gageler, Gordon, Steward JJ).

- In the context of family and gendered violence, the difficulty of proving intent means that recklessness often becomes a 'fall back' position, 'lessening the possible punitive outcomes for often serious offending'.
- Some alleged offenders are not fit to be interviewed, making it even more difficult to obtain evidence regarding their state of mind.⁴⁷

Examples provided by the OPP

- 47 The Office of Public Prosecutions provided the following hypothetical examples to illustrate where recklessness is not likely to be met under the current probability test but may be made out under a possibility test:⁴⁸

Scenario 1: A punch causing a traumatic brain injury

A and B are at a bar. Both have consumed alcohol. A becomes aggressive towards B, and punches B in the face, causing B to fall and strike his head on the floor. B suffers a traumatic brain injury as a consequence of striking his head.

Given the severity of the resulting injury, a charge of recklessly causing serious injury would, on its face, be appropriate. However, it would be open to A to argue that, while they were aware of the probability that, by throwing a punch, they would cause an injury to B, they were not aware of the probability that this would cause a serious injury. In this circumstance, while a less serious charge of causing injury intentionally or recklessly may be open, it would be exceedingly difficult for the prosecution to prove a charge of recklessly causing serious injury.

Scenario 2: Kicking

The dangers of a one-punch assault, in which a person is knocked to the ground and strikes their head, may be well understood in the community. But kicking—another all too common form of violent assault—can carry with it consequences which an attacker might foresee as possible but not necessarily probable.

An assailant who kicks a prone victim to the torso might readily foresee grazing or soft tissue contusions, falling short of serious injury, as probable consequences. But the same force could result in a rib breaking and puncturing an organ or lung, or the prone victim rolling into a gutter and striking their head.

Scenario 3: A police siege

A has barricaded himself in a property. There is a visible police presence (Officers B and C) at the front of the property. Two other officers (D and E) move into position covertly, at the rear of the property. A produces a firearm and fires several shots towards the rear of the property. The bullets come very close to striking D and E.

The prosecution would need to prove that A foresaw that placing another in danger of serious injury or death was a probable consequence of him firing behind the house. In circumstances where A had not seen officers in that area, it would be difficult to prove that A recklessly engaged in conduct endangering life or conduct endangering serious injury, notwithstanding the fact that D and E were endangered. A similar difficulty would arise in relation to the alternative offence of discharging a firearm reckless to the safety of a police officer (Crimes Act s 31C).

If the test were 'possible consequence' rather than 'probable consequence', the prosecution may well be able to establish the threshold of recklessness.

Is the distinction between intentional and reckless offending obscured by requiring foresight of probable harm?

- 48 The distinction between intentional and reckless offending may be obscured when the definition of recklessness requires foresight of probable harm.⁴⁹
- 49 In the DPP Reference case, the Director of Public Prosecutions said:
- By requiring proof of the knowledge of the probability of the relevant consequences, an accused's mental state is morally equivalent to having an intention to cause the relevant consequence. This conflation creates a lacuna in the proper determination of liability.⁵⁰
- 50 The Director's reasoning here implies that the probability threshold for recklessness makes it almost as difficult to prove as intention. This suggests that there is a gap in the criminal law and behaviour that injures or endangers people is not appropriately criminalised when the alleged offender did not foresee it would probably happen.⁵¹

Would the distinction between reckless and negligent offending be obscured by lowering the threshold?

- 51 On the other hand, lowering the threshold for recklessness to foresight of possible harm might obscure the distinction between reckless and negligent offending. It could make it easier to prove reckless offending than negligent offending, even though reckless behaviour is more culpable than negligence in the hierarchy of offences.

Are there any practical differences between the various definitions?

- 52 An assessment of what is a:
- risk of a probable outcome
 - risk of a possible outcome
 - substantial and unjustifiable risk
- will invariably be influenced by the context, circumstances, and social views on the reasonableness or acceptability of the conduct.
- 53 For example, driving is a high-risk activity, but driving is useful and socially accepted, so it is not considered reckless as long as drivers obey the road rules. A driver who is obeying the road rules and who injures another person (perhaps someone who steps out from the kerb without looking) will not be characterised as reckless, regardless of how recklessness is defined.⁵²
- 54 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 used.⁵³

49 O'Hara notes one possible consequence of the standard for recklessness being 'very close to the standard required for intent itself': 'Without sufficient separation between recklessness and intent, similar offending may result in convictions for different offences with different mental states which may produce radically divergent, and potentially unfair, outcomes at sentence.' James O'Hara, 'Recklessness in Criminal Law: Possibilities and Probabilities' (2022) 46 *Criminal Law Journal* 67, 70.

50 *The Director of Public Prosecutions Reference No 1 of 2019—Appellant's Submissions* (Court File, 29 January 2021) 14-15 [46].

51 In other words, a 'probability' threshold 'may set the bar too high for the prosecution in cases where on any estimation, the conduct should attract liability.' James O'Hara, 'Recklessness in Criminal Law: Possibilities and Probabilities' (2022) 46 *Criminal Law Journal* 67, 70.

52 See, for example, *Aubrey v R* (2017) CLR, 329 [49] (Kiefel CJ, Keane, Nettle and Edelman JJ).

53 See Mirko Bagaric, '[g.1.2680] The Accused's Knowledge of the Risk of Bringing about the Conduct Elements of the Offence Constitutes the Subjective Component of Recklessness' in *The Laws of Australia* (Thomson Reuters, 2016). See also, *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [69] (Edelman J: 'The difference between the meaning of recklessness for most offences (which focuses upon foresight of the *possibility* of the consequences) and the meaning in the context of murder ... (which focuses upon foresight of the *probability* of the consequences) is not as stark as first appears.')

- 55 But the ordinary, everyday meanings of 'possibility' and 'probability' are different. According to ordinary usage, 'probability' sets a higher threshold. Taken at face value, we can assume that 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.⁵⁴

How clearly expressed is the objective fault element?

- 56 Recklessness relates to a risk that a person subjectively perceives. It can be distinguished from 'negligence', which relates to an objective risk that an ordinary person should be aware of.⁵⁵
- 57 However, reckless offences may also include an objective fault element. This is overtly signalled in the 'substantial and unjustifiable risk' test by reference to the risk being unjustifiable. When that test was drafted, it was chosen in part because the concepts of 'probability' and 'possibility':
- ignore the link between the degree of risk and the unjustifiability of running that risk in any given situation.⁵⁶
- 58 The 'unjustifiable' branch of the test has not been considered much by the courts. This may reflect the use of prosecutorial discretion to prevent justified risk-taking behaviour being charged. It may also be because accused persons have relied on defences of duress or sudden or extraordinary emergency, rather than arguing that their behaviour was justified.⁵⁷
- 59 In addition, the failure to focus on the 'unjustifiable' branch of the test may reflect that 'substantial risk' has itself been interpreted as including an objective element. As discussed earlier, although the accused must have been consciously aware of the risk (the subjective fault element), the standard of the reasonable observer is used when deciding if the risk was substantial.⁵⁸
- 60 Similarly, in New South Wales the possibility threshold has been interpreted as having both subjective and objective components, requiring both that a person foresaw the possibility of harm and that it was unreasonable for them to take the risk in the circumstances known to them.⁵⁹ Assessing if it was reasonable to take a risk in the circumstances has been described as requiring consideration of:
- the 'social utility' of the act,⁶⁰ or
 - a range of factors including the 'magnitude of the risk ... along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have'.⁶¹
- 61 In the example discussed in paragraph 53, because driving is socially useful a driver who causes an injury to a pedestrian 'is not judged to be reckless by reason only of foresight of the mere possibility of injury'.⁶²

54 See footnote 42.

55 Joseph Lelliott et al, 'More Scope for Murder: Reckless Indifference in Queensland's Criminal Code' (2020) 44 *Criminal Law Journal* 19, 23.

56 Criminal Law Officers Committee of the Standing Committee of Attorneys-General (Model Criminal Code Officers Committee), *Model Criminal Code*, 'Chapters 1 & 2: General Principles of Criminal Responsibility' (December 1992) 27.

57 *The Commonwealth Criminal Code: Guide for Practitioners* (2nd ed, 2002) Pt 2.2, div 5.4-C, 77.

58 See paragraph 34 of this paper.

59 As set out by Justice Edelman, with reference to 'the developed meaning given by all members of this Court in *Aubrey* [which dealt with a NSW offence involving recklessness]': *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [64].

60 *Aubrey v R* (2017) CLR, 329 [49] (Kiefel CJ, Keane, Nettle and Edelman JJ).

61 Justice Edelman has objected to using the concept of 'social utility' because it implies 'a Benthamite metric of overall welfare'.

In Justice Edelman's view, assessing the reasonableness of an act does not require additional explanation in terms of social utility: 'social utility is a label which conceals the real enquiry – the implicit reasonableness assessment'. Such assessment might involve consideration of the range of factors listed (magnitude of risk, etc): *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [72] (Edelman J, citing *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48).

62 *Aubrey v R* (2017) CLR, 329 [49] (Kiefel CJ, Keane, Nettle and Edelman JJ).

- 62 In New South Wales the objective element of recklessness is not usually explicitly identified. The High Court has said that in most cases it is unnecessary to do so:
- Experience to date suggests that juries are ordinarily able as a matter of common sense and experience, and so without the need for particular directions, to take the social utility of an act into account when determining whether it was reckless.⁶³
- 63 However, the High Court also recognised that there may be cases where it is necessary to direct the jury to the objective element to ensure the accused receives a fair trial.⁶⁴
- 64 A direction to this effect could involve explaining to the jury that, to establish recklessness, the prosecution must prove beyond reasonable doubt that:
- 1) The accused person foresaw the possibility of harm but proceeded nonetheless to take that risk; and
 - 2) The risk was unreasonable in the circumstances known to the accused,⁶⁵ which is an objective test.
- 65 In the DPP Reference case, in the Court of Appeal, Justice Priest said that the probability test 'is purely subjective ... and has no complicating objective components.' For this reason 'it is straightforward and relatively simple' and 'easily grasped by juries'.⁶⁶
- 66 It should be noted that in Victoria, acting 'without lawful excuse' is an element of many offences against the person involving recklessness.⁶⁷ For these offences, juries are told that the prosecution must prove that the accused acted without lawful justification or excuse.⁶⁸
- 67 In the DPP Reference case, the Director of Public Prosecutions asked the High Court to find that the correct test for recklessness for offences against the person in Victoria is that the accused had foresight of the possibility of the relevant consequence and proceeded nonetheless, having regard to the social utility of the action.⁶⁹ In other words, the Director sought the adoption in Victoria of a possibility test similar to that which has been used in New South Wales, but with an explicitly articulated objective element.

63 *Aubrey v R* (2017) CLR, 329 [50] (Kiefel CJ, Keane, Nettle and Edelman JJ).

64 *Ibid.*

65 See *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [64] (Edelman J).

66 *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181 [124] (Priest JA). However, the Supreme Court of Victoria has said that the elements of reckless conduct endangering life (s 22 of the Crimes Act) include an 'objective mental element'. The Court said the elements of reckless conduct endangering life include: the accused engaged in the conduct; that conduct placed a person in danger (ie, conduct that carried with it an appreciable risk) of death (the *actus reus*); the accused engaged in that conduct voluntarily; a reasonable person in the position of the accused, engaging in the very conduct in which the accused engaged and in the same circumstances, would have realised that they had placed another in danger of death; (the objective mental element); and the accused engaged in that conduct recklessly in that they foresaw that placing another in danger of death was a probable consequence of their conduct in the surrounding circumstances (the subjective mental element): *R v Abdul-Rasool* (2008) 18 VR 586; 180 A Crim R 556, [19], emphasis added.

67 Reckless offences against the person that include 'without lawful excuse' as an element are: *Crimes Act 1958* (Vic) ss 15A, 15B, 17, 18, 19, 20, 21, 22, 23.

68 See, eg, Judicial College of Victoria, *Criminal Charge Book*, 7.4.2.5 Charge: intentionally or recklessly causing serious injury (from 1/7/13).

69 The phrase, 'having regard to the social utility of the action' was added by leave in the course of argument: *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181 [3] & footnote 3, (Maxwell P, McLeish and Emerton JJA).

68 The majority of the High Court did not directly address this aspect of the Director's case. In the same case, the Victorian Court of Appeal had said:

When and how a 'reasonableness' element is appropriately included in the definition of a criminal offence is a question of policy, not of interpretation. Given that criminal responsibility ordinarily rests on what an accused person actually knew or intended or foresaw, rather than on what a reasonable person would have known or intended or foreseen, the introduction of an objective test is always a matter requiring careful consideration.⁷⁰

69 The Court of Appeal said it was not its role to trespass into this policy area.

70 For this inquiry, we are seeking input on whether the Crimes Act should include a definition of recklessness for offences against the person, and if so, what definition. Part of our assessment of what definition is preferable will involve considering whether and how it incorporates an objective fault element.

71 As well as the need to establish a threshold for recklessness that captures an appropriate range of offending behaviour without being overly inclusive, an important consideration when evaluating any definition of recklessness is how clearly it can be communicated to a jury. At the conclusion of a criminal trial the judge explains to the jury the relevant law that they are required to apply. This includes the elements of the offences charged and their component parts. To arrive at a guilty finding for an offence, the jury must find each element proven beyond reasonable doubt.

Recklessness is defined in a variety of ways in Victorian legislation— is this a problem?

72 Recklessness and related concepts are used in a variety of ways in the Crimes Act. Other Victorian legislation also uses different definitions of recklessness.

73 The Crimes Act does not define recklessness in relation to offences against the person in Part I, Division 1(4). The meaning of recklessness for these offences comes from the common law, as discussed earlier.

74 For some sexual offences in Part I, Division 1(8A)–(8F) of the Crimes Act the concept of recklessness remains relevant but the language of recklessness is no longer used. It has been replaced with the expression 'probably'.

75 For example, 'Threat to commit a sexual offence' (section 43):

A person (A) commits an offence if—

- A makes to another person (B) a threat to rape or sexually assault B ...; and
- A intends that B will believe, **or believes that B will probably believe**, that A will carry out the threat.⁷¹ [Emphasis added].

76 Section 43 was modelled on the offences of threat to kill and threat to inflict a serious injury.⁷² These offences still use the language of recklessness. For example, 'Threats to kill' (section 20):

A person who, without lawful excuse, makes to another person a threat to kill that other person or any other person—

- intending that that other person would fear the threat would be carried out; or
- **being reckless as to whether or not that other person would fear** the threat would be carried out—

is guilty of an indictable offence. [Emphasis added].

70 *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181 [44] (Maxwell P, McLeish and Emerton JJA).
71 *Crimes Act 1958* (Vic) s 43(1), emphasis added.
72 Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (2015) 21 [9.2].

- 77 When section 43 was introduced, the Department of Justice explained that:
- [the] element of recklessness in [the offence] is made clearer by being explicated in terms of a belief in a probable result.⁷³
- 78 The Crimes Act also contains property offences that use the concept of recklessness but not the term. For example, 'Destroying or damaging property' (section 197):
- A person who intentionally and without lawful excuse destroys or damages any property belonging to another ... shall be guilty of an indictable offence...
- ... a person who destroys or damages property shall be taken as doing so intentionally if, but only if—
- his purpose or one of his purposes is to destroy or damage property; or
 - he knows or **believes that his conduct is more likely than not to result in destruction of or damage to property.**⁷⁴ [Emphasis added].
- 79 A different definition of recklessness applies to the offence of culpable driving causing death.⁷⁵ As discussed earlier, this offence uses a definition that is very close to the Commonwealth definition. The offence provides that:
- a person drives a motor vehicle culpably if he drives the motor vehicle—
- recklessly, that is to say, if he **consciously and unjustifiably disregards a substantial risk** that the death of another person or the infliction of grievous bodily harm upon another person **may result** from his driving⁷⁶ [Emphasis added].
- 80 As the examples above show, recklessness is used in at least four different ways in the Crimes Act:
- specific reference to 'recklessness' but no statutory definition, hence 'foresight of probable harm' is required in accordance with the common law
 - foresight of a probable outcome, with no reference to 'recklessness'
 - foresight of a result that is 'more likely than not', with no reference to 'recklessness'
 - specific reference to 'recklessness', which is defined as 'conscious and unjustifiable disregard of a substantial risk that may result'.
- 81 In a single case where an accused is charged with multiple offences, a jury may be required to apply different tests for recklessness to different offences.⁷⁷
- 82 Several different concepts of recklessness are also used in other Victorian legislation.
- 83 For example, the *Family Violence Protection Act 2008* (Vic) uses both the language of 'probability' and of 'recklessness'. Section 123A provides that a person against whom a Family Violence Intervention Order has been made and who has had an explanation of the order given to them, must not contravene the order 'intending to cause, or knowing that [their] conduct will probably cause - ... physical or mental harm to the protected person ... or ... apprehension or fear ...'. And section 144RA relates to the 'intentional or reckless ... use of confidential information'. There may be other sections of the Act where the concept of recklessness is relevant even though the language associated with recklessness is not used.⁷⁸
- 84 We are interested to know if the use of different language and definitions of recklessness in the Crimes Act, as well as in other Victorian legislation, is a problem, and if so why.

73 Ibid.

74 *Crimes Act 1958* (Vic) s 197(1),(2),(4); and see 197(5), 198, 199.

75 Ibid s 318.

76 Ibid s 318(2)(a).

77 An analogous point can be made about the advantage of having a consistent meaning of recklessness for fatal and non-fatal offences: James O'Hara, 'Recklessness in Criminal Law: Possibilities and Probabilities' (2022) 46 *Criminal Law Journal* . 72. See also *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181 [121] ('adapting the same test for recklessness in offences under s 17 as for reckless murder avoids the possible inconvenience flowing from a jury being asked to consider two different forms of recklessness in the event that reckless murder and recklessly causing serious injury are charged on the indictment': Priest JA).

78 For example, s 123 makes it an offence to contravene a Family Violence Intervention Order. The mental element of this offence was discussed in *DPP v Cormick*, but the court found it was not necessary in that case to determine if recklessness would be sufficient to establish the mental fault element: *Director of Public Prosecutions v Cormick* [2022] VSC 786 [50].

- 85 Previously, the Model Criminal Code committee sought to codify general principles of criminal responsibility in order 'to encourage consistency in the language of the criminal law and to promote certainty as to the meaning of that language'.⁷⁹ The committee failed to secure an Australia wide consensus to adopt these principles of criminal responsibility but there was widespread recognition of the benefits that consistency might bring.⁸⁰
- 86 Complexity in the criminal law can make it difficult for people to understand the law and know their obligations. On the other hand, there may be good reasons to have different definitions of recklessness for some offences.

Would a different definition require new penalties?

- 87 If Victoria adopts a legislative definition of recklessness for offences against the person that differs from the current common law definition, it will be necessary to consider whether the penalties associated with these offences need to change.
- 88 The maximum penalties for offences against the person in Victoria are generally higher than for comparable offences in New South Wales.⁸¹ The penalties for causing injury offences were significantly increased in 1997, two years after *Campbell* was decided.⁸² The Court of Appeal said these changes can be understood on the basis that the legislature accepted the *Campbell* interpretation and that the increased penalties were seen as necessary given the high degree of culpability where the offender was aware of the 'probability' of serious injury.⁸³
- 89 Victoria also has some statutory minimum terms of imprisonment, such as for causing serious injury recklessly in circumstances of gross violence.⁸⁴
- 90 If Victoria adopts the same definition of recklessness as New South Wales, and this expands the scope of offences involving recklessness and makes them easier to prove, justice may require that relevant penalties are less severe.
- 91 On the other hand, it may still be harder in Victoria to convict for serious injury offences. These offences require foresight of a *serious injury*. The comparable offences in New South Wales only require foresight of *bodily harm*, as opposed to 'grievous' (serious) bodily harm.
- 92 The issue of penalties is relevant more generally. For example, the offence of culpable driving causing death contains recklessness as a fault element. It is a category 2 offence under the *Sentencing Act 1991* (Vic), requiring a custodial sentence in most cases.⁸⁵ The Crimes Act also specifies that the standard sentence for this offence is eight years.⁸⁶
- 93 It is also important to note that some Crimes Act offences, such as causing serious injury intentionally, do not refer to recklessness at all, but must be sentenced differently if the accused knew or was reckless about the victim having a certain occupation, such as an emergency worker on duty.⁸⁷ Any recommendations we make in this inquiry regarding the definition of recklessness for offences against the person may have implications for how the concept of 'recklessness' is used in the Sentencing Act.

79 Harry Gibbs, R.S. Watson and A.C.C. Menzies, *Review of the Commonwealth Criminal Law: Interim Report—Principles of Criminal Responsibility and Other Matters* (Report, July 1990) 31.

80 Model Criminal Code Officers Committee, *Model Criminal Code: Chapter 2, General Principles of Criminal Responsibility* (Final Report, Australian Government Public Service for the Attorney-General's Dept., December 1992) chapter 2, i-iii.

81 For example, for the offence of causing serious injury recklessly, s 17 of the *Crimes Act 1958* (Vic) sets the maximum penalty at 15 years imprisonment, whereas the comparable offence of 'reckless grievous bodily harm' under s 35(2) of the *Crimes Act 1900* (NSW) has a maximum of 10 years imprisonment: 'A person who— (a) causes grievous bodily harm to any person, and (b) is reckless as to causing actual bodily harm to that or any other person, is guilty of an offence. Maximum penalty—Imprisonment for 10 years.'

82 The maximum for intentionally causing serious injury was increased from 12.5 to 20 years; for recklessly causing serious injury, from 10 to 15 years; and for intentionally causing injury, from 7.5 to 10 years.

83 *Re Director of Public Prosecutions (Vic) Reference No 1 of 2019* [2020] VSCA 181; (2020) 284 A Crim R 19 [20]-[21] (Maxwell P, McLeish and Emerton JJA), [140] (Kaye JA).

84 *Crimes Act 1958* (Vic) s 15B; *Sentencing Act 1991* (Vic) s 10.

85 *Sentencing Act 1991* (Vic) s 5(2H).

86 *Crimes Act 1958* (Vic) s 318 (1A).

87 *Sentencing Act 1991* (Vic) s 3(1), definition of category 1 offence (ca)(ii).

If a statutory definition is adopted, what role should the common law play?

- 94 If a short definition of recklessness is legislated, such as 'A person is reckless if they foresee (predict) that harm will [possibly or probably] occur and they continue regardless', the courts will need to reach a conclusion about how 'possibly' or 'probably' (whichever has been legislated) is defined. If a statutory definition does not exclude the common law, how the courts have previously interpreted the relevant terms will continue to apply.
- 95 Alternatively, the legislative definition could attempt to define 'possibility' or 'probability' (or whatever test has been legislated) and exclude the operation of the common law. For example, 'a possible risk is a risk that is more than a trivial risk or bare logical possibility' or 'a probable risk is one that is likely to occur, but it does not need to be "more likely than not"'. It would remain the role of the courts to interpret the words of the provision once enacted.⁸⁸

How would a legislated definition affect the justice system?

- 96 If the Crimes Act is amended to include the current common law definition of recklessness for offences against the person, this will provide certainty about Parliament's support for the status quo. Aside from this, it is unlikely to have significant flow-on effects for the justice system.
- 97 If the Crimes Act is amended to include a definition that sets a lower threshold for recklessness, such as foresight of possible harm, this will have flow-on effects. The extent of these effects is uncertain but could include those set out in Table 6.

Table 6: Potential outcomes of lowering the threshold for recklessness

Stage of criminal process	Potential outcome
Police respond to an incident or report of an offence against the person	Police informant interviews alleged offender. It may be that more alleged offenders give evidence of having foreseen a possible outcome, by comparison to those admitting foresight of a probable outcome.
Charges filed	An increase in charges filed in relation to a wider range of behaviour.
Pleading behaviour	Accused people agree to plead guilty to offences involving recklessness more often than at present, given the higher likelihood of the offence being proven on the available evidence about their mental state.
Trial outcomes	More offences involving recklessness are proven than at present, including serious offences that require custodial penalties. More people imprisoned for offences involving recklessness than at present.

88 The Commonwealth Criminal Code Act excluded the operation of the common law: *Criminal Code Act 1995* (Cth) ss 1.1, 2.1; See also: *Criminal Code Act 1899* (Qld) ss 2, 5.

- 98 The situation in New South Wales can provide little insight to the flow-on effects for the justice system of changing the definition of recklessness. Aside from the existing differences in the definition of recklessness, there are other differences in how offences against the person are expressed and defined in the two states.⁸⁹
- 99 There may be other consequences of legislating a new definition of recklessness for offences against the person that we have not considered here.
- 100 We are interested to hear about any potential consequences for the justice system, including but not limited to likely changes in rates of prosecution, conviction, or incarceration.

Guiding principles

- 101 Our terms of reference ask us to:
- develop a set of guiding principles that could be used to review the use or proposed use of recklessness as a fault element in other categories of Crimes Act offences.⁹⁰
- 102 These guiding principles will not be inserted in the Crimes Act. Instead, they will assist policy makers and drafters, and Parliament, to analyse if and how the language and concept of recklessness should be used or reformed in relation to Crimes Act offences other than offences against the person.
- 103 Potential guiding principles might include:
- How recklessness is used should be clear and easy to understand, including so that judges can effectively explain its meaning to juries.
 - How recklessness is used should be consistent with everyday usage.
 - Inconsistency in the Crimes Act should be reduced.
 - Inconsistency in Victorian legislation should be reduced.
 - Offences that are distinctive should have definitions of recklessness that are appropriately tailored to those offences.
 - The scope of the definition of recklessness should match the level of culpability associated with the offences and the penalties attached to them.
 - There should be clarity about the subjective and objective elements of recklessness.

89 As discussed earlier, in Victoria, the offence of causing serious injury recklessly (*Crimes Act 1958* (Vic) s 17) requires the prosecution to prove that the accused was reckless about the risk of causing a *serious injury*. In New South Wales, the equivalent offence of 'reckless grievous bodily harm' (*Crimes Act 1900* (NSW) s 35) only requires the prosecution to prove that the accused was reckless about the risk of causing 'actual bodily harm'. If their actions caused 'grievous' bodily harm and they were reckless about causing actual bodily harm, this is sufficient to make them guilty of the grievous bodily harm offence. The definitions of 'serious injury' and 'grievous bodily harm' also differ between the two states. Serious injury is defined in relation to offences against the person in the Victorian Crimes Act as '(a) an injury (including the cumulative effect of more than one injury) that—(i) endangers life; or (ii) is substantial and protracted; or (b) the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm': *Crimes Act 1958* (Vic) s 15. In the NSW Crimes Act, 'grievous bodily harm' is defined as including '(a) the destruction (other than in the course of a medical procedure ...) of the foetus of a pregnant woman, whether or not the woman suffers any other harm, and (b) any permanent or serious disfiguring of the person, and (c) any grievous bodily disease (in which case a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease)': *Crimes Act 1900* (NSW) s 4.

90 However, the terms of reference specifically exclude consideration of offences in the Crimes Act that have recently been subject to review by the Commission, such as stalking and sexual offences.

Please tell us your views

- 104 We are now seeking written submissions that respond to our terms of reference. We encourage you to use the questions at the end of this issues paper to guide your response. You may choose to answer some or all of these questions.
- 105 The Commission will consult with people who have an interest in this reference after we have received and considered written submissions.
- 106 If you would like to meet with us to provide your views (even if you have not provided a written submission) you can contact us directly by email or phone.
- 107 **Please make your submission by 3 March 2023.** You can provide your submission by:
- email: law.reform@lawreform.vic.gov.au
 - via a form on our website: lawreform.vic.gov.au/submissions
 - mail: GPO Box 4637, Melbourne Vic 3001
 - phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call).

Questions

Questions

1. Are there problems with the current common law definition of recklessness as it applies to offences against the person in Victoria? If so, please explain what these problems are and provide case studies or examples.
In answering this question, you might wish to consider:
 - if the test of foresight of probable harm is unjustifiably high for offences against the person
 - if there are behaviours that are not currently criminalised but should be under Part I, Division 1(4) of the *Crimes Act 1958* (Vic).
2. Should the Crimes Act be amended to include a definition of recklessness applicable to offences against the person in Part I, Division 1(4)? If so, what definition should be adopted? For example, foresight of
 - probable harm (with or without an objective element)
 - possible harm (with or without an objective element)
 - a substantial risk that the accused is not justified in taking
 - some other definition.
3. What are the strongest arguments for or against adopting:
 - a legislative definition of recklessness for offences against the person in Part I, Division 1(4) of the Crimes Act?
 - the particular definition you support?
4. For the purposes of charging offences that have recklessness as an element, are you aware of any problems with obtaining relevant evidence about the alleged offender's state of mind?
5. What are your views on the approach and reasons for using 'probably' to express the fault element for recklessness in Part I, Division 1(8A)-(8F) of the Crimes Act?
6. What are the advantages/disadvantages of ensuring that recklessness is consistently defined
 - in the Crimes Act?
 - in other Victorian statutes?
7. If you support legislating a definition of recklessness for offences against the person, should the common law continue to apply in relation to that definition or should its operation be excluded?

8. If a new statutory definition of recklessness for offences against the person is adopted that incorporates a lower threshold, will the associated penalties and minimum terms of imprisonment need to change, and if so, how?
9. If a new statutory definition of recklessness for offences against the person is adopted, what will be the consequences for the justice system (for example, impacts on prosecution, conviction or incarceration rates)?
10. What guiding principles could be used to review the use or proposed use of recklessness as a fault element in Crimes Act offences other than offences against the person?

Appendix: Recklessness in Australia and other common law jurisdictions

Appendix: Recklessness in Australia and other common law jurisdictions

This table sets out how recklessness is defined in federal law and Australia's states and territories, as well as in Canada, England, Wales and Northern Ireland.

Victoria is a common law jurisdiction, whereas Western Australia, Queensland, Tasmania and the Northern Territory are 'code' jurisdictions. Common law is developed by judges through court decisions. In common law jurisdictions, criminal offences may be contained in legislation, such as the offences against the person in Victoria's Crimes Act; or they may be part of the common law, such as murder in Victoria. Even if they are set out in legislation, the common law is used to interpret the language of criminal offences. In code jurisdictions, most serious criminal offences are contained in one piece of legislation: a criminal code. The criminal code sets out principles of interpretation and is designed to remove the need to refer to the common law, although it does not do so completely.¹ Some jurisdictions, such as the Commonwealth and the Australian Capital Territory, have partially but not completely codified their criminal law.

Caution is necessary when comparing the definitions of recklessness in common law and code jurisdictions. This is because the interpretive frameworks for the definitions are different. In common law jurisdictions, the framework is the common law plus any relevant provisions in that jurisdiction's criminal legislation. In code jurisdictions, the framework is primarily the code itself, and how each criminal offence operates depends on other provisions in the code.

¹ Courts may still use the common law to interpret the meaning of language where the meaning is unclear. For this reason, the difference between common law and code jurisdictions has been described as 'one of emphasis rather than kind': Colvin E, Linden S & McKechnie J, *Criminal Law in Queensland and Western Australia: Cases and Materials* (Sydney: LexisNexis Butterworths, 2005) 7 in Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report*, chapter 2, 14.

Jurisdiction	Definition of recklessness
<p>Commonwealth (Cth)</p> <p>Statutory definition applies to all Cth offences where recklessness is a fault element.²</p>	<p>Statutory definition</p> <p>(1) A person is reckless with respect to a circumstance if:</p> <p>(a) he or she is aware of a <i>substantial risk</i> that the circumstance exists or will exist; and</p> <p>(b) having regard to the circumstances known to him or her, it is <i>unjustifiable to take the risk</i>.</p> <p>(2) A person is reckless with respect to a result if:</p> <p>(a) he or she is aware of a <i>substantial risk</i> that the result will occur; and</p> <p>(b) having regard to the circumstances known to him or her, it is <i>unjustifiable to take the risk</i>.</p> <p>(3) The question whether taking a risk is unjustifiable is one of fact.</p> <p>(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.³</p> <p>Common law</p> <p>What counts as a 'substantial risk' varies according to the context.⁴ Ordinarily, risks that a person was 'justified' in taking are not prosecuted; where they are, a claim of justification will usually be subsumed under a defence of 'duress' or 'sudden or extraordinary emergency'.⁵</p>

² 'A finding of recklessness with respect to death is sufficient fault for murder, the most serious of offences. But recklessness is also the general presumptive threshold requirement for the most trivial of offences in federal law.': *The Commonwealth Criminal Code: A Guide for Practitioners* (Report, Commonwealth Attorney-General's Department 2nd ed, (2002) 5.4 Recklessness [5.4-A] 73;

Note that for offences that do not specify a fault element, the Act provides: '5.6 (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element. (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.': *Criminal Code Act 1995* (Cth) s 5.6.

³ *Criminal Code Act 1995* Sch 1, ch 2, pt 2.2, div 5, s 5.4. Emphasis added.

⁴ 'The Code requirement of "substantial risk" appears to have been chosen for its irreducible indeterminacy of meaning. The same difficulty is apparent in the common law, which oscillates between the requirement that the anticipated result must have been "likely" or "probable" and the lesser requirement that it be merely "possible". One nugget of comparative certainty can be extracted... References to "likelihood" and "probability" do not mean that the risk must be one which was more likely than not. Between these uncertain poles of likelihood and possibility, academic opinion and judicial precedent are equally diverse in their conclusions. Successive editions of *Howard's Criminal Law* maintain the position that the requirement of substantial risk varies in stringency with the degree of social acceptance of the conduct which gave rise to the risk. If the conduct is without redeeming social value, anything in excess of a "bare logical possibility" is said to count as a "substantial" risk. Other academic treatises are more circumspect, though most appear to accept that recklessness extends to "possible" risks in offences other than murder.': *The Commonwealth Criminal Code: Guide for Practitioners* (2nd ed, 2002) Pt 2.2, div 5.4-A, 73-75.

⁵ 'There is very little case law on the possibility of justification. In *Crabbe*, which concerned recklessness as a fault element in murder, there was passing mention of the defence of necessity, which might justify a surgeon's decision to undertake a risky operation which provided the only hope of prolonging the victim's life. However, claims that a risk was justified will be rare. In practice, the exercise of discretion in the selection of cases for prosecution will usually ensure that any claim of justification for risk taking is without substance. In cases where the issue of justification might arise, it will tend to be subsumed under the defences of duress or sudden or extraordinary emergency ...': *Ibid* Pt 2.2, div 5.4-C, 77.

Jurisdiction	Definition of recklessness
<p>Victoria (Vic)</p> <p>Common law definition applies to:</p> <ul style="list-style-type: none"> • Murder⁶ • Offences against the person⁷ • According to some authorities, all Victorian offences.⁸ 	<p>Statutory definition</p> <p>No statutory definition of recklessness in relation to offences against the person.⁹</p> <p>Common law</p> <p>The accused must have foreseen the <i>probability</i> that harm would occur and have proceeded regardless. The word 'probable' means likely to happen.¹⁰ Recklessness is <i>not</i> established when the accused knew only that a particular consequence 'might occur'.¹¹</p>
<p>New South Wales (NSW)</p> <p>Two common law definitions for offences against the person: a higher threshold for murder and lower threshold for other offences against the person.</p>	<p>Statutory definition</p> <p>No statutory definition of recklessness in relation to offences against the person.¹²</p> <p>Common law</p> <p>For murder, the accused must have foreseen the <i>probability</i> that harm would occur and have proceeded regardless.¹³ Probability requires something more than doing an act knowing 'it is possible but not likely that death' might result.¹⁴</p> <p>For other offences against the person, the accused must have foreseen the <i>possibility</i> of harm occurring and have proceeded regardless.¹⁵ An outcome that is possible is something that 'might' occur.¹⁶</p>

6 *R v Crabbe* (1985) 156 CLR 464.

7 Those offences listed in Part I, Div 1 (4) of the *Crimes Act 1958* (Vic). In relation to use of the foresight of probable harm test in cases of 'causing serious injury recklessly' (s 17, *Crimes Act 1958* (Vic)): *R v Crabbe* (1985) 156 CLR 464 (The court said its reasoning applied to an intention [or recklessness] to kill or cause grievous bodily harm. The equivalent offence to 'grievous bodily harm' in Victoria is serious injury); *R v Campbell* (1997) VR 585. In relation to 'conduct endangering life' (s 22, *Crimes Act 1958* (Vic)): *R v Nuri* [1990] VR 641; *R v Abdul-Rasool* (2008) 18 VR 586; 180 A Crim R 556.

8 Judicial College of Victoria, *Victorian Criminal Charge Book* (Online Manual, 2022) 7.1.3 [2].

9 A version of the Commonwealth definition of recklessness is adopted specifically in relation to culpable driving in the *Crimes Act 1958* (Vic) Part I, Div 9, s 318: 'Culpable driving causing death - (2) For the purposes of subsection (1) a person drives a motor vehicle culpably if he drives the motor vehicle a) recklessly, that is to say, if he consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person upon another person may result from his driving ...'.

10 See footnote 26 on page 7.

11 Judicial College of Victoria, *Victorian Criminal Charge Book* (Online Manual, 2022) 7.2.1 [44].

12 These offences are found in the *Crimes Act 1900* (NSW).

13 *R v Crabbe* (1985) 156 CLR 464, 469.

14 *Ibid* 469–70.

15 *R v Coleman* (1990) NSWLR 467, 474–475; *Blackwell v The Queen* (2011) NSWLR 119, [78] (Beazley JA); *Aubrey v The Queen* [2017] HCA 18; (2017) 260 CLR 305.

16 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (Report, 2022) 'Recklessness' [4-080]; *R v Coleman* (1990) NSWLR 467, 475. Note that our discussion is concerned with offences committed on or after 21 June 2012. See the NSW *Criminal Trial Courts Bench Book* for discussion of how the requirements for establishing recklessness differ in relation to offences committed before 21 June 2012, 15 February 2008, and 27 September 2007, respectively: Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (Report, 2022) 'Recklessness' [4-080].

Jurisdiction	Definition of recklessness
<p>Australian Capital Territory (ACT)</p> <p>Statutory definition applies to select offences against the person.¹⁷</p> <p>Common law definition applies to most offences against the person.¹⁸</p>	<p>Statutory definition</p> <p>Same as Cth definition.¹⁹</p> <p>Common law</p> <p>The accused must have foreseen the <i>possibility</i> that harm might or would occur and have proceeded regardless.²⁰</p>
<p>Queensland (Qld)</p> <p>Statutory definition applies to all offences that do not explicitly require intention as a fault element (eg, s 320, 'unlawfully doing grievous bodily harm'). Where offences are explicitly defined as intentional (eg, s 317, 'acts intended to cause grievous bodily harm') recklessness is insufficient to establish criminal responsibility.</p>	<p>Statutory definition</p> <p>Aside from murder,²¹ recklessness is not explicitly referred to as a fault element for criminal offences in Qld. However, for those offences (including unlawfully doing grievous bodily harm and assault) that do not require intention as a fault element in the wording of the offence, the Qld Criminal Code Act provides that an accused is not responsible for events that they did not intend or foresee as <i>a possible consequence</i> of their acts or omissions, and that an ordinary person would not have reasonably foreseen as a possible consequence.²² Thus, in practice, an accused may be responsible for consequences in relation to which they were reckless, with recklessness defined as reasonable foresight of possible harm.</p>

17 The ACT Criminal Code specifies that its principles apply only to offences created from 2003 onwards, except if a pre-2003 offence has been omitted and remade or an Act or subordinate law expressly provides for its application to an offence: *Criminal Code 2002* (ACT) s 8(1). Pursuant to the *Crimes Act 1990* (ACT) s 7A, the Criminal Code applies to the following offences against the person in the *Crimes Act 1990* (ACT) which contain recklessness as an element: s 26A (Assault of frontline community service provider); s 28B (Discharging firearm at building or conveyance); s 29A (Driving motor vehicle at police); s 29B (Damaging police vehicle); s 36A (Abuse of vulnerable person); s 36B (Failure to protect vulnerable person from criminal offence); s 36C (Neglect of vulnerable person).

18 *Crimes Act 1900* (ACT) s 20 (recklessly inflicting grievous bodily harm) and s 23 (inflicting actual bodily harm).

19 *Criminal Code 2002* (ACT) s 20. The language and section ordering of the ACT definition differs slightly from the Commonwealth definition, but the differences are immaterial:

(1) A person is reckless in relation to a result if—

- (a) the person is aware of a substantial risk that the result will happen; and
- (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(2) A person is reckless in relation to a circumstance if—

- (a) the person is aware of a substantial risk that the circumstance exists or will exist; and
- (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is a question of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element.

20 *R v Daniel* [2021] ACTSC 64, [100]-[104] (Loukas-Karlsson J).

21 *Criminal Code Act 1899* (Qld) s 302(1): '... a person who unlawfully kills another ... is guilty of murder. Unlawful killing includes: (aa) if death is caused by an act done, or omission made, with reckless indifference to human life.'

22 *Criminal Code Act 1899* (Qld) s 23(1). 'Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for— (a) an act or omission that occurs independently of the exercise of the person's will; or (b) an event that—(i) the person does not intend or foresee as a possible consequence; and (ii) an ordinary person would not reasonably foresee as a possible consequence'. Historically, the test of objective foresight of *probable* or *likely* injury was used as the test for unlawfully doing grievous bodily harm: *R v Knutsen* (1963) Qd R 166. However, in that case, the Queensland Court of Criminal Appeal was applying a version of s 23 that has since been amended. At the time, s 23 provided that 'a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident'.

Jurisdiction	Definition of recklessness
<p>Northern Territory (NT)</p> <p>Definition applies to offences against the person as well as other Criminal Code offences.²³</p>	<p>Statutory definition</p> <p>Same as Cth definition.²⁴</p> <p>Similarly to in Qld, a person is not criminally responsible for an event that <i>the person did not foresee as a possible consequence</i>; and that <i>an ordinary person in similar circumstances would not have foreseen as a possible consequence</i>.²⁵ This operates as an excuse or defence.</p>
<p>Western Australia (WA)</p>	<p>Statutory definition</p> <p>Intention (hence by extension, recklessness) is not a fault element for most offences in WA.²⁶ Honest and reasonable mistake of fact is a defence to criminal offences unless specifically excluded.²⁷</p>
<p>Tasmania (Tas)</p>	<p>Statutory definition</p> <p>Similarly to Qld, there is no statutory definition of recklessness, but a person is only criminally responsible for voluntary and intentional acts and events that <i>the person intends or foresees as a possible consequence</i>; and that <i>an ordinary person would reasonably foresee as a possible consequence</i>.²⁸</p>

23 The definition applies to all offences in the *Criminal Code Act 1983* (NT) and declared offences. The Criminal Code Act includes offences against the person: these are set out in part VI.

24 *Criminal Code Act 1983* (NT) s 43AK. The language and section ordering of the NT definition differs slightly from the Commonwealth definition, but the differences are immaterial:

(1) A person is reckless in relation to a result if:

- (a) the person is aware of a substantial risk that the result will happen; and
- (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(2) A person is reckless in relation to a circumstance if:

- (a) the person is aware of a substantial risk that the circumstance exists or will exist; and
- (b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element.

25 *Criminal Code Act 1983* (NT) s 31: 'Division 4 Excuse, 31 Unwilled act etc. and accident—(1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct. (2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct. (3) This section does not apply to an offence against section 155 [failure to rescue, provide help &c].'

26 *Criminal Code Act Compilation Act 1913* (WA) s 23(1). 'Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.'

27 Ibid s 24.

28 *Criminal Code Act 1924* (Tas) Sch 1, s 13, emphasis added. The legislation is expressed in the negative:

(1) No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event –

- (a) that the person does not intend or foresee as a possible consequence; and
- (b) that an ordinary person would not reasonably foresee as a possible consequence.'

Jurisdiction	Definition of recklessness
<p>South Australia (SA)</p> <p>Definition applies to a subset of offences against the person,</p> <p>(i) Definition applies to a subset of offences against the person, causing physical or mental harm offences.²⁹</p> <p>(ii) Definition applies to the offence of 'acts endangering life or creating risk of serious harm'.</p>	<p>Statutory definition</p> <p>(i) A person is reckless in causing harm or serious harm to another³⁰ if the person—(a) is aware of a <i>substantial risk that his or her conduct could result in harm or serious harm</i> (as the case requires); and (b) engages in the conduct despite the risk and <i>without adequate justification</i>.³¹</p> <p>(ii) The offence of 'acts endangering life or creating risk of serious harm' involves doing or omitting to do something knowing that it is 'likely' to endanger the life of or cause serious harm to another and either intending or being 'recklessly indifferent' as to whether the life of another is endangered or such harm is caused.³²</p> <p>Common law</p> <p>In relation to (ii), an act or omission that is 'likely' to endanger the life of or cause serious injury to another is one that is probable; it requires more than 'mere advertence to a possibility of the consequence'.³³</p>
<p>Canada</p> <p>Common law definition applies to murder and lesser offences including dealing in stolen property and criminal harassment.</p>	<p>Statutory definition</p> <p>To be guilty of reckless murder, the accused must cause a person's death:</p> <ul style="list-style-type: none"> • meaning to cause bodily harm that the accused knows is <i>likely</i> to cause death and • being reckless whether death ensues or not.³⁴ <p>There is no statutory definition of recklessness in relation to offences against the person.</p> <p>Common law</p> <p>For reckless murder, the accused must have foreseen the likelihood of death and not merely a danger of death.³⁵ Once it is proved that the accused caused bodily harm knowing that death was likely, they will inevitably be reckless to continue.³⁶</p> <p>For other offences, recklessness 'presupposes knowledge of the likelihood of the prohibited consequence'³⁷ (dealing with stolen property) or relates to a 'foreseen probability'³⁸ (harassment).</p>

29 *Criminal Law Consolidation Act 1935 (SA)* Part 3, Division 7A. See also Division 7, 'Assault', s 20AA 'Causing harm to or assaulting certain emergency workers'.

30 *Ibid* s 24 and s 23, respectively.

31 *Ibid* s 21, emphasis added. This section defines 'harm' as physical or mental harm (whether temporary or permanent).

32 *Ibid* s 29.

33 *Ducay v The Queen* [2019] SASFC 152; (2019) 135 SASR 127, [14].

34 *Criminal Code 1985 (Canada)* (R.S.C. 1985, c C-46) s 229(a)(ii).

35 *R v Cooper* [1993] 1 S.C.R. 146 [21] (Cory J); *R v Czibulka* (2004) 190 O.A.C. 1, 24 C.R. (6th) 152 [66]-[68] (Rosenberg JA).

36 *R v Cooper* [1993] 1 S.C.R. 146 [18]-[21].

37 *R v Vinokurov* (2001) 156 CCC (3d) 300, [21] (Berger JA, Wittmann JA concurring).

38 *R v Davis* (2000) 71 C.R.R. (2d) 340 [35] (Beard J).

Jurisdiction	Definition of recklessness
<p>England, Wales and Northern Ireland</p> <p>Common law definition applies to offences relating to criminal damage³⁹ and non-fatal offences against the person.⁴⁰</p>	<p>Statutory definition</p> <p>There is no statutory definition of recklessness in relation to offences against the person.⁴¹</p> <p>Common law</p> <p>A person acts recklessly 'with respect to -</p> <ul style="list-style-type: none"> (i) a circumstance when [they are] aware of a risk that it exists or will exist; (ii) a result when [they are] aware of a risk that it will occur; <p>and it is, in the circumstances known to [them], unreasonable to take the risk.⁴²</p>

39 *R v G* (2004) 1 AC 1034, [41], [2003] UKHL 50.

40 *R v Cunningham* [1957] 2 QB 396; *R v Spratt* [1990] 1 WLR 1073. It is likely it applies for all statutory offences of recklessness unless Parliament has explicitly provided otherwise: Maddison et al, *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (Report, Judicial College UK, June 2022) 8–2 Recklessness [3].

41 Offences against the person are set out for England, Wales and Northern Ireland in the *Offences against the Person Act 1861 (UK)*. The territorial extent for some offences varies, with a separate version applying to Northern Ireland (see, for example, s 47, assault occasioning bodily harm).

42 *R v G* (2004) 1 AC 1034, [41] (Lord Bingham); [2003] UKHL 50. See also Maddison et al, *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up* (Report, Judicial College UK, June 2022) 8–2 Recklessness.

Recklessness

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