Recklessness
Report

VICTORIAN LAW REFORM COMMISSION

February 2024

VICTORIAN LAW REFORM COMMISSION

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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.

The office of the Victorian Law Reform Commission is located on the land of the Traditional Custodians, the people of the Kulin Nations. We acknowledge their history, culture and Elders both past and present.

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Preface

Our review of the test for recklessness as it applies to offences against the person had some unusual features. Unlike some VLRC inquiries involving broad and complex social issues, this inquiry concerned a specific and technical question: whether the definition of recklessness as it relates to Victoria's *Crimes Act 1958* (Vic) should change. Our report is unusual because it does not recommend any change to the law. That is uncharacteristic for the Commission as we frequently propose substantive law reform and legislative change. But ultimately, our role is to recommend reform only where it can be justified, because it will result in positive change or address a significant problem. In this case, we are not persuaded that such a problem exists.

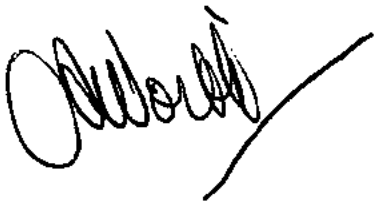
Also unusually for a VLRC project, the subject matter was recently considered by both the Victorian Court of Appeal and the High Court of Australia. Although narrowly deciding that the current law concerning recklessness should continue to apply in Victoria, members of the High Court criticised the correctness of Victoria's current test. Such criticism was echoed by Victoria's prosecutorial agencies. But the Commission must consider a range of factors in making its recommendations. In this inquiry, we had to balance the views of the High Court with policy considerations, taking into account submissions by other stakeholders that the current test operates well and has done so for more than 25 years. Moreover, the test is just one piece in a complex system, and piecemeal reform to a single element could have far-reaching consequences. We have concluded that to disturb a functioning system to achieve unclear results would not be a wise course of action.

Often incidents involving recklessness occur in a split second, and apparently without much thought. Yet the courts must apply a recklessness test which involves deciding what an accused person intended or foresaw in that split second. We were intrigued to understand how juries or decision makers assess what the accused was thinking and whether the accused turned their mind to the risk of injury. Based on our research and consultations with those who have practical experience, we have formed the opinion that juries understand the test and are performing their task well. Judges are directing juries appropriately, offenders are being convicted, and there are few appeals related to the recklessness test. Whatever challenges exist in the prosecution of offences against the person, we do not believe they are caused by the definition of recklessness.

Reckless behaviour can have catastrophic results for victims, especially where serious injury is caused. We are grateful to those victims who shared their experiences and perspectives, helping us better understand the impact of offending. We were assisted by views and expertise from across the legal sector, which provided insights into the operation of the law concerning recklessness in Victoria. I am grateful for the valuable input from the courts and judicial officers, the Office of Public Prosecutions (including analysis of over 300 case files), Victoria Police, and the expertise and views from all legal practitioners and other people contributing to this inquiry (see Appendices A and B). We appreciate the time and effort involved in each submission and consultation, and the willingness of stakeholders to canvass views from across an organisation or body.

I wish to thank the research team of Dr Emma Larking, Liz Margaronis, Marcus Hickleton and team leader Kathryn Terry for their diligent work. I also thank my fellow Commissioners, Liana Buchanan, the Hon. Jennifer Coate AO, Kathleen Foley SC, Bruce Gardner PSM, Professor Bernadette McSherry, Dan Nicholson, Gemma Varley PSM and Dr Vivian Waller for their constructive input and feedback. I am grateful for the extensive experience they brought to the review, and for their dedicated and collegiate approach.

I also acknowledge Merrin Mason PSM, the CEO of the Commission, for her wise counsel and administration of the project, the excellent communications and editorial assistance from Nick Gadd and Natalie Young, and support from our administrative team, including Jennifer Joyner, Monika George and other Commission staff.



The Hon. Anthony North KC

Chairperson

Victorian Law Reform Commission

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.

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.

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;
- 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.

Glossary

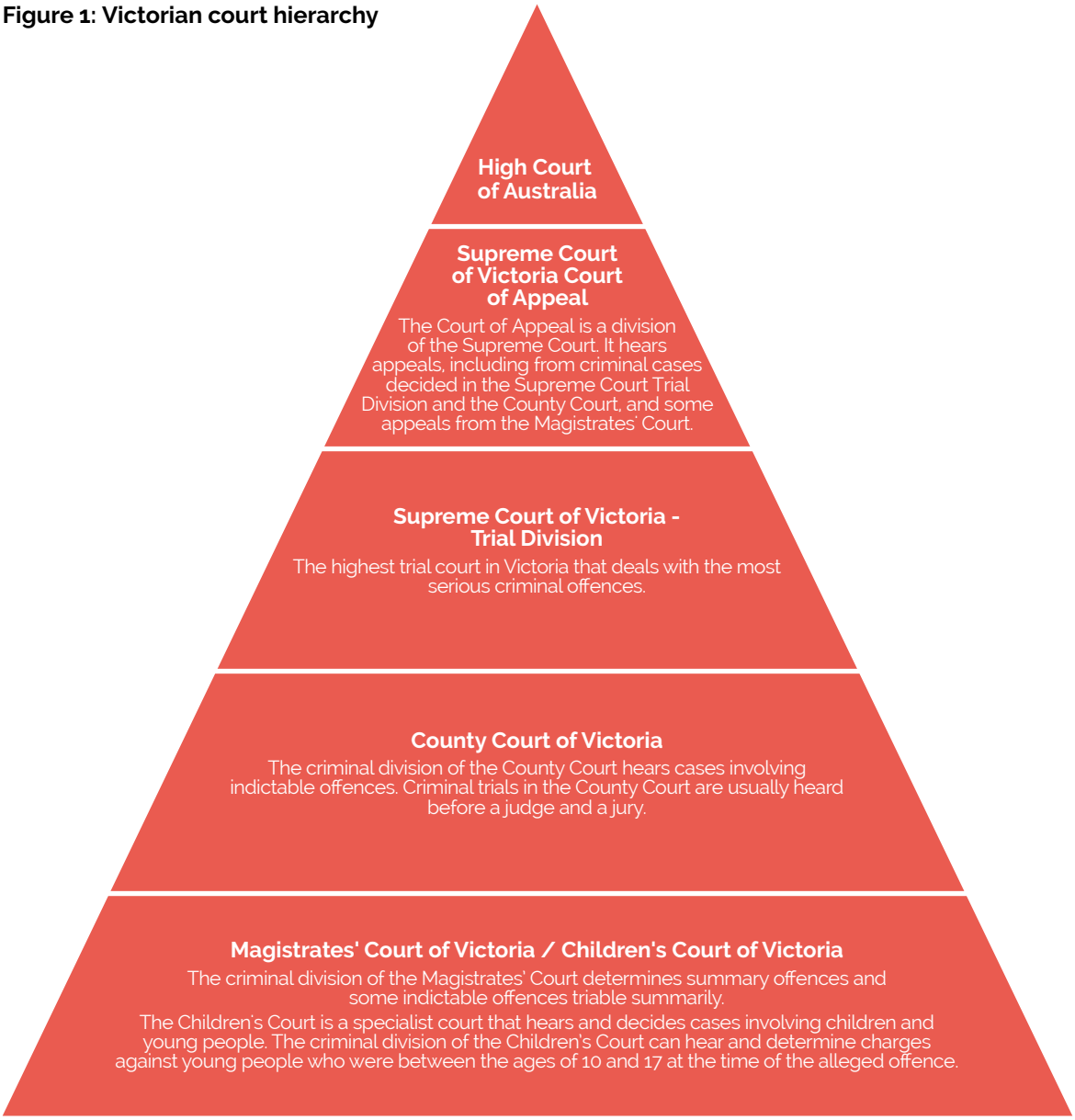
Accused	A person **charged** with a **criminal offence.**
Acquittal	When an **accused** is found not guilty of a **criminal offence**.
Appeal	A review of a decision by a **higher court**. An **offender** can appeal against their **conviction** and/or their **sentence**. If a criminal appeal is successful, the higher court can overturn the **conviction**, or change the **sentence**.
Bail	Allowing an **accused** to be released from custody until the hearing of their case in court. Conditions can be attached to bail, for example, the **accused** might be required to reside at a certain address.
Beyond reasonable doubt	The **standard of proof** in criminal cases. It is the highest standard of proof. By comparison, the lower standard of proof in civil cases is the 'balance of probabilities' ('more likely than not').
Charge	The **criminal offence** an **accused** is alleged to have committed. A **prosecution** starts when a charge is filed in court.
Codification	The introduction of comprehensive **legislation** that sets out laws and legal principles. Codification makes the legislation the primary source of the law.
Common law	Law developed from the reasoning given by **judges** in individual cases that is applied in later cases.
Conviction	A formal finding of guilt for a **criminal offence**.
Criminal justice system	A term used to describe the system for responding to crime. It includes the police, prosecuting agencies, **defence** lawyers, the courts, and correctional services.
Criminal offence	Conduct that the law says is prohibited and punishable under the criminal law. A criminal offence is against the state and is prosecuted on behalf of the community.
Crown Prosecutor	A barrister appointed to work exclusively for the **Director of Public Prosecutions (DPP)**. Crown Prosecutors have authority to make certain decisions on behalf of the DPP, including authorising **resolution** and signing **indictments**. They also appear in court to **prosecute** criminal matters.
Culpability	A person's responsibility, or blameworthiness, for a **criminal offence** and its consequences.

Defence	A term used to describe: • the **accused's** lawyers • how the accused responds to the **charge** • a lawful excuse for a **criminal offence**, for example, self-defence.
Director of Public Prosecutions (DPP)	The DPP is an independent legal officer responsible for prosecuting serious criminal cases in Victoria.
Discontinuance	A decision not to go ahead with a **charge** on an **indictment**. A discontinuance brings the **prosecution** to an end.
Elements	The essential components of a **criminal offence**. An element can be either a **physical element** or a **fault element**. All elements of a **criminal offence** need to be proved by the prosecution **beyond reasonable doubt** before an **accused** can be found guilty of the offence.
Evidence	Material presented to a court to prove or disprove a fact. Evidence can include what witnesses say in court and documents or objects marked as exhibits.
Explanatory Memorandum	A document that explains proposed **legislation** in simple terms.
Fault element	The **element** of a **criminal offence** that usually relates to the **accused's** state of mind at the time they are alleged to have committed the crime. The main fault elements used in Victoria are intention, knowledge and recklessness. A **subjective fault element** is based on a person's actual state of mind at the time of their conduct. An **objective fault element** generally assesses the accused's behaviour by reference to what a reasonable person would have known, foreseen, or done in the circumstances.
Foresight	Recognition or awareness of the potential outcomes of one's actions.
Guilty plea	When an **accused** pleads guilty to a **charge**, they admit all of the **elements** of the **criminal offence** and forego their right to a trial.
Higher courts	In Victoria, the **County Court** and the **Supreme Court.**
Indictable offence	A serious **criminal offence** determined in a **higher court**.
Indictable offence triable summarily	A less serious **indictable offence** that can be determined in a **lower court**.
Indictment	A formal written document filed in a **higher court** by the **DPP** that sets out the **charge/s** against the **accused**. An indictment must be authorised by a **Crown Prosecutor** or the DPP.
Inference	A conclusion reached on the basis of **evidence** and reasoning.
Informant	The person responsible for a criminal investigation and filing **charges** in a case. Often a member of Victoria Police, but sometimes a representative from another agency.
Judge	A senior legal officer who hears cases in a **higher court**.
Jurisdiction	The authority of a court to hear cases within a particular geographic area and/or certain types of cases.

Jury	Members of the public who are selected to hear the **evidence** in a **trial** and decide whether an **accused** is guilty or not guilty of each **charge** on an **indictment**.
Jury directions	The legal instructions provided by a **judge** to a **jury**.
Legislation	A written law made by Parliament, also called an Act or statute.
Lower courts	In Victoria, the **Magistrates' Court** and the **Children's Court.**
Magistrate	A senior legal officer who considers and decides cases in a **lower court**.
Mandatory sentence	A type of **sentence** (for example, imprisonment) and/or minimum length of sentence or **non-parole period** that must be imposed, with limited or no exceptions.
Maximum penalty	The heaviest **sentence** a **magistrate** or a **judge** can impose for a **charge**.
Non-parole period	The period of a total **sentence** that an **offender** must spend in prison before they are eligible to be released on parole.
Offender	A person who has been found guilty or has pleaded guilty to a **criminal offence**.
Office of Public Prosecutions (OPP)	The **OPP** prepares and conducts prosecutions on behalf of the **DPP**.
Physical element	The external **element** of a **criminal offence**, usually a person's conduct (an act or omission). Circumstances and/or a result can also be physical elements of an offence.
Plea	A term used to describe the **accused** person telling the court whether they are guilty or not guilty of the **charge**.
Plea hearing	The hearing after a guilty finding at which the **prosecution** and **defence** present information they want the court to consider when deciding on the **sentence**.
Police prosecutors	Members of Victoria Police responsible for prosecuting **summary offences** heard in a **lower court**.
Presumptive sentence	A statutory presumption of a particular type and/or minimum length of sentence or **non-parole period**, subject to exceptions.
Prosecution	A term used to describe: • the case against a person **accused** of a **criminal offence**. • the lawyers conducting a criminal case before the court on behalf of the investigating agency.
Record of interview	A recording made of the formal questioning by police of a person suspected of committing a crime.
Resolution	An agreement between the **prosecution** and **defence** about how **charges** will be finalised. Usually, it involves the **accused** agreeing to plead guilty to a particular charge or charges on the condition that the prosecution will withdraw, discontinue, or not proceed with a different charge or charges.
Second reading speech	A speech made by the minister introducing proposed **legislation** to Parliament to explain its general principles and purpose.
Sentence	The penalty given to an **offender** by a court.

Standard of proof	The level of certainty and the degree of **evidence** necessary to establish that a criminal or civil case has been proved.
Summary offence	A **criminal offence** heard and usually determined in a **lower court**. Less serious than an **indictable offence**.
Trial	A hearing in a **higher court** before a **judge** where all the **evidence** is presented, and a **jury** determines whether an **accused** is guilty or not guilty of each **charge**.
Victim	In criminal proceedings, a victim is a person who has suffered harm as a result of the action of an **offender**. In this report, the term applies to a person alleged by the **prosecution** to be a victim before the **accused** has been found guilty, as well as a person who has suffered due to an offence for the which the offender has been found guilty.
Withdrawal of a charge	If the **prosecution** decides not to proceed with a **charge**, it can apply to withdraw the charge, which brings an end to the prosecution of that **criminal offence**.

Figure 1: Victorian court hierarchy



Executive summary

1 This report reviews the use of 'recklessness' in Victorian criminal law. It considers if the current 'recklessness' test should change, and whether to legislate a definition in the *Crimes Act 1958* (Vic). The focus is on offences against the person, although 'recklessness' is used in many contexts.

2 Our conclusion is that the recklessness test should not change and does not need to be legislated.

Our approach

3 We assessed the overall case for reform, including:

- how the law operates
- whether there are problems in practice
- alternative definitions.

4 We were informed by case studies, court decisions, data, and the experience of stakeholders, including legal practitioners, Victoria Police, judges and magistrates, and victims.

The 'probable' test for recklessness in Victoria

5 Recklessness as a legal concept is about recognising but ignoring risk. Its meaning for Victoria's offences against the person has developed through the common law. A person is reckless if they foresee a harmful consequence will probably result from their actions but they continue regardless. This test has been used for nearly three decades. Offences and penalties have been calibrated to it.

6 In 2019, the Victorian Director of Public Prosecutions (DPP) asked the Victorian Court of Appeal, and then in 2020 the High Court of Australia, to determine the correct interpretation of recklessness. The DPP argued that Victoria's definition is incorrect and that a possibility threshold should apply for offences other than murder. The Court of Appeal and the High Court decided that the current definition should stand unless altered by legislation.

Alternative definitions of recklessness

7 Different jurisdictions use different definitions of recklessness. Each operates as part of the jurisdiction's own criminal law framework.

8 Several contributors proposed alternative definitions for recklessness in Victoria. The Office of Public Prosecutions (OPP) and Victoria Police recommended using a 'possibility' threshold, similar to the definition in New South Wales. Unlike the Victorian test, most of the proposed tests have an additional objective component, such as reasonableness.

Are there problems with the current recklessness test?

9 Victoria Police and the OPP told us that the current test is too close to intention, is difficult to prove, and is based on legal error.

10 However, Victoria has a hierarchy of offences against the person, providing alternative charges and significant penalties. There is no obvious gap in the hierarchy, or undesirable outcomes resulting from the current recklessness test.

11 Issues such as charging practices and the definition of 'serious injury' may be contributing to perceived problems with the test.

12 The current test is well established in Victoria. It is relatively clear and easy to understand and apply. Appeals relating to recklessness are rare.

13 We heard that the test works well. We found significant support for keeping the current test, including from the Children's Court, the Law Institute of Victoria, the Criminal Bar Association, Liberty Victoria, Youthlaw, the Victorian Aboriginal Legal Service and Victoria Legal Aid.

Risk of changing the test

14 On its own, a 'possibility' test is too broad. An objective 'reasonableness' component would limit the test but would add complexity.

15 Objective assessments are criticised because they shift the focus away from the accused person's state of mind, which is what criminal responsibility for serious crimes is usually based on.

16 A new definition of recklessness for offences against the person would lead to inconsistency with other offences with a recklessness element, increasing complexity and risk of error.

17 A new test would result in the loss of substantial, settled jurisprudence. There would be less consistency and certainty in sentencing until a new body of law was established.

18 A lower threshold could lead to more people being charged with serious offences. This would have a disproportionate impact on First Peoples and young people.

19 Penalties would need to be reviewed if the test for recklessness was lowered.

20 Although difficult to measure, there would be flow-on effects throughout the justice system, which might include more demand on courts and more people in custody.

The recklessness test should not change or be legislated

21 We did not find a compelling case for reform. The current common law definition of recklessness should be kept for offences against the person.

22 Some stakeholders said that a legislated definition of recklessness might provide some additional certainty. But the current test is already clear, accessible, and consistent, so legislation is not needed.

23 Keeping the current test for recklessness ensures fairness; clarity and simplicity; stability and certainty; and consistency in the law for offences against the person. These principles should guide policy makers when reviewing how the concept of recklessness is used for other categories of Crimes Act offences.

Recommendation

1. The current common law definition of recklessness should be retained for offences against the person.

PART ONE: INTRODUCTION AND CONTEXT

CHAPTER

01

Introduction

1. Introduction

A note on content

1.1 This report relates to offences against the person, which often involve violence and traumatic consequences. Our report examines case studies and uses examples that may be confronting or distressing.

A note on language

1.2 Due to the technical focus of this reference, this report uses a lot of legal terminology. For definitions of legal words used in this report, see the Glossary on page x.

1.3 Unless otherwise noted, references to the Magistrates' Court, the County Court, the Supreme Court and the Court of Appeal refer to the Victorian courts, and references to the High Court refer to the High Court of Australia.

1.4 We use the term 'victim' to refer to a person involved in a criminal proceeding who has suffered harm. We acknowledge that some people might prefer the term 'victim survivor' and/or 'survivor'.

1.5 We use the term 'accused' to refer to a person who has been charged with a criminal offence, and 'offender' to refer to a person who has been found guilty of a criminal offence.

1.6 Although we use terms such as 'victim' and 'offender', we acknowledge that people do not necessarily just belong to one group or another. For example, some people who commit a crime have previously been a victim of crime.

1.7 We use the term First Peoples to include all Traditional Owners of a place in the state of Victoria, as well as Aboriginal and/or Torres Strait Islander people who are living or have lived in Victoria. When citing other sources, we use the same words that were in the original source.

1.8 We understand that the best terms to use can change and people often disagree about the right terms to use.

Our terms of reference

1.9 The Victorian Law Reform Commission was asked to review the use of 'recklessness' in offences against the person in Part I, Division 1(4) of the *Crimes Act 1958* (Vic) (the Crimes Act).[1]

1 Sections 15A (Causing serious injury intentionally in circumstances of gross violence), 15B (Causing serious injury recklessly in circumstances of gross violence), 17 (Causing serious injury recklessly), 18 (Causing injury intentionally or recklessly), 19 (Offence to administer certain substances), 20 (Threats to kill), 21 (Threats to inflict serious injury), 22 (Conduct endangering life), 23 (Conduct endangering persons), 25 (Setting traps etc. to kill), 26 (Setting traps etc. to cause serious injury), 31 (Assaults) and 31C (Discharging a firearm reckless to safety of a police officer or a protective services officer): *Crimes Act 1958* (Vic).

1.10 We were guided by the terms of reference (see page viii) given to us by the Attorney-General, the Hon. Jaclyn Symes MP, on 25 October 2022.

1.11 We were asked to consider what definition of recklessness should apply to offences against the person, and whether a definition should be legislated. We were also asked to develop a set of guiding principles to review the use of recklessness in other categories of Crimes Act offences.

1.12 The Attorney-General asked us to consider:

- the meaning of recklessness in other jurisdictions.
- the approach and reasons for using 'probably' to express the fault element of recklessness in reforms to sexual offences in Part I, Division 1(8A)–(8F) of the Crimes Act.
- the operation of legislated statutory minimum terms of imprisonment.
- the potential impacts of any recommended changes on all parts of the criminal justice system, including whether maximum penalties would need to be adjusted.

1.13 Sexual offences and stalking were largely excluded from our inquiry, although they are offences against the person, because they have recently been reviewed.[2]

The Commission's purpose

1.14 The Commission's purpose is to make a significant contribution to a just, inclusive and accessible legal system for all Victorians.

1.15 Our main task is to examine laws, prepare reports and make recommendations to serve the needs of the Victorian community.

Our approach

Our leadership

1.16 The Hon. Anthony North KC was the Commission's Chair during this inquiry.

1.17 The Chair established a Division to guide and make decisions about the inquiry. All Commissioners were Division members. Their names are listed on the inside front cover.

What we published

1.18 On 17 January 2023 we published an issues paper to explain the current law and call for submissions. We invited submissions by 3 March 2023.

Our submissions and consultations

1.19 As this is an inquiry into a technical area of law, our community engagement was relatively limited.

1.20 We received 21 written submissions (see Appendix A). We published the public submissions on our website.

1.21 We held 15 consultations with stakeholders across the criminal justice system, including members of the legal profession, police, judicial officers and representatives of the courts (see Appendix B).

1.22 We engaged with specialist legal services, receiving a submission from Youthlaw and consulting with the Victorian Aboriginal Legal Service.

2 Victorian Law Reform Commission, *Stalking* (Final Report No 45, June 2022); Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021). Although sexual offences were largely excluded from the scope of our inquiry, we discuss sexual offences in Chapter 5 to respond to our terms of reference about the approach and reasons for using 'probably' to express recklessness in sexual offences.

1.23 We were grateful to receive a submission from the Victims of Crime Commissioner's office and to consult with members of the Victim Survivors' Advisory Council. The Victims of Crime Consultative Committee was unable to participate in a consultation due to the technical nature of the reference and a period of change with its representatives.

Data we used

1.24 We received data from:

- the Sentencing Advisory Council
- the Crime Statistics Agency
- the Supreme Court of Victoria
- the County Court of Victoria
- the Magistrates' Court of Victoria
- the Office of Public Prosecutions (OPP)
- New South Wales Bureau of Crime Statistics and Research.

1.25 We are grateful to the OPP for providing us with data collated from a review of over 300 of its files.

Our report to the Attorney-General

1.26 This report is due for delivery to the Attorney-General by 29 February 2024. Within 14 sitting days of receiving our report the Attorney-General must table it in the Victorian Parliament. It will then be published on our website.

CHAPTER

02

Recklessness and criminal responsibility

2. Recklessness and criminal responsibility

Overview

- This chapter explains how the concept of recklessness fits in Victoria's criminal law.
- Fault elements largely determine the culpability attached to an offence. Fault elements can be subjective (to do with a person's state of mind) or objective.
- Recklessness is a fault element for a range of Victorian offences against the person. In the scale of culpability, recklessness comes between intention (most serious) and negligence.
- Proving recklessness involves establishing a person's state of mind at the time of the offending.

Criminal responsibility in Victoria

2.1 For a person to be lawfully convicted of a crime, every element of the offence must be proved beyond reasonable doubt.

2.2 Elements of criminal offences are divided into physical and fault elements.[1] Serious offences usually consist of one or more physical elements, each with an accompanying fault element.

2.3 A physical (or external) element usually relates to conduct, circumstances and/or a result.[2] Conduct can be an act or omission. The physical conduct of a person must be committed voluntarily, in that it must be a product of their will to act.[3]

2.4 A person's intoxication may be relevant to whether their conduct was voluntary or whether they had the necessary state of mind to establish a fault element.[4]

1 A variety of terms have been used to describe these elements, the most common (and often criticised) being the Latin *actus reus* and *mens rea*. These terms stem from the saying '*actus non facit reum, nisi mens sit rea*', loosely translated as 'an act does not make a person guilty of a crime unless that person's mind be also guilty': Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 178 [3.05], citing *Haughton v Smith* [1975] AC 476, 491–2 (Lord Hailsham).

2 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 194–96 [3.75]–[3.100].

3 Judicial College of Victoria, '7.1.1 Voluntariness', *Victorian Criminal Charge Book* (Online Manual, 27 March 2019) [56] <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4462.htm> citing *R v Tait* [1973] VR 151. The *Criminal Charge Book* also notes that, while it is presumed that an act done by a conscious person was done voluntarily, some conduct may raise voluntariness as an issue to be proved by the prosecution. For example, muscular movements like spasms, convulsions or reflex actions that occur without any control by the mind, acts done in a state of impaired consciousness, while a person is asleep or in a state of automatism, or accidental actions, for example when a person trips over and bumps into someone.

4 See Judicial College of Victoria, '8.7 Common Law Intoxication', *Victorian Criminal Charge Book* (Online Manual, 29 June 2015) [5] <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19075.htm>. For the issue of intoxication under s 322T of the *Crimes Act 1958* (Vic) which applies to defences (self-defence, duress and sudden or extraordinary emergency) for offences committed on or after 1 November 2014, see generally Judicial College of Victoria, '8.5 Statutory Intoxication (From 1/11/14)', *Victorian Criminal Charge Book* (Online Manual, 19 March 2018) <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#58482.htm>.

Subjective and objective fault elements

2.5 A subjective fault element is based on a person's state of mind at the time of their conduct. This can be contrasted with an objective fault element, which generally assesses the accused's behaviour by reference to what a reasonable person would have known, foreseen, or done in the circumstances.

2.6 Where an offence has a fault element, there is a presumption in the criminal law that it is subjective.[5] This presumption can be overridden. For example, some offences have objective fault elements.[6]

Proving subjective fault elements

2.7 The onus is on the prosecution to prove a subjective fault element. This raises questions about what evidence is necessary to show a person had a particular state of mind.

2.8 We heard that not being able to see into the mind of the accused person can be a problem in all offences that require proof of a subjective state of mind, including intentional and reckless offences.[7] The 'artificiality of imputing mental states is inherent to our criminal justice system, because no one knows what is happening in someone else's head'.[8]

2.9 When an act is planned in advance, there is a clear distinction between having a state of mind and acting on it. But spontaneous acts that do not have a perceptible time gap between the thought and the action make it difficult to distinguish between the fault and physical elements of an offence. As English lawyer and academic Rupert Cross observed, 'when dealing with incidents which occupy a split second, the question "did the accused contemplate certain results?" is apt to be a little unreal.'[9]

2.10 In our everyday lives we attribute mental states to other people based on assumptions about how rational people behave, in combination with our understanding of other people's environment, perceptions, interests, and past experiences.[10] The ability to draw inferences about other people's state of mind has been called 'folk psychology'.[11] Legal scholar Peter Cane argues 'inferred intention' does not capture a frame of mind at all, but 'rather it consists of a contextualised interpretation of what the accused did and said based on a judgment about the way people normally (ought to) behave.'[12]

2.11 When a fact-finder (a magistrate, a jury or a judge in a judge-alone trial) attributes a culpable state of mind to an accused person, they are 'influenced by their expectations of how reasonable people like themselves perceive, think, and behave in a particular situation.'[13] In doing this a fact-finder will 'inevitably engage in a mix of subjective and objective inquiry.'[14] This illustrates the tension between subjective and objective accounts of criminal culpability.[15]

5 Ian Freckelton and Mirko Bagaric, Thomson Reuters, *Indictable Offences in Victoria* (online at 22 November 2023) [18.40], citing *Sherras v De Rutzen* [1895] 1 QB 918, 921 (Wright J).

6 The presumption can be displaced expressly (by the words of the statute creating the offence) or by necessary implication: *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523, 566 (Brennan J); *CTM v The Queen* [2008] HCA 25, [148]; (2008) 236 CLR 440, 483–4 [148] (Hayne J) (citations omitted).

7 Submissions 14 (Law Institute of Victoria), 17 (Victoria Legal Aid). Consultations 1 (Victorian Aboriginal Legal Service), 2 (Liberty Victoria), 5 (Judicial College of Victoria), 6 (Victoria Legal Aid).

8 Consultation 2 (Liberty Victoria).

9 Rupert Cross, 'The Mental Element in Crime' (1967) 83(2) *Law Quarterly Review* 215, 226.

10 Rebecca Dresser, 'Culpability and Other Minds' (1993) 2(1) *Southern California Interdisciplinary Law Journal* 41, 78, citing Daniel Dennett, *The Intentional Stance* (MIT Press, 1987) 17.

11 Bertram F Malle and Sarah E Nelson, 'Judging *Mens Rea*: The Tension between Folk Concepts and Legal Concepts of Intentionality' (2003) 21(5) *Behavioral Sciences and the Law* 563, 563.

12 Peter Cane, 'Fleeting Mental States' (2000) 59(2) *Cambridge Law Journal* 273, 281.

13 Rebecca Dresser, 'Culpability and Other Minds' (1993) 2(1) *Southern California Interdisciplinary Law Journal* 41, 88.

14 Ibid 83.

15 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 224 [3.230].

2.12 In Victoria, if a trial judge believes a jury is in danger of applying an objective standard to infer a subjective fault element, the judge can explain how it is legitimate to use contextual material to infer the required state of mind, but that the jury must do so in a manner that applies a subjective standard.[16] As a question of fact, the issue is always what the accused person actually appreciated or understood in their own mind.[17]

The practical experience of criminal lawyers

2.13 When we consulted with lawyers, we explored whether it is realistic for criminal offences to require proof of subjective fault elements. For example, is it realistic to say that an 18-year-old in a drunken moment of rage 'forms an intention to seriously injure' the person they punch in a bar fight?

2.14 We were told that juries infer the accused's state of mind by assessing the accused's conduct and all the circumstances of a case.[18] The Criminal Bar Association told us:

> you just need a split second to know what you're trying to do by, for example, swinging your arm really hard knowing it is going to hurt the other person …
>
> Juries are using their common sense, which is perfectly legitimate, to assess what is in someone's mind based on their actions.[19]

2.15 As Dr Greg Byrne explained,[20] the circumstances of the offence 'can tell you about what result the person was intending to produce.'[21]

2.16 We return to the topic of proving a subjective state of mind in Chapter 8.

Degrees of fault and culpability

2.17 'Intention', 'knowledge', 'recklessness' and 'negligence' are terms used in offence provisions in Victoria to imply different degrees of fault and culpability.

2.18 Culpability 'refers to the factors of intent, motive and circumstance that determine how much the offender should be held accountable for [their] act.'[22] Generally, culpability:

> rests upon the extent to which the individual can be seen to be personally responsible for both the prohibited acts and their consequences … the greater the level of insight and understanding possessed by [them] concerning the act and its potential harm, the higher becomes the level of culpability for then deliberately engaging in the conduct involved.[23]

2.19 Culpability will 'in part, be determined by both the consequences of the offender's conduct and whether they intended, foresaw, or were negligent as to those consequences'.[24]

16 See, eg, Judicial College of Victoria, '7.4.2.5 Charge: Intentionally or Recklessly Causing Serious Injury (From 1/7/13)', *Victorian Criminal Charge Book* (Online Manual, 2 July 2020) <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#46298.htm>. This model charge also appears in sections of the *Criminal Charge Book* relating to other offences against the person.

17 Consultation 5 (Judicial College of Victoria).

18 Consultations 2 (Liberty Victoria), 6 (Victoria Legal Aid). VLA gave the example of a 'glassing', where a person hits another in the face with a broken bottle. Although it might have happened quickly with no premeditation, a jury might reasonably infer that there must have been some realisation of the obvious risk of causing serious injury in those circumstances. Even if a person told police in a record of interview that they were not thinking, a jury could disregard the accused's version if there was contrary evidence.

19 Consultation 4 (Criminal Bar Association).

20 Dr Greg Byrne PSM is an experienced criminal law policy adviser in Victoria. He has led many significant criminal law reforms, including the introduction of the *Jury Directions Act 2015* (Vic) and the *Criminal Procedure Act 2009* (Vic), and the review and reform of Victoria's sexual offence laws with the introduction of the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) and the *Crimes Amendment (Sexual Offences) Act 2016* (Vic).

21 Consultation 9 (Dr Greg Byrne PSM).

22 Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 280, citing A von Hirsch, *Doing Justice: The Choice of Punishments* (Hill and Wang, 1986) 64–65.

23 Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 281, citing *DPP v Weidlich* [2008] VSCA 203, [17] (Vincent and Weinberg JJA, Mandie AJA).

24 Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 281. 'Culpability also relates to such matters as the degree of planning or the method used to commit the offence, the offender's motive, degree of participation in the offence, and … whether they [had a mental impairment]'.

The meaning of recklessness

2.20 'Conscious disregard of risk' is the essence of recklessness as a legal concept.[25] The more an offender turns their mind to the consequences of their conduct, the more culpable they are.[26]

2.21 Consequences aside, recklessness as a fault element is considered more culpable than negligent behaviour, but less culpable than an act done intentionally. In some circumstances there may be little difference between high-end recklessness and intention.

2.22 In Victoria, recklessness is not defined in the Crimes Act. It takes its meaning from the common law. A person is reckless if they know that a particular harmful consequence will probably (is likely to) result from their action, but they continue regardless.[27] The test is subjective.[28]

2.23 The common law definition applies to all offences against the person in Part I, Division 1 of the Crimes Act involving recklessness.[29]

2.24 A person can be reckless as to:

- a result (for example, causing serious injury)[30]
- a circumstance (for example, the victim being an emergency services worker).[31]

Intention and negligence

2.25 The fault element of intention sits at the top of the hierarchy of Victorian offences against the person, indicating the highest level of culpability. Intention reflects a decision to bring about an act (general intent) or a result (specific intent).[32]

2.26 A person may also be held criminally responsible if they act 'with the knowledge that a particular circumstance exists, or with the awareness that a particular consequence will result from … the conduct.'[33]

2.27 At the lowest end of the scale of culpability is criminal negligence. It is not a true 'state of mind' offence as it involves an objective test and is primarily concerned with a failure to take sufficient care where a legal duty exists. For a person's conduct to be negligent, it must involve 'a great falling short of the standard of care which a reasonable [person] would have exercised'.[34]

2.28 Table 1 shows the fault elements with a simple explanation and examples.

25 *R v Towle* [2009] VSCA 280, [31]; (2009) 54 MVR 543, 554 [31] (Maxwell P), citing *R v Burnside* [1962] VR 96, 97; *Nydam v R* [1977] VR 430, 444; *R v Nuri* [1990] VR 641, 643–4; *Director of Public Prosecutions (Vic) v Gany* [2006] VSCA 148; (2006) 163 A Crim R 322, [35]; *Brown v R* [2005] UKPC 18; [2006] 1 AC 1, 19.

26 *Ashe v The Queen* [2010] VSCA 119, [31] (Redlich JA).

27 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26; (2021) 274 CLR 177; *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181; (2020) 284 A Crim R 19; *R v Campbell* (1997) VR 585.

28 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [124] (Priest JA).

29 Judicial College of Victoria, '7.1.3 Recklessness', *Victorian Criminal Charge Book* (Online Manual, 28 October 2022) <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4469.htm>. The Judicial College of Victoria's *Criminal Charge Book* states that the definition 'applies to all Victorian offences involving recklessness', but as we discuss in Chapter 5, there are some exceptions to this.

30 *Crimes Act 1958* (Vic) s 17.

31 Ibid ss 3(2)(ii), 31(1)(b).

32 *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523, 569–70 (Brennan J).

33 'An accused may claim a mistaken belief to show that they did not have the requisite knowledge': Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 213 [3.195].

34 *R v Shields* [1981] VR 717, 723; *Nydam v The Queen* [1977] VR 430, 445.

Table 1: A comparison of fault elements

Fault element	Simple explanation	Examples
Intention	Deciding to do a prohibited act (general intent) or deciding to bring about a harmful result (specific intent).	*Intentionally causing serious injury* The offender doused the victim with petrol and then used a cigarette lighter to set fire to the fuel.[35]
Recklessness	Being aware that harm will probably (is likely to) result from the conduct but going ahead anyway.	*Recklessly causing serious injury* The offender punched the victim to the head, causing him to fall backwards and strike his head on the footpath.[36]
Negligence	Failing to take enough care where a legal duty of care exists.	*Negligently causing serious injury* The offender, after consuming excessive alcohol, drove erratically and at high speed. He collided with the victim's vehicle, causing it to hit a tree. The victim suffered life threatening injuries.[37]

Result-oriented offences

2.29 Some criminal offences are result-oriented, meaning that the conduct must have led to a particular result. For offences against the person in sections 15A, 15B, 16–18 and 24 of the Crimes Act, the fault elements of intention, recklessness, or negligence attach to the resulting harm, which must meet the definition of 'injury' or 'serious injury'.

2.30 For the offence of intentionally causing serious injury,[38] the physical act must have been committed with the specific intention to cause a serious injury.[39] In a situation where a person throws a punch that causes a serious injury, proving the person had an intention to complete the physical act of throwing the punch is not enough—they must have intended to bring about a serious injury.

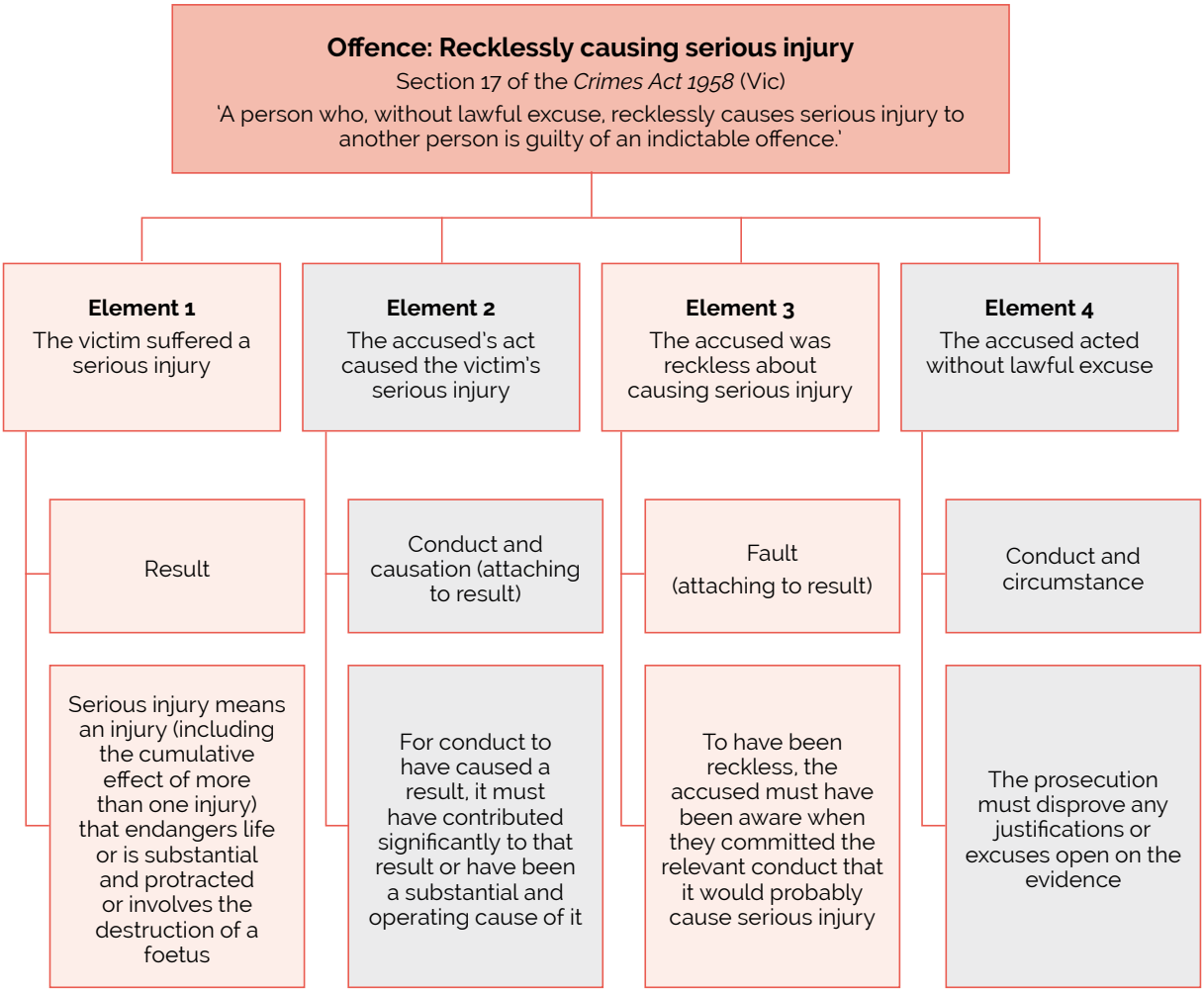
2.31 For result-oriented offences, the prosecution must prove causation as an element of the offence. This means that a person's conduct must have 'contributed significantly' to that result or have been a 'substantial and operating cause' of it.[40]

35 *DPP v Gorgulu* [2023] VSCA 140.
36 *DPP v Betrayhani; Betrayhani v The Queen* [2019] VSCA 150.
37 *Cook v The Queen* [2021] VSCA 293.
38 *Crimes Act 1958* (Vic) s 16.
39 *R v Westaway* [1991] VicSC 143; (1991) 52 A Crim R 336, 337 (Brooking J). The accused does not need to have intended to cause the precise injury that resulted, see *Royall v The Queen* [1991] HCA 27; (1991) 172 CLR 378.
40 Judicial College of Victoria, '7.1.2 Causation', *Victorian Criminal Charge Book* (Online Manual, 19 March 2018) <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4465.htm>, citing *Royall v The Queen* [1991] HCA 27; *R v Rudebeck* [1999] VSCA 155; *R v Stein* [2007] VSCA 300; (2007) 18 VR 376; *R v Withers* [2009] VSCA 306; *R v Aidid* [2010] VSCA 56; (2010) 25 VR 593.

Proving the elements of an offence

2.32 In Figure 2 we have used the offence of recklessly causing serious injury[41] to illustrate the elements to be proved.

Figure 2: The elements of the offence 'recklessly causing serious injury'



The hierarchy of offences

2.33 The varying degrees of criminal culpability, expressed as different fault elements, together with the level of harm caused by an act (death, serious injury, injury), create a hierarchy of offences against the person. This hierarchy is reflected in the scale of maximum penalties that attach to the offences.

2.34 Figure 3 shows the gradation of all the offences against the person in Part I, Division 1(4) of the Crimes Act in descending order of maximum penalty.

41 *Crimes Act 1958* (Vic) s 17.

Figure 3: Hierarchy of offences against the person

20 years imprisonment

- Intentionally causing serious injury in circumstances of gross violence (s 15A)
- Intentionally causing serious injury (s 16)

15 years imprisonment

- Recklessly causing serious injury in circumstances of gross violence (s 15B)
- Recklessly causing serious injury (s 17)
- Setting traps etc. to kill (s 25)
- Extortion with threat to kill (s 27)
- Discharging a firearm reckless as to the safety of a police officer or a protective services officer (s 31C)
- Female genital mutilation offences (ss 32, 33)

10 years imprisonment

- Intentionally causing injury (s 18)
- Threats to kill (s 20)
- Stalking (s 21A)
- Conduct endangering life (s 22)
- Negligently causing serious injury (s 24)
- Setting traps etc. to cause serious injury (s 26)
- Extortion with threat to destroy property etc. (s 28)
- Using firearm to resist arrest etc. (s 29)
- Intimidation of a law enforcement officer or a family member of a law enforcement officer (s 31D)

5 years imprisonment

- Recklessly causing injury (s 18)
- Offence to administer certain substances (s 19)
- Threats to inflict serious injury (s 21)
- Conduct endangering persons (s 23)
- Threatening injury to prevent arrest (s 30)
- Assaults (s 31)
- Use of firearms in the commission of offences (s 31A)
- Being armed with criminal intent (s 31B)

2.35 The gross violence offences[42] have the same maximum penalties (20 years and 15 years imprisonment) as the plain intentionally and recklessly causing serious injury offences,[43] but the aggravating element of gross violence means the offences attract mandatory custodial sentences and minimum non-parole periods (see Chapter 4).

2.36 Negligently causing serious injury carries a higher maximum penalty (10 years)[44] than recklessly causing injury (five years).[45] This is because negligence is only a crime where a *serious* injury results and the conduct involves 'such a great falling short of the standard of care which a reasonable [person] would have exercised' that it 'merits punishment under the criminal law.'[46] There is no offence of 'negligently causing injury' in Victoria.

42 *Crimes Act 1958* (Vic) ss 15A, 15B.
43 Ibid ss 16, 17.
44 Ibid s 24.
45 Ibid s 18.
46 *R v Shields* [1981] VR 717, 723.

CHAPTER

03

The history of recklessness in Victoria

3. The history of recklessness in Victoria

Overview

- The meaning of recklessness has developed in a distinct way in Victoria and has evolved over time. Victoria has adopted a threshold requiring foresight of 'probable' harm for modern offences against the person.
- Victoria reformed its criminal offences in 1985. When Parliament introduced the new offences in 1985, it left the meaning of recklessness to the common law.
- In 2019, the Victorian Director of Public Prosecutions (DPP) asked the Court of Appeal, and then in 2020 the High Court, to determine the correct interpretation of recklessness for offences against the person other than murder.
- The Court of Appeal and the High Court concluded that the current definition as stated in the 1995 case of *R v Campbell*[1] should stand in Victoria unless changed by Parliament.

Pre-1985: malice offences and *Cunningham*

3.1 The meaning of recklessness in Victoria has evolved over several decades. Offences in Victoria for non-fatal injury did not use the term 'recklessness' before 1985. Victorian offences used concepts of 'malice' and 'grievous bodily harm' similarly to offences in New South Wales and England.[2] 'Malice' was interpreted as requiring either intention or recklessness.[3]

3.2 The degree of recklessness required to establish malice was set out in the 1957 English case of *R v Cunningham* ('*Cunningham*').[4] The *Cunningham* test required that the accused foresaw that the particular kind of harm *might* be done and yet went on to take the risk of it.[5]

3.3 In the 1990 New South Wales case of *R v Coleman* ('*Coleman*'),[6] Justice Hunt pointed out that the 'foresight of possible consequences' test in *Cunningham* was taken from a chapter in a criminal law textbook relating to property offences.[7] In that same textbook, the test required for non-fatal offences against the person, particularly for unlawful and

1 *R v Campbell* [1995] VSC 186; (1997) 2 VR 585 ('Campbell').
2 These offences were 'copied from the consolidating English Offences Against the Person Act of 1861 but the roots of some of the offences lie in the eighteenth century or even earlier. The original offences [were] augmented in Victoria in a piecemeal fashion, usually in response to specific events of the day.': Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 1985, 1039, (Mr Mathews, Minister for Police and Emergency Services).
3 *R v Cunningham* (1957) 2 QB 396, 399–400 (Byrne, Slade and Barry JJ); In *R v Lovett*, Justice Harris referred to 'the practice which prevailed in Victoria for many years before 1957. The practice was to direct juries that an unlawful and malicious wounding was committed by [someone] who in fact did an unlawful act which caused a wound, intending to do that act, and in the knowledge that it was unlawful. It was not the practice to add a further direction that the accused must have intended to cause the wound or to have had a foresight of the likelihood of a wound and acted recklessly notwithstanding.': *R v Lovett* [1975] VR 488, 489 [42]–[50] (Harris J) citing *R v Smyth* [1963] VR 737, 739.
4 *R v Cunningham* (1957) 2 QB 396. This case concerned the offence of unlawfully and maliciously causing a person to take a noxious thing: *Offences Against the Person Act 1861* (UK), 24 & 25 Vict, c.100, s 23 (E & W & NI).
5 *R v Cunningham* (1957) 2 QB 396, 399–400 (Byrne, Slade and Barry JJ) (emphasis added).
6 *R v Coleman* [1990] 19 NSWLR 467. This case concerned the offence of maliciously inflicting actual bodily harm with intent to have sexual intercourse: *Crimes Act 1900* (NSW) s 61c.
7 *R v Coleman* [1990] 19 NSWLR 467, 476–7 [F]-[A] (Hunt J), discussing *Kenny's Outlines of Criminal Law*, 16th ed (1952).

malicious wounding, was foresight of a 'likely' result.[8] But Justice Hunt concluded that the law had 'become sufficiently settled' and that:

> the discovery of this apparent confusion in the seminal work from which the law has flowed should not … lead to the law being changed.[9]

3.4 Early cases applying *Cunningham* in Victoria discussed the appropriate threshold for recklessness. In *R v Whitehead*[10] Justice Hudson found, ostensibly in accordance with *Cunningham*, that the word 'maliciously' requires either intention or that the accused acted 'foreseeing that they would *probably* produce this result, but … reckless as to the consequence of [their] acts.'[11]

3.5 However, in *R v Smyth*,[12] Justice Sholl concluded that 'probably' goes further than the language of *Cunningham* and the accused needs only to have foreseen that harm 'might' be done,[13] and that:

> the jury might reasonably conclude that … to drive … past the house with the gun in readiness to fire, involved a recklessness as to consequences foreseen as possible or probable. That, I think, would be sufficient to justify a conviction on the third count [unlawful and malicious wounding].[14]

3.6 Similarly, cases such as *R v Lovett*[15] and *R v Kane*[16] referred to *Cunningham* and the need for foresight that harm 'might' result.[17] But in *Campbell* these cases were said to concern repealed offences relating to malice, and were not applied to recklessly causing serious injury,[18] an offence introduced as part of the new statutory offences against the person in 1985.[19] Those new offences replaced offences that had incorporated the common law concept of 'malice'.

Post-1985: offences against the person

3.7 The *Crimes (Amendment) Act 1985* (Vic) ('the amending Act') came into operation on 24 March 1986. It amended Part I of the *Crimes Act 1958* (Vic) and inserted new sections including the offences against the person that are the subject of this review.

3.8 The amending Act made 'a fundamental reform' to non-fatal offences against the person,[20] replacing outdated offences that had become 'anachronistic over the passage of 120 years' with simpler modern offences.[21] But it was not intended to 'reduce the coverage' of serious offences.[22]

3.9 The new offences created a scale of seriousness using the fault elements of intention and recklessness. Maximum penalties varied according to seriousness.[23]

8 Ibid 477 [A]-[B] (Hunt J), quoting *Kenny's Outlines of Criminal Law*, 16th ed (1952) 163.
9 Ibid 478 [B] (Hunt J).
10 *R v Whitehead* [1960] VR 12. This case concerned the offence of setting fire unlawfully and maliciously to a dwelling-house: *Crimes Act 1958* (Vic) s 197.
11 *R v Whitehead* [1960] VR 12, 13 (Hudson J) (emphasis added).
12 *R v Smyth* [1963] VR 737. This was a ruling concerning an application for a directed acquittal on a charge of unlawful and malicious wounding.
13 Ibid 739 [24]-[33] (Sholl J).
14 Ibid.
15 *R v Lovett* [1975] VR 488. This case concerned the offence of unlawfully and maliciously inflicting grievous bodily harm: *Crimes Act 1958* (Vic) s 19A.
16 *R v Kane* [1974] VR 759. This case concerned the offence of malicious wounding: *Crimes Act 1958* (Vic) s 19.
17 *R v Lovett* [1975] VR 488, 493–4 (Harris J); *R v Kane* [1974] VR 759, 760 (Gowans, Nelson and Anderson JJ).
18 *R v Campbell* (1997) VR 585, 593 (Hayne JA and Crockett AJA). 'These are relatively old cases and concerning the now repealed offences of unlawful and malicious wounding or unlawful and malicious infliction of grievous bodily harm. The spirit of the decision in *Crabbe* indicates that such cases should not be applied to the offence of recklessly causing serious injury. *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'.
19 *Crimes (Amendment) Act 1985* (Vic).
20 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 1985, 1039, (Mr Mathews, Minister for Police and Emergency Services).
21 Ibid 1039–1040.
22 Ibid 1040.
23 Ibid.

The development of common law recklessness in Victoria

3.10 Many offences introduced in 1985 were based on a report by the Criminal Law Revision Committee of England and Wales (the Law Revision Committee).[24] These offences included intentionally causing serious injury, recklessly causing serious injury, and intentionally or recklessly causing injury.[25]

3.11 The Law Revision Committee proposed legislating a definition of recklessness.[26] It said that it was necessary to define intention and recklessness in relation to offences against the person as there is 'no unanimity as to the ordinary meaning of the words'.[27]

3.12 The Victorian legislature adopted the offences in the report but chose not to legislate a definition of recklessness. As Justice Edelman noted in the High Court:

> The intention of Parliament was … that the law as to the meaning of recklessness be developed and incrementally clarified in the manner of the common law.[28]

3.13 Since 1985 the common law definition of recklessness for offences against the person in Victoria has developed through several key cases: *R v Nuri ('Nuri')*[29] and then *Campbell*,[30] building on the High Court case of *R v Crabbe ('Crabbe')*.[31]

Crabbe

3.14 The 1985 case of *Crabbe* concerned the fault element necessary to constitute murder. The appellant, after consuming a substantial amount of alcohol, drove a prime mover and trailer through the wall of a motel in the Northern Territory and into a bar, killing five people.

3.15 Before *Crabbe* there was 'some difference of opinion' about the threshold for murder where a person did not intend to kill or cause grievous bodily harm ('reckless murder').[32] The question for the court was whether an accused's knowledge that their acts would 'probably' cause death or grievous bodily harm was required, or was it enough if they knew these outcomes were 'possible'?

3.16 At the time of *Crabbe* it was widely accepted in Australia that recklessness for statutory offences other than murder only required foresight of possible harm.[33] The High Court in *Crabbe* decided that knowledge of *possibility* for murder is not enough.[34] It is now settled law in Australia that a person is guilty of reckless murder if they commit an act knowing that it will *probably* cause death or grievous bodily harm, and death in fact results.[35]

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24 Ibid 1041; Great Britain, Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person* (Report, 1980).

25 *Crimes Act 1958* (Vic) ss 16–18.

26 Great Britain, Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person* (Report, 1980) 3 [6], 5 [12]. The essential elements proposed by the Criminal Law Revision Committee for a statutory definition of recklessness were: (i) the accused foresaw that their act might cause the particular result, and (ii) the risk of causing that result which they knew they were taking was, on an objective assessment, an unreasonable risk to take in the circumstances known to the accused.

27 Great Britain, Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person* (Report, 1980) 3 [6].

28 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [63]; (2021) 274 CLR 177, 25–26 [63] (Edelman J) .

29 *R v Nuri* [1990] VR 641.

30 *R v Campbell* (1997) 2 VR 585.

31 *R v Crabbe* [1985] HCA 22; (1985) 156 CLR 464. This was an appeal from the Federal Court of Australia after a trial in the Supreme Court of the Northern Territory.

32 *R v Crabbe* [1985] HCA 22, [7] discussing; *Pemble v The Queen* [1971] HCA 20; (1971) 124 CLR 107; *La Fontaine v The Queen* [1976] HCA 52; (1976) 136 CLR 62.

33 *R v Coleman* [1990] 19 NSWLR 467, 475 (E) (Hunt J). Justice Hunt noted that the general acceptance in Australia appears to have flowed from the decision of the English Court of Criminal Appeal in *R v Cunningham* (1957) 2 QB 396 as explained by that Court in *R v Mowatt* (1968) QB 421, 426.

34 *R v Crabbe* [1985] HCA 22, [7] citing *R v Jakac* [1961] VR 367; *R v Sergi* [1974] VR 1; *Nydam v The Queen* [1977] VR 430; *R v Windsor* [1982] VR 89; *R v Hallett* [1969] SASR 141 (emphasis added).

35 *R v Crabbe* [1985] HCA 22, [9]. This is the position as long as no statutory provision affects it, and if the person acts without lawful justification or excuse. The Judicial College of Victoria's *Criminal Charge Book* states: 'In Victoria, the degree of harm that must be intended [or risked] is "really serious injury"' and 'the meaning of "really serious injury" is a matter for the jury to determine … The law gives only very general assistance to juries in this regard': Judicial College of Victoria, '7.2.1 Intentional or Reckless Murder', *Victorian Criminal Charge Book* (Online Manual. 27 March 2019) [51], [54] <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4478.htm> (citations omitted).

3.17 In the context of reckless murder, the High Court found that:

> If an accused knows … that death or grievous bodily harm is a probable consequence, [they] act expecting that death or grievous bodily harm will be the likely result, for the word "probable" means likely to happen. That state of mind is comparable with an intention to kill or to do grievous bodily harm.[36]

3.18 The rationale for the probability threshold for reckless murder was 'moral equivalency', that is, that a person who knows their conduct will *probably* cause death or grievous bodily harm can be regarded as being 'just as blameworthy' as someone who does an act intending to kill or do grievous bodily harm.[37]

Nuri

3.19 The 1989 case of *Nuri* involved the offence of conduct endangering life.[38] It was the first time an appellate court in Victoria was required to interpret this offence.[39] Citing *Crabbe*, the Court of Appeal held that:

> Presumably conduct is relevantly reckless if there is foresight on the part of an accused of the *probable* consequences of [their] actions and … indifference as to whether or not those consequences occur.[40]

3.20 Following *Nuri*, the 'probable' threshold for recklessness was applied to the offence of conduct endangering persons.[41]

3.21 In *R v Sofa*,[42] the Court of Appeal approved the application of the *Crabbe* probability test for the recklessness element of the offence of making a threat to kill.[43]

Campbell

3.22 The 1995 case of *Campbell* considered the threshold for recklessness in relation to the offence of recklessly causing serious injury.[44] The Court of Appeal affirmed that a person is reckless if they foresee that a particular harmful consequence will *probably* result from their conduct.[45]

3.23 Although the use of 'probable' in *Crabbe* related to murder, in *Campbell* Justices Hayne and Crockett held that 'the same principles are relevant'.[46] They distinguished 'relatively old' cases that used a 'possibility' threshold for repealed offences of unlawful and malicious wounding or infliction of grievous bodily harm because 'the spirit of the decision in *Crabbe* indicates that such cases should not be applied to the offence of recklessly causing injury'.[47]

3.24 Instead, Justices Hayne and Crockett reasoned:

> *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.[48]

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36 *R v Crabbe* [1985] HCA 22, [8]; The Court acknowledged there had been some 'controversy' about whether a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur, but said it was unnecessary to enter upon that discussion: ibid citing *R v Hyam* [1975] AC 55, 82.

37 Ibid.

38 *Crimes Act 1958* (Vic) s 22.

39 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [72]; (2020) 284 A Crim R 19, 37 [72] (Justice Priest).

40 *R v Nuri* [1990] VR 641, 643 citing *R v Crabbe* [1985] HCA 22; (1985) 156 CLR 464 (emphasis added).

41 *Crimes Act 1958* (Vic) s 23; *Filmer v Barclay; Mansfield v Arnold* [1994] VicRp 59; (1994) 2 VR 269, 275–6 (McDonald J) citing *R v McCarthy* (Supreme Court of Victoria Court of Criminal Appeal, Brooking, Teague and Coldrey JJ, 4 November 1993); and *R v Nuri* [1990] VR 641.

42 *R v Sofa* [1990] Vic SC 483.

43 *Crimes Act 1958* (Vic) s 20; *R v Sofa* [1990] Vic SC 483, 11–12 (Crockett J, O'Bryan and McDonald JJ agreeing at 14); The Office of Public Prosecutions cited *Sofa* in its submission to support the proposition that 'the Court of Criminal Appeal held that *Nuri* had no application to the offence of threat to kill': Submission 10 (Office of Public Prosecutions). But the Court in *Sofa*, in saying that *Nuri* had no application, was referring to the fact that the offence of threat to kill did not require the additional objective element that an endangerment offence requires. The Court in *Sofa* still applied a probable test for the subjective element of recklessness.

44 *Crimes Act 1958* (Vic) s 17.

45 *R v Campbell* (1997) VR 585, 592 (Hayne JA and Crockett AJA, Phillips CJ agreeing at 586).

46 Ibid 593 (Hayne JA and Crockett AJA).

47 Ibid (Hayne JA and Crockett AJA) citing *R v Smyth* [1963] VR 737; *R v Kane* [1974] VR 759; *R v Lovett* [1975] VR 488.

48 *R v Campbell* (1997) 2 VR 585, 593 (Hayne JA and Crockett AJA).

3.25 As the definition of 'probable' was applied in *Nuri* for the offence of conduct endangering life, other offences against the person (including recklessly causing serious injury) could be considered 'kindred' sections for which the same definition of recklessness is appropriate.

3.26 In *Campbell*, the prosecution conceded that:

- 'The prevailing practice' in relation to the offence of recklessly causing serious injury and related sections of the Crimes Act was 'to direct a jury as to foreseeability that the injury would *probably* occur.'[49]
- It was improbable that the term 'recklessly' in the section 17 offence was intended to have a different meaning from other sections of the Crimes Act.[50]

3.27 Although the prosecution suggested that support for the 'possible' threshold could be found in the second reading speech where the Minister referred to an injury that 'might' result,[51] Justices Hayne and Crockett concluded:

> We have no doubt that the appropriate test to apply [for recklessness] … is possession of foresight that the injury *probably* will result … [52]

3.28 The effect of *Campbell* has been to apply the 'probable' definition of recklessness to all relevant offences against the person in Part I, Division 1(4) of the Crimes Act, the offences that are the subject of this reference (see Chapter 4).[53]

The Director of Public Prosecutions reference

3.29 In 2019 the Victorian Director of Public Prosecutions (DPP) asked the Court of Appeal, and then in 2020 the High Court, to determine a point of law relating to the correct interpretation of recklessness for offences against the person other than murder (the *DPP Reference*).[54]

3.30 In the Court of Appeal the DPP argued 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, *having regard to the social utility of the action*.[55]

3.31 The DPP said that the *Campbell* approach requiring foresight of the probability of injury was inconsistent with *Aubrey v The Queen* ('*Aubrey*')[56] (see below), and should no longer be followed.[57]

49 Ibid 592 (Hayne JA and Crockett AJA) (emphasis in original); See, for example, *R v Westaway* (Supreme Court of Victoria Court of Criminal Appeal, Young CJ, Murphy and Beach JJ, 24 September 1991) which concerned an offence of recklessly causing serious injury. The Court said that the accused's act was 'reckless with a foresight of the probable consequences that [the victim] would be seriously injured'; In *R v Totivan* (Supreme Court of Victoria Court of Appeal, Phillips CJ, Callaway JA and Smith AJA, 15 August 1996) 16, which concerned recklessly causing injury, the prosecution conceded that 'being aware that a person may be injured' was a misdirection by the trial judge, because 'injury must be foreseen as a probable and not merely a possible consequence'.

50 *R v Campbell* (1997) 2 VR 585, 592 (Hayne JA and Crockett AJA).

51 Ibid (Hayne JA and Crockett AJA); Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 1985, 1040, (Mr Mathews, Minister for Police and Emergency Services).

52 *R v Campbell* (1997) 2 VR 585, 592 (Hayne JA and Crockett AJA, Phillips CJ agreeing at 586) (emphasis in original).

53 Judicial College of Victoria, '7.1.3 Recklessness', *Victorian Criminal Charge Book* (Online Manual, 28 October 2022) <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4469.htm>. The *Criminal Charge Book* states that the definition 'applies to all Victorian offences involving recklessness', but as we discuss in Chapter 5, there are some exceptions to this.

54 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181; *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26. The Director's reference was brought pursuant to the *Criminal Procedure Act 2009* (Vic) s 308.

55 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181 [3] (Maxwell P, McLeish and Emerton JJA) (emphasis in original). The emphasised words were added by leave in the course of argument.

56 *Aubrey v The Queen* [2017] HCA 18; (2017) 260 CLR 305. This was an appeal to the High Court from the New South Wales Court of Criminal Appeal, after a trial in the District Court of New South Wales. The case concerned the offence of maliciously inflicting grievous bodily harm: *Crimes Act 1900* (NSW) s 35(1)(b). The appellant caused the victim to contract human immunodeficiency virus (HIV).

57 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [3] (Maxwell P, McLeish and Emerton JJA).

Aubrey and recklessness in New South Wales

3.32 New South Wales has a different threshold for recklessness (for further discussion, see Chapter 6).

3.33 In the 1990 case of *Coleman*, the New South Wales Court of Criminal Appeal held that 'possibility', rather than 'probability', was sufficient to establish malice for offences other than murder in New South Wales.[58]

3.34 In 2011, in *Blackwell v The Queen*,[59] the New South Wales Court of Criminal Appeal considered whether probability or possibility was the appropriate threshold for recklessness. The defence submitted that the appropriate test for recklessness was foresight of the 'probable' consequences. However, the Court concluded that:

> this court should not follow the Victorian decision of *Campbell*. That decision is inconsistent with authority in the High Court, New South Wales and in England. The [New South Wales] Attorney General expressly referred to the test for recklessness stated by Hunt J in *Coleman* when commenting upon the proposed legislative changes to [remove 'maliciously' from the *Crimes Act 1900* (NSW) and replace it with 'recklessly' and 'intentionally'].[60]

3.35 In 2017, in *Aubrey*, the High Court held that foreseeing the 'possibility' of grievous bodily harm is sufficient to establish recklessness for offences other than murder in New South Wales.[61] It distinguished murder from other offences:

> the reason for requiring foresight of probability in the case of common law murder was the near moral equivalence of intention to kill or cause grievous bodily harm and the foresight of the probability of death. The same does not necessarily, if at all, apply to statutory offences other than murder.[62]

3.36 The High Court did not specifically consider recklessness offences in Victoria but noted that 'the requirements in States other than New South Wales may vary according to the terms of each State's legislation.'[63]

3.37 Following *Aubrey*, the Judicial College of Victoria (JCV) added a cautionary note to its *Criminal Charge Book* for material discussing recklessness. It advised judges to consider seeking submissions on the impact of *Aubrey* and if they should give different directions to the standard directions about recklessness that had applied since *Campbell*.[64]

The *DPP Reference* case

3.38 The *DPP Reference* stemmed from a trial in the County Court of Victoria (see box over page).[65]

58 *R v Coleman* [1990] 19 NSWLR 467, 476 [B] – [C] (Hunt J, Finlay and Allen JJ agreeing at 489 [C]) citing *R v Cunningham* (1957) 2 QB 396; *R v Mowatt* (1968) QB 421; In Coleman, Justice Hunt made observations as to the need to replace the concept of malicious acts in the *Crimes Act 1900* (NSW) with acts done intentionally or recklessly, but 'malice' was not removed as a fault element for various offences in New South Wales until 2007: *Crimes Amendment Act 2007* (NSW).

59 *Blackwell v The Queen* [2011] NSWCCA 93; (2011) 81 NSWLR 119. This case concerned the offence of recklessly causing grievous bodily harm: *Crimes Act 1900* (NSW) s 35.

60 *Blackwell v The Queen* [2011] NSWCCA 93 [78] (Beazley JA) (James J agreeing at [120], Hall J agreeing at [170]). For a short time in New South Wales following *Blackwell*, the prosecution had to prove that an accused person foresaw the possibility of the specific harm identified in the offence. But since 2012, only foresight of the possibility of actual bodily harm is required, see *Crimes Amendment (Reckless Infliction of Harm) Act 2012* (NSW).

61 *Aubrey v The Queen* [2017] HCA 18.

62 Ibid [47] (Kiefel CJ, Keane, Nettle and Edelman JJ, Bell J agreeing at [53]) citing *R v Crabbe* (1985) 156 CLR 464, 469.

63 *Aubrey v The Queen* [2017] HCA 18, [47] (Kiefel CJ, Keane, Nettle and Edelman JJ).

64 Consultation 5 (Judicial College of Victoria). We note that a recent version of *Indictable Offences in Victoria* states that *Aubrey* 'appears to overturn a significant strand of Victorian authority on recklessness' and 'for the present, the law in Victoria should be regarded as to some degree uncertain.': Ian Freckelton and Mirko Bagaric, Thomson Reuters, *Indictable Offences in Victoria* (online at 22 November 2023) [18.100]. While the specific basis of any uncertainty is not identified, the application of the *Campbell* test for offences against the person in Victoria is settled (Chapters 10 and 12). The Judicial College of Victoria told us that the cautionary note about *Aubrey* was removed from the *Criminal Charge Book* after the *DPP Reference* as that case 'settled the issue'.

65 Transcript of charge to jury and entry of verdict, (*case name withheld)* (County Court of Victoria, August 2019).

An argument broke out in the streets of Melbourne between two men, A and B. B was said to have been intoxicated and aggressive. The argument escalated into a physical altercation with pushing, shoving, and punches.

The fight culminated with A kicking B to the side of his head. The kick was described as very powerful and quick. B was rendered unconscious and fell backwards, hitting his head on the pavement. B sustained skull fractures and brain swelling. His injuries were life-threatening.

A was 18 years old at the time of the incident and had consumed alcohol. He was charged with intentionally causing serious injury,[66] and the alternative of recklessly causing serious injury.[67] He pleaded not guilty and faced a jury trial.

At trial, it was accepted that B had suffered a serious injury caused by A. The issues in dispute were A's state of mind when he delivered the kick to B's head, and whether he did so in self-defence.[68]

The jury found the accused not guilty of both intentionally and recklessly causing serious injury, and the alternative verdicts of intentionally causing injury and recklessly causing injury.[69]

The jury needed to be satisfied beyond reasonable doubt that (1) when A kicked B in the head he intended or foresaw the probability of causing (serious) injury to B; and (2) A was not acting in self-defence. Given the not guilty findings, the jury was not satisfied of at least one of these things.

3.39 During the trial, the judge brought counsels' attention to the section of the JCV's *Criminal Charge Book* that referred to *Aubrey*.[70] After seeking instructions from the DPP, the prosecutor submitted that the judge should charge the jury in accordance with *Aubrey*. The trial judge declined to do so. He ruled that he was bound by the Court of Appeal's judgment in *Campbell* and went on to instruct the jury that conduct is reckless if the accused foresees the *probable* consequences of their actions.[71]

3.40 At the conclusion of the trial, the DPP referred the correctness of the decision in *Campbell* as a point of law to the Court of Appeal.

The Court of Appeal's decision

3.41 In the Court of Appeal, the DPP argued that the correct interpretation of recklessness for offences other than murder is that an accused has foresight of the *possibility* of relevant consequences and proceeds nevertheless.[72]

3.42 The DPP also sought to include an objective assessment of the risk in the recklessness test, that a person recklessly causes injury if they:

1) foresee the possibility of causing injury; and
2) the risk of causing injury was, on an objective assessment of the circumstances including the social utility of the act, an unreasonable risk for them to take.[73]

66 *Crimes Act 1958* (Vic) s 16.
67 Ibid s 17.
68 An accused acts in self-defence if they believe that their conduct is necessary to defend themselves, and it is a reasonable response in the circumstances as the accused perceived them at the time: *Crimes Act 1958* (Vic) s 322K. The prosecution bears the onus of disproving self-defence.
69 *Crimes Act 1958* (Vic) s 18. In a trial for any offence other than treason or murder, the jury may return an alternative verdict for another offence within the jurisdiction of the court if the allegations on the indictment amount to or include (whether expressly or impliedly) an allegation of that other offence: *Criminal Procedure Act 2009* (Vic) s 239(2).
70 Consultation 5 (Judicial College of Victoria).
71 This history of the reference is set out in *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181 [57]-[58] (Priest JA).
72 Ibid [3] (Maxwell P, McLeish and Emerton JJA) (emphasis added).
73 This position was refined in the course of oral argument: Ibid [42] (Maxwell P, McLeish and Emerton JJA) (emphasis added).

3.43 The Court of Appeal concluded:

> unless and until it is altered by legislation, the meaning of 'recklessly' in s 17 of the *Crimes Act 1958* is that stated by the Court of Appeal in *Campbell*.[74]

3.44 Justice Priest stated that *Campbell* should continue to be followed and there was nothing in *Aubrey* which compelled the conclusion that *Campbell* should be overruled.[75] The DPP pursued the reference to the High Court.

The High Court's decision

3.45 The High Court's decision was split across three judgments.[76] In their joint judgment, Chief Justice Kiefel and Justices Keane and Gleeson considered *Campbell* to be wrong.[77] In their view, recklessness for offences other than murder requires that an accused had foresight of the possibility of relevant consequences and proceeded nevertheless.[78]

3.46 Justices Gageler, Gordon and Steward in a joint judgment concluded that the foresight of probability test as per *Campbell* should stand in Victoria unless addressed by the legislature.[79] Justice Edelman agreed that 'Unless and until it is altered by legislation, the meaning of "recklessly" in s 17… is that stated by the Court of Appeal in *R v Campbell*'.[80]

The re-enactment presumption

3.47 As part of their reasoning, Justices Gageler, Gordon and Steward relied on the re-enactment presumption, which holds that where parliament re-enacts words that have already been given a meaning, it is presumed that parliament intended those words to carry the same meaning.[81] The Court of Appeal also relied on this presumption.

3.48 The High Court discussed two key legislative changes in Victoria:

- amendments in 1997 to the maximum penalties for a range of offences including offences against the person[82]
- amendments in 2013 which introduced new offences where serious injury was caused in circumstances of 'gross violence', and new definitions of 'injury' and 'serious injury'.[83]

3.49 Justices Gageler, Gordon and Steward observed that:

> even if, when s 17 was enacted, the mental element of recklessness, consistent with *Crabbe*, should have been interpreted as the *possibility* and not *probability* of relevant consequences, the 1997 and 2013 amendments were based on the nature and extent of the criminality and culpability of a contravention of s 17 as stated in *Campbell* (which followed *Nuri*), not *Crabbe*. Those amendments, and the basis for those amendments, cannot be put to one side.[84]

74 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181 [6] (Maxwell P, McLeish and Emerton JJA, Kaye JA agreeing at [127]).
75 Ibid [60] (Priest JA).
76 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26.
77 Ibid [7] (Kiefel CJ, Keane and Gleeson JJ).
78 Ibid [35] (Kiefel CJ, Keane and Gleeson JJ).
79 Ibid [59] (Gageler, Gordon and Steward JJ).
80 Ibid [99] (Edelman J) quoting *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [6] (Maxwell P, McLeish and Emerton JJA, Kaye JA agreeing at [127]).
81 Ibid [51] (Gageler, Gordon and Steward JJ). The Court of Appeal also relied on this presumption.
82 *Sentencing and Other Acts (Amendment) Act 1997* (Vic).
83 *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic).
84 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [57] (Gageler, Gordon and Steward JJ).

3.50 In considering the application of the re-enactment presumption, Justices Gageler, Gordon and Steward also observed that:

> temporal proximity between a judicial interpretation and subsequent enactment may be significant. The 1997 amendments were made just two years after *Campbell* was decided. And while the 2013 amendments were made many years after the decision of the Court of Appeal in *Campbell*, many subsequent decisions of the Court of Appeal which applied *Campbell* were decided contemporaneously with those amendments.[85]

3.51 Addressing the significance of the 2013 amendments, Justices Gageler, Gordon and Steward found that:

> [the amendments] could only be understood on the basis that the legislature was aware of, and accepted, the *Nuri* (and thus the *Campbell*) interpretation for the mental element of recklessness.[86]

Victoria's distinctive approach

3.52 There have been 'dramatic divergences of view and differences of opinion at the highest judicial levels' about the definition of recklessness in criminal law.[87] The meaning ascribed to the concept of recklessness has varied over time and across jurisdictions, as outlined above and in Chapter 6.

3.53 The definition of recklessness in Victoria has developed in its own distinct way and has evolved over time. Victoria has adopted a threshold requiring foresight of 'probable' harm for modern offences against the person. The current test has been in operation for nearly three decades and a substantial and settled jurisprudence exists based on that test.

85 Ibid [54] (Gageler, Gordon and Steward JJ) (citations omitted).
86 Ibid [50] (Gageler, Gordon and Steward JJ).
87 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [32] (Maxwell P, McLeish and Emerton JJA) citing *R v G* [2003] UKHL 50; [2004] 1 AC 1034.

CHAPTER

04

Victorian offences against the person that include recklessness

4. Victorian offences against the person that include recklessness

Overview

- This chapter outlines the offences against the person in Part I, Division 1(4) of the *Crimes Act 1958* (Vic) that include recklessness, including the source of the offence, jurisdiction, history, elements, possible alternative offences, and penalties.
- Understanding the scope of the offences involving recklessness assists in locating the offences in their wider criminal law context and assessing the implications of any potential change.

Offences against the person that include recklessness

4.1 Before we address the broader policy issues about how recklessness should be defined, it is important to understand the offences involved. This helps us locate the offences in their wider criminal law context and assess the implications of any potential change.

4.2 Our review of recklessness focused on offences against the person in Part I, Division 1(4) of the *Crimes Act 1958* (Vic) that include a recklessness element.[1] We have grouped them as follows:

- gross violence offences (sections 15A and 15B)
- injury offences (sections 17–18)
- offence to administer certain substances (section 19)
- threat offences (sections 20–21)
- endangerment offences (sections 22–23)
- setting traps (sections 25–26)
- assaults (section 31)
- discharging a firearm reckless as to the safety of a police officer or protective services officer (PSO) (section 31C)

4.3 This chapter describes each of the offences against the person that include recklessness, including their source, jurisdiction, history and elements. It also sets out the relative frequency of the various offences, trends over time, and sentencing outcomes.

4.4 We list other possible charges that might be open, although their applicability would depend on the evidence in the individual case. Other assault offences outside of the Crimes Act are set out in Appendix C.

1 *Crimes Act 1958* (Vic) ss 15A, 15B, 17, 18, 19, 20, 21, 22, 23, 25, 26, 31 and 31C.

Indictable offences and the courts they can be heard in

4.5 Offences in the Crimes Act are indictable offences, meaning that they are serious offences usually determined in the higher courts. If an accused person pleads not guilty to an indictable offence, the case will go to trial to be determined by a jury.[2]

4.6 Less serious indictable offences might be 'triable summarily', meaning they can be heard and determined by a magistrate in the lower courts.[3] The maximum term of imprisonment that can be imposed for an indictable offence in the summary jurisdiction is two years for a single offence, or five years for multiple offences.[4]

Without lawful excuse

4.7 Many of the offences against the person that include recklessness also include the element 'without lawful excuse'. This requires the prosecution to disprove any justifications, excuses or defences that are open on the evidence.

The definitions of 'injury' and 'serious injury'

4.8 The gross violence and injury offences require the prosecution to prove an 'injury' or 'serious injury' resulted.

4.9 'Injury' means 'physical injury' or 'harm to mental health', whether temporary or permanent.[5]

4.10 'Serious injury' means:

> 'an injury (including the cumulative effect of more than one injury) that:
>
> i) endangers life; or
>
> ii) is substantial and protracted; or
>
> 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.'[6]

4.11 These definitions apply from 1 July 2013.[7] We discuss the development of the serious injury definition further in Chapter 8.

Gross violence offences

4.12 Section 15A of the Crimes Act creates the offence of intentionally causing serious injury in circumstances of gross violence. Although this is an intentional offence, if the circumstance of gross violence relied on involves planning in advance, that circumstance can be proved by intention, a subjective recklessness test, or an objective recklessness test.

4.13 Section 15B of the Crimes Act creates the offence of recklessly causing serious injury in circumstances of gross violence.

4.14 The gross violence offences are indictable only. They cannot be heard in the summary jurisdiction.

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2 During the coronavirus (COVID-19) pandemic provisions were inserted into the *Criminal Procedure Act 2009* (Vic) to temporarily provide for some criminal trials to be determined by a judge alone, without a jury. Criminal trial by judge alone was available in Victoria for two periods during the pandemic: see, respectively, s 32 of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic), which commenced on 21 October 2020 and was repealed on 21 April 2021; and s 3 of the *Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022* (Vic), which commenced on 30 March 2022 and was repealed on 30 March 2023.

3 An indictable offence may be heard and determined summarily (that is, in the Magistrates' Court) if the accused consents, and the court considers it appropriate in the circumstances (considering the seriousness of the offence, the adequacy of available sentences, whether there is a co-accused and any other relevant matters): *Criminal Procedure Act 2009* (Vic) s 29(1).

4 *Sentencing Act 1991* (Vic) ss 113, 113B.

5 *Crimes Act 1958* (Vic) s 15. 'Harm to mental health' is defined as including psychological harm but does not include an emotional reaction such as distress, grief, fear or anger unless it results in psychological harm. 'Physical injury' is defined as including unconsciousness, disfigurement, substantial pain, infection with a disease, and an impairment of a bodily function.

6 Ibid.

7 Introduced by the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic).

4.15 The gross violence offences commenced on 1 July 2013, at the same time as the amended 'injury' and 'serious injury' definitions. They sit at the top of the hierarchy of non-fatal offences against the person in Victoria and 'are intended to capture a subset of the serious injury offences cases … that involve a particularly high level of harm and culpability.'[8] The then-Attorney-General said that the offences were introduced to combat a 'culture of extreme violence':

> For too long, the law has not done enough to protect innocent Victorians from being victims of horrific, unprovoked attacks that leave terrible lifelong injuries … Vicious kicking or stomping on the heads of victims has become commonplace, as has the deliberate carrying and use of knives to inflict terrible wounds. These attacks go way beyond spontaneous street brawls.[9]

4.16 Table 2 sets out the elements of the gross violence offences and other possible charges.

Table 2: Elements of the gross violence offences and other possible charges

Elements of the gross violence offences	Other possible charges
• The accused caused serious injury to another person. • The accused acted intentionally (s 15A) or recklessly (s 15B). • The accused acted in circumstances of gross violence. • The accused acted without lawful excuse.	• the injury offences[10] • the endangerment offences • violent disorder[11] • affray[12] • assault offences.

4.17 The prosecution only needs to prove one circumstance of gross violence. Table 3 sets out the circumstances of gross violence,[13] alongside their purpose.[14]

8 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012, 5550 (Mr Clark, Attorney-General).
9 Ibid 5549–50.
10 Section 16 causing injury intentionally is a statutory alternative to the section 15A offence: *Crimes Act 1958* (Vic) s 422(1). Section 17 causing injury recklessly is a statutory alternative to the section 15B offence: Ibid s 422(2). Other possible injury offence alternatives: Ibid ss 18, 24.
11 *Crimes Act 1958* (Vic) s 195I.
12 Ibid s 195H.
13 Ibid ss 15A(2), 15B(2).
14 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012, 5551–2 (Mr Clark, Attorney-General).

Table 3: Circumstances of gross violence and their purpose

Circumstance of gross violence	Purpose
a) The accused planned in advance to engage in conduct and at the time of planning had a particular state of mind, either: i) the accused intended that the conduct would cause serious injury; or ii) the accused was reckless as to whether the conduct would cause serious injury; or iii) a reasonable person would have foreseen that the conduct would be likely to result in a serious injury.	'This circumstance is intended to capture situations where an offender has planned to beat or threaten someone with violence, and at the time [they] formulated that plan, [they] intended or [were] reckless about causing serious injury. The circumstance is also intended to capture scenarios where, at the time of planning, a reasonable person would have foreseen the conduct would be likely to result in a serious injury.'[15] 'The idea of planning in advance is intended to capture premeditation or pre-planning, rather than intent formulated only moments in advance of the offending behaviour. [For example] It is not intended to capture someone who is pushed in a pub and then turns around and decides to king-hit the other person. That person can be charged with intentionally or recklessly causing serious injury. However, it is intended that planning in advance will capture, for example, someone who is pushed in a nightclub, goes home and decides to retaliate … then returns to the nightclub and causes serious injury.'[16]
b) The accused caused the serious injury in company with two or more other people.	These circumstances are intended to 'target group behaviour.'[17] A person may be found guilty of an offence against section 15A or 15B regardless of whether any other person is prosecuted for or found guilty of the offence.[18]
c) The accused entered into an agreement, arrangement or understanding with two or more people to cause a serious injury.	
d) The accused planned in advance to have with them and to use an offensive weapon, firearm or imitation firearm and in fact used it to cause the serious injury.	This circumstance 'targets offenders who have planned in advance to have … and use a weapon, and then [have] in fact used that weapon to cause serious injury'.[19] 'The offender's plan to have and use a weapon does not need to involve planning to cause a serious injury. For example, it may be that an offender has planned to have and use a weapon for self-defence purposes … then used a weapon to cause a serious injury.'[20]

15 Ibid 5551.
16 Ibid 5552.
17 Ibid 5551.
18 *Crimes Act 1958* (Vic) s 15C.
19 Victoria, Parli*amentary Debates*, Legislative Assembly, 13 December 2012, 5552 (Mr Clark, Attorney-General).
20 Ibid.

Table 3: Circumstances of gross violence and their purpose (continued)

Circumstance of gross violence	Purpose
e) The accused continued to cause injury to the other person after the other person was incapacitated.	These circumstances 'address situations where serious injuries are caused to incapacitated victims. The [legislation] does not define the term 'incapacitation', but leaves it open to the courts to interpret the term by reference to its ordinary and natural meaning, and on a case-by-case basis … to mean anything from a person being unconscious to a person being conscious but unable to defend [themselves].'[21] These circumstances are 'intended to cover, for example, cases where the victim is in a wheelchair and has been attacked … [and] where the offender has continued to cause injury to the victim after the victim is incapacitated.'[22] 'This circumstance does not depend on proof that the offender knew the victim was incapacitated.'[23]
f) The accused caused the serious injury to the other person while the other person was incapacitated.	

Injury offences

4.18 Section 17 of the Crimes Act creates the offence of recklessly causing serious injury.

4.19 Section 18 of the Crimes Act creates two distinct offences:

- intentionally causing injury
- recklessly causing injury.

4.20 The section 17 and 18 offences are indictable offences triable summarily,[24] except where they are alleged to have been committed against an on-duty emergency worker, custodial officer, or youth justice custodial worker.[25]

4.21 Sections 17 and 18 commenced operation on 24 March 1986.[26] Together with the section 16 offence of intentionally causing serious injury, they replaced old offences of malicious wounding with intent to do grievous bodily harm, malicious infliction of grievous bodily harm, and malicious wounding.[27] The purpose of the reforms was to simplify the offences and the relationship between them.[28]

4.22 When section 18 was introduced it had a single maximum penalty of seven years imprisonment. In 1992, the commencement of the *Sentencing Act 1991* (Vic) applied a new penalty scale to the Crimes Act offences,[29] and two separate maximum penalties were applied to section 18:

- seven and a half years imprisonment for intentionally causing injury
- five years imprisonment for recklessly causing injury.

21 Ibid.
22 Ibid.
23 Ibid.
24 *Criminal Procedure Act 2009* (Vic) s 28(1)(a) and (b)(ii).
25 Ibid sch 2 cl 4.1, 4.1A; *Sentencing Act 1991* (Vic) s 10AA.
26 Sections 17 and 18 were inserted into the *Crimes Act 1958* (Vic) by the *Crimes (Amendment) Act 1985* (Vic).
27 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 1985, 1040 (Mr Mathews, Minister for Police and Emergency Services).
28 Ibid.
29 The penalty scale sets the maximum penalty for many offences. The penalty scale for imprisonment has nine levels, ranging from Level 9 (six months imprisonment) to Level 1 (life imprisonment): *Sentencing Act 1991* (Vic) s 109.

4.23 For some time, there was uncertainty as to whether section 18 created one or two offences. The Court of Appeal resolved this issue in 1994 in *R v Hassett*,[30] finding that with the introduction of the Sentencing Act, Parliament intended to separate section 18 into two offences by attaching different maximum penalties to the distinct fault elements.

4.24 In 1997, after an extensive review of maximum penalties, a new penalty scale was applied to the Crimes Act offences.[31] The penalties for the injury offences were amended to their current level, with five-year increments between them.

4.25 Table 4 sets out the elements of the injury offences and other possible charges.

Table 4: Elements of the injury offences and other possible charges

Elements of the injury offences	Other possible charges
Section 17 • The accused caused serious injury to another person. • The accused acted recklessly. • The accused acted without lawful excuse.	• the endangerment offences • affray[32] • assault offences.
Section 18 • The accused caused injury to another person. • The accused acted intentionally or recklessly. • The accused acted without lawful excuse.	

Offence to administer certain substances

4.26 Section 19 of the Crimes Act creates the offence of administering or causing another person to take a substance capable of substantially interfering with bodily functions. It is indictable triable summarily.[33]

4.27 The section 19 offence commenced operation on 24 March 1986.[34] It replaced old offences including administering chloroform and poison. The section 19 offence was:

> designed to catch the case in which no injury results from the administration [of a dangerous substance]. The administration of dangerous substances without the consent of another is a serious matter and ought to be punishable whether or not harm is actually done.[35]

4.28 There are very few cases of this offence in practice.[36]

4.29 Table 5 sets out the elements of the section 19 offence and other possible charges.

30 *R v Hassett* [1994] Vic SC 765; (1994) 76 A Crim R 19.
31 *Sentencing and Other Acts (Amendment) Act 1997* (Vic).
32 *Crimes Act 1958* (Vic) s 195H.
33 *Criminal Procedure Act 2009* (Vic) s 28(1)(b)(ii).
34 Section 19 was inserted into the *Crimes Act 1958* (Vic) by the *Crimes (Amendment) Act 1985* (Vic).
35 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 1985, 1040 (Mr Mathews, Minister for Police and Emergency Services).
36 See, eg, *R v Cherry (No 2)* [2006] VSCA 271; *R v SH* [2006] VSCA 83; *R v Barnes* [2003] VSCA 156. The Sentencing Advisory Council's sentencing statistics database, SACStat, does not have data on this offence due to the small number of cases prosecuted.

Table 5: Elements of the section 19 offence and other possible charges

Elements of the section 19 offence	Other possible charges
• The accused administered to or caused to be taken by another person a substance. • The substance was capable of interfering substantially with the other person's bodily functions. • The accused knew that the substance was capable of interfering substantially with the other person's bodily functions. • The accused knew that the other person had not consented to the administration or taking of the substance or was reckless as to whether or not the other person had consented. • The accused acted without lawful excuse.	• administration of an intoxicating substance for a sexual purpose[37] • the injury offences • the endangerment offences • food or drink spiking[38] • introduction of a drug of dependence into the body of another person,[39] or other drug offences[40] • assault offences.

4.30 A person should not be taken to have consented to the administration or taking of a substance if, had they known the likely consequences, they would not be likely to have consented.[41]

4.31 If a substance is capable of inducing unconsciousness or sleep it falls within the scope of interfering substantially with bodily functions.[42]

Threat offences

4.32 Section 20 of the Crimes Act creates the offence of making a threat to kill.

4.33 Section 21 of the Crimes Act creates the offence of making a threat to inflict serious injury.

4.34 Both threat offences are indictable triable summarily.[43] They commenced operation on 24 March 1986.[44]

4.35 Table 6 sets out the elements of the threat offences and other possible charges.

37 *Crimes Act 1958* (Vic) s 46.
38 *Summary Offences Act 1966* (Vic) s 41H.
39 *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 74.
40 *Drugs, Poisons and Controlled Substances Act 1981* (Vic).
41 *Crimes Act 1958* (Vic) s 19(2)(a).
42 Ibid s 19(2)(b).
43 *Criminal Procedure Act 2009* (Vic) s 28(1)(b)(ii).
44 Sections 20 and 21 were inserted into the *Crimes Act 1958* (Vic) by the *Crimes (Amendment) Act 1985* (Vic).

Table 6: Elements of the threat offences and other possible charges

Elements of the threat offences	Other possible charges
• The accused made a threat to another person. • The threat was to kill (s 20) or seriously injure (s 21) that person or some other person. • The accused intended that the other person would fear that the threat would be carried out or was reckless as to whether or not that person would fear that the threat would be carried out. • The threat was made without lawful excuse.	• blackmail[45] • bomb hoaxes[46] • extortion offences[47] • threatening injury to prevent arrest[48] • intimidation of a law enforcement officer or their family member[49] • threat to commit a sexual offence[50] • false statements (threat to property or persons)[51] • threats to destroy or damage property[52] • affray[53] • assault offences • threat to distribute intimate image[54] • obscene, indecent, threatening language and behaviour etc. in public.[55]

Endangerment offences

4.36 Section 22 of the Crimes Act creates the offence of conduct endangering life.

4.37 Section 23 of the Crimes Act creates the offence of conduct endangering persons. This offence 'is sometimes described as reckless conduct endangering *serious injury*, which reflects its elements.'[56] The seriousness of this offence is 'determined according to the degree of recklessness [shown] by the conduct that constitutes the charge, and the nature of its foreseeable potential consequences.'[57]

4.38 Both endangerment offences are indictable triable summarily.[58] They commenced operation on 24 March 1986,[59] replacing a large number of specific endangerment offences.[60]

4.39 Table 7 sets out the elements of the endangerment offences and other possible charges.

45 *Crimes Act 1958* (Vic) s 87.
46 Ibid s 317A.
47 Ibid ss 27 and 28.
48 Ibid s 30.
49 Ibid s 31D.
50 Ibid s 43.
51 Ibid s 247.
52 Ibid s 198.
53 Ibid s 195H.
54 *Summary Offences Act 1966* (Vic) s 41DB.
55 Ibid s 17.
56 *R v Liszczak & Phillips* [2017] VSC 103, [4] n 7 (Croucher J) (emphasis in original).
57 *Jones v The King* [2023] VSCA 167, [30]; (2023) 105 MVR 93, 100 [30] (Priest and Macaulay JJA).
58 *Criminal Procedure Act 2009* (Vic) s 28(1)(b)(ii).
59 Sections 22 and 23 were inserted into the *Crimes Act 1958* (Vic) by the *Crimes (Amendment) Act 1985* (Vic).
60 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 1985, 1041 (Mr Mathews, Minister for Police and Emergency Services).

Table 7: Elements of the endangerment offences and other possible charges

Elements of the endangerment offences	Other possible charges
• The accused engaged in conduct. • The accused's conduct was voluntary. • The accused's conduct placed (or may have placed) a person in danger (that is, conduct that carried with it an appreciable risk) of death (s 22) or serious injury (s 23) (the physical element). • 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, or might place, another in danger of death (s 22) or serious injury (s 23) (endangerment, the objective fault element). • The accused acted recklessly in that they foresaw that placing another in danger of death (s 22) or serious injury (s 23) was a probable consequence of their conduct in the surrounding circumstances, but went ahead and engaged in the conduct (recklessness, the subjective fault element). • The accused acted without lawful excuse.	• the injury offences • the setting traps offences.

4.40 We discuss the complexities of the endangerment offences in Chapter 8.

Setting traps

4.41 Section 25 of the Crimes Act creates the offence of intentionally or recklessly setting a trap or device to kill. This offence is indictable only. It cannot be heard in the summary jurisdiction.

4.42 Section 26 of the Crimes Act creates the offence of intentionally or recklessly setting a trap or device to cause serious injury. It is indictable triable summarily.[61]

4.43 The section 25 and 26 offences commenced operation on 24 March 1986.[62] They modernised an old offence that criminalised the setting or placing of 'any spring-gun man-trap or other engine calculated to destroy human life or inflict grievous bodily harm on any person',[63] which dealt with the practices of 18th century English landowners.[64]

4.44 There are very few cases of these offences in practice.[65]

4.45 Table 8 sets out the elements of the setting traps offences and other possible charges.

61 *Criminal Procedure Act 2009* (Vic) s 28(1)(b)(ii).
62 Sections 25 and 26 were inserted into the *Crimes Act 1958* (Vic) by the *Crimes (Amendment) Act 1985* (Vic).
63 *Crimes Act 1958* (Vic) s 32 (the original Act).
64 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 October 1985, 1041 (Mr Mathews, Minister for Police and Emergency Services). The old offence contained an exception for traps set with the intent of destroying vermin or set from sunset to sunrise in a house for protection. Sections 25 and 26 omit these exceptions.
65 The Sentencing Advisory Council's sentencing statistics database, SACStat, does not have data on these offences due to the small number of cases prosecuted.

Table 8: Elements of the setting traps offences and other possible charges

Elements of the setting traps offences	Other possible charges
• The accused set a trap or device. • The accused acted with the intention of killing (s 25) or seriously injuring (s 26) another person or being reckless as to whether or not another person was killed or seriously injured.	• the injury offences • the endangerment offences • assault offences.

Assaults

4.46 Section 31 of the Crimes Act creates five distinct assault offences:

1) Assault or threat to assault with intent to commit an indictable offence.[66]
2) Assault or threat to assault an emergency worker, youth justice custodial worker or custodial officer on duty, or a person lawfully assisting those workers.[67]
3) Resist an emergency worker, youth justice custodial worker or custodial officer on duty, or a person lawfully assisting those workers.[68]
4) Obstruct an emergency worker, youth justice custodial worker or custodial officer on duty, or a person lawfully assisting those workers.[69]
5) Assault or threat to assault a person with intent to resist or prevent arrest.[70]

4.47 All of the section 31 assault offences are indictable triable summarily.[71]

4.48 Before 2 November 2014, the assault offences created by section 31(1)(b) only covered police and protective services officers. The offences were expanded to encompass emergency workers including ambulance workers, hospital staff, fire emergency service members and others engaged to perform work in emergencies.[72] The offences were further expanded from 3 October 2016 to include assaults to custodial officers,[73] and from 5 April 2018 to include youth justice custodial workers.[74]

4.49 The following definitions apply to the section 31 offences:

- 'Assault' means the direct or indirect application of force to the body of, or to the clothing or equipment worn by, another person with intent to inflict, or being reckless as to the infliction of, bodily injury, pain, discomfort, damage, insult or deprivation of liberty. The assault must also result in the infliction of one of these consequences, although not necessarily the one intended or foreseen, and be done without lawful excuse.[75]
- 'Application of force' includes the application of heat, light, electric current or any other form of energy, as well as the application of matter in solid, liquid or gaseous form.[76]
- 'Emergency worker', 'youth justice custodial worker', 'custodial officer' and 'on duty' are defined in section 10AA of the Sentencing Act.

4.50 Table 9 sets out the elements of the section 31 assault offences and other possible charges.

66 *Crimes Act 1958* (Vic) s 31(1)(a).
67 Ibid s 31(1)(b) and (ba).
68 Ibid.
69 Ibid.
70 Ibid s 31(1)(c).
71 *Criminal Procedure Act 2009* (Vic) s 28(1)(b)(ii).
72 *Sentencing Amendment (Emergency Workers) Act 2014* (Vic).
73 *Crimes Legislation Amendment Act 2016* (Vic).
74 *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) Part 8.
75 *Crimes Act 1958* (Vic) s 31(2).
76 Ibid s 31(3).

Table 9: Elements of the section 31 assault offences and other possible charges

Elements of the section 31 assault offences	Other possible charges
Section 31(1)(a) assault/threat to assault with intent to commit an indictable offence • The accused applied or threatened to apply force to the victim's body. • The accused intended to injure, inflict pain, cause discomfort, cause damage, cause insult or deprive the victim of liberty, or was reckless as to that outcome. • The accused's actions resulted in the victim being injured, caused pain, discomfort or damage, insulted or deprived of liberty. • The accused's actions were done with intent to commit an indictable offence. • The accused acted without lawful excuse. **Section 31(1)(b), (ba) assault/threat to assault workers on duty or persons lawfully assisting** • The victim was an emergency worker, youth justice custodial worker or custodial officer on duty (s 31(1)(b)) or a person lawfully assisting those workers (s 31(1)(ba)). • The accused knew or was reckless as to whether the victim was an emergency worker, youth justice custodial worker or custodial officer on duty. • The accused applied or threatened to apply force to the victim's body. • The accused intended to injure, inflict pain, cause discomfort, cause damage, cause insult or deprive the victim of liberty, or was reckless as to that outcome. • The accused's actions resulted in the victim being injured, caused pain, discomfort or damage, insulted or deprived of liberty. • The accused acted without lawful excuse.	• the injury offences • the threat offences • the endangerment offences • other assault offences.

Table 9: Elements of the section 31 assault offences and other possible charges (continued)

Elements of the section 31 assault offences	Other possible charges
Section 31(1)(b), (ba) resist/obstruct workers on duty or persons lawfully assisting • The victim was an emergency worker, youth justice custodial worker or custodial officer on duty (s 31(1)(b)) or a person lawfully assisting those workers (s 31(1)(ba)). • The accused knew or was reckless as to whether the victim was an emergency worker, youth justice custodial worker or custodial officer on duty. • The accused intentionally resisted or obstructed the victim. • The accused acted without lawful excuse. **Section 31(1)(c) assault/threat to assault with intent to resist or prevent arrest** • The accused applied or threatened to apply force to the victim's body. • The accused intended to injure, inflict pain, cause discomfort, cause damage, cause insult or deprive the victim of liberty, or was reckless as to that outcome. • The accused's actions resulted in the victim being injured, caused pain, discomfort or damage, insulted or deprived of liberty. • The accused's actions were done with intent to resist or prevent their lawful arrest. • The accused acted without lawful excuse.	

Discharging a firearm reckless to safety of police/PSO

4.51 Section 31C of the Crimes Act creates the offence of discharging a firearm reckless as to the safety of a police officer or a protective services officer (PSO). It does not apply to certain authorised officers acting in the course of their duties.[77]

4.52 The section 31C offence is indictable only. It cannot be heard in the summary jurisdiction.

4.53 The section 31C offence is relatively new.[78] There has been one appeal concerning this offence.[79] The Court of Appeal quashed the convictions on the section 31C charges and instead the accused was convicted of the alternative charge of discharging a weapon at a vehicle.[80]

4.54 Table 10 sets out the elements of the section 31C offence and other possible charges.

77 Police or protective service officers, senior IBAC officers, prison guards, people authorised to use a firearm under licence in the course of their duties under specific environmental protection legislation: *Crimes Act 1958* (Vic) s 31C(3).
78 Introduced by the *Justice Legislation Amendment (Police and Other Matters) Act 2019* (Vic). It commenced operation on 5 June 2019.
79 *Diab v The King* [2023] VSCA 107.
80 Ibid [93] (Beach JA and Kaye JA, Niall JA dissenting at [95]–[115]); *Firearms Act 1996* (Vic) s 131A(1).

Table 10: Elements of the section 31C offence and other possible charges

Elements of the section 31C offence	Other possible charges
• The accused discharged a firearm. • The accused was reckless as to the safety of the victim due to the discharge of the firearm. • The victim was a police officer or PSO on duty. • The accused knew or was reckless as to whether the victim was a police officer or PSO.	• discharging a firearm at a premises or vehicle[81] or other firearm offences[82] • using a firearm to resist arrest[83] • use of a firearm in the commission of an offence[84] • being armed with criminal intent[85] • the injury offences • the endangerment offences • assault offences.[86]

Penalties

4.55 The Sentencing Act has been the subject of various amendments in recent years. This means that penalties and sentencing schemes in Victoria can be difficult to navigate.

4.56 The current maximum penalties for all of the offences against the person are set out in Chapter 2 (see Figure 3). Since the introduction of the modern offences against the person in 1985 (see Chapter 3), there have been successive changes to penalties, including to some offences against the person that include a recklessness element (see Table 11).

Table 11: Changes to maximum penalties for offences against the person

Offence	1985[87]	1992[88]	1997[89]
Intentionally causing serious injury (s 16)[90]	15	12.5	20
Recklessly causing serious injury (s 17)[91]	10	10	15
Intentionally causing injury (s 18)	7	7.5[92]	10
Recklessly causing injury (s 18)		5	5
Offence to administer certain substances (s 19)	7	5	5

81 *Firearms Act 1996* (Vic) s 131A.
82 Ibid Part 2, Divison 1 and Part 7.0
83 *Crimes Act 1958* (Vic) s 29.
84 Ibid s 31A.
85 Ibid s 31B(2).
86 If the victim of a common law assault is a police officer or PSO on duty and the offender knows or is reckless as to that fact, and has with them a weapon, the maximum penalty increases to 10 years' imprisonment (offensive weapon) and 15 years' imprisonment (firearm or imitation firearm) respectively: *Crimes Act 1958* (Vic) s 320A.
87 *Crimes (Amendment) Act 1985* (Vic), as made.
88 *Sentencing Act 1991* (Vic), as made.
89 *Sentencing and Other Acts (Amendment) Act 1997* (Vic), as made.
90 The offence of intentionally causing serious injury in circumstances of gross violence was introduced in 2013. The maximum penalty is the same as intentionally causing serious injury (20 years' imprisonment), but a statutory minimum four-year non-parole period also applies to adult offenders unless an exception exists (five years if committed against an emergency services worker or custodial officer): *Sentencing Act 1991* (Vic) ss 10, 10AA.
91 Ibid: The offence of recklessly causing serious injury in circumstances of gross violence was introduced in 2013. The maximum penalty is the same as recklessly causing serious injury (15 years imprisonment), but a statutory minimum four-year non-parole period also applies to adult offenders unless an exception exists (five years if committed against an emergency services worker or custodial officer).
92 The *Sentencing Act 1991* (Vic) introduced different maximum sentences for the s 18 Crimes Act offence, depending on whether the injury was inflicted intentionally or recklessly. This created two offences where previously there had only been one: *R v Hassett* [1994] Vic SC 765.

Table 11: Changes to maximum penalties for offences against the person (continued)

Offence	1985[87]	1992[88]	1997[89]
Threats to kill (s 20)	15	5	10
Threat to inflict serious injury (s 21)	5	3	5
Conduct endangering persons (s 23)	7	7.5	5
Setting traps to kill (s 25)	15	12.5	15
Assaults (s 31)	5	3	5

4.57 For the purposes of sentencing, some offences against the person that include recklessness are classed as:

- Category 1 or Category 2 offences (mandatory and presumptive sentences).[93] Most Category 1 offences will attract a mandatory custodial order.[94] For Category 2 offences, a court must impose a custodial order unless an exception applies.[95]
- Category A or Category B serious youth offences.[96] These offences attract jurisdictional and sentencing presumptions.

4.58 Minimum non-parole periods apply to the gross violence offences.[97] A non-parole period must be at least six months less than the term of the sentence.[98]

4.59 Minimum terms of imprisonment apply to certain offences against on-duty emergency workers, custodial officers, and youth justice custodial workers,[99] unless:

- the offender was charged on a complicity basis (intentionally assisting, encouraging, or directing the commission of the offence),[100] or
- the offender was under the age of 18 at the time of the offence,[101] or
- the court finds a 'special reason' exists.[102]

4.60 For the offences against on-duty emergency workers, custodial officers, and youth justice custodial workers, a court may avoid imposing a prison sentence and instead impose a youth justice centre order with the prescribed minimum period if:

- the offender is under the age of 21 at the time of sentencing
- the court does not find a 'special reason' exists, and
- the court has received a pre-sentence report and the offender has reasonable prospects of rehabilitation or is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison.[103]

93 *Sentencing Act 1991* (Vic) s 3(1) (definitions of 'category 1 offence' and 'category 2 offence').
94 Ibid s 5(2G). Custodial orders are set out in Part 3, Division 2 of the Sentencing Act and include imprisonment, drug treatment orders and youth justice centre orders. Section 5(2G) prohibits courts from imposing a combined order of a term of imprisonment and a community correction order for category 1 offences.
95 Ibid s 5(2H). The section 5(2H) exceptions replicate the 'special reasons' for not imposing a mandatory minimum sentence as set out in section 10A of the Sentencing Act.
96 Ibid s 3(1) (definitions of 'Category A serious youth offence' and 'Category B serious youth offence').
97 Ibid s 10(1).
98 Ibid s 11(3).
99 Ibid s 10AA(1).
100 Ibid ss 10(2)(a), 10AA(6)(a); *Crimes Act 1958* (Vic) s 323(1)(a) and (b). For certain offences against on-duty emergency workers, custodial officers and youth justice custodial workers the offender must prove on the balance of probabilities that their involvement was minor in order to avoid the imposition of a mandatory sentence: *Sentencing Act 1991* (Vic) s 10AA(6)(a).
101 *Sentencing Act 1991* (Vic) ss 10(2)(b), 10AA(6)(b).
102 Ibid ss 10(1), 10AA(1).
103 Ibid ss 3 (definition of 'young offender'), 10AA(2)-(3).

4.61 The 'special reasons'[104] relevant to imposing minimum periods are:

- the offender has assisted or has given an undertaking to assist law enforcement authorities in an investigation or prosecution,
- the offender proves on the balance of probabilities that at the time of the offence they had impaired mental functioning (not substantially caused by self-induced intoxication)[105] 'causally linked to the commission of the offence' that 'substantially and materially reduces [their] culpability', or they have impaired mental functioning that would result in 'being subject to substantially, and materially greater than the ordinary burden or risks of imprisonment,
- the court proposes to make a court secure treatment order or a residential treatment order, or
- 'there are substantial and compelling circumstances that are exceptional and rare'[106] and that justify not imposing the statutory minimum.

4.62 The 'special reasons' provisions:

> provide the courts with scope in limited circumstances to consider factors that either substantially reduce the offender's moral culpability or provide a strong public policy reason for imposing a lesser sentence than the statutory minimum.[107]

4.63 For the section 17 and 18 Crimes Act injury offences, if a court finds a special reason exists the court can impose a custodial order or make a therapeutic order.[108]

4.64 There is a recklessness element in the application of the minimum periods to some offences against the person.[109] A court must be satisfied beyond reasonable doubt that the victim was an emergency worker, custodial officer or youth justice custodial worker on duty and at the time of carrying out the conduct the offender knew or was reckless as to whether the victim was an emergency worker, custodial officer or youth justice custodial worker.[110]

4.65 Table 12 sets out:

- the penalties for offences against the person that include recklessness, from highest to lowest, indicating their relative seriousness
- the sentencing schemes applicable to each of the offences.[111]

104 Ibid s 10A.
105 Ibid ss 10A(1) and (2A).
106 In determining whether there are substantial and compelling circumstances the court must regard general deterrence and denunciation of the offender's conduct as having greater importance than the other purposes set out in section 5(1), give less weight to the personal circumstances of the offender than to other matters such as the nature and gravity of the offence, and must not have regard to the offender's previous good character, an early guilty plea, prospects of rehabilitation or parity with other sentences. The Court must also have regard to Parliament's intention that a sentence of imprisonment with the relevant non-parole period should ordinarily be imposed: *Sentencing Act 1991* (Vic) s 10A(2B) and (3).
107 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012, 5552 (Mr Clark, Attorney-General).
108 *Sentencing Act 1991* (Vic) ss 5(2GA)–(2GC). The therapeutic orders include a mandatory treatment and monitoring order, a Residential Treatment Order, or a Court Secure Treatment Order. A court may only make one of these orders if the offender proves on the balance of probabilities that at the time of the commission of the offence they had impaired mental functioning that is causally linked to the commission of the offence and substantially and materially reduces their culpability, the impaired mental functioning was not caused substantially by self-induced intoxication, the court has received and considered a psychiatric or psychological report addressing these matters, and the court considers a therapeutic order is appropriate. These reasons replicate the 'special reasons' for not imposing a mandatory minimum sentence as set out in section 10A of the Sentencing Act.
109 Ibid s 9C(3)(d): Although outside our terms of reference, we also note that one of the circumstances a court must be satisfied about beyond reasonable doubt before imposing a minimum non-parole period of 10 years for manslaughter by single punch or strike is that the offender 'knew that the victim was not expecting, or was probably not expecting, to be punched or struck by the offender'.
110 Ibid s 10AA(5).
111 The applicability of the serious offender provisions have not been included in this table.

Table 12: Offences against the person that include recklessness: table of penalties

Offence	Maximum penalty (term of imprisonment in years)	Category 1 or 2 offence or Category A or B serious youth offence	Statutory minimums (unless an exception exists)
Section 15A Intentionally causing serious injury in circumstances of gross violence	20	**Category 1 offence**.[112] **Category A serious youth offence.**[113] Jurisdictional presumption: should be heard in the higher courts if the offender is aged 16 or over.[114] Sentencing presumption: adult imprisonment unless exceptional circumstances exist.	4 years non-parole period.[115] If committed against an emergency worker, custodial officer, or youth justice custodial worker on duty: 5 years non-parole period.[116]
Section 15B Recklessly causing serious injury in circumstances of gross violence	15	**Category 1 offence**.[117] **Category B serious youth offence.**[118] Jurisdictional presumption: court must consider whether offence should not be heard and determined summarily.[119] Sentencing presumption: adult imprisonment if young offender has previously been convicted of another Category A or B serious youth offence, unless exceptional circumstances exist.	4 years non-parole period.[120] If committed against an emergency worker, custodial officer, or youth justice custodial worker on duty: 5 years non-parole period.[121]

112 *Sentencing Act 1991* (Vic) ss 3(1) (definition of 'category 1 offence') and 5(2G).
113 Ibid s 3(1) (definition of 'Category A serious youth offence').
114 The charge must be heard and determined in the higher courts unless the child or the prosecution requests that the charge be heard and determined summarily, and the Children's Court is satisfied that the sentencing options available to it under the *Children, Youth and Families Act 2005* (Vic) are adequate to respond to the child's offending, and it is in the interests of the victim or victims that the charge be heard and determined summarily or the accused is particularly vulnerable because of cognitive impairment or mental illness or there is a substantial and compelling reason why the charge should be heard and determined summarily. In determining whether there is a substantial and compelling reason why the charge should be heard and determined summarily, the Children's Court must have regard to Parliament's intention that a charge for a Category A serious youth offence should not normally be heard and determined summarily.
115 *Sentencing Act 1991* (Vic) s 10.
116 Ibid s 10AA(1).
117 Ibid ss 3(1) (definition of 'category 1 offence') and 5(2G).
118 Ibid s 3(1) (definition of 'Category B serious youth offence').
119 Charge must be heard and determined summarily unless the child objects or the court considers that the charge is unsuitable, by reason of exceptional circumstances, to be determined summarily: *Children, Youth and Families Act 2005* (Vic) s 356(3).
120 *Sentencing Act 1991* (Vic) s 10.
121 Ibid s 10AA(1).

Table 12: Offences against the person that include recklessness: table of penalties (continued)

Offence	Maximum penalty (term of imprisonment in years)	Category 1 or 2 offence or Category A or B serious youth offence	Statutory minimums (unless an exception exists)
Section 17 Recklessly causing serious injury	15	**Category 1 offence** if committed against an emergency/custodial/youth justice worker on duty.[122]	If committed against an emergency worker, custodial officer, or youth justice custodial worker on duty: 2 years non-parole period.[123] 2 years youth justice centre detention for a young offender in certain circumstances.[124]
Section 25 Setting trap to kill	15	-	-
Section 31C Discharging a firearm reckless to safety of police officer/PSO	15	**Category 2 offence** if committed in circumstances where the offender's conduct created a risk to the physical safety of the victim or to any member of the public.[125]	If committed in circumstances where the offender's conduct created a risk to the physical safety of the victim or to any member of the public, presumption of cumulative sentencing.[126]
Section 18 Intentionally causing injury	10	**Category 1 offence** if committed against an emergency/custodial/youth justice worker on duty.[127]	If committed against an emergency worker, custodial officer, or youth justice custodial worker on duty: 6 months imprisonment.[128] 6 months youth justice centre detention for a young offender in certain circumstances.[129]

122 Ibid ss 3(1) (definition of 'category 1 offence'), 5(2G) and (2GA).
123 Ibid s 10AA(1).
124 Ibid s 10AA(2) and (3).
125 Ibid ss 3 (definition of 'category 2 offence') and 5(2H).
126 Ibid s 16(3E).
127 Ibid ss 3 (definition of 'category 1 offence'), 5(2G) and (2GA).
128 Ibid s 10AA(4).
129 Ibid s 10AA(2) and (3).

Table 12: Offences against the person that include recklessness: table of penalties (continued)

Offence	Maximum penalty (term of imprisonment in years)	Category 1 or 2 offence or Category A or B serious youth offence	Statutory minimums (unless an exception exists)
Section 20 Threats to kill	10	-	-
Section 22 Conduct endangering life	10	-	-
Section 26 Setting trap to cause serious injury	10	-	-
Section 18 Recklessly causing injury	5	**Category 1 offence** if committed against an emergency/custodial/youth justice worker on duty.[130]	If committed against an emergency worker, custodial officer, or youth justice custodial worker on duty: **6 months imprisonment**.[131] **6 months youth justice centre detention** for a young offender in certain circumstances.[132]
Section 19 Offence to administer certain substances	5	-	-
Section 21 Threats to inflict serious injury	5	-	-
Section 23 Conduct endangering persons	5	-	-
Section 31 Assaults	5	-	-

130 Ibid ss 3 (definition of 'category 1 offence'), 5(2G) and (2GA).
131 Ibid s 10AA(4).
132 Ibid s 10AA(2) and (3).

Offence prevalence

4.66 This section discusses the prevalence of some offences against the person, including the number of police charges for each offence, the number of charges resulting in a sentence, and the court jurisdictions where matters are determined.

4.67 We considered charge data for a range of offences against the person. See Appendix F for figures showing the number of charges by offence. Over five years to March 2023, there was an average (a year) of:

- 43 charges of recklessly causing serious injury in circumstances of gross violence
- 412 recklessly causing serious injury charges
- 7027 recklessly causing injury charges
- 1201 reckless conduct endangering life charges
- 2168 reckless conduct endangering persons charges.

4.68 There was also an average (a year) of:

- 71 charges of intentionally causing serious injury in circumstances of gross violence
- 235 intentionally causing serious injury charges
- 3118 intentionally causing injury charges.

4.69 The number of charges for serious injury offences has significantly declined. Victoria Police said that the decline in recorded offences and charges coincided with legislative changes to the definition of 'serious injury' and the introduction of gross violence offences, although a specific causal relationship could not be established. Victoria Police told us that the downward trend might also be attributed to the introduction of offences (including offences against emergency workers, affray and violent disorder), incidents fulfilling the elements of assault, and process improvements to reporting and recording data under specific offence codes.[133]

Sentencing outcomes

4.70 The number of people sentenced for serious injury offences has significantly declined over the last 10 years, likely due in part to the decline in offences recorded and charged by police. The revised definition of 'serious injury' introduced in 2013 has likely had an impact on the number of people charged and sentenced for serious injury offences (see Chapter 8 for discussion). We also note the impact of the coronavirus (COVID-19) pandemic from 2020.[134] See Appendix F for detailed data about sentencing by offence.

4.71 While the number of people sentenced has significantly decreased for serious injury offences, the length of prison sentences over time has increased. Over 20 years, the average charge-level prison sentences have increased by 84 per cent for intentionally causing serious injury, 59 per cent for recklessly causing serious injury and 131 per cent for intentionally causing injury.[135]

133 Response to further consultation question on downward trend in recorded offences and operational practices—Victoria Police response (14 June 2023); Consultation 10 (Victoria Police).

134 Alannah Burgess et al, *Police-Recorded Crime Trends in Victoria during the COVID-19 Pandemic: Update to End of December 2020* (In Brief No 12, Crime Statistics Agency, March 2021) 22–3. The pandemic and resulting restrictions impacted crime types differently, including a decrease in non-family violence related serious assaults and an increase in family violence incidents.

135 Paul McGorrery and Zsombor Bathy, *Long-Term Sentencing Trends in Victoria* (Report, 2022) 10. These measurements incorporate data from 2001–02 to 2020–21 for intentionally causing serious injury and recklessly causing serious injury, and data from 2006–07 to 2020–21 for intentionally causing injury: at 10 n 26. The charge-level sentence is the sentence imposed on a single count of an offence within a case: at 1 n 5.

4.72 Over five years to 30 June 2021:[136]

- An average of about five charges a year of intentionally causing serious injury (gross violence) were sentenced in the higher courts. The shortest prison sentence was four years, the longest was 14 years, and the median was seven years.[137] The most common sentence was imprisonment (91 per cent). There was an average of about two charges a year of recklessly causing serious injury (gross violence) sentenced in the higher courts.[138]
- An average of 27 charges a year of intentionally causing serious injury were sentenced in the higher courts. The most common sentence was imprisonment (94 per cent). The shortest prison sentence was one year, the longest was 13.75 years, and the median was five years.[139]
- An average of 45 charges a year of recklessly causing serious injury were sentenced in the higher courts, and 59 a year in the Magistrates' Court. In the higher courts, the shortest imprisonment length was 1.3 months, the longest was 10 years, and the median was three years and nine months. The most common sentence was imprisonment (88 per cent higher courts[140], 50 per cent[141] Magistrates' Court).
- An average of 144 charges a year of intentionally causing injury were sentenced in the higher courts, and 575 a year in the Magistrates' Court. In the higher courts the shortest prison sentence was less than one month, the longest was six years, and the median was 1.5 years. The most common sentence was imprisonment (86 per cent higher courts[142], 58 per cent[143] Magistrates' Court).
- An average of 97 charges a year of recklessly causing injury were sentenced in the higher courts, and 2296 a year in the Magistrates' Court. In the higher courts the shortest imprisonment length was less than one month, and the longest six years, with a median sentence of one year. The most common sentence was imprisonment (76 per cent higher courts[144], 41 per cent[145] Magistrates' Court).
- An average of 39 charges a year of reckless conduct endangering life were sentenced in the higher courts, and 152 a year in the Magistrates' Court. In the higher courts the shortest prison sentence was one month, the longest was six years, and the median was three years. The most common sentence was imprisonment (93 per cent higher courts[146], 69 per cent[147] Magistrates' Court).
- An average of 47 charges a year of reckless conduct endangering persons were sentenced in the higher courts, and 588 a year in the Magistrates' Court. In the higher courts the shortest prison sentence was less than one month, the longest was four years, and the median was 1.08 years. The most common sentence was imprisonment (87 per cent higher courts[148], 56 per cent[149] Magistrates' Court).

136 Data on charges sentenced provided by the Sentencing Advisory Council, 15 September 2023.
137 Meaning that half of the prison sentences were below seven years and half were above. Sentencing Advisory Council (Vic), 'Higher courts offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 5 July 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.
138 Sentencing Advisory Council (Vic), 'Higher courts offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 5 July 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.
139 Ibid.
140 Ibid.
141 Sentencing Advisory Council (Vic), 'Magistrates' court offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 24 May 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.
142 Sentencing Advisory Council (Vic), 'Higher courts offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 5 July 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.
143 Sentencing Advisory Council (Vic), 'Magistrates' court offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 24 May 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.
144 Sentencing Advisory Council (Vic), 'Higher courts offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 5 July 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.
145 Sentencing Advisory Council (Vic), 'Magistrates' court offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 24 May 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.
146 Sentencing Advisory Council (Vic), 'Higher courts offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 5 July 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.
147 Sentencing Advisory Council (Vic), 'Magistrates' court offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 24 May 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.
148 Sentencing Advisory Council (Vic), 'Higher courts offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 5 July 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.
149 Sentencing Advisory Council (Vic), 'Magistrates' court offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 24 May 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.

4.73 A range of other offences including other categories of assault (Appendix C) are finalised each year. The data for other assault offences indicate that they are more commonly determined in the lower courts. For example, over five years to June 2021, an average of 146 charges a year of common law assault were sentenced in the higher courts, and 181 a year in the Magistrates' Court. The most common sentence for common law assault was imprisonment (74 per cent in the higher courts,[150] 54 per cent in the Magistrates' Court). [151]

150 Sentencing Advisory Council (Vic), 'Higher courts offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 5 July 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.

151 Sentencing Advisory Council (Vic), 'Magistrates' court offences', *SACStat Sentencing Advisory Council Statistics* (Web Page, 24 May 2022) <https://www.sentencingcouncil.vic.gov.au/sacstat/browse-offences.html>.

CHAPTER

05

Other recklessness offences in Victoria

5. Other recklessness offences in Victoria

Overview

- The focus of our report is on the definition of recklessness for offences against the person in Part I, Division 1(4) of the *Crimes Act 1958* (Vic). Recklessness is also an element of many other Crimes Act, common law, and statutory offences.
- Some offences use the word 'likely', and some offences use the word 'probably', both consistent with the *Campbell* recklessness test.
- Culpable driving includes a definition of recklessness close to the definition used in the *Criminal Code Act 1995* (Cth). Two identity crimes in the Crimes Act also draw on this language.
- Despite some differences in language, the meaning of recklessness is relatively consistent across the Crimes Act.

Recklessness across the Crimes Act

5.1 Many offences in the Crimes Act include recklessness as a fault element (see Appendix D).

5.2 The Judicial College of Victoria (JCV)'s *Criminal Charge Book* states that the following definition, based on *R v Campbell ('Campbell')*, 'applies to all Victorian offences involving recklessness':

> an accused is said to have been reckless if they acted in the knowledge that a particular harmful consequence would *probably* result from their conduct, but they decided to continue their actions regardless of that consequence.[1]

5.3 Unless an offence explicitly contains a different definition, the *Criminal Charge Book* assumes that the *Campbell* common law definition applies. The Criminal Bar Association (CBA) told us:

> When you see recklessness in other areas of the Crimes Act, the assumption is that the well-understood definition that has suffused the criminal law in Victoria is the definition intended by Parliament.[2]

5.4 Barrister Dermot Dann KC and solicitor Felix Ralph, who represented the acquitted person in the *DPP Reference* case, describe 'much of the architecture of the criminal law in this state' as being 'founded on the probability test of recklessness'. They say the concept is 'central' to Victoria's criminal justice landscape as 'an element of so many offences'. They also refer to the probability test as the 'settled meaning' of recklessness in this state.[3]

1 Judicial College of Victoria, '7.1.3 Recklessness', *Victorian Criminal Charge Book* (Online Manual, 28 October 2022) <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4469.htm> (emphasis in original) citing *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26; (2021) 274 CLR 177; *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181; (2020) 284 A Crim R 19; *R v Campbell* [1995] VSC 186; (1997) 2 VR 585; *R v Nuri* [1990] VR 641; *R v Kalajdic; R v Italiano* [2005] VSCA 160; (2005) 157 A Crim R 300.

2 Consultation 4 (Criminal Bar Association).

3 Submission 12 (Dermot Dann KC and Felix Ralph).

5.5 Some stakeholders drew our attention to specific Crimes Act offences outside Part I, Division 1(4), where the *Campbell* definition has been applied.[4] Others mentioned such offences in passing.[5]

5.6 The Office of Public Prosecutions (OPP) recognises that the probability test is 'clearly dominant'. But it said there are some offences where it is not always applied. It referred us to cases of aggravated burglary[6] and threat to kill[7] where it said the court suggested that a possibility test applies.[8]

Aggravated burglary

5.7 The aggravated burglary cases cited by the OPP involve comments made during sentence appeals.[9] They do not involve direct analysis of the threshold for recklessness. As the OPP acknowledges, other cases involving aggravated burglary apply the probability threshold.[10] The JCV's suggested jury directions for aggravated burglary refer to foresight of probability, not possibility.[11] When discussing the implications of adopting a possibility test, Dermot Dann and Felix Ralph take for granted that the current test for aggravated burglary is probability.[12]

5.8 The CBA suggested that when the form of aggravation of 'knowing or being reckless as to the presence of a person in a building' was introduced to the offence of aggravated burglary,[13] it was clearly Parliament's intention to set the recklessness threshold at the level of probability rather than a lower threshold.[14] The CBA's argument implies that if the threshold for recklessness was lower, Parliament would not have legislated recklessness as an alternative ground of proof to knowledge, which sets a high bar for criminal responsibility. On its face, a high bar is appropriate given knowledge or recklessness can be used to establish a circumstance that makes a serious offence even more serious, and has a maximum penalty of 25 years imprisonment.

Threats to kill

5.9 In relation to threats to kill, the OPP stated that the Court of Appeal 'applied a possibility test in 2012'.[15] In our view, the Court did not go so far. The Court made a reference to the accused being 'recklessly indifferent to [the] possibility' that the victim would believe the threat. But this comment had no bearing on the Court's finding concerning the relevant ground of appeal, nor was it applied to the facts.

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4 Ibid; Dr Greg Byrne mentioned several Crimes Act offences, including the offences involving controlling dangerous, menacing, or restricted breed dogs (ss 319B and 319C). Dr Byrne noted that the Explanatory Memorandum elaborated on the phrase, 'where the person is reckless', by adding 'or aware of the probability': Submission 18 (Dr Greg Byrne PSM citing Explanatory Memorandum, Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011 (Vic)). There are different views about the construction of sections 319B and 319C of the Crimes Act and whether the offences are a specialised form of the endangerment offences in sections 22 and 23, but these debates do not draw into question the application of the probability threshold for recklessness: Ian Freckelton and Mirko Bagaric, Thomson Reuters, *Indictable Offences in Victoria* (online at 22 November 2023) [211.200]; Patrick Leader-Elliot, 'Causing Death by Dangerous Dog: Victoria's New Offences for Failing to Control Prescribed Dogs' (2013) 11 *Macquarie Law Journal* 125.

5 Victoria Police referred to recklessly exposing an emergency worker to risk by driving (*Crimes Act 1958* (Vic) s 317AE) and aggravated burglary (*Crimes Act 1958* (Vic) s 77): Submission 7 (Victoria Police); The JCV referred to obtaining property by deception (*Crimes Act 1958* (Vic) s 81): Consultation 5 (Judicial College of Victoria).

6 *Crimes Act 1958* (Vic) s 77.

7 Ibid s 20.

8 Submission 10 (Office of Public Prosecutions).

9 Ibid citing *Maslen v The Queen* [2018] VSCA 90, [32] (Priest and McLeish JJA); *Bonacci v The Queen; Vasile v The Queen* [2012] VSCA 170, [9]; (2012) 224 A Crim R 194, 196 [9] (Neave, Mandie and Harper JJA); *Le v The Queen* [2010] VSCA 199, [4] (Harper JA). We note that in *Le*, Justice Harper assumed a 'likelihood' threshold, stating: 'These were serious examples of the offence of aggravated burglary. In each case, entry was made into residential premises in the early hours of the morning when the only conclusion could be that the appellant was recklessly indifferent of the likelihood of someone being present': at [32].

10 The OPP cited the cases of *Verde v The Queen* [2009] VSCA 16; (2009) 193 A Crim R 211, 215 [21] (Nettle JA); *R v Chimirri* [2010] VSCA 57, [37] (Neave and Redlich JJA, Hollingworth AJA). See also *R v Taylor* [2004] VSCA 189 [42]; (2004) 149 A Crim R 399, 413 [42] (Charles and Nettle JJA).

11 Judicial College of Victoria, '7.5.5.5 Charge: Aggravated Burglary Where Person Present' *Victorian Criminal Charge Book* (Online Manual, 2022)<https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#5145.htm>.

12 Submission 12 (Dermot Dann KC and Felix Ralph).

13 Introduced by *Sentencing and Other Acts (Amendment) Act 1997* (Vic). The offence provision states: 'Aggravated burglary—(1) A person is guilty of aggravated burglary if he or she commits a burglary and—(a) at the time has with him or her any firearm or imitation firearm, any offensive weapon or any explosive or imitation explosive; or (b) at the time of entering the building or the part of the building a person was then present in the building or part of the building and he or she knew that a person was then so present or was reckless as to whether or not a person was then so present.': *Crimes Act 1958* (Vic) s 77(1). The fault element can be proven if the accused either 'knew' that another person was present in the building or was reckless about the presence of another person.

14 Consultation 4 (Criminal Bar Association). In the CBA's view, the offence of aggravated burglary treats 'recklessness as equivalent to knowledge or intention'.

15 Submission 10 (Office of Public Prosecutions) citing *Macfie v The Queen* [2012] VSCA 314, [22] (Harper JA).

A result or circumstance that is 'likely'

5.10 There are some Crimes Act offences in which the language of recklessness does not appear. Instead, the offence refers to a 'likely' circumstance, or conduct that a person knows 'would be likely' to cause harm. Examples are the stalking offence[16] and the offence of using intimidation because of a person's involvement in a criminal investigation or proceeding.[17] The use of 'likely' in these offences captures the concept of recklessness using the same threshold as the *Campbell* definition.

A result or circumstance that is 'probable'

5.11 Some Crimes Act offences attach culpability to intentionally doing an act while being aware of or knowing or believing that a result or circumstance is probable. This equates to recklessness about the result or circumstance and uses the same threshold as applies in other Victorian offences.

Statutory complicity

5.12 Complicity provisions were first legislated in the Crimes Act in 2014. They replaced common law complicity, which included 'extended common purpose'.[18] For many crimes, including murder, extended common purpose made it easier to convict a secondary offender than a primary offender. For example, a person who agreed to commit an armed robbery would be liable for murder if they foresaw the mere possibility that an accomplice would shoot someone, with murderous intent, during the robbery.[19]

5.13 Simplified statutory complicity provisions now create liability for a person who:

- enters into an agreement to commit an offence and
- foresees the probability of another offence occurring in the course of carrying out the agreed offence.[20]

5.14 When introducing the provisions, the government noted that:

> Focussing on 'probability' rather than 'possibility' is consistent with general principles of criminal liability, and will result in simpler jury directions.[21]

5.15 Dr Greg Byrne told us that:

> the test of probability for complicity was designed to simplify the laws and be consistent with existing laws, indicating that parliament understood that recklessness involved a test of … foresight of the probability of a circumstance or result.[22]

5.16 The OPP recognised that introducing a possibility threshold for offences against the person would lead to inconsistency with the 'probability' threshold for statutory complicity, and 'could present some complexity'.[23] But it said that 'it is not unreasonable for the test for accessorial liability to be calibrated more narrowly.'[24] The OPP did not advocate a change in the definition for statutory complicity.[25]

16 *Crimes Act 1958* (Vic) s 21A(3)(a).
17 Ibid s 257(2)(b)(i).
18 *Crimes Act 1958* (Vic) ss 323, 324. See also Explanatory Memorandum, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014 (Vic) 13 [Clause 6] referring to 'New section 323(1)(b) and (d)' as 'a form of recklessness'.
19 Mark Weinberg, Judicial College of Victoria and Department of Justice, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (Report, August 2012) 85 <https://www.supremecourt.vic.gov.au/about-the-court/publications/simplification-of-jury-directions-project-report-weinberg-report>. See, eg, Clayton v R [2006] HCA 58; (2006) 231 ALR 500.
20 *Crimes Act 1958* (Vic) ss 323(1)(d), 324.
21 Victoria, *Parliamentary Debates*, Legislative Council, 25 June 2014, 2130 (E J O'Donohue, Minister for Liquor and Gaming Regulation); Submission 18 (Dr Greg Byrne PSM). The introduction of the provisions was said to achieve alignment with 'general principles of criminal responsibility.' Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2836 (Mr Clark, Attorney General); Explanatory Memorandum, Crimes Amendment (Abolition of Defensive Homicide) Bill 2014, 13.
22 Submission 18 (Dr Greg Byrne PSM).
23 Submission 10 (Office of Public Prosecutions).
24 Ibid.
25 Ibid.

Sexual offences – Part I Division 1 (8A)–(8F)

5.17 Some sexual offences in Part I, Division 1 (8A)–(8F) of the Crimes Act attach culpability to intentionally doing an act while being aware of, or knowing or believing, that a result or circumstance is probable. Our terms of reference ask us to consider the approach and reasons for using 'probably' to express the fault element of recklessness in these offences. There are 22 relevant offences.[26]

5.18 Section 43, 'threat to commit a sexual offence', was introduced by the *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic). When that legislation came into effect, the government explained that section 43 was 'essentially modelled on the offences of threat to kill and threat to inflict serious injury in sections 20 and 21 of the Crimes Act.'[27] However, rather than referring to recklessness, section 43 refers to making a threat believing that the other person will 'probably believe' the threat will be carried out.[28] The rationale for using the language of probable belief was to clarify the meaning of the recklessness fault element.[29]

5.19 The remaining offences that use 'probably' to express a fault element were introduced by the *Crimes Amendment (Sexual Offences) Act 2016* (Vic). The Act was described by the government as building on the 2014 Act and its project of 'clarifying and modernising existing [sexual offence] laws', and 'closing gaps in the law.'[30] Explanatory material again highlighted the use of 'probably' to express the fault element of recklessness.[31]

5.20 In its submission, the County Court said that:

> The use of the word 'probably' to express the fault element of recklessness for sexual offences brings a harmonious definition, for the most part, to offences under the *Crimes Act* …[32]

5.21 The OPP commented that the use of 'probably' in these sexual offences:

> was most likely to ensure consistency with the *Nuri/Campbell* understanding of recklessness in Victoria.[33]

5.22 The use of 'probably' in these offences was clearly viewed by legislators as consistent with the well-established common law definition of recklessness. In our view, it is implausible that its use was solely a reflexive recourse to the established position, or a focus on achieving modernity and clarity with no concern for the substance of the offences.

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26 *Crimes Act 1958* (Vic) ss 43 (Threat to commit a sexual offence), 44 (Procuring sexual act by threat), 45 (Procuring sexual act by fraud), 47 (Abduction or detention for a sexual purpose), 48 (Sexual activity directed at another person), 49F (Sexual activity in the presence of a child under the age of 16), 49G (Sexual activity in the presence of a child aged 16 or 17 under care, supervision or authority), 49P (Abduction or detention of a child under the age of 16 for a sexual purpose), 49S (Facilitating a sexual offence against a child), 51B (Involving a child in the production of child abuse material), 51C (Producing child abuse material), 51D (Distributing child abuse material), 51H (Accessing child abuse material), 52D (Sexual activity in the presence of a person with a cognitive impairment or mental illness), 53B (Using force, threat etc. to cause another person to provide commercial sexual services), 53C (Causing another person to provide commercial sexual services in circumstances involving sexual servitude), 53D (Conducting a business in circumstances involving sexual servitude), 53E (Aggravated sexual servitude), 53G (Aggravated deceptive recruiting for commercial sexual services), 53R (Producing intimate image), 53S (Distributing intimate image) and 53T (Threat to distribute intimate image).

27 Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Discussion Paper, June 2015) 21 [9.2].

28 The offence provision states: 'Threat to commit a sexual offence—(1) A person (A) commits an offence if— (a) A makes to another person (B) a threat to rape or sexually assault B or a third person (C); and (b) A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.': *Crimes Act 1958* (Vic) s 43(1).

29 Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Discussion Paper, June 2015) 21 [9.2].

30 Criminal Law Review, Department of Justice and Regulation (Vic), *Crimes Amendment Sexual Offences Act 2016: An Introduction* (Discussion Paper, June 2017) 1.

31 Ibid 58–9 (definition of fault element); see also 12 [5.2], 42 [8.3.4].

32 Submission 15 (County Court of Victoria). The Court added that this 'restricts consideration of case law from other jurisdictions' but went on to discuss the benefits of having a consistent definition of recklessness in Victorian legislation.

33 Submission 10 (Office of Public Prosecutions). The OPP added that this 'understanding is the product of error'. We address this argument in Chapter 8.

5.23 The offences were introduced following 'a comprehensive review [over several years] of Victoria's sexual offence law'.[34] As well as introducing the threat offence, the 2014 Act introduced an objective fault element for rape and sexual assault ('no reasonable belief in consent'),[35] and the 2016 Act added to the list of consent-negating circumstances.[36]

5.24 These reforms 'move[d] beyond the old subjective approach' to consent,[37] and made substantive changes to the scope of rape and sexual assault. They were very significant reforms. If the review process had identified a need to change the threshold for recklessness, this would almost certainly have been reflected in the amending legislation. In our recent inquiry into sexual offences, neither the threshold for recklessness nor the use of 'probably' to express this threshold were raised as concerns.[38]

5.25 In its submission, the OPP acknowledged that the sexual offence provisions 'have been the subject of considerable change in recent years.' Given this, it said it did 'not advocate for further reform to the probability fault element as it appears in Part I, Division 1(8A)–(8F) of the Crimes Act'.[39]

Crimes Act offences using 'substantial risk'

Culpable driving causing death

5.26 The offence of culpable driving causing death has its own distinctive statutory definition of recklessness,[40] close to the Commonwealth definition that we discuss in Chapter 6.[41] A person commits reckless culpable driving if they consciously and unjustifiably disregard a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from their driving.[42]

5.27 In *R v McGrath*,[43] Justice Callaway said that the state of mind for recklessness in culpable driving causing death is the same as for reckless murder.[44] Applying this reasoning in *R v Fieldman*,[45] Justice Kaye ruled that the statutory definition of recklessness for culpable driving causing death does not materially change the common law; it still requires the prosecution to prove that the defendant knew their driving would probably cause the death of, or really serious injury to, another person.[46]

5.28 However, in *Pasznyk v The Queen*,[47] Justice Priest said that the state of mind necessary for reckless culpable driving is plainly not the same as for reckless murder, because section 318(2)(a) of the Crimes Act:

> requires disregard of a risk (albeit substantial) that death or really serious bodily injury *may* result.[48]

5.29 In practice, these differences have limited significance as it is relatively rare for recklessness to be used in charges of culpable driving.[49]

34 Criminal Law Review, Department of Justice and Regulation (Vic), *Crimes Amendment Sexual Offences Act 2016: An Introduction* (Discussion Paper, June 2017) iii.
35 Ibid iii, 3 [2.2].
36 Ibid 8 [4.5].
37 Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Discussion Paper, June 2015) 13 [7].
38 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021).
39 Submission 10 (Office of Public Prosecutions).
40 *Crimes Act 1958* (Vic) s 318(2)(a).
41 *Criminal Code Act 1995* (Cth) s 5.4. However, the Commonwealth definition does not include reference to 'consciously' disregarding a risk. This comes from the Model Penal Code formulation in the United States (see Chapter 6).
42 *Crimes Act 1958* (Vic) s 318(2)(a).
43 *R v McGrath* [1999] VSCA 197.
44 Ibid [15] (Callaway JA).
45 *R v Fieldman (Ruling No 2)* [2010] VSC 258; (2010) 55 MVR 573.
46 Ibid [16]–[17], see also [24] (Kaye J).
47 *Pasznyk v The Queen* [2014] VSCA 87; (2014) 43 VR 169.
48 Ibid [49] (Priest JA) (emphasis in original).
49 Ibid [44] (Priest JA); *R v Fieldman (Ruling No 2)* [2010] VSC 258, [26] (Kaye J); Moreover, although the offence has four forms of culpability—driving recklessly; negligently; under the influence of alcohol; or under the influence of a drug; it has a single maximum penalty. This indicates that '... the objective seriousness of each case ... must be adjudged according to the factual circumstances peculiar to it'. It also means that the lines of culpability between the fault elements may be blurred: 'although the mental element is clearly different, there may be factual elements which will render the criminality of a case of causing death by grossly negligent driving worse than that of some cases of causing death by reckless culpable driving.': *Pasznyk v The Queen* [2014] VSCA 87, [8], [57] (Priest JA) citing *R v Birnie* [2002] VSCA 155; (2002) 5 VR 426.

Identity crimes

5.30 Two identity crimes do not use the language of recklessness, but instead refer to awareness of a 'substantial risk'.[50] The offences involve use of identification information with the intention of committing an indictable offence where the person is:

> aware that, or aware that there is a substantial risk that, the information is identification information …[51]

5.31 The offences are based on recommendations made in a Model Criminal Law Officers' Committee report.[52] The report's model offences did not include any 'recklessness' elements. The model offences refer simply to dealing in identification information with the intention of committing an indictable offence.[53] As we discuss below, 'a translation process' has occurred as part of the integration of model national offences into Victorian law.[54]

Translating national offences: proceeds of crime, betting, bushfire and data modification offences

5.32 In the *DPP Reference* case, Justice Edelman cast doubt on whether the probability definition applies to recklessness offences beyond offences against the person:

> the error in *Campbell* in relation to section 17 has not necessarily entrenched this meaning of recklessness for all other offences in the Crimes Act.[55]

5.33 Justice Edelman drew attention to four offences: dealing with proceeds of crime,[56] concealing conduct that would corrupt a betting outcome,[57] causing a bushfire,[58] and the unauthorised modification of data to cause impairment.[59] He noted that the offences:

> were enacted in nearly identical terms [in Victoria and New South Wales] and thus plainly by reference to each other with the need for coherent operation.[60]

5.34 The bushfire and data modification offences were based on the Australian Model Criminal Code.[61] The betting offence was a product of the National Policy on Match Fixing in Sport.[62] The proceeds of crime offence 'clarified' and replaced offences in the *Confiscation Act 1997* (Vic) in the context of a Council of Australian Governments agreement regarding reform of money laundering laws.[63]

50 *Crimes Act 1958* (Vic) ss 192B, 192C.
51 Ibid ss 192B(1)(a), 192C(1)(a).
52 Victoria, *Parliamentary Debates*, Legislative Council, 7 May 2009, 2197 (Mr Jennings, Minister for Environment and Climate Change). Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Identity Crime* (Final Report, March 2008).
53 Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Identity Crime* (Final Report, March 2008) 25–26. Note that the equivalent offences in New South Wales adhere more closely to the model offences than Victoria's offences, and do not mention 'substantial risk' or 'recklessness': *Crimes Act 1900* (NSW) ss 192J, 192K.
54 Consultation 9 (Dr Greg Byrne PSM). Dr Byrne, who was a contributor to the Model Criminal Law Officers' Committee *Identity Crime* report, told us that there is necessarily a 'translation process' that occurs when states and territories legislate offences based on the Model Criminal Code.
55 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [100]: 'Without more, it is unlikely that the *Campbell* decision will require identical elements of other offences to be treated differently the moment that a person steps across the border between New South Wales and Victoria.' (Edelman J).
56 *Crimes Act 1958* (Vic) s 194(3).
57 Ibid s 195E(1)(a).
58 Ibid s 201A.
59 Ibid s 247C(c).
60 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [100] (Edelman J).
61 For ss 201A and 247C(c), see Explanatory Memorandum, Crimes (Property Damage and Computer Offences) Bill 2003 (Vic) 2003; Model Criminal Code Officers Committee, *Model Criminal Code Chapter 4 Damage and Computer Offences and Amendments to Chapter 2: Jurisdiction* (Report, January 2001).
62 For s 195E(1)(a), see Explanatory Memorandum, Crimes Amendment (Integrity in Sports) Bill 2013 (Vic) 2013; Sports Ministers of Australia, *National Policy on Match-Fixing in Sport* (Report, 10 June 2011).
63 Victoria, *Parliamentary Debates*, Legislative Council, 2 December 2003, 2036–2037 (Ms Mikakos, Member for Jika Jika Province).

5.35 The modification of data offence was introduced in Victoria in the same amending legislation as the bushfire offence.[64] The context for their introduction was an agreement reached by the Standing Committee of Attorneys-General:

> that the states might like to increase, ramp up or improve their legislation in respect of [these] offences. The states agreed to try to work together to bring their legislation on a number of different offences up to agreed standards.[65]

5.36 There was recognition among different jurisdictions of the need to attach serious criminal liability to the relevant behaviour, and for 'a coordinated and uniform national approach to these serious crimes'.[66] However, Parliament did not expressly adopt the definitions or interpretations of other states. Victoria has retained its approach to the criminal law, including in relation to recklessness.

5.37 As Dr Greg Byrne told us, offences based on the Model Criminal Code 'required adaptation to fit with Victoria's laws in relation to recklessness'.[67] According to Dr Byrne:

> Because the States have not adopted [the Commonwealth and Model Criminal Code] definitions [of recklessness], there is always a translation process …[68]

5.38 The JCV and the CBA both support the view that the probability threshold applies to these four offences.[69] Dermot Dann and Felix Ralph argue that Victorian offences have been specifically 'calibrated on the current law relating to recklessness';[70] that is, a probability threshold.

5.39 In relation to the bushfire offence, the *Criminal Charge Book* says:

> the [Crimes] Act does not contain any affirmative definition of recklessness. It is likely that the conventional legal meaning of that word applies. The prosecution must prove that the accused foresaw the probability that the fire would spread to vegetation on property belonging to another.[71]

5.40 When the amending legislation was being debated in Parliament, a Member for the Opposition noted:

> At a briefing we were informed by the government representatives—and this matter was raised specifically—that the common-rule laws [sic] in relation to recklessness will apply. [72]

64 Crimes (Property Damage and Computer Offences) Bill 2003 (Vic).
65 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 April 2003, 1099 (Mr McIntosh, Member for Kew).
66 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 March 2003, 526 (Mr Hulls, Attorney-General).
67 Submission 18 (Dr Greg Byrne PSM).
68 Consultation 9 (Dr Greg Byrne PSM). As an example, Victoria was the first jurisdiction in Australia to enact specific provisions in the Crimes Act to deal with contamination of goods, developed from legislation in the United Kingdom that was based on federal legislation in the USA: Australia. Model Criminal Code Officers Committee, *Model Criminal Code. Chapter 8, Public Order Offences: Contamination of Goods* (Report, March 1998) 6 citing *Public Order Act 1986* (UK) s 38, 18 USC Sec.1365. In 2005, the *Crimes (Contamination of Goods) Act 2005* (Vic) amended the Crimes Act 'to add recklessness as a fault element' to the contamination of goods provisions (ss 249–252): Explanatory Memorandum, Crimes (Contamination of Goods) Bill 2005 (Vic) 1. The amendment did not include a definition of 'recklessness'. The second reading speech states, 'For the guidance of members, I note that the model criminal code provides that a person is reckless with respect to a result when he or she is aware of a substantial risk that it will occur and it is, having regard to the circumstances known to him or her, unjustifiable to take the risk. Ultimately the definition of recklessness is a matter for the courts to determine': Victoria, *Parliamentary Debates*, Legislative Assembly, 8 September 2005, 713 (Mr Hulls, Attorney-General). An earlier bill introduced by the National Party, the Crimes (Contamination of Goods Offences) Bill 2005 (Vic), was not adopted. That bill proposed to 'extend the definition of "intention"' for the contamination of goods offences by providing that intention to cause public alarm/anxiety or economic loss could be proved 'if the person knows, or in all the particular circumstances the person ought to have understood, that engaging in the conduct would be likely to cause' those outcomes. The government amended the proposed legislation 'to include recklessness, as it is a more widely accepted and understood fault element that is commonly used in relation to criminal offences.': Victoria, *Parliamentary Debates*, Legislative Council, 6 October 2005, 1289 (Ms Mikakos, Member for Jika Jika Province).
69 The CBA told us, '\When you see recklessness in other areas of the *Crimes Act*, the assumption is that the well-understood definition that has suffused the criminal law in Victoria is the definition intended by Parliament.': Consultation 4 (Criminal Bar Association); Judicial College of Victoria, '7.1.3 Recklessness', *Victorian Criminal Charge Book* (Online Manual, 28 October 2022) <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4469.htm>.
70 Submission 12 (Dermot Dann KC and Felix Ralph).
71 Judicial College of Victoria, '7.5.21 Intentionally or Recklessly Causing a Bushfire', *Victorian Criminal Charge Book* (Online Manual, 19 October 2011) <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#5208.htm>. The *Criminal Charge Book* goes on to note that the Crimes Act contains a partial negative definition of recklessness that exempts a person who engages in fire prevention or fire suppression activity and who honestly believes that their conduct was justified in the circumstances: *Crimes Act 1958* (Vic) s 201A(2), (3).
72 Victoria, *Parliamentary Debates*, Legislative Assembly, 29 April 2003, 1100 (Mr McIntosh, Member for Kew) see also 1105 (Mr Lupton, Member for Prahran); Explanatory Memorandum, Crimes (Property Damage and Computer Offences) Bill 2003 (Vic) 2003 2 (Clause 4): 'The court will still be free to consider other circumstances where a person may not be reckless as to the spread of fire. The common law standard for recklessness will continue to apply in these situations.'.

5.41 The courts have not explicitly addressed the meaning of recklessness in the proceeds of crime offence.[73] In their submission, Dermot Dann and Felix Ralph said that if a lower test than probability is applied, it would create 'a self-evidently dramatic expansion' of the offence.[74]

5.42 When the introduction of the offence was being debated in Parliament, it was noted that there is:

> plenty of case law now which adequately defines 'reckless' within the terms of legislation such as this … it is a well-established legal term.[75]

5.43 Both the second reading speech and the explanatory memorandum also use language drawn from the Commonwealth Code context:

> To be reckless, a person must be aware that there is a *substantial risk* that the property is proceeds of crime, and decide to deal with the property anyway despite this risk.[76]

5.44 However, this likely reflects the origins of the offence in the Model Criminal Code. In our view, it does not indicate an intention to import new fault elements from the Code. And as the OPP acknowledged in its submission:

> While many commentators agree that a 'substantial risk' can include a 'possible risk', it has also been described as 'a possibility, chance *or likelihood*'.[77]

5.45 The explanatory materials do not provide additional guidance regarding the betting[78] and modification of data offences.[79] In our view, there is contextual support for concluding that the probability test applies to all four of the offences mentioned by Justice Edelman, consistently with the common law position in Victoria since *Campbell*.

Recklessness is mostly consistent across the Crimes Act

5.46 While the OPP says that consistency is 'preferable' 'if it [is] achievable', the OPP suggests 'the reality is that recklessness is not consistently defined in the Crimes Act, or other Victorian statutes.'[80] It claims that legislating its proposed definition of recklessness for offences against the person (see Chapter 7) would not produce greater inconsistency 'than the inconsistency that already exists in Victorian law.'[81]

5.47 Our review suggests that the concept of 'recklessness' is relatively consistent across the Crimes Act. In our view, the introduction of a new test for offences against the person would generate significant inconsistency. We discuss the benefits of consistency in Chapters 10 and 13.

73 Submission 12 (Dermot Dann KC and Felix Ralph).
74 Ibid.
75 Victoria, *Parliamentary Debates*, Legislative Council, 2 December 2003, 2036 (Hon. W. R. Baxter, Member for the North Eastern Province).
76 Explanatory Memorandum, Crimes (Money Laundering) Bill 2003 (Vic) 2003 3 (emphasis added); See also Victoria, *Parliamentary Debates*, Legislative Council, 2 December 2003, 2038 (Ms Mikakos, Member for Jika Jika Province); For the Commonwealth test, see *Criminal Code Act 1995* (Cth) s 5.4: A person is reckless with respect to a circumstance or a result if: 'he or she is aware of a *substantial risk* that the circumstance exists or will exist …' (emphasis added).
77 Submission 10 (Office of Public Prosecutions) (emphasis in original, citations omitted); For a similar view, see John L Anderson, '"Playing with Fire": Contemporary Fault Issues in the Enigmatic Crime of Arson' (2016) 39(3) *University of New South Wales Law Journal* 950, 967: 'The use of the phrase 'substantial risk' can be equated with a material or real risk of the occurrence of the actual result, which in turn can be aligned with foresight of the likelihood or probability of certain consequences … Possibility is more akin to a chance or generalised risk of something happening rather than there being a real, weighty and substantial risk.'.
78 See generally Explanatory Memorandum, Crimes Amendment (Integrity in Sports) Bill 2013 (Vic) 2013.
79 See generally Explanatory Memorandum, Crimes (Property Damage and Computer Offences) Bill 2003 (Vic); Victoria, *Parliamentary Debates*, Legislative Assembly, 25 March 2003, 525 (Mr Hulls, Attorney-General).
80 Submission 10 (Office of Public Prosecutions).
81 Ibid.

Recklessness outside the Crimes Act

5.48 'Recklessness' is also an element of statutory offences outside the Crimes Act (see Appendix E). For most of these offences, recklessness is not legislatively defined and its interpretation relies on the common law.[82] Because our reference is confined to Crimes Act offences, we have not investigated Parliament's intention each time 'recklessness' appears outside the Crimes Act.

5.49 Some offences outside the Crimes Act are expressly based on offences against the person. Section 32 of the *Occupational Health and Safety Act 2004* (Vic) creates the offence of recklessly endangering persons at a workplace.[83] It 'applies the same standards, tests and penalty as section 23 of the Crimes Act'.[84] We discuss the operation of this offence further in Chapter 9.

Nationally consistent laws

5.50 The OPP referred us to two Victorian Acts that implement nationally consistent laws. It said that a Commonwealth 'substantial risk' test for recklessness clearly applies in the first, but it is 'not entirely clear whether the Commonwealth test or the Victorian *Nuri/Campbell* test would apply' to the second.[85] The *Marine (Domestic Commercial Vessel National Law Application) Act 2013* (Vic) applies Commonwealth law relating to marine safety and domestic commercial vessels as a law of Victoria.[86] However, we note that offences are deemed to be offences against the Commonwealth, not Victorian law.[87] The Commonwealth criminal law framework applies, including the *Criminal Code Act 1995* (Cth) definition of recklessness and other fault elements and defences.[88] The *Co-operatives National Law Application Act 2013* (Vic) applies a national law relating to co-operatives.[89] Offences under the Act are Victorian offences. As we discuss above, a translation process occurs when adopting national laws in Victoria. However, because these offences were not the focus of our terms of reference, we have not investigated this question further or reached any strong conclusions about the definition of recklessness that applies. [90]

82 The Judicial College of Victoria says the *Campbell* definition applies to all Victorian offences. While there are exceptions to this, the Judicial College statement points to broad consistency. Judicial College of Victoria, '7.1.3 Recklessness' [2], *Victorian Criminal Charge Book* (Online Manual, 2022) <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4469.htm>.

83 *Occupational Health and Safety Act 2004* (Vic) s 32. For an individual, the section 32 offence has a maximum penalty of five years imprisonment or a fine of 1800 penalty units, or both. For a corporation, the maximum penalty is a fine of 20,000 penalty units. There is a corresponding workplace reckless endangerment provision in New South Wales which includes the additional aspect of reckless exposure to a danger of death and carries a higher maximum penalty of a $3 million fine: *Work Health and Safety Act 2011* (NSW) s 31.

84 Victoria, *Parliamentary Debates*, Legislative Assembly, 18 November 2004, 1764 (Mr Hulls, Minister for WorkCover). The endangerment offence created by section 31D of the *Dangerous Goods Act 1958* (Vic) is also 'modelled on section 22 of the *Crimes Act 1958*': Explanatory Memorandum, Dangerous Goods Amendment (Penalty Reform) Bill 2019 (Vic) cl 8.

85 Submission 10 (Office of Public Prosecutions).

86 *Marine (Domestic Commercial Vessel National Law Application) Act 2013* (Vic) s 1.

87 Ibid ss 8, 9, and see s 3 for the meaning of 'applied provisions'.

88 Ibid s 9; See also Explanatory Memorandum, Marine (Domestic Commercial Vessel National Law Application) Bill 2013 (Vic).

89 *Co-Operatives National Law Application Act 2013* (Vic) ss 1, 4.

90 Some other national laws also involve recklessness. The Heavy Vehicle National Law makes breach of a safety duty a 'category one' offence where the breach exposes an individual to a risk of serious injury or death and the duty holder is reckless about that risk: *Heavy Vehicle National Law Act 2012* (Qld), Schedule, 'The Heavy Vehicle National Law', ss 26C, 26F (implemented in Victoria by the *Heavy Vehicle National Law Application Act 2013* (Vic)). The law does not define recklessness. In a Victorian case that is currently before the courts, the prosecution has proceeded on the basis that the threshold for 'recklessness' is foresight of a *probable* risk (see the interlocutory judgement in *DPP v Tuteru* [2023] VSCA 188, [32], sub-paragraphs (216), (228); [40], sub-paragraph [166].) By comparison, in South Australia, recklessness for the purposes of the same section of the national law has been interpreted as knowledge of the possibility of serious injury or death: *NHVR v Birrell* [2023] SASC 49. In that case, Justice Blue referred to 'general principles' of common law that the threshold for recklessness for offences other than murder is 'possibility', although also considering the social utility of the behaviour in question. He cautioned that these principles are subject to variation based on what is required by statutory construction in specific contexts.

Recklessness in relation to improperly obtained evidence

5.51 In 2001 the Victorian Court of Appeal cited a passage about recklessness from a New South Wales case. The passage had been used by a Victorian County Court trial judge in 'setting out the appropriate test for recklessness' in relation to improperly obtained evidence under the *Evidence Act 2008* (Vic):

> [Recklessness] must involve as a minimum some advertence to the possibility of, or breach of, some obligation, duty or standard of propriety, or of some relevant Australian law or obligation and a conscious decision to proceed regardless or alternatively a 'don't care' attitude, generally.[91]

5.52 The Court of Appeal described this passage as 'accord[ing] with the conventional understanding of recklessness within the criminal law', clarifying that 'Conduct would be reckless if the [police] officer had foresight that it might be illegal but proceeded with indifference as to whether that was so.'[92]

5.53 Recklessness is not relevant as an element of a criminal offence in cases concerned with the admissibility of improperly obtained evidence. The significance of recklessness arises because the court is required to consider several factors in weighing up the desirability of admitting improperly obtained evidence. These factors include 'whether the impropriety … was deliberate or reckless'.[93] This is a question to be determined on the civil standard of proof: the balance of probabilities.[94]

5.54 The Victorian Court of Appeal's description of the New South Wales definition as consistent with 'the conventional understanding of recklessness within the criminal law' does not displace the well-established dominance of the *Campbell* definition of recklessness for offences against the person in this state, as consistently confirmed by the Court of Appeal itself.

91 *DPP v Marijancevic; DPP v Preece; DPP v Preece* [2011] VSCA 355, [84]; (2011) 33 VR 440, 462 [84] (Warren CJ, Buchanan and Redlich JJA) citing *R v Helmhout* [2001] NSWCCA 372, [33]; (2001) 125 A Crim R 257, 262-263 [33]. The Court of Appeal found that aspects of the manner in which the trial judge dealt with the alternate finding that the police officers were reckless were 'problematic'. The OPP referred us to this case: Submission 10 (Office of Public Prosecutions).

92 *DPP v Marijancevic; DPP v Preece; DPP v Preece* [2011] VSCA 355, [85] (Warren CJ, Buchanan and Redlich JJA). Given the necessity to draw a distinction between recklessness and carelessness, the Court of Appeal stated that the 'alternative of a "don't care" attitude … must be understood as meaning that the offender, recognising that the conduct might be illegal, did not care whether it was.'

93 *Evidence Act 2008* (Vic) s 138(1), (3)(e).

94 Judicial College of Victoria, *Evidence Act 2008* (Vic) *Key Principles: Exclusion of Improperly or Illegally Obtained Evidence (Section 138)* (Factsheet, 24 June 2021) 2.

CHAPTER

06

Recklessness in other jurisdictions

6. Recklessness in other jurisdictions

Overview

- Our terms of reference ask us to consider how recklessness is defined in other jurisdictions.
- Debates about recklessness in other jurisdictions can illuminate issues we confront when we apply the concept here.
- This chapter explains and considers the test for recklessness in England and Wales, New South Wales, the Commonwealth of Australia, South Australia, New Zealand, Canada, and the United States.
- How recklessness is used differs across jurisdictions. Each jurisdiction has its own unique and integrated hierarchy of offences. Murder and other offences against the person use different language, have different elements and different penalties. This reflects divergent views about the criminality to be ascribed to conduct.
- Our focus in this report is on offences against the person other than murder. We include reference to murder in this chapter because it demonstrates how each jurisdiction's overall approach is unique.
- All the models we have reviewed have limitations. None offers a way of defining recklessness that is clearly preferable to what exists in Victoria.

England and Wales

The criminal law framework

6.1 Fault elements for offences against the person are not legislatively defined in England and Wales.

Murder and other offences against the person

6.2 Murder is a common law offence involving unlawful killing[1] with intent to kill or cause grievous bodily harm.[2] Recklessness is not a fault element for murder in England.[3]

1 'Unlawfully' means 'without legal justification or excuse': Mark Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2023 ed, 2022) 2212 [19.3].

2 Ibid 2212 [19.1]; Judicial College (UK), *The Crown Court Compendium--Part I: Jury and Trial Management and Summing Up* (Report, June 2022) 19–1.

3 Judicial College (UK), *The Crown Court Compendium--Part I: Jury and Trial Management and Summing Up* (Report, June 2022) 19-1-19–4. See also discussion of 'intent' and 'example 2': at 8–4. If a person kills another and was reckless about whether their actions would cause the other person's death, they may be guilty of manslaughter. However, in Scots law, the *mens rea* for murder is either 'wicked intention' or 'wicked recklessness': Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Discussion Paper No 172, May 2021) 13 [2.3].

6.3 Other offences against the person are contained in the *Offences Against the Person Act 1861* (UK) (OAP Act).[4] Assault and battery are also common law offences against the person.[5]

6.4 The OAP Act does not use the language of recklessness. Instead it refers to acts done 'unlawfully and maliciously'. The language of 'malice' has been interpreted by the courts as requiring a fault element of either intention or recklessness.[6] But the meaning of 'recklessness' in malice offences may be different to its meaning in offences that do not refer to malice (see paragraphs 6.31-6.37).[7]

6.5 The Law Commission of England and Wales sets out a 'rough hierarchy of seriousness' covering four core violence offences, aside from murder (Table 13).

Table 13: Offences against the person in England and Wales

Offence	Penalty (maximum term of imprisonment)
Murder	**Mandatory life imprisonment for offenders aged over 21**[8]
Unlawful or malicious wounding or causing grievous bodily harm with intent to cause grievous bodily harm s 18 Offences Against the Person Act 1861[9] Inflicting bodily injury contrary to s 20 is the recognised alternative verdict for s 18.[10]	**Life imprisonment**[11]

4 In 2015, the Law Commission of England and Wales noted that, 'Despite a long history of criticism of many aspects of the Act and repeated efforts at reform, it remains in heavy use: the offences in the 1861 Act form the basis of over 26,000 prosecutions every year': Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 2 [1.4]. For a list of the 'many attempts to reform' the law relating to offences against the person, see ibid 42 [4.1].

5 "'Battery" is unlawful physical touching, however slight. Strictly speaking, "assault" means any intentional or reckless conduct which causes someone to apprehend immediate unlawful violence. However "assault" is often used in a looser way, to refer either to that conduct or to a battery': Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 10 [2.5]. The Law Commission chose to use the term 'common assault' to refer to assault and/or battery: at 10 [2.6].

6 Judicial College (UK), *The Crown Court Compendium--Part I: Jury and Trial Management and Summing Up* (Report, June 2022) 8–10, citing *R v Cunningham* [1957] 2 QB 396.

7 Ibid.

8 'The Sentencing Act 2020 [UK Public General Acts 2020 c. 17], ss.321 and 322 and Sch. 21, provide the statutory scheme for the setting of minimum terms in all murder cases.' Sentence requirements for offenders aged 18 when the offence was committed and under 21 on the date of conviction are discussed in the same place: Mark Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2023 ed, 2022) 2248–9 [19-109].

9 '\Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person with intent to do some grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life': *Offences Against the Person Act 1861* (UK), 24 & 25 Vict, c.100, s 18 (E & W). 'The very frequently charged section 18 offence can be committed by causing grievous bodily harm or wounding, whilst intending to cause grievous bodily harm or to resist or prevent apprehension or detention. This creates ten ways of committing the offence, some of which are considered to be distinct offences which must be charged separately on an indictment': Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 4 [1.12(1)] (emphasis in original).

10 *R v G* [2003] UKHL 50, [11]; [2004] 1 AC 1034, 1045 [11]. The Criminal Law Revision Committee noted that 'juries often return a verdict under section 20 as a compromise on an indictment for an offence under section 18': Great Britain, Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person* (Report, 1980) 69 [152].

11 *Offences Against the Person Act 1861* (UK), 24 & 25 Vict, c.100, s 18 (E & W & NI).

Table 13: Offences against the person in England and Wales (continued)

Offence	Penalty (maximum term of imprisonment)
Unlawful and malicious wounding/ infliction of grievous bodily harm s 20 Offences Against the Person Act 1861[12] The accused does not have to have foreseen the extent of the injury caused, they only need to have foreseen the risk of some physical harm.[13]	**5 years**[14]
Assault occasioning actual bodily harm s 47 Offences Against the Person Act 1861[15] Assault and battery can be alternative verdicts for assault occasioning actual bodily harm.[16]	**5 years**[17] Assault occasioning actual bodily harm has the same maximum penalty as s 20 but is lower in the hierarchy of seriousness. According to sentencing guidelines, the most serious cases of assault occasioning actual bodily harm should only receive a maximum of four years imprisonment.[18]
Common assault The fault element for assault can be either intention or recklessness.[19]	**Offence triable summarily: 6 months**[20] Where victim is an emergency worker acting in the course of their duties: **offence triable summarily or on indictment: two years (or one year for offences committed before 28 June 2022)**[21]

12 'Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude': *Offences Against the Person Act 1861* (UK), 24 & 25 Vict, c.100, s 20 (E & W).

13 Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 18 [2.36]; see also Law Commission of England and Wales, *Reform of Offences Against the Person: A Scoping Consultation Paper* (Consultation Paper No 217, 2014) 28 [2.99].

14 Sentencing Council (UK), *Inflicting Grievous Bodily Harm/Unlawful Wounding/Racially or Religiously Aggravated GBH/Unlawful Wounding* (Web Page, 1 July 2021) <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/inflicting-grievous-bodily-harm-unlawful-wounding-racially-or-religiously-aggravated-gbh-unlawful-wounding/>. Although the penalty for malicious wounding or infliction of grievous bodily harm is the same as for assault occasioning actual bodily harm, the former is treated as a more serious offence: Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 2 [1.5(3)].

15 'Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable to be kept in penal servitude': *Offences Against the Person Act 1861* (UK) 24 & 25 Vict, c.100, s 47 (E & W). It does not matter the extent of the injury caused—the prosecution only has to prove 'some personal injury (however slight)': Judicial College (UK), *The Crown Court Compendium—Part I: Jury and Trial Management and Summing Up* (Report, June 2022) 8–8.

16 *Criminal Law Act 1967* (UK) ss 6-6(3B); Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 12 [2.15(2)].

17 Mark Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2023 ed, 2022) Guideline 43, 1101 [S-43.3].

18 Ibid.

19 Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 11-12 [2.13]. Archbold cites a presumption of law that mens rea (a guilty mind) is required before a person can be convicted of a criminal offence: Mark Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2023 ed, 2022) [17-3].

20 Although a common law offence, section 39 of the *Criminal Justice Act 1988* (UK) provides for the mode of trial and maximum penalty.

21 *Assaults on Emergency Workers (Offences) Act 2018* (UK), s 1; Mark Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2023 ed, 2022) Guideline 43, 1123 [S-43.25].

6.6 The section 18 offence requires intention to be proven.[22] The next three offences include intention or recklessness as fault elements, although the fault element in section 20 uses the language of malice and the fault element in section 47 is not specified.[23]

6.7 The injuries associated with these offences are defined as follows:

- 'grievous bodily harm' means 'really serious bodily harm' but it need not be permanent. Can include psychiatric injury.[24]
- 'actual bodily harm' means any hurt or injury that interferes with the health or comfort of the victim and is more than 'merely transient and trifling', although it need not be permanent. Can include psychiatric injury, but not 'mere emotions, such as fear, distress or panic'.[25]
- 'wound' means an injury that breaks 'the continuity of the skin', including puncture wounds and lacerations but excluding scratches.[26]

6.8 The Criminal Law Revision Committee has said that the higher penalty for intentional grievous bodily harm is justified by comparison with injury offences that have recklessness as a fault element:

> there is … a need to separate the intentional causing of serious injury from the reckless causing of serious injury. There is, in our opinion, a definite moral and psychological difference between the two offences which it is appropriate for the criminal law to reflect.[27]

6.9 Despite this, the Committee said there was no need to create two separate offences for the reckless and intentional versions of assault occasioning actual bodily harm (which it said should be reformed to be called intentionally or recklessly causing injury).[28]

6.10 Because of the very different penalties for serious injury offences and the distinction in culpability that they represent,[29] the Criminal Bar Association suggested that a lower threshold for recklessness may be justified in England and Wales where it is not in Victoria.[30]

6.11 By comparison with England and Wales, Victoria has an even progression on the penalty scale for the intentional and 'reckless' versions of the main injury offences (sections 15A, 15B, 16, 17 & 18) (see Chapter 2, Figure 3). There is a standard gap of five years between maximum penalties.

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22 For a draft charge to the jury on the offence of causing grievous bodily harm with intent, see Judicial College (UK), *The Crown Court Compendium--Part I: Jury and Trial Management and Summing Up* (Report, June 2022) 8.3-8.4.

23 For 'assault occasioning actual bodily harm', the mental element relates to the assault: 'There is no need for [the accused] to be shown to have intended or foreseen any harm. What is required is that [the accused] intended or was reckless as to an assault or battery': Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 15 [2.26]. See also Law Commission of England and Wales, *Reform of Offences against the Person: A Scoping Consultation Paper* (Consultation Paper No 217, 2014) 20 [2.61].

24 Mark Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2023 ed, 2022) 2303 [19–258].

25 Ibid 2300 [19–249].

26 Ibid 2304 [19–263].

27 Great Britain, Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person* (Report, 1980) 69 [152].

28 '[W]e are of the opinion that the moral distinction between the two types of mental element [ie, intention and recklessness] involved in acts of violence amounting to serious injury justifies two separate offences. We appreciate, however, that it is not an easy distinction for the police, magistrates and juries to have to make, and, with regard to acts of violence amounting to injury but not serious injury, we feel that the law need not be altered to require the distinction in mental element to be made in every case: accordingly we are … in favour of [replacing section 20 with] causing injury recklessly or with intent to cause injury': Ibid.

29 Life imprisonment for malicious wounding or causing grievous bodily harm with intent (s 18) and five years for malicious wounding or infliction of grievous bodily harm (s 20): *Offences Against the Person Act 1861* (UK), 24 & 25 Vict, c.100 (E & W & NI).

30 Consultation 4 (Criminal Bar Association). The CBA was in fact referring to the difference in penalties proposed by the Criminal Law Revision Committee in a report recommending the modernisation of the OAP Act offences. The Committee proposed a maximum of life imprisonment for a new offence of 'causing serious injury with intent to cause serious injury' (to replace s 18) and a maximum of five years imprisonment for a new offence of 'causing serious injury recklessly' (to replace s 20), so it preserved the same difference in penalty ranges as currently exists: Great Britain, Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person* (Report, 1980) 71 [157]. The same penalty range was subsequently recommended by the Law Commission, in respect of comparable offences: Law Commission of England and Wales, *A Criminal Code for England and Wales—Vol 1 Report and Draft Criminal Code Bill* (Law Com Report No 177, 1989) 123. In 2015, the Law Commission continued to support the existing hierarchy and penalty range, although it recommended increasing the penalty for malicious wounding or infliction of grievous bodily harm (i.e., the recklessly causing serious injury offence) from five to seven years maximum imprisonment. It continued to support modernising the language of the offences: Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 53 [4.36], 56 [4.45], 70 [4.106], 86–7 [4.172], 200 (table).

What is the threshold for recklessness in England and Wales?

6.12 In England and Wales, a person is reckless if they are aware of a risk but proceed regardless. For many criminal offences, it must also have been unreasonable for them to proceed in the circumstances known to them.[31]

6.13 The courts in England and Wales use a variety of language to describe the gravity of the consequences or risks when someone acts recklessly. Sometimes the offender ignored a risk that was 'significant', 'obvious', or 'likely'; at other times it was merely 'possible'.[32]

6.14 In 1978, the Law Commission of England and Wales commented that the law relating to recklessness did 'not deal with the question of the degree of risk which it is necessary to appreciate'.[33] The Law Commission said it was not necessary to specify the degree of risk because 'What is relevant is the [accused's] estimation of the likelihood of the particular result required by the offence'.[34]

6.15 In line with this, *The Crown Court Compendium* explains that the concept of risk does not need to be qualified.[35] Whether a risk was serious enough to establish criminal recklessness will depend on the circumstances of the case. Since at least 2003, a 'reasonableness' assessment operates to limit the degree of risk that will be considered culpable.[36]

6.16 The High Court in *Aubrey* accepted a description of the English test for recklessness as ignoring a 'possible' risk where it is unreasonable for the accused to do so.[37] But the current authorities in England and Wales do not support characterising the test primarily with reference to possibility. Instead, the risk must be assessed according to the circumstances in each case and what was reasonable for the accused person in those circumstances, as we discuss further below.[38]

Is the test for recklessness in England and Wales subjective, objective, or mixed?

6.17 At different times the test for recklessness in England and Wales has been characterised as subjective or objective.

- Between 1957 and 1982 (the '*Cunningham*' era), the test for reckless offences against the person was said to be subjective.[39]
- Between 1982 and 2003 (the '*Caldwell*' era), it could be purely objective.[40]

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31 *R v G* [2003] UKHL 50; [2004] 1 AC 1034.

32 'Significant' and 'obvious' are used in [32] (Lord Bingham). *R v G* was a case involving property damage endangering life. 'Likely' is used in *Attorney General's Reference No 3 of 2003* [2004] EWCA Crim 868, [58], [59]; [2005] QB 73, 91 [58], [59]. This was a case involving the common law offence of misconduct in public office. The mental elements for this include reckless disregard of a duty to act and/or the consequences of acting or failing to act in accordance with that duty. Foresight of an outcome that 'may' or 'might' occur is used in *R v Cunningham* (1957) 2 QB 396, 399–401. *Cunningham* involved the offence of property damage endangering life. Recognition of a 'possible' consequence is used in *R v Mowatt* [1968] 1 QB 421, 426–7, a case involving charges of wounding with intent to do grievous bodily harm or unlawful wounding.

33 The Commission was referring to the law of recklessness as established since the 1957 case of *Cunningham*. Law Commission of England and Wales, *Report on the Mental Element in Crime* (Law Com No 89, 21 June 1978) 10 [20]. See also 11 [21] (noting in respect of driving and criminal damage cases that 'the required degree of … risk is a matter of some uncertainty') and 12 [24] (referring in general to the absence of 'authoritative guidance on the degree of risk required').

34 Law Commission of England and Wales, *Report on the Mental Element in Crime* (Law Com No 89, 21 June 1978) 28 [51], 30 [55].

35 'In directing a jury, there is no need to qualify the word "risk"': Judicial College (UK *The Crown Court Compendium--Part I: Jury and Trial Management and Summing Up* (Report, June 2022) 8–6. See also Mark Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2023 ed, 2022) [17.55].

36 *R v G* [2003] UKHL 50.

37 The appellant in *Aubrey* described the English test in these terms and argued that it 'should lead this Court to replace the requirement of foresight of possibility with a test of foresight of probability.' The High Court rejected the need to replace the test, but accepted the way in which it was characterised, as ignoring a 'possible' risk in circumstances where it was unreasonable to do so: *Aubrey v The Queen* [2017] HCA 18, [48]; (2017) 260 CLR 305, 329–30 [48] (Kiefel CJ, Keane, Nettle, Edelman JJ). See also the discussion that follows from 330 [49] to 331 [50].

38 Mark Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2023 ed, 2022) [17.55].

39 *R v Cunningham* (1957) 2 QB 396. See also the discussion of the history in Lord Diplock's judgment: *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341, 351–4, although note that Lord Diplock objects to the 'subjective' vs 'objective' characterisation of the various definitions.

40 In the view of the House of Lords, 'The label of "objective" or "subjective" solves nothing': *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341, 342 (per Lord Diplock, Lord Keith of Kinkel and Lord Roskill). Regardless of this, and based on the model direction formulated by Lord Diplock, the case became synonymous with a test for recklessness that could be purely objective. As Lord Steyn pointed out in *R v G*, 'Lord Diplock's formulation leaves no room, in the great majority of cases, for any inquiry into the defendant's state of mind'. Thus, Lord Steyn referred to 'the objective mould into which the *Caldwell* analysis forced recklessness': *R v G* [2003] UKHL 50, [47].[54].

- The current test, which dates from the 2003 decision in *R v G*, is described as subjective.[41]

6.18 The test in *R v Cunningham* (*'Cunningham')* required that:

> the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it.[42]

6.19 In *Commissioner of Police of the Metropolis v Caldwell* (*'Caldwell')*, Lord Diplock in the House of Lords said it was not necessary for a person to have foreseen the harm that was a consequence of their actions, or indeed, to have 'given any thought' to it. Instead a person is reckless if:

> (1) he does an act which in fact creates an obvious risk …, and
>
> (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.[43]

6.20 Because it could impose objective liability and allowed for a finding of guilt that was not linked to the accused having 'a guilty mind' (either intention or foresight of consequences), the *Caldwell* decision sparked 'tremendous controversy'.[44] It was described as introducing 'a definition which to many eyes divorced the criminal law from basic principles of justice.'[45]

6.21 In *R v G*, the House of Lords overturned *Caldwell* and held that a person acts recklessly with respect to a circumstance when they are 'aware of a risk that it exists or will exist' or with respect to a result when they 'are aware of a risk that it will occur', and it is, in the circumstances known to the person, 'unreasonable to take the risk'.[46]

6.22 This definition replicates a definition proposed by the Law Commission of England and Wales in its 1989 draft criminal code.[47]

6.23 In overturning *Caldwell*, the court in *R v G* emphasised that a subjective test accords with principles of fairness to an accused person. Lord Bingham said:

> it is a salutary principle that conviction of serious crime should depend on proof not simply that the [accused] caused … an injurious result to another but that [their] state of mind when so acting was culpable.[48]

6.24 He explained that the *Caldwell* test could produce 'obvious unfairness' and it is:

> neither moral nor just to convict [an accused] … on the strength of what someone else would have apprehended if the [accused themselves] had no such apprehension.[49]

6.25 In Chapter 10 we discuss the benefits of having a subjective test for recklessness in Victoria. In Chapter 13 we suggest that a subjective test is consistent with principles of fairness and equity, which should be guiding principles for how recklessness is used for offences outside Part I, Division 1(4) of the Crimes Act.

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41 *R v G* [2003] UKHL 50.

42 *R v Cunningham* (1957) 2 QB 396, 399. This test was attributed by the *Cunningham* court to the first edition of C. S. Kenny's *Outlines of Criminal Law* (1902), which it said was 'repeated at p.186 of the 16th edition edited by Mr J. W. Cecil Turner and published in 1952':

43 *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341, 354 (Lord Diplock). The decision in *Caldwell* related to criminal property damage of a kind that could endanger life. It was subsequently applied to reckless driving cases. There was dispute about whether it applied more generally to offences against the person: Law Commission of England and Wales, *Legislating the Criminal Code: Offences against the Person and General Principles* (Law Com Report No 218, November 1993) 12-13 [9.4]-[9.6].

44 Simon France, 'The Mental Element' (1990) 20(3) *Victoria University of Wellington Law Review* 43, 44.

45 Ibid. More recently, Jeremy Horder commented that in *R v G*, Lord Bingham's judgment referred to 'the substance of the criticisms of' *Caldwell* as 'the lack of legal foundation for the decision [and] the unfairness of its effects in some cases': Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 10th ed, 2022) 222.

46 *R v G* [2003] UKHL 50 [41] (Lord Bingham).

47 Law Commission of England and Wales, *A Criminal Code for England and Wales—Vol 1 Report and Draft Criminal Code Bill* (Law Com Report No 177, 1989) 51–2 (cl 18(c)).

48 *R v G* [2003] UKHL 50 [32] (Lord Bingham).

49 Ibid [33] (Lord Bingham).

The *R v G* definition involves asking if the accused's actions were reasonable

6.26 The test adopted in *R v G* involves an assessment of whether it was reasonable for the accused to take the risk in the circumstances known to them. For this reason, it could be interpreted as including an objective element, requiring a conclusion about guilt based on how a reasonable person would have acted in the circumstances.[50] But in both *R v G* and *The Crown Court Compendium*, which judges rely on to interpret the law and direct juries, the test is described as subjective.[51]

6.27 The test requires an assessment of reasonableness based on what was reasonable for a particular accused in the specific circumstances they found themselves in, which means 'the circumstances as [the accused] believed them to be.'[52]

6.28 What was 'reasonable' for the accused in those circumstances may be different from what would have been reasonable for another person or an objective observer. Assessing the reasonableness of the accused's actions could involve considering such things as their age and mental capacity.[53]

6.29 In *R v Stephenson*,[54] the court suggested that proof of the accused's subjective recognition of risk may follow from a jury's assessment that a risk was 'obvious', but this alone is not conclusive:

> The fact that the risk of some damage would have been obvious to anyone in [their] right mind in the position of the [accused] is not conclusive proof of the [accused's] knowledge, but it may well be and in many cases doubtless will be a matter which will drive the jury to the conclusion that the [accused themselves] must have appreciated the risk.[55]

6.30 In our view, the need to assess if an accused's actions were 'reasonable in the circumstances' adds unnecessary complexity to the task required of a jury (see Chapter 11).

Applying the R v G *definition to other offences*

6.31 *R v G* concerned offences under the *Criminal Damage Act 1971* (UK), including property damage that endangered life.[56]

6.32 It is now generally accepted in England and Wales that the *R v G* definition applies to all offences with recklessness as an explicit element, unless a statutory offence sets out an alternative definition.[57] According to Archbold, the definition extends further, and 'may safely be taken to be a formulation of general application to the criminal law of England and Wales.'[58]

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50 In 2014, the Law Commission referred to it as an objective requirement. Posing the question whether the *R v G* requirement that the risk 'was unjustified in the circumstances' applies to section 20 OAP offences, it said, 'is the test one of "awareness without *objective* justification", or "awareness" alone?' Law Commission of England and Wales, *Reform of Offences against the Person: A Scoping Consultation Paper* (Consultation Paper No 217, 2014) 27 [2.96] (emphasis added).

51 Judicial College (UK *The Crown Court Compendium--Part I: Jury and Trial Management and Summing Up* (Report, June 2022) 8-6 [3]–[4]; *R v G* [2003] UKHL 50 [32]–[33] (Lord Bingham), [54]–[55], [58] (Lord Steyn).

52 Law Commission of England and Wales, *Reform of Offences against the Person: A Scoping Consultation Paper* (Consultation Paper No 217, 2014) 12 [2.26].

53 According to France, 'Such an analysis necessarily allows the accused to bring into [consideration] all of his or her capabilities and incapacities. If the accused is slow, young, infirm, absent-minded, inexperienced or anything else, this will feed into the relevant situation and produce the state of mind that can be assessed as culpable or not': Simon France, 'The Mental Element' (1990) 20(3) *Victoria University of Wellington Law Review* 43, 49. Although writing about recklessness in New Zealand, this aspect of France's characterisation of 'the subjective approach' appears to be consistent with the approach taken by the courts in England and Wales since *R v G*.

54 *R v Stephenson* [1979] QB 695.

55 Ibid 703; cited in *R v G* [2003] UKHL 50 [15] (Lord Bingham).

56 Lord Bingham cautioned that he was 'not addressing the meaning of "reckless" in any other statutory or common law context': *R v G* [2003] UKHL 50 [28] (Lord Bingham); and see [69] (Lord Rodger).

57 *Attorney General's Reference No 3 of 2003* [2004] EWCA Crim 868; [2005] QB 73, [12]: 'The issue as to the proper approach to the concept of recklessness in the criminal law appears to us to have been resolved by the decision of the House of Lords in *G*. Although the case was concerned with the definition of recklessness in Section 1 of the Criminal Damage Act 1971 … general principles were laid down'; Mark Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2023 ed, 2022) [17.54]-[17.55]. The Crown Court Compendium says it 'likely' applies to 'all statutory offences of recklessness unless Parliament has explicitly provided otherwise': Judicial College (UK *The Crown Court Compendium--Part I: Jury and Trial Management and Summing Up* (Report, June 2022) 8–6 [3]. The Law Commission of England and Wales says 'We assume that the [*R v G* definition] now applies in relation to assault and battery': Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 12 [2.14].

58 Mark Lucraft (ed), *Archbold Criminal Pleading, Evidence and Practice* (Sweet and Maxwell, 2023 ed, 2022) [17-54].

6.33 However, the Law Commission of England and Wales noted in 2015:

> There is still some doubt whether [the *R v G* definition of recklessness] applies in the offences under the 1861 [Offences Against the Person] Act, as these speak of 'malice' rather than 'recklessness'.[59]

6.34 *The Crown Court Compendium* suggests that the earlier *Cunningham* definition, which does not include a 'reasonableness' test, applies to the old 'malice' offences in the OAP Act, including 'malicious wounding or infliction of grievous bodily harm' (section 20).[60]

6.35 Despite the position in *The Crown Court Compendium*, the England and Wales Court of Appeal applied the *R v G* definition in a 2006 case involving the offence of inflicting grievous bodily harm contrary to section 20 of the OAP Act.[61]

6.36 This suggests the law in England and Wales is uncertain, with authorities and *The Crown Court Compendium* saying conflicting things. Another issue is that repeated calls to modernise the offences in the OAP Act have not been acted on. The language of these offences is 'archaic'.[62]

6.37 The Law Commission of England and Wales has said the law would be more clear and certain if a comprehensive criminal code was adopted. This would include general principles of criminal responsibility and the major criminal offences.[63] As we discuss in Chapter 12, the Law Commission does not support legislating a definition of recklessness applicable only to offences against the person.[64]

Limitations of the test in England and Wales

6.38 Given the uncertain state of the law relating to recklessness, and its continued use of the concept of 'malice', the position in England and Wales does not provide an appropriate model for reform in Victoria.

New South Wales

The criminal law framework

6.39 The fault elements for offences against the person are not legislatively defined in New South Wales. They come from the common law, initially as it developed in England and Wales.[65]

6.40 In 2007, New South Wales updated many offences against the person, removing 'malicious' offences and introducing specific 'reckless' offences.[66] Parliament chose not to legislate a definition of recklessness.[67]

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59 Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 81 [4.150]. See also Law Commission of England and Wales, *Reform of Offences against the Person: A Scoping Consultation Paper* (Consultation Paper No 217, 2014) 27 [2.96].

60 Judicial College (UK), *The Crown Court Compendium—Part I: Jury and Trial Management and Summing Up* (Report, June 2022) 8–10 [1], [3]. Ormerod and Laird say that *The Crown Court Compendium* uses the *R v G* definition for malice offences, but this is incorrect. They cite the sections of the Compendium dealing with recklessness (part 8-2, at pages 8-6–8–9), not those dealing specifically with malice offences (part 8-3, at pages 8-10–8-11): David Ormerod and Karl Laird, *Smith, Hogan and Ormerod's Criminal Law* (Oxford University Press, 16th ed, 2021) 107 [3.2.2.4], 113.

61 *R v Brady* [2006] EWCA Crim 2413, [15]. For this reason, the Law Commission has said that it thinks the additional *R v G* 'reasonableness' requirement now applies to section 20 as well: Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 18 [2.35].

62 Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 5 [1.15], 6 [1.17]–[1.18].

63 Law Commission of England and Wales, *A Criminal Code for England and Wales - Vol 1 Report and Draft Criminal Code Bill* (Law Com Report No 177, 1989); Law Commission of England and Wales, *A Criminal Code for England and Wales - Vol 2 Commentary on Draft Criminal Code Bill* (Law Com Report No 177, April 1989).

64 Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 81 [4.148].

65 In relation to recklessness, see *R v Cunningham* (1957) 2 QB 396; *R v Coleman* [1990] 19 NSWLR 467, 476–7 (Hunt J).

66 *Crimes Amendment Act 2007* (NSW). Previously, 'malice' was an element of various offences against the person and was defined to include acts done 'with indifference to human life or suffering … or done recklessly or wantonly' *Crimes Act 1900* (NSW) s 5, as in operation before the *Crimes Amendment Act 2007* (NSW) took effect: New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 September 2007, 2257 (Mr Collier, Parliamentary Secretary).

67 The Parliamentary Secretary explained that '[t]he term "recklessly" … is well-known to the criminal law'.

Murder and other offences against the person

6.41 Murder and other offences against the person are set out in Part 3 of the *Crimes Act 1900* (NSW) (NSW Crimes Act). The fault elements for murder include an intention to kill or inflict grievous bodily harm, or 'reckless indifference to human life'.[68] If it is alleged that an accused showed 'reckless indifference to human life', the jury may be told that:

> The conduct of a person who does an act that the person knows or foresees is likely to cause death is regarded, for the purposes of the criminal law, to be just as blameworthy as a person who commits an act with a specific intention to cause death.[69]

6.42 Although the NSW Crimes Act also provides that the act or omission causing death must have been 'malicious',[70] malice is inferred if one of the other fault elements is established.[71]

6.43 The main injury offences (Table 14) include similar offences to those in England and Wales.

Table 14: Offences against the person in New South Wales

Offence	Penalty (maximum term of imprisonment)
Murder s 18(1) NSW Crimes Act	**Imprisonment for life**[72]
Wounding or causing grievous bodily harm with intent to cause grievous bodily harm[73] s 33(1) NSW Crimes Act	**25 years**
Reckless grievous bodily harm s 35(2) NSW Crimes Act The accused caused grievous bodily harm and was reckless about causing actual bodily harm. Reckless grievous bodily harm or wounding contrary to s 35 is the statutory alternative verdict for s 33(1).[74]	**10 years**
Reckless wounding s 35(4) NSW Crimes Act The accused wounds a person and was reckless about causing actual bodily harm. Reckless wounding contrary to s 35(4) is a statutory alternative verdict for s 35(2).[75]	**7 years**

68 *Crimes Act 1900* (NSW) s 18(1). Murder may also be committed if a person is killed 'during or immediately after the commission, by the accused … of a crime punishable by imprisonment for life or for 25 years':

69 Judicial Commission of New South Wales, ' [5–6310] Suggested direction — mental element of murder', *Criminal Trial Courts Bench Book* (Online Manual, 2023) <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/murder.html#p5>. The Bench Book also notes, in a general introductory section on murder: 'In some cases there may be little difference between doing an act with an intention to kill (or to inflict grievous bodily harm) and doing an act in the recognition that it would probably cause death': at '[5–6300] Introduction', citing *Campbell v R* [2014] NSWCCA 175 [311].

70 *Crimes Act 1900* (NSW) s 18(2)(a).

71 Judicial Commission of New South Wales, '[5–6300] Introduction', *Criminal Trial Courts Bench Book* (Online Manual, 2023) <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/murder.html#p5–6300>.

72 *Crimes Act 1900* (NSW) s 19A. This penalty is mandatory if the victim was an on-duty police officer or killed because of their role as a police officer: ibid s 19B.

73 *Crimes Act 1900* (NSW) s 33(1).

74 Ibid s 33(3).

75 Ibid s 35(5).

Table 14: Offences against the person in New South Wales (continued)

Offence	Penalty (maximum term of imprisonment)
Assault occasioning actual bodily harm s 59(1) NSW Crimes Act	**5 years**
Common assault (indictable) (no actual bodily harm) s 61 NSW Crimes Act	**2 years**

6.44 The injuries associated with these offences are defined in the same way as in England and Wales, except that the NSW Crimes Act also includes specific examples of grievous bodily harm. The other injuries take their meaning from the common law and are not legislatively defined:

- 'grievous bodily harm' means really serious bodily harm (at common law),[76] including —
  - (a) the destruction (other than in the course of a medical procedure or a termination …) of the foetus of a pregnant woman …
  - (b) any permanent or serious disfiguring of the person
  - (c) any grievous bodily disease …[77]
- 'actual bodily harm' means any hurt or injury that interferes with the health or comfort of the victim and is more than 'merely transient or trifling', although it need not be permanent. It may include very serious psychological injury, 'going beyond merely transient emotions, feelings and states of mind'.[78]
- 'wound' means a 'breaking of the skin'. The 'consequences of a wounding can vary widely … and may be quite minor'; wounding 'need not involve the use of a weapon'.[79]

6.45 Unlike New South Wales, Victoria has only two categories of injury for offences against the person.[80] Both are defined in the Victorian Crimes Act. They use different language to the New South Wales categories (see Chapter 4).

What is the threshold for recklessness in New South Wales?

6.46 Recklessness in New South Wales has different meanings in relation to murder and other offences against the person. A person shows 'reckless indifference' to human life for the purposes of murder if they foresaw or realised that their actions would *probably* cause death but they continued regardless. 'Probably' means 'likely'.[81]

6.47 For other offences against the person in New South Wales, an accused is reckless if they foresaw or realised that their actions would *possibly* cause harm but they continued regardless.

76 'At common law, the words "grievous bodily harm" are given their ordinary and natural meaning. "Bodily harm" needs no explanation and "grievous" simply means "really serious"': Judicial Commission of New South Wales, '[50-070] Recklessly causing grievous bodily harm or wounding: s 35', *Sentencing Bench Book* (Online Manual, 2023) <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/assault_wounding_offences.html#p50-070>.

77 *Crimes Act 1900* (NSW) s 4. Section 4 is a general definition section, applying to the entire *Crimes Act 1900* (NSW).

78 Judicial Commission of New South Wales, ' [50-060] Assault occasioning actual bodily harm: s 59', *Sentencing Bench Book* (Online Manual, 2023) <https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/assault_wounding_offences.html#p50-060>.

79 Ibid [50-070]. There is no Crimes Act definition for wounding.

80 'Injury' and 'serious injury': *Crimes Act 1958* (Vic) s 15. In Victoria, 'really serious injury' is the degree of harm that applies to intentional and reckless murder, however the meaning of this term is not legislated and it 'is a matter for the jury to determine.': Judicial College of Victoria, '7.2.1 Intentional or Reckless Murder', *Victorian Criminal Charge Book* (Online Manual. 27 March 2019) [54] <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4478.htm> (citations omitted).

81 Judicial Commission of New South Wales, '[5–6310] Suggested direction — mental element of murder', *Criminal Trial Courts Bench Book* (Online Manual, 2023) <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/murder.html#p5–6310>; *R v Crabbe* [1985] HCA 22; (1985) 156 CLR 464, 469; *R v Coleman* [1990] 19 NSWLR 467, 475–6 (Hunt J, Finlay and Allen JJ agreeing).

6.48 For a brief period, following the 2011 decision in *Blackwell v R*,[82] an accused in New South Wales had to foresee the possibility of the specific harm identified in the offence charged but to have proceeded regardless. For example, they must have foreseen the possibility of inflicting 'grievous bodily harm', if that was the injury caused, rather than merely 'wounding'. Since 2012, offences involving the infliction of 'grievous bodily harm' or 'wounding' only require foresight of the possibility of 'actual bodily harm'—a lesser injury—for recklessness to be proven.[83]

6.49 By comparison, for serious injury offences in Victoria, the accused person must have foreseen the risk of a *serious* injury, rather than merely an injury. This is consistent with the principle of justice that people should only be held criminally responsible for conduct that they intended or recognised the risk of.

Is the New South Wales test for recklessness subjective, objective, or mixed?

6.50 The possibility threshold in New South Wales has subjective and objective parts, requiring both that:

- a person foresaw ('actually thought about')[84] the possibility of harm, and
- it was unreasonable for them to take the risk in the circumstances known to them.[85]

6.51 What constitutes 'unreasonable' risk-taking has been described in different ways. For example, an assessment of whether it was reasonable for an accused to take the risk they did can involve considering:

- the 'social utility' of their actions,[86] 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 [accused] may have'.[87]

6.52 In most cases, the objective part of the New South Wales test is implicit, and juries are not directed to consider it. Where this is so, the High Court has said that it influences jurors' decision-making simply 'as a matter of common sense and experience'.[88]

6.53 What this means in practice is unclear. However, in *Aubrey*, the High Court distinguished between acts 'devoid of social utility' (including sticking a hay fork into a horse and ripping a gas meter from the mains to steal money from it), and acts that have social utility, such as driving a car.[89]

6.54 Where an act has no social utility, the High Court held that an accused who ignores a 'mere possibility' or 'bare possibility' acts recklessly. The accused who stabbed the horse and ignored the risk of killing it acted recklessly. So did the accused who damaged the gas meter, injuring the person sleeping in the house where the gas leaked.[90]

82 *Blackwell v The Queen* [2011] NSWCCA 93; (2011) 81 NSWLR 119.
83 *Chen v R* [2013] NSWCCA 116, [66]; *Crimes Amendment (Reckless Infliction of Harm) Act 2012* (NSW); Judicial Commission of New South Wales, '[4-080] Introduction', *Criminal Trial Courts Bench Book* (Online Manual, 2023) <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/recklessness.html#p4-080>.
84 Judicial Commission of New South Wales, '[4-097] Suggested direction — particular offences following the Crimes Amendment (Reckless Infliction of Harm) Act 2012', *Criminal Trial Courts Bench Book* (Online Manual, 2023) <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/recklessness.html#p4-097>.
85 As set out by Justice Edelman, with reference to what he said was 'the developed meaning given by all members of this Court in *Aubrey*' (which dealt with old NSW offences comparable to the current offences of intentionally or recklessly causing grievous bodily harm): *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [64]; (2021) 274 CLR 177, 203 [64] (Edelman J).
86 *Aubrey v The Queen* [2017] HCA 18, [49] (Kiefel CJ, Keane, Nettle, Edelman JJ).
87 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, 47–8.
88 *Aubrey v The Queen* [2017] HCA 18, [50] (Kiefel CJ, Keane, Nettle, Edelman JJ).
89 Ibid [49] (Kiefel CJ, Keane, Nettle, Edelman JJ).
90 Ibid [49], [51] (Kiefel CJ, Keane, Nettle, Edelman JJ).

6.55 On the other hand, 'if the act in question has a slight degree of social utility … something more than a mere possibility of harm is required.'[91] The High Court described this as 'a real possibility'.[92]

6.56 The High Court also acknowledged that there may be cases where a fair trial requires a judge to direct a jury to:

- explicitly consider the reasonableness of the accused's actions
- take this into account in their assessment of whether the accused acted recklessly, with foresight of possible harm.[93]

Limitations of the New South Wales test

6.57 The various ways of expressing how to assess reasonableness, and the rather tortured attempts to distinguish between the degree of 'possible' risk required to establish recklessness in different contexts,[94] indicate the complexity of having a subjective test with an objective component. This is so even if the objective part of the test is not usually emphasised or drawn to the attention of juries.[95] In our view, the approach in New South Wales is not an appropriate model for Victoria.

The Commonwealth of Australia

The criminal law framework

6.58 Work has been done in Australia towards codifying the criminal law,[96] but the codification project has faltered. It was partially realised in the 'general principles' section of the *Criminal Code Act 1995* (Cth).[97] This has also influenced the law in the Northern Territory and the Australian Capital Territory.[98]

6.59 The Criminal Code Act includes and defines four fault elements: 'intention', 'knowledge', 'recklessness' and 'negligence'.[99]

Murder and other offences against the person

6.60 Ordinarily, murder and other offences against the person are prosecuted under the jurisdiction of the state or territory where they occur. However, the Criminal Code Act does include Commonwealth versions of these offences which apply where the victim is employed by or associated with the United Nations (UN). We include an overview of them here for comparative purposes.[100]

6.61 Murder involves intentionally or recklessly causing the death of UN or associated personnel. Manslaughter involves causing the death of UN or associated personnel while intending or being reckless about causing serious harm to that person. The concept of manslaughter in the Commonwealth Criminal Code captures behaviour that would constitute murder in Victoria.

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91 Ibid [49] (Kiefel CJ, Keane, Nettle, Edelman JJ).

92 With reference to the level of risk that the applicant in the case himself conceded as having recognised (this case concerned an HIV positive applicant who knew he carried the virus and was accused of recklessly inflicting injury when he had unprotected sex with another person who subsequently caught the virus): ibid [51] (Kiefel CJ, Keane, Nettle, Edelman JJ).

93 Ibid [50] (Kiefel CJ, Keane, Nettle, Edelman JJ).

94 Dr Steven Tudor notes that in everyday usage, 'Possibility is a binary concept: something is either possible or not; there are no degrees of possibility': Submission 8 (Dr Steven Tudor).

95 See the discussion in Submission 8 (Dr Steven Tudor).

96 Model Criminal Code Officers Committee, *Model Criminal Code Chapters 1 and 2 General Principles of Criminal Responsibility* (Report, December 1992).

97 *Criminal Code Act 1995* (Cth) ch 2 ('General principles of criminal responsibility').

98 Both have adopted substantially the same definition of recklessness as in the Commonwealth Criminal Code: *Criminal Code 2002* (ACT) s 20; *Criminal Code Act 1983* (NT) s 43AK.

99 'A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.' The Act specifies that the identification of these four elements 'does not prevent a law that creates a particular offence from specifying other fault elements': *Criminal Code Act 1995* (Cth) Schedule, s 5.1 The fault elements are defined in ss 5.2-5.5.

100 Sometimes Commonwealth offences (usually drug, child exploitation, or telecommunication offences where recklessness may be a fault element) are joint with state offences, so they can appear on the same indictment as the state offences. Whether a joint prosecution is prosecuted by the Commonwealth Director of Public Prosecutions or the state Director of Public Prosecutions is based on an assessment of the relative seriousness of the charges and on a 'balance of convenience' test: Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process*, (Policy, 19 July 2021) 9-10 [3.11].

6.62 Aside from murder and manslaughter, there are four core violence offences for harm caused to UN or associated personnel (see Table 15).

Table 15: Offences against the person—Commonwealth of Australia

Offence	Penalty (maximum term of imprisonment)
Murder s 71.2 Sch, Criminal Code Act	**Imprisonment for life**
Intentionally causing serious harm s 71.4 Sch, Criminal Code Act	**20 years**
Recklessly causing serious harm s 71.5 Sch, Criminal Code Act	**15 years**
Intentionally causing harm s 71.6 Sch, Criminal Code Act	**10 years**
Recklessly causing harm s 71.7 Sch, Criminal Code Act	**7 years**

6.63 Injuries are defined as follows:

- 'harm' 'means physical harm or harm to a person's mental health, whether temporary or permanent. However, it does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.'[101]
- 'serious harm' 'means harm (including the cumulative effect of any harm):
  (a) that endangers, or is likely to endanger, a person's life; or
  (b) that is or is likely to be significant and longstanding.'[102]

6.64 The definitions in Victoria's Crimes Act (see Chapter 4) echo these definitions in some respects. But Victoria's injury definitions do not refer to 'likely' outcomes, and a serious injury in Victoria is one that is 'substantial and protracted' rather than 'significant and longstanding'.[103]

What is the threshold for recklessness in the Commonwealth of Australia?

6.65 Under the Criminal Code Act, recklessness involves awareness of a 'substantial' risk and unjustifiably taking that risk.[104] We discuss the 'unjustifiable' branch of the test below.

6.66 The code drafting committee chose to characterise the risk as 'substantial' rather than 'probable' or 'possible'. The committee said that references to risks that are 'probable' or 'possible':

> invite speculation about mathematical chances and ignore the link between the degree of risk and the unjustifiability of running that risk in any given situation.[105]

101 *Criminal Code Act 1995* (Cth) Schedule, 'Dictionary'.
102 Ibid.
103 *Crimes Act 1958* (Vic) s 15. Another difference is that the Commonwealth definition of serious harm does not include reference to the destruction of a pregnant woman's foetus.
104 *Criminal Code Act 1995* (Cth) Schedule, s 5.4.
105 Model Criminal Code Officers Committee, *Model Criminal Code Chapters 1 and 2 General Principles of Criminal Responsibility* (Report, December 1992) 27.

6.67 The committee also noted the common law application—at that time—of 'probability' and 'possibility' to different categories of offences:

> It now seems clear at common law that foresight of probability is restricted to murder and foresight of possibility is the test for all other offences, including, complicity in murder.[106]

6.68 The committee rejected the need for different tests. It concluded:

> that the modification of the existing recklessness tests by substituting 'substantial' for 'probability' or 'possibility' and adding the concept of unjustifiability set the proper level for recklessness.[107]

6.69 Subsequent commentary accepts that the word 'substantial' was chosen for its 'irreducible indeterminacy of meaning', which allows courts to apply it flexibly to 'the vast range of offences covered by the Code'.[108] Thus, what counts as 'substantial' varies according to the 'context and gravity of the criminal activity'.[109] But at a minimum, it appears to require that the risk was:

- 'real or of substance as distinct from ephemeral or nominal',[110]
- 'not remote or fanciful'.[111]

Is the Commonwealth test for recklessness subjective, objective, or mixed?

6.70 The Commonwealth test for recklessness imposes a mixture of subjective and objective liability.

6.71 The definition of recklessness in the Commonwealth Code provides that a person was 'aware' of a risk. Explanatory text provided by the Attorney-General's Department says that the Commonwealth Code is:

> constructed on the assumption that the underlying principles of criminal justice require proof of conscious advertence to the physical elements of an offence.[112]

6.72 This was confirmed in a case dealing with importation of prohibited goods, being reckless about whether the contents were prohibited.[113] Justice Gray in the Supreme Court of South Australia found that to establish recklessness in accordance with the Code definition:

> Conscious awareness of risk is required; it is not sufficient to show that the risk was obvious or well known.[114]

106 Ibid.
107 Ibid.
108 Attorney-General's Department (Cth), '5.4 Recklessness', *Commonwealth Criminal Code: Guide for Practitioners* (Online Guide) 5.4-A <https://www.ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners-draft/part-22-elements-offence/division-5-fault-elements/54-recklessness>; *Hann v Director of Public Prosecutions (Cth)* [2004] SASC 86, [23]; (2004) 88 SASR 99, 106 [23] (Gray J).
109 *Hann v Director of Public Prosecutions (Cth)* [2004] SASC 86, [23] (Gray J). See generally [23]-[25], [33].
110 Ibid [25] n 9 (Gray J), citing *Butterworth's Australian Legal Dictionary* (1997) 1128; *Butterworth's Words and Phrases Legally Defined* (1989) Vol 4, 474.
111 Ibid [33] (Gray J).
112 Commonwealth Attorney-General's Department, '5.4 Recklessness', *Commonwealth Criminal Code: Guide for Practitioners* (Online Guide) 5.4-Overview <https://www.ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners-draft/part-22-elements-offence/division-5-fault-elements/54-recklessness>.
113 Contrary to s 233BAB(5) of the *Customs Act 1901* (Cth).
114 *Hann v Director of Public Prosecutions (Cth)* [2004] SASC 86, [26] (Gray J). Justice Gray also noted: 's 5.4 of the *Criminal Code* provides a definition of recklessness. This definition is premised on the proposition that criminal liability should not be imposed unless the accused had knowledge of the substantial risk that his or her conduct was criminal, or knowledge of the substantial risk that his or her conduct would result in a prohibited harm': at [22].

6.73 But while the accused person must have been consciously aware of some level of risk, the Commonwealth definition also has an objective aspect. The Attorney-General's Department explains:

> To say that a risk was substantial, it is necessary to adopt the standpoint of a reasonable observer at the time of the allegedly reckless conduct … The risk is substantial if a reasonable observer would have taken it to be substantial at the time the risk was taken.
>
> … Since it is the *reasonable* observer who sets a standard against which the [accused] will be measured, this notional figure may be in possession of more information than the [accused] and will usually be endowed with far better judgement about risks than the [accused].[115]

6.74 The definition of recklessness in the Commonwealth Code provides not only that a person was aware of a 'substantial' risk, but that, 'having regard to the circumstances known to [them], it [was] unjustifiable to take the risk'.

6.75 During the drafting of the Code, 'unreasonable' was proposed instead of 'unjustifiable'. Parliament opted to use the word 'unjustifiable' 'to avoid confusion between recklessness and criminal negligence.'[116]

6.76 While the wording of the test made it clear that:

> the unjustifiability of the risk is to be assessed on the facts as the accused believes them to be [it …] leaves the question of whether the risk taken is 'unjustifiable' for the jury (or the judge or magistrate in cases where there is no jury).[117]

6.77 Applying the test:

> requires that the jury make a moral or value judgment concerning the accused's advertent [knowing] disregard of the risk.[118]

6.78 Both branches of the Commonwealth definition of recklessness therefore appear to combine subjective and objective risk assessments, adding to its complexity.[119]

Limitations of the Commonwealth test

6.79 The use of objective tests appears to dilute the original intention of the Code drafting committee. This was to create subjective fault elements in accordance with principles of justice and 'the mainstream of legal development of the late 20th century'.[120]

6.80 By comparison, the Victorian test remains true to these justice-oriented developments.

6.81 The limited success of the codification project demonstrates the complexity of systematising the criminal law within and across jurisdictions. It suggests there is now greater appreciation of the advantages of criminal laws that are responsive to the distinctive conditions within different states and territories.

6.82 In our view, the Commonwealth definition of recklessness is not appropriate as a model for piecemeal reform in Victoria.

115 Attorney-General's Department (Cth), '5.4 Recklessness', *Commonwealth Criminal Code: Guide for Practitioners* (Online Guide) 5.4-A <https://www.ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners-draft/part-22-elements-offence/division-5-fault-elements/54-recklessness> (emphasis in original).

116 Explanatory Memorandum, Criminal Code Bill 1994 (Cth) 15.

117 Model Criminal Code Officers Committee, *Model Criminal Code Chapters 1 and 2 General Principles of Criminal Responsibility* (Report, December 1992) 27.

118 *R v Narongchai Saengsai-Or* [2004] NSWCCA 108, [70]; [2004] 61 NSWLR 135, 147 [70] (Bell J, Wood CJ and Simpson J agreeing).

119 Even though 'value judgments' are not ordinarily described as 'objective', because the judgment is one that the jury must reach based on its own assessment of what moral behaviour requires, it can be characterised for our purposes as objective.

120 Model Criminal Code Officers Committee, *Model Criminal Code Chapters 1 and 2 General Principles of Criminal Responsibility* (Report, December 1992) 23.

South Australia

The criminal law framework

6.83 South Australia is a common law jurisdiction.[121] But aside from murder and manslaughter, the elements of most serious offences are contained in its *Criminal Law Consolidation Act 1935* (SA).

6.84 Where recklessness is an element of an offence in the Criminal Law Consolidation Act, the Act may include a definition that applies to that offence or to a group of offences. Definitions of recklessness in the Act vary.

Murder and other offences against the person

6.85 Murder and other offences against the person are contained in Part 3 of the Criminal Law Consolidation Act. The Act only provides the penalties for murder and manslaughter, leaving their definition to the common law.[122] Murder can be intentional or reckless.

6.86 'Causing physical or mental harm' offences are set out in Division 7A of Part 3 of the Criminal Law Consolidation Act (Table 16). This Division has its own 'interpretation' section, which includes injury definitions and a definition of 'recklessness' (see below).

Table 16: Offences against the person in South Australia

Offence	Penalty (maximum term of imprisonment)
Murder s 11 Criminal Law Consolidation Act	**Imprisonment for life**
Intentionally causing serious harm s 23(1) Criminal Law Consolidation Act	**20 years** for a basic offence; 25 years for an aggravated offence
Recklessly causing serious harm s 23(3) Criminal Law Consolidation Act	**15 years** for a basic offence; 19 years for an aggravated offence
Intentionally causing harm s 24(1) Criminal Law Consolidation Act	**10 years** for a basic offence; 13 years for an aggravated offence
Recklessly causing harm s 24(2) Criminal Law Consolidation Act	**5 years** for a basic offence; up to 8 years for an aggravated offence (depending on the circumstances)
Assault s 20 Criminal Law Consolidation Act Assault is not part of the 'physical or mental harm offences' in Div 7A. It is an intentional offence.	**2 years** for a basic offence; up to 5 years if there are aggravating circumstances (max. depends on which circumstances apply)

121 Penny Crofts et al, *Waller and Williams Criminal Law: Text and Cases* (LexisNexis Butterworths, 14th ed, 2020) 30.
122 *Criminal Law Consolidation Act 1935* (SA) ss 11, 13. Although s 12A provides that a person is also guilty of murder if they caused the death of another through an intentional act of violence that was committed while engaged in a major offence.

6.87 In a section that appears designed to operate in a similar manner to the 'without lawful excuse or justification' element in many of Victoria's offences against the person, the South Australian legislation provides that if a person lawfully consents to the infliction of harm, then it will not be an offence under Division 7A.[123] People may consent to harm that 'fall[s] within limits that are generally accepted in the community'.[124]

6.88 Division 7A also includes endangerment offences that can be committed intentionally or recklessly.[125] But the section containing these offences uses the phrase 'with reckless indifference' rather than 'reckless' or 'recklessly'. We discuss how this has been interpreted below.

6.89 Injuries for the causing harm offences are defined as:

- 'harm' 'means physical or mental harm (whether temporary or permanent)'[126]
- 'mental harm' 'means psychological harm and does not include emotional reactions such as distress, grief, fear or anger unless they result in psychological harm'[127]
- 'physical harm' 'includes—
  - (a) unconsciousness;
  - (b) pain;
  - (c) disfigurement;
  - (d) infection with a disease'[128]
- 'serious harm' 'means—
  - (a) harm that endangers a person's life; or
  - (b) harm that consists of, or results in, serious and protracted impairment of a physical or mental function; or
  - (c) harm that consists of, or results in, serious disfigurement.'[129]

6.90 These definitions are very similar to the definitions for offences against the person in Victoria (see Chapter 4). But the Victorian definition of serious injury refers to 'substantial' rather than 'serious' impairment and does not tie the harm to impairment of a physical or mental function.

What is the threshold for recklessness in South Australia?

6.91 'Recklessness' in South Australia has different meanings in relation to murder and other offences against the person.

6.92 To be guilty of reckless murder, a person must have been aware that death or 'grievous bodily harm' was a *probable* result of their actions.[130]

123 Ibid s 22(1), 'Conduct falling outside the ambit of this Division'.
124 Ibid s 22(3).
125 Ibid s 29(1), (2), (3).
126 *Criminal Law Consolidation Act 1935* (SA) s 21. But note that it is not an offence under Division 7A to cause only mental harm 'unless—(a) the defendant's conduct gave rise to a situation in which the victim's life or physical safety was endangered and the mental harm arose out of that situation; or (b) the defendant's primary purpose was to cause such harm': at s 22(5).
127 *Criminal Law Consolidation Act 1935* (SA) s 21.
128 Ibid.
129 Ibid.
130 Courts Administration Authority of South Australia, *South Australian Criminal Trials Bench Book* (3rd ed, 2021) 248–9 [11], [16], [17]. 'Probability' has been defined as 'more likely than not': *R v Shah* [2018] SASCFC 90, [34]; [2018] 85 MVR 291, 303 [34] (Kourakis CJ, Blue and Doyle JJ). However, the *South Australian Criminal Trials Bench Book* section on murder says: 'In most cases, it is not desirable to attempt to translate "probable" into mathematical percentages, or into a more precise form such as "more likely than not": at 249 [18]. 'Knowledge that [death or grievous bodily harm] is *possible* is not sufficient': ibid 249 [17] (emphasis in original).

6.93 The threshold for recklessness for 'causing harm' offences is different. It is where a person:

(a) is aware of a substantial risk that his or her conduct could result in harm or serious harm (as the case requires); and

(b) engages in the conduct despite the risk and without adequate justification.[131]

6.94 The *South Australian Criminal Trials Bench Book* does not expand on the meaning of 'substantial risk' in its overview of the 'causing harm' offences, except to say that:

> Recklessness requires more than negligence, carelessness or lack of thought. It requires proof of an active thought process.[132]

6.95 The Court of Criminal Appeal in South Australia cautions against explaining the meaning of 'ordinary' words such as 'substantial risk' by reference to synonyms.[133] But it has observed that a 'substantial risk' is *not* synonymous with a 'likely' risk,[134] and may capture lesser risks:

> Persons who are risk averse may give the expression 'substantial risk' a meaning which encompasses consequences which are not likely at all.[135]

6.96 This is consistent with material in the *South Australian Criminal Trials Bench Book* acknowledging that 'substantial risk' may be interpreted by juries as 'a degree of possibility that is little more than a chance or risk'.[136]

6.97 In the Victorian context, the Office of Public Prosecutions (OPP) says that its proposed 'possibility' test is consistent with the recklessness definition for South Australia's causing harm offences.[137] It also says that if Victoria adopts a possibility test, it might not have to change its penalties because other jurisdictions with a possibility threshold have similar penalties:

> In South Australia, where recklessly causing serious harm to another requires awareness of a substantial risk that the conduct *could* result in serious harm, the maximum penalty is 15 years for a 'basic' offence, or 19 years for an aggravated offence.[138]

6.98 It is not clear that the recklessness test for 'causing harm' offences in South Australia can be equated with a 'possibility' test. As in the Commonwealth Criminal Code, the South Australian definition uses the language of 'substantial risk' combined with a requirement that the accused person engaged in the conduct 'despite the risk and without adequate justification'. It creates a 'link between the degree of risk and the unjustifiability of running that risk in any given situation.'[139] Like the Commonwealth test, its meaning may be 'indeterminate' and depend on the context.[140]

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131 *Criminal Law Consolidation Act 1935* (SA) s 21. Division 7A also includes a 'shooting at police officers' offence that can be committed intentionally or recklessly. The offence contains its own definition of recklessness, which mirrors the general section 21 definition, except that it refers specifically to the harm of a police officer being hit with shot or a bullet (etc): at s 29A(6).

132 Courts Administration Authority of South Australia, *South Australian Criminal Trials Bench Book* (3rd ed, 2021) 275 [12], citing *R v Dransfield* [2016] SASCFC 68, [21].

133 *Ducaj v The Queen* [2019] SASCFC 152, [32]; (2019) 135 SASR 127, 135–6 [32] (Kourakis CJ, Kelly and Peek JJ agreeing): 'to attempt to elucidate statutory text by the use of synonyms risks putting a judicial gloss on the statutory language. Recognising that the meaning of ordinary words is a question of fact, the substitution of other words for the statutory text may result in the application of a different meaning by the tribunal of fact to that intended by the legislature. It is the statutory language to which a tribunal of fact must give meaning and then apply to the facts.'

134 The Court rejected the prosecution's contention that 'creating a substantial risk of an event occurring is, for all practical purposes, the same as engaging in conduct which is likely to cause that event': *Ducaj v The Queen* [2019] SASCFC 152, [30].

135 Ibid [32] (Kourakis CJ, Keely and Peek JJ agreeing).

136 In the context of a discussion of the meaning of the word 'likely' in the first branch of endangerment offences (which is a separate element to the 'reckless indifference' element of these offences): Courts Administration Authority of South Australia, *South Australian Criminal Trials Bench Book* (3rd ed, 2021) 286 [29].

137 Submission 10 (Office of Public Prosecutions).

138 Ibid (emphasis in original).

139 Model Criminal Code Officers Committee, *Model Criminal Code Chapters 1 and 2 General Principles of Criminal Responsibility* (Report, December 1992) 27.

140 See discussion in paragraph [6.69].

6.99 We also note that in a recent dissenting judgment, a member of the South Australian Court of Criminal Appeal said a 'substantial risk' is one that is 'likely'.[141] He referred to previous authority in South Australia supporting the view that conduct giving rise to a 'substantial risk' of harm is comparable to conduct giving rise to a 'probability' of harm.[142] This authority was recently applied by a trial judge in the District Court of South Australia, who equated an act that is 'likely' to cause harm with:

> the notion of a substantial i.e., a real and not remote chance, regardless of whether that chance was more or less than 50 per cent.[143]

6.100 The second branch of the Division 7A definition of recklessness can itself be broken into two parts. The accused person:

- engaged in the conduct despite ('regardless of') the risk, and
- without adequate justification.[144]

6.101 In the above, the first point is often paraphrased by courts in South Australia as the accused person '"does not care" about the relevant consequence or other matter'.[145] The second point has been described as operating to prevent defensibly risky conduct from being criminalised:

> there may be some conduct which is not reckless despite the actor's appreciation of the likelihood that life will be endangered. Medical treatment is one such example. So too is conduct engaged in under dangerous circumstances, for example on the roads or in work places, but in the hope that a known risk will nonetheless be averted.[146]

6.102 Even though the phrase 'without adequate justification' functions as a 'reasonableness' limitation, the scope of reckless causing harm offences is further limited. The Act provides that the 'causing harm' offences do not apply to conduct that is 'generally accepted in the community as normal incidents of social interaction or community life', unless the accused person intended to cause harm.[147]

6.103 Endangerment/creating risk of harm offences in Division 7A use the expression 'recklessly indifferent' rather than 'reckless' or 'recklessly'. For example, section 29 endangerment involves doing or omitting to do something knowing it is likely to endanger life and intending or being recklessly indifferent as to whether the life of another is endangered.[148]

6.104 While 'recklessly' and 'recklessly indifferent' have been used interchangeably by the South Australian courts when interpreting common law offences,[149] they have different meanings for the purposes of the endangerment/creating risk of harm offences.

6.105 In the case of *R v Shah*, the South Australian Court of Criminal Appeal said 'it would be incongruous' if one part of the offence required knowledge of likelihood and the other required knowledge of substantial risk:

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141 *Ducaj v The Queen* [2019] SASCFC 152, [75] (Stanley J). Justice Stanley cites the High Court's decision in *Boughey v The Queen* (1986) 161 CLR 10. He says the High Court held that in 'a comparable provision', 'the word "likely" was used in its ordinary meaning, namely, to convey the notion of a substantial ie a real and not remote chance regardless of whether that chance was more or less than 50%.'

142 Ibid [76] (Stanley J), citing *Nelson v Police* [2011] SASC 55. In *Nelson*, Chief Justice Doyle said that the meaning of 'recklessly indifferent' in endangerment offences (which we discuss below) requires 'proof of … conduct giving rise to a probability of harm, or substantial risk of harm, and awareness of that probability or substantial risk of harm, and a decision to engage in the relevant conduct nevertheless.' He said that the definition of 'recklessly' in section 21 is the same: both the 'causing harm' and 'endangerment' offences require conduct that is 'likely' to cause harm (or endanger a person). Assessing 'likelihood' involves 'consideration [of] whether the act creates a real or substantial risk of harm': *Nelson v Police* [2011] SASC 55, [6], [13].

143 *R v McFarlane* [2022] SADC 155, [6] (Stretton J). For the purposes of the section 20A offence of choking, suffocation or strangulation in a domestic setting, Judge Fuller in the South Australian District Court defined recklessness as involving foresight of a 'probable' risk and rejected the prosecution's submission that a possibility threshold applies. While there is no statutory definition of recklessness for the purposes of the section 20A offence, Judge Fuller commented that a 'possibility' test is lower than the 'substantial' risk test set out in section 21. She found that the common law *Crabbe* test (followed in Victoria in *Campbell*) is appropriate given the choking offence is 'an indicator of escalation to domestic homicide': *R v Fraser* [2020] SADC 127 [31] and see generally [26]-[31]. We discuss Victoria's new choking offences in Chapter 9.

144 *R v Shah* [2018] SASCFC 90, [36] (Kourakis CJ, Blue and Doyle JJ).

145 Ibid [37] (Kourakis CJ, Blue and Doyle JJ), citing *The Queen v O* (Supreme Court of South Australia, Bleby J, 19 June 1997).

146 Ibid [46] (Kourakis CJ, Blue and Doyle JJ).

147 *Criminal Law Consolidation Act 1935* (SA) s 22(4).

148 'Where a person, without lawful excuse, does an act or makes an omission—(a) knowing that the act or omission is likely to endanger the life of [or cause serious harm to; or cause harm to] another; and (b) intending to endanger the life of [or cause serious harm to; or cause harm to] another or being *recklessly indifferent* as to whether the life of another is endangered [or such harm is caused], that person is guilty of an offence': *Criminal Law Consolidation Act 1935* (SA) s 29(1), (2), (3) (emphasis added).

149 *R v Shah* [2018] SASCFC 90, [33] (Kourakis CJ, Blue and Doyle JJ).

> Accordingly … reckless indifference requires that the [accused] know that it is likely that his or her conduct will endanger the life of another and does not care, ie engages in the conduct despite the risk and without adequate justification.[150]

6.106 In the same case, the Court addressed the fact that the expression, 'recklessly indifferent' is used for a wide range of other offences,[151] including some sexual offences. In Division 11 sexual offences, the expression is defined as awareness of a *possibility* that a person is not consenting or not giving any thought to that possibility.[152] In *Shah,* the Court held that the Division 11 definition 'is tailored to offences in which lack of consent … is an element and is inapposite to endangerment of life and most (if not all) … other offences' where it is used.[153] It concluded that:

> the concept of 'reckless' and 'reckless indifference' can invite a different focus, or at least a focus on a different level of risk, depending on context.[154]

Is the South Australian test for recklessness subjective, objective, or mixed?

6.107 For 'causing harm' offences in South Australia, the test for recklessness is subjective,[155] at least with respect to the 'substantial risk' part of the definition.

6.108 The suggested jury directions for recklessly causing harm and recklessly causing serious harm in the *South Australian Criminal Trials Bench Book* say in respect of the 'recklessness' element of the offence:

> this element concerns the accused's state of mind. It is not enough that you, or a reasonable person, would have realised that the accused's conduct would create a substantial risk of [harm or serious harm]… You can only find this element proved if the prosecution proves that [the accused] was aware of that risk, and engaged in the conduct without adequate justification.[156]

6.109 The jury directions are silent about the meaning of 'without adequate justification'. Indicating that the phrase could be confusing for juries, the directions suggest that trial judges consider omitting reference to it unless it is an issue in a case.[157] We discuss in Chapters 7 and 11 how juries find it difficult to apply complex fault elements.

Limitations of the South Australian test

6.110 The number of definitions of recklessness in the Criminal Law Consolidation Act and the subtle distinctions between them make the law relating to recklessness in South Australia complex and difficult to navigate. This is not an area of law that is accessible or easy for lawyers to explain to people without legal training. The South Australian example supports the view we reach in Chapter 12 that the Victorian government should not legislate a definition of recklessness for offences against the person.

6.111 Victoria's definition of recklessness is not perfectly consistent across all Victorian offences (see Chapter 5). However, by comparison with South Australia it is remarkably consistent, and over the decades since the *Campbell* decision (see Chapter 3) it has been applied relatively consistently. Compared to South Australia, the law in Victoria is clear and accessible.

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150 Ibid [45] (Kourakis CJ, Blue and Doyle JJ). The Court said the trial judge had erred by directing a jury that 'reckless indifference' for endangerment offences required 'no more than that a life *might* be endangered': at [7] (Kourakis CJ, Blue and Doyle JJ) (emphasis in original). The *Criminal Trials Bench Book* similarly explains that 'reckless indifference' for the purpose of the endangerment offences 'means that the … accused knew the conduct was likely to endanger life': Courts Administration Authority of South Australia, *South Australian Criminal Trials Bench Book* (3rd ed, 2021) 286–7 [35], 287 [37] ('awareness of the possibility' is insufficient).

151 Sections 19 (unlawful threats), 32C (spiking food or beverage), 85(1) (arson), 85(1) (property damage), 85A (endangering property), 85B (causing a bushfire), 245 (interfering with jurors), 254 (escape from lawful custody), 255 (harbouring an escapee) and 257 (criminal defamation): *R v Shah* [2018] SASCFC 90, [42] (Kourakis CJ, Blue and Doyle JJ).

152 '[A] person is recklessly indifferent to the fact that another person does not consent to an act … if he or she—(a) is aware of the possibility that the other person might not be consenting … but decides to proceed regardless of that possibility; or (b) is aware of the possibility that the other person might not be consenting … but fails to take reasonable steps to ascertain whether the other person does in fact consent …; or (c) does not give any thought as to whether or not the other person is consenting …': *Criminal Law Consolidation Act 1935* (SA) s 47.

153 *R v Shah* [2018] SASCFC 90, [42] (Kourakis CJ, Blue and Doyle JJ).

154 Ibid [43] (Kourakis CJ, Blue and Doyle JJ).

155 This was historically the case for all common law offences: ibid [34].

156 Courts Administration Authority of South Australia, *South Australian Criminal Trials Bench Book* (3rd ed, 2021) 279, 284.

157 Ibid 279 n 14, 284 n 18.

New Zealand

The criminal law framework

6.112 New Zealand has codified its criminal offences but not general principles of criminal responsibility. This means that the fault elements for offences against the person come from the common law, initially as it developed in England and Wales.[158]

Murder and other offences against the person

6.113 The *Crimes Act 1961* (NZ) (NZ Crimes Act) establishes a hierarchy of injury offences, including murder.

6.114 Part 8 of the NZ Crimes Act deals with 'crimes against the person'. It includes several offences that roughly correlate with the hierarchy set out for other jurisdictions (Table 17).

Table 17: Offences against the person in New Zealand

Offence	Penalty (maximum term of imprisonment)
Murder ss 167 & 168 NZ Crimes Act	**Imprisonment for life.**[159] There is a presumption in favour of life imprisonment for murder.[160]
Wounding with intent to cause grievous bodily harm s 188(1) NZ Crimes Act	**14 years**
Injuring with intent to cause grievous bodily harm s 189(1) NZ Crimes Act	**10 years**
Wounding with intent to injure or with reckless disregard for the safety of others s 188(2) NZ Crimes Act	**7 years**
Injuring with intent to injure or with reckless disregard for the safety of others s 189(2) NZ Crimes Act	**5 years**
Common assault s 196 NZ Crimes Act[161]	**1 year**

158 Julia Tolmie et al, *Criminal Law in Aotearoa New Zealand* (LexisNexis NZ Limited, 2022) 23–4. New Zealand's Crimes Act provides that no one shall be convicted of a common law offence or an offence under British legislation. However, people can still be punished by Parliament for contempt and under Court Martial or by officers of the New Zealand armed forces: *Crimes Act 1961* (NZ) s 9.

159 *Crimes Act 1961* (NZ) s 172(1).

160 *Sentencing Act 2002* (NZ) s 102(1).

161 Assault is defined in section 2 as 'the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, present ability to effect his or her purpose'. Section 196 provides the penalty: *Crimes Act 1961* (NZ) ss 2, 196.

6.115 The NZ Crimes Act says that 'to injure' means 'to cause actual bodily harm'.[162] The specific injuries associated with these offences are defined similarly as in England and Wales, although the slight differences in wording may be significant in practice:

- 'actual bodily harm' ('injury') means 'discomfort that is more than minor or momentary. The harm need not be permanent or long-lasting. It may be internal or external.'[163]
- 'wound' means 'an injury involving breaking the skin, a cut or a laceration of some kind. This can be evidenced by a flow of blood and is usually external but may be internal.'[164]
- 'grievous bodily harm' means 'really serious harm interfering with health or human function.'[165]

What is the threshold for recklessness in New Zealand?

6.116 A form of reckless murder combines an intention to cause an injury that the offender knows is *likely* to cause death with recklessness about death.[166] The courts have decided that the fault element for this offence requires that the accused:

- knew their actions were *likely* to cause death, and
- consciously ran the risk of causing death.[167]

6.117 'Likely' in this context is explained to juries as meaning that 'death could well happen or was a real risk'.[168]

6.118 For reckless offences other than murder, the defendant must have recognised a 'real possibility' of harm and have acted unreasonably with regard to that possibility.[169] But the words 'real possibility' need not be explained to a jury. Often juries are simply told to assess if the defendant recognised a risk of harm and unreasonably took that risk.[170]

6.119 The courts have at various times described the level of risk necessary to establish recklessness as 'likely or possible', or something that 'could well' happen.[171] The situation appears to be the same as in England and Wales, where no specific level of risk is required. Instead:

> The mens rea of recklessness necessitates balancing the likelihood, nature and gravity of the harm, against the value of the conduct.[172]

6.120 It is now accepted by the courts in New Zealand that this balancing act involves applying a test of reasonableness.

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162 Ibid s 2.
163 Courts of New Zealand, 'Definitions Used in the Question Trails', *Jury directions and question trails* (Web Page) <https://www.courtsofnz.govt.nz/for-lawyers/jury-directions-and-question-trails/definitions-used-in-the-question-trails/>.
164 Ibid.
165 Ibid.
166 'Culpable homicide is murder in each of the following cases: ... (b) if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not': *Crimes Act 1961* (NZ) s 167(b).
167 Courts of New Zealand, 'Murder or Manslaughter—Standard Case (Sections 167(a)–(b) and 171 Crimes Act 1961)', *Jury directions and question trails - Homicide* (Web Page) <https://www.courtsofnz.govt.nz/for-lawyers/jury-directions-and-question-trails/homicide/murder-or-manslaughter-standard-case/>.
168 Ibid; see also Julia Tolmie et al, *Criminal Law in Aotearoa New Zealand* (LexisNexis NZ Limited, 2022) 164–5.
169 Courts of New Zealand, 'Definitions Used in the Question Trails', *Jury directions and question trails* (Web Page) <https://www.courtsofnz.govt.nz/for-lawyers/jury-directions-and-question-trails/definitions-used-in-the-question-trails/>.
170 See, eg, Courts of New Zealand, 'Wounding, Etc. with Reckless Disregard for the Safety of Others (Section 188(2) Crimes Act 1961)', *Jury directions and question trails - Violence, threats, and weapon offences* (Web Page) <https://www.courtsofnz.govt.nz/for-lawyers/jury-directions-and-question-trails/violence-threats-and-weapon-offences/wounding-etc-with-reckless-disregard-for-the-safety-of-others-section-1882-crimes-act-1961/>; Courts of New Zealand, 'Injuring with Reckless Disregard for the Safety of Others (Section 189(2) Crimes Act 1961)', *Jury directions and question trails - Violence, threats, and weapon offences* (Web Page) <https://www.courtsofnz.govt.nz/for-lawyers/jury-directions-and-question-trails/violence-threats-and-weapon-offences/injuring-with-reckless-disregard-for-the-safety-of-others-section-189-2-crimes-act-1961/>.
171 *R v Harney* [1987] NZCA 86; [1987] 2 NZLR 576, 579; *Hilder v Police* [1989] NZHC 30; [1989] 4 CRNZ 232; see also Julia Tolmie et al, *Criminal Law in Aotearoa New Zealand* (LexisNexis NZ Limited, 2022) 164–5.
172 Evans, Amelia, 'Critique of the Criminalisation of Sexual HIV Transmission' (2007) 38(3) *Victoria University of Wellington Law Review* 517, 530; see also Julia Tolmie et al, *Criminal Law in Aotearoa New Zealand* (LexisNexis NZ Limited, 2022) 164–5.

Is the New Zealand test for recklessness subjective, objective, or mixed?

6.121 In line with *Cunningham* in England and Wales, recklessness in New Zealand was for many years characterised as subjective.[173] Following *Caldwell*, the New Zealand Court of Appeal in 1982 used an objective standard for recklessness in a property damage case.[174] It stressed that this did not represent 'a general adoption of *Caldwell*' but did not provide guidance on when or how the objective standard might apply to other offences.[175] This left the law in an 'uncertain' state.[176]

6.122 Five years later, the New Zealand Court of Appeal decided that recklessness for the purposes of murder required 'a conscious taking of the risk of causing death'.[177] But it did not rule out using *Caldwell* in future and did not provide guidance 'as to when it might be used'.[178]

6.123 In 1989, a new Crimes Bill was introduced to Parliament, containing general principles of criminal responsibility.[179] The Explanatory Note to the Bill explained that two definitions would be introduced, separately capturing 'pre-*Caldwell*' and '*Caldwell*' recklessness. It explained the necessity of this:

> it is bad drafting practice to have a pivotal term [such as recklessness] meaning different things in different provisions, with nobody knowing which meaning it has in any particular provision unless and until a case comes before the Court of Appeal for determination.
>
> The solution adopted in the Bill is to use [two] different terms. 'Reckless' is used in the pre-*Caldwell* sense (running a recognised risk), and 'heedless' is used for *Caldwell* recklessness (not giving any thought to the possibility of risk).[180]

6.124 This Bill was never passed. In subsequent years, the New Zealand courts were relatively consistent in applying what they described as a 'subjective' test for recklessness.[181] However, they also added a 'reasonableness' component and this aspect of the test has been described in objective terms:

> the question whether the [accused's] actions were unreasonable came down to whether the [accused] had acted as a reasonable and prudent person—that is, as a law-abiding person doing their best to comply with the law.[182]

6.125 The position that the courts have now arrived at appears to be one that applies an objective limit to the subjective test. The test used is whether:

> the [accused] recognised there was a real possibility that the consequence or outcome could occur and … having regard to that possibility, the [accused's] actions were unreasonable.[183]

6.126 Juries are directed that:

> 'Unreasonable' actions are actions that a reasonable and prudent person would not have taken.[184]

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173 Simon France, 'The Mental Element' (1990) 20(3) *Victoria University of Wellington Law Review* 43, 44–45.
174 *R v Howe* [1982] 1 NZLR 618.
175 Simon France, 'The Mental Element' (1990) 20(3) *Victoria University of Wellington Law Review* 43, 44 (emphasis omitted).
176 Ibid; see also Julia Tolmie et al, *Criminal Law in Aotearoa New Zealand* (LexisNexis NZ Limited, 2022) 162–4.
177 *R v Harney* [1987] NZCA 86; Simon France, 'The Mental Element' (1990) 20(3) *Victoria University of Wellington Law Review* 43, 45.
178 Simon France, 'The Mental Element' (1990) 20(3) *Victoria University of Wellington Law Review* 43, 45; Findlay Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge University Press, 2016) 58.
179 The Bill is discussed generally in Simon France, 'The Mental Element' (1990) 20(3) *Victoria University of Wellington Law Review* 43. The definition of recklessness was: 'A person is reckless as to any consequence … where: (a) The person does or omits to do the act knowing or believing that there is a risk that the consequence will result; and (b) It is, in the circumstances known to the person, unreasonable to take the risk': at 45.
180 Crimes Bill 1989 (NZ) (Explanatory Note No 152–1) vi.
181 Findlay Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge University Press, 2016) 58–9.
182 *Cameron v The Queen* [2018] 1 NZLR 161, 202 [97]; Nick Chisnall, 'Case Note: *Cameron v R* [2017] NZSC 89 - Controlled Drug Analogues, Indeterminacy and Mens Rea under the Misuse of Drugs Act 1975' [2017] *New Zealand Criminal Law Review* 256, 264. See also *Griffin v R*, a strangulation case where the High Court quashed a conviction on a strangulation charge but appeared to accept the trial judge's description of recklessness as requiring recognition of 'the real possibility' of impeding the victim's normal breathing combined with a requirement that the accused's actions were unreasonable in the 'sense that a reasonable and prudent person would not have done' what he did: *Griffin v R* [2022] NZHC 2325, [24], [34], [49].
183 Courts of New Zealand, 'Definitions Used in the Question Trails', *Jury directions and question trails* (Web Page) <https://www.courtsofnz.govt.nz/for-lawyers/jury-directions-and-question-trails/definitions-used-in-the-question-trails/>; see also Julia Tolmie et al, *Criminal Law in Aotearoa New Zealand* (LexisNexis NZ Limited, 2022) 164–5.
184 Courts of New Zealand, 'Definitions Used in the Question Trails', *Jury directions and question trails* (Web Page) <https://www.courtsofnz.govt.nz/for-lawyers/jury-directions-and-question-trails/definitions-used-in-the-question-trails/>.

Limitations of the New Zealand test

6.127 The objective overlay to the New Zealand test is problematic. Reference to what a 'prudent' person would have done adds complexity to the need to determine what was 'reasonable' in the circumstances. As discussed earlier, basic principles of justice and fairness recognise that people should not be held responsible for serious crimes if they did not recognise that the risk they took was unreasonable. By comparison with New Zealand, the Victorian test is simpler.

Canada

The criminal law framework

6.128 Canada's *Criminal Code*, RSC 1985 includes much of the country's criminal law,[185] but no general principles of criminal responsibility or definitions of fault elements.[186] Fault elements for offences and some defences are part of the common law in Canada.[187]

Murder and other offences against the person

6.129 Offences against the person are set out in Part VIII of the Criminal Code.

6.130 Most of Canada's 'core' injury offences (Table 18) include recklessness as a fault element.[188]

Table 18: Offences against the person in Canada

Offence	Penalty (maximum term of imprisonment)
First degree murder ss 229, 231(2) Criminal Code	**A minimum penalty of imprisonment for life**; no eligibility for parole until 25 years of sentence has been served[189]
Second degree murder ss 229, 231(7) Criminal Code	**A minimum penalty of imprisonment for life**; no eligibility for parole until 10 years of sentence has been served[190]
Causing death by criminal negligence s 220 Criminal Code	**Imprisonment for life**
Aggravated assault s 268 Criminal Code	**14 years**
Causing bodily harm by criminal negligence s 221 Criminal Code	**10 years**

185 Government of Canada, *The Criminal Code of Canada* (Web Page, 4 June 2021) <https://justice.gc.ca/eng/csj-sjc/ccc/index.html>.

186 It does say that there is a presumption of innocence until a person is convicted or discharged of an offence: *Criminal Code*, RSC 1985, c C-46, s 6.

187 As well as common law and the Criminal Code: 'There are other federal laws that also contain criminal law but do not form part of the *Criminal Code*, such as the *Firearms Act*, the *Controlled Drugs and Substances Act*, and the *Youth Criminal Justice Act*': Government of Canada, *The Criminal Code of Canada* (Web Page, 4 June 2021) <https://justice.gc.ca/eng/csj-sjc/ccc/index.html>.

188 In relation to assault: John L Gibson and Henry Waldock, *Canadian Criminal Code Offences* (Thomson Reuters, Online Encyclopedia, 2023) § 4:31. An exception is first degree murder, where the offender 'means' to cause death and it was 'planned and deliberate': *Criminal Code*, RSC 1985, c C-46, ss 229(a)(i), 231; John L Gibson and Henry Waldock, *Canadian Criminal Code Offences* (Thomson Reuters, Online Encyclopedia, 2023) § 30.7.

189 *Criminal Code*, RSC 1985, c C-46, ss 235, 745(a).

190 Ibid ss 235, 745(c).

Table 18: Offences against the person in Canada (continued)

Offence	Penalty (maximum term of imprisonment)
Assault causing bodily harm s 267 Criminal Code	**10 years**
Unlawfully causing bodily harm s 269 Criminal Code	**10 years**
Assault s 265 Criminal Code	**5 years (s 266)**

6.131 Criminal negligence in Canada is distinctive. It involves doing or failing to do something that a person has a legal duty to do while showing 'wanton or reckless disregard for the lives or safety of other persons.'[191] It has been described as 'notorious in its ambiguity'.[192]

6.132 The Criminal Code defines 'bodily harm' as:

> any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature…[193]

What is the threshold for recklessness in Canada?

6.133 The threshold for recklessness appears to vary according to the offence in Canada.[194]

6.134 Reckless murder involves causing death 'mean[ing] to cause bodily harm that [the accused] knows is likely to cause death' and being 'reckless whether death ensues or not'.[195] The courts have decided that for reckless murder, the reference to being 'reckless whether death ensues' 'can be considered an afterthought' because if the accused is proven to have intentionally caused bodily harm knowing that death was likely, they must 'of necessity' have been reckless to continue.[196]

6.135 For criminal harassment—an offence similar to the Victorian offence of stalking—the threshold for recklessness has been described as 'foreseen probability' or 'an awareness of probability'.[197]

6.136 However, in a sexual offence case, recklessness was described in a way that suggested a lower threshold, as:

> the attitude of one who, aware that there is danger that [their] conduct *could* bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance.[198]

6.137 This definition of recklessness has been cited in subsequent cases dealing with offences against the person, where the courts have not identified any specific level of risk necessary to establish recklessness. To establish recklessness, the prosecution only needs to prove that the accused was aware of a risk and proceeded regardless.[199]

191 Ibid s 219.
192 Findlay Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge University Press, 2016) 35, quoting *R v Tutton* [1989] 1 SCR 1392, 1403.
193 *Criminal Code*, RSC 1985, c C-46, s 2.
194 See the discussion in *R v Barca* [2022] MBCA 80, [76] – [97] (Manitoba Court of Appeal) (Beard JA).
195 *Criminal Code*, RSC 1985, c. C-46, s 229(a)(ii).
196 *R v Cooper* 1993 CanLII 147 (SCC); [1993] 1 SCR 146, 154–5 (Cory J). *R v Nygaard* 1989 CanLII 6 (SCC); [1989] 2 SCR 1074, 1075–6, 1088; The Canadian offence of murder is further complicated by being divided into first and second degree murder. Murder is first degree murder when it is 'planned and deliberate', or in specific situations that are listed, for example, if the victim was a police officer. 'All murder that is not first degree murder is second degree murder': *Criminal Code*, RSC 1985, c C-46, s 231.
197 *R v Davis* 1999 CanLII 14505 (MB KB), [35]; (1999), 143 Man.R.(2d) 105 (QB), [35] (Beard J) (Court of Queen's Bench of Manitoba). Criminal harassment involves engaging in stalking behaviour while knowing or being reckless about whether the person targeted is harassed: *Criminal Code*, RSC 1985, c C-46, s 264.
198 *Sansregret v The Queen* 1985 CanLII 79 (SCC), [16]; [1985] 1 SCR 570, 582 (McIntyre J) (emphasis added).
199 In *R v Hamilton* (2005) SCC 47; [2005] 2 SCR 432, Justice Fish, for the majority, noted that the Court in *Sansregret* 'did not set out the degree of risk required': at [32]. In *R v Barca* [2022] MBCA 80, Madam Justice Beard, for the Court, described *Sansregret* as providing the 'most often-cited definition of recklessness': at [78].

6.138 A 'substantial and unjustified risk' test has also been widely used by Canadian courts but variously interpreted.[200]

6.139 In *R v Zora* ('*Zora*'),[201] a recent case dealing with failure to comply with bail conditions, the Supreme Court of Canada decided that 'recklessly' failing to comply with bail conditions means that the accused person:

> perceived *a substantial and unjustified risk* that their conduct would likely fail to comply with the conditions and persisted in this conduct.[202]

6.140 The Court went on to say that a 'substantial and unjustified' risk 'cannot be far-fetched, trivial, or *de minimis*.'[203]

6.141 The Court also described the assessment of risk as a balancing exercise:

> The extent of the risk, as well as the nature of harm, the social value in the risk, and the ease with which the risk could be avoided, are all relevant considerations ...[204]

6.142 In 2020, the authors of Canada's *Annual Review of Criminal Law* commented that the court in *Zora*:

> appeared to impose a higher standard ... for recklessness than commonly defined in the jurisprudence.[205]

6.143 The law relating to the threshold for recklessness in Canada therefore appears to be unsettled.[206]

Is the Canadian test for recklessness subjective, objective, or mixed?

6.144 Canadian courts have repeatedly emphasised that the test for recklessness is subjective.[207] However, some commentators have described the 'substantial and unjustified' test as one that is mixed, including objective and subjective components, and some have said that whether a risk is 'unjustifiable' is 'determined on an objective standard'.[208]

6.145 While the Supreme Court in *Zora* held that an assessment of whether the risk was 'unjustified' is required, it said that this assessment must be undertaken from the perspective of the accused person:

> the focus must be on whether the accused was aware of the substantial risk they took and any of the factors that contribute to the risk being unjustified.[209]

200 Justice Fish in the Canadian Supreme Court has described the test as having 'venerable roots in Canada and in other common law jurisdictions'. The Court was considering the offence of counselling the commission of indictable offences not committed. In that context, Justice Fish, for the majority, said that 'conscious disregard of [a] substantial and unjustified risk' involved the accused having 'knowingly counselled the commission of the offence while aware of the unjustified risk that the offence counselled was in fact *likely* to be committed' (emphasis added). In an aside, Justice Fish quoted a discussion of recklessness in a Canadian Criminal Law textbook: 'courts have arbitrarily endorsed varying standards: "uncertainty, probability, likelihood [and] possibility" - and, in some instances, "probability" and "possibility" in the very same case.' However, Justice Fish said he 'had not been invited to consider afresh the governing principles of recklessness as a fault element under the criminal law of Canada. And I should not be taken to have done so.' *R v Hamilton* (2005) SCC 47 [28], [29], [32] citing D. Stuart, *Canadian Criminal Law: A Treatise* (4th ed. 2001), 225–6, [33].

201 *R v Zora* 2020 SCC 14, [2020] 2 SCR 3; *Criminal Code*, RSC 1985, c. C-46, s 145(3).

202 *R v Zora* 2020 SCC 14, [109] (emphasis added).

203 Ibid [118]. The following cases are listed in support of the claim that the Court has previously 'adopted this standard of risk': *R v Hamilton* 2005 SCC 47, [27]-[29]; *Leary v The Queen* 1977 CanLII 2 (SCC); [1978] 1 SCR 29, 35 (per Dickson J dissenting, but not on this point).

204 *R v Zora* 2020 SCC 14, [118].

205 Steve Coughlan, Adelina Iftene and Rob Currie, *Annual Review of Criminal Law 2020* (Carswell Thomson Reuters, 2021) ch 1, 13.

206 In *R v Barca* [2022] MBCA 80, Madam Justice Beard commented: ''Whether the criteria of "substantial and unjustified" apply in all cases where recklessness is at issue has been raised in the jurisprudence but not determined. I, as well, would decline to determine that larger issue.': at [97].

207 *Sansregret v The Queen* 1985 CanLII 79 (SCC), [16] (McIntyre J); *R v Tatton* [2015] SCC 33, [49] (Moldaver J for the Court); in relation to murder: *R v Cooper* [1993] 1 SCR 146, 156 (Cooper J for the majority).

208 Cited in *R v Barca* [2022] MBCA 80, [87], [92] (Manitoba Court of Appeal) (Beard JA).

209 *R v Zora* 2020 SCC 14, [118]. Note that subsequently, in the Manitoba Court of Appeal, Madam Justice Beard said: '[W]hether the risk is substantial and unjustified is determined on an objective basis, although the accused must have knowledge of the facts that make it so.'; *R v Barca* [2022] MBCA 80, [96].

6.146 An exception to the predominantly subjective approach in Canada may be in criminal negligence offences. These offences require 'a marked and substantial departure … from the conduct of a reasonably prudent' person, where the accused either:

- 'recognised and ran an obvious and serious risk', or
- 'gave no thought to that risk'.[210]

Limitations of the Canadian test

6.147 The unsettled nature of the law in Canada and its complexity suggest it is not an appropriate model for reform.

The United States

The criminal law framework

6.148 Individual states in America have primary responsibility for legislating and enforcing the criminal law.[211] Many states have reformed their law based on a Model Penal Code drafted in 1962 and revised in 1984.[212]

6.149 The Model Penal Code includes four fault elements, from most to least culpable: 'purposely' (meaning 'intentionally' or 'with intent'), 'knowingly', 'recklessly' and 'negligently'.[213]

6.150 We have not included a hierarchy of core injury offences here as the offences and penalties differ from state to state.

What is the threshold for recklessness in the United States?

6.151 In the Model Penal Code, a person acts recklessly if they:

- consciously disregard a substantial and unjustifiable risk
- the risk must be of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to them, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in their situation.[214]

6.152 According to Matthew Ginther and his co-authors:

> Exactly how the dual requirements of substantial and unjustified risk are meant to operate is ambiguous and has been debated by [Model Penal Code] commentators.[215]

210 *R v JF* 2008 SCC 60, [9]; [2008] 3 SCR 215, 222-223 [9] (emphasis omitted).

211 United States Bureau of Justice Statistics, 'The Structure of the Justice System', *The Justice System*, (Web Page, 3 June 2021) <https://bjs.ojp.gov/justice-system#the-structure-of-the-justice-system>.

212 The first draft of the Model Penal Code was completed by the American Law Institute in 1962. It has been 'adopted or adapted' by thirty-four states. A revised version of the Code and accompanying commentary, informed by legislative and judicial responses to the first draft, was published in 1984: American Law Institute, *Model Penal Code and Commentaries : (Official Draft and Revised Comments) : With Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962*. (The Institute, 1985) 1–2. 'Court opinions often cite the MPC as persuasive authority, even if the particular state in which the court resides has not adopted the [Code] provision in question': D Scott Broyles, *Criminal Law in the USA* (Kluwer Law International, 2011) 35.

213 American Law Institute, *Model Penal Code and Commentaries : (Official Draft and Revised Comments) : With Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962*. (The Institute, 1985) s 1.13, 2.02(2). Section 1.13 provides that 'intentionally' or 'with intent' means 'purposely'. One of the fault elements must be established as a prerequisite for a finding of criminal guilt: Ibid s 2.02(1).

214 American Law Institute, *Model Penal Code and Commentaries : (Official Draft and Revised Comments) : With Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962*. (The Institute, 1985) s 2.02(2)(c). In the Sentencing Commission's guidelines, the following definition of recklessness is provided for 'involuntary manslaughter' but appears to have more general application in the guidelines: 'a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation': United States Sentencing Commission, *Guidelines Manual* (United States Sentencing Commission, November 2023) 54 [2A1.4], 367 [3C1.2(2)].

215 Matthew R Ginther et al, 'The Language of Mens Rea' (2014) 67(5) *Vanderbilt Law Review* 1327, 1341.

6.153 The courts have held that what counts as a 'substantial and unjustifiable' risk depends on the context and the harm that could result. Even if the chances of something happening are relatively slight, if it would be a very bad outcome such as death or serious injury, then the risk of it may be 'substantial and unjustifiable'.[216]

Is the United States test for recklessness subjective, objective, or mixed?

6.154 Recklessness in the Model Penal Code explicitly combines subjective and objective standards:

- the accused person 'consciously disregard[ed]' the risk
- this disregard was 'a gross deviation from the standard of conduct that a law-abiding person would observe' in the circumstances known to the accused.[217]

6.155 The Model Penal Code definition of what it means to act recklessly is complex and research suggests it is difficult to apply.

6.156 Lay people in the United States provided with the Model Penal Code's fault element definitions generally attribute blameworthiness consistently with the Code's hierarchy. They treat acting 'purposely' as the most blameworthy state of mind and acting 'negligently' as the least blameworthy of the code's fault elements.[218] But the research indicates that lay people find it very difficult to differentiate between 'knowing' and 'reckless' conduct and they treat these states of mind as deserving the same punishment. This suggests they see them as equally blameworthy.[219]

6.157 Furthermore, reckless conduct was the hardest conduct for lay people to identify correctly.[220] Their ability to identify reckless conduct improved greatly if the test was described simply as doing an act that creates a 'substantial risk'.[221] But even then:

> More than one out of every three times they read a reckless scenario, subjects fail[ed] to identify it as such …[222]

Limitations of the United States test

6.158 Dr Greg Byrne told us that the more complex a test is, the harder it will be for jurors to understand. He noted that in the Model Penal Code:

> Having the second limb of unjustified makes comprehension more difficult and raises the question—what does it mean?[223]

6.159 The requirement that the conduct was a 'gross deviation' from standards a law-abiding person would observe further adds to the complexity of the test. This suggests it is not an appropriate model for reform in Victoria.

216 *People v Hall* 999 P.2d 207 (Colo, 2000), 217–19 (Bender J for the Court); Wayne R LaFave, *Substantive Criminal Law* (Thomson Reuters, 3rd ed, 2022) 'Recklessness vs intention and knowledge' 5.4(f). See also *Borden v United States* 141 S.Ct. 1817 (2021), 1824 (Kagan J).

217 Congressional Research Service, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, No R46836 (Congressional Research Service (Library of Congress), 7 July 2021).

218 Matthew R Ginther et al, 'Decoding Guilty Minds: How Jurors Attribute Knowledge and Guilt' (2018) 71(1) *Vanderbilt Law Review* 241, 245, 254–5; Matthew R Ginther et al, 'The Language of Mens Rea' (2014) 67(5) *Vanderbilt Law Review* 1327, 1336–7.

219 Congressional Research Service, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses*, No R46836 (Congressional Research Service (Library of Congress), 7 July 2021).

220 Matthew R Ginther et al, 'The Language of Mens Rea' (2014) 67(5) *Vanderbilt Law Review* 1327, 1363.

221 Ibid 1340–1359; Francis X Shen et al, 'Sorting Guilty Minds' (2011) 86 *New York University Law Review* 1306.

222 Matthew R Ginther et al, 'The Language of Mens Rea' (2014) 67(5) *Vanderbilt Law Review* 1327, 1359.

223 Consultation 9 (Dr Greg Byrne PSM).

Conclusion

6.160 None of the models that we have reviewed offers a way of defining recklessness that is preferable to what exists in Victoria.

6.161 Despite some similarities and sometimes common starting points, the criminal law has developed in distinctive ways in different jurisdictions. Even where jurisdictions share a similar definition of recklessness, how it is used diverges. This reflects the interplay of differences between other fault elements, offences, injury definitions, and penalties.

6.162 Even if another jurisdiction had a definition of recklessness that appeared to be working better than the Victorian definition, transplanting it into our criminal law framework would be complicated. The criminal law in each jurisdiction is a complex and interconnected structure. As we discuss in the next chapter and Chapter 11, the flow-on effects of incorporating one new element in Victorian law would be difficult to predict, creating uncertainty.

PART TWO: SHOULD THE RECKLESSNESS TEST CHANGE?

CHAPTER

07

Proposed alternative definitions of recklessness

7. Proposed alternative definitions of recklessness

Overview

- Several stakeholders supported alternative definitions of recklessness during our inquiry.
- Some proposed definitions based on the tests used in other jurisdictions:
  - The Office of Public Prosecutions (OPP) recommended a definition with the same threshold as is used in New South Wales and that has similarities to the definitions in England and Wales and New Zealand.
  - Victoria Police supports a 'possibility' threshold based on the High Court's decision in *Aubrey v The Queen ('Aubrey')*.
  - Steven Tudor proposed a definition influenced by the law in England and Wales, although his support for a new definition was qualified.
  - Some students from the University of Melbourne proposed definitions similar to the Commonwealth definition, and others suggested keeping the current definition but adding a reasonableness test.
- Caterina Politi said recklessness should be based on 'what a reasonable person' would or could have foreseen.
- Each of the proposed definitions has disadvantages. None would achieve consistency between Victoria and other jurisdictions. Consistency is an impractical goal given the different path Victoria's criminal law has taken and our distinctive and integrated architecture of offences.

The Office of Public Prosecutions

7.1 The submission from the OPP suggests inserting the following definition in the 'offences against the person' subdivision of the *Crimes Act 1958* (Vic):

> a person is reckless as to a result or circumstance if they were aware of the possibility that:
>
> - their actions would bring about the result; or
> - the circumstance existed; and
> - having regard to the risk their actions were unreasonable.

7.2 That definition adopts the possibility threshold for recklessness used in New South Wales, but explicitly:

- distinguishes between foresight of a result or circumstance
- articulates the objective part of the test: the accused's actions were unreasonable.

7.3 The OPP said a test that distinguishes between results and circumstances is necessary because for some offences against the person, being reckless about a circumstance is relevant. These are offences against on-duty emergency workers or other specified workers (see Chapter 4).

7.4 However, during our inquiry we did not hear about any difficulties applying the current Victorian test to offences against on-duty emergency workers and other specified workers.[1]

7.5 The OPP says its proposed definition is based on the common law of New Zealand and the United Kingdom and is a formulation that has 'proven to be sufficiently flexible to cater for a broad range of offences' in those jurisdictions.[2] But the definition of recklessness applicable to different categories of offences in New Zealand was contested until quite recently (see Chapter 6). Further, it remains unclear if England and Wales have one definition of recklessness applicable to offences in the *Offences Against the Person Act 1861* and a separate definition for other offences (see Chapter 6).

7.6 The OPP says that the express incorporation of an objective 'unreasonableness' element is 'broadly consistent' with the recklessness definition in New South Wales, where the possibility test is implicitly limited by the concept of unreasonableness.[3]

7.7 Although advocating for an explicit objective element, the OPP says this 'would not necessarily overcomplicate jury directions. Indeed, it may not always require an explicit direction at all.'[4]

7.8 The OPP points out that in New South Wales:

> juries are not generally directed to consider social utility or [the] unreasonableness of the accused's act in determining whether the accused was reckless. Rather, they are simply directed to consider whether the accused realised their act may possibly cause the result.[5]

7.9 The OPP says that for many offences against the person in Victoria, 'the unreasonableness of the actions will not be in issue' and it would not be necessary to direct a jury about the unreasonableness of the act.[6] For example, it says that 'punching someone in the head' or 'kicking a prone person' will 'rarely if ever be reasonable'.[7]

7.10 As well as consistency with other jurisdictions, the OPP says there are additional reasons to adopt its proposed definition.[8] We address these in Chapters 8 and 9.

Victoria Police

7.11 Victoria Police expressed strong support for a new definition of recklessness based on the definition set out by the High Court in *Aubrey*: 'foresight of the *possibility* of harm with an objective element of unreasonableness'.[9]

7.12 Victoria Police said the Crimes Act should be amended to include this definition for offences against the person in Part I, Division 1(4). It also said the same definition should be considered for other Crimes Act offences.[10]

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1 A review of reforms that strengthened sentencing requirements for injury offences against emergency workers found the reforms were working as intended. While the focus of the review was not recklessness, at least two of the cases reviewed involved sentences for recklessly causing injury to an emergency worker on duty, suggesting that this offence is being successfully prosecuted: Victorian Government, *Sentencing of Emergency Worker Harm Offences: Review into the Operation and Effectiveness of the Sentencing Amendment (Emergency Worker Harm) Act 2020* (Report, 2022) 6, 7 (case 2).

2 Submission 10 (Office of Public Prosecutions).

3 Ibid (citations omitted).

4 Ibid.

5 Ibid.

6 Ibid; If an accused person claims they were acting in self-defence, this will raise the issue of whether their actions were 'a reasonable response in the circumstances as [they] perceived them', but that is so regardless of the definition of recklessness that applies: *Crimes Act 1958* (Vic) s 322K.

7 Submission 10 (Office of Public Prosecutions).

8 Ibid. The OPP makes seven arguments for its proposed definition. The OPP says the definition: (1) would better align legal and moral culpability; (2) would be consistent with other jurisdictions; (3) is relatively simple; (4) will only infrequently require juries to apply a different threshold to other offences; (5) will not over-criminalise conduct; (6) is distinct from negligence; and (7) will correct a long-standing error in law.

9 Submission 7 (Victoria Police) citing *Aubrey v The Queen* [2017] HCA 18; (2017) 260 CLR 305 (emphasis added).

10 Submission 7 (Victoria Police).

7.13 In addition to the definition based on *Aubrey*, Victoria Police suggested that:

> the element of recklessness that requires the prosecution to prove the accused acted without lawful justification or excuse, be incorporated into the statutory definition of recklessness.[11]

7.14 Victoria Police said this would ensure that:

> people employed in high-risk occupations, such as surgeons, paramedics, police officers (where they may be required to take reasonable risks), are protected from prosecution.[12]

7.15 Many offences against the person have a separate 'without lawful excuse' element, requiring the prosecution to disprove any justifications, excuses or defences that are open on the evidence (see Chapter 4). This is not 'an element of recklessness' as such. The effect of incorporating it into the definition of recklessness could be to:

- alter the existing structure of recklessness offences, removing 'without lawful excuse' as a stand-alone element and instead making it part of recklessness, or
- create offences in which this element must be established twice.

7.16 The first option would lead to disparity between the structure of intentional and recklessness offences, creating unnecessary complexity without any obvious benefit. The second option would lead to unnecessary duplication.

Dr Steven Tudor

7.17 In his submission, Dr Steven Tudor is critical of both 'probable' and 'possible' definitions of recklessness. He says that both:

> seem to present the task facing fact-finders as if the *sole* question was the degree of likelihood of the circumstance or result occurring. This makes it look like the issue … is simply a matter of trying to work out, in a quasi-mathematical way, just what that degree of likelihood was in a particular case…[13]

7.18 In his view, both thresholds implicitly rely on an objective assessment of the reasonableness or social utility of the act in question, resulting in a lack of clarity and 'contortions of ordinary English language'. This, he says, is 'clearly undesirable' because the law needs to be 'clear and honest'.[14]

7.19 The probability test in Victoria is subjective. In instances where foresight of risk is fleeting, it may be difficult for juries to avoid importing an objective assessment, but they can be cautioned that they should not do this. In our discussion of folk psychology, we discuss the artificiality inherent in attributing a state of mind to a person who acted on the spur of the moment (see Chapter 2). This is an issue that also arises in relation to intentional offences. Stakeholders told us that in practice it does not cause problems for the prosecution of criminal offences (see Chapters 2 and 8).

7.20 We do not consider that the issue is so serious as to justify a wholesale revision of fundamental principles of criminal responsibility. It certainly does not justify changing the test for recklessness in the absence of more comprehensive reform than we were asked to consider in our terms of reference.

7.21 Dr Tudor says that the Commonwealth test's reference to 'substantial' and 'unjustifiable' risk in the *Criminal Code Act 1995* (Cth) (the Commonwealth Code) 'goes part of the way towards [the] goal' of a test that explicitly assesses:

- the degree of risk
- the seriousness of the harm in relation to which the risk is taken
- the social utility or value of the conduct.[15]

11 Ibid.
12 Ibid.
13 Submission 8 (Dr Steven Tudor) (emphasis in original).
14 Ibid.
15 Ibid.

7.22 He points out that:

> there is more to the unjustifiability of taking [a] risk [than] the degree (or substantiality) of the risk. The other factors of seriousness of the risked harm and the social value or utility of the conduct need to go into the mix. The Commonwealth Code's definition certainly allows for that. But it should be made explicit.[16]

7.23 For this reason, he supports a version of the test used in England and Wales, which he claims is explicit about containing an objective element.[17] His proposed definition is:

> A person is reckless (or acts recklessly) with regard to a circumstance or result where:
>
> (i) they are aware of a risk that the circumstance exists or will exist or that the result will occur; and
>
> (ii) it is, in the circumstances known to them, unjustifiable to take that risk.
>
> In assessing whether taking the risk was unjustifiable, the fact-finder must take into account, among any other relevant matters, the following:
>
> (a) the degree of the risk; that is, how likely it is that the circumstance exists or will exist or that the result will occur;
>
> (b) the seriousness of the circumstance or result, including the seriousness of any harm involved in that circumstance or result; and
>
> (c) the social value or utility of the person's act.

7.24 Dr Tudor qualifies his support for this test by saying that empirical research is required to work out if the test can be easily understood by juries. In his view, the test should only be adopted if research indicates juries are able to understand and apply it without difficulty.[18]

Other submissions

7.25 Some students from the University of Melbourne supported alternative definitions of recklessness. One submission suggested a definition very close to the Commonwealth Code definition but without reference to 'circumstance' or 'result', proposing that:

> A person is reckless with respect to a situation if [they are] aware of a substantial risk and having regard to the circumstances known to [them], it is unjustifiable to take the risk.[19]

7.26 Another student submission proposed that recklessness for offences other than murder should be defined as a 'conscious and unjustifiable disregard of a substantial risk of infliction of harm upon another person.'[20] This includes the requirement from the United States Model Penal Code that the recognition of risk be 'conscious' (see Chapter 6).

7.27 Another student submission supported a test for recklessness with the current threshold of probability but including a reasonableness assessment: 'the risk was unreasonable in the circumstances known to the accused.'[21]

7.28 We also received a submission from Caterina Politi, whose son David Cassai was killed in a 'one-punch' attack. Ms Politi suggested a purely objective test for recklessness:

> based on what a reasonable person would have foreseen or could have foreseen. This involves considering whether the risks and potential consequences of the accused's conduct were reasonably foreseeable and not justified in taking.[22]

16 Ibid.
17 In Chapter 6, we note the current characterisation of the test in England and Wales as purely subjective.
18 Submission 8 (Dr Steven Tudor).
19 Submission 4 (Waller, Herszberg, Muldoon (students at the University of Melbourne)).
20 Submission 2 (Peck, Borchard, Carlei, Ciampoli (students at the University of Melbourne)).
21 Submission 3 (Kavaleris, Shehnah, Aforozis, Vinci (students at the University of Melbourne)) (citations omitted).
22 Submission 21 (Caterina Politi).

7.29 Ms Politi said that 'a clear definition of recklessness' could reduce 'the risk of uncertainty or confusion in legal proceedings'.[23]

The proposed definitions do not improve on the current test

7.30 The advantages of the proposed definitions do not outweigh the advantages of the current Victorian test which we discuss in Chapter 10. As we discuss further in Chapter 11, a new definition would create risks.

7.31 We have not found a 'gap' in the existing hierarchy of offences that requires a different test for recklessness (see Chapter 8).

7.32 Ms Politi proposed a purely objective test. The definitions proposed by the OPP, Victoria Police, Dr Tudor, and some students from the University of Melbourne include an objective component, which increases their complexity.

7.33 Dr Greg Byrne told us that having two limbs to assess rather than one is a 'complication' and including an objective limb 'makes comprehension more difficult' for jurors.[24]

7.34 The complexity involved in assessments of social utility and reasonableness is apparent in Ormerod and Laird's discussion of the English test:

> Whether it is justifiable to take a risk depends on the social value of the activity involved relative to the probability and the gravity of the harm which might be caused.[25]

7.35 An assessment of 'social value' 'relative to the probability and the gravity of the harm' introduces multiple concepts, each of which may be contentious. Different people might reasonably arrive at different conclusions about what behaviour has 'social value' when taking into account the likelihood of harm and its seriousness, 'introduc[ing] complexities into juries' considerations and room for juries to come to different views about the same conduct.'[26]

7.36 By comparison, an assessment of whether a person had foresight of probable harm is more straightforward (see Chapter 10).

The proposed definitions will not achieve consistency with other jurisdictions

7.37 The OPP says its proposed test is 'broadly in line with the common law in New South Wales' and would allow Victoria to 'move into step with other jurisdictions'.[27]

7.38 However, others told us that given the different criminal law frameworks in New South Wales and Victoria, changing Victoria's definition of recklessness for offences against the person from probability to possibility would not lead to consistency with New South Wales.

7.39 In the *DPP Reference* in the High Court, Justices Gageler, Gordon and Steward said that:

> The DPP's reliance on a policy preference for consistency in the meaning of like provisions in different States as a reason for this Court to alter the meaning of s 17 of the *Crimes Act* is misplaced … Each State has taken a different view on the criminality to be ascribed to the conduct.[28]

7.40 Dr Greg Byrne emphasised the 'translation process' that occurs as the common law develops within discrete jurisdictions, leading to inconsistencies between them.[29]

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23 Ibid.
24 Consultation 9 (Dr Greg Byrne PSM).
25 David Ormerod and Karl Laird, *Smith, Hogan, and Ormerod's Criminal Law* (Oxford University Press, 16th ed, 2021) 106 [3.2.2.3].
26 Consultation 4 (Criminal Bar Association).
27 The OPP also said its proposed formulation is broadly in line with the Australian Capital Territory, the United Kingdom and New Zealand, and consistent with South Australia's statutory offences of causing harm and serious harm: Submission 10 (Office of Public Prosecutions). See Chapter 6 for discussion of recklessness in these jurisdictions.
28 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26 [58]; (2021) 274 CLR 177, 201 [58] (Gageler, Gordon and Steward JJ).
29 Consultation 9 (Dr Greg Byrne PSM).

7.41 Dr Byrne and the Criminal Bar Association (CBA) said the quest for consistency between New South Wales and Victoria ignores the differences in the elements of their offences and between the definitions of serious injury and grievous bodily harm.[30]

7.42 Barrister Dermot Dann and solicitor Felix Ralph pointed out that recklessness has a central place 'in the criminal justice landscape in Victoria' and this landscape 'is a finely calibrated mix between common law and statute.'[31] As such, the contours of our criminal justice landscape are quite different to those in New South Wales and other jurisdictions.

7.43 The CBA told us:

> it is mistaken to think that Victoria cleaving to the definition of recklessness that prevails in New South Wales would bring about [consistency] …
>
> merely 'cutting and pasting' the definition of 'recklessness' that prevails in New South Wales would not result in similar criminal laws applying in Albury and Moama—instead, it would result in *more disparate* treatment of equivalent conduct on each side of the Murray River.[32]

7.44 On the other hand, the County Court told us that inconsistency between Victoria and other jurisdictions makes it difficult to consider case law from other intermediate appellate courts.[33]

7.45 In her commentary on the *DPP Reference*, Michaela Puntillo says that the outcome in the High Court, leaving the decision as to whether to adopt the *Aubrey* test or keep the existing *Campbell* test (see Chapter 3) to Parliament:

> generates the unattractive consequence of inconsistency and incoherence across different Australian states in respect of the concept of recklessness in similar statutory offences.[34]

7.46 But there are many inconsistencies, some stark and others subtle, between the criminal law in Victoria and other Australian jurisdictions (see Chapter 6). They occur at the macro level in the criminal law frameworks of each jurisdiction, as well as in the detail of their laws regarding recklessness and other fault elements.

7.47 As the CBA told us, consistency with other jurisdictions is a 'radical objective' that would require 'a wholesale revision of the criminal laws of the various states'.[35]

Conclusion

7.48 It would not be a simple matter to import a definition of recklessness from another jurisdiction into Victorian law. No other jurisdiction has a model of recklessness that provides a clear improvement on the current law in Victoria, and the proposed definitions are more complex than Victoria's definition. Consistency is in any event an impractical goal, because Victoria's criminal law has taken a different trajectory and has its own integrated architecture of offences (see Chapters 3 and 4).

30 Ibid; Submission 6 (Criminal Bar Association); See also Submissions 1 (Clifton, Liu, Neulinger, Wong (students at the University of Melbourne)); 5 (McGavin, Jenkins-Smales, NcNaughton, Allen (students at the University of Melbourne)).
31 Submission 12 (Dermot Dann KC and Felix Ralph).
32 Submission 6 (Criminal Bar Association) (emphasis in original).
33 Submission 15 (County Court of Victoria).
34 Michaela Puntillo, 'What Does Parliament Want? *Director of Public Prosecutions (Vic) Reference No 1 of 2019* (2021) 392 ALR 413' (2022) 43(2) *Adelaide Law Review* 1003, 1013 citing *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26; (2021) 274 CLR 177, 218 [101] (Edelman J).
35 Submission 6 (Criminal Bar Association). Dermot Dann KC and Felix Ralph told us that 'a radical overhaul of the criminal justice system is unnecessary and no good reason has been advanced in support of such a dramatic overhaul': Submission 12 (Dermot Dann KC and Felix Ralph).

CHAPTER

08

Are there problems with Victoria's recklessness test?

8. Are there problems with Victoria's recklessness test?

Overview

- Victoria Police and the Office of Public Prosecutions (OPP) told us that the recklessness threshold causes problems for the prosecution of offences against the person.
- Here we consider if the recklessness threshold:
  - is based on a legal error
  - is too high
  - causes victim dissatisfaction
  - is difficult to prove
  - is a problem for family violence-related prosecutions.
- The evidence indicates that it is not uniquely hard to prove offences with a recklessness element.
- The evidence also suggests victim dissatisfaction is not directly related to the threshold for recklessness.
- There are many reasons why family violence-related prosecutions present challenges, but they are not tied to the definition of recklessness.
- Other factors may be contributing to the perception of practical problems with the recklessness test. They include the high threshold of the 'serious injury' definition, charging practices, and the complexity of the endangerment offences.
- Overall, the Commission's view is that the recklessness test is not problematic.

Police and prosecution perspectives

8.1 Victoria Police and the OPP told us that the recklessness definition needs to change. They proposed alternative definitions (see Chapter 7). The OPP's view is that Victoria took 'a wrong turn' by adopting the *R v Crabbe ('Crabbe')*[1] (murder) threshold for offences against the person in the cases of *R v Nuri ('Nuri')*[2] and *R v Campbell ('Campbell')*.[3] Victoria Police also noted that case law has 'cast doubt over the correctness' of *Campbell*.[4]

1 *R v Crabbe* [1985] HCA 22; (1985) 156 CLR 464.
2 *R v Nuri* [1990] VR 641.
3 *R v Campbell* [1995] VSC 186; [1997] 2 VR 585; Consultation 7 (Office of Public Prosecutions).
4 Submission 7 (Victoria Police).

8.2 Victoria Police and the OPP told us that the current definition has the following interrelated issues:

- It is too close to intent.[5] In their view, it is 'unjustifiably high',[6] resulting in decisions that are 'incongruous to justice',[7] and undesirable outcomes[8] that do not reflect the gravity of harm.[9]
- It causes victim dissatisfaction.[10]
- It has practical difficulties that make it hard to prove offences with a recklessness fault element.[11]

Is the recklessness test based on a legal error?

8.3 We discuss the distinct development of the meaning of recklessness in Victoria in Chapter 3. Victoria's common law definition of recklessness for offences against the person was set down in the 1995 Victorian case of *Campbell*, building on the 1985 High Court case of *Crabbe*.

8.4 The Director of Public Prosecutions (DPP)'s position in the *DPP Reference* was that the interpretation of 'recklessly' adopted in *Campbell*, applying the *Crabbe* threshold of probability to non-fatal offences against the person with a recklessness element, was 'untenable' and 'wrongly decided'.[12] The DPP argued that *Campbell* was inconsistent with *Aubrey v The Queen*,[13] and 'was directly contrary to the (manifest) intent of the legislature'.[14] As the DPP pointed out, when the reformed offences against the person were introduced in 1985, acting 'recklessly' was described in the second reading speech as being 'aware that an injury *might* result.[15]

8.5 The Court of Appeal declined to determine whether *Campbell* was rightly or wrongly decided,[16] but Justice Priest said that the probability test is:

> consistent with the 'spirit' of the decision in *Crabbe*, in that it reflects the common law notion of recklessness in murder, the offence in s 17 [of the *Crimes Act 1958* (Vic)] arguably being the next most serious non-fatal offence against the person. … in many circumstances, the offence of recklessly causing serious injury will be committed in circumstances which are (or, at least, are not far removed from) the moral equivalence of the offence of intentionally causing serious injury.
>
> That provides a solid basis for demanding that the offence in s 17 must require foresight of the probability that serious injury will result from the relevant act (or omission).[17]

8.6 In the High Court, the minority had 'no doubt that the decision in *Campbell* is wrong'.[18] Justices Gageler, Gordon and Steward, in the majority, stated that 'The identified error in Campbell … is not insignificant. If the meaning of a statute is wrong, it should be corrected', but added that the subsequent legislative amendments made on the basis of *Campbell* 'cannot be put to one side'.[19] The majority concluded that the *Campbell* definition should stand unless altered by Parliament.[20] Justice Edelman stated:

5 Submission 10 (Office of Public Prosecutions).
6 Submission 7 (Victoria Police).
7 Ibid.
8 Ibid; Submission 10 (Office of Public Prosecutions).
9 Consultation 7 (Office of Public Prosecutions).
10 Submission 10 (Office of Public Prosecutions). Consultations 7 (Office of Public Prosecutions), 10 (Victoria Police).
11 Submissions 7 (Victoria Police), 10 (Office of Public Prosecutions). Consultations 7 (Office of Public Prosecutions); 10 (Victoria Police).
12 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [12], [16], [94]; (2020) 284 A Crim R 19, 24 [12], 24-25 [16] (Maxwell P, McLeish and Emerton JJA), 43 [94] (Priest JA).
13 Ibid [3] (Maxwell P, McLeish and Emerton JJA).
14 Ibid [12] (Maxwell P, McLeish and Emerton JJA).
15 Ibid [13] (Maxwell P, McLeish and Emerton JJA) (emphasis added). The Court went on to say that this argument 'could have been deployed by successive Directors of Public Prosecutions at any time after *Campbell*', and prosecutions for recklessly causing serious injury have continued to be conducted on the basis that *Campbell* was correct. The Court said, 'it is far too late for this construction argument to be advanced for the first time': Ibid [14] (Maxwell P, McLeish and Emerton JJA).
16 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [17] (Maxwell P, McLeish and Emerton JJA).
17 Ibid [120] (Priest JA) (citations omitted).
18 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [7]; (2021) 274 CLR 177, 184 [7] (Kiefel CJ, Keane and Gleeson JJ).
19 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [57] (Gageler, Gordon and Steward JJ).
20 Ibid [59] (Gageler, Gordon and Steward JJ, Edelman J agreeing at [99]).

> By applying the reasoning in [the New South Wales case of] *Aubrey* it can be seen that the decision in *Campbell* was wrong. But prior to *Aubrey* the decision in *Campbell* could not have been thought to have been plainly wrong …[21]

8.7 Justice Edelman concluded that the *Campbell* interpretation of recklessness should continue to apply even though it 'involves some inconsistency and lack of principle'.[22]

8.8 During our inquiry, the OPP told us that there is no principled basis for extending the 'probability' test beyond homicide offences. The OPP said that murder is a special category of offence. A higher threshold for reckless murder is warranted to distinguish it from manslaughter,[23] because there is a 'moral equivalency' with intentional murder. But the OPP said that in the context of offences against the person, where different penalties apply, the 'intentional and reckless forms of the offences cannot fairly be considered "comparable in heinousness"'.[24]

8.9 On the question of legal principle, some stakeholders noted that *Campbell* stood unchallenged for a long time.[25] The Criminal Bar Association (CBA) said:

> there is some force in the contention that, three decades ago, the courts deviated from the doctrinal purity that had thence seen recklessness require proof only of foresight of the possibility of the prohibited result. But doctrinal purity is hardly a reason to disrupt the operation of laws that have delivered appropriate results for many years.[26]

Law reform: the intersection of law and policy

8.10 We do not underestimate the concern expressed by members of the High Court that Victoria's application of the probability threshold is wrong. However, this consideration raises the question of how law and policy intersect.

8.11 The role of the Commission is to assess the overall case for reform, a different function from that of the judicial branch. Law reform requires broader policy considerations, including how the law is operating and whether there are problems in practice, which we discuss in this chapter. It also involves consideration of the benefits of the current definition (see Chapter 10) and the potential impact of reform (see Chapter 11).

Is the recklessness threshold too high?

8.12 Both Victoria Police and the OPP argued that the thresholds for proving recklessness and intention are too close, so that offences with these elements are almost equivalent.[27] The OPP said that this closeness 'does away with a meaningful lesser alternative offence'.[28] In the OPP's view:

> people aren't being sentenced for what they are morally culpable of; the appropriate charge is falling away.[29]

8.13 The OPP provided hypothetical scenarios and case studies to illustrate the problems it says exist.[30] Victoria Police agreed the hypotheticals illustrate that the recklessness threshold in Victoria is too high.[31] We analyse the hypotheticals and case examples in Chapter 9.

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21 Ibid [83] (Edelman J): citing *Aubrey v The Queen* [2017] HCA 18; (2017) 260 CLR 305.
22 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [65] (Edelman J).
23 In *La Fontaine v The Queen*, Justice Gibbs said that a high threshold was justified because a lower possibility test 'would seem to obliterate almost totally the distinction between murder and manslaughter': *La Fontaine v The Queen* [1976] HCA 52, [4]; (1976) 136 CLR 62, 76 (Gibbs J). Justice Gibbs also observed that the law on this matter was first stated in *Stephen's Digest of the Criminal Law* in 1887, and at that time 'there was little authority' to support the view that foresight of probable death is a fault element for murder rather than manslaughter, but the 'probable' threshold for murder had since been accepted in the Victorian Supreme Court and confirmed in *Pemble v The Queen: La Fontaine v The Queen* [1976] HCA 52, [4] (Gibbs J) citing *Pemble v The Queen* [1971] HCA 20; (1971) 124 CLR 107.
24 Submission 10 (Office of Public Prosecutions).
25 Submissions 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph), 14 (Law Institute of Victoria).
26 Submission 6 (Criminal Bar Association) (emphasis omitted).
27 Submissions 7 (Victoria Police), 10 (Office of Public Prosecutions).
28 Consultation 7 (Office of Public Prosecutions).
29 Ibid.
30 Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023). Examples one, two, three and four were included in the OPP's submission dated 3 March 2023: Submission 10 (Office of Public Prosecutions). Examples five and six were included in the OPP's file review dated 14 July 2023: Supplementary Submission 20 (Office of Public Prosecutions).
31 Submission 7 (Victoria Police).

8.14 Most stakeholders disagreed that the threshold for recklessness is too high and does not appropriately capture serious offending. In relation to the OPP's hypotheticals, we were told that:

- In reality, similar factual scenarios result in convictions for offences that have a recklessness element.
- In many cases, alternative offences are available if a recklessness offence cannot be proved, so there is no 'gap' where criminality is not adequately captured and punished.
- If the evidence does not support the charge, it is appropriate that a person is not convicted.

8.15 Victoria Legal Aid (VLA) and the CBA said that the OPP's hypotheticals do not demonstrate a gap in the law.[32] The CBA said the current test has:

> operated satisfactorily for many years, without any genuine suggestion that [it] has resulted in persons escaping the reach of the criminal law … in circumstances which would be generally considered unjust or inappropriate.[33]

8.16 VLA told us that it does not see cases that indicate that the recklessness standard is unreasonably high. It has not encountered outcomes related to the definition of recklessness that suggest a change is needed.[34] It said:

> it is difficult to draw a concluded view that [the OPP's hypotheticals] result in an unfair or inappropriate outcome… This is because, like many factual circumstances, there may be a range of different offences that could be considered, charged, and ultimately proceeded with as the most appropriate charge for finalisation.[35]

8.17 Our analysis suggests that the additional case studies provided by the OPP can be characterised in the same way (see Chapter 9). It is difficult to conclude the results were inappropriate. The outcomes depend on the inferences available from the surrounding circumstances. Alternative charges were available where the facts did not support an offence with a fault element of recklessness.

8.18 The Law Institute of Victoria (LIV) said there is no evidence to suggest that 'clearly guilty' offenders are escaping proper liability.[36] The LIV said, 'It is much better not to create a problem where there isn't one.'[37] In its view:

> The OPP's inability to point to concrete examples of cases where the current test is not working is demonstrative of the fact that the test *is* working. People are not walking free where they should obviously have been convicted.[38]

8.19 Liberty Victoria rejected the idea that the recklessness definition is enabling guilty people to evade responsibility. It asked, 'where is the actual real-world example of this regime failing because of recklessness as to "probability"?'[39] It said that 'changing the definition of recklessness is a solution in search of a problem—it has not been demonstrated why such a reform is necessary.'[40]

8.20 A County Court judge said that it is 'not hard to fit someone into recklessness even with the probability threshold'. The judge also told us, 'juries do not have trouble convicting on recklessness. It simply doesn't happen that people get off'. In the judge's view, jury verdicts 'almost inevitably sit squarely with the evidence'.[41]

32 Consultations 4 (Criminal Bar Association), 6 (Victoria Legal Aid).
33 Submission 6 (Criminal Bar Association).
34 Submission 17 (Victoria Legal Aid).
35 Ibid.
36 Submission 14 (Law Institute of Victoria).
37 Consultation 3 (Law Institute of Victoria).
38 Ibid (emphasis in original).
39 Consultation 2 (Liberty Victoria).
40 Submission 9 (Liberty Victoria).
41 Consultation 11 (County Court of Victoria).

Alternative offences are available

8.21 We have a 'raft of [criminal] charges in Victoria that pick up [a range of offending]'.[42] There may be multiple charges available to capture the criminality of a single incident.

8.22 In Chapter 4, we listed other possible charges for the offences against the person involving recklessness, noting that their applicability would depend on the evidence in the individual case. The Crimes Act creates some specific statutory alternatives.[43] If a trial indictment has alternative charges, the jury will consider the most serious charge first. If they do not find the most serious charge proved, they consider the next alternative charge. In a trial for any offence other than treason or murder, the jury may return a verdict for another offence within the jurisdiction of the court if the allegations 'amount to or include' that other offence.[44]

8.23 We heard that people are routinely convicted of offences with an element of recklessness in Victoria.[45] Many stakeholders also noted the range of alternative charges available if there is not enough evidence to support a particular charge of recklessness.[46] The County Court said:

> there may be sufficient 'alternative' charges for consideration by the fact finder that can be brought against an accused, in creating a hierarchy where the prosecution has not discharged its obligation to prove a head charge beyond reasonable doubt.[47]

8.24 The Court pointed to the example of recklessly causing serious injury:

> It may be, depending on the evidence about the accused's state of mind, that alternative charges of intentionally causing injury, recklessly causing injury or common assault are more appropriate...[48]

8.25 The LIV noted that in every hypothetical provided by the OPP, alternative charges were available.[49] It said that a person will not escape liability merely because a specific recklessness charge cannot be proved, they will simply be charged with another offence.[50] Where a person did not foresee that serious injury was a probable consequence, intentionally causing injury is available, as well as recklessly causing injury and common assault.[51]

8.26 VLA acknowledged that in some circumstances it can be difficult to predict what kind of injury is likely to result from using force. But it emphasised that 'scenarios which fall into a gap where there is no appropriate charge [are] just not [something] we see in practice.'[52]

Scope to reflect moral culpability

8.27 The OPP and Victoria Police raised concerns that alternative charges do not adequately reflect the moral culpability of the offending. But other stakeholders noted that the alternatives are often serious offences with high penalties, providing adequate sentencing scope to capture criminality and penalise the conduct.

8.28 The degree of harm caused and the extent of an offender's culpability are major components of the seriousness of a crime.[53] Courts consider the nature of the injury and its impact on the victim in determining an appropriate sentence.[54] A judge must be careful to sentence a person only for the offence for which they have been found guilty.

42 Consultation 6 (Victoria Legal Aid).
43 *Crimes Act 1958* (Vic) ss 6(2), 6B, 77C, 88A, 421, 422, 422A, 426–29, 435.
44 *Criminal Procedure Act 2009* (Vic) s 239. An offence will amount to or include another offence if words could be deleted from the description of the offence on the indictment in a way that leaves the particulars of the alternative offence. This is the common law 'red pencil' test: see *Mareangareu v The Queen* [2019] VSCA 101, [44]; (2019) 277 A Crim R 319, 331 [44]; *R v Lillis* (1972) QB 236. For example, a charge of robbery as an alternative to armed robbery would satisfy the test: Ian Freckelton and Mirko Bagaric, Thomson Reuters, *Indictable Offences in Victoria* (online at 22 November 2023) [27.10].
45 See also Chapter 4.
46 Submissions 11 (Children's Court of Victoria), 15 (County Court of Victoria). Consultations 2 (Liberty Victoria), 6 (Victoria Legal Aid).
47 Submission 15 (County Court of Victoria).
48 Ibid.
49 Submission 14 (Law Institute of Victoria).
50 Ibid.
51 Consultation 3 (Law Institute of Victoria).
52 Consultation 6 (Victoria Legal Aid).
53 Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 240.
54 *Sentencing Act 1991* (Vic) s 5(2)(daa) and 5(2)(db); Consultations 3 (Law Institute of Victoria), 4 (Criminal Bar Association).

But the court will consider, among other factors, the seriousness of the injury, including immediate and long-term consequences.[55]

8.29 The County Court explained that the seriousness of an injury and the degree of recklessness are 'significant' sentencing considerations 'in determining the gravity of the offence and the offender's culpability.'[56] The Court added that:

> considerations about the seriousness of the injury take into account present and future harm, physical and psychological harms, the impact of the injuries on the victim, how the injuries were inflicted and whether the accused delayed, refused or obstructed the victim from receiving medical assistance for the injury or to identify its cause.[57]

8.30 In some circumstances, there may be little difference between recklessness about a result and intention to cause it. This arises at the most serious end of the spectrum of recklessness offences. In these cases, the upper end of the available penalties for recklessness offences can capture the moral culpability involved. *Hamid v The Queen* involved a guilty plea to recklessly causing serious injury and resulted in a sentence of 10 years imprisonment. The court noted that, where the facts are similar to intentionally causing serious injury, 'no meaningful differentiation in sentence between the two types of offence will be warranted'.[58]

The recklessness threshold is not producing undesirable outcomes

8.31 The examples and analysis do not provide strong evidence that the recklessness test leads to undesirable outcomes. We heard from many stakeholders that factual scenarios similar to the examples provided result in convictions for recklessness offences. Where the facts do not support conviction, alternative offences are available. These are often serious offences with high penalties. They offer scope to adequately capture the moral culpability of the offending.

The impact of the recklessness threshold on prosecutorial discretion

8.32 The OPP told us that the problems with recklessness it identified are uniquely visible to prosecuting agencies because they arise in the context of 'prosecutorial discretion'.[59] It added that when intentionally and recklessly causing serious injury are both charged, the prosecution has 'no incentive' to reject a plea offer to the recklessness offence because the offences are so close.[60] The OPP also described the recklessness test as 'requiring' prosecutors to resolve cases on a basis that does not always reflect moral culpability or the harm done to victims.[61]

Decisions about whether charges proceed

8.33 The OPP told us that the recklessness test requires prosecutors to make difficult decisions about whether to proceed with charges. It said that charges of recklessly causing serious injury or injury, or the endangerment offences, are commonly withdrawn before committal or discontinued ahead of trial because of concerns about meeting the recklessness threshold.[62]

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55 See, eg, *Nash v The Queen* [2013] VSCA 172, [10]; (2013) 40 VR 134, 137 [10] (Maxwell P).
56 Submission 15 (County Court of Victoria).
57 Ibid.
58 *Hamid v The Queen* [2019] VSCA 5, [44] The sentencing judge noted that despite evidence of premeditation, the accused was to be sentenced for recklessly causing serious injury, rather than intentionally causing serious injury, as a result of a plea resolution. The Court of Appeal said the sentencing judge was right to express surprise that the prosecution had agreed to accept a plea to a charge of recklessly causing serious injury rather than intentionally causing serious injury. See also *Ashe v The Queen* [2010] VSCA 119, [31]; *DPP v Terrick* [2009] VSCA 220, [86]-[91]; (2009) 197 A Crim R 474, 477-79 [86]-[91].
59 Consultation 7 (Office of Public Prosecutions).
60 Ibid.
61 Submission 10 (Office of Public Prosecutions).
62 Ibid.

8.34 The DPP Policy provides that a prosecution should only proceed if there is a reasonable prospect of conviction and it is in the public interest.[63]

8.35 The OPP reviewed 300 finalised cases involving charges of recklessly causing serious injury between 2018 and 2022 ('the OPP file review').[64] Of the 300 cases, 179 had one or more recklessly causing serious injury charges withdrawn, discontinued, or acquitted at trial. These were classified in the OPP file review as 'unsuccessful'[65] or 'partially successful'.[66] Table 19 sets out reasons the OPP identified as relevant in assessing why the charges did not proceed.[67] We note that difficulty proving recklessness was a factor in 14 cases (7.8 per cent).

Table 19: The OPP file review: reasons why recklessly causing serious injury did not proceed

Reason	Number of cases	Percentage
Difficulty proving recklessness as the fault element was a factor	10	5.58%
Difficulty proving the seriousness of the injury was a factor	75	41.89%
Difficulty proving both recklessness as the fault element and the seriousness of the injury were factors	4	2.23%
Other factors identified (including identity, causation, self-defence, witness issues, public interest factors, difficulties in proving complicity, or death of an accused)[68]	47	26.25%
Unclear whether recklessness as the fault element or the element of 'serious injury' was a factor[69]	43	24.02%

Resolution

8.36 Across Australian criminal jurisdictions, cases are finalised most frequently by the accused pleading guilty.[70] An accused person can choose to plead guilty at any stage of criminal proceedings. By pleading guilty to a charge, the accused admits every element of the offence and the case resolves without the need for a trial.

63 Director of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (Policy, 24 January 2022) 3 <https://www.opp.vic.gov.au/wp-content/uploads/2022/10/DPP-Policy.pdf>. In determining whether there is a reasonable prospect of conviction, regard must be had to the following factors: all the admissible evidence, the reliability and credibility of the evidence, the possibility of evidence being excluded, any possible defence, whether the prosecution witnesses are available, competent and compellable, any conflict between eye-witnesses, whether there is any reason to suspect that evidence may have been concocted, how the witnesses are likely to present in court, any possible contamination of evidence, and any other matter relevant to whether a jury or magistrate would find the person guilty.

64 Supplementary Submission 20 (Office of Public Prosecutions). These files were opened between January 2018 and April 2023.

65 Ibid: The OPP described as 'unsuccessful' prosecutions where all recklessly causing serious injury charges 'were not proceeded with or resulted in a finding of not guilty.' There were 175 of these cases.

66 Ibid: The OPP described as 'partially successful' prosecutions where 'there was a plea of guilty or a finding of guilt to one or more [recklessly causing serious injury] charges or a more serious alternative, but also another [recklessly causing serious injury] charge was not proceeded with.'. There were four of these cases.

67 Ibid.

68 Ibid.

69 Ibid: 'This included jury trials [which resulted in acquittal/s], and cases where it was simply not clear from the available documentation why the recklessly causing serious injury charge was not proceeded with.'.

70 Asher Flynn and Arie Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (Palgrave Macmillan, 2018) 1. In Victoria, between 2011 and 2022 the number of OPP prosecutions finalised by a guilty plea as a percentage of total case completions per financial year varied between 73.8 to 88.7 per cent. Recent years were impacted by coronavirus (COVID-19) restrictions and the reduced number of jury trials: Office of Public Prosecutions (Vic), *Annual Report 2021/22* (Report, 2022) 30, 104. The County Court reports 45 per cent of the criminal cases it finalised in 2021–22 resolved and the accused pleaded guilty: County Court of Victoria, *Annual Report 2021–22* (Report, 2022) 23. The Supreme Court reports that in 2021–22, of the 83 finalised indictment cases (61 standard committals and 22 fast-tracked committals), 47 were finalised as pleas (38 in standard committals, 9 in fast-tracked committals). This equates to 56 per cent: Supreme Court of Victoria, *Annual Report 2021–22* (Report, 2022) 17.

8.37 Where an accused person is charged with more than one offence, there might be negotiation between the defence and prosecution to arrive at an agreed resolution. It may include the prosecution agreeing to withdraw or discontinue charges or accepting a plea of guilty to less serious charges.[71]

8.38 Plea negotiations are very common.[72] The most common offences negotiated are those where there are multiple alternative charges available. Examples are intentionally or recklessly causing serious injury and intentionally or recklessly causing injury, and gross violence offences.[73]

8.39 In the summary jurisdiction, police prosecutors decide whether and how to resolve a matter. In the indictable jurisdiction, the decision to resolve a case is made by a Crown Prosecutor or the DPP. The DPP Policy provides that resolution may only occur if it is in the public interest.[74]

8.40 Prosecutorial discretion is exercised in light of the facts and circumstances of each case.[75] Resolution decisions might also take into account pragmatic reasons, like avoiding the delay of trial, or where the sentence for a lesser charge is likely to be in a similar range to the primary charge. There are many benefits to early resolution, but sometimes the facts may not align with a lesser charge.[76] And while there are guidelines about resolution, 'The discretion exercised by prosecutors, including that used for plea negotiations … remains largely opaque.'[77]

8.41 In the OPP file review, 81 cases (27 per cent) resolved to a plea of guilty to all recklessly causing serious injury charges. The OPP is concerned that the prosecution has 'no incentive … not to accept a plea of guilty to [recklessly causing serious injury]'.[78] However, 30 files (10 per cent) resulted in a plea of guilty to a more serious charge and the withdrawal of the alternative recklessly causing serious injury charge.[79]

71 Resolution discussions may also include the prosecution agreeing to accept a 'rolled up' charge, which is a collection of charges bundled together into a single charge: see *Stanczewski v The Queen* [2021] VSCA 232, [45]. A rolled-up charge can only be used on a plea of guilty, not at a trial, and the offender is sentenced for all the offending but the maximum penalty for a single offence still applies. Resolution discussions may also include the prosecution agreeing to accept a 'representative' charge, which is a single charge that is representative of a number of occasions of offending of a similar kind. A representative charge can only be used on a plea of guilty, not at a trial, and while the offender is only sentenced for the single occasion the represented acts work to show the court that it was not an isolated incident: at [43]. Resolution discussions may also include the prosecution agreeing to exclude certain facts from the summary of the offending.

72 Asher Flynn and Arie Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (Palgrave Macmillan, 2018) 53, 91.

73 Ibid 132–133.

74 Director of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (Policy, 24 January 2022) 14 <https://www.opp.vic.gov.au/wp-content/uploads/2022/10/DPP-Policy.pdf>. In determining whether a proposed resolution is in the public interest, regard must be had to the following factors: whether there is a reasonable prospect of a conviction of each offence charged (if there is no reasonable prospect of conviction, that charge must not proceed); the strength of the evidence on each charge; any defences; the likelihood of an acquittal on any of the charges; whether the charge or charges to which the accused will plead guilty adequately reflect the accused's criminality; allow an appropriate sentence to be imposed and allow all appropriate ancillary orders to be made; and the views of the victims and the informant about the proposed resolution.

75 An example from Flynn and Freiberg's study of plea negotiation practices demonstrates the OPP successfully pursuing an intentionally causing serious injury charge over a reckless charge. The defence offered a plea to recklessly causing serious injury on the basis that intoxication had impaired the accused's intent and the incident had occurred quickly and spontaneously. The OPP rejected the offer, maintaining that it could prove the more serious charge. Ultimately the accused pleaded guilty to the intentional charge: Asher Flynn and Arie Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (Palgrave Macmillan, 2018) 132.

76 See, eg, *Phillips v The Queen; Liszczak v The Queen* [2017] VSCA 313, where the prosecution accepted a charge of recklessly causing injury even though serious injury appeared to be open on the facts. In sentencing, Justice Croucher noted 'The "injury" caused to [the victim was] about as grave as it gets without being classified as a "serious injury": *R v Liszczak & Phillips* [2017] VSC 103, [68] (Croucher J). On appeal, Justice Weinberg said 'Even making due allowance for the negotiations that often take place between the Crown and an accused, which will sometimes result in charges being reduced to a level significantly below what the objective facts seem to warrant, the decision in this case to allow these applicants to plead guilty merely to recklessly causing injury, rather than causing serious injury, is a complete mystery': *Phillips v The Queen; Liszczak v The Queen* [2017] VSCA 313, [2] (Weinberg JA).

77 Asher Flynn and Arie Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (Palgrave Macmillan, 2018) 9.

78 Consultation 7 (Office of Public Prosecutions).

79 The more serious charges included attempted murder, intentionally causing serious injury in circumstances of gross violence, intentionally causing serious injury, recklessly causing serious injury in circumstances of gross violence: Supplementary Submission 20 (Office of Public Prosecutions).

8.42 The OPP also said that recklessly causing serious injury charges are commonly resolved to recklessly causing injury or negligently causing serious injury. This happens because of concerns about whether the prosecution can prove the accused was aware of the probability of serious injury.[80] In the OPP file review, 115 cases (38 per cent) resulted in resolution to lesser alternatives.[81] It is unclear how many of these involved a decision based on the perceived difficulty of proving recklessness. The OPP noted that difficulties proving serious injury affected a large proportion of cases where a recklessly causing serious injury charge did not proceed.[82]

Recklessness is purposely close to intent and offers resolution opportunities

8.43 In Chapter 3 we discussed the history of Victoria's offences against the person. The modernised offences introduced in Victoria in 1985 were based on a Criminal Law Revision Committee report for England and Wales. The report proposed that intentionally causing serious injury should have a maximum penalty of life imprisonment, and recklessly causing serious injury a maximum penalty of five years.[83] The difference in these penalties indicated a significant difference between culpability for intentional and recklessness offences.

8.44 In contrast, the maximum penalties for equivalent Victorian offences were set as 15 years imprisonment for intentionally causing serious injury and 10 years for recklessly causing serious injury.[84] The smaller gap between penalties suggests that the intentional and recklessness offences were considered to be relatively close in culpability.

8.45 The LIV suggested the recklessness threshold is:

> set appropriately high considering the criminal penalties and degree of criminal culpability attached to recklessness offences.[85]

8.46 When we asked the County Court about recklessness being close to intention, a judge told us that although foresight of probable risk is a 'state of mind [that] is pretty close to intention', this is not problematic. Recklessness remains distinct from intention because it does not have 'the directness of intention'.[86] A judge of the Supreme Court told us 'there is a moral distinction between intentional and reckless acts.'[87]

8.47 It is the prosecution's role to exercise its discretion carefully when deciding:

- which charges are appropriate
- if they should proceed
- if, when, and how each case should be resolved.

8.48 As a judge of the County Court explained:

> When talking about offences against the person, you have to be rigorous about framing the charges. You should not work backwards to reason from [the fact of an] injury to [the accused person's] intent [to cause that injury] and allow the consequences to unfairly impact your reasoning.[88]

8.49 Offences against the person with a fault element of recklessness provide the prosecution with alternative charging options to intentional offences. Such options can

80 Submission 10 (Office of Public Prosecutions).
81 The lesser alternative charges were not specifically identified but the OPP said it approached this in a broad sense and looked at whether a plea of guilty was entered to a charge carrying a penalty of less than 15 years which captured the conduct initially charged as recklessly causing serious injury. Most often this was intentionally causing injury or recklessly causing injury, but other potential alternatives included negligently causing serious injury, the endangerment offences, assaults and affray: Supplementary Submission 20 (Office of Public Prosecutions).
82 Ibid.
83 Great Britain, Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person* (Report, 1980) 71 [155].
84 *Crimes (Amendment) Act 1985* (Vic) ss 16-17.
85 Submission 14 (Law Institute of Victoria).
86 Consultation 11 (County Court of Victoria).
87 Consultation 8 (Supreme Court of Victoria).
88 Consultation 11 (County Court of Victoria).

help achieve resolution in appropriate cases.[89] A magistrate described recklessness as an alternative to intention as a 'reasonable bargaining tool'.[90] A County Court judge explained:

> In pragmatic terms, having recklessness with a 5-year lower maximum penalty [than intention] is a significant dealmaker [in terms of resolution]. There is still a lot of scope … for having high-end recklessness close in sentencing to the low-end of intention, so in practical terms it's achieving an appropriate sentence …[91]

8.50 A judge of the Supreme Court suggested that if there is concern that cases are settling 'too lightly', then it is open to the prosecution to 'run the case'.[92]

Is the recklessness test causing victim dissatisfaction?

8.51 The OPP and Victoria Police told us that the way the recklessness test is working in practice is causing victim dissatisfaction. The OPP said it can be difficult for victims 'to accept that a person who foresees the possibility of an outcome, and acts anyway, may not legally be held responsible for that outcome', especially when 'the ordinary understanding of recklessness … can indicate conduct which is negligent, careless, rash or incautious'.[93]

8.52 The OPP also told us that:

> it is not uncommon for a victim who sustains a serious injury, but sees the case resolve on the basis of a charge other than recklessly causing serious injury, to feel a significant sense of grievance …[94]

8.53 Victoria Police told us victims feel disappointed if charges are downgraded on a plea, and it may be especially difficult for victims who have suffered serious injuries to accept a finding of guilt for recklessly causing injury rather than recklessly causing serious injury.[95]

Victim dissatisfaction stems from broad issues

8.54 To better understand victim perspectives:

- We considered submissions from the Victims of Crime Commissioner and Caterina Politi.[96]
- We consulted with members of the Victim Survivors' Advisory Council.[97]
- We asked the OPP to provide examples of victim dissatisfaction with the recklessness test or identify victims who could share their experiences with offences against the person involving recklessness.[98] One victim was identified by the OPP and Victoria Police.[99]

8.55 One victim contacted us directly. She told us that the person who offended against her was charged with numerous offences including stalking, intentionally causing serious injury, and recklessly causing serious injury. It was important to the victim that a causing serious injury charge be included in any resolution, to recognise the injury caused. But an injury charge was not included in the plea resolution. The victim felt her views

89 See, eg, the case file referred to in Asher Flynn and Arie Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (Palgrave Macmillan, 2018) 43, where the OPP agreed to accept a charge of recklessly causing serious injury and a charge of criminal damage as a substitute for charges of intentionally causing serious injury and injury, where there were reliability issues with the victim's evidence and insufficient medical evidence.
90 Consultation 12 (Magistrates' Court of Victoria).
91 Consultation 11 (County Court of Victoria).
92 Consultation 8 (Supreme Court of Victoria).
93 Submission 10 (Office of Public Prosecutions) citing *Banditt v The Queen* [2005] HCA 80, [36]; (2005) 224 CLR 262, [36] (Gummow, Hayne and Heydon JJ).
94 Submission 10 (Office of Public Prosecutions).
95 Consultation 10 (Victoria Police).
96 Submissions 19 (Victims of Crime Commissioner), 21 (Caterina Politi). Caterina Politi is a victim of crime, having lost her son to a violent one-punch attack. She co-founded 'STOP. One Punch Can Kill': <http://stoponepunchcankill.org/>. The Victims of Crime Consultative Committee was unable to participate in a consultation due to the technical nature of the reference and a period of change with its representatives.
97 Consultation 13 (Victim Survivors' Advisory Council).
98 Supplementary Submission 20 (Office of Public Prosecutions). Consultation 7 (Office of Public Prosecutions).
99 Consultation 14 (Police member who was a victim of an offence).

were not properly considered, and the process and reasons for resolution were not explained well.[100]

8.56 A police member who was the victim of a punch that broke his jaw (see Chapter 9) also expressed disappointment with the outcome of recklessly causing injury, and the resolution process, because he felt that he 'didn't have much say [in the resolution]'.

8.57 We did not hear from any other victims or agencies about victim dissatisfaction being linked to recklessness offences in particular.

8.58 The Victims of Crime Commissioner told us that victims have not raised recklessness as a specific issue with her.[101] The Commissioner expressed concern in response to the OPP and Victoria Police submissions to our inquiry that some unlawful injury matters are not receiving an appropriate justice response.[102] However, she noted that many issues that regularly arise for victims 'relate to how well justice agencies have regard to, and comply with, victim entitlements under the *Victims' Charter Act 2006* (Vic)' (Victims' Charter).[103]

8.59 The Parliamentary Inquiry into Victoria's Criminal Justice System found that many victims 'feel unsupported and isolated during criminal proceedings.'[104] A key issue faced by many victims is a lack of understanding about the criminal justice system, which can lead to unrealistic expectations about outcomes.[105] When it comes to plea negotiations, Flynn and Freiberg note that victims can 'feel disregarded, overlooked and ignored',[106] and may perceive that their experience is being 'downgrad[ed]'.[107]

8.60 A 2021 report by the Department of Justice and Community Safety found that victims in the lower courts often feel disengaged because of a lack of information about police charging practices and plea negotiations.[108] They may find the process distressing or unjust when they do not understand the reasons for decisions.[109]

8.61 A 2019 report by the Centre for Innovative Justice (CIJ), RMIT University, suggested that prosecution lawyers could better manage victims' expectations by reinforcing that:

- a criminal prosecution is inherently uncertain, and cases are regularly reviewed
- multiple charges are routinely filed in respect of the same offence, and the highest charge filed may not be the most appropriate one
- resolutions are common.[110]

8.62 The DPP Policy has a chapter dedicated to victims. It provides guidelines about early engagement and appropriate communication.[111]

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100 Consultation 15 (Victim—name withheld).
101 Submission 19 (Victims of Crime Commissioner).
102 Ibid.
103 Ibid. Under the Victims' Charter, prosecuting agencies are required to give information to victims about the progress of criminal proceedings, the offences charged, and any decision to substantially modify or discontinue a charge or accept a plea of guilty to a lesser charge: *Victims' Charter Act 2006* (Vic) s 9(a)-(c)(iii).
104 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 389.
105 Ibid 396-398. The Parliamentary *Inquiry into Victoria's Criminal Justice System* recommended the Victorian Government develop a trauma-informed strategy 'to support agencies involved in the criminal justice system to implement effective methods for communicating with victims of crime': at 398 (Recommendation 47). The Centre for Innovative Justice (CIJ) also found that some victims have unrealistic expectations about the strength of the case based on assurances given by police: Centre for Innovative Justice, RMIT University, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Report to the Office of Public Prosecutions, Victoria, April 2019) 12–13.
106 Arie Freiberg and Asher Flynn, *Victims and Plea Negotiations: Overlooked and Unimpressed* (Springer International Publishing AG, 2020) 115.
107 Asher Flynn and Arie Freiberg, *Plea Negotiations, Report to the Criminology Research Advisory Council* (Australian Institute of Criminology, April 2018) 85 citing Asher Flynn, 'Bargaining with Justice: Victims, Plea Bargaining and the Victims' Charter Act 2006 (Vic)' (2012) 37(3) *Monash University Law Review* 73.
108 Department of Justice and Community Safety, *Improving Victims' Experience of Summary Proceedings* (Final Report, November 2021) 4, 22, 59–60.
109 Ibid 22.
110 Centre for Innovative Justice, RMIT University, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Report to the Office of Public Prosecutions, Victoria, April 2019) 107 <https://cij.org.au/cms/wp-content/uploads/2018/08/communicating-with-victims-about-resolution-decisions--a-study-of-victims-experiences-and-communication-needs-1.pdf>.
111 Director of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (Policy, 24 January 2022) Chapter 3 <https://www.opp.vic.gov.au/wp-content/uploads/2022/10/DPP-Policy.pdf>. It provides that the 'prosecutor must treat victims with courtesy, respect, dignity and sensitivity. The solicitor must establish an early relationship with the victim [and] must address the individual priorities of a victim and not make assumptions about what is in the victim's interests … The solicitor must proactively explain the prosecution and resolution process to the victim in accordance with the *Victims' Charter Act 2006*.'

8.63 The CIJ suggested that the OPP should liaise with Victoria Police to 'support police officers to communicate effectively with victims about prosecution processes and decisions.'[112] Victoria Police acknowledged that 'Victim management and engagement is central', and 'Expectation management starts with police and goes right through a case'.[113]

8.64 Victims' needs are diverse, but what is important for most victims is having their experiences recognised and being supported to understand why particular outcomes occur.[114] Victim satisfaction levels 'are highest when agencies have actively provided information and support.'[115] As the Victims of Crime Commissioner said, 'much of victims' dissatisfaction with the justice system can be ameliorated by adherence to the Victims' Charter principles and having regard to procedural fairness.'[116]

Are there practical difficulties proving recklessness?

8.65 Victoria Police told us that intention can be easier to establish than recklessness. They said that it is easier to draw inferences from the surrounding circumstances of the conduct, which might include planning an offence. By comparison '[i]t's not that easy to say the accused turned their mind to the probability of [harm] occurring … when it's a split-second decision.'[117]

8.66 The OPP emphasised there are practical difficulties proving foresight of probable harm because many offences against the person are 'committed … in the heat of the moment, often while [people are] affected by alcohol or otherwise acting irrationally.'[118] The OPP referred to a punch or a kick following an alcohol-fuelled argument as a paradigmatic example. It said that in these cases, without an admission from the accused, 'it may be a bridge too far' for a jury to infer the accused was aware their actions would probably cause harm.[119]

Is proving recklessness reliant on admissions?

8.67 Victoria Police told us: 'The police interview is a critical component of an investigation when establishing recklessness', as proving state of mind often depends on an admission.[120] Victoria Police said a suspect's subjective state of mind is 'exceedingly difficult' to prove without an admission. This can be a problem given that suspects may make a 'no comment' interview or may not be fit to be interviewed.[121]

8.68 The OPP said that even in rare cases where someone admits they foresaw a consequence, that may not be enough to prove recklessness:

> the natural inclination of a person to minimise their own conduct means their subjective awareness will more often be expressed in terms of a possibility—'might have' or 'could have', rather than 'was likely to', or 'probably would'. As the law stands, admissions of that nature may very well not prove recklessness.[122]

112 Centre for Innovative Justice, RMIT University, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Report to the Office of Public Prosecutions, Victoria, April 2019) 104 (Recommendation 4) <https://cij.org.au/cms/wp-content/uploads/2018/08/communicating-with-victims-about-resolution-decisions--a-study-of-victims-experiences-and-communication-needs-1.pdf>. In the lower courts, prosecutors should give victims information about why certain charges are filed and withdrawn, and about the resolution process to assist in managing victims' expectations about court outcomes. Department of Justice and Community Safety, *Improving Victims' Experience of Summary Proceedings* (Final Report, November 2021) 5, 29 (Recommendation 4).

113 Consultation 10 (Victoria Police).

114 Centre for Innovative Justice, RMIT University, *Improving Support for Victims of Crime: Key Practice Insights* (Report, November 2020) 13–14.

115 Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report No 34, August 2016) 22, citing Department of Justice and Regulation, *A Survey About How Our Justice System Meets the Needs of the Community: 2014 Results* (Victorian Government, 2015) 5.

116 Submission 19 (Victims of Crime Commissioner).

117 Consultation 10 (Victoria Police).

118 Submission 10 (Office of Public Prosecutions).

119 Ibid.

120 Submission 7 (Victoria Police). An admission in the context of a criminal proceeding is a previous representation made by an accused that is 'adverse to the [accused's] interest in the outcome of the proceeding': *Evidence Act 2008* (Vic) Dictionary pt 1 (definition of 'admission').

121 Submission 7 (Victoria Police). Consultation 10 (Victoria Police).

122 Submission 10 (Office of Public Prosecutions).

8.69 The issues raised by Victoria Police and the OPP illustrate perceived difficulties in eliciting evidence as to a reckless state of mind. But what a suspect says in a record of interview is not the totality of a case. As Liberty Victoria said:

> The actual process for discerning state of mind is about assessing the whole of the evidence, rather than just what the accused says…[123]

Inferring an accused's state of mind

8.70 In Chapter 2 we discussed how the law allows an accused person's state of mind to be proved by drawing reasonable inferences. Several stakeholders told us that issues obtaining evidence of a person's state of mind are not particular to recklessness.[124] The CBA said that the probability test does not present a unique difficulty because:

> juries approach the appraisal of criminal liability in a sensible and realistic fashion—as they are directed to do—assessing an accused person's mental state by drawing inferences from their proven actions and the surrounding circumstances.[125]

8.71 It is not uncommon for juries to find the accused had a particular state of mind at the time of the offending, even though the accused claimed they did not. The High Court has referred to 'the law's scepticism in accepting later assertions as to the existence or absence of a mental state which are at odds with practical experience of life':[126]

> It is fundamental … that the jury be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful.[127]

8.72 In the English case *R v G*, Lord Bingham explained:

> There is no reason to doubt the common sense which tribunals of fact bring to their task. In a contested case based on intention, the [accused] rarely admits intending the injurious result … the tribunal of fact will readily infer such an intention, in a proper case, from all the circumstances and probabilities and evidence of what the [accused] did and said at the time. Similarly with recklessness: it is not to be supposed that the tribunal of fact will accept [an accused's] assertion that [they] never thought of a certain risk when all the circumstances and probabilities and evidence of what [they] did and said at the time show that [they] did or must have done.[128]

8.73 We asked stakeholders if it is difficult to establish recklessness in cases where an accused appeared to act instantaneously. A magistrate told us that each case turns on its specific facts, but generally there is no problem finding foresight because inferences can be drawn.[129] VLA said that 'a jury will be able to infer the accused's mental state … from all the surrounding evidence, even in short moments.'[130]

8.74 The Court of Appeal has said it is 'entirely orthodox' for the accused's state of mind to be determined by inferences from all the surrounding circumstances, even in 'one-punch' cases that result in traumatic injury.[131]

8.75 The LIV further explained a jury's reasoning process:

> A jury may be entitled to draw a strong inference that the accused had foresight of the probability of a serious injury, depending on the circumstances and given common knowledge about the likely consequences of certain actions. But if there are other circumstances that do not support such a strong inference, then it may be appropriate that the accused is found … guilty of a lesser charge …
>
> there are cases where a person is entitled to be acquitted and there is nothing inherently wrong about that.[132]

123 Consultation 2 (Liberty Victoria).
124 Submissions 6 (Criminal Bar Association), 16 (Youthlaw), 17 (Victoria Legal Aid). Consultation 6 (Victoria Legal Aid).
125 Submission 6 (Criminal Bar Association).
126 *Banditt v The Queen* [2005] HCA 80, [8] (Gummow, Hayne and Heydon JJ).
127 *Doney v The Queen* [1990] HCA 51, [14]; (1990) 171 CLR 207, 214 (Deane, Dawson, Toohey, Gaudron and McHugh JJ).
128 *R v G* [2003] UKHL 50, [39]; [2004] 1 AC 1034, 1057 [39].
129 Consultation 12 (Magistrates' Court of Victoria).
130 Consultation 6 (Victoria Legal Aid).
131 *DPP v Betrayhani; Betrayhani v The Queen* [2019] VSCA 150, [26] (Maxwell ACJ, Beach and Niall JA).
132 Consultation 3 (Law Institute of Victoria).

Recklessness is not uniquely hard to prove

8.76 There is no evidence of any unique difficulty proving recklessness. The recognised challenge for prosecutors, set in all criminal cases, is to meet the standard of proof. The criminal law sets high standards because the consequences of guilty findings for serious offences are significant.

8.77 The presumption of innocence and the right to silence are central to our criminal justice system. They 'safeguard the accused's right to a fair trial and the proper administration of justice.'[133] The LIV emphasised:

> It is a cornerstone of the criminal justice system that the prosecution bears the onus of proving the accused's state of mind by reference to cogent and compelling evidence. If there are insurmountable difficulties in obtaining such evidence, the person should not be charged with that offence.[134]

Is recklessness a problem for family violence-related prosecutions?

8.78 Victoria Police told us that many assault charges occurring in the context of family violence[135] are not being authorised.[136] It suggested that lowering the recklessness threshold could improve conviction rates for family violence-related offences against the person.[137] It said that the recklessness threshold is critical as intent can be very difficult to prove:[138]

> No one is putting their hand up and saying, 'I'm a family violence perpetrator' in a record of interview … All we get in interviews is, 'I was just trying to shut her up, she just pushed me [to do it]'; we get the most preposterous reasons for the bad behaviour.[139]

8.79 Victoria Police told us that unless it has 'compelling evidence' of intention, such as a threatening text message, it will tend to charge a 'recklessness' offence rather than an intentional offence:[140]

> We have a situation with family violence cases where a victim survivor is 100% certain that the infliction of the injury was intentional, but we can't go forward with charging that, so we have to take intentional off the table and we have to start from reckless.[141]

8.80 Victoria Police said that the recklessness threshold is particularly problematic where a person seriously harms an infant by shaking, and in non-fatal strangulation cases.[142] But these examples do not indicate a problem with the recklessness test (see Chapter 9). Rather, the same themes emerge:

- charges must be supported by clear and cogent evidence
- charging decisions must be made with a full appreciation of the hierarchy of offences available

133 Submission 14 (Law Institute of Victoria). See also Consultation 2 (Liberty Victoria). The rights of an accused person are enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25.
134 Submission 14 (Law Institute of Victoria), citing *Ignatova v The Queen* [2010] VSCA 263, [41].
135 'Family violence' is defined as behaviour towards a family member that is physically or sexually abusive, emotionally or psychologically abusive, economically abusive, threatening, coercive, or in any other way controlling or dominating, causing the family member to feel fear for their own or another persons' safety or wellbeing. It also includes exposing a child to these behaviours: *Family Violence Protection Act 2008* (Vic) s 5(1).
136 Consultation 10 (Victoria Police). 'Non-authorisation' occurs when an offence is recorded by police, but charges are not filed. A supervisor within Victoria Police determines whether charges will be authorised. Victoria Police does not record the reasons why charges are not authorised. Between 2016 and 2022, the non-authorisation rate for family violence serious assaults ranged from 16 to 26 per cent: Crimes Statistics Agency, *Data Tables Recorded Offences Visualisation Year Ending March 2023* (Table 04). The A21 Serious Assault category covers 'the direct and confrontational infliction of force, injury or violence upon a person or a group of people'.
137 Ibid.
138 Submission 7 (Victoria Police).
139 Consultation 10 (Victoria Police). We note that the Court of Appeal has said that self-justifying statements by perpetrators in family violence-related crimes should not reduce the seriousness of the offending: 'nothing should be said in sentencing reasons to suggest that statements by … an offender to the effect of "I just snapped" or "I'd had enough" in any way mitigate the seriousness of the offending or reduce the offender's moral culpability. Such self-justifying statements are, regrettably, all too common in cases of family violence … a resort to violence can never be condoned.': *DPP v Evans* [2019] VSCA 239, [85] (Maxwell P, T Forrest and Weinberg JJA).
140 Consultation 10 (Victoria Police).
141 Ibid.
142 Submission 7 (Victoria Police).

- a charge cannot result in a finding of guilt unless there is sufficient evidence to prove all its elements—including fault elements—to the criminal standard.

Difficulties prosecuting family violence-related offences stem from a range of issues

8.81 There are many reasons why family violence prosecutions present particular challenges. The 2016 report of the Royal Commission into Family Violence found that:

> Family violence is often hidden, so that few people other than the perpetrator and victim can directly attest to the violence. The ability or willingness of victims to give evidence may be hindered by trauma, shame, intimidation or a desire to maintain [a] relationship with the perpetrator … Family violence may also be constituted by a complex pattern of behaviour, not all of it criminalised or admissible as evidence.[143]

8.82 These difficulties are not tied to the definition of recklessness as a single element of an offence. A Queensland family violence taskforce found that difficulties prosecuting family violence-related offences 'relate more to problems with evidence gathering, witness cooperation, police practice and court process' than inadequacies with existing offences.[144]

8.83 The Royal Commission into Family Violence found that responses to family violence in Victoria have historically 'been marked by a tendency to dismiss, trivialise and misunderstand family violence', and sometimes this has 'manifested in a reluctance to charge or prosecute family violence-related offences'.[145] But judges told us that proving intention or recklessness in family violence-related cases does not present a specific problem.[146] In fact, 'juries are incredibly unsympathetic to family violence, they do not like it—it's a difficult position to defend.'[147]

8.84 A magistrate told us she had not experienced any particular difficulty with recklessness in family violence-related cases:

> If I am asked to compare family violence cases and offences that don't occur in the context of family violence, I see no particular difficulty finding a reckless family violence offence on the facts: I have to be convinced beyond reasonable doubt; that is a very high standard, but that doesn't change [regardless of the context of the offence].[148]

8.85 The report of the Royal Commission into Family Violence specifically considered the prosecution of family-violence related offences.[149] The Royal Commission declined to recommend the creation of any new offences and did not identify any specific issues with recklessness. It noted that 'many existing offences' already apply to family violence, including offences against the person such as threats to kill and inflicting serious injury.[150] The Royal Commission concluded:

> If these offences are not being applied properly to family violence, this may reflect the approach, attitude or expertise of those applying or prosecuting these offences. Simply changing the laws by carving out a specific response for family violence is not likely to address those underlying deficiencies.[151]

143 State of Victoria, *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol III, 223.
144 Ibid vol III, 212, citing Special Taskforce on Domestic and Family Violence in Queensland, 'Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland' (State of Queensland, 2015) 14–15.
145 Ibid vol III, 189.
146 Consultation 11 (County Court of Victoria).
147 Ibid.
148 Consultation 12 (Magistrates' Court of Victoria).
149 State of Victoria, *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol III, chap 17.
150 Ibid vol III, 228.
151 Ibid.

8.86 Inexperience may be contributing to the problems Victoria Police perceives with prosecuting family violence-related offences.[152] Victoria Police told us that '85 per cent of cases are managed at the uniformed officer level.'[153] Members of the Victim Survivors' Advisory Council said that 'regular police are not sufficiently trained, or do not have enough time, to deal with complex family violence cases.'[154]

8.87 The Royal Commission found: 'To continue the upward trend in charge rates, police training and supervision should highlight the importance of laying charges wherever the evidence allows it.'[155] A County Court judge suggested that it may be helpful to:

> arm [police] with an understanding of the existing slate of offences and [how] to charge those offences… It's about identifying the conduct which will allow a jury to draw appropriate inferences about the accused's state of mind and appreciation of harm.[156]

Other challenges to prosecution

8.88 We heard about other challenges, separate to the definition of recklessness, that appear to be affecting the prosecution of offences against the person. These other challenges may be contributing to the perceived problem with the recklessness threshold:

- the definition of serious injury has been tightened
- charging practices are not always appropriate
- endangerment offences are complex.

The definition of serious injury

8.89 Although outside our terms of reference, the definition of serious injury was raised by several stakeholders during our inquiry. The Children's Court said that 'whether the test of foresight of probable harm is unjustifiably high for offences against the person in part relates to the definition/scope of "injury" and "serious injury".'[157] The Victorian Aboriginal Legal Service (VALS) told us that difficulties proving recklessly causing serious injury usually arise because of 'the injury aspect of the charge, not the reckless aspect.'[158]

8.90 In the Office of Public Prosecutions' (OPP) file review, proof of serious injury emerged as the leading reason why a recklessly causing serious injury prosecution was not successful.[159] Of 179 cases where a recklessly causing serious injury charge was not proceeded with or resulted in a not guilty finding, proving the seriousness of the injury was identified as a factor in 44.1 per cent of the cases.[160] In contrast, difficulty proving the fault element of recklessness was a factor in only 7.8 per cent of the cases.[161]

8.91 It was suggested that the push to change the recklessness test might be motivated 'by the reflection that more cases are in the "cause injury" rather than the "cause serious injury" category'.[162]

152 The Royal Commission into Family Violence noted 'that, because of the prevalence of family violence, front-line police members will continue to shoulder much of the responsibility for the response. These members, often young and relatively inexperienced, need effective support and supervision to meet required service levels in compliance with the Code of Practice and to cope with the challenging and often confronting nature of family violence policing. This is doubly important in view of the influence of supervisors in setting culture and attitudes.': ibid vol III, 40. A parliamentary committee recommended all front-line Victoria Police officers undertake regular, ongoing training in relation to responding to family violence incidents: Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 244 (Recommendation 26).
153 Consultation 10 (Victoria Police).
154 Consultation 13 (Victim Survivors' Advisory Council).
155 State of Victoria, *Royal Commission into Family Violence: Report and Recommendations* (Final Report, March 2016) vol III, 100.
156 Consultation 11 (County Court of Victoria).
157 Submission 11 (Children's Court of Victoria).
158 Consultation 1 (Victorian Aboriginal Legal Service).
159 Supplementary Submission 20 (Office of Public Prosecutions).
160 Ibid.
161 Ibid.
162 Consultation 11 (County Court of Victoria).

8.92 As we explained in Chapters 2 and 4, the offence of recklessly causing serious injury requires the prosecution to prove that the accused ignored the risk their actions would cause a *serious* injury, not just any injury. A County Court judge told us:

> A lot of people are injured but the evidence is not capable of getting to the higher level of serious injury – that is partly a problem from the 'sharpening up' of the serious injury definition.[163]

8.93 Before 1 July 2013, 'serious injury' was defined as including a combination of injuries. The 'lack of detail' in this definition 'resulted in a very low threshold for offences involving serious injury.'[164] For example, two relatively minor injuries, such as two black eyes and a grazed forehead, were enough to establish serious injury. Cases that should have been charged as causing injury and heard and determined in the Magistrates' Court were instead being charged as causing serious injury.[165] This was creating 'delay for victims and accused and plac[ing] unnecessary pressure on the County Court.'[166]

8.94 New definitions of 'injury' and 'serious injury' came into operation on 1 July 2013. The definition of 'injury' was updated to 'physical injury or harm to mental health, whether temporary or permanent', and the definition of 'serious injury' to:

'an injury (including the cumulative effect of more than one injury) that:

i) endangers life; or

ii) is substantial and protracted; or

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.'[167]

8.95 The aim of changing the definition of serious injury was to:

- 'focus' serious injury offences 'on the more serious end of the spectrum of injuries'.[168]
- 'clarify the law and enable judges to give much clearer guidance to juries about what constitutes a serious injury'.[169]
- 'make it easier for prosecutors to determine the appropriate offence to charge.'[170]

8.96 The OPP told us:

> Once the 'serious injury' definition was amended, it resulted in a raising of the bar. There was a burgeoning problem with being able to prove foresight of probability of serious injury … then the decision in *Aubrey* came down and illuminated the problem. It calibrated probability too high. All these things coalesced … at once.[171]

8.97 The amended definition reflects the gravity of the serious injury offences and the penalties that apply to those offences.[172] The revision of the serious injury definition purposely confined its scope and raised the threshold for demonstrating serious injury as it applies to all non-fatal offences against the person.

8.98 The revised definition, 'even in its current form which was intended to narrow the scope of what constituted a serious injury … covers a potentially wide range of injury' and allows an evaluative judgment to be made.[173] The Court of Appeal has said the offence of recklessly causing serious injury is broad, and its elements can arise in many circumstances.[174]

163 Ibid.
164 Victoria, *Parliamentary Debates,* Legislative Assembly, 13 December 2012, 5550 (Mr Clark, Attorney-General).
165 Ibid 5551.
166 Ibid.
167 *Crimes Act 1958* (Vic) s 15.
168 Victoria, *Parliamentary Debates,* Legislative Assembly, 13 December 2012, 5551 (Mr Clark, Attorney-General).
169 Ibid.
170 Ibid.
171 Consultation 7 (Office of Public Prosecutions).
172 Victoria, *Parliamentary Debates,* Legislative Assembly, 13 December 2012, 5551 (Mr Clark, Attorney-General).
173 *McLean v The King* [2023] VSCA 6, [33] (Niall and T Forrest JJA).
174 *Ashe v The Queen* [2010] VSCA 119, [31–32] citing *DPP v Terrick* [2009] VSCA 220; (2009) 197 A Crim R 474 and; *DPP v Zullo* [2004] VSCA 153.

8.99 The objective gravity of an injury offence is not solely tied to the assessment of the nature and extent of the injury.[175] Other factors such as the victim's vulnerability, whether a weapon was used, and the duration of the attack can make an offender's conduct objectively serious.[176] Any injury sustained by the victim and the impact of the offence on the victim are factors that a court must consider when sentencing an offender.[177]

8.100 The definition of serious injury is a concern for Victoria Police and the OPP. But to tighten the definition was what Parliament intended and the change appears to be achieving its purpose. Since the definitional change in 2013 there has been a sharp decline in the number of people charged and sentenced for serious injury offences (see Appendix F).

Charging practices

8.101 The LIV told us its members see 'reckless' offences charged in cases where the evidence does not support those charges.[178]

8.102 During our inquiry we repeatedly heard that Victoria Police has a practice of 'overcharging'.[179] We were told that if charges for recklessness-based offences are not being proven or are being withdrawn, this is an overcharging problem, not a problem with the recklessness threshold.[180]

8.103 VLA told us that it regularly receives police briefs with cascading serious injury, injury, and common assault charges.[181] Flynn and Freiberg found that overcharging is 'partly the product of the number of possibly overlapping or related offences that can be charged, and partly reflects "defensive" charging practices intended to ensure that no relevant offence is inadvertently omitted.'[182]

8.104 The LIV pointed us to the case of *Ignatova v The Queen* as an example of inappropriate charging (see Chapter 9).[183]

8.105 It is important to appreciate the availability of alternative offences. But this does not mean that every conceivable charge should be included on a charge sheet or indictment. In our *Committals* report we concluded that overcharging is a problem in Victoria.[184] We recommended Victoria Police officers should receive regular and up-to-date charging training, and that the DPP should be involved in reviewing charges for serious offences at an early stage.[185] We continue to support those recommendations.

8.106 Victoria Police told us a rationale for charging the full hierarchy of offences is 'about negotiating with the defence.'[186] VLA told us that while there is significant overcharging, this provides a ladder of resolution where appropriate charges are eventually agreed through meaningful negotiation with the OPP.[187]

175 *McLean v The King* [2023] VSCA 6, [36] (Niall and T Forrest JJA).
176 *Nash v The Queen* [2013] VSCA 172, [10]; (2013) 40 VR 134, 137 [10] (Maxwell P).
177 *Sentencing Act 1991* (Vic) s 5(2)(daa) and 5(2)(db).
178 Consultation 3 (Law Institute of Victoria). One example related to a scuffle in a workshop: 'the complainant and the accused fell over, and the complainant's ankle was wedged under a car, resulting in a snapped ankle. Although the injury was serious, it was not an obviously foreseeable outcome. The accused was charged with recklessly causing serious injury but the charges were ultimately and appropriately downgraded to recklessly causing injury or common law assault.' Another example involved a woman who was over-prescribed medication with a side-effect including seizures: 'She was driving her children home when she became unresponsive and veered across the road, crashing into an embankment. It was unclear if the cause of her unresponsiveness was that she had fallen asleep or had a seizure. Her four-year-old child was seriously injured and became quadriplegic. She was charged with recklessly causing serious injury … The DPP eventually discontinued the recklessly causing serious injury charge on the basis that they couldn't exclude that the accused had had a seizure.'
179 Participants in Flynn & Freiberg's study of plea negotiations 'overwhelmingly … acknowledged that Victoria Police tends to charge every possible offence that fits the offending conduct.': Asher Flynn and Arie Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (Palgrave Macmillan, 2018) 109.
180 Submission 14 (Law Institute of Victoria).
181 Consultation 6 (Victoria Legal Aid). See similar observations of a defence practitioner noted in Asher Flynn and Arie Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (Palgrave Macmillan, 2018) 42.
182 Asher Flynn and Arie Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (Palgrave Macmillan, 2018) 224.
183 Submission 14 (Law Institute of Victoria), citing *Ignatova v The Queen* [2010] VSCA 263.
184 See, eg, Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) 80 [8.4], 85 [8.40].
185 Ibid Recommendations 19, 20, 21 and 22.
186 Consultation 10 (Victoria Police).
187 Consultation 6 (Victoria Legal Aid).

8.107 Liberty Victoria told us cascading charges are often charged as 'ambit claims'.[188] The LIV said: 'The experience of our members is unquestionably that Victoria Police have a habit of over-charging'.[189] The LIV also noted that 'the DPP is not as prone to overcharging [on a trial indictment] but is not immune to it'.[190]

8.108 In a study of plea negotiation practices, Flynn and Freiberg suggested that police inexperience may be contributing to overcharging,[191] and noted that there were many practical reasons underpinning the charging process, including flexibility.[192] However, they also found that:

> while most participants recognised this charging practice as 'standard' and 'acceptable', there is the potential for it to place undue pressure on the accused to plead guilty in exchange for a reduction in the number and extent of charges on the indictment.[193]

8.109 Divergence between the charges originally filed and those ultimately prosecuted is inevitable in some cases, particularly for offences against the person where there are a range of alternative offences. But there is a need to reduce disparity.[194] As we noted in our *Committals* report, 'overcharging undermines fair trial rights, is inefficient, and can have consequences that are traumatic for victims and witnesses.'[195]

Endangerment offences are complex

8.110 Many of the examples provided by the OPP and Victoria Police raised concern about recklessness in the context of endangerment offences (see Chapter 9).[196] While other stakeholders did not raise any specific concerns about the recklessness definition, during our reference we heard that the endangerment offences are 'complicated'[197] and 'conceptually difficult'.[198] The 'notion of foresight that a probable consequence of impugned conduct was exposure of potential victims to an appreciable risk of death' has been characterised as 'complex'.[199]

8.111 Several submissions misstated the legal test for endangerment offences. In our issues paper, we incorrectly implied that recklessness in endangerment offences may have an objective component, whereas the objective element relates to the accused's appreciation that their actions placed someone in danger.[200]

8.112 We explain the elements of endangerment offences in Chapter 4. These generic offences were introduced by the *Crimes (Amendment) Act 1985* (Vic). They replaced multiple specific endangerment offences. Similar offences have been legislated in other Australian jurisdictions.

188 Consultation 2 (Liberty Victoria).
189 Consultation 3 (Law Institute of Victoria).
190 Ibid. See, eg, *DPP v Appleton* (a pseudonym) [2019] VCC 2238 where the judge observed 'The prosecution case was made more complex by the laying of too many charges … The trial was conducted because the prosecution tried its hardest to get a conviction on every charge, notwithstanding the difficulties of proving [the accused's] intention by inference, and of separating from the evidence, what evidence related to each charge when in fact there was only one assault': at [3]–[4] (Lacava J).
191 Asher Flynn and Arie Freiberg, *Plea Negotiations, Report to the Criminology Research Advisory Council* (Australian Institute of Criminology, April 2018) 83.
192 Ibid 84.
193 Ibid 85.
194 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) 84.
195 Ibid 84 [8.30]. The Centre for Innovative Justice reports that overcharging is common and plea negotiations are a common response. But this is not well understood by victims and the range of charges can create false hope about the outcome: Centre for Innovative Justice, RMIT University, *Communicating with Victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs* (Report to the Office of Public Prosecutions, Victoria, April 2019) 27 <https://cij.org.au/cms/wp-content/uploads/2018/08/communicating-with-victims-about-resolution-decisions--a-study-of-victims-experiences-and-communication-needs-1.pdf>.
196 See Chapter 9: OPP Hypothetical 3, OPP Example 1 (*R v Wilson*), OPP Example 2, OPP Example 3 (reckless exposure to risk by driving offences), Example 4 (reckless endangerment at a workplace), Victoria Police's three case examples (*R v Wilson*, *R v Abdul-Rasool*, *DPP v Saurini*) said to illustrate 'undesirable outcomes'.
197 Consultations 3 (Law Institute of Victoria), 9 (Dr Greg Byrne PSM).
198 Consultation 3 (Law Institute of Victoria).
199 *R v Lam* [2006] VSCA 162, [16]; (2006) 46 MVR 207, 210 [16] (Ashley JA).
200 We cited Justice Priest's description of the test for recklessness as 'purely subjective', but in a footnote we said, 'However, the Supreme Court of Victoria has said that the elements of reckless conduct endangering life … include an "objective mental element"': Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023) 15 [65], n 66.

8.113 In *Nuri*, the Court of Appeal said that 'in an endeavour to subsume all life-endangering behaviour in one offence, the very generality of that offence has given rise to difficulties of construction and interpretation.'[201]

8.114 In *R v Abdul-Rasool*, Justice Redlich pointed out:

> Though relatively new offences, the general endangerment offences in Australian jurisdictions have received either judicial, legislative or scholarly criticism of some sort. The reason for this criticism has generally arisen because of the complexities involved in the overarching structure of the offences.[202]

8.115 Justice Redlich went on to note that some of the difficulties associated with the reckless endangerment offences stem from the objective element having two functions:

> the objective element is not only a means of ascertaining whether the [accused] is at fault, but perhaps more importantly, whether or not the harm sanctioned by the offence can be attributed to the accused's act.[203]

8.116 There is also the difficulty of conflating the chance involved in recklessness with the chance involved in danger.[204] Justice Mandie said:

> Because danger of itself carries the notion of chance or risk, this aspect of chance or risk may tend to be equated or conflated with the notion of chance or risk involved in the "probability" of harm which … must be foreseen or realised by the reckless accused. This confusion may lead to the conclusion that acting recklessly under this section involves the realisation or foresight of the probability of the other person's death whereas … the section is concerned with the realisation or foresight of the probability of the other person's exposure to the risk of death … danger of death in this context means an 'appreciable risk' of death.[205]

8.117 We discuss the issue of complexity more generally in Chapter 11.

Conclusion

8.118 The role of the Commission is to assess the overall case for reform and to consider whether the definition of recklessness in Victoria should change. The starting point for any reform is that there is an identifiable problem or a gap in the law.[206] As VLA said in relation to this reference:

> it is vital that any potential changes are grounded in … a strong and identifiable evidence base that demonstrates the need for change …[207]

8.119 We have examined the underlying criticism that the recklessness definition is wrong in principle. But as former Chief Justice of the High Court Sir Anthony Mason has said:

> a court is at liberty to depart from its earlier decision when it is convinced that the decision is plainly wrong. Even then, there is a question of legal policy whether the earlier decision should be overruled. The fact that a [legal] decision has operated satisfactorily may outweigh purity of legal doctrine.[208]

201 *R v Nuri* [1990] VR 641, 643 (Young CJ, Crockett and Nathan JJ).
202 *R v Abdul-Rasool* [2008] VSCA 13, [18]; (2008) 18 VR 586, 590 [18] (Redlich JA) (citations omitted).
203 *R v Abdul-Rasool* [2008] VSCA 13, [52].
204 *Mutemeri v Cheesman* (1998) 4 VR 484, 491 (Mandie J).
205 Ibid.
206 '[L]aw reformers … need to see the entire picture and identify the real problem(s) before launching into a search for policy solutions': Laura Barnett, 'The Process of Law Reform: Conditions for Success' (2011) 39 *Federal Law Review* 161, 181. The legislated functions of the Australian Law Reform Commission require it to be responsive by 'ensuring that [the law] meets current needs' and 'removing defects' in the law: *Australian Law Reform Commission Act 1996* (Cth) s 21(1)(a)(i), (ii). The founding legislation of the VLRC does not include specific guiding principles for law reform.
207 Submission 17 (Victoria Legal Aid).
208 Sir Anthony Mason, 'Law Reform and the Courts' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (The Federation Press, 2005) 319 citing *Geelong Harbour Trust Commissioners v Gibbs Bright & Co Ltd* (1974) 129 CLR 576, 582-584.

8.120 We have considered the views of Victoria Police and the OPP about the practical operation of the recklessness test. We have analysed case studies, court decisions, offences data and reports. We have taken into account what we were told by experienced legal practitioners, judicial representatives and victims, and the OPP's analysis of more than 300 finalised cases.

8.121 It is the Commission's conclusion that the recklessness test is not a barrier to prosecution, nor does it produce undesirable outcomes.

CHAPTER

09

Analysis of examples

9. Analysis of examples

Overview

- In this chapter we summarise and discuss three hypothetical scenarios and several other examples provided by Victoria Police and the Office of Public Prosecutions (OPP).
- While we have endeavoured to consider the examples fairly, each case turns on its facts and there can be a wide range of opinion about the 'appropriate' or 'desirable' outcome in a particular case. There are a myriad of variables in the criminal law process that may affect the outcome of a case.
- Overall, the examples provided do not make a strong case for changing the recklessness test.

The Office of Public Prosecutions' examples

9.1 To support changing the definition of recklessness, the OPP provided three hypothetical scenarios and other examples said to illustrate problems with the recklessness test. We published the scenarios in our issues paper and some people referred to them in submissions and during consultations. We summarise and analyse the examples in this chapter.

Hypothetical one: a punch

9.2 The first scenario involved a punch causing a traumatic brain injury. The OPP said it would be very difficult to prove recklessly causing serious injury as the person delivering the punch might only have been aware their punch would probably cause an injury, not a serious injury.

9.3 But the Criminal Bar Association (CBA) told us that in its experience, cases with similar facts to this scenario *do* lead to convictions for recklessly causing serious injury.[1] The Court of Appeal has accepted that 'a forceful punch to the head is highly dangerous', and ordinarily, anyone delivering such a punch will foresee there is a high probability of serious injury.[2]

9.4 There are many recent examples of unprovoked attacks that have caused traumatic injury and have resulted in convictions for recklessly causing serious injury, both at trial[3] and by guilty plea.[4]

1 Submission 6 (Criminal Bar Association) (emphasis in original).
2 *DPP v Betrayhani; Betrayhani v The Queen* [2019] VSCA 150, [44]. See also *DPP v Lindsay* [2021] VCC 636, [81].
3 See *Kennedy v The King* [2023] VSCA 86; *DPP v Betrayhani; Betrayhani v The Queen* [2019] VSCA 150.
4 *McLean v The King* [2023] VSCA 6; *Mazzonetto v The Queen* [2022] VSCA 153; *DPP v Lindsay* [2021] VCC 636; *DPP v Dow* [2020] VCC 1605; *Al Wahame v The Queen* [2018] VSCA 4; *R v Wyley* [2009] VSCA 17.

Hypothetical two: a kick

9.5 The second scenario suggested the act of kicking can have serious consequences (like breaking a rib or puncturing a lung or organ) that a person may foresee as possible but not necessarily probable.[5]

9.6 Several stakeholders responded by suggesting that the accused would be found guilty of recklessly causing serious injury if there was sufficient evidence. Even if the evidence did not support a conviction for a serious injury offence, the accused could be found guilty of intentionally causing injury, which carries a maximum penalty of 10 years imprisonment.[6]

9.7 A judge of the Supreme Court told us that if a person kicks someone lying on the ground in the head and causes a serious injury, 'a jury should be able to be satisfied that the accused foresaw the probability that that would cause serious injury'.[7]

Hypothetical three: a police siege

9.8 The third scenario described a police siege.[8] The person under siege fired bullets in the opposite direction from where he could see police congregating. The bullets came close to striking two police officers who had moved in that direction. The OPP said it would be difficult to secure convictions for the reckless endangerment offences. But the CBA's analysis concluded otherwise:

> a person who has seen police approaching the front of [their] house, who has demonstrated themselves to be determined to avoid capture, and who fires a weapon out the back of the house, will inevitably be found to have fired out the back of the house precisely because of their awareness of the likely presence of police at the back. The problem of proof postulated in this scenario does not reflect the real-world analysis of the type engaged in by juries.[9]

9.9 Dr Greg Byrne said it would be 'implausible' for a person who had barricaded themselves in not to realise that the police might move about, and a jury would be entitled to reject a different version of events.[10]

The OPP's further examples

9.10 The OPP provided additional examples which it said demonstrate practical problems with the recklessness test.[11]

Example one: *Wilson*

9.11 Example one was *R v Wilson*[12] (also a Victoria Police example, discussed below at [9.31]). The OPP said this case 'demonstrates the difficulties in relying on responses given in records of interview to prove foresight of probable consequences'.[13]

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5 Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023). The scenario involved kicking a prone victim in the torso.

6 Submission 6 (Criminal Bar Association). Consultation 9 (Dr Greg Byrne PSM); See also Consultation 2 (Liberty Victoria): 'kicking assault – 'intentionally causing injury' – can be a significant offence with significant penalties. It is taken seriously in the Magistrates' Court and has significant opprobrium connected to it.'

7 Consultation 8 (Supreme Court of Victoria).

8 Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023). The OPP's police siege scenario may have found inspiration from the case of *DPP v Le* [2019] VSCA 258, where at least 14 members of the Clandestine Laboratory Squad of Victoria Police attempted to force entry of a house owned by Mr Le, who was inside at the time. Soon after the first attempt by police to gain entry, Mr Le took up a loaded revolver and fired two shots towards the front door and at least another three shots towards the window of the front room. There were police officers behind both the front door and the window. Mr Le pleaded guilty to 14 charges of conduct endangering life (*Crimes Act 1958* (Vic) s 22) and a firearm offence (*Firearms Act 1996* (Vic) s 5(1)). He was sentenced to a term of five years and three months imprisonment, with a non-parole period of four years. The DPP appealed against sentence. One of the grounds of appeal argued that an alternative state of knowledge based on recklessness (that the offender ought to have known that the people attempting to enter the house were police) was an aggravating factor of the charges of conduct endangering life. The Court dismissed the appeal but left open the question of the extent to which recklessness as to whether victims are police officers, acting in the course of their duty, is an aggravating factor for an offence of violence.

9 Submission 6 (Criminal Bar Association).

10 Consultation 9 (Dr Greg Byrne PSM).

11 Examples 1-4 were included in Submission 10 (Office of Public Prosecutions) dated 3 March 2023. Examples 5 and 6 were included in the OPP's file review dated 14 July 2023: Supplementary Submission 20 (Office of Public Prosecutions).

12 *R v Wilson & Carman* [2005] VSCA 78.

13 Submission 10 (Office of Public Prosecutions).

Example two: a country road at night

9.12 Example two was a hypothetical scenario where person A is driving a car with a front seat passenger (person B) on a country road at night in the wet. A is driving at a speed of 80 kilometres per hour in a 60 zone and with only one working headlight.[14] A fails to give way to another vehicle, driven by person C, and causes a collision. C and B suffer minor injuries.

9.13 To prove charges of reckless conduct endangering persons,[15] the prosecution would need to prove that A was aware their conduct would probably place B and C at risk of serious injury. The OPP said this would be difficult because any risk of serious injury to passenger B would involve A exposing themself to a comparable risk, and 'Juries find it hard to grapple with that.'[16]

9.14 While alternative offences would be available, the OPP said these may not reflect A's moral culpability.[17] But A's driving was not necessarily an egregious display of indifference to the safety of others.[18] The alternative offence of dangerous driving is not insignificant and carries serious penalties.[19]

Example three: crashing into police

9.15 Example three was a hypothetical scenario where person A drives a stolen car into a petrol station, followed by a police car with flashing lights and sirens on. When a second police car moves in to block A's exit, A accelerates to flee but misjudges the scene and collides with the driver-side of the second police car.

9.16 The *Crimes Act 1958* (Vic) includes an offence of recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving,[20] and an aggravated version of the offence.[21] The OPP suggested it could be difficult to prove that A was aware of the probability they would expose police to a risk to safety.

9.17 This would depend on what inferences could be drawn from the available evidence of the surrounding circumstances, including the position of the vehicles, their speed and direction, and the visibility of the scene. Evidence could include CCTV footage, body-worn camera footage and witness accounts.

9.18 Even if the prosecution could not prove A's recklessness as to police safety, other serious offences would be available, including damaging an emergency service vehicle, which carries a maximum penalty of five years imprisonment,[22] or dangerous or negligent driving while pursued by police, which carries a maximum penalty of three years imprisonment.[23]

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14 A similar hypothetical was raised by Justice Edelman in *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [88]; (2021) 274 CLR 177, 214 [88] (Edelman J). In Justice Edelman's example, a driver, driving at high speed without headlights on, strikes a pedestrian. If the driving occurred on a quiet country road at midnight, Justice Edelman suggested 'it would not have been foreseen as probable that any person would be on the road', so the accused might successfully defend a charge of causing serious injury recklessly, which would be a 'surprising outcome' of the application of the Victorian recklessness test. Melbourne University Law School students responded to Justice Edelman's example by suggesting a driver in those circumstances should not be considered 'highly morally culpable', and a guilty finding for an alternative offence would be open: Submission 5 (McGavin, Jenkins-Smales, NcNaughton, Allen (students at the University of Melbourne)).

15 *Crimes Act 1958* (Vic) s 23.

16 Consultation 7 (Office of Public Prosecutions).

17 Submission 10 (Office of Public Prosecutions).

18 Compare the circumstances in *DPP v Reid* [2020] VSCA 247. The offender, who was a P-plate driver, had consumed methylamphetamine and alcohol, cheated an alcohol-interlock device, used a mobile phone while driving at various speeds between 140 and 200 kilometres per hour, and crossed double white centre lines. The offender pleaded guilty to two s 22 reckless endangerment offences and a culpable driving causing death.

19 Dangerous driving carries a maximum penalty of two years imprisonment and/or a maximum fine of 240 penalty units: *Road Safety Act 1986* (Vic) s 64. Penalty units determine the amount a person is fined. From 1 July 2023 to 30 June 2024, the value of a penalty unit is $192.31. The value of a penalty unit is set annually by the Victorian Treasurer and is updated on 1 July each year: Department of Justice and Community Safety, *Penalties and Values* (Web Page, 28 June 2023) <https://www.justice.vic.gov.au/justice-system/fines-and-penalties/penalties-and-values>. The offence of dangerous driving also requires mandatory cancellation of the driver's licence or permit and disqualification from obtaining a licence or permit for at least six months, and if the vehicle was driven at a speed of 45km/h more than the speed limit, the court must disqualify the driver from obtaining a licence or permit for at least 12 months: *Road Safety Act 1986* (Vic) s 64(2).

20 *Crimes Act 1958* (Vic) s 317AE. This offence is outside 'offences against the person', the focus of our terms of reference.

21 Ibid s 317AF. This offence is outside 'offences against the person', the focus of our terms of reference.

22 Ibid s 317AG(1). This offence has a recklessness element, but the recklessness attaches to 'recklessly driv[ing] a motor vehicle so that damage is caused to an emergency service vehicle' rather than recklessly exposing someone to a risk to safety.

23 Ibid s 319AA(1).

Example four: workplace endangerment *(Hooper)*

9.19 Example four was *DPP v Hooper*,[24] a judge-alone trial involving the offence of recklessly endangering persons at a workplace.[25] The OPP told us the workplace endangerment offence 'demonstrate[s] how far the *Nuri/Campbell* error has spread into Victorian law'.[26] The OPP said the offence is rarely prosecuted 'because of the difficulty of proving foresight of probability of risk'.[27]

9.20 *DPP v Hooper* involved the death of a man following a fault with a breathing mask in a hyperbaric oxygen chamber. The company and its director were acquitted of workplace reckless endangerment as the judge could not be satisfied of the objective endangerment element or the subjective recklessness element of the offence.[28] The two accused were convicted of other offences under the *Occupational Health and Safety Act 2004* (Vic) and fined $550,000 and $176,750 respectively.[29]

9.21 The OPP also suggested that this offence can be harder to prove than workplace manslaughter.[30] This is unsurprising given workplace manslaughter applies criminal negligence as its fault element.[31]

Example five: stabbing

9.22 Example five was a case study from the OPP's file review.[32] From the front seat of a car, person A lashed out and stabbed person B (who was in the back seat) in the leg at least four times. B sustained an arterial injury requiring surgery. A told police he swung the knife to scare B and thought he had stabbed the seat.

9.23 A was charged with intentionally and recklessly causing serious injury, but the prosecution accepted a guilty plea to intentionally causing injury. The OPP said it would be difficult to prove A was aware his conduct would probably cause serious injury, and it was arguable that the arterial injury was not serious.

9.24 Given the matter resolved to an intentional charge, 'serious injury' may have been the critical element rather than the threshold for recklessness. As noted earlier, intentionally causing injury is a serious offence, with a maximum penalty of 10 years imprisonment.

Example six: a punch in the face

9.25 Example six was a case study from the OPP's file review.[33] Person A stole liquor from a bottle shop. Police pursued A. A began yelling at police aggressively. The situation escalated. Police officer B used capsicum spray in A's face. A struck B in the face. B used the spray again. Police officer C struck A. A then punched C in the face, breaking his jaw in three places.

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24 *DPP v Hooper* (County Court of Victoria, Fox J, 13 July 2021).

25 *Occupational Health and Safety Act 2004* (Vic) s 32. This offence is outside 'offences against the person', the focus of our terms of reference.

26 Submission 10 (Office of Public Prosecutions).

27 Consultation 7 (Office of Public Prosecutions). We note that as recently as June 2023 a diving company specialising in underwater tank inspections and repairs pleaded guilty in the County Court to recklessly engaging in conduct that placed workers in danger of serious injury and was fined $600,000: WorkSafe Victoria, *Diving Company Fined $730,000 for Reckless Safety Breaches*, (Web Page, 27 June 2023) <https://www.worksafe.vic.gov.au/news/2023-06/diving-company-fined-730000-reckless-safety-breaches>. In September 2023, WorkSafe charged the Victorian Building Authority under section 32 of the *Occupational Health and Safety Act* for recklessly engaging in conduct that placed another person at a workplace in danger of serious injury, after an inspector took their own life: WorkSafe Victoria, *Building Regulator Charged Following Inspector's Death* (Web Page, 28 September 2023) <https://www.worksafe.vic.gov.au/news/2023-09/building-regulator-charged-following-inspectors-death>.

28 *DPP v Hooper* (County Court of Victoria, Fox J, 13 July 2021).

29 Office of Public Prosecutions (Vic), *Annual Report 2021/22* (Report, 2022) 34.

30 Submission 10 (Office of Public Prosecutions); *Occupational Health and Safety Act 2004* (Vic) s 39G.

31 The offence of workplace manslaughter was introduced by the Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Bill 2019 (Vic) and came into effect on 1 July 2020. It only applies to workplace deaths which occur after that date. In practice, the workplace reckless endangerment offence captures high culpability offending prior to the introduction of the workplace manslaughter offence: see, eg, *Anderton (VWA) v Jackson* (Latrobe Valley Magistrates' Court, 19 December 2018) discussed in *R v Brisbane Auto Recycling Pty Ltd* [2020] QDC 113, [121]. An employee had been standing in a large industrial bin raised on a forklift operated by the business owner. The owner did not have a forklift licence. The bin was being lifted with the employee inside to enable him to throw scrap metal into a larger bin. The bin, which was not secured, fell from the forklift and the employee was killed. The business owner was sentenced to six months imprisonment. See also *Orbit Drilling Pty Ltd v The Queen; Smith v The Queen* [2012] VSCA 82. The company pleaded guilty to a breach of section 32 of the OHS Act. An unsupervised and inexperienced driver was directed by Orbit's site manager to drive a heavy truck down a steep off-road slope. The truck had a known brake defect. The driver lost control and the truck overturned, killing the driver. By pleading guilty, the company admitted it was aware that requiring its employee to drive the truck down the slope would probably place him in danger of serious injury, and the risk was recklessly disregarded.

32 Supplementary Submission 20 (Office of Public Prosecutions).

33 Ibid.

9.26 A was charged with recklessly causing serious injury to C, but the prosecution accepted a plea of guilty to recklessly causing injury. The OPP said it faced difficulty proving if A was aware his punch would probably result in serious injury in circumstances where A:

- was apparently affected by drugs or alcohol
- had been sprayed with capsicum spray
- suffered from mental health issues
- was deemed unfit to be interviewed by police.[34]

9.27 We were grateful to have the opportunity to speak with the Victoria Police member who was victim C in this matter. He told us:

> I'm surprised [the offender] wasn't charged with intentional for what he did … I couldn't understand why it wasn't intentional, an intentionally cause injury … It was a deliberate act, that was my opinion.[35]

9.28 Victim C also expressed disappointment with the resolution process.

9.29 It is not clear on the details provided why a charge of intentionally cause injury was not pursued.

Victoria Police's examples

9.30 Victoria Police referred to three cases (*R v Wilson*,[36] *R v Abdul-Rasool*,[37] and *DPP v Saurini*)[38] as examples of how the current definition of recklessness may lead to undesirable outcomes.[39] In our view these cases do not demonstrate problems with the recklessness test that require reform.

R v Wilson

9.31 Wilson and Carman entered a restaurant in balaclavas, carrying a cut-down rifle and a pistol. People were slow to respond to their command to get on the floor, so the men said it was not a joke and the guns were not toys. They discharged several bullets from the rifle, which had a silencer. A kitchen worker thought Carman might have been a staff member joking around, so he tried to wave the pistol (which appeared not to be working) away. Wilson emphasised 'This is serious', and discharged two bullets from his rifle into the kitchen between the two workers. One bullet hit a stack of plates. The kitchen staff dropped to the floor. Wilson and Carman took around $4,000 from the registers and fled.

9.32 Both men were convicted at trial of multiple offences including reckless endangerment (see Chapter 4 for the elements of the endangerment offences). But the endangerment convictions were quashed on appeal. The court found there was insufficient evidence for the jury to infer that Wilson had foreseen that an appreciable risk of serious injury was a probable consequence of discharging his rifle.[40] As Wilson had not been asked nor said anything about his foresight in his record of interview, the prosecution had failed to exclude all other inferences consistent with innocence.[41] Circumstantial evidence can only prove a fact beyond reasonable doubt if all other reasonable hypotheses are excluded.[42]

34 Ibid.
35 Consultation 14 (Police member who was a victim of an offence). This was the view of the victim in their personal capacity, and not attributed to Victoria Police.
36 *R v Wilson & Carman* [2005] VSCA 78.
37 *R v Abdul-Rasool* [2008] VSCA 13; (2008) 18 VR 586.
38 *DPP v Saurini* [2022] VCC 1054.
39 Submission 7 (Victoria Police).
40 *R v Wilson & Carman* [2005] VSCA 78, [18] (Batt JA, Buchanan and Vincent JJA agreeing). On appeal, the prosecutor submitted that it was unfortunate that the conduct endangering life charges had proceeded to trial. Justice Batt observed the prosecutor did not appear to be strongly committed to maintaining the guilty verdicts on the statutory alternative endangerment charges.
41 Ibid (Batt JA, Buchanan and Vincent JJA agreeing).
42 *Doney v The Queen* [1990] HCA 51, [8]; (1990) 171 CLR 207, 211.

9.33 Wilson and Carman did not escape criminal liability. They were convicted of armed robbery and theft and were each sentenced to significant terms of imprisonment.[43] The discharge of the rifle was treated as seriously aggravating the armed robbery.[44]

R v Abdul-Rasool

9.34 Abdul-Rasool's (AR) daughter was placed in a refuge. Not knowing her daughter's whereabouts, AR went to her daughter's school and met with the deputy principal and an interpreter, demanding to know where her daughter was. AR became distressed. She pulled a can of petrol out of a bag she was carrying and poured petrol over herself. AR also placed a cigarette lighter on top of her handbag next to her. AR was heard to say, 'I am going to burn the school, I am going to burn you' and 'I'll kill myself and you and burn the school down.'

9.35 When arrested and interviewed by police, AR said she had only considered the harm to herself and did not consider the risk of harm to which she was exposing others. At trial, a jury convicted AR of reckless conduct endangering life, but the Court of Appeal overturned the conviction, finding that criminal liability cannot arise from future conduct that has not yet been performed. AR would have created a risk if she had attempted to ignite the petrol, but the incident lasted about an hour and over that time AR made no attempt to ignite the fuel. The facts did not fit the elements of the reckless endangerment charge.

9.36 On appeal it was also noted that an appropriate charge was overlooked, as AR's contemporaneous statements 'plainly constituted a threat to kill … for which she could have been tried'.[45]

DPP v Saurini

9.37 Saurini was smoking cannabis in a parked Holden Commodore. The Commodore's headlights were off. There was no street lighting. Close to midnight, a police van on patrol stopped in front of the Commodore. The police van's high beams, the LED light mounted on its bumper bar, and its 'takedown' lights were all turned on, directed at the front of the Commodore. The police lights and siren were not activated. As the two police officers were getting out of their vehicle, Saurini, then aged 19 and substance-affected, started driving. His vision was impaired by condensation inside the Commodore and the police van's lights. The Commodore collided with part of the police van and one of the police officers, who sustained serious leg injuries.

9.38 Saurini faced trial on several charges,[46] including recklessly exposing an emergency worker to risk by driving (one charge for each police officer)[47] and alternative charges of negligently causing serious injury[48] and dangerous driving causing serious injury.[49]

9.39 Saurini's defence was that when he drove off, he did not know and was not reckless as to the probability that there was a police vehicle and police officers behind the bright lights. The jury acquitted Saurini of the reckless exposure charge. The court concluded this was 'an unsurprising verdict … there was evidence in the trial that Victoria Police's own accident reconstruction unit had declined to even attempt a reconstruction of the collision, in part at least because of the brightness of the lights that shone upon the Commodore'.[50]

43 Wilson was ultimately sentenced to a total effective sentence of eight years imprisonment with a non-parole period of five years and six months. Carman was ultimately sentenced to a total effective sentence of eight years imprisonment with a non-parole period of six years: *R v Wilson & Carman* [2005] VSCA 78, [20], [24], [27]–[28] (Batt JA)
44 *R v Wilson & Carman* [2005] VSCA 78, [26] (Batt JA).
45 *R v Abdul-Rasool* [2008] VSCA 13, [66] (Redlich JA); *Crimes Act 1958* (Vic) s 20.
46 A conviction on any of the charges would require Mr Saurini to be disqualified from driving: *Sentencing Act 1991* (Vic) ss 87P, 89.
47 *Crimes Act 1958* (Vic) s 317AF(1)(b). This offence is outside 'offences against the person', the focus of our terms of reference.
48 Ibid s 24.
49 Ibid s 319(1A) and 422A.
50 *DPP v Saurini* [2022] VCC 1054, [20].

9.40 The jury found Saurini guilty of negligently causing serious injury. He was sentenced to a community correction order, a disposition the prosecution agreed with. The sentence took into account the fact that almost two years before his trial, Saurini had offered to plead guilty to the charge for which the jury ultimately convicted him, but that offer was rejected by the prosecution.[51]

Ignatova v The Queen

9.41 Victoria Police also referred us to the case of *Ignatova v The Queen ('Ignatova')*,[52] saying it illustrates 'how the evidence required to prove a recklessly causing serious injury charge is close to or could be the same evidence required to prove an intentionally causing serious injury charge'.[53] But the LIV pointed us to *Ignatova* as an example of inappropriate charging.[54]

9.42 When Ignatova met her former husband for the weekly handover of their four-year-old daughter, she gave him a note saying the child had a rash on her bottom and had received medical attention. The child appeared to be in pain, so her father took her to a doctor. A forensic paediatrician found burns on the child's left side, genital area, and inner thighs, caused by scalding with hot liquid. Police were alerted. Ignatova was interviewed by police and denied scalding her daughter. She said the child had soiled herself, so she had put her in the bath to clean her. She tested the water first then used the shower hose to wash the child's bottom with lukewarm water.

9.43 Ignatova faced trial on a charge of intentionally causing serious injury. But after the prosecutor conceded the evidence did not support that charge, the jury were left to consider recklessly causing serious injury as the alternative. Ms Ignatova was convicted, but successfully appealed.

9.44 The jury could only convict Ignatova of recklessly causing serious injury if they were satisfied that she had tested the temperature of the water and foresaw the probability that it was so hot that the child would be burnt. But if Ignatova had tested the water and knew it was too hot, the charge of intentionally causing serious injury should have been left to the jury.[55] It would have 'required impermissible mental agility' for the jury to conclude that Ignatova had tested the water and found it sufficiently hot that she was reckless as to her daughter suffering serious injury, but not so hot to have intended to cause serious injury.[56]

9.45 Several inferences about Ignatova's state of mind were open. Ignatova might have:

- Failed to test the temperature of the water.
- Tested the water and mistakenly considered that the temperature was not hot enough to burn the child.
- Tested the water but not foreseen the risk that a change in water pressure would increase its temperature so that the child would probably be burnt.

9.46 Any of these factual findings would have supported a conviction for negligently causing serious injury, but that charge was not included on the trial indictment.[57]

9.47 *Ignatova* illustrates the importance of exercising prosecutorial discretion rigorously, with a full appreciation of the hierarchy of charges available, to ensure charges are supported by clear and cogent evidence.

51 Ibid [29].
52 *Ignatova v The Queen* [2010] VSCA 263.
53 Submission 7 (Victoria Police).
54 Submission 14 (Law Institute of Victoria).
55 *Ignatova v The Queen* [2010] VSCA 263, [38] (Neave JA).
56 Ibid [8] (Ashley JA).
57 Compare with the case of *Mok v The Queen* [2011] VSCA 247, where the offender was found guilty by a jury of negligently causing serious injury to his infant son by placing him in a 65 degrees Celsius bath. He was acquitted of the charges of intentionally causing serious injury and recklessly causing serious injury. Prior to the trial he had offered to plead guilty to negligently causing serious injury, but that offer was rejected by the prosecution. Justice Nettle characterised the offending as 'negligence constituted of momentary inattention' and placed the offender's moral culpability 'towards the lower end of the scale': at [4]–[5] (Nettle J).

Victoria Police's family violence examples

9.48 In its submission, Victoria Police said that the probability threshold is particularly problematic for family violence where:

- an action results in serious harm but the accused did not foresee that serious harm would be the outcome (for example, where a person seriously harms an infant by shaking), or
- serious injury is inflicted but is not physically obvious (for example, non-fatal strangulation cases).[58]

Seriously harming an infant by shaking

9.49 Victoria Police described a situation where a person shakes a baby 'to manage or stop the baby from crying' or as 'an act of frustration' and causes serious harm.[59] It said that people responsible for seriously harming infants are 'under-penalis[ed]'.[60]

9.50 Cases that involve baby shaking are complex and involve a high incidence of death. It can be difficult to establish the cause of injury and the level of force used.[61] The chosen charge needs to fit the facts of the case and be supported by evidence.

9.51 *DPP v QPX*[62] illustrates the complexity of these cases. A mother pleaded guilty to infanticide of one of her newborn twin daughters (M) and recklessly causing serious injury to her other daughter (N). She had shaken the babies but was adamant she never intended harm or acted in anger; her only desire was to settle the babies, who had colic symptoms. In this context, the sentencing judge questioned the appropriateness of the charges filed and prosecuted:

> The police … laid charges of murder (in respect of M) and alternative charges of attempted murder and intentionally causing serious injury (in respect of N) … after committal she was indicted by the [DPP] on one charge of infanticide in respect of M and one charge of recklessly causing serious injury in respect of N … there was no evidence sufficient to support the charges brought by the police. The mental elements of those charges could never have been legally established. …On the facts of this case it must be seriously doubted as to whether [the recklessly causing serious injury] charge was, in the circumstances, supported by the evidence. However, having regard to the fact that QPX pleaded guilty … [the] charges are established …
>
> [the injuries] were inflicted by a loving mother suffering from significant emotional and psychological compromise. Her moral culpability … is either non-existent or of such a low degree as to be negligible.[63]

9.52 If the prosecution cannot prove that a person intended to cause serious harm or foresaw that their actions were likely to cause serious harm, the person should not be found guilty of either intentionally or recklessly causing serious injury. Negligently causing serious injury might be an appropriate alternative.[64]

9.53 Where there is sufficient evidence, a conviction for recklessly causing serious injury can be achieved.[65]

58 Submission 7 (Victoria Police).
59 Ibid.
60 Ibid.
61 See, eg, *Vinaccia v The Queen* [2022] VSCA 107; *R v Hammond* (Ruling No 3) [2019] VSC 195; *R v Barnes* [2008] VSC 66; *R v Klamo* [2008] VSCA 75; (2008) 18 VR 644, all cases of baby shaking in the context of homicide charges.
62 *DPP v QPX* [2014] VSC 189.
63 Ibid [10]-[13], [27].
64 Negligently causing serious injury has a maximum penalty of 10 years imprisonment, by comparison with 15 years imprisonment for recklessly causing serious injury, or 20 years for intentionally causing serious injury. For examples, see *DPP v Farrell (a pseudonym)* [2019] VCC 297; *DPP v Weston* [2016] VSCA 243.
65 See, eg, *Harvey v The King* [2023] VSCA 219 where a father was found guilty by a jury of recklessly causing serious injury to his seven-week-old son by forceful shaking.

Choking, suffocation and non-fatal strangulation[66]

9.54 Victoria Police told us that physical harm may not be evident where someone uses their body weight, a pillow or other instrument to apply pressure to another person's neck, so proving recklessness is challenging.[67] It also said:

> The person most likely to have the injuries in that scenario is the perpetrator with defensive wounds, and there'll be nothing on the woman, and so it's not getting as far as charges even being laid.[68]

9.55 We were concerned to hear that instances of choking, suffocation or strangulation are being left uncharged by police because an injury is not visible. Within the context of family violence, these acts represent 'a chilling exploitation of physical power or dominance.'[69] The Court of Appeal has acknowledged that 'choking is a particularly serious form of violence. Strangulation to the point of unconsciousness has potentially life-threatening consequences.'[70]

9.56 It is 'generally recognised that the absence of visible injuries to the neck doesn't mean that … strangulation [has not] occur[red]'.[71] The definition of injury in the Crimes Act includes unconsciousness and harm to mental health. Serious injury includes an injury that endangers life.[72]

9.57 In practice, injury offences can be used to capture instances of choking, suffocation and non-fatal strangulation where there is sufficient evidence.[73] Where injury cannot be proved, an endangerment charge might be available, and at the very least, an assault charge would ensure such behaviour is captured by the criminal law.

9.58 We note the introduction of the *Crimes Amendment (Non-fatal Strangulation) Bill 2023* to create two new Crimes Act offences:

- New section 34AD will create the offence of 'Non-fatal strangulation intentionally causing injury', with a maximum penalty of 10 years imprisonment.[74] This offence will cover a person who intentionally chokes, strangles or suffocates a family member, intending to cause an injury and resulting in an injury.
- New section 34AE will create the offence of 'Non-fatal strangulation', with a maximum penalty of five years imprisonment.[75] This offence will cover a person who intentionally chokes, strangles or suffocates a family member. It will not require proof of injury.

66 Choking, suffocation and strangulation are often used interchangeably in everyday usage to describe the application of pressure to a person's neck or face, or the obstruction or restriction of their breath. The proposed definition of 'chokes, strangles or suffocates' for the purposes of the new non-fatal strangulation offences will include 'applying pressure to the front or sides of a person's neck; obstructing any part of, or interfering with the operation of, a person's respiratory system or accessory systems of respiration; impeding a person's respiration': Crimes Amendment (Non-Fatal Strangulation) Bill 2023 (Vic) (as at 8 November 2023).

67 Submission 7 (Victoria Police).

68 Consultation 10 (Victoria Police).

69 *DPP v Reynolds* [2022] VSCA 263, [80] (T Forrest JA and Kidd AJA).

70 *DPP v Avalos (a pseudonym)* [2023] VSCA 117, [15].

71 *Pompei v The King* [2023] VSCA 71, [22(b)] (Beach, T Forrest and Kaye JJA).

72 *Crimes Act 1958* (Vic) s 15.

73 See, eg, *DPP v Avalos (a pseudonym)* [2023] VSCA 117 where instances of choking were covered by both intentionally causing injury and common law assault. In *Matovic v The Queen* [2021] VSCA 212 choking resulting in a loss of consciousness was covered by a charge of conduct endangering person. In *DPP v Shams (a pseudonym)* [2023] VCC 1479 the jury convicted the offender of conduct endangering life for an instance of choking where the victim lost consciousness.

74 'The element of intentional injury means there is a higher level of culpability attached to this offence, triggering the higher maximum sentence. It is also consistent with comparable existing offences that have 10-year penalties, such as conduct endangering life and intentionally causing injury': Victoria, *Parliamentary Debates*, Legislative Assembly, 19 October 2023, 3932 (Anthony Carbines, Minister for Police, Minister for Crime Prevention, Minister for Racing).

75 Ibid 3932. The Minister notes that because non-fatal strangulation 'often leaves no visible signs of physical injury', historically prosecutors resorted 'to charging offenders with common assault to get a conviction. Common assault only attracts a maximum penalty of three months…'. While the summary offence of common assault (commonly referred to as 'unlawful assault') carries a maximum penalty of three months imprisonment (*Summary Offences Act 1966* (Vic) s 23), the indictable offence of common law assault carries a maximum penalty of five years imprisonment, the same as the proposed new s 34AE offence: *Crimes Act 1958* (Vic) s 320.

Contravening a Family Violence Intervention Order

9.59 Although this matter is outside our terms of reference, Victoria Police also told us that there is 'a gap in [the] police response to hold perpetrators accountable for family violence' because of the judgment in *DPP v Cormick ('Cormick')*.[76]

9.60 Before *Cormick*, Victoria Police interpreted the summary offence of contravening a Family Violence Intervention Order[77] as a strict liability offence.[78] But intention is a fault element of this offence.[79] Victoria Police said that because of the challenge of proving intention, 'the definition of "recklessness" will become critical in family violence contravention cases.'[80] But requiring the prosecution to prove intention is not 'unduly burdensome':

> Consistent with most crimes, intent will be proved inferentially … having regard to the context and nature of the acts [of the accused in breaching the order] including their content and frequency, it will often present little difficulty for the prosecution to prove purpose and intent. [81]

Conclusion

9.61 Criminal cases have many variables, and there can be different views about the 'appropriate' or 'desirable' outcome in a particular case.

9.62 Overall, the offered examples do not indicate a problem with the recklessness test that requires reform. Rather, the examples highlight that:

- charges must be supported by clear and cogent evidence
- charging decisions must be made with a full appreciation of the hierarchy of offences available
- a charge cannot result in a finding of guilt unless there is sufficient evidence to prove all its elements, including fault elements, to the criminal standard.

76 Submission 7 (Victoria Police).
77 It is an offence for a person who has been served with a Family Violence Intervention Order (FVIO) and had the FVIO explained to them to contravene the FVIO: *Family Violence Protection Act 2008* (Vic) s 123.
78 This was despite the earlier decision of *DPP v Cope (a pseudonym)* [2021] VMC 14 where a finding was made that the prosecution is required to establish a *mens rea* element in any prosecution under s 123(2) of the *Family Violence Protection Act 2008* (Vic).
79 As the prosecution conceded that intention is the relevant fault element of the offence, it was not necessary for the Court of Appeal to determine if recklessness would also be sufficient: *DPP v Cormick* [2022] VSC 786, [50]. We note that the more serious offence of contravention of order intending to cause harm or fear for safety in s 123A of the *Family Violence Protection Act 2008* (Vic) has a reckless element as it applies where a person contravenes an order 'intending to cause, or knowing that his or her conduct will probably cause' physical or mental harm or apprehension or fear.
80 Submission 7 (Victoria Police).
81 *DPP v Cormick* [2022] VSC 786, [58].

CHAPTER

10

The benefits of Victoria's recklessness test

10. The benefits of Victoria's recklessness test

Overview

- Victoria's current recklessness test was supported by most stakeholders.
- The current test is functioning well. It has the benefits of being:
  - well established, with a long history and embedded into the architecture of Victoria's criminal law
  - relatively clear, simple, and easy to apply
  - largely consistent across *Crimes Act 1958* (Vic) offences.

Overwhelming support for the current test

10.1 During our inquiry many stakeholders supported retaining the current recklessness test. Those supporting the existing definition of recklessness have considerable experience in the criminal law and apply it daily. They are:

- The Children's Court of Victoria, a specialist court for children and young people.
- The Criminal Bar Association (CBA), the peak body for Victorian barristers practising criminal law. The CBA represents criminal barristers who prosecute and defend criminal prosecutions and those who have a mixed practice.[1]
- The Law Institute of Victoria (LIV), Victoria's peak body for lawyers and those working in the legal sector.[2]
- Victoria Legal Aid (VLA), the largest criminal defence practice in Victoria. It represents people who are unable to afford private lawyers. VLA has extensive experience in the Magistrates' Court and higher courts in Victoria.[3]
- The Victorian Aboriginal Legal Service (VALS). Criminal law (both summary and indictable crime) is one of VALS' specialist areas and its legal practice spans Victoria.[4]
- Youthlaw, Victoria's state-wide community legal centre for young people under 25 years of age. Youthlaw has extensive summary crime experience.[5]
- Liberty Victoria, a peak civil liberties organisation. Its members and office holders include legal practitioners who appear in criminal proceedings for both the prosecution and defence.[6]
- Barrister Dermot Dann KC and solicitor Felix Ralph,[7] who represented the acquitted person in the *DPP Reference* appeals.

1 Submission 6 (Criminal Bar Association).
2 Submission 14 (Law Institute of Victoria).
3 Submission 17 (Victoria Legal Aid).
4 Victorian Aboriginal Legal Service, *Criminal Law* (Web Page, 14 June 2023) <https://www.vals.org.au/criminal-law/>. Consultation 1 (Victorian Aboriginal Legal Service).
5 Submission 16 (Youthlaw).
6 Submission 9 (Liberty Victoria).
7 Submission 12 (Dermot Dann KC and Felix Ralph).

10.2 The Judicial College of Victoria (JCV) and the Magistrates', County and Supreme Courts were neutral on the policy question of how recklessness should be defined but told us the current recklessness test is functioning well. They provided insights about the potential impacts of change (see Chapter 11).[8]

The current test is well established

10.3 The Court of Appeal has recognised that 'recklessness is a concept well known to the criminal law.'[9] The current common law definition of recklessness has a long history in Victoria. It is embedded in our criminal law.

A long history

10.4 We discuss the history of recklessness in Victoria in Chapter 3. The current test has been applied consistently for almost 30 years, since the 1995 decision of *R v Campbell ('Campbell')*.[10]

10.5 In the *DPP Reference* in the Court of Appeal,[11] Justice Priest referred to 'the apparent general level of satisfaction with *Campbell*',[12] and noted that:

> the principle established by *Campbell* has been applied daily in the criminal jurisdiction of all courts in the [Victorian] hierarchy. As far as I can tell, in the years since it was decided there has been no academic or judicial criticism of its application and operation—the Director's counsel could find none—let alone any suggestion that it needed to be reconsidered.[13]

10.6 Justice Priest returned to these observations later in his judgment to emphasise:

> the test in *Campbell* has stood the test of time. The law is well-settled. Thus, *Campbell* has been satisfactorily applied for many years, without attracting any criticism, judicial or academic. That alone provides compelling justification for leaving it undisturbed.[14]

10.7 Justice Kaye endorsed Justice Priest's observations about the durability of the test. He noted it was 'settled practice' to direct juries in accordance with *Campbell* and added:

> at no time, in the 25 years that have followed the decision in *Campbell*, has there been any criticism of, or dissatisfaction with, the test stated by the Court in that case.[15]

10.8 On the appeal of the *DPP Reference* to the High Court, Justices Gageler, Gordon and Steward highlighted that *Campbell* has been consistently followed in Victoria.[16] Justice Edelman also stated, 'the judicial meaning of recklessness in *Campbell* has been adopted in the courts of Victoria for 26 years without any obvious inconvenience.'[17]

10.9 During our inquiry many stakeholders similarly emphasised that the common law test for recklessness has been settled for a long time without issue and was unchallenged until the *DPP Reference*.[18] The CBA told us, 'Since the probability test has been in operation for several decades, there exists a substantial body of law which assists in the routine application of the test.'[19]

8 Submissions 13 (Supreme Court of Victoria), 15 (County Court of Victoria). Consultations 5 (Judicial College of Victoria), 8 (Supreme Court of Victoria), 11 (County Court of Victoria), 12 (Magistrates' Court of Victoria).
9 *Orbit Drilling Pty Ltd v The Queen; Smith v The Queen* [2012] VSCA 82, [21] (Maxwell P, Bongiorno JA and Kyrou AJA).
10 *R v Campbell* [1995] VSC 186; [1997] 2 VR 585.
11 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181; (2020) 284 A Crim R 19.
12 Ibid.
13 Ibid [53] (Priest JA).
14 Ibid [122] (Priest JA).
15 Ibid [143]-[144] (Kaye JA).
16 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [42]; (2021) 274 CLR 177, 194 [42] (Gageler, Gordon, Steward JJ) citing, eg, *R v Ruano* [1999] VSCA 54 at [8]; *R v Le Broc* (2000) 2 VR 43 at 60 [56]; *R v Kucma* (2005) 11 VR 472 at 474 [4], 482 [29]; *R v Wilson* [2005] VSCA 78 at [17]; *R v Pota* [2007] VSCA 198 at [26]; *R v Abdul-Rasool* (2008) 18 VR 586 at 603-604 [67]–[69]; *Ignatova v The Queen* [2010] VSCA 263 at [36]–[37]; *Paton v The Queen* [2011] VSCA 72 at [46]–[49], [68]; *James v The Queen* (2013) 39 VR 149 at 179 [148]; *Ejupi v The Queen* [2014] VSCA 2 at [34]; *Phillips v The Queen* [2017] VSCA 313 at [43].
17 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [66] (Edelman J).
18 Submissions 6 (Criminal Bar Association), 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph), 13 (Supreme Court of Victoria), 14 (Law Institute of Victoria), 17 (Victoria Legal Aid).
19 Submission 6 (Criminal Bar Association).

10.10 Longevity alone is not reason enough to avoid reform. But the current definition of recklessness has stood the test of time, which lends weight to keeping it. As some stakeholders noted, the current definition has the benefits of certainty and stability (see Chapter 13).

Embedded in Victoria's criminal law

10.11 Recklessness as it is currently defined is integral to the way Victoria's criminal law has developed and how it operates. Previous legislative changes to offences and penalties were made on the basis of the current definition of recklessness (see Chapter 3).

10.12 Recklessness is an element in many Crimes Act offences (see Appendix D) and maximum penalties and mandatory sentencing provisions are calibrated to the probability threshold (see Chapters 4 and 5). The recklessness test also interacts with other pieces of legislation such as the *Sentencing Act 1991* (Vic).

10.13 The CBA described the current test as one of the 'building blocks' of Victorian criminal law,[20] and legal practitioners urged caution in disrupting a definition that is 'deeply entrenched' in the 'architecture' of criminal law in Victoria.[21]

The current test is functional

10.14 A strong theme in submissions and consultations was that the current definition of recklessness is working well. We heard that it is simple and easily applied by lawyers, judges, and juries across the criminal courts.

10.15 The LIV told us the test is 'fit-for-purpose',[22] and a County Court judge described it as 'a good, broad definition'.[23] A judge of the Supreme Court told us the practical application of the test is 'seamless' and 'working very well'.[24] In the *DPP Reference* in the Court of Appeal, Justice Kaye stated the probability test is 'logical and readily understood.'[25]

Clear and well understood by stakeholders

10.16 Trial by jury is central to our criminal justice system. Jurors come from all walks of life and must determine the facts in a criminal case. Most do not have pre-existing knowledge of the law or experience in evaluating evidence. Legal concepts should be easy for judges to explain and for jurors to understand so the law can be properly applied.

10.17 Victoria Police said that the current definition of recklessness is difficult for juries to understand because it requires proof of a subjective fault element.[26] This point was not made by any other stakeholder during our inquiry.

10.18 Most serious criminal offences have subjective fault elements (see Chapter 2). The LIV told us that the current recklessness test is 'straightforward, clear and easy for juries to apply' *because* it is subjective—a jury only needs 'to consider the accused's state of mind at the time of the offence and the accused's recognition of probable consequences.'[27]

10.19 The JCV explained that jury directions on recklessness for non-fatal offences largely replicate the jury directions for reckless murder. It had not received any feedback suggesting these directions are difficult to understand.[28]

20 Consultation 4 (Criminal Bar Association).
21 Submission 12 (Dermot Dann KC and Felix Ralph).
22 Submission 14 (Law Institute of Victoria).
23 Consultation 11 (County Court of Victoria).
24 Consultation 8 (Supreme Court of Victoria).
25 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [146] (Kaye JA).
26 Submission 7 (Victoria Police).
27 Consultation 3 (Law Institute of Victoria).
28 Consultation 5 (Judicial College of Victoria).

10.20 In the *DPP Reference* in the Court of Appeal, Justice Priest said one of the reasons the current test should be retained is its simplicity:

> longstanding experience has demonstrated that the *Campbell* test is straightforward and relatively simple for juries to apply. The test is purely subjective … and has no complicating objective components. In the Court's experience, it is a test easily grasped by juries.[29]

10.21 Dr Byrne told us that evidence suggests jurors are generally reluctant to ask questions.[30] But Dr Byrne said that:

> the limited available research on juror comprehension of different forms of recklessness supports the view that the simpler the definition of recklessness, the easier it is likely to be for jurors to understand. The simplest form of recklessness tested is closest to Victoria's approach of defining recklessness in terms of what is probable.[31]

10.22 A magistrate, judges of the County Court and judges of the Supreme Court told us that the current form of recklessness is easy to understand.[32]

10.23 County Court judges said they do not have any difficulty explaining recklessness to juries.[33] One judge explained:

> it is very simple to determine whether a particular issue causes trouble for a jury. For example, we are often asked 'what does beyond reasonable doubt mean?' It's very easy when you've sat in a lot of trials to determine when a jury is struggling, you get a stream of questions from the jury.
>
> … [the] probable [test for recklessness] … is not a concept a jury has trouble with.[34]

10.24 The CBA reiterated that the definition has the benefit of simplicity and is readily understood and applied by juries.[35] The CBA said it asked approximately 60 criminal barristers whether they had ever been involved in a case where there was a question from the jury about the meaning of recklessness. None recalled such a question being put to the trial judge.[36] By comparison, the CBA said juries regularly ask about the meaning of 'beyond reasonable doubt'.[37] Dr Byrne told us 'research from different jurisdictions [indicates] that jurors commonly struggle to understand the concept of "proof beyond reasonable doubt"'.[38]

10.25 It is also important for victims and the wider community to understand legal concepts so they can meaningfully engage with the legal system. The Victims of Crime Commissioner supported the view that the simpler the definition, the easier it is for people to understand.[39]

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29 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181 [124] (Priest JA).

30 Consultation 9 (Dr Greg Byrne PSM). See also Greg Byrne, 'A Pathway to Fair(er) Trials: Why We Need a Juries Advisory Council' (2021) 31(2) *Journal of Judicial Administration* 49, 51 n 18, 19, citing Penny Darbyshire, Andy Maughan and Angus Stewart, *What Can the English Legal System Learn from Jury Research Published up to 2001?* (Kingston Law School, 2001) 48; Phoebe C Ellsworth and Alan Reifman, 'Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions' (2000) 6 *Psychology, Public Policy and Law* 788, 804; Jacqueline Horan, *Juries in the 21st Century* (Federation Press, 2012) 84–85; Mark Findlay, 'Juror Comprehension and Complexity' (2001) 41 *British Journal of Criminology* 56, 71.

31 Submission 18 (Dr Greg Byrne PSM). Dr Byrne added that 'while Victoria's existing test of reasonableness may be easier to understand, we do not have research concerning how best to guide jurors in understanding this term' and proposed that a Juries Advisory Council be established to 'provide expert interdisciplinary analysis of juror comprehension issues'.

32 Consultations 8 (Supreme Court of Victoria), 11 (County Court of Victoria), 12 (Magistrates' Court of Victoria). Victoria Police also said that without 'qualitative data provided by juries in response to questions about their understanding … we cannot determine how well the probability test is understood.': Consultation 10 (Victoria Police).

33 Consultation 11 (County Court of Victoria).

34 Ibid.

35 Submission 6 (Criminal Bar Association).

36 Consultation 4 (Criminal Bar Association).

37 Ibid. See also Consultations 5 (Judicial College of Victoria), 11 (County Court of Victoria).

38 Submission 18 (Dr Greg Byrne PSM), citing Criminal Law Review, Department of Justice, *Jury Directions: A New Approach* (Report, 2013) 89-91; Katrin Mueller-Johnson, Mandeep K Dhami and Samantha Lundrigan, 'Effects of Judicial Instructions and Juror Characteristics on Interpretations of Beyond Reasonable Doubt' (2018) 24 *Psychology, Crime and Law* 117, 118. See also Lily Trimboli, 'Juror Understanding of Judicial Instructions in Criminal Trials', *Crime and Justice Bulletin: Contemporary Issues in Criminal Justice*, Number 119 (NSW Bureau of Crime Statistics and Research, 2008).

39 Submission 19 (Victims of Crime Commissioner).

10.26 We discuss the complexities of alternative approaches to recklessness in Chapters 6 and 7. Our view is that Victoria's current approach to recklessness is the simplest form of the test.

Relatively easy to apply

10.27 Youthlaw and VALS did not see a problem with the current definition of recklessness and did not support a change to the threshold. However, both specialist legal services suggest there may be inconsistency in how the test is applied, especially by prosecutors, in the high-volume, fast-paced environment of the Magistrates' Court.[40]

10.28 Other practitioners told us that the current test for recklessness is applied consistently.[41] The Magistrates' Court told us the test is well understood, clear, and there are no issues with its application.[42]

10.29 Liberty Victoria said it had not encountered misapplication of the recklessness test. It added that if there was inconsistent application by 'outlier' decision makers, this would be a problem with judicial education rather than with the test itself.[43]

10.30 Although we heard there may be some inconsistency in application in the Magistrates' Court, this was not the experience of most stakeholders we spoke to. If any inconsistency is identified in the future, it can be remedied through education.

10.31 A judge of the County Court told us 'a combination of a working definition and good judicial resources … has led to good consistency of approach' in the County Court.[44]

Largely consistent across Crimes Act offences

10.32 The County Court told us that the definition of recklessness for Crimes Act offences is 'for the most part' 'harmonious'.[45] Some other stakeholders, including the OPP, said that the definition is not completely consistent. But, as we discuss in Chapter 5, the definition is largely consistent across Crimes Act offences.

10.33 Having a definition of recklessness that is largely consistent, regardless of the outcome of the conduct, means that the definition can be understood relatively easily and applied fairly across Victoria.

Appeals are rare

10.34 VLA told us there would likely be more appeals about misdirection or miscarriages of justice if the recklessness test were unclear or difficult to understand.[46]

10.35 A judge of the Supreme Court said that recklessness is not an issue 'clutter[ing] up' the Court of Appeal.[47] Indeed, appeals alleging error in the trial judge's charge on recklessness are 'extremely rare'.[48] This is consistent with jury directions on the current test being 'simple, logical and straightforward'.[49]

40 Submission 16 (Youthlaw). Consultation 1 (Victorian Aboriginal Legal Service).
41 Consultations 3 (Law Institute of Victoria), 6 (Victoria Legal Aid).
42 Consultation 12 (Magistrates' Court of Victoria).
43 Consultation 2 (Liberty Victoria). If any problems with inconsistent application were identified, they could be addressed in ways other than changing or legislating the definition, such as improving judicial education resources: Consultation 12 (Magistrates' Court of Victoria).
44 Consultation 11 (County Court of Victoria).
45 Submission 15 (County Court of Victoria).
46 Consultation 6 (Victoria Legal Aid).
47 Consultation 8 (Supreme Court of Victoria).
48 Submission 13 (Supreme Court of Victoria). Consultation 8 (Supreme Court of Victoria). Shortly after *Campbell*, in *R v Totivan* (Supreme Court of Victoria Court of Appeal, Phillips CJ, Callaway JA and Smith AJA, 15 August 1996) the prosecution conceded that the trial judge's direction to the jury that recklessly in s 18 of the Crimes Act meant 'being aware that it *may* happen' (emphasis in original) was a misdirection, because injury must be foreseen as a probable consequence. In *R v Kalajdic; R v Italiano* [2005] VSCA 160, [31]; (2005) 157 A Crim R 300, 307 [31] the jury were told, in the context of charges of obtaining property by deception, that it was sufficient to constitute recklessness as to the truth of the statement if the accused appreciated the possibility that the statement might be false. The misdirection did not cause any injustice because recklessness was not an issue on the evidence before the jury. In *Paton v The Queen* [2011] VSCA 72, [46]-[49] the Court of Appeal held the trial judge's misdescription of the foresight necessary for the offence of recklessly causing injury by using the word 'might' was a 'fundamental irregularity' and, as per *Campbell*, a material error.
49 Submission 13 (Supreme Court of Victoria); *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [144] (Kaye JA).

Conclusion

10.36 The current test for recklessness in Victoria is functioning well. Many stakeholders support keeping the current test because it is relatively simple to understand and apply, which minimises error. It has the benefit of being well-established and largely consistent across Crimes Act offences.

CHAPTER

11

The consequences of changing the recklessness test

11. The consequences of changing the recklessness test

Overview

- We heard limited support for changing the recklessness test other than from Victoria Police and the Office of Public Prosecutions (OPP).
- On its own, a possibility test for recklessness would be too broad and would capture behaviour that should not be criminalised.
- Introducing an objective limb, 'reasonableness', to limit the scope of a possibility test could increase unfairness in its application. Changing the test for offences against the person would increase inconsistency in the *Crimes Act 1958* (Vic), and make the task for magistrates, juries and judges more complex than at present. Added complexity is more likely to lead to error when directing juries.
- Changing the test would result in the loss of case law and create uncertainty.
- Changing the test would require reconsideration of penalties and other offences with a recklessness element.
- Lowering the threshold for the recklessness test could have a disproportionate impact on young people and people who face disadvantage.
- There is not a compelling case to support reform of the recklessness test. The current common law definition of recklessness should be retained.

Little support for changing the test

11.1 This chapter examines the potential impacts of re-defining recklessness. While we heard overwhelming support for Victoria's current recklessness test (see Chapter 10), only a small number of stakeholders favoured changing the test (see Chapter 7).

A 'possibility' test alone would be too broad

11.2 The OPP and Victoria Police told us the test for recklessness should be based on whether the accused was aware of a 'possible' rather than 'probable' risk.

11.3 A 'possible' threshold for recklessness would be too broad on its own. In the *DPP Reference* case in the Court of Appeal, Justice Kaye stated:

> foreseeability of a mere possibility would, without any qualification, impose criminal liability on ordinary everyday actions performed with the foresight of the possibility—no matter how slight or remote—of a particular consequence.[1]

1 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [146]; (2020) 284 A Crim R 19, [146] (Justice Kaye).

11.4 The scope of 'reckless' offences would cover 'a vast area of moral culpability'[2] and have an 'oppressively wide reach.'[3] Legal practitioners told us that a possibility test on its own would 'invariably capture situations where on any sensible view it is unjust to criminalise the behaviour',[4] with outcomes that would be 'entirely disproportionate with … moral culpability'.[5]

11.5 A 'possibility' test could be limited by requiring that the accused's actions were also 'unreasonable' in the circumstances. Adding a reasonableness element is intended to avoid 'over-criminalisation of acts which are socially acceptable but inherently risky'.[6] In the *DPP Reference* case in the High Court, Justice Edelman said 'the difference between foresight of possibility and foresight of probability can be much reduced by the additional element of unreasonableness'.[7] However, even if reasonableness reduced the gap, the scope of a 'possibility' test would still be broader than the current test. Everyone who contributed to our inquiry proceeded on this basis.

11.6 The Court of Appeal said that a change from a 'probability' to a 'possibility' test, as proposed by the Director of Public Prosecutions (DPP), would expand the potential scope of criminal liability. This was also acknowledged in the *DPP Reference* case by the DPP's senior counsel.[8] Stakeholders also said that a lower threshold would significantly expand the scope of criminal liability for recklessness offences.

11.7 New South Wales has a 'possibility' threshold for recklessness for offences against the person other than murder, with a 'reasonableness' part to constrain its scope (see Chapter 6). We provide data on the number of charges where people were found guilty of some 'recklessness' offences in New South Wales in Appendix F. On their face, the numbers of finalised 'recklessness' cases do not indicate a vast difference between the two jurisdictions.

11.8 However, it is very difficult to draw a meaningful comparison between Victoria and New South Wales. There are differences in population size, the range of offences, the way the elements of the offences are constructed, and the definitions that apply to them (such as various versions of 'harm' and 'injury'). Further, charging practices and prosecutorial discretion may be exercised differently in each state.

Risks of adding an objective limb

11.9 Victoria Police and the OPP accepted that a 'possibility' test on its own would be too broad. They proposed that a 'possibility' test should be limited by requiring that the accused's actions were also 'unreasonable'. This would add an objective limb to recklessness. We heard from stakeholders that adding an objective limb to the recklessness test could lead to unfairness, greater complexity, and inconsistent application.

Unfairness

11.10 Fairness requires that for serious crimes, responsibility is linked to a person's state of mind at the time of their conduct. There is a presumption that serious criminal offences involve a subjective fault element.[9] The Court of Appeal has cautioned:

> given that criminal responsibility ordinarily rests on what an accused person actually knew or intended or foresaw … the introduction of an objective test is always a matter requiring careful consideration.[10]

2 Consultation 4 (Criminal Bar Association).
3 Submission 6 (Criminal Bar Association).
4 Consultation 3 (Law Institute of Victoria).
5 Submission 6 (Criminal Bar Association).
6 Submission 10 (Office of Public Prosecutions).
7 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [75]; (2021) 274 CLR 177, [75] (Edelman J).
8 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [45], [93].
9 Ian Freckelton and Mirko Bagaric, Thomson Reuters, *Indictable Offences in Victoria* (online at 22 November 2023) [18.40]; this presumption can be displaced expressly (by the words of the statute creating the offence) or by necessary implication: *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523, 566 (Brennan J).
10 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [44] (Maxwell P, McLeish and Emerton JJA).

11.11 The Criminal Bar Association (CBA) and the Law Institute of Victoria (LIV) told us that the recklessness test should focus on someone's actual state of mind.[11] Introducing the concept of reasonableness is problematic because:

> you are not aligning [someone's criminal] liability to their own culpability, but to a community standard …
>
> for serious offences, it's hard to justify saying someone who didn't actually foresee the outcome should be convicted because someone else would have appreciated what the accused did not.[12]

11.12 A member of the Victim Survivors' Advisory Council (VSAC) noted the importance of considering a person's individual circumstances to properly understand their conduct. Another VSAC member highlighted that someone's age, upbringing, and possible mental health or substance abuse issues at the time of the offending will affect their assessment of risk and consequences.[13]

11.13 The Victorian Aboriginal Legal Service (VALS) was concerned that a shift away from the current subjective definition would disproportionately impact Aboriginal and/or Torres Strait Islander people:

> The current subjective definition allows you to provide the context and history of the alleged offending, which for Aboriginal and Torres Strait Islander people is very significant. Any move to a more objective test would have the effect of … increasing the criminalisation of Aboriginal and Torres Strait Islander people.[14]

11.14 The LIV told us that overlaying a possibility test with an objective assessment does not adequately consider the accused's state of mind and could unjustly criminalise children and people with a cognitive impairment or mental illness.[15]

Adding complexity

11.15 We heard that lowering the threshold for recklessness and adding an objective limb would make the test more complex than at present.[16]

11.16 The OPP suggested that for many offences against the person 'the unreasonableness of the actions will not be in issue' and 'may not always require an explicit direction' to a jury.[17] But there will be some cases where it will be necessary to explain the reasonableness limitation to a jury. And in the Supreme Court's experience:

> multi-factorial tests, while not uncommon, pose greater challenges for judges instructing juries and for juries in understanding and applying those instructions.[18]

11.17 A judge of the County Court noted:

> A subjective/objective test is harder to explain, it adds another layer of complexity. We have a simple direction now; if it changes then we would have to explain 'possible' with an objective component.[19]

11.18 Dr Greg Byrne said, 'whatever you do to make something more complex, that will push juror comprehension levels down.'[20] Dr Byrne referred to research demonstrating that jurors found recklessness one of the more difficult definitions in the United States Model Penal Code.[21] He said that 'tests that involved two elements or involved different concepts were generally more difficult for people to understand.'[22]

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11 Consultations 3 (Law Institute of Victoria), 4 (Criminal Bar Association).
12 Consultation 4 (Criminal Bar Association).
13 Consultation 13 (Victim Survivors' Advisory Council).
14 Consultation 1 (Victorian Aboriginal Legal Service).
15 Consultation 3 (Law Institute of Victoria).
16 Consultations 1 (Victorian Aboriginal Legal Service), 3 (Law Institute of Victoria), 4 (Criminal Bar Association), 8 (Supreme Court of Victoria), 11 (County Court of Victoria). Submission 11 (Children's Court of Victoria).
17 Submission 10 (Office of Public Prosecutions); If an accused person claims they were acting in self-defence, this will raise the issue of whether their actions were 'a reasonable response in the circumstances as [they] perceived them', but that is so regardless of the definition of recklessness that applies: *Crimes Act 1958* (Vic) s 322K.
18 Submission 13 (Supreme Court of Victoria).
19 Consultation 11 (County Court of Victoria).
20 Consultation 9 (Dr Greg Byrne PSM).
21 Ibid.
22 Submission 18 (Dr Greg Byrne PSM) citing Matthew R Ginther et al, 'The Language of Mens Rea' (2014) 67(5) *Vanderbilt Law Review* 1327, 1356.

11.19 The endangerment offences are complex, as we discussed in Chapter 8. Dermot Dann KC and Felix Ralph submitted that the proposed changes to the recklessness test 'would invariably expand criminal liability for [a reckless endangerment offence] that already poses really difficult problems in its current application.'[23] Adding an objective limb to the recklessness element could create further confusion as there would be two separate objective components to consider for the endangerment offences.[24]

11.20 Juries are often asked to deal with matters of considerable complexity. The LIV said that it would 'get … very complicated' to introduce a possibility test and then attempt 'to carve out behaviour that was reasonable'.[25] While it is hard to say whether this would make the task of the jury too difficult, the LIV said there is no need to complicate a jury's task further.[26]

Inconsistent application

11.21 The CBA said an objective component for recklessness could 'give rise … to idiosyncratic views' among jurors and create 'room for juries to come to different views about the same conduct.'[27]

11.22 As much as possible, the criminal law should be consistently applied. The same conduct in the same circumstances should be treated as the same offence. But the CBA warned that:

> the more you give juries tests that involve qualitative judgments rather than a straightforward test as we have now, the more room for divergences in opinion.[28]

11.23 The risk of having a divergence of views and inconsistent application is that juries may arrive at different verdicts for essentially identical cases. This compromises the fundamental principle of fairness.

Risks of changing the recklessness test

Inconsistency between offences

11.24 Recklessness is an element of many Crimes Act and other offences. We heard that changing the recklessness test for offences against the person would lead to inconsistency with other groups of offences and be 'a recipe for juror confusion.'[29] The Judicial College of Victoria (JCV) explained:

> If you have different recklessness standards, both might need to be used in a case involving common assault, threats, and obtaining property by deception, for example.
>
> The jury might need to be told, 'the accused needs to have been aware that their conduct would probably result in the application of force to the complainant's body, in the first instance, of the possibility that the threat would be believed in the second instance, and the accused must have known that their claim was probably false in the third instance'.[30]

23 Submission 12 (Dermot Dann KC and Felix Ralph), (internal quotation marks omitted).
24 The endangerment element would require proof that 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, or might place, another in danger of an appreciable risk of death (*Crimes Act 1958* (Vic) s 22) or serious injury (s 23). The recklessness element would require proof that the accused foresaw that placing another in danger of an appreciable risk of death (s 22) or serious injury (s 23) was a possible consequence of their conduct in the surrounding circumstances but went ahead and engaged in the conduct; and having regard to the risk of danger of death or serious injury, the accused's actions were *unreasonable* in the circumstances known to them.
25 Consultation 3 (Law Institute of Victoria).
26 Ibid.
27 Consultation 4 (Criminal Bar Association).
28 Ibid.
29 Consultation 5 (Judicial College of Victoria).
30 Ibid.

11.25 Victoria Legal Aid (VLA) told us that juries already have to consider different fault elements on the same indictment in some cases.[31] Dr Byrne said that where there is:

> potential for alternatives on an indictment then the desire for consistency is at its highest to improve comprehension for jurors.[32]

11.26 The Supreme Court said, 'complexity can lead to error when directing juries, and make it difficult for juries to grasp the law to be applied.'[33] A judge of the Supreme Court said the complexity of a possibility test with an objective limb would be 'magnified' for:

- already complex indictments
- indictments including a charge of reckless murder, where the test for recklessness would be different.[34]

11.27 In Chapter 9 we considered a hypothetical scenario provided by the OPP involving a police siege. Dr Byrne extended this scenario to illustrate the complexity of lowering the recklessness definition for offences against the person:

> imagine if the two shots had hit police officers, killing one of them and causing serious injury to the other. On the DPP proposal, the relevant fault element would be common law recklessness (probability) for the police officer who died and possibility for the police officer who lived … the judge would need to instruct the jury about two different definitions of recklessness for murder and recklessly causing serious injury. That is a recipe for juror confusion and increases the chance of error in the judge's charge. It may also seem very strange to a jury that they should be applying two different tests for the same type of conduct where the only difference is one shot was fatal and the other was not.[35]

11.28 Liberty Victoria raised concern about potential risks if a jury had to be directed on different tests for recklessness.[36] The CBA agreed that different definitions of the same term would create confusion and opportunities for error in jury directions.[37]

11.29 A County Court judge told us that the need to direct a jury on two different tests of recklessness could 'bring … the law into disrepute.' Another judge said that having different tests creates 'a terrible mess'.[38]

Case law 'out the window'

11.30 The LIV said that changing the way recklessness is defined involves changing the fundamental elements of 'reckless' offences.[39] According to the CBA, a new definition would:

> result in the loss of the useful guidance given by case law that is based on the current definition …[40]

11.31 For affected offences, legal precedents and comparative sentencing data could no longer be relied on to ensure consistency in the application of the law.[41] The CBA said sentencing practices based on the current test could not legitimately influence sentences for newly formulated offences: the settled sentencing jurisprudence would go 'out the window'.[42] 'A judge of the Supreme Court agreed that 'courts would need to start again' in relation to sentencing jurisprudence for these offences.[43]

31 Consultation 6 (Victoria Legal Aid).
32 Consultation 9 (Dr Greg Byrne PSM).
33 Submission 13 (Supreme Court of Victoria).
34 Consultation 8 (Supreme Court of Victoria).
35 Consultation 9 (Dr Greg Byrne PSM).
36 Consultation 2 (Liberty Victoria).
37 Submission 6 (Criminal Bar Association).
38 Consultation 11 (County Court of Victoria).
39 Consultation 3 (Law Institute of Victoria).
40 Submission 6 (Criminal Bar Association).
41 Ibid.
42 Consultation 4 (Criminal Bar Association).
43 Consultation 8 (Supreme Court of Victoria).

11.32 In *Ashdown v The Queen*, Justice Redlich emphasised the importance of consistency for fairness in sentencing, and how consistency relies on existing sentencing practice:

> Consistency in sentencing, fundamental to the administration of criminal justice, requires adherence to current sentencing practice unless a specific circumstance exists which warrants departure from that practice. … By this judicial method the law … diminishes the risk of arbitrary and capricious adjudication.[44]

11.33 Several stakeholders told us that until a comparable body of law could be established:

- Sentencing outcomes would be less predictable than at present, leading to fewer guilty pleas as it would be more difficult for lawyers to advise accused persons of likely outcomes.[45]
- The number of contested matters and potential appeals would increase because of uncertainty about the meaning and application of a new definition.[46]

Sentencing more complicated

11.34 If the test was lowered, a magistrate, jury or judge would only need to determine whether a person had foresight of a possible result or circumstance to prove the recklessness element. A sentencing magistrate or judge would need to decide how to characterise a wider range of behaviour, including how to treat offending at the upper end of seriousness. Without the benefit of established sentencing jurisprudence, this would be a more complicated sentencing task than at present. It could lead to an increase in contested plea hearings[47] and appeals.

A disproportionate impact

Impact on disadvantaged people

11.35 The overwhelming concern we heard from stakeholders about the potential impacts of lowering the recklessness threshold was the disproportionate impact it would have on people who face disadvantage.

11.36 The Parliamentary Inquiry into Victoria's Criminal Justice System found that socio-economic disadvantage increases a person's risk of engagement with the criminal justice system, especially where they experience both intergenerational and intersectional disadvantage.[48]

11.37 If the recklessness threshold is lowered, a magistrate anticipated that:

> the same cohort, the disadvantaged, that by and large we see in our courts, will be charged more.[49]

11.38 County Court judges told us that a cohort of 'generally vulnerable people' would likely be 'caught up' in the criminal justice system if the recklessness test were lowered, because they might be:

> more likely than better-resourced accused to accede to [having had foresight of a] 'possible' [risk] at the police interview stage.[50]

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44 *Ashdown v The Queen* [2011] VSCA 408, [191]; (2011) 37 VR 341, 406, [191].
45 Submission 6 (Criminal Bar Association). Consultation 2 (Liberty Victoria).
46 The CBA referred to an 'increase in litigation': Submission 6 (Criminal Bar Association); Liberty Victoria told us 'Change creates greater complexity and uncertainty and potential for retrials until jurisprudence is set down.' It also said that 'with current sentencing practices gone, lawyers and the judiciary rely on that, so you would unquestionably have an upswing of people pleading not guilty because the test would be lower and because uncertainty of outcome encourages offenders to "roll the dice"': Consultation 2 (Liberty Victoria); A judge of the Supreme Court warned there could be an increase in appeals 'because of confusion about terminology': Consultation 8 (Supreme Court of Victoria).
47 Consultation 4 (Criminal Bar Association).
48 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 77. Different forms of disadvantage include poverty, homelessness/housing instability, lower education attainment, unemployment, trauma, exposure/victimisation to violence and/or sexual abuse, family member offending/incarceration, poor health and wellbeing including mental illness, disability or cognitive impairment, discrimination, racism and exclusion: at 73.
49 Consultation 12 (Magistrates' Court of Victoria).
50 Consultation 11 (County Court of Victoria).

11.39 We know that First Peoples[51] and individuals from culturally and linguistically diverse backgrounds are overrepresented in the criminal justice system.[52] Aboriginal and Torres Strait Islander people comprise only one per cent of the Victorian population,[53] but comprised around nine per cent of people charged with recklessly causing serious injury over the last five years (see Appendix F). Legal practitioners told us that:

> The proposal [to change the recklessness definition] would fundamentally lower the threshold for laws that are regularly charged against First Nations people, people with cognitive or mental health issues, women, people with unstable housing and employment, and children.[54]

Impact on young people

11.40 Age determines how the criminal law in Victoria applies to young people:

- Children under the age of 10 cannot be held criminally responsible.[55]
- Children aged over 10 and under 14 are presumed to be unable to commit an offence, unless the prosecution can prove the child was capable of forming a criminal intention.[56]
- A 'child' is defined as a person aged over 10 and under 18 at the time of the alleged offence and under 19 when a proceeding for the offence is commenced in court.[57] The Children's Court hears most matters relating to children.[58]
- A 'young offender' is defined as a person who at the time of being sentenced is under the age of 21 years.[59] Victoria's dual track system allows adult courts to sentence young offenders to detention in a youth justice centre instead of adult prison.[60]

11.41 We use the term 'young people' for people under the age of 25.

11.42 Youthlaw and Liberty Victoria told us that young people are more susceptible to risk-taking than other demographics. Lowering the recklessness test might disproportionately criminalise young people.[61] Around 25 per cent of people charged with gross violence offences in the last five years were aged 10–17 years, and around 30 per cent were aged 18-24 years. Almost 35 per cent of people charged with recklessly causing serious injury were aged under 25; the figure was almost 30 per cent for recklessly causing injury (see Appendix F).

51 Victorian Aboriginal organisations contributing to the Parliamentary *Inquiry into Victoria's Criminal Justice System* highlighted 'how a history of colonisation and systemic racism places Aboriginal people at greater risk of interaction with the criminal justice system': Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 599.
52 Ibid ch 4.
53 Australian Bureau of Statistics, *Victoria 2021 Census All Persons QuickStats* (Web Page, 2021) <https://abs.gov.au/census/find-census-data/quickstats/2021/2>.
54 Submission 12 (Dermot Dann KC and Felix Ralph).
55 The Victorian Government has stated its intention to raise the minimum age of criminal responsibility first from 10 years old to 12 years old, and then to 14 by 2027; and to codify the existing common law presumption of *doli incapax* which provides that a child under 14 cannot be held criminally responsible unless they knew their actions were wrong. Jaclyn Symes (Attorney-General), 'Keeping Young People out of the Criminal Justice System' (Media Release, 26 April 2023).
56 This common law rebuttable presumption is known as the principle of *doli incapax* meaning 'incapable of crime': *R v ALH* [2003] VSCA 129, [75]; (2003) 6 VR 276, 295 [75].
57 *Children, Youth and Families Act 2005* (Vic) s 3.
58 The Children's Court does not have jurisdiction to determine offences of murder, attempted murder, manslaughter, child homicide, homicide by firearm, arson causing death and culpable driving causing death; those offences must be dealt with in the Supreme Court or the County Court: Ibid s 516(1)(b)-(c).
59 *Sentencing Act 1991* (Vic) s 3.
60 Ibid s 7(1)(d) and (da).
61 Youthlaw is Victoria's state-wide community legal centre for young people under 25 years of age: Submission 16 (Youthlaw). Consultation 2 (Liberty Victoria). See also Consultation 8 (Supreme Court of Victoria).

11.43 It is understood that 'adolescents are developmentally different from adults.'[62] Studies indicate that the brain reaches maturity much later than the end of adolescence. Impulse control, planning and decision-making capacity do not fully develop until adulthood.[63] Trauma can interrupt the neurological development of children and increase the likelihood of contact with the criminal justice system.[64]

11.44 For offences involving recklessness, it is important to recognise that young people:

- are more prone than adults to ill-considered or rash decisions.[65]
- 'May lack the degree of insight, judgment and self-control that is possessed by an adult.'[66]
- 'May not fully appreciate the nature, seriousness and consequences of their criminal conduct.'[67]

11.45 The Court of Appeal has recognised that:

- The immaturity of young offenders markedly reduces their moral culpability.
- Custody can be 'particularly criminogenic' (causing or likely to produce criminal behaviour) for a young person. Young people who are sent to jail may be more likely to re-offend than older people.
- The 'process of development and maturation' that a young person experiences provides 'a unique opportunity for rehabilitation.'[68]

11.46 The Parliamentary Inquiry into Victoria's Criminal Justice System found that Aboriginal children and young people in out-of-home care 'are typically experiencing multiple forms of compounding disadvantage and trauma' and 'are at high risk of entering the youth and criminal justice systems.'[69]

11.47 Youthlaw told us that marginalised young people, including Aboriginal and/or Torres Strait Islander young people, out-of-home care leavers, victims of family violence, and culturally and linguistically diverse young people might be at even greater risk of entering the criminal justice system if the recklessness test is lowered.[70]

Creating a need for extensive changes

11.48 We were told that changing the definition of recklessness for offences against the person would require a 'recalibration' of offences and associated penalties.[71]

11.49 Several stakeholders were concerned about the interaction of 'recklessness' offences with provisions in the *Bail Act 1977* (Vic) and the *Sentencing Act 1991* (Vic).[72] More generally, stakeholders were concerned about 'disrupting the ecosystem of [offences] in Victoria which are … tied to the probability test'.[73]

62 Kathryn Monahan, Laurence Steinberg and Alex R Piquero, 'Juvenile Justice Policy and Practice: A Developmental Perspective' (2015) 44 *Crime and Justice* 577, 578.

63 Sarah-Jayne Blakemore and Suparna Choudhury, 'Development of the Adolescent Brain: Implications for Executive Function and Social Cognition' (2006) 47(3) *Journal of Child Psychology and Psychiatry* 296, 297, 300; Elizabeth R Sowell et al, 'Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation' (2001) 21(22) *Journal of Neuroscience* 8819, 8826. 'The corpus callosum, the dense mass of fibres that connects the two hemispheres of the brain, has also been found to undergo region-specific growth … up until the mid-twenties': Blakemore and Choudhury, 298.

64 Sentencing Advisory Council, *'Crossover Kids': Vulnerable Children in the Youth Justice System, Report 3: Sentencing Children Who Have Experienced Trauma* (Report, June 2020) xii.

65 *R v McGaffin* [2010] SASCFC 22, [69]; (2010) 206 A Crim R 188, 210 [69] (White J).

66 *DPP v TY (No 3)* [2007] VSC 489, [43]; (2007) 18 VR 241, 242 [43] (Bell J).

67 *Azzopardi v The Queen* [2011] VSCA 372, [34]; (2011) 35 VR 43, 53 [34] (Redlich JA).

68 *Webster (a pseudonym) v The Queen* [2016] VSCA 66, [8]; (2016) 258 A Crim R 301, 303 [8] (Maxwell P and Redlich JA).

69 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 113–23.

70 Submission 16 (Youthlaw).

71 Submissions 6 (Criminal Bar Association), 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph), 17 (Victoria Legal Aid). Consultation 3 (Law Institute of Victoria).

72 Submissions 6 (Criminal Bar Association), 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph), 14 (Law Institute of Victoria), 16 (Youthlaw), 17 (Victoria Legal Aid).

73 Submission 6 (Criminal Bar Association).

11.50 The CBA said the probability test is 'so embedded in Victoria's statutory infrastructure that change to its meaning is undesirable and indeed—absent significant revision of all of the offences against the person—unworkable.'[74] Liberty Victoria told us that the current test for recklessness 'is so baked into [the criminal law] in this state that disentangling it would be a nightmare.'[75]

11.51 Liberty Victoria was concerned that:

> Changing the test would be so complex in so many different ways, and not just in terms of sentencing. This is something that Parliament needs to be very cautious about because the impact on practitioners and the judiciary will be very significant.[76]

Penalties would need review

11.52 We heard that lowering the threshold for recklessness would alter the relationship between different offences and require corresponding changes to penalties.[77]

11.53 In his textbook on sentencing law, Arie Freiberg notes two main components that determine the seriousness of a crime:

- the harmfulness of the conduct
- the offender's culpability.[78]

11.54 Punishment should be proportionate to both the harm caused and the culpability:[79]

> principles of sentencing generally hold that the lower the degree of culpability … the lower the sentence should be, all other factors being equal.[80]

11.55 Maximum penalties for offences against the person vary by fault element and culpability (see Chapters 2 and 4). They act as a guidepost for the seriousness of an offence. Penalties for offences against the person with recklessness as a fault element have been calibrated to the current definition of recklessness.

11.56 Most stakeholders said that maximum penalties should be reviewed if the threshold for recklessness is lowered.[81] VLA said lowering the threshold would lower the moral culpability for the offence, 'warranting a reduction in the maximum penalty'.[82]

11.57 The LIV said that if a lower threshold was introduced:

> there would be a substantial reduction in the degree of culpability necessary to constitute criminal liability in relation to the relevant offences against the person, changing the very nature of the offence. As a result, current penalties would no longer be appropriate and would have to be reconsidered.[83]

11.58 The CBA also noted that related offences would have to be reconsidered:

> The Act takes a tiered approach to offences against the person, with the result that changing the inherent criminality of, and/or the maximum penalty applicable to, any single offence may necessitate changing penalties to all other offences within the structure. Altering the definition of recklessness will have a direct impact on several offences in that structure and will have an indirect effect on all offences.[84]

11.59 However, we were also cautioned against lowering the maximum penalties for recklessness offences as these offences will still need to capture the most culpable behaviour.[85]

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74 Ibid.
75 Consultation 2 (Liberty Victoria).
76 Ibid.
77 Submissions 3 (Kavaleris, Shehnah, Aforozis, Vinci (students at the University of Melbourne)), 6 (Criminal Bar Association), 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph), 14 (Law Institute of Victoria). Consultation 1 (Victorian Aboriginal Legal Service).
78 Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 240.
79 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 21.
80 Arie Freiberg, *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 281.
81 Submissions 6 (Criminal Bar Association), 7 (Victoria Police), 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph), 14 (Law Institute of Victoria), 15 (County Court of Victoria), 16 (Youthlaw). Consultation 1 (Victorian Aboriginal Legal Service).
82 Submission 17 (Victoria Legal Aid).
83 Submission 14 (Law Institute of Victoria).
84 Submission 6 (Criminal Bar Association).
85 Consultation 8 (Supreme Court of Victoria).

11.60 The OPP said it is likely that a lower threshold would capture offending involving less morally culpable accused:

> Accordingly, one possible outcome would be a greater spread of sentences towards the lower end … Such a change would be unlikely to increase the number of sentences imposed at the higher end of the sentencing range.[86]

Unjust application of sentencing schemes

11.61 Some stakeholders told us that a lower threshold for recklessness would have an impact on offences with mandatory or presumptive sentences.[87] The applicable presumptive and mandatory sentencing provisions, combined with a lower threshold for recklessness, would result in disproportionate sentences.

11.62 Several offences involving recklessness require a specified non-parole period or a minimum term of imprisonment (see Chapter 4).[88] There are limited exceptions to the requirement to impose a minimum non-parole period, including where there are 'substantial and compelling reasons that are exceptional and rare'.[89] The Court of Appeal has described this as a stringent test that is 'almost impossible to satisfy'.[90]

11.63 Legal professionals told us the presumptive and mandatory sentencing provisions, combined with a lower threshold, would result in disproportionate sentences.[91] Mandatory provisions would apply to a wider range of behaviour, which was not contemplated when the provisions were introduced.[92]

11.64 This is a serious concern. Mandatory sentencing has been criticised for reducing judges' discretion to determine sentences that are 'just in all the circumstances'.[93] The Court of Appeal has said that mandatory minimum sentences can require the infliction of 'more severe punishment than a proper application of sentencing principle could justify'.[94]

11.65 Liberty Victoria was concerned that 'Where recklessness overlaps with presumptive and mandatory sentencing provisions, any lowering of the threshold could have deleterious effects including the unjust deprivation of liberty'.[95]

11.66 We heard that the extended reach of mandatory and presumptive provisions would have a disproportionate impact on disadvantaged groups.

11.67 Lowering the threshold for recklessness could lead to more young offenders being convicted of Category B offences, potentially requiring them to serve sentences in adult prisons.[96]

86 Submission 10 (Office of Public Prosecutions).
87 Submissions 6 (Criminal Bar Association), 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph), 14 (Law Institute of Victoria), 16 (Youthlaw), 17 (Victoria Legal Aid). Consultations 1 (Victorian Aboriginal Legal Service), 8 (Supreme Court of Victoria), 11 (County Court of Victoria).
88 In addition to the offences against the person that include recklessness that attract the mandatory or presumptive sentencing schemes (see Chapter 4), an offence to contravene a supervision or interim supervision order under s 169 of the *Serious Offenders Act 2018* (Vic) also triggers the mandatory sentencing provisions. A minimum term of imprisonment of at least 12 months must be imposed in the case of a reckless contravention of a restrictive condition, unless a special reason exists: *Sentencing Act 1991* (Vic) s 10AB, 10A.
89 *Sentencing Act 1991* (Vic) s 5(2H)(e), 5(2HC), 5(2I), 10A(2)(e), 10A(2B), 10A(3).
90 *Buckley v The Queen* [2022] VSCA 138, [44]; *DPP v Bowen* [2021] VSCA 355, [11]; (2021) 65 VR 385, 388 [11]. We note that an exception where an offender aged 18–21 years had 'a particular psychosocial immaturity that resulted in a substantially diminished ability to regulate his or her behaviour' was repealed in 2018: *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 79(2).
91 Submissions 6 (Criminal Bar Association), 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph), 14 (Law Institute of Victoria), 16 (Youthlaw), 17 (Victoria Legal Aid). Consultations 1 (Victorian Aboriginal Legal Service), 8 (Supreme Court of Victoria), 11 (County Court of Victoria).
92 Submission 12 (Dermot Dann KC and Felix Ralph).
93 *Sentencing Act 1991* (Vic) s 5(1)(a).
94 *Buckley v The Queen* [2022] VSCA 138, [5].
95 Submission 9 (Liberty Victoria).
96 Submissions 12 (Dermot Dann KC and Felix Ralph), 16 (Youthlaw).

11.68 Some stakeholders said that if the recklessness threshold is lowered, presumptive and mandatory sentencing provisions should be repealed for these offences. The LIV said that it is:

> highly likely that current Category 1 and 2 designations, mandatory sentences, and standard sentences would no longer be justifiable and would need to be reduced.[97]

An increased burden on the criminal justice system

11.69 It is difficult to predict the specific impact on court processes of a change to the definition. But the Magistrates' Court, the County Court, and the Supreme Court told us that a lower bar for the prosecution of 'reckless' offences against the person would have flow-on effects for the justice system. This could include more charges filed, more prosecutions, and potentially more appeals and subsequent re-trials.[98]

11.70 The LIV noted that there would likely be an increase in congestion and delays in the courts. In particular, many offences are heard in the Magistrates' Court, so an increase in people charged would increase demand on that court.[99]

11.71 A lower recklessness test might also increase the number of applications for indictable charges to be determined in the summary jurisdiction, as more people would be charged with more serious offences, although at the lower end of the spectrum of seriousness.

11.72 There would be cost implications if more offences were determined in the higher courts, if more charges are filed for recklessness offences that are not suitable to be determined summarily. Prosecutions in the higher courts are more expensive and take longer than lower court prosecutions.[100]

11.73 A 2020 Sentencing Advisory Council report found the overall number and proportion of people sentenced and on remand in Victorian prisons had increased in the seven financial years to 30 June 2018.[101] The County and Supreme Courts told us that a lower bar for the prosecution of 'reckless' offences against the person might lead to a higher rate of accused persons being convicted.[102] This might increase incarceration rates.[103]

11.74 The LIV said a lower threshold for recklessness could bring a greater number of people into contact with the criminal justice system. This would increase costs and delay. It would also increase:

- the number of people in custody, sentenced and on remand. A lower threshold would indirectly affect bail laws 'because the strength of the prosecution case is a consideration for bail', and 'with a lower test the prosecution would have a stronger case.'[104]
- strains on providers of free legal assistance.[105]

97 Submission 14 (Law Institute of Victoria).
98 Submissions 13 (Supreme Court of Victoria), 15 (County Court of Victoria). Consultation 12 (Magistrates' Court of Victoria).
99 Submission 14 (Law Institute of Victoria).
100 Victorian Law Reform Commission, *Committals* (Report No 41, March 2020) 55 [5.27].
101 Paul McGorrery and Zsombor Bathy, *Time Served Prison Sentences in Victoria* (Report, February 2020) 17–18.
102 Submissions 13 (Supreme Court of Victoria), 15 (County Court of Victoria).
103 Submission 15 (County Court of Victoria). VALS warned 'If there's any danger of an increase in rates of incarceration, then that should be fully costed … It is dangerous to make a change that increases the incarceration rate when the system is already under strain': Consultation 1 (Victorian Aboriginal Legal Service).
104 Consultation 3 (Law Institute of Victoria). The Parliamentary *Inquiry into Victoria's Criminal Justice System* found that 'Women, particularly Aboriginal women and women experiencing poverty, are disproportionately remanded under current bail legislation' and 'Aboriginal Victorians are disproportionately represented among the remand population': Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 449 (Finding 37), 450.
105 Submission 14 (Law Institute of Victoria).

11.75 However the CBA said that higher prosecution, conviction and incarceration rates would not necessarily result, because the hierarchy of offences already provides alternative offences when the current recklessness definition is not satisfied.[106] Lowering the threshold might 'rebadge' more offending under the 'banner of "recklessness", rather than other offences'.[107] More people would be charged with a more serious 'recklessness' offence than, for example, an assault, as they are now.

11.76 While Victoria Police said conviction rates for 'reckless' offences would increase if the test were lowered, it also recognised that 'There might be a transfer from one bucket [of offences] to another' and this would depend on charging practices.[108] VLA agreed that any increased load on the courts would depend on police charging practices.[109]

11.77 The coronavirus (COVID-19) pandemic increased the caseload pressures on Victorian courts.[110] We were warned that the criminal justice system is already overburdened.[111] Changing the recklessness test would likely result in an increase on the workload of courts, demand for legal assistance, costs and delays, and higher rates of people in custody. The risks of such consequences should be avoided.

Conclusion: the recklessness test should not change

11.78 We have assessed the competing arguments in relation to whether the recklessness test should be changed. In the Commission's view, there is not a compelling case to support reform of the recklessness test. We recommend that the current common law definition of recklessness be retained for offences against the person.

11.79 In assessing the case for reform, we developed a detailed picture of the operation of recklessness. We considered the development of recklessness in Victoria (Chapter 3) and the scope of offences involving recklessness (Chapters 4 and 5).

11.80 We considered the experience in other jurisdictions (Chapter 6) and other definitions of recklessness that were proposed to us (Chapter 7). None of the proposed definitions would achieve consistency between Victoria and other jurisdictions. We have not found another jurisdiction where the definition of recklessness is preferable to Victoria's definition. Other jurisdictions do not provide greater clarity or have definitions of recklessness that are simpler to apply. Other jurisdictions do not use the concept of recklessness more consistently than in Victoria, or in a way that better aligns with basic principles of justice.

11.81 We examined the concerns raised by the Office of Public Prosecutions and Victoria Police about the current recklessness threshold (Chapters 8 and 9). We analysed case studies, court decisions, and offences data. We were informed by what legal practitioners and judicial representatives told us based on their practical experience, and what we understood from the experiences of victims. There is no identifiable problem with the operation of the recklessness test in Victoria that demands reform.

11.82 Most stakeholders support keeping the current recklessness test, which is relatively simple to understand and easy to apply (Chapter 10). Changing the recklessness test would dispose of a definition that has operated largely unchallenged for over 25 years and that has been central to the development of Victoria's criminal law. The argument for re-defining fundamental concepts in the criminal law might be more compelling if an entirely new Act or Code was being considered, but we are not in that position. Disrupting the status quo to change the recklessness test alone cannot be justified.

106 Submission 6 (Criminal Bar Association).
107 Ibid.
108 Consultation 10 (Victoria Police).
109 Consultation 6 (Victoria Legal Aid).
110 Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 491 (Finding 43).
111 Submissions 6 (Criminal Bar Association), 12 (Dermot Dann KC and Felix Ralph). Consultation 1 (Victorian Aboriginal Legal Service).

11.83 We have also assessed the potential implications of changing the current test (Chapter 11). A new definition of recklessness for offences against the person would lead to inconsistency with other offences and would create uncertainty. Changing the definition would have many flow-on effects for an already overburdened criminal justice system. It is difficult to be precise about what these effects would be, but a lower recklessness threshold than the current one would likely require reconsideration of penalties and other offences. It would result in the loss of valuable jurisprudence, and would disproportionately affect young people and people who face disadvantage. It might also increase prosecutions, the number of people in custody, and the burden on the courts.

Recommendation

1. The current common law definition of recklessness should be retained for offences against the person.

CHAPTER

12

Should a definition of recklessness be legislated?

12. Should a definition of recklessness be legislated?

Overview

- We heard different views about whether a definition of recklessness should be included in the *Crimes Act 1958* (Vic) for offences against the person.
- Some contributors told us that legislating the current recklessness test could improve clarity and certainty. But we also heard that legislating the current definition could increase complexity.
- The current test is clear, accessible, and consistently applied. Legislating a definition is unnecessary and carries risk.
- The Commission does not support including a definition of recklessness in the Crimes Act.

The state of the law

12.1 Our terms of reference ask us to consider if a definition of recklessness should be included in the *Crimes Act 1958* (Vic) for offences against the person.

12.2 In Chapter 11, we recommend keeping the current test. Here, we discuss whether the definition of recklessness should be legislated. Our analysis is guided by three key considerations:

- clarity
- accessibility
- certainty (see Chapter 13).[1]

12.3 The law is clear if it can be easily understood and applied, including by people without legal training.

12.4 The law is accessible if:

- it is clear
- it is easy to find
- its protections are equally available to all people.

12.5 Clear and accessible laws allow people to understand their rights and obligations and to behave accordingly.[2] Clarity, accessibility and certainty are also important for the effective operation of the law.

1 See, eg, the first key principle of the Law Council of Australia's Policy Statement on Rule of Law Principles that 'The law must be both readily known and available, and certain and clear': Law Council of Australia, *Policy Statement on Rule of Law Principles* (Report, 19 March 2011) <https://lawcouncil.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf>.

2 Matthew Goode, 'Codification of the Australian Criminal Law' (1992) 16(1) *Criminal Law Journal* 5, 11 citing Law Reform Commission of Canada, *Criminal Law: Towards a Codification* (Study Paper, 1976) 21–22.

The law is clear

12.6 We were told that the current common law definition of recklessness is:

- simple[3]
- clear[4]
- well understood[5]
- easy to apply.[6]

12.7 The Criminal Bar Association (CBA) told us, 'there isn't currently any lack of clarity, so legislating a definition for that benefit is illusory.'[7]

12.8 The clarity of the definition can be seen in the Judicial College of Victoria (JCV)'s *Criminal Charge Book*. The *Criminal Charge Book* contains concise information for the legal profession, magistrates and judges about the meaning of recklessness. Importantly, it makes clear that the threshold for recklessness is *probability* and sets out the meaning of 'probable'.[8] A judge told us:

> We have good resources from the Judicial College of Victoria … the language in the direction [for reckless offences] is clear … It's a combination of a working definition and good judicial resources which has led to good consistency of approach.[9]

The law is accessible

12.9 Guidance on the common law definition of recklessness is readily available. The JCV's *Criminal Charge Book* is user-friendly and easily accessible. Victoria Legal Aid (VLA) also provides information on its website.[10]

12.10 Although not raised during our inquiry, general arguments in favour of legislating common law principles are sometimes made in the context of support for wholesale 'codification'.[11] Advocates of codification argue that legislated definitions improve accessibility. For example, Matthew Goode points out that it can be 'very hard to find out what [the common law] says—even on fundamental matters'.[12] In his view, legislation can enhance clarity and accessibility by helping to present the law:

> in straightforward and easily comprehensible terms so that the ordinary [person] will be able to … know what [they are] sometimes presumed to know, namely what is the law.[13]

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3 Submissions 6 (Criminal Bar Association), 9 (Liberty Victoria). The Supreme Court submitted that consistent with jury directions on the *Campbell* test being 'simple, logical and straightforward', it has been extremely rare for appeals to include a ground alleging error in the trial judge's charge on recklessness: Submission 13 (Supreme Court of Victoria). Consultation 11 (County Court of Victoria).

4 Submission 17 (Victoria Legal Aid). Consultations 1 (Victorian Aboriginal Legal Service), 3 (Law Institute of Victoria), 4 (Criminal Bar Association), 11 (County Court of Victoria), 12 (Magistrates' Court of Victoria).

5 Submissions 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph), 17 (Victoria Legal Aid). Consultations 3 (Law Institute of Victoria), 4 (Criminal Bar Association), 6 (Victoria Legal Aid), 8 (Supreme Court of Victoria), 12 (Magistrates' Court of Victoria).

6 Submissions 6 (Criminal Bar Association), 17 (Victoria Legal Aid). See also Submission 14 (Law Institute of Victoria) citing *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181 [124]; (2020) 284 A Crim R 19, 51 [124] (Priest JA). The Judicial College of Victoria told us it hadn't 'heard anything to the effect that jurors have trouble with applying the charge in relation to recklessness': Consultation 5 (Judicial College of Victoria). A Supreme Court judge told us 'in terms of the practical application of the current law of recklessness, it is seamless': Consultation 8 (Supreme Court of Victoria). See also Consultation 11 (County Court of Victoria).

7 Consultation 4 (Criminal Bar Association).

8 Judicial College of Victoria, '7.1.3 Recklessness', *Victorian Criminal Charge Book* (Online Manual, 28 October 2022) <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#4469.htm>.

9 Consultation 11 (County Court of Victoria).

10 Victoria Legal Aid has published offence snapshots for duty lawyers on its website, providing an overview of individual offences including the injury and endangerment offences: Victoria Legal Aid, *Criminal Law Resources* (Web Page, 19 April 2023) <https://www.legalaid.vic.gov.au/criminal-law-resources>. In the Criminal Law Offence Snapshot for *Causing injury intentionally or recklessly and causing serious injury recklessly*, VLA explains that to be reckless about causing injury, the accused person must have been aware that their conduct would *probably* cause injury. It is not sufficient that injury was merely 'possible' or 'might' result: Victoria Legal Aid, *Causing injury intentionally or recklessly and causing serious injury recklessly* (Criminal Law Offence Snapshot, 1 May 2015).

11 A criminal code refers to 'A comprehensive piece of legislation that attempts to exhaustively define the elements of crimes within a jurisdiction … [A] code is considered to be a systematic and integrated statement of law…': *Australian Law Dictionary* (Oxford University Press, 1st ed, 2010) 'criminal code'.

12 Matthew Goode, 'Codification of the Australian Criminal Law' (1992) 16(1) *Criminal Law Journal* 5, 9.

13 Ibid 12 quoting the Criminal Law and Penal Methods Reform Committee of South Australia, *The Substantive Criminal Law* (Fourth Report, 1977), 379–380.

12.11 A broad and cohesive codification project might make the law clearer,[14] but legislating definitions in a piecemeal way does not. This is especially so where existing definitions are relatively easy to find, understand and apply, as is the case with recklessness.

The law is settled

12.12 In the *DPP Reference* the High Court held that the foresight of probability test in *Campbell* should stand unless addressed by the legislature in Victoria.[15]

12.13 A recent version of *Indictable Offences in Victoria* said that 'for the present, the law in Victoria should be regarded as to some degree uncertain.'[16] Victoria Police told us that case law has 'cast doubt over the correctness' of *Campbell* and 'this needs to be clarified by the legislature.'[17] Although members of the High Court determined that *Campbell* was wrong,[18] and Justice Edelman questioned the extension of *Campbell* 'for all other offences in the Crimes Act',[19] the *DPP Reference* case was conclusive that *Campbell* continues to apply in Victoria.[20]

12.14 Justices Gageler, Gordon and Steward emphasised that the current test has been consistently applied for a long time.[21] This was also the view of Justices Priest and Kaye in the Court of Appeal.[22]

12.15 A judge of the Supreme Court told us 'that in Victoria the authority is settled'.[23] The JCV told us 'the *DPP Reference* case has settled [the law] in Victoria'.[24] The CBA submitted 'that following the *DPP Reference* case, the definition of recklessness in Victoria as it applies to crimes against the person is settled', and so legislating the definition is 'neither necessary nor desirable'.[25]

12.16 Although a magistrate told us there is 'never a harm' in legislating a definition, she did not think there exists 'any inconsistency or concerns [with the current definition] that call for clarification':

> we all know it and understand it and it's pretty clear, if you are ever in doubt there is the Judicial College of Victoria's charge book. [The current definition] is something we've known for so long, it's been around for a long, long time.[26]

12.17 As discussed earlier, Parliament has repeatedly legislated in ways that are calibrated to and entrench the current test. Since the current definition was endorsed in *Nuri* and *Campbell*,[27] Parliament has made changes to offences against the person and related penalties, including changing the definitions of 'injury' and 'serious injury'.[28] On all these occasions, Parliament has left the definition of recklessness to the common law.[29]

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14 But see Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 311 (describing the promise of accessibility as an 'idealised view [that] is no longer strongly asserted by proponents [of codification]'); Virginia Bell, 'Paul Byrne SC Memorial Lecture - Keeping the Criminal Law in "Serviceable Condition": A Task for the Courts or the Parliament?' (2016) 27(3) *Current Issues in Criminal Justice* 335, 338 ('The notion that [an] interested citizen might acquire a meaningful understanding of the reach of the criminal law by reading [a criminal code] has an air of unreality to it').

15 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [59]; (2021) 274 CLR 177, 202 [59] (Gageler. Gordon and Steward JJ, Edelman J agreeing at 217 [99] that 'Unless and until it is altered by legislation, the meaning of "recklessly" in s 17 of the Crimes Act 1958 is that stated by the Court of Appeal in R v Campbell', Kiefel CJ, Keane and Gleeson JJ dissenting at 184 [7], 192 [35]).

16 Ian Freckelton and Mirko Bagaric, Thomson Reuters, *Indictable Offences in Victoria* (online at 22 November 2023) [18.100].

17 Submission 7 (Victoria Police).

18 *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, [35] (Kiefel CJ, Keane and Gleeson JJ).

19 Ibid [100] (Edelman J). Justice Edelman said that the *Campbell* test 'has not necessarily entrenched this meaning of recklessness for all other offences in the Crimes Act' (see Chapter 5).

20 Ibid [59] (Gageler. Gordon and Steward JJ, Edelman J agreeing at [99], Kiefel CJ, Keane and Gleeson JJ dissenting at [7], [35]).

21 Ibid (Gageler, Gordon and Steward JJ) (citations omitted).

22 *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [52]–[53], [122]; (2020) 284 A Crim R 19, 32 [52]-[53], 49 [122] (Priest JA, Kaye JA agreeing at 55 [144]).

23 Consultation 8 (Supreme Court of Victoria).

24 Consultation 5 (Judicial College of Victoria).

25 Submission 6 (Criminal Bar Association).

26 Consultation 12 (Magistrates' Court of Victoria).

27 *R v Nuri* [1990] VR 641; *R v Campbell* [1995] VSC 186; (1997) 2 VR 585.

28 *Sentencing Act 1991* (Vic); *Sentencing and Other Acts (Amendment) Act 1997* (Vic); *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic); *Sentencing Amendment (Emergency Workers) Act 2014* (Vic); *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic); *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic); *Justice Legislation Miscellaneous Amendment Act 2018* (Vic).

29 See *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181, [26] (Maxwell P, McLeish and Emerton JJA) noting that '[g]iven the significance of "recklessness" as a concept in criminal law and the frequency of its use in the creation of … criminal offences, it is certainly "no fiction" to attribute knowledge of the settled meaning of "recklessness" to the responsible Ministers and their Departments "and, through them, the Parliament"', citing *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, [81] (McHugh J).

12.18 We consistently heard that the current common law definition of recklessness has been operating well for a long time.[30] Parliament's decision to maintain the status quo accords with this view.

12.19 These arguments support the CBA's view that 'the definition of recklessness ought not be disturbed by legislation'.[31]

The risks of a statutory definition

12.20 While we heard some support for legislating a definition of recklessness, we also heard that it would carry avoidable risks.

12.21 Among those who recognised potential benefits, the County Court suggested there would be value in a statutory definition of recklessness for offences against the person.[32]

12.22 Other people told us that legislating a definition of recklessness could make the law clearer than it presently is.[33] According to Youthlaw, '[a] statutory definition may assist self-represented young people to identify the appropriate test and may guide all court users in the correct application of the appropriate test.'[34] Caterina Politi noted that 'A clear definition of recklessness can aid in the consistent delivery of justice in the application of recklessness, reducing the risk of uncertainty or confusion in legal proceedings.'[35]

12.23 The Law Institute of Victoria (LIV) acknowledged that a statutory definition 'might provide more certainty' but did not support amending the Crimes Act.[36]

12.24 Other stakeholders identified avoidable risks of legislating a definition,[37] noting that:

- The nuance of common law might be lost.
- It could lead to uncertainty.
- Appeals could increase.
- It could lead to inconsistency.

The nuance of common law might be lost

12.25 When Parliament reformed offences against the person in 1985, it chose to leave the definition of recklessness, along with other fault elements, to the common law (see Chapter 3). The common law has developed incrementally, taking on important nuance as to how recklessness should be understood. But legislating a statutory definition of recklessness could mean that this nuance is lost.

12.26 VLA noted the inherent risk of losing the common law's nuance when translating common law to legislation, particularly when a common law definition has been applied for decades.[38] Legislating could risk losing 'a well-functioning definition that is capable of being understood.'[39]

30 Submissions 6 (Criminal Bar Association), 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph) citing *Director of Public Prosecutions Reference (No 1 of 2019)* [2020] VSCA 181; (2020) 284 A Crim R 19, 32 [52]–[53], 49 [122] (Priest JA, Kaye JA agreeing at 55 [144]; 14 (Law Institute of Victoria). Consultations 2 (Liberty Victoria), 3 (Law Institute of Victoria), 4 (Criminal Bar Association), 6 (Victoria Legal Aid), 11 (County Court of Victoria).
31 Submission 6 (Criminal Bar Association).
32 Submission 15 (County Court of Victoria).
33 Submissions 2 (Peck, Borchard, Carlei, Ciampoli (students at the University of Melbourne)), 16 (Youthlaw). Consultation 1 (Victorian Aboriginal Legal Service).
34 Submission 16 (Youthlaw).
35 Submission 21 (Caterina Politi).
36 Submission 14 (Law Institute of Victoria). Consultation 3 (Law Institute of Victoria).
37 Submission 17 (Victoria Legal Aid). Consultations 2 (Liberty Victoria), 4 (Criminal Bar Association), 5 (Judicial College of Victoria), 6 (Victoria Legal Aid), 9 (Dr Greg Byrne PSM).
38 Submission 17 (Victoria Legal Aid). Consultation 6 (Victoria Legal Aid).
39 Consultation 6 (Victoria Legal Aid).

12.27 Dr Greg Byrne similarly noted the challenge of capturing the nuance of the common law in legislation and asked: 'what level of detail do you include?'[40] There is a risk that 'imprecise terms may cause confusion', or that 'definitions that are drawn very broadly, or very narrowly, may be ambiguous.'[41]

12.28 A virtue of the common law is that it is 'grounded in the practicality of individual fact situations, [and] is the refined product of the wisdom of many minds'.[42] The LIV told us that the common law provides:

> an invaluable resource on the meaning of recklessness, comprising decades worth of cases on the highly complicated, circumstantially specific concept that have been decided … by some of Australia's best legal minds. To do away with this resource would strip the concept of useful, in-depth analyses of what it means to be 'reckless' in circumstances where criticisms of the common law, as it stands, are largely absent.[43]

12.29 In concisely setting down fundamental common law principles of recklessness, it would be difficult for a legislated definition to fully encapsulate all such matters.

12.30 Whether the common law's nuance is lost will depend, however, on the specific definition adopted. A definition that excluded the common law and sought to explicitly define the concept would lose nuance. A definition that merely gave effect to the common law would not. For this reason, a range of contributors cautioned that if the *Campbell* recklessness test is retained and legislated, the continued operation of the common law should not be excluded.[44]

It could lead to uncertainty

12.31 We were told that a legislated definition might have unintended consequences or be applied in unexpected ways.[45] The CBA noted that:

> There are risks in even attempting to codify the present test … there is potential for a lawyer to say the words used are slightly different, and therefore that there must be some nuance intended by Parliament.[46]

12.32 On this view, even a definition that sought to capture the definition of recklessness as 'probability' could be argued to have diverged from the common law meaning.

12.33 Such arguments are not new. Dennis Pearce, an authority on statutory interpretation in Australia, has stated:

> a drafter [of legislation] cannot assume that a reader will approach legislation sympathetically. In fact, the reader will often try to place a possible meaning on legislation that suits the reader, regardless of what the drafter intended.[47]

12.34 Noting this tendency and the 'inherent uncertainties associated with the use of language', Pearce argues that drafters 'must try to forestall destructive arguments as to [legislation's] meaning'.[48] Professor Pamela Ferguson says this applies particularly in the case of the defence, 'who will strive to construe any ambiguities in drafting in a manner which is most favourable to their clients'.[49]

12.35 A definition that was applied in unexpected ways could undermine the existing clarity of the law, which would defeat the very purpose of legislating a definition.

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40 Consultation 9 (Dr Greg Byrne PSM).
41 Office of the Queensland Parliamentary Counsel, *Principles of Good Legislation: OQPC Guide to FLPs, Clear Meaning* (Report, 19 June 2013) 17 [47], 21 [59].
42 John Burrows, 'Common Law among the Statutes: The Lord Cooke Lecture 2007' (2007) 39(3) *Victoria University of Wellington Law Review* 401, 411. See also Virginia Bell, 'Paul Byrne SC Memorial Lecture—Keeping the Criminal Law in "Serviceable Condition": A Task for the Courts or the Parliament?' (2016) 27(3) *Current Issues in Criminal Justice* 335, 342 (arguing that the common law 'has the … charm of developing the criminal law incrementally in the face of real factual controversies').
43 Submission 14 (Law Institute of Victoria).
44 Submissions 6 (Criminal Bar Association), 14 (Law Institute of Victoria), 15 (County Court of Victoria), 16 (Youthlaw). In contrast Victoria Police's position is that if the test of recklessness is modelled on *Campbell* the definition should operate to the exclusion of the common law: Submission 7 (Victoria Police).
45 Submissions 16 (Youthlaw), 17 (Victoria Legal Aid). Consultations 2 (Liberty Victoria), 4 (Criminal Bar Association), 5 (Judicial College of Victoria).
46 Consultation 4 (Criminal Bar Association).
47 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 4.
48 Ibid 4–5.
49 Pamela R Ferguson, 'Constructing a Criminal Code' (2009) 20(1) *Criminal Law Forum* 139, 161 (citations omitted).

Appeals could increase

12.36 We heard that appeals about recklessness are rare,[50] but legislating a definition of recklessness could increase their number.

12.37 The Supreme Court stated that 'complexity of any legislative amendments may … contribute to an increase in appeals and, in turn, retrials. Complexity can lead to error when directing juries'.[51]

12.38 A legislated definition would require the JCV to write new model jury directions.[52] The JCV told us that a 'clear legislated definition can make things easier for the JCV [in its tasks of drafting model jury directions and updating the *Criminal Charge Book*] and reduce the risk of appeals',[53] but:

> There are always risks where judges depart from the words of the Act, and then there is a debate about whether they accurately conveyed the test set out in the Act. If you introduced a legislative definition that was poorly expressed that would be worse than the current [common law] situation.[54]

It could lead to inconsistency between offences

12.39 The focus of our report is offences against the person. However, recklessness offences exist in other parts of the Crimes Act and in other Victorian Acts (see Chapter 5 and Appendix E). A legislated definition for offences against the person could create inconsistency, or the appearance of inconsistency, with other recklessness offences.

12.40 We should be cautious about adopting a piecemeal approach where the definition of recklessness is legislated for only a subset of offences in the Crimes Act. This could create doubt about the definition to be applied to offences outside the terms of this reference.

12.41 A wholesale review or codification of Victoria's criminal law might consider new, statutory definitions for fundamental criminal law concepts like the fault element of recklessness. But our task is to consider if a definition of recklessness should be included in the Crimes Act for offences against the person. We have considered the existing criminal law context, including consistency with other offences and established jurisprudence.

12.42 The risk of legislating a definition of recklessness for a subset of offences was highlighted in England and Wales. The Law Commission of England and Wales acknowledged the benefits of a wholesale codification of its criminal law, which would include definitions of all criminal fault elements. But the Commission opposed legislating a definition of recklessness only for offences against the person. It noted that 'enacting [a definition] separately in statutes dealing with different groups of offences creates an impression of fragmentation, even if the definitions are in fact identical.'[55]

12.43 There is a risk that a jury could be directed on two definitions of recklessness, one statutory and one common law. This situation was described by the Law Commission of England and Wales as 'awkward … even if [the definitions] largely coincided.'[56] The JCV noted that 'having [a] statutory definition only apply to certain offences … is a recipe for juror confusion.'[57] This risk could be partially mitigated, however, if the legislated definition were extended to the entire Crimes Act.

50 Submissions 13 (Supreme Court of Victoria), 17 (Victoria Legal Aid). Consultations 5 (Judicial College of Victoria), 6 (Victoria Legal Aid), 8 (Supreme Court of Victoria).
51 Submission 13 (Supreme Court of Victoria).
52 Consultation 5 (Judicial College of Victoria).
53 Ibid.
54 Ibid.
55 Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 81 [4.148] (citations omitted).
56 Ibid 78 [4.139] (stated in the context of whether to include a statutory definition of *intention*, not recklessness).
57 Consultation 5 (Judicial College of Victoria).

12.44 Also problematic in Victoria, particularly for recklessness offences beyond the Crimes Act, is another concern raised by the Law Commission of England and Wales, that:

> common law meanings sometimes change; this means that, in the future, a difference may open up between those offences where the meaning of recklessness has been restated in statute and those where it is governed by the common law.[58]

12.45 The CBA noted that section 32 of the *Occupational Health and Safety Act 2004* (Vic) created a recklessness offence 'identical' to the endangerment offence in section 23 of the Crimes Act.[59] The CBA questioned:

> If you legislate a definition of recklessness, how does that definition fit with the different contexts it might be used in? It will potentially give rise to inconsistency with other offences … if you try and change the definition in the division of the *Crimes Act* that contains the offences against the person it has a flow-on effect—does it cast doubt over what everyone assumes other provisions mean? It creates inconsistency between these identical offences … It's not easy to disentangle.[60]

12.46 This risk of inconsistency could be avoided by leaving the definition to the common law.

Conclusion: a legislated definition is unnecessary

12.47 The current definition of recklessness is relatively easy to find, understand and apply. There may be some benefit to legislating a definition, but this does not outweigh the potential risks. In addition, legislating a definition of recklessness while leaving aside the other fault elements 'would look distinctly lopsided'.[61]

12.48 Policy makers should be cautious about legislating without the expectation of a tangible improvement. According to the Commonwealth Attorney-General's Department, the first principle for making laws clearer is 'don't legislate if you don't have to'.[62]

12.49 In this inquiry, we have not found uncertainty or a lack of clarity about the application of recklessness that requires a legislated definition.. It is therefore unnecessary to amend the Crimes Act to include a definition of recklessness.

58 Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 81 [4.148] (citations omitted).

59 Consultation 4 (Criminal Bar Association). The endangerment offence created by section 31D of the *Dangerous Goods Act 1958* (Vic) is also 'modelled on section 22 of the Crimes Act 1958': Explanatory Memorandum, Dangerous Goods Amendment (Penalty Reform) Bill 2019 (Vic) cl 8.

60 Ibid.

61 Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 81 [4.152] (this argument being made in the England and Wales context). The Children's Court of Victoria noted that if Parliament decided to define the test, 'consideration may need to be given to defining other elements alongside recklessness': Submission 11 (Children's Court of Victoria).

62 Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (Fact Sheet, 2020) 1 <https://www.ag.gov.au/sites/default/files/2020-03/causes-of-complex-legislation-and-strategies-to-address-these.pdf>.

PART THREE: RECKLESSNESS AND OTHER OFFENCES— PRINCIPLES

CHAPTER

13

Principles for reviewing how recklessness is used for other offences

13. Principles for reviewing how recklessness is used for other offences

Overview

- The following principles should guide any review of how recklessness and related concepts are used for *Crimes Act 1958* (Vic) offences outside offences against the person:
  - fairness
  - clarity and simplicity
  - stability and certainty in the law
  - consistency.
- We explain why and how these principles should provide guidance when reviewing other offences.
- Sometimes, there will be good reasons to give different weight to individual principles. For example, the benefits of consistency may be outweighed if achieving consistency leads to uncertainty.

Role of the guiding principles

13.1 As well as our primary focus on how recklessness is used for offences against the person, 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 offences in the *Crimes Act 1958* (Vic) (the Crimes Act).[1]

1 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.

In our issues paper we proposed some potential guiding principles:

- 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.[2]

13.2 There was broad support for most of these principles among contributors to our inquiry. 'Consistency with everyday usage' was not broadly supported, as people use the word in diverse ways in everyday life.

13.3 Some submissions touched on other principles:

- several contributors expressed support for 'justice' or fairness[3]
- some contributors commented on the benefits of stability or certainty.[4]

13.4 We recommend the following guiding principles:

- fairness
- clarity and simplicity
- stability and certainty
- consistency—but only within Victorian legislation, not between state and federal jurisdictions, and only where it can be achieved without creating instability in the law.

13.5 The principles are intended for use by Parliament, policy makers and drafters.[5] It is not our intention that the courts should have regard to these principles when interpreting statutory provisions that contain recklessness as a fault element.[6]

2 Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023) 20, [103].

3 Submissions 3 (Kavaleris, Shehnah, Aforozis, Vinci (students at the University of Melbourne)), 4 (Waller, Herszberg, Muldoon (students at the University of Melbourne)), 5 (McGavin, Jenkins-Smales, NcNaughton, Allen (students at the University of Melbourne)), 6 (Criminal Bar Association), 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph), 14 (Law Institute of Victoria), 18 (Dr Greg Byrne PSM). Consultations 2 (Liberty Victoria), 3 (Law Institute of Victoria), 10 (Victoria Police).

4 Submissions 1 (Clifton, Liu, Neulinger, Wong (students at the University of Melbourne)), 3 (Kavaleris, Shehnah, Aforozis, Vinci (students at the University of Melbourne)), 5 (McGavin, Jenkins-Smales, NcNaughton, Allen (students at the University of Melbourne)), 6 (Criminal Bar Association), 14 (Law Institute of Victoria), 15 (County Court of Victoria), 19 (Victims of Crime Commissioner), 21 (Caterina Politi). Consultation 2 (Liberty Victoria).

5 We made this clear in our issues paper: Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023) 20 [102].

6 This statement was suggested by the Supreme Court for inclusion with the guiding principles. The Court noted that 'ambiguities [involving the fault element of recklessness] should be resolved in the provisions [themselves] rather than relying on extraneous materials or guiding principles to give clarity to the provisions': Submission 13 (Supreme Court of Victoria). The County Court saw merit in the principles listed in the issues paper, noting they are not designed for inclusion in the Crimes Act: Submission 15 (County Court of Victoria).

Fairness

13.6 We did not refer to 'fairness' as a potential guiding principle in our issues paper. But we recommend it as useful for orienting any review of how recklessness is used.

13.7 Fairness and justice are analogous but the idea of fairness is broader.[7] Because people are born free and equal in dignity and rights,[8] they are entitled to be treated fairly. Fairness captures the importance of acting without bias and with respect for human equality and dignity. At the same time, it recognises that different treatment may sometimes be justified by differences in individuals and their circumstances.[9]

13.8 Using 'fairness' as a guiding principle encourages scrutiny of how change could affect individuals or groups who are marginalised or over-criminalised. The other guiding principles we support are valuable in part because they promote fairness, including by improving access to justice.

13.9 One of the principles we listed in our issues paper as a potential guiding principle captures an aspect of what fairness in the law requires:

> The scope of the definition of recklessness should match the level of culpability associated with the offences and the penalties attached to them.[10]

13.10 Sentences should be proportionate and just, taking into account the totality of the offending.[11] Fairness allows for differences in sentences to take account of the circumstances of individual offenders.

13.11 Several stakeholders raised concerns that lowering the threshold for recklessness could lead to injustice and unnecessarily punitive sentences (see Chapter 11).[12]

13.12 Another aspect of fairness is that the criminal law should not have a disproportionate impact on some individuals or members of the community. It should not entrench existing disadvantage or marginalisation. Many of the people we heard from during our inquiry were concerned that changing the current definition of recklessness would disproportionately affect First Peoples, young people, and people with mental illness or cognitive impairment, among others (see Chapter 11).[13]

13.13 The principle of fairness also favours subjective over objective fault elements. One reason for our recommendation to retain the current definition of recklessness for offences against the person is that it has a purely subjective fault element, consistent with basic principles of justice.

13.14 The idea that 'punishment is justified only if the defendant had a guilty mind' is 'central to the criminal law'.[14] It helps ensure the law operates fairly and people are not criminalised for things they did not foresee. Except in relation to some sexual offences—where there is a need to overcome permissive community attitudes and low reporting and charging rates[15]—there has been a generally recognised move towards

7 In the Macquarie Dictionary, 'fair' is defined in part as 'free from bias, dishonesty, or injustice ...; that is legitimately sought, pursued, done, given, etc, proper under the rules': *Macquarie Dictionary* (Macquarie Dictionary Publishers Pty Ltd, 6th ed., 2013). *Garner's Dictionary of Legal Usage* points out that in legal usage, 'fair play' 'is the quintessential expression for equitable and impartial treatment.': Bryan A Garner, *Garner's Dictionary of Legal Usage* (Oxford University Press, 3rd ed, 2011).

8 *Charter of Human Rights and Responsibilities Act 2006* (Vic) preamble.

9 For example, the *Equal Opportunity Act 2010* (Vic) recognises that the achievement of substantive equality 'may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures'. *Equal Opportunity Act 2010* (Vic) ss 3(d)(iii), 12.

10 Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023) 20 [103].

11 See *Sentencing Act 1991* (Vic) s 5(1)(a); Sentencing Advisory Council (Vic), 'Sentencing Principles, Purposes, Factors', *About Sentencing* (Web Page, 3 November 2022) <https://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-principles-purposes-factors>.

12 Submissions 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph), 14 (Law Institute of Victoria).

13 Submissions 5 (McGavin, Jenkins-Smales, NcNaughton, Allen (students at the University of Melbourne)), 9 (Liberty Victoria), 12 (Dermot Dann KC and Felix Ralph), 16 (Youthlaw), 17 (Victoria Legal Aid). Consultations 1 (Victorian Aboriginal Legal Service), 2 (Liberty Victoria), 3 (Law Institute of Victoria), 6 (Victoria Legal Aid), 11 (County Court of Victoria), 12 (Magistrates' Court of Victoria).

14 Allan Beever, 'The Future of Exemplary Damages in New Zealand' (2010) 24(2) *New Zealand Universities Law Review* 197, 206. See also; *Azadzoi v County Court of Victoria* [2013] VSC 161, [17]-[24]; (2013) 40 VR 390, [17]-[24]; Ian Freckelton and Kerryn Cockroft, *Indictable Offences in Victoria* (Thomson Reuters, 6th ed, 2016) 120 [18.10]; Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford University Press, 10th ed, 2022) 192 [6.4].

15 See Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021) 9–10, 26–29, 38, 41–42, 142.

'subjectivist' understandings of the criminal law.[16] This move has been justified on the grounds that it remedies the injustice of fault elements that impose criminal liability using an objective standard.[17]

13.15 In the English case of *R v G* (see Chapter 6), two children were charged with criminal damage to property because of the effects of a fire they had started. They were 11 and 12 years old at the time of the fire and did not foresee that it would spread. The House of Lords overturned an earlier decision that recklessness could be established using an objective fault element. In the House of Lords, Lord Bingham spoke about the 'obvious unfairness' of objective fault elements:

> It is neither moral nor just to convict [an accused] (least of all a child) on the strength of what someone else would have apprehended if the [accused themselves] had no such apprehension.[18]

Clarity and simplicity

13.16 Complexity in the criminal law can make it difficult for people to understand the law and know their obligations.[19] As much as possible, legislation should assist people affected by the law to understand how it applies to them.[20] Clarity and simplicity can assist with this. Clarity is also essential so judicial officers can apply the law effectively and explain it in a straightforward way to juries.

13.17 The Commonwealth Office of Parliamentary Counsel emphasises the importance of making laws easy to understand:

> [People who draft legislation] have a very important duty to do what we can to make laws easy to understand. If laws are hard to understand, they lead to administrative and legal costs, [and] contempt of the law …[21]

13.18 A more recent guidance note on avoiding complex legislation states that 'when developing policy, reducing complexity should be a core consideration.'[22]

13.19 The Law Commission of England and Wales has commented that:

> One basic function of law is to inform the public clearly about what conduct is permitted or forbidden, and if it is forbidden what the consequences are.[23]

13.20 Victoria Legal Aid (VLA) told us that 'laws should not be unnecessarily complex in achieving the overall aim.'[24]

13.21 The Criminal Bar Association (CBA) suggested the current recklessness test 'has the benefit of simplicity', 'a benefit not to be underestimated in the context of offences that judicial officers must explain to lay juries.'[25] Among several guiding principles for reviewing how recklessness is used for other categories of offences in the Crimes Act, the CBA recommended including that 'The definition ought to be simple and easy to understand.'[26]

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16 '[T]he general tendency in modern times of our criminal law … is towards adopting a subjective approach. It is generally necessary to look at the matter in the light of how it would have appeared to the defendant.': *R v G* [2003] UKHL 50, [55]; [2004] 1 AC 1034, 1062 [55] (Lord Steyn).

17 As we discuss in Chapter 6, the objective test for recklessness introduced in the United Kingdom by the decision in *Caldwell* was described by one theorist as 'a definition which to many eyes divorced the criminal law from basic principles of justice.': Simon France, 'The Mental Element' (1990) 20(3) *Victoria University of Wellington Law Review* 43, 44.

18 *R v G* [2003] UKHL 50, [33] (Lord Bingham of Cornhill).

19 Victorian Law Reform Commission, *Recklessness* (Issues Paper, January 2023) 18, [86].

20 Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (Fact Sheet, 2020) 1 [4] <https://www.ag.gov.au/sites/default/files/2020-03/causes-of-complex-legislation-and-strategies-to-address-these.pdf>.

21 Office of Parliamentary Counsel (Cth), *Plain English Manual* (Report, 1993) 5 [5].

22 Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (Fact Sheet, 2020) 1 [2] <https://www.ag.gov.au/sites/default/files/2020-03/causes-of-complex-legislation-and-strategies-to-address-these.pdf>.

23 Law Commission of England and Wales, *Reform of Offences Against the Person* (Law Com Report No 361, November 2015) 40-41 [3.18].

24 Submission 17 (Victoria Legal Aid) citing Attorney-General's Department (Cth), *Causes of Complex Legislation and Strategies to Address These* (Fact Sheet, 2020) <https://www.ag.gov.au/sites/default/files/2020-03/causes-of-complex-legislation-and-strategies-to-address-these.pdf>.

25 Submission 6 (Criminal Bar Association). The Supreme Court noted that 'Consistent with jury directions on the [current] test being "simple, logical and straightforward", it has been extremely rare for appeals to include a ground alleging error in the trial judge's charge on recklessness.': Submission 13 (Supreme Court of Victoria) (citing *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181 [Kaye JA]).

26 Submission 6 (Criminal Bar Association).

13.22 In our view, a purely subjective test for recklessness is preferable not only from the perspective of fairness but also because it is clear and simple.

13.23 In Chapter 7, we discuss how multi-factorial tests are more complex. The Supreme Court told us that:

> Complexity can lead to error when directing juries, and make it difficult for juries to grasp the law to be applied. The effects of complexity in the law should be given close consideration when developing recommendations as to the meaning of recklessness.[27]

13.24 Other submissions emphasised the importance of a clear definition that juries will understand.[28] Dr Greg Byrne said research on juror comprehension, although limited, suggests that 'the simpler the definition of recklessness, the easier it is likely to be for jurors to understand.'[29] The Victims of Crime Commissioner cited Dr Byrne's submission about the benefits of simplicity for jurors and said this 'can also be extended to victims.'[30]

13.25 The Victims of Crime Commissioner and Caterina Politi separately emphasised the importance of clarity in the law for victims of crime.[31]

13.26 We agree that, as much as possible, how recklessness is used should be clear and easy to understand. Clarity promotes accessibility and supports certainty about the application of the law. But clarity does not necessarily require consistency with everyday usage.[32]

13.27 We cannot simply assume that words such as 'probably' or 'likely' are easily and consistently understood. VLA said that consistency with everyday usage should not be a guiding principle for how recklessness is used in the Crimes Act because:

> the term 'recklessness' is unlikely to have a consistent or broadly accepted similar [everyday] meaning.[33]

13.28 Similarly, the Victims of Crime Commissioner commented that 'there appears to be considerable divergence of views' in the community about what recklessness means.[34]

13.29 In their textbook on criminal law, Bronitt and McSherry suggest that how the word 'recklessness' is used in ordinary speech 'is much broader than its legal use.'[35]

Stability and certainty

13.30 The Law Commission of England and Wales has described the mental (fault) element in criminal offences as 'a branch of the law where the maximum degree of certainty is desirable'.[36] Certainty makes the law easier to access and removes doubts about its application. On its own, longevity is not necessarily a reason to avoid reform (see Chapter 10). But as guiding principles, stability and certainty weigh against changing how recklessness is used in the Crimes Act unless there is a clear need for it.[37]

13.31 The Victims of Crime Commissioner emphasised the benefits of certainty in the law for victims and the community.[38]

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27 Submission 13 (Supreme Court of Victoria).
28 Submissions 6 (Criminal Bar Association), 8 (Dr Steven Tudor).
29 Submission 18 (Dr Greg Byrne PSM).
30 Submission 19 (Victims of Crime Commissioner).
31 Ibid; Submission 21 (Caterina Politi).
32 Submissions 13 (Supreme Court of Victoria), 16 (Youthlaw), 17 (Victoria Legal Aid).
33 Submission 17 (Victoria Legal Aid); The Supreme Court of Victoria also noted that 'a principle to the effect that recklessness should be used consistently with everyday usage may understate the role and complexity of recklessness in the criminal law': Submission 13 (Supreme Court of Victoria).
34 Submission 19 (Victims of Crime Commissioner).
35 Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2017) 218 [3.215].
36 Law Commission of England and Wales, *Report on the Mental Element in Crime* (Law Com No 89, 21 June 1978) 25 [39].
37 The Criminal Bar Association described the current definition of recklessness as having the benefit of 'certainty and stability in the law'. The comment related to the use of the current test for offences against the person, but it equally applies to its use for other categories of offences. The Criminal Bar Association also suggested as a guiding principle that 'Only necessary changes should be made, and with the least disruption to [the] legislative environment.' Submission 6 (Criminal Bar Association).
38 The Victims of Crime Commissioner advocated for 'an approach that creates the most clarity and certainty for victims and the broader community, meets community expectations and does not retraumatise victims.' The Commissioner noted that the 'law and the justice system are inherently uncertain for victims and any opportunity for clarity and certainty is important.': Submission 19 (Victims of Crime Commissioner).

13.32 Liberty Victoria said that any proposal to change the current definition of recklessness in Victoria risked introducing uncertainty and instability to an area of law that has been working well.[39]

13.33 The Law Institute of Victoria told us that:

> the rule of law requires a degree of stability in the law to prevent unnecessary confusion arising about what the law is and what it requires.[40]

Consistency

Consistency within the Crimes Act

13.34 In Chapter 5, we consider how recklessness is used for other Crimes Act offences. Our review revealed a high degree of consistency. With isolated exceptions, the definition of recklessness is the same as it is for offences against the person: foresight of 'probable' or 'likely' harm.

13.35 We discuss the benefits of consistency in Chapter 10. Consistency in the language of fault elements helps promote certainty about the meaning of that language.[41] It reduces the risk of confusion and misunderstanding among people affected by the law and those who are required to interpret and apply it:

> The possibility of a reader being confused or misled is increased if the same expression has a different meaning according to which Part, Division or section of an Act the expression is used in. For this reason, where possible, drafters generally avoid: (a) defining an expression to have different meanings in different parts of an Act; or (b) defining, in one part of an Act, an expression that is used in its ordinary meaning in another part of the Act.[42]

13.36 The CBA said a guiding principle for reviewing how recklessness is used throughout the Crimes Act should be that all such terms 'ought to have a single definition.' It suggested 'It is problematic to ask a jury to consider different definitions for the same word.'[43]

13.37 The County Court identified several benefits of consistency, including improved access to justice:

> A consistent understanding of recklessness may assist the community's understanding of legislation and confidence in their ability to understand laws that apply to them. Similarly, the consistent use of terms will facilitate legal certainty among the judiciary and profession.[44]

13.38 Some stakeholders said that consistency should not be pursued at all costs. The Supreme Court suggested that:

> any principle about reducing inconsistency in legislation should recognise that there are circumstances where inconsistency may be preferable to the complexity caused by changing the meaning of a well-understood statutory term.[45]

Consistency and a new threshold

13.39 The Office of Public Prosecutions (OPP) says that defining recklessness consistently in the Crimes Act and other Victorian legislation 'would be preferable—if it was achievable.'[46] But in its view, there is inconsistency in how recklessness is currently defined. We address this in Chapter 5.

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39 Consultation 2 (Liberty Victoria).
40 Submission 14 (Law Institute of Victoria).
41 See Harry Gibbs, RS Watson and ACCC Menzies, *Review of Commonwealth Criminal Law—Principles of Criminal Responsibility and Other Matters* (Interim Report, Attorney-General's Department (Cth), July 1990) 31 citing Law Commission of England and Wales, *A Criminal Code for England and Wales—Vol 1 Report and Draft Criminal Code Bill* (Law Com Report No 177, 1989) [8.4].
42 Office of Parliamentary Counsel (Cth), *Reducing Complexity in Legislation* (Report, June 2016) 8 [50] <https://www.opc.gov.au/sites/default/files/2023-01/reducingcomplexity.pdf>.
43 Submission 6 (Criminal Bar Association).
44 Submission 15 (County Court of Victoria).
45 Submission 13 (Supreme Court of Victoria).
46 Submission 10 (Office of Public Prosecutions).

13.40 The OPP suggests that its proposed definition of recklessness (see Chapter 7) should provide a 'guiding principle' for reviewing how recklessness is used for other offences.[47] Victoria Police suggested that:

> for consistency and clarity, [Victoria Police] recommends that the VLRC consider whether a common definition [based on a possibility test with an objective element] could be extended to apply to all offences in the Crimes Act where recklessness is a fault element.[48]

13.41 However, Victoria Police acknowledged that this would 'require considerable analysis and consultation to avoid any unintended consequences.'[49]

13.42 For the same reasons that we do not support a different definition of recklessness for offences against the person, we do not support it for other offences.

Consistency across different jurisdictions

13.43 Some submissions identified consistency between jurisdictions as a benefit.[50] The County Court told us that:

> Inconsistency of definition between jurisdictions (State and Federal) makes it difficult in Victoria to consider case law from other intermediate appellate courts.[51]

13.44 But as we discuss in Chapters 6 and 7, there are many differences in the criminal law between jurisdictions within Australia and among common law countries. Achieving interjurisdictional consistency is not realistic. It would require wholesale reform of Victoria's criminal law.

Some offences may require a tailored approach

13.45 VLA said that consistency:

> should not be the only or primary consideration given to the creation of fault elements, as offences should be appropriately tailored to the conduct that is being criminalised …[52]

13.46 The County Court:

> acknowledge[d] that there may be times when, for policy reasons and in the context of particular legislation, the definition of recklessness will take on an alternative meaning.[53]

13.47 It said that where this is the case, there is 'value in clearly stating' in the legislation that a different definition applies.[54]

Conclusion

13.48 The Commission supports keeping the current common law subjective test of recklessness for most Crimes Act offences. This will allow the greatest degree of fairness, clarity and simplicity, stability and certainty, and consistency within the legislation.

47 'In our view, the fundamental guiding principle for the use of recklessness as a fault element in other Crimes Act offences should be that recklessness means awareness of a possibility, unless there are cogent reasons to depart from that position for a particular offence.': Ibid.
48 Submission 7 (Victoria Police).
49 Ibid.
50 Submissions 10 (Office of Public Prosecutions), 15 (County Court of Victoria); the Victims of Crime Commissioner noted that the High Court's acceptance of the correctness of the possibility test for offences other than murder in the *DPP Reference* case, coupled with consistency with other jurisdictions, 'is persuasive': Submission 19 (Victims of Crime Commissioner); and see Submission 7 (Victoria Police).
51 Submission 15 (County Court of Victoria).
52 Submission 17 (Victoria Legal Aid).
53 Submission 15 (County Court of Victoria).
54 Ibid.

Appendices

Appendix A: Submissions

1	Melbourne University law students (Clifton, Liu, Neulinger, Wong)
2	Melbourne University law students (Peck, Borchard, Carlei, Ciampoli)
3	Melbourne University law students (Kavaleris, Shehnah, Aforozis, Vinci)
4	Melbourne University law students (Waller, Herszberg, Muldoon)
5	Melbourne University law students (McGavin, Jenkins-Smales, McNaughton, Allen)
6	Criminal Bar Association
7	Victoria Police
8	Dr Steven Tudor
9	Liberty Victoria
10	Office of Public Prosecutions, Victoria
11	Children's Court of Victoria
12	Dermot Dann KC and Felix Ralph
13	Supreme Court of Victoria
14	Law Institute of Victoria
15	County Court of Victoria
16	Youthlaw
17	Victoria Legal Aid
18	Dr Greg Byrne PSM
19	Victims of Crime Commissioner
20	Office of Public Prosecutions (Supplementary)
21	Caterina Politi

Appendix B: Consultations

1	Victorian Aboriginal Legal Service
2	Liberty Victoria
3	Law Institute of Victoria
4	Criminal Bar Association
5	Judicial College of Victoria
6	Victoria Legal Aid
7	Office of Public Prosecutions, Victoria
8	Supreme Court of Victoria
9	Dr Greg Byrne PSM
10	Victoria Police
11	County Court of Victoria
12	Magistrates' Court of Victoria
13	Victim Survivors' Advisory Council
14	Police member who was a victim—name withheld
15	Victim—name withheld

Appendix C: Other categories of assaults outside of the *Crimes Act 1958* (Vic)

In Chapter 4, we set out a hierarchy of offences with recklessness as a fault element, and alternative offences that may be charged. We did not include all the available assault charges outside of the Crimes Act; we list them here for completeness.

Table 20

Offence	Maximum penalty (term of imprisonment)
Common law assault *Indictable offence triable summarily*	Five years.[1] 10 years if the person has an offensive weapon and the victim is a police or protective services officer on duty.[2] 15 years if the person has a firearm or imitation firearm and the victim is a police or protective services officer on duty.[3] If the person has an offensive weapon/firearm/imitation firearm and the victim is a police or protective services officer on duty, common law assault is a Category 2 offence (mandatory custodial) under the *Sentencing Act 1991* (Vic) if committed on/after 5 June 2019 and if the assault included the direct 'application of force'.[4]
Aggravated assault *Summary Offences Act 1966* (Vic) s 24	For an assault against a male child under 14 or any female where the assault is too serious to be punished under section 23 common assault: six months. For an assault in company with another person (multiple offenders): 12 months. For an assault by kicking, or with the use of a weapon or instrument: two years.

1 *Crimes Act 1958* (Vic) s 320.

2 The 10-year maximum penalty applies if at the time of the assault the person who commits the assault has an offensive weapon readily available; and the person assaulted is a police or protective services officer on duty; and the offender knows or is reckless as to whether the victim is a police or protective services officer; and the offender enables the victim to see the weapon or its general shape or tells or suggests to the victim that the offender has the weapon; and the offender knows or in all the circumstances ought to have known that engaging in the conduct would be likely to arouse apprehension or fear: *Crimes Act 1958* (Vic) s 320A(1).

3 The 15-year maximum penalty applies if at the time of the assault, the person who commits the assault has a firearm or imitation firearm readily available; and the person assaulted is a police or protective services officer on duty; and the offender knows or is reckless as to whether the victim is a police or protective services officer; and the offender enables the victim to see the firearm or imitation firearm or its general shape or tells or suggests to the victim that the offender has the weapon; and the offender knows or in all the circumstances ought to have known that engaging in the conduct would be likely to arouse apprehension or fear: *Crimes Act 1958* (Vic) 320A(2).

4 Within the meaning of Crimes Act *1958* (Vic) s 31(2).

Table 20 (continued)

Offence	Maximum penalty (term of imprisonment)
Assaulting, resisting, obstructing, hindering or delaying emergency workers, custodial officers, youth justice custodial workers or local authority staff on duty *Summary Offences Act 1966* (Vic) s 51	60 penalty units[5] or imprisonment for six months.
Assaulting registered health practitioners *Summary Offences Act 1966* (Vic) s 51A	60 penalty units or imprisonment for six months.
Common assault (unlawful assault) *Summary Offences Act 1966* (Vic) s 23	15 penalty units or imprisonment for three months.

5 Penalty units determine the amount a person is fined. The value of a penalty unit is set annually by the Victorian Treasurer and is updated on 1 July each year. From 1 July 2023 to 30 June 2024, the value of the penalty unit is $192.31: Department of Justice and Community Safety (Vic) *Penalties and Values* (Web Page, 28 June 2023) <https://www.justice.vic.gov.au/justice-system/fines-and-penalties/penalties-and-values>.

Appendix D: Provisions of the *Crimes Act 1958* (Vic) that include the concept of 'recklessness'[1]

Table 21

Provision	Title	Language used: 'reckless' or 'recklessly'	Language used: 'likely' or 'more likely than not'	Language used: 'probable' or 'probably'	Language used: 'substantial risk'
Part I, Division 1	Offences against the person				
s 3	Punishment for murder	X			
s 15A	Causing serious injury intentionally in circumstances of gross violence	X			
s 15B	Causing serious injury recklessly in circumstances of gross violence	X			
s 17	Causing serious injury recklessly	X			
s 18	Causing injury intentionally or recklessly	X			
s 19	Offence to administer certain substances	X			
s 20	Threats to kill	X			
s 21	Threats to inflict serious injury	X			
s 21A	Stalking		X		
s 22	Conduct endangering life	X			
s 23	Conduct endangering persons	X			
s 25	Setting traps etc. to kill	X			
s 26	Setting traps etc. to cause serious injury	X			

1 Where 'likely' is used but does not directly relate to recklessness, it has not been included. For example, some offences refer to conduct or circumstances that 'a reasonable person would have foreseen', or that a person 'ought to have known', or 'ought to have understood', or 'ought reasonably to know' 'would be likely' to cause harm: *Crimes Act 1958* (Vic) ss 15A(2)(iii), 15B(2)(iii), 21A(3)(b), 31D(3)(b)(ii), 195F(1)(e), 195K(1)(d), 257(2)(b)(ii), 320A(1)(e)(ii), 320A(2)(e)(ii). The offence in s 490 has a negligence element that includes knowledge of a 'substantial risk'. There are also a small number of older offences that may be committed maliciously e.g. Crimes Act ss 225, 228, 232, 244, 245, 246B, and 317.

Table 21 (continued)

Provision	Title	Language used: 'reckless' or 'recklessly'	Language used: 'likely' or 'more likely than not'	Language used: 'probable' or 'probably'	Language used: 'substantial risk'
s 31	Assaults	X			
s 31C	Discharging a firearm reckless to safety of a police officer or a protective services officer	X			
s 43	Threat to commit a sexual offence			X	
s 44	Procuring sexual act by threat			X	
s 45	Procuring sexual act by fraud			X	
s 47	Abduction or detention for a sexual purpose			X	
s 48	Sexual activity directed at another person			X	
s 49F	Sexual activity in the presence of a child under the age of 16			X	
s 49G	Sexual activity in the presence of a child aged 16 or 17 under care, supervision or authority			X	
s 49P	Abduction or detention of a child under the age of 16 for a sexual purpose			X	
s 49S	Facilitating a sexual offence against a child			X	
s 51B	Involving a child in the production of child abuse material			X	
s 51C	Producing child abuse material			X	
s 51D	Distributing child abuse material			X	
s 51H	Accessing child abuse material			X	
s 52D	Sexual activity in the presence of a person with a cognitive impairment or mental illness			X	
s 53B	Using force, threat etc. to cause another person to provide commercial sexual services			X	
s 53C	Causing another person to provide commercial sexual services in circumstances involving sexual servitude			X	

Table 21 (continued)

Provision	Title	Language used: 'reckless' or 'recklessly'	Language used: 'likely' or 'more likely than not'	Language used: 'probable' or 'probably'	Language used: 'substantial risk'
s 53D	Conducting a business in circumstances involving sexual servitude			X	
s 53E	Aggravated sexual servitude			X	
s 53G	Aggravated deceptive recruiting for commercial sexual services			X	
s 53R	Producing intimate image			X	
s 53S	Distributing intimate image			X	
s 53T	Threat to distribute intimate image			X	
Part I, Division 2	Theft and similar or associated offences				
s 77	Aggravated burglary	X			
s 77B	Aggravated home invasion	X			
s 81	Obtaining property by deception	X			
s 191	Fraudulently inducing persons to invest money	X			
Part I, Division 2AA	Identity crime				
s 192B	Making, using or supplying identification information				X
s 192C	Possession of identification information				X
Part I, Division 2A	Money laundering etc				
s 194	Dealing with proceeds of crime	X			
s 195A	Dealing with property which subsequently becomes an instrument of crime	X			
Part I, Division 2B	Cheating at gambling				
s 195C	Engaging in conduct that corrupts or would corrupt a betting outcome of event or event contingency	X			

Table 21 (continued)

Provision	Title	Language used: 'reckless' or 'recklessly'	Language used: 'likely' or 'more likely than not'	Language used: 'probable' or 'probably'	Language used: 'substantial risk'
s 195D	Facilitating conduct that corrupts or would corrupt a betting outcome of event or event contingency	X			
s 195E	Concealing conduct, agreement or arrangement	X			
s 195F	Use of corrupt conduct information for betting purposes	X			
Part I, Division 2C	Offences against public order and grossly offensive public conduct				
s 195H	Affray	X			
s 195I	Violent disorder	X			
s 195K	Grossly offensive public conduct	X	X		
Part I, Division 3	Criminal damage to property				
s 197	Destroying or damaging property		X		
s 198	Threats to destroy or damage property		X		
s 199	Possessing anything with intent to destroy or damage property		X		
s 201A	Intentionally or recklessly causing a bushfire	X			
s 246C	Endangering safety of an aircraft		X		
s 247C	Unauthorised modification of data to cause impairment	X			
s 247D	Unauthorised impairment of electronic communication	X			
Part 1, Division 4	Contamination of goods				
s 249	Contaminating goods with intent to cause, or being reckless as to whether it would cause, public alarm or economic loss	X			
s 250	Threatening to contaminate goods with intent to cause, or being reckless as to whether it would cause, public alarm or economic loss	X			

Table 21 (continued)

Provision	Title	Language used: 'reckless' or 'recklessly'	Language used: 'likely' or 'more likely than not'	Language used: 'probable' or 'probably'	Language used: 'substantial risk'
s 251	Making false statements concerning contamination of goods with intent to cause, or being reckless as to whether it would cause, public alarm or economic loss	X			
s 252	Territorial nexus for offences	X			
Part I, Division 5A	Intimidation and reprisals relating to witnesses, etc				
s 257	Intimidation or reprisals relating to involvement in criminal investigation or criminal proceeding		X		
Part I, Division 8A	Driving offences connected with emergency workers, custodial officers, youth justice custodial workers and emergency service vehicles				
s 317AC	Intentionally exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving	X			
s 317AD	Aggravated offence of intentionally exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving	X			
s 317AE	Recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving	X			
s 317AF	Aggravated offence of recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving	X			
s 317AG	Damaging an emergency service vehicle	X			

Table 21 (continued)

Provision	Title	Language used: 'reckless' or 'recklessly'	Language used: 'likely' or 'more likely than not'	Language used: 'probable' or 'probably'	Language used: 'substantial risk'
Part I, Division 9	Driving offences connected with motor vehicles				
s 318	Culpable driving causing death	X (including a specific definition of recklessness that differs from the definition applied to other Crimes Act offences)[2]			X
s 319	Dangerous driving causing death or serious injury	X			
Part I, Division 9AA	Offences connected with dangerous, menacing and restricted breed dogs and related court powers				
s 319B	Failure to control dangerous, menacing or restricted breed dog that kills person	X			
s 319C	Recklessness as to whether controlling dangerous, menacing or restricted breed dog may place another person in danger of death	X			
Part I, Division 9A	Penalties for certain common law offences				
s 320A	Maximum term of imprisonment for common assault in certain circumstances	X	X		
Part I, Division 11A	Recruiting a child to engage in criminal activity				
s 321LB	Recruiting a child to engage in criminal activity		X		
Part II, Division 1	Abettors, accessories and concealers of offences				
s 323	Interpretation			X	
Part III, Division 1	Pleading procedure, proof &c.				
s 464JA	Offences in relation to recordings	X			

2 'consciously and unjustifiably disregards a substantial risk [that] … may result …': *Crimes Act 1958* (Vic) s 318(2)(a)

Table 21 (continued)

Provision	Title	Language used: 'reckless' or 'recklessly'	Language used: 'likely' or 'more likely than not'	Language used: 'probable' or 'probably'	Language used: 'substantial risk'
s 464ZE	Evidence relating to forensic procedures or DNA profile samples	X			
s 464ZGG	Supply of forensic material for purposes of DNA database	X			
s 464ZGI	Permissible matching of DNA profiles	X			
s 464ZGJ	Recording, retention and removal of identifying information on DNA database	X			
s 464ZGK	Disclosure of Victorian information	X			

Appendix E: Provisions in Victorian legislation other than the *Crimes Act 1958* (Vic) that include the concept of recklessness

Table 22

Statute (Vic)	Section	Provision
Aboriginal Heritage Act 2006	s 19	Offence of failure to transfer Aboriginal ancestral remains to Council
	s 27(3)	Offence to harm Aboriginal cultural heritage
	s 34	Offence to carry out specified activities other than in accordance with a cultural heritage permit
	s 46(4)	Offence to commence activity without cultural heritage management plan
	s 67A(3)	Offence of failure to comply with an approved cultural heritage management plan
	s 74G(3)	Offence of failure to comply with Aboriginal cultural heritage land management agreement
	s 79G(2)	Offence to use registered Aboriginal intangible heritage for commercial purposes without consent
	s 79H(3)	Offence of failure to comply with a registered Aboriginal intangible heritage agreement
	s 102(3)	Offence to contravene interim protection declaration
	s 108(3)	Offence to contravene ongoing protection declaration
	s 147A(2)	Offence to use information for prohibited purposes
Accident Compensation Act 1985	s 119IA(2)	'Reckless misrepresentation' used in relation to circumstances in which offer may be withdrawn or settlement avoided
Accident Towing Services Act 2007	s 215	Offence to provide false or misleading information
Assisted Reproductive Treatment Act 2008	s 35	Offence to form an embryo outside the body of a woman
	s 38	Offence to provide false or misleading information
Associations Incorporation Reform Act 2012	ss 83(3)-(4)	Offences to make improper use of information or position
Australian Consumer Law and Fair Trading Act 2012	s 22(3)(b)	'Reckless disregard' used in relation to circumstances that limit liability under a contract of supply of recreational services

Table 22 (continued)

Statute (Vic)	Section	Provision
Bail Act 1977	sch 2	Some 'reckless' offences in the *Crimes Act 1958* (Vic) are listed as Schedule 2 offences that determine which bail test applies
Bus Safety Act 2009	s 66(1)	Offence to provide false or misleading information
Children, Youth and Families Act 2005	s 3	Recklessly causing serious injury in circumstances of gross violence (s 15B of the *Crimes Act 1958* (Vic)) included in the definition of 'Category B serious youth offence' Recklessly causing serious injury in circumstances of gross violence (s 15B of the *Crimes Act 1958* (Vic)), recklessly causing serious injury (s 17 of the *Crimes Act 1958* (Vic)), and recklessly causing injury (s 18 of the *Crimes Act 1958* (Vic)) included in the definition of 'offence involving an assault'
	s 119	Offence for out of home care service to approve, engage or employ disqualified person
	s 488DB(1)	Offence to operate or possess a remotely piloted aircraft or helicopter near a youth justice facility
Child Wellbeing and Safety Act 2005	ss 41ZL, 46W	Offences of unauthorised use and disclosure of confidential information
Commercial Passenger Vehicle Industry Act 2017	s 269(2)	Offence to provide false or misleading information
Conservation, Forests and Lands Act 1987	s 77(2)	Remedies for breach of agreement—damages must not be awarded unless breach arose from an intentional or reckless act or omission on the part of the land owner
Control of Genetically Modified Crops Act 2004	s 17	Offence to contravene an order
Control of Weapons Act 1990	s 8E	Offences of breaching a condition to which an exemption or approval applies
Coroners Act 2008	s 115(5)	Offence of failure to comply with condition placed on release of a document
Corrections Act 1986	s 3	Recklessly causing serious injury in circumstances of gross violence (s 15B of the *Crimes Act 1958* (Vic)) and recklessly causing serious injury (s 17 of the *Crimes Act 1958* (Vic)) are included in the definition of 'serious violent offence'
	s 32A	Offence to operate or possess remotely piloted aircraft or helicopter near a prison
	sch 3	Recklessly causing injury (s 18 of the *Crimes Act 1958* (Vic)) listed as a violent offence
Crime Statistics Act 2014	s 9	Offence of unauthorised access to, use of or disclosure of information

Table 22 (continued)

Statute (Vic)	Section	Provision
Crimes (Assumed Identities) Act 2004	s 23	The provision refers to a person not being reckless about the existence of a variation or cancellation of an authority for an assumed identity. 'Recklessness' is defined in s 23(3): 'For the purposes of this section, a person is reckless about the existence of the variation or cancellation of an authority if the person is aware of a substantial risk that the authority has been varied or cancelled and having regard to the circumstances known to the person, it is unjustifiable to take the risk.'
	s 29	Offences of misusing assumed identity
	s 30	Offences of disclosing information about an assumed identity
Crimes (Controlled Operations) Act 2004	s 31	The provision refers to a person not being reckless about the existence of a variation or cancellation of an authority for a controlled operation. 'Recklessness' is defined in s 31(3): 'For the purposes of this section, a person is reckless about the existence of the variation or cancellation of an authority if the person is aware of a substantial risk that the variation or cancellation has happened and having regard to the circumstances known to the person, it is unjustifiable to take the risk.'
	s 36	Offences of unauthorised disclosure of information
Criminal Organisations Control Act 2012	s 68	Offence of failure to comply with a control order
	ss 74, 82	Offences to enter closed court
	ss 84, 85	Offences to disclose, receive or solicit protected criminal intelligence/confidential material
Dangerous Goods Act 1985	s 31D	Offence to engage in the manufacture, storage, transport, transfer, sale or use of dangerous goods that places or may place a person in danger of death
Disability Service Safeguards Act 2018	s 258	Offences where a person who is not a registered disability worker uses registered disability worker titles
	s 259	Offences where a person claims to hold a registration, endorsement or qualification they do not hold
	s 260	Offence for a person who is registered in a particular division of the Register of Disability Workers to claim they are registered in another division
Domestic Animals Act 1994	s 41EB	Offence to breed a dog from a restricted breed dog
Drugs, Poisons and Controlled Substances Act 1981	s 71F	Offence to publish a document containing instructions for trafficking or cultivation of a drug of dependence
	s 80C	Offence to sell a cocaine kit

Table 22 (continued)

Statute (Vic)	Section	Provision
Electricity Industry Act 2000	s 40SD	Offence to disconnect supply of electricity at premises when not permitted
	s 40SF	Offence to disconnect supply of electricity at premises of life support customer
	s 40ST(3)	Offence to disconnect supply of electricity at a person's premises for fraudulent or illegal taking of electricity
	s 40SU(3)	Offence for exempt electricity seller to arrange for disconnection of supply of electricity at a person's premises for fraudulent or illegal taking of electricity
	s 80	Offence of unauthorised interference with critical electricity infrastructure plant or equipment or vehicles
Environment Protection Act 2017	s 27	Offence of aggravated breach of the general environmental duty
Equipment (Public Safety) Act 1994	s 9(2)	'Recklessly' used in relation to duties of persons in charge of prescribed equipment
Evidence Act 2008	s 103(2)(a)	When considering the exception to the credibility rule (cross-examination as to credibility), the court must have regard to whether the evidence proves that the witness knowingly or recklessly made a false representation while under an obligation to tell the truth
	s 106(2)(e)	Exception to the credibility rule: If evidence tends to prove that the witness has knowingly or recklessly made a false representation while under an obligation to tell the truth, leave is not required to adduce that evidence to rebut a denial made during cross-examination
	s 108A(2)(a)	When considering the admissibility of credibility evidence for a person who has made a previous representation in a proceeding, the court must have regard to whether the person knowingly or recklessly made a false representation when under an obligation to tell the truth
	s 138(3)(e)	When considering the exclusion of evidence improperly or illegally obtained, the court must have regard to whether the impropriety or legal contravention was deliberate or reckless
Evidence (Miscellaneous Provisions) Act 1958	ss 42BH, 42BS	Disclosure offences
	s 42BN(2)	Offence to contravene an order to protect interstate operative's identity
	s 42BQ(4)	Offence to contravene suppression and protection orders
Family Violence Protection Act 2008	s 144RA	Offence to use or disclose confidential information

Table 22 (continued)

Statute (Vic)	Section	Provision
Firearms Act 1996	s 54(6)	Offence to give false information about a general category handgun notification
	s 101B	Offences related to providing financial accommodation for the illegal acquisition or disposal of firearms
	s 130	'Reckless disregard' used in offences to possess, carry and use firearms in certain places
	s 131A	'Reckless disregard' used in offences to discharge firearm at a premises or vehicle
	s 140A(3)	Offence to make a false or misleading statement in support of another person's application
Fisheries Act 1995	s 131N	The provision refers to a person not being reckless about the existence of a variation or cancellation of an authority for a controlled operation. 'Recklessness' is defined in s 131N(3): 'For the purposes of this section, a person is reckless about the existence of the variation or cancellation of an authority if the person is aware of a substantial risk that the variation or cancellation has happened and having regard to the circumstances known to the person, it is unjustifiable to take the risk.'
	s 131Q	Offences of unauthorised disclosure of information
Freedom of Information Act 1982	s 63E	Offence of unauthorised disclosure of documents
Gas Industry Act 2001	s 48DF	Offence to disconnect supply of gas at premises when not permitted
	s 48DH	Offence to disconnect supply of gas at premises of life support customer
	s 48DV(3)	Offence to disconnect supply of gas at a person's premises for fraudulent or illegal taking of gas
	s 48DW(3)	Offences for exempt gas seller to arrange for disconnection of supply of gas at a person's premises for fraudulent or illegal taking of gas
Gas Safety Act 1997	s 71A	Offence to (offer to) supply or sell an unsafe appliance
	s 71C	Offence to make unsafe modifications to appliance
	s 79D	Offence to interfere with pipeline, gas installation or meter assembly

Table 22 (continued)

Statute (Vic)	Section	Provision
Gene Technology Act 2001	s 32	Offence to deal with a genetically modified organism without a licence
	s 34	Offence to breach conditions of a genetically modified organism licence
	s 35A	Offence to breach conditions of emergency dealing determination
	s 38	Aggravated offences—significant damage to health and safety of people or to the environment
	s 65	If a licence holder was reckless as to whether additional information as to any risks to health, safety or the environment existed, they are taken to have become aware of the additional information for the purposes of the condition of a licence to inform the Regulator
	s 192A	Offence to damage, destroy, or interfere with premises at which dealings with genetically modified organisms are being undertaken
Heritage Act 2017	s 74(1)	Offence to take, destroy, damage, remove, disturb or otherwise interfere with or dispose of any registered shipwreck, historic shipwreck, registered shipwreck artefact or historic shipwreck artefact
	s 74(3)	Offence to buy, offer to buy, agree to buy or offer, or agree to barter or exchange or possess a registered shipwreck, historic shipwreck, registered shipwreck artefact or historic shipwreck artefact
	s 87	Offences to remove, relocate or demolish, damage or despoil, develop or alter, or excavate, a registered place or object
Honorary Justices Act 2014	s 45	Offence to provide false or misleading information
Human Source Management Act 2023	s 87	Offence of unauthorised disclosure of human source information
	s 88	Aggravated offence of unauthorised disclosure of human source information—intent to endanger health or safety
	s 89	Aggravated offence of unauthorised disclosure of human source information—prejudice
Independent Broad-based Anti-corruption Commission Act 2011	s 4(1)(c)	'Recklessly breaching public trust' used in the definition of 'corrupt conduct'
	s 129A(7)	Offence to contravene suppression order issued by IBAC

Table 22 (continued)

Statute (Vic)	Section	Provision
Inquiries Act 2014	s 48	Offence to contravene a commissioner's exclusion or restriction orders
	s 49	Offence to hinder, obstruct or cause serious disruption to Royal Commission proceeding
	s 88	Offence to contravene a Board of Inquiry exclusion or restriction order
	s 89	Offence to hinder, obstruct or cause serious disruption to Board of Inquiry proceeding
	s 118	Offence to contravene a Formal Review exclusion or restriction order
	s 119	Offence to hinder, obstruct or cause serious disruption to a Formal Review proceeding
Livestock Management Act 2010	s 48	Offences of failing to comply with a notice to comply
	s 50	Offence to endanger people or animals or risk disease
Local Government Act 2020	s 125	Offence to disclose confidential information
	s 133(3)	Offence to lodge an initial personal interests return containing false or incomplete information
	s 134(2)	Offence to lodge a biannual personal interests return containing false or incomplete information
	s 213	Offence to contravene exclusion or restriction orders
	s 304(2)	Offence to print, publish or distribute electoral material during election period purporting to be on behalf of the Council
Long Service Benefits Portability Act 2018	s 64(6)(e)	'Recklessly' making a false representation about a worker's entitlement to long service benefit included in definition of an employer taking 'adverse action' against a worker
Long Service Leave Act 2018	s 36(6)(e)	'Recklessly' making a false representation about an employee's long service leave entitlements included in definition of an employer taking 'adverse action' against an employee
Major Crime (Investigative Powers) Act 2004	s 3C(2)	Offence of failure to comply with full disclosure to Public Interest Monitor
Marine (Drug, Alcohol and Pollution Control) Act 1988	s 33B(2)	Offence to supply a bodily sample for prohibited analysis or carry out prohibited analysis, or include information from a prohibited analysis to be kept on a DNA database

Table 22 (continued)

Statute (Vic)	Section	Provision
Marine Safety Act 2010	ss 30(2), (3)	Offences for marine safety worker to interfere with or misuse anything provided by regulated entity employing them, or to place the safety of another person on or in the immediate vicinity of marine safety infrastructure at risk
	s 31(2)	Offence for master of a recreational vessel to place the safety of another person on or in the immediate vicinity of the vessel at risk
	ss 32(2), (3)	Offences for a person operating a recreational vessel to interfere with or misuse anything provided by the master, or place the safety of another person on or in the immediate vicinity of the vessel at risk
	ss 33(2), (3)	Offences for a passenger on board a recreational vessel to interfere with or misuse anything provided by the master, or place the safety of another person on or in the immediate vicinity of the vessel at risk
Occupational Health and Safety Act 2004	s 25(2)	Offence for employee to interfere with or misuse anything provided at the workplace in the interests of health, safety or welfare
	s 32	Offence to recklessly endanger persons at workplaces
Offshore Petroleum and Greenhouse Gas Storage Act 2010	s 669(2)	Offences in relation to entering or being present in petroleum safety zones
	s 671(2)	Offences in relation to entering or being present in greenhouse gas safety zones
	s 673(2)	Offence for unauthorised vessel to enter area to be avoided
Open Courts Act 2013	s 23	Offence to contravene proceeding suppression order or interim order
	s 27	Offence to contravene Magistrates' Court publication order
	s 32	Offence to contravene closed court order
Personal Safety Intervention Orders Act 2010	s 6(1)(a)(ii)	'[R]eckless as to the infliction of bodily injury, pain, discomfort, damage, insult or deprivation of liberty' included in definition of 'assault'
Pharmacy Regulation Act 2010	s 34	Offence to use 'pharmacy' title except in relation to pharmacy to which a licence applies
Pipelines Act 2005	s 119	Offence to interfere with pipeline
Plant Biosecurity Act 2010	s 8(2)	Offence to import prescribed material
	s 9(2)	Offence to possess imported prescribed material
	s 10(2)	Offence to import plants or plant products affected by disease or pest
Prevention of Cruelty to Animals Act 1986	s 15C	Offences of breeding/selling or disposing of animals with heritable defects
Prohibition of Human Cloning for Reproduction Act 2008	s 16	Offence to import, export or place a prohibited embryo
	s 20	Offence to use precursor cells from a human embryo or foetus to create or develop a human embryo

Table 22 (continued)

Statute (Vic)	Section	Provision
Public Interest Disclosures Act 2012	ss 4(1)(b)(iv)-(v)	'[R]eckless breach of public trust' and 'reckless misuse of information or material' included in definition of 'improper conduct'
Radiation Act 2005	s 15	Offences of failing to comply with conditions of a licence
	s 21	Offence of abandoning a radiation source
	s 22	Offences of causing another person to receive a higher radiation dose than prescribed
	s 23	Offences of causing serious harm to the environment when conducting radiation practice or using radiation source
	s 26	Offence of failing to comply with conditions of tester's approval
	s 36B	Offence of failing to comply with conditions of assessor's approval
Research Involving Human Embryos Act 2008	s 9	Offence to use embryo that was created by fertilisation that is not an excess assisted reproductive technology embryo
	s 10	Offence to breach a licence condition
Residential Tenancies Act 1997	ss 91ZI, 142ZB, 206AQ, 207W	'Recklessly' used in provisions allowing providers, operators and owners to give renters, residents and tenants a notice to vacate if serious damage to premises
	s 398, 498ZZZL	'Recklessly' used in provisions allowing a person who has a lawful right to goods or documents to apply for compensation order when those goods or documents are wilfully or recklessly damaged or lost
Road Safety Act 1986	s 58B	Offence to supply a bodily sample for prohibited analysis or carry out prohibited analysis, or include information from a prohibited analysis to be kept on a DNA database
	s 68B	Offence to enter a level crossing when a train or tram is approaching
	s 90Q	Offences of unauthorised use or disclosure of information
Sale of Land Act 1962	s 9AB(5)	Offence for vendor under an off-the-plan contract to supply false information or fail to supply all information to purchaser
	ss 12(a), (d)	Offences to induce the sale of land
	s 27(8)	Offence for vendor to supply false information to purchaser
	s 32L	Offence for vendor to provide false or incomplete information in section 32 statement or fail to provide statement
Second-Hand Dealers and Pawnbrokers Act 1989	s 16(1)	Offence to make a false or misleading statement relating to registration
	s 26ZW	Offence of failure to comply with an interim or long-term closure notice

Table 22 (continued)

Statute (Vic)	Section	Provision
Sentencing Act 1991	s 3	Some offences against the person that include recklessness are included in the definitions of 'category B serious youth offence', 'category 1 offence', 'category 2 offence', 'offence involving an assault' and 'serious offence'
	s 10AA(5)(b)	Custodial sentence for certain offences against emergency workers, custodial officers and youth justice custodial workers on duty where a court is satisfied beyond reasonable doubt that at the time of carrying out the conduct the offender was reckless as to whether the victim was an emergency service worker, custodial officer or a youth justice custodial worker
	s 10AB(2)	Custodial sentence for offence of contravening supervision order or interim supervision order under *Serious Offenders Act 2018* (Vic) where a court is satisfied beyond reasonable doubt that the offender recklessly contravened a restrictive condition of the order
	s 89DC	Some offences against the person that include recklessness are included in the definition of 'relevant offence' for the purpose of alcohol exclusion orders
	s 89DF	Offences for contravening alcohol exclusion order
	sch 1	Some offences against the person that include recklessness are included as 'violent offences' (cl 2) 'serious violent offences' (cl 3) and 'arson offences' (cl 5) for the purposes of serious offender offences
Serious Offenders Act 2018	s 169	Note 1 to offence to contravene supervision order or interim supervision order indicates that the offence triggers the mandatory sentencing provisions: 'In the case of intentional or reckless contravention of a restrictive condition of a supervision order or an interim supervision order, section 10AB of the *Sentencing Act 1991* requires that a term of imprisonment of not less than 12 months be imposed for an offence against this section unless the court finds under section 10A of that Act that a special reason exists.'
	s 190	Offence to operate or possess remotely-piloted aircraft or helicopter near residential facility
	sch 2	Recklessly causing serious injury in circumstances of gross violence (s 15B of the *Crimes Act 1958* (Vic)) and recklessly causing serious injury (s 17 of the *Crimes Act 1958* (Vic)) listed as serious violent offences
	sch 3	Recklessly causing injury (s 18 of the *Crimes Act 1958* (Vic)) listed as an additional offence not to be committed as core conditions of supervision order
Service Victoria Act 2018	s 51	Offence to access, use or disclose data or information
Sex Work Act 1994	s 22	Offences to carry on or assist in carrying on unlicensed sex work business as a sex work service provider
	s 48(3)(da)	'Recklessly' permitting the involvement in the management or operation of the licensed business of a person who, within the preceding five years, had been convicted or found guilty of a disqualifying offence as a ground for taking disciplinary action against licensee

Table 22 (continued)

Statute (Vic)	Section	Provision
Social Services Regulation Act 2021	s 46	Aggravated offence of contravention of duty to comply with Social Services Standards
	s 89	Offences to apply for employment as a Worker and Carer Exclusion Scheme worker or carer if subject to investigation, referral or exclusion decision
	s 90	Offence to provide Worker and Carer Exclusion Scheme service while excluded
	s 267(1)	'Recklessly' used in provision allowing provider to give resident a notice to vacate the supported residential service if resident causes or allows serious damage
Suburban Rail Loop Act 2021	s 87	'Other than in a reckless manner' used in the offence to record, divulge or communicate confidential information
Summary Offences Act 1966	s 41H	Offence to spike food or drink knowing or being reckless as to whether the victim is unaware of the presence of the intoxicating substance
	s 51A	Offence to assault a registered health practitioner knowing or being reckless as to whether the practitioner is a health practitioner
Supported Residential Services (Private Proprietors) Act 2010	s 116(1)	'Recklessly' used in provision allowing proprietor to give resident a notice to vacate the supported residential service if resident causes or allows serious damage
Surveillance Devices Act 1999	s 12C	Offence of failing to comply with full disclosure to Public Interest Monitor
	s 30E	Offences of using, communicating or publishing protected information
Telecommunications (Interception) (State Provisions) Act 1988	s 4B(2)	Offence of failure to comply with full disclosure to Public Interest Monitor
Terrorism (Community Protection) Act 2003	ss 4E, 4I	Offences of failing to comply with full disclosure to Public Interest Monitor
	ss 13AZN(5), 13ZNM(5)	Offences of tampering with, modifying or erasing recording
	s 33(7)	Offence of applicant for a counter-terrorism intelligence protection order failing to comply with full disclosure to special counsel
	s 35	Offences of entering a closed court
	s 37	Offence to disclose, receive or solicit protected counter-terrorism intelligence
	s 37A	Offence to disclose, receive or solicit confidential material

Table 22 (continued)

Statute (Vic)	Section	Provision
Tobacco Act 1987	s 6(2D)	Offence for a tobacco or e-cigarette company to carry out certain advertising
	s 7(5)	Offence for a tobacco or e-cigarette company to carry out competitions, rewards and loyalty schemes
	s 8(3)	Offence for a tobacco or e-cigarette company to offer or give free samples
	s 9(5)	Offence for a tobacco or e-cigarette company to promote products in exchange for certain sponsorships or prizes
	s 13A(2A)	Offence for a tobacco or e-cigarette company to sell products on the seller's person
	s 15M	Offences for a tobacco or e-cigarette company to sell products from a temporary outlet
	s 15S	Offence for a tobacco or e-cigarette company to sell a banned product
Transport (Safety Schemes Compliance and Enforcement) Act 2014	s 103(3)	Offence to provide false or misleading information
Transport (Compliance and Miscellaneous) Act 1983	s 224	Offence to provide false or misleading information
Victoria Police Act 2013	s 228	Offence of unauthorised access to, use of or disclosure of police information
Victorian Data Sharing Act 2017	s 27	Offence of unauthorised access to, use of or disclosure of data or information

Table 22 (continued)

Statute (Vic)	Section	Provision
Water Act 1989	s 33E(2)	Offence to take water without a water share, resulting in serious damage or substantial economic loss
	s 63(2)	Offence to take or use water from a non-declared water system, resulting in serious damage or substantial economic loss
	s 64FB	Offence to take water from a declared water system without a general place of take approval, resulting in serious damage or substantial economic loss
	s 64FZB	Offence to contravene a restriction or prohibition determination, resulting in serious damage or substantial economic loss
	s 64FZI	Offence to take water from a declared water system without a particular place of take approval, resulting in serious damage or substantial economic loss
	s 75A(2)	Offence to obstruct waterways, resulting in serious damage or substantial economic loss
	s 76A(2)	Offence to dispose of matter underground by means of a bore without authorisation, resulting in serious damage or substantial economic loss
	ss 145A(2), (5)	Offences to cause or permit the connection or discharge of works without consent, resulting in serious damage or substantial economic loss
	s 169A(2)	Offence of failure to comply with notice of contravention, resulting in serious damage or substantial economic loss
	s 194(1A)	Offence to cause or permit interference with designated land or works, resulting in serious damage or substantial economic loss
	s 195(1A)	Offence to cause or permit a regulated drainage activity to be carried out without consent, resulting in serious damage or substantial economic loss
	s 208(1A)	Offence to cause or permit undertaking or erection of regulated works or structure without consent, resulting in serious damage or substantial economic loss
	s 288(2)	Offence to destroy, damage, remove, alter or interfere with Authority's property without consent, resulting in serious damage or substantial economic loss
	s 289(2)	Offence to take, use or divert an Authority's water without consent, resulting in serious damage or substantial economic loss
	s 289B(2)	Offence to interfere with the flow of water, resulting in serious damage or substantial economic loss

Table 22 (continued)

Statute (Vic)	Section	Provision
Wildlife Act 1975	s 74J	The provision refers to a person not being reckless about the existence of a variation or cancellation of an authority for a controlled operation. 'Recklessness' is defined in s 74J(3): 'For the purposes of this section, a person is reckless about the existence of the variation or cancellation of an authority if the person is aware of a substantial risk that the variation or cancellation has happened and having regard to the circumstances known to the person, it is unjustifiable to take the risk.'
	s 74M	Offences of unauthorised disclosure of information
Witness Protection Act 1991	s 9N	Offence to misuse assumed identity
	s 20L(2)	Note use of 'recklessly' in relation to the requirement of full disclosure to the Public Interest Monitor
Worker Screening Act 2020	s 118	If a person 'was not reckless as to whether or not' a person did not hold an NDIS clearance or interstate NDIS clearance they do not commit an offence relating to NDIS clearances
	s 121	Offence to engage in child-related work without a working with children clearance
	s 123	Offence to engage a person who does not have a working with children clearance in child-related work
	s 124	Offence for agency to offer the services of a person who does not have a working with children clearance
	s 125	Offences to use volunteer clearance for paid work
	sch 1	Recklessly causing serious injury in circumstances of gross violence (s 15B of the *Crimes Act 1958* (Vic)), recklessly causing serious injury (s 17 of the *Crimes Act 1958* (Vic)), recklessly causing injury (s 18 of the *Crimes Act 1958* (Vic)) listed as NDIS category A offences
	sch 3	Recklessly causing serious injury in circumstances of gross violence (s 15B of the *Crimes Act 1958* (Vic)), recklessly causing serious injury (s 17 of the *Crimes Act 1958* (Vic)), recklessly causing injury (s 18 of the *Crimes Act 1958* (Vic)) listed as NDIS category B offences
	sch 4	'An offence specified in clause 2 of Schedule 1 to the *Sentencing Act 1991* (violent offences) other than murder or attempted murder' and 'An offence against section 18 (causing injury intentionally or recklessly) of the *Crimes Act 1958* or under a law of a jurisdiction other than Victoria that, if it had been committed in Victoria, would have constituted an offence against section 18 of the *Crimes Act 1958*' listed as WWC category B offences
Workplace Injury Rehabilitation and Compensation Act 2013	s 260(2)	'Reckless misrepresentation' used in relation to circumstances in which offer may be withdrawn or settlement avoided
Zero and Low Emission Vehicle Distance-Based Charge Act 2021	s 64	Offence to include false or misleading information in records or evidence required to be kept about zero and low emission vehicles
	s 70	Offences regarding unauthorised use and disclosure of information

References to the concept of recklessness appear in the following national laws, enacted by Victorian legislation:

- *Co-operatives National Law Application Act 2013* (Vic)
- *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic)
- *Heavy Vehicle National Law Application Act 2013* (Vic)
- *Marine (Domestic Commercial Vessel National Law Application) Act 2013* (Vic)
- *National Redress Scheme for Institutional Child Sexual Abuse (Commonwealth Powers) Act 2018* (Vic)
- *Pollution of Waters by Oil and Noxious Substances Act 1986* (Vic)
- *Terrorism (Commonwealth Powers Act) 2003* (Vic)

'Probably' appears in offence provisions in the following Victorian legislation:

- *Crimes Act 1958* (Vic)
- *Family Violence Protection Act 2008* (Vic)
- *Summary Offences Act 1966* (Vic)

'Probably' also appears in:

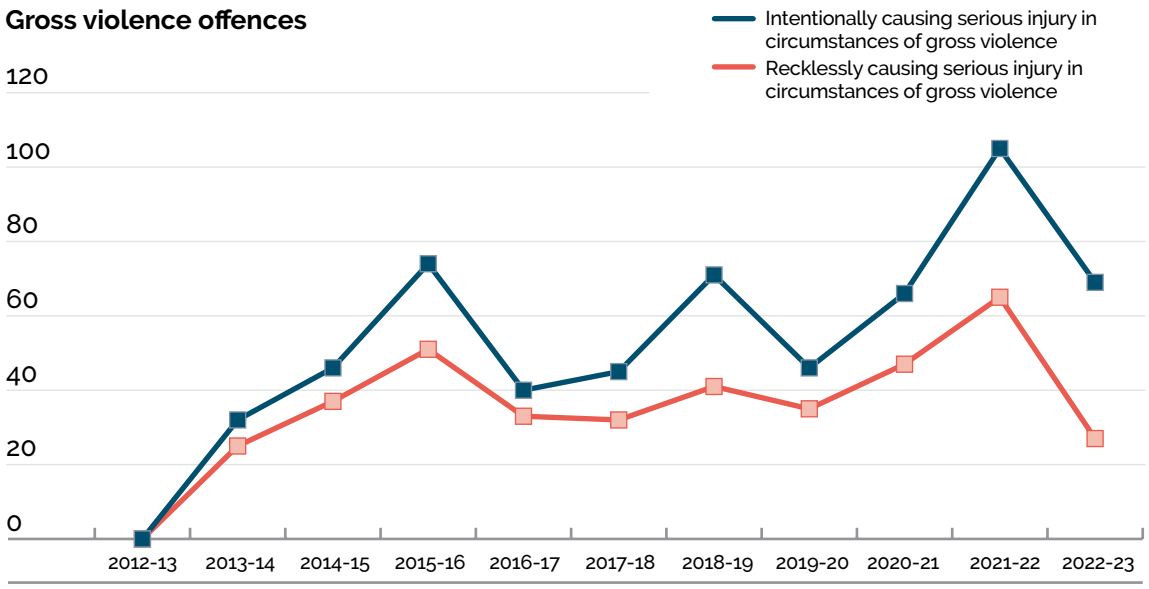
- s 64(1)(b) of the *Jury Directions Act 2015* (Vic). To explain the phrase 'beyond reasonable doubt' to a jury, a trial judge may indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty.
- s 9C(3)(d) of the *Sentencing Act 1991* (Vic). One of the circumstances that a court must be satisfied about beyond reasonable doubt before imposing a minimum non-parole period of 10 years for manslaughter by single punch or strike is that the offender knew that the victim was not expecting, or was probably not expecting, to be punched or struck by the offender.

*The table and the lists in this Appendix are not intended to be exhaustive.

Appendix F: Charging and sentencing data

Charge numbers for offences against the person

Figure 4: Number of charges by offence: 2012–2023



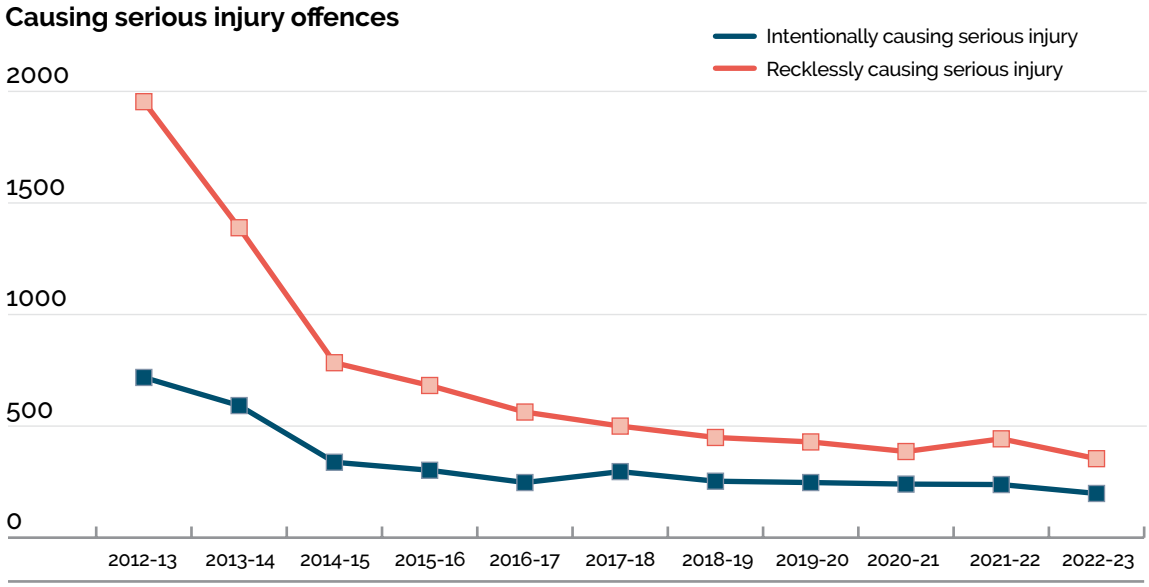
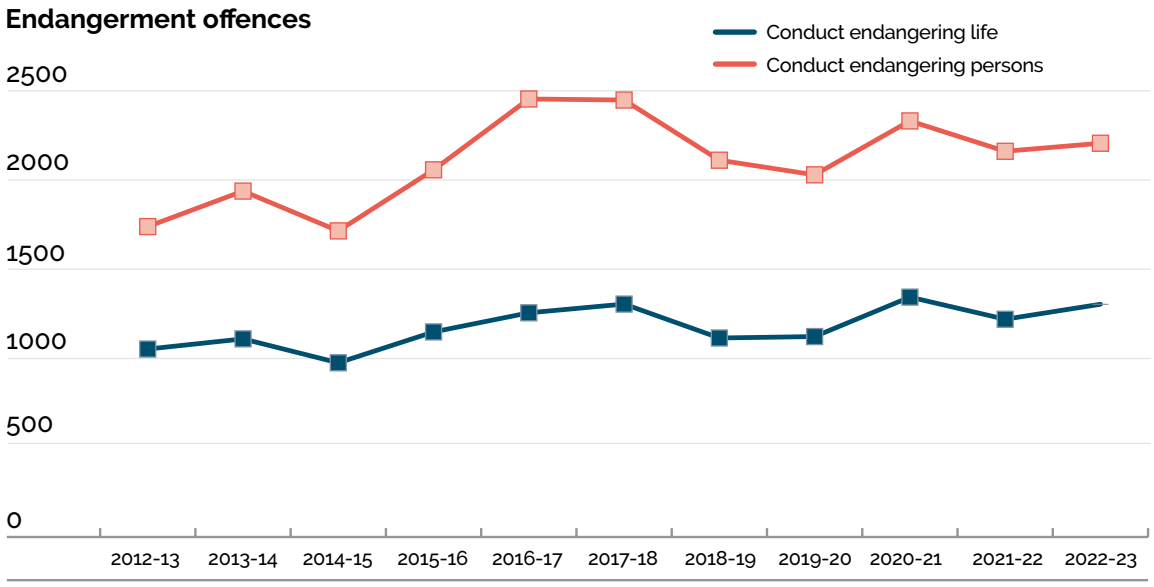
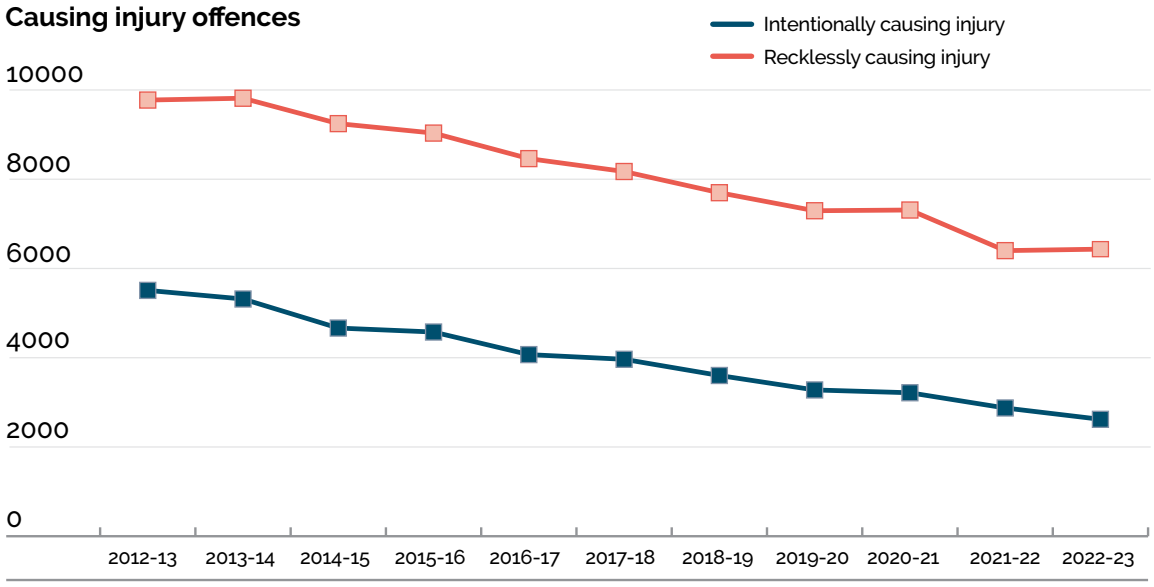


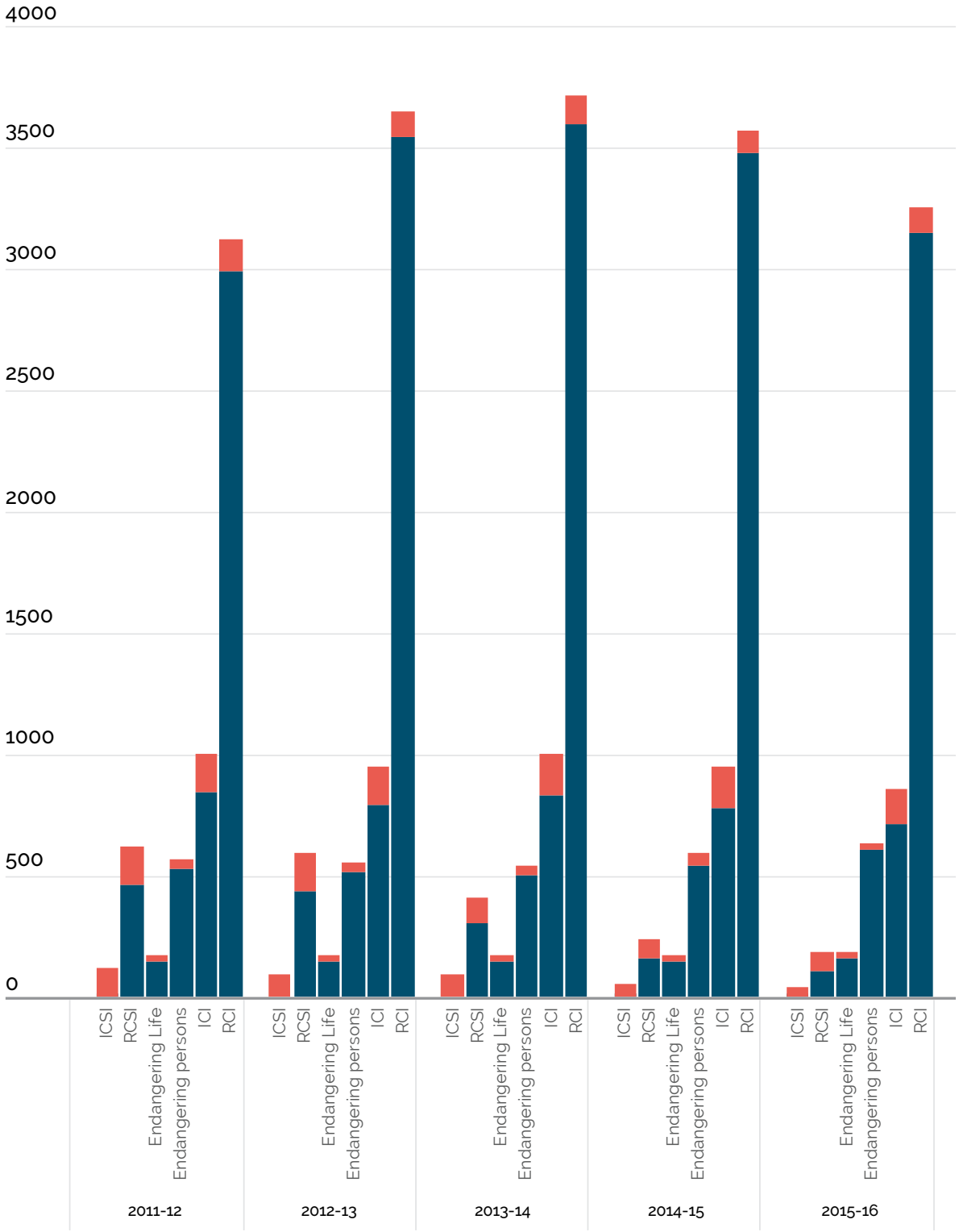
Figure 4: Number of charges by offence: 2012–2023 (continued)





Data provided by Crime Statistics Agency, 29 August 2023

Figure 5: Number of charges sentenced by offence: June 2011 to June 2021



Data provided by Sentencing Advisory Council, 15 September 2023. Excludes Children's Court data.

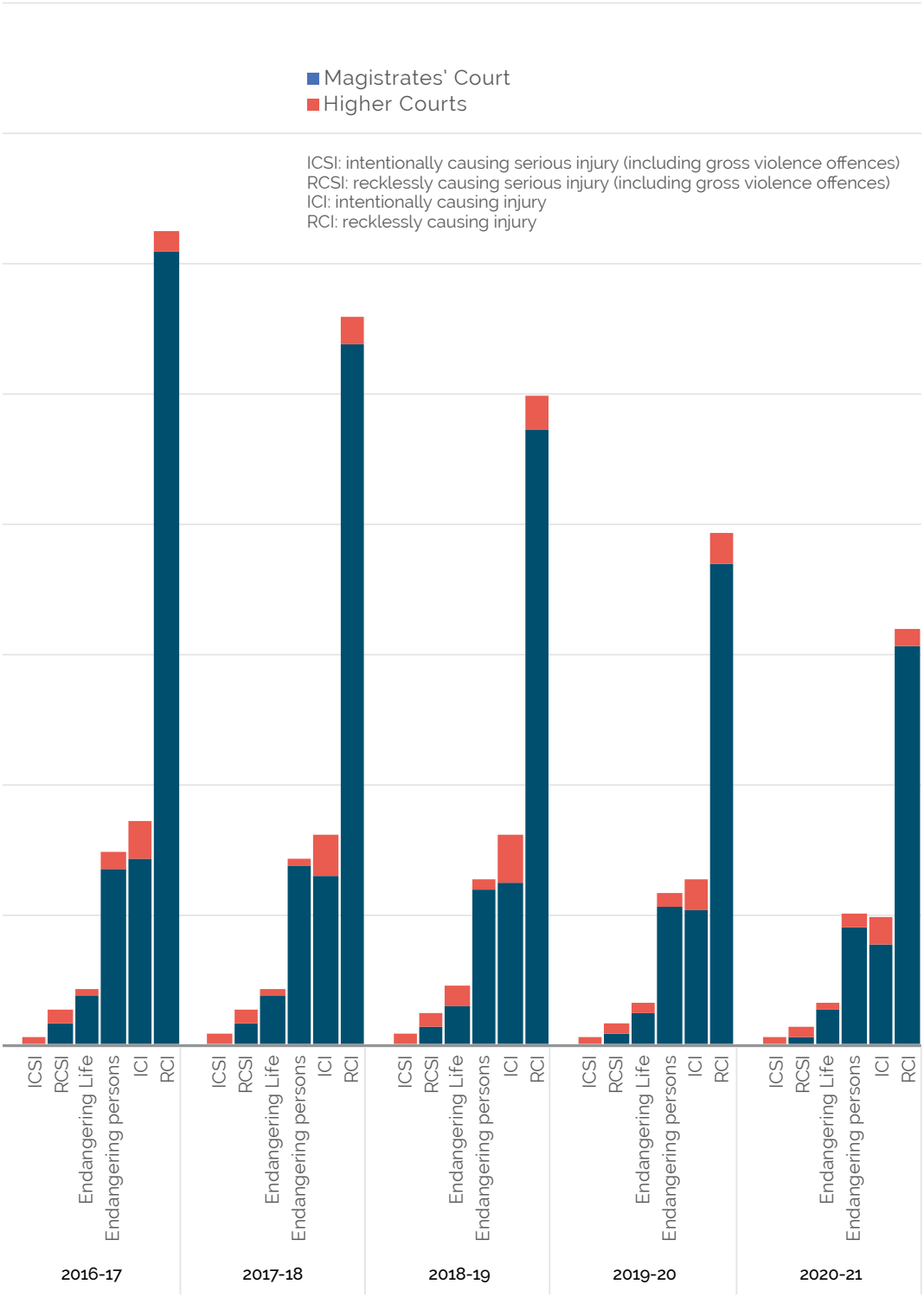

Magistrates' Court
Higher Courts
ICSI: intentionally causing serious injury (including gross violence offences)
RCSI: recklessly causing serious injury (including gross violence offences)
ICI: intentionally causing injury
RCI: recklessly causing injury
ICSI
RCSI
Endangering Life
Endangering persons
ICI
RCI
2016-17
2017-18
2018-19
2019-20
2020-21

Table 23: Unique alleged offenders associated with charge category by Indigenous status, April 2018–March 2023

Indigenous Status	Cause Injury	2018–19	2019–20	2020–21	2021–22	2022–23
Aboriginal and/or Torres Strait Islander	Gross violence[1]	4	10	6	8	≤ 3
	Intentionally causing serious injury (s 16)	18	29	22	12	17
	Recklessly causing serious injury (s 17)	31	39	37	35	35
	Intentionally causing Injury (s 18)	249	257	249	223	231
	Recklessly causing injury (s 18)	538	510	531	488	505
	Reckless conduct endangering life (s 22)	68	80	106	70	75
	Reckless conduct endangering persons (s 23)	118	131	179	130	147
	Negligently causing serious injury (s 24)	≤ 3	≤ 3	4	≤ 3	5
Non-Indigenous	Gross violence	70	43	62	91	71
	Intentionally causing serious injury (s 16)	213	198	195	204	156
	Recklessly causing serious injury (s 17)	390	368	333	379	285
	Intentionally causing Injury (s 18)	2,757	2,454	2,393	2,170	1,985
	Recklessly causing injury (s 18)	5,851	5,551	5,447	4,873	4,950
	Reckless conduct endangering life (s 22)	805	770	943	875	929
	Reckless conduct endangering persons (s 23)	1,527	1,523	1,732	1,634	1,659
	Negligently causing serious injury (s 24)	52	54	42	55	40

Source: Crime Statistics Agency (Vic)[2]

1 Includes intentionally and recklessly causing serious injury in circumstances of gross violence.
2 Data provided by Crime Statistics Agency, 29 August 2023.

Table 24: Unique alleged offenders associated with charge category by age, April 2018–March 2023

Age Group	Cause Injury	2018–19	2019–20	2020–21	2021–22	2022–23
10–17 years	Gross violence[3]	14	16	23	25	14
	Intentionally causing serious injury (s 16)	26	26	32	38	25
	Recklessly causing serious injury (s 17)	33	34	47	50	30
	Intentionally causing Injury (s 18)	353	360	318	263	284
	Recklessly causing injury (s 18)	636	619	560	491	454
	Reckless conduct endangering life (s 22)	52	58	65	63	57
	Reckless conduct endangering persons (s 23)	101	114	129	127	95
	Negligently causing serious injury (s 24)	≤ 3	≤ 3	0	≤ 3	≤ 3
18-24 years	Gross violence	22	13	20	37	20
	Intentionally causing serious injury (s 16)	67	53	56	54	44
	Recklessly causing serious injury (s 17)	118	96	84	100	68
	Intentionally causing injury (s 18)	705	597	577	560	462
	Recklessly causing injury (s 18)	1,368	1,182	1,108	1,088	1,011
	Reckless conduct endangering life (s 22)	238	234	267	248	250
	Reckless conduct endangering persons (s 23)	464	450	458	426	410
	Negligently causing serious injury (s 24)	17	14	10	12	9
25 years and over	Gross violence	38	24	25	37	39
	Intentionally causing serious injury (s 16)	138	150	131	124	103
	Recklessly causing serious injury (s 17)	270	277	240	263	221
	Intentionally causing Injury (s 18)	1,948	1,759	1,733	1,565	1,467
	Recklessly causing injury (s 18)	4,382	4,247	4,286	3,769	3,978
	Reckless conduct endangering life (s 22)	580	556	717	634	695
	Reckless conduct endangering persons (s 23)	1,074	1,085	1,323	1,210	1,300
	Negligently causing serious injury (s 24)	35	40	36	42	35

Source: Crime Statistics Agency (Vic)[4]

3 Includes intentionally and recklessly causing serious injury in circumstances of gross violence.
4 Data provided by Crime Statistics Agency, 29 August 2023.

Table 25: Number of finalised charges in NSW for offences[5] with outcome of guilty, 2011–2021

Offence	Court	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Wound person intend to cause grievous bodily harm s33(1)(a)	Lower	0	0	1	1	0	0	0	0	0	0	0
	Higher	45	42	29	67	60	54	64	66	71	54	53
Cause grievous bodily harm to person with intent s33(1)(b)	Lower	1	1	0	0	0	0	0	0	0	0	0
	Higher	32	14	40	36	37	30	29	24	30	30	17
Reckless grievous bodily harm—in company s 35(1)	Lower	32	27	29	14	14	7	8	14	7	11	22
	Higher	25	19	14	19	20	19	20	24	23	21	17
Reckless grievous bodily harm s 35(2)	Lower	118	95	120	99	107	89	91	102	84	69	69
	Higher	64	42	71	50	53	49	45	61	60	45	49
Reckless wounding—in company s35(3)	Lower	15	23	16	27	10	37	20	20	13	36	38
	Higher	19	21	19	16	18	32	38	15	56	65	32
Reckless wounding s35(4)	Lower	222	209	211	222	187	217	188	177	220	203	205
	Higher	46	64	65	78	66	89	103	117	103	101	84
Causing grievous bodily harm s 54	Lower	14	5	5	6	10	8	7	5	10	4	9
	Higher	1	0	0	0	0	4	0	5	1	1	0

Source: NSW Bureau of Crime Statistics and Research (BOCSAR)[6]

Explanatory notes

Crime Statistics Agency

- Data from April – March each year. Up to 31 March 2023.
- In order to maintain confidentiality, sensitive offence counts with a value of 1 to 3 are displayed as "≤ 3" and are given a value of 2 to calculate totals.
- Recorded crime statistics are based on data extracted by Victoria Police on the 18th day after the reference period, and are subject to movement between releases. For more information about how statistics are compiled, refer to the Explanatory notes on the CSA website.
- Indigenous status data are derived using the revised CSA most frequent recorded status of an individual as recorded by Victoria Police, and may not represent the Indigenous status recorded by police at the time of the incident.
- Where an unique alleged offender has more than one 'Cause Injury' charge category they will be counted in each 'Cause Injury' charge category. Therefore, counts for each 'Cause Injury' charge category should not be combined as it may cause duplication.

5 This table is for select offences only. There are other categories of offences involving recklessness, such as causing grievous bodily harm to police officer on duty reckless as to causing actual bodily harm s 60(3)
6 Table based on data provided by NSW Bureau of Crime Statistics and Research, 11 July 2023.

Sentencing Advisory Council

- To be included in SACStat, an offence must have had at least 10 charges sentenced in the higher courts of Victoria over the five-year period and at least 40 charges sentenced in the Magistrates' Court of Victoria over the three-year period.
- For charge data, the all proven offence counting rule counts all proven charges of a particular offence, not just those where the crime is the principal proven offence in the case. This counting rule is useful for understanding how a particular offence is usually sentenced.
- While every effort is made to ensure that the data is accurate and complete, irregularities may sometimes occur. The data is therefore subject to revision.
- In the higher courts, it does not include data on sentences imposed in the County Court following a sentence appeal from the Magistrates' Court. It also does not include custodial or non-custodial supervision orders for people who have been found not guilty because of mental impairment or found guilty at a special hearing, and unconditional release orders.
- In the Magistrates' Court, it does not include data on sentences imposed in the Children's Court, changes to sentences resulting from a sentence appeal to the County Court, local law offences, Commonwealth offences, cases in which the principal offence is a Commonwealth offence, or charges that received a criminal justice diversion program.

NSW Bureau of Crime Statistics and Research (BOCSAR)

- The table shows the outcome of individual finalised charges by calendar year. A charge refers to an instance of a particular type of offence being charged against a defendant. A 'charge' is similar to an offence. A court appearance or a defendant appearing in court can have multiple individual charges. A finalised charge is one which has been fully determined by the court and for which no further court proceedings are required.
- The Lower court data refers to both Lower Courts and the Children's Court. The Higher Courts category refers to the Supreme Court and the District Court.
- Definitions of injury:
  - **Wounding** is not defined in the *Crimes Act 1900* (NSW). It has been defined at common law to involve the breaking of the skin.[7]
  - **Grievous bodily harm** includes any permanent or serious disfiguring, the destruction of a foetus, and any grievous bodily disease.[8]
  - Typical examples of injuries that are capable of amounting to **actual bodily harm** include scratches and bruises.[9]

7 *R v Shepherd* [2003] NSWCCA 351, [31]; *Vallance v The Queen* [1961] HCA 42, [7]; (1961) 108 CLR 56, 77; *R v Hatch* [2006] NSWCCA 330, [16]; *R v Devine* (1982) 8 A Crim R 45, 47, 52, 56.

8 *Crimes Act 1900* (NSW) s 4(1).

9 *McIntyre v R* [2009] NSWCCA 305, [44]; (2009) 198 A Crim R 549, 558 [44].

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Recklessness

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