HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 29 Jan 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M131/2020
File Title:	The Director of Public Prosecutions Reference No1 of 2019
Registry:	Melbourne
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	29 Jan 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

IN THE MATTER OF:
THE DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO. 1 OF 2019

APPELLANT'S SUBMISSIONS

Part I: Certification

1. The appellant certifies that these submissions are in a form suitable for publication on the internet.

Part II: Statement of Issues

2. This appeal raises the following two issues for consideration:

   a) What is the correct meaning of 'reckless' in Victoria? Resolution of this question is a matter of significance to the administration of the criminal law.

   b) The reference question provides this Court the opportunity to resolve a conflict in the interpretation of 'recklessness' for offences other than murder between New South Wales and Victoria and the opportunity to ensure consistency, so far as is desirable, between the states.

Part III: Notices

3. The appellant certifies that the question of whether notice should be given under section 78B of the *Judiciary Act* 1903 has been considered. Such notice is not considered to be necessary in this appeal.

Part IV: Citations

4. The decision of the Court of Appeal ('the court below') is cited as *Director of Public Prosecutions Reference No 1 of 2019* [2020] VSCA 181 ('the judgement below').

Part V: Relevant Facts

5. Indictment J10044578[1] filed in the County Court of Victoria charged that the accused intentionally (or, in the alternative, recklessly) caused serious injury to the complainant. On 13 August 2019 the accused was arraigned and entered pleas of not guilty, and the trial commenced before Judge Georgiou. In discussing the necessary directions to be given to the jury during the judge's charge, the learned trial judge raised with counsel this Court's decision of *Aubrey v The Queen*[2] and whether it impacted how the jury should be directed in respect of the offence of recklessly causing serious injury. The prosecution submitted that his Honour should direct the jury consistently with *Aubrey,* namely, that foresight of the possibility of the causation of serious injury on the part of the accused is sufficient.

6. The prosecution submitted that insofar as the Court of Appeal's decision in *R v Campbell*[3] held to the contrary (i.e. that foresight of probability is required) that decision constituted a misapplication of this Court's reasoning in *R v Crabbe*[4] and was incorrect. The prosecution accepted the trial judge was probably bound by *Campbell*, but sought to reserve its position on this point of law. The jury was charged in accordance with *Campbell*.[5] The Victorian Director of Public Prosecutions referred the point of law to the Supreme Court of Victoria (Court of Appeal) for consideration and opinion pursuant to s.308 of the *Criminal Procedure Act* 2009 (Vic).[6]

7. On 2 July 2020 the Court of Appeal delivered judgment on the reference question.[7] Maxwell P, Emerton and McLeish JJA delivered a joint judgment, Priest and Kaye JJA each delivered separate judgments. Each concluded that the Director's contention

---

[1] Core Appeal Book, tab 1.
[2] (2017) 260 CLR 305 (*'Aubrey'*).
[3] [1997] 2 VR 585 (*'Campbell'*).
[4] (1985) 156 CLR 464 (*'Crabbe*').
[5] Core Appeal Book, tab 3.
[6] Core Appeal Book, tab 6.
[7] The judgment below, Core Appeal Book, tab 7.

should be answered in the negative and that the correct interpretation of recklessness in the context of non-fatal offences in Victoria is as stated in *Campbell*. This Court has jurisdiction to entertain an appeal as to the correctness of an opinion delivered on a reference question.[8]

Part VI: Argument

8. The Director submits that, consistent with *Aubrey* (and relevant earlier authority), the correct interpretation of "recklessness" in the context of offences against the person other than murder (particularly recklessly causing serious injury and its alternative)[9] is that an accused had foresight of possibility of relevant consequences and proceeded nevertheless. It is submitted the approach in *Campbell* requiring proof of foresight of probability or likelihood should no longer be followed. To make good this contention, it is necessary to consider the Victorian history of non-fatal offences against the person.

Pre-1985 practice

9. Prior to 1985, non-fatal offences were typically charged as offences contrary to ss. 17, 19A and 19 of the *Crimes Act* - malicious wounding with intent to do grievous bodily harm, malicious infliction of grievous bodily harm and malicious wounding.

10. The word "malicious" was applied consistently with authority from England. In *R v Cunningham*[10] the English Court of Criminal Appeal approved the following as an accurate statement of the law:

> In any statutory definition of a crime malice… [requires] either:
> (1) an actual intention to do the particular kind of harm that in fact was done; or,
> (2) recklessness as to whether such harm should occur or not (i.e., the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).

11. Consistent with *Cunningham*, Victorian courts historically interpreted "malicious" as requiring proof of foresight of possible relevant consequence. In order to be guilty, an

---

[8] *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, at 299-306; *Director of Public Prosecutions Reference No 1 of 2017* (2019) 93 ALJR 42.
[9] See also for example *Crimes Act 1958* (Vic) ss15B, 17, 18, 19. 20, 21, 22, 23, 25, 26, 31, 31C, 317AE, 317AF.
[10] [1957] 2 QB 396 ('*Cunningham*').

accused person must either have intended the harm done or foreseen such harm might possibly eventuate and proceeded regardless.[11]

The 1985 Crimes Act amendments

12. In 1985, Parliament amended the *Crimes Act* 1958 by passing the *Crimes (Amendment) Act* 1985. The amending bill repealed malicious wounding and allied offences. These were replaced with, relevantly, the offences of causing serious injury intentionally (s.16), causing serious injury recklessly (s.17), causing injury intentionally or recklessly (s.18) and other offences with a reckless mental element.

13. The Second Reading Speech made by the then Attorney-General[12] made clear that while the new offences with recklessness as the relevant state of mind represented a modernisation of the language used to describe offences against the person, it was intended that they were to be interpreted consistently with the established notion of "maliciousness" - that is, by requiring proof of an awareness of the possibility of a serious injury. The Attorney-General said this:

> In general, the Bill will replace the old sections with new ones. *It is not intended in any way to reduce the coverage of these serious offences*.
>
> It is proposed to replace the current collection of general offences phrased in various ways …with three offences on a scale of seriousness…In general these three offences are designed to replace section 17, malicious wounding with intent to do grievous bodily harm, section 19A, malicious infliction of grievous bodily harm, and section 19, malicious wounding.
>
> The approach taken in the Bill is *where serious injury is inflicted there is a sufficient difference in moral turpitude* - sufficient to justify distinct offences - *between one who does so intentionally in the sense of desiring to cause injury and one who does so recklessly - aware that an injury* ***might result*** *to another but goes ahead anyway*…The proposals simplify and strengthen the law…of offences against the person. They involve an

[11] For example see: *R v Smyth* [1963] V.R. 737; *R v Kane* [1974] V.R. 759 & *R v Lovett* [1975] V.R. 488.
[12] Legislative Council, Parliamentary Debates, Volume 379 at 201, Applicant's Further Materials, tab 1.

> enormous reduction in the amount of words…*to achieve the same purposes*. (emphasis added)

14. It was Parliament's intention in introducing the new offences in the 1985 bill that there would be two offences which reflect a "difference in moral turpitude" between one who inflicts serious injury intentionally and one who does so recklessly. The status quo regarding the interpretation of criminal recklessness was to be preserved: an accused could be reckless if he or she had foresight of the <u>possible</u> consequence of (serious) injury but proceeded nevertheless.

10

15. Notwithstanding these clear statements to the contrary, the Court of Appeal held in the judgment below that Parliament instead had intended to entirely de-couple these new offences from the offences they replaced, the result being that previous Victorian authorities on the meaning of recklessness no longer applied. Priest JA stated:

> Those responsible for drafting had made no attempt to define recklessly. They had, however, specifically disavowed use of the intent element maliciously which had permeated the repealed provisions, and, so it might be thought, thereby implicitly abandoned the learning surrounding that term.[13]

20 16. This "implicit abandoning of the learning surrounding malice", however, does not recognise the express intention of Parliament to "preserve the coverage" of the old offences. That statement by the then Attorney General demonstrates an intent to preserve the previous formulation of recklessness, as any new interpretation of recklessness constituting the foresight of <u>probability</u> would plainly provide lesser "coverage" than the test of foresight of <u>possibility</u>.

17. *Campbell* plainly represents an erroneous departure from the stated intention of the Victorian legislature. It also represents an erroneous departure from the historical common law construction of recklessness in Victoria (and in other jurisdictions). That
30 error can, at least largely, be understood as occurring as a result of the misapplication of this Court's decision in *R v Crabbe.*[14]

---

[13] The judgment below [73].
[14] (1985) 156 C.L.R. 464 (*'Crabbe'*).

18. In 1985 this Court decided *Crabbe,* which concerned an accused's state of mind in a murder. Five hotel patrons were killed when the accused drove his truck into a bar. The jury were directed he could be convicted of murder if they were satisfied beyond reasonable doubt that he "foresaw the possibility that there might be some people in the bar…and drove the vehicle in".[15] Crabbe was convicted and appealed. The Federal Court set the convictions aside, holding it was "erroneous to refer to foresight of a possibility, rather than a probability" in directing the jury.[16] This Court confirmed the decision, as the mental element for murder is that an accused must either have an intention to kill or cause grievous bodily harm or knowledge his acts probably will. Foresight of possibility, for murder, is insufficient.[17] The Court held that the approach adopted by the Federal Court was supported both by a preponderance of authority (including from Victoria[18]) and sound principle. The Court said:

> The conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded…as just as blameworthy as…one who does an act intended to kill or to do grievous bodily harm…That state of mind is comparable.[19]

19. Insofar as the mental state discussed in *Crabbe* might refer to as a general state of "recklessness", this Court explained the necessity to interpret this concept narrowly regarding murder, to ensure an equality of blameworthiness. However, recklessly causing serious injury was always intended to be a *less serious offence* than intentionally causing serious injury, by virtue of the lesser culpability built into its mental element.

---

[15] The jury were also directed as to intent to kill and intent to do really serious bodily injury.
[16] *Crabbe* at p. 467.
[17] *Crabbe* at pp.468-469.
[18] *R v Jakac* [1961] V.R. 367; *R v Sergi* [1974] V.R. 1; *Nydam v R* [1977] V.R. 430 & *R v Windsor* [1982] V.R. 89.
[19] *Crabbe* at 469. The Court also considered the "controversy" surrounding whether "a person who does an act knowing its probable consequences may be regarded as having intended those consequences to occur".

The (mis)application of Crabbe in Victoria

20. In 1989 the Victorian Court of Criminal Appeal decided the case of *R v Nuri*,[20] a case which concerned s.22 of the *Crimes Act*, the then relatively new offence of conduct endangering life. In deciding the appeal, the Court was not required to consider the meaning of the term "recklessly" in the context of the offences created by the *Crimes (Amendment) Act* 1985, however the Court made the following *obiter* observation:

> The expression "recklessly" may not give rise to difficulty. It has for long been employed in statutory offences. Presumably conduct is relevantly reckless if there is foresight on the part of an accused of the probable consequences of his actions and he displays indifference as to whether or not those consequences occur: see *R v Crabbe* (1985) 156 C.L.R. 464.[21]

21. It is submitted *Nuri* misapplied *Crabbe*. *Nuri* elevated the degree of foresight required to establish recklessness for offences other than murder, raising the degree of proof necessary to establish criminal recklessness to moral equivalence of intentional conduct. This is inconsistent with pre-1985 Victorian authorities and Parliament's intention in 1985. It is also inconsistent with High Court authority, authority from England and authority from New South Wales.[22]

The (mis)application of Crabbe consolidated - R v Campbell

22. This misapplication of *Crabbe* was repeated in *Campbell* and thereafter took root.[23] *Campbell* concerned a non-fatal shooting. The majority in *Campbell* (relying on *Crabbe*) concluded the trial judge was in error when he directed the jury the applicant would be guilty of recklessly causing serious injury if he acted "knowing that serious injury *might* occur and taking the risk of doing so".[24] The majority appeared to acknowledge *Crabbe* was dissimilar to the case under consideration and so looked for further support for its interpretation of recklessness. That support was to be found in *Nuri*. The Court said:

---

[20] [1990] V.R. 641 (*'Nuri'*).
[21] *Nuri* at 643.
[22] See, for example the discussion in *R v Coleman* (1990) 19 NSWLR 467, at 472–478.
[23] See, for example: *Ignatova v R* [2010] VSCA 262 [36]-[38] and *Paton v R* [2011] VSCA 72 [45]-[49].
[24] *Campbell* p.592 (emphasis in original).

> Whilst that citation [that is, *Crabbe*] is from a case specifically regarding murder, the same principles are relevant. Indeed the Court of Criminal Appeal in *R v Nuri* [1990] VR 641 said at 643: Presumably conduct is relevantly reckless if there is foresight on the part of the accused of the probable consequence of his action and he displays indifference as to whether or not those consequences occur.[25]

23. *Nuri*, of course, represented little authority for the Court's conclusion beyond *Crabbe*. The majority in *Campbell* went on to state that decisions which favoured the test of possibility over probability for reckless intent (including *Smyth, Kane & Lovett*) should, in light of "the spirit of the decision in *Crabbe*", no longer be followed.[26]

Crabbe explained - Aubrey v R

24. This Court in *Aubrey* returned to consider the degree of recklessness required in non-fatal offences. In *Aubrey* the Court observed the decision in *Crabbe* was concerned only with the offence of murder, and neither the ratio in *Crabbe* nor the Court's reasons extend to offences beyond murder. The Court noted the Victorian Court's invocation of the "spirit of *Crabbe*" in deciding *Campbell*. It went on to state:

> As this Court emphasised in *Crabbe*, 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.

English Practice

25. The approach for many years in England was to distinguish *Cunningham* and move in entirely the opposite direction to the Victorian courts post-*Nuri*.

26. The English courts developed a seemingly objective test for recklessness based primarily upon the reasoning of Lord Diplock in *R v Caldwell*[27]. Nevertheless, in England *R v G* [28] (a case cited with apparent approval by the Australian High Court in

---

[25] *Campbell* p.593.
[26] Ibid.
[27] [1982] AC 341.
[28] [2004] 1 AC 1034.

R v Lavender[29]) marked the restoration of what may be described as the subjective advertence-of-"possibility" approach, namely, the approach that had hitherto been developed in *Cunningham*.

New South Wales Practice

27. As in Victoria, historically New South Wales adopted the *Cunningham* construction of recklessness in the context of malice as it related to offences against the person. As the New South Wales Court of Criminal Appeal confirmed in *R v Coleman*,[30] the correct construction of recklessness in the context of malice was foresight of the possibility of the relevant consequence. This was also the construction of recklessness used in Victoria, prior to the amendments to the *Crimes Act* replacing the language of 'malice' with 'intention' and 'recklessness'.

28. Also like Victoria, the New South Wales Parliament modernised the language of offences against the person, and in 2007 the *Crimes Amendment Act* 2007 repealed s.5 of *Crimes Act* and replaced 'malice' with 'recklessness'.

29. The equivalent provision to the Victorian offence of recklessly causing serious injury is s.35 of that Act, which, as amended by the *Crimes Amendment Act* was in the following terms:

> 35 Reckless grievous bodily harm or wounding
>
> ...
>
> (2) Reckless grievous bodily harm
>
> A person who recklessly causes grievous bodily harm to any person is guilty of an offence.
>
> Maximum penalty: Imprisonment for 10 years.

30. The Victorian offence equivalent is in the following terms:

[29] (2005) 222 CLR 67 [40].
[30] (1990) 19 NSWLR 467.

17 Causing serious injury recklessly

A person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence.

Penalty: Level 4 imprisonment (15 years maximum).

31. In New South Wales the model charge to the jury for the relevant offence is, relevantly, as follows:

> The element of recklessness is made out if you are satisfied beyond reasonable doubt that the injury was caused recklessly by [*the accused*].
>
> An injury is caused recklessly if [*the accused*] realised that grievous bodily may possibly be caused upon [*the victim*] by [*his/her*] actions yet [*he/she*] went ahead and acted as [*he/she*] did.

32. In Victoria juries are directed in the following terms;

> To prove this crime, the prosecution must prove the following **4 elements** beyond reasonable doubt:
>
> **One** - the complainant suffered a serious injury.
>
> **Two** - the accused caused the complainant's serious injury.
>
> **Three** - the accused was aware that his/her acts would probably cause serious injury to the complainant.
>
> **Four** - the accused acted without lawful justification or excuse.

33. While the offence provisions themselves are equivalent,[31] there is divergence in the construction of the term 'recklessly' between the two jurisdictions. The New South Wales Court of Criminal Appeal in *Blackwell v The Queen*[32] were required to consider whether the change in language from recklessness as a form of malice differed in substance from recklessness in the newly expressed offences. The appellant in

[31] While both Priest and Kaye JJA each observe what historical differences may arguably have existed (the judgment below, [110]–[115] per Priest JA and [128]–[137] per Kaye JA) between NSW and Victoria, neither analysis extends to the *Crimes Amendment Act* 2007 (NSW) and the replacement of 'malice' with 'recklessness' in NSW. It is submitted that, as can be seen in the analysis at [29]-[35] above the relevant provisions in Victoria and NSW are equivalent.

[32] (2011) 81 NSWLR 119 ('*Blackwell*').

Blackwell argued in favour of a test of foresight of *probability* and relied on the Victorian authority of *Campbell* in support of the argument. The Court expressly declined to follow the Victorian approach on this point, concluding the recklessness required foresight of the *possibility* relevant consequences.[33] The Court called in aid in doing so earlier New South Wales authority as well as authority in the High Court and in England.[34]

The Judgment Below

34. The court below accepted the respondent's contention that the "re-enactment presumption" is sufficient grounds to conclude that Parliament could be presumed to have adopted *Campbell* in subsequent re-enacting of the relevant provisions.[35] Support for this conclusion was said to be found in two occasions of legislative change - once to increase the maximum penalty for recklessly causing serious injury and once to introduce the offence of causing serious injury recklessly in circumstances of gross violence.

35. As to the first of these, the maximum penalty for recklessly causing serious injury was increased by the *Sentencing and Other Acts (Amendment) Bill* 1997. This was a bill which amended large swathes of the criminal law in Victoria. It included changes to penalties for contravention of acts including the *Prostitution Control Act* 1994, *Legal Practice Act* 1996 and the *Crimes Act* 1958. The change to the penalty for recklessly causing serious injury was one amongst over 60 changes in penalties for offences in the *Crimes Act* alone.

36. It is submitted that this 're-enactment' of the offence in this context could hardly be thought to be a considered examination of the operation of the substance of the offence such that it represents a positive determination by Parliament that the legislature were adopting as, in effect, a statutory definition, what had become the common law

---

[33] It is noted that subsequent to *Blackwell* the New South Wales Parliament amended s.35 to specify that the relevant consequence as 'actual bodily harm'. The degree of foresight required remains, however, foresight of the possibility of the occurrence of the consequence.
[34] See *Blackwell* at 131-134, [66]-[78].
[35] The judgment below [18]–[29] per Maxwell P, Emerton & McLeish JJA; [123] per Priest JA & [145] per Kaye JA.

understanding of the construction of recklessness in Victoria post *Campbell*. Rather, whatever the state of the awareness of the legislature regarding the common law approach to recklessness in Victoria, the construction of recklessness remained a common law notion and within the jurisdiction of the common law to consider – and indeed to correct if the previous construction was in error.

37. As to the second 're-enactment', the offence of causing serious injury recklessly in circumstances of gross violence was introduced by s.4 of the *Crimes Amendment (Gross Violence Offences) Act* 2013.

10

38. The new offence was enacted in the following terms:

> Causing serious injury recklessly in circumstances of gross violence
>
> (1) A person must not, without lawful excuse, recklessly cause serious injury to another person in circumstances of gross violence.
>
> Penalty: Level 4 imprisonment (15 years maximum).
>
> (2) For the purposes of subsection (1), any one of the following constitutes circumstances of gross violence—
>
> 20 (a) the offender planned in advance to engage in conduct and at the time of planning—
>
> (i) the offender intended that the conduct would cause a serious injury; or
>
> (ii) the offender was reckless as to whether the conduct would cause a serious injury; or
>
> (iii) a reasonable person would have foreseen that the conduct would be likely to result in a serious injury;
>
> (b) the offender in company with 2 or more other persons caused the serious injury;
>
> (c) the offender entered into an agreement, arrangement or understanding with 2
> 30 or more other persons to cause a serious injury;
>
> (d) the offender planned in advance to have with him or her and to use an offensive weapon, firearm or imitation firearm and in fact used the offensive weapon, firearm or imitation firearm to cause the serious injury;
>
> (e) the offender continued to cause injury to the other person after the other person was incapacitated;

(f) the offender caused the serious injury to the other person while the other person was incapacitated.

39. This new offence was concerned, not with the nature of the substantive offence of recklessly causing serious injury or the construction of the degree of foresight required to be criminally reckless as to the causing of serious injury, but rather with cataloguing a number of aggravating circumstances which if proven would amount to "gross violence" and result in the imposition of a prescribed sentencing regime. Neither of these legislative changes compel the conclusion that in the circumstances of this case, the re-enactment presumption had "very great force".[36]

10

40. Further, the re-enactment presumption ought not to have prevented the Court of Appeal from exercising its jurisdiction to correct the error arising from its decision in *Campbell*. Nothing in the principle requires perpetuating the erroneous construction of a statutory provision.[37] The majority concluded there was no need to answer whether *Campbell* was wrongly decided as the legislature could be presumed to have adopted the test. This was an error. Nothing in the "re-enactment presumption" prevented the Court of Appeal coming to a concluded view about the correctness of the construction of s.17 arrived at by the Court in *Campbell* and going on to correct that error.

20 41. Additionally, the Court below considered that possible difficulties arising from jury's consideration of the social utility of an act in appropriate cases was another basis upon which to determine the Director's reference in the negative.[38] However, as this Court concluded in *Aubrey*, considerations of possible future directions were no basis to replace the requirement of foresight of possibility with a test of probability.[39] It is submitted the converse of that conclusion must also be true: any inconvenience from changing jury directions cannot form a basis to maintain an erroneous construction requiring foresight of probability rather than possibility. It is respectfully submitted that the Court below overestimated the significance of this matter, and in truth it poses no obstacle to the outcome sought by the Director in the reference question.

---

[36] The judgment below [19].
[37] *Re Alcan Australia Limited; Ex Parte Federation of Industrial Manufacturing & Engineering Employees Employees* (1991) 181 CLR 96 [20]; *Salvation Army (Vic) Property Trust v Fern Tree Gully Corporation* (1952) 85 C.L.R 159 [10]; *Georgopoulos v Silaforts Painting Pty Ltd* & Ors [2012] VSCA 179 [41].
[38] The judgment below [41].
[39] Ibid [50].

42. In the Court below, and in this Court, the Director accepts the role of the jury's consideration, in appropriate cases, of the social utility of the relevant act in the proper construction of recklessness.[40] Consistent with statements from this Court,[41] such considerations will depend significantly on the facts of each case and in any event are themselves no reason to adopt - or maintain - the erroneous construction of recklessness in Victoria. As stated by this Court:

> Experience to date suggests that juries are ordinarily able as a matter of common sense and experience, and so without the need for particular directions, to take the social utility of an act into account when determining whether it was reckless.[42]

10

43. It is submitted that the Court below ought not to have concluded that considerations of the social utility of the relevant act militated against the construction of recklessness argued for by the Director, and, that the emphasis placed on the issue by the Court below was out of proportion to its significance as noted by this Court in the passage above.

Conclusion

44. The decisions of *Nuri* and *Campbell*, which purport to rely on *Crabbe* in concluding
20 that criminal recklessness in non-fatal offences requires proof that an accused person had foresight of the probability of the relevant consequences were wrongly decided.

45. As this Court held in *Aubrey*, it is the particular nature of the offence of murder which led to the formulation of so-called recklessness (in that context) requiring proof of foresight of the probability of death or grievous bodily harm.

46. As the Attorney-General noted on the introduction of the relevant Bill in 1985, causing serious injury recklessly is a less serious offence than intentionally causing serious injury. The difference in maximum penalty further demonstrates the point. The two
30 offences share elements in common, departing only on the mental element necessary to be proven to establish the offence. By requiring proof of the knowledge of the

---

[40] For example, the judgment below [31] and Application for Special Leave at [29].
[41] *Aubrey* [48]–[51].
[42] Ibid [50].

probability of the relevant consequences, an accused's mental state is morally equivalent to having an intention to cause the relevant consequence. This conflation creates a lacuna in the proper determination of liability.[43]

47. By interpreting causing serious injury recklessly as requiring proof of the foresight of the probable consequence of an accused's acts, the degree of proof required to establish the offence is elevated beyond what Parliament intended and beyond the way analogous offences were traditionally treated in this State. It is inconsistent with High Court authority. It is also inconsistent with authority from New South Wales and England.

48. The practice of directing juries, in cases other than murder, that proof of a reckless state of mind requires proof an accused foresaw the probability of a relevant consequence should therefore cease. Juries instead should be directed what needs to be established is an accused foresaw the possibility the relevant consequence might occur and proceeded regardless. This is consistent with the legislative history, what Victoria's Parliament intended in 1985 and High Court authority.

Part VII: Orders Sought

49. The order sought by the Victorian Director of Public Prosecutions is that the reference question should be answered in the affirmative, namely, that consistent with the decision of the High Court in *Aubrey v The Queen* (and relevant earlier authority), the correct interpretation of "recklessness" for offences other than murder (and, in particular, the offence of recklessly causing serious injury and its alternative) is that an accused had foresight of the possibility of relevant consequences and proceeded nevertheless.

---

[43] Translation of the murder form of so-called "recklessness" into other statutory contexts creates instances where offenders who clearly have caused the result, and by any common estimation would be deemed to have been "reckless" as to its causation, escape proper liability for causing that result. The presence of manslaughter (which is a result-based crime) appears to avoid this problem in the instance of murder, in that situation an offender still falls to be sentenced by reference to the result, causing a fatality. There is no lesser form of causing serious injury recklessly where an offender is sentenced for causing the result, a serious injury, if proof of the mental element fails.

50. An order that the appellant pay the acquitted person's reasonable costs is also sought.

Part VIII: Time estimate

51. The appellant estimates that the hearing of this appeal will take half a day.

Dated: 29 January 2021

.....

10 Name: Brendan Kissane QC

Telephone: 9603 7886

Email: brendan.kissane@opp.vic.gov.au

.....

Name: Jeremy McWilliams

Telephone: 9603 7878

Email: jeremy.mcwilliams@opp.vic.gov.au

IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

IN THE MATTER OF:

THE DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO. 1 OF 2019

RESPONDENT'S ANNEXURE

10

1. *Crimes Act* 1958 (Vic), ss. 17, 19. 19A, Authorised Version No. 6231
2. *Crimes Act* 1958 (Vic), Authorised Version No. 293
3. *Crimes (Amendment) Act* 1985 (Vic), Authorised Version No. 10233
4. *Crimes Amendment Act* 2007 (NSW), Authorised Version No. 38
5. *Crimes Act* 1900 (NSW), Authorised Version No. 40
6. *Sentencing and Other Acts (Amendment) Act* 1997, Authorised Version No. 48
7. *Crimes Amendment (Gross Violence Offences) Act* 2013, Authorised Version No. 6