

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

DIRECTOR OF PUBLIC PROSECUTIONS
REFERENCE NO 1 OF 2019

Director of Public Prosecutions Reference No 1 of 2019
[2021] HCA 26
Date of Hearing: 14 May 2021
Date of Judgment: 1 September 2021
M131/2020

ORDER

1. *Appeal dismissed.*
2. *The Director of Public Prosecutions (Vic) pay the acquitted person's reasonable costs.*

On appeal from the Supreme Court of Victoria

Representation

B F Kissane QC with J C J McWilliams for the appellant (instructed by Office of Public Prosecutions (Vic))

D A Dann QC with C T Carr SC for the acquitted person (instructed by C. Marshall & Associates)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Director of Public Prosecutions Reference No 1 of 2019

Criminal law – Recklessness – Where s 17 of *Crimes Act 1958* (Vic) provides that person who, without lawful excuse, recklessly causes serious injury is guilty of indictable offence – Where Court of Appeal of Supreme Court of Victoria in *R v Campbell* [1997] 2 VR 585 held that recklessness means person foresaw that serious injury *probably* will result from act or omission – Where *Crimes Act* amended following *Campbell* with significant, substantive and direct effect on s 17 – Where High Court cast doubt on correctness of *Campbell* in *Aubrey v The Queen* (2017) 260 CLR 305 – Where accused charged with recklessly causing serious injury under s 17 of *Crimes Act* – Where trial judge directed jury in relation to recklessness consistently with *Campbell* – Where accused acquitted – Where Director of Public Prosecutions (Vic) referred correctness of *Campbell* as point of law to Court of Appeal – Whether Parliament left meaning of recklessness in s 17 of *Crimes Act* to courts – Whether recklessness in s 17 of *Crimes Act* has meaning stated in *Campbell*.

Words and phrases – "culpability and criminality", "elements of the existing offences", "expert review of the law", "extensive consultation with key stakeholders", "foresight of possibility", "foresight of probability", "gross violence offences", "injury", "maximum penalty", "offences against the person other than murder", "recklessness", "re-enactment presumption", "serious injury", "specialised and politically sensitive fields", "temporal proximity".

Crimes Act 1958 (Vic), s 17.

1 KIEFEL CJ, KEANE AND GLEESON JJ. In *Aubrey v The Queen*¹, this Court confirmed that the degree of recklessness required for the statutory offence of maliciously inflicting grievous bodily harm in New South Wales was foresight of the *possibility* of harm, not the *probability* of harm. Foresight that death or grievous bodily harm is a *probable* consequence is the test for common law murder, as this Court held in *R v Crabbe*². The reason for the higher test in the case of common law murder, the Court explained in *Crabbe*³, is the near moral equivalence of intention to kill or cause grievous bodily harm and the foresight of the probability of death or grievous bodily harm. That rationale does not apply to offences other than murder.

2 That foresight of the possibility of harm was the correct standard of recklessness to apply to statutory offences other than murder was the view taken in England and generally in Australia, in 1985⁴. In *Aubrey*⁵ it was observed that nothing said in *Crabbe* altered or required any change to that approach. Statutory provisions which involved recklessness in offences of that kind had consistently been construed to require foresight of the possibility of harm⁶.

3 An exception identified in *Aubrey*⁷ to that approach was the decision of the Victorian Court of Appeal in *R v Campbell*⁸, in 1995. That decision concerned s 17 of the *Crimes Act 1958* (Vic), which came into force in 1986⁹ and provided for the offence of recklessly causing serious injury. "Recklessly" was not defined. The

1 (2017) 260 CLR 305 at 327-329 [43]-[47].

2 (1985) 156 CLR 464.

3 (1985) 156 CLR 464 at 469.

4 *Aubrey v The Queen* (2017) 260 CLR 305 at 329 [46].

5 (2017) 260 CLR 305 at 329 [46].

6 *Aubrey v The Queen* (2017) 260 CLR 305 at 327-328 [44], referring to by way of example *R v Smyth* [1963] VR 737 at 738-739; *R v Kane* [1974] VR 759 at 760; *R v Lovett* [1975] VR 488 at 493.

7 (2017) 260 CLR 305 at 328 [44]-[45].

8 [1997] 2 VR 585.

9 *Crimes (Amendment) Act 1985* (Vic).

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Court of Appeal applied the standard of recklessness as requiring foresight of the probability of harm. In so doing, it overturned a line of authority in that State¹⁰ which had consistently dealt with the test for recklessness in the way which had been generally accepted before *Crabbe*.

4 The Court of Appeal in *Campbell* reasoned¹¹ that, whilst *Crabbe* concerned murder, the same principles are relevant to the offence under s 17. An earlier decision of the Court of Criminal Appeal, *R v Nuri*¹², had applied a test of probability to the offence of recklessly engaging in conduct endangering life under s 22 of the *Crimes Act*. The Court in *Campbell* held that all relevant sections in this group of sections in the Act, including s 17, must apply the same test¹³.

5 *Aubrey*¹⁴ was concerned with the offence of maliciously inflicting grievous bodily harm in s 35(1)(b) of the *Crimes Act 1900* (NSW) where "maliciously" was defined in s 5 to include "recklessly". The New South Wales Court of Criminal Appeal in *R v Coleman*¹⁵ had rejected the reasoning later adopted in *Campbell* and instead applied the test of foresight of the possibility of harm. This Court held that it was correct to do so¹⁶.

The reference and the Court of Appeal

6 This matter comes to this Court because the Director of Public Prosecutions for Victoria referred the correctness of the decision in *Campbell* as a point of law for the opinion of the Victorian Court of Appeal¹⁷. The background to the reference was proceedings in the County Court of Victoria involving a charge brought under

10 *R v Smyth* [1963] VR 737 at 738-739; *R v Kane* [1974] VR 759 at 760; *R v Lovett* [1975] VR 488 at 493.

11 [1997] 2 VR 585 at 592-593.

12 [1990] VR 641 at 643.

13 [1997] 2 VR 585 at 593.

14 (2017) 260 CLR 305.

15 (1990) 19 NSWLR 467 at 475-476.

16 (2017) 260 CLR 305 at 329 [47].

17 *Criminal Procedure Act 2009* (Vic), s 308(1) and (2).

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s 17 of the *Crimes Act* where the trial judge declined to direct the jury in accordance with *Aubrey*, considering himself bound to follow *Campbell*. The accused was acquitted.

7 There can be no doubt that the decision in *Campbell* is wrong. The question of its correctness was not answered in the joint judgment in the Court of Appeal¹⁸. It was not considered necessary to do so because, even if *Campbell* were "plainly wrong", there were said to be "powerful reasons" for the Court not to apply the test stated in *Aubrey*. Those reasons essentially arose from the "re-enactment presumption" which applies to the interpretation of statutes¹⁹.

8 In the joint judgment it was said²⁰ that the legislature had successively "endorse[d]" the decision in *Campbell* in legislative amendments it had made since that decision. Parliament having "repeatedly approved" that decision, any change to the test there stated is a matter for Parliament, their Honours held²¹.

9 The Court of Appeal gave as the answer to the reference 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 [*Campbell*]."

Re-enactment, presumption and inference

10 In *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees*²² this Court said that there is abundant authority "for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the

18 *Director of Public Prosecutions Reference (No 1 of 2019)* (2020) 284 A Crim R 19 at 25 [17] per Maxwell P, McLeish and Emerton JJA.

19 *Director of Public Prosecutions Reference (No 1 of 2019)* (2020) 284 A Crim R 19 at 25 [18] per Maxwell P, McLeish and Emerton JJA.

20 *Director of Public Prosecutions Reference (No 1 of 2019)* (2020) 284 A Crim R 19 at 27 [29] per Maxwell P, McLeish and Emerton JJA.

21 *Director of Public Prosecutions Reference (No 1 of 2019)* (2020) 284 A Crim R 19 at 27 [29], 32 [51].

22 (1994) 181 CLR 96 at 106.

meaning already 'judicially attributed to [them]'. The Court stated the proposition in short form, no doubt because its application was so clear in that case. In a case to which it referred, *Barras v Aberdeen Steam Trawling and Fishing Co*²³, this principle of statutory construction was said to apply where a word of doubtful meaning has received a clear judicial interpretation and the subsequent statute incorporates the same word or phrase in a similar context.

11 It has been said that the presumption should not be relied upon to perpetuate an erroneous construction of a statutory provision²⁴. It is notable that in *Alcan* the reason why the presumption was applied was not only that the Parliament had re-enacted the provision in almost identical terms with those which had been considered; the decision construing the similar provision had also been accepted in a number of later cases as correctly applying the relevant principle and there was no reason to think that it was in any way affected by error²⁵.

12 It is the duty of appellate courts, and this Court in particular, to correct error. It would seem to follow that the terms of the re-enactment, the circumstances surrounding it, or the context in which it is made must be such that the adoption by the legislature of the meaning assigned by the courts to the statutory term in question is tolerably clear. There have been cases, such as *Alcan*²⁶ and *Electrolux Home Products Pty Ltd v Australian Workers' Union*²⁷, where the courts have been able to conclude that there has been a clear case of legislative adoption.

13 The question which may be seen to arise in the cases is whether more is required for the presumption than the repetition of the words in a similar context in a subsequent statute. The "presumption" has been described as a "valuable

23 [1933] AC 402 at 411.

24 *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159 at 174.

25 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-107; see also *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 323-325 [7]-[8] per Gleeson CJ, 339-341 [61]-[62] per McHugh J, 370-371 [160]-[162] per Gummow, Hayne and Heydon JJ.

26 (1994) 181 CLR 96.

27 (2004) 221 CLR 309; see also *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1243-1244 [19]; 374 ALR 1 at 7.

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presumption"²⁸ and a "presumption of no great weight"²⁹. Much may depend on other factors, such as legislative history³⁰.

14 Dixon CJ in *R v Reynhoudt*³¹ said that it was "quite artificial" to take the mere repetition in legislation of a provision which has been judicially considered as legislative approval of that decision. If that is so, mere legislative inaction must surely be problematic³². In such a circumstance the presumption would not seem to arise. In *Flaherty v Girgis*³³, Mason A-CJ, Wilson and Dawson JJ said that mere amendment of a statute not involving any re-enactment of the words in question could seldom be taken as approval. Even re-enactment of the words in circumstances not involving any reconsideration of their meaning will not do so.

15 In *Flaherty v Girgis*³⁴, their Honours spoke of this principle of interpretation as involving the drawing of an inference as to parliamentary approval, which in some cases may be difficult:

"Whilst it is true that, where an inference can be drawn from the terms in which subsequent legislation has been passed that Parliament itself has approved of a particular judicial interpretation of words in an earlier statute,

28 *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159 at 174.

29 *Flaherty v Girgis* (1987) 162 CLR 574 at 594 per Mason A-CJ, Wilson and Dawson JJ.

30 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-107; *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 503 [16].

31 (1962) 107 CLR 381 at 388; see also *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159 at 174.

32 *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020) at 720 [24.6].

33 (1987) 162 CLR 574 at 594.

34 (1987) 162 CLR 574 at 594; see also *R (N) v Lewisham London Borough Council* [2015] AC 1259 at 1304 [53] per Lord Hodge JSC; *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020) at 719 [24.6].

a court should adhere to that interpretation, the difficulty is in discerning the existence of parliamentary approval".

16 In *Alcan* it was said³⁵ that consideration of the legislative history of a statute may strengthen the presumption. It might also be said that it may enable an inference of parliamentary adoption more readily to be drawn. There are other factors which might be taken into account. The likelihood that the legislature intended to adopt a previous judicial interpretation may be greater when the earlier decision is settled or well-recognised³⁶. The principle has been said to have greater force in specialised and technical fields of the law, where legislation is often amended and judicial decisions carefully scrutinised by those responsible for amendments³⁷.

17 Whatever factors may be necessary to permit with some certainty a conclusion that the legislature has adopted or approved a previous judicial meaning assigned to a word or phrase, it is important to recall that the process in which the presumption is applied is one of statutory construction of the subsequent provision. The presumption is a principle of interpretation.

The legislative amendments

18 There were two amendments on which the joint judgment principally relied in concluding that the legislature had adopted the meaning in *Campbell*. The first, in 1997, effected changes to the maximum sentences for certain offences, including s 17; the second, in 2013, created new offences involving gross violence.

The 1997 amendments

19 In 1997 the *Sentencing and Other Acts (Amendment) Act 1997* (Vic) ("the Amending Act") altered the maximum penalties for a large number of offences.

35 (1994) 181 CLR 96 at 106-107.

36 *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402 at 447; *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020) at 720 [24.6].

37 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 346-347 [81]; *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 502-503 [15]; Herzfeld and Prince, *Interpretation*, 2nd ed (2020) at 168 [8.60].

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As was pointed out in the joint judgment in the Court of Appeal³⁸, the changes included the penalties for the "causing injury" offences³⁹. The maximum for intentionally causing serious injury (s 16) was increased from 12.5 to 20 years; for recklessly causing serious injury (s 17) from 10 to 15 years; and for intentionally causing injury (s 18) from 7.5 to 10 years.

20 The penalty for the s 17 offence (and for ss 16 and 18) appears at the foot of the section. The alteration of the penalty for the s 17 offence, and two unrelated offences, was effected by providing in a schedule to the Amending Act that:

"11. In sections 17, 25 and 27, for the penalty set out at the foot of the section **substitute** 'Penalty: Level 4 imprisonment (15 years maximum).'"

21 No part of the body of s 17, including the word "recklessly", was enacted as part of the amending provision.

22 The joint judgment⁴⁰ gave as the explanation for the increase in s 17 the following:

"the decision to increase the maximum for recklessly causing serious injury by 50% can only be understood on the basis that the legislature was aware of, and accepted, the *Campbell* interpretation. That is, the increased maximum was seen to be both necessary and appropriate given the high degree of culpability involved in the causing of serious injury in circumstances where the offender was aware of the probability that serious injury would result and proceeded nonetheless. This was, in effect, a re-enactment of s 17 – with a higher maximum – on the basis of the interpretation adopted in *Campbell*."

23 The assumption made in the joint judgment as to legislative intention finds no support from the secondary materials relating to the Amending Act. To the contrary, in the Second Reading Speech to the Bill which led to the 1997

38 *Director of Public Prosecutions Reference (No 1 of 2019)* (2020) 284 A Crim R 19 at 25 [20].

39 *Sentencing and Other Acts (Amendment) Act 1997* (Vic), s 60, Sch 1 items 10-12.

40 *Director of Public Prosecutions Reference (No 1 of 2019)* (2020) 284 A Crim R 19 at 25-26 [21].

amendments⁴¹ it was explained that a wide-ranging revision of maximum sentences involving numerous offences was undertaken by the Victorian government because of perceived public concern about the level of sentences imposed by the courts in Victoria for certain serious offences. The general concern was that higher sentences should be imposed for offences of that kind, including offences against the person. In the Second Reading Speech it was said:

"This wide-ranging process of consultation was designed to find out where the sentencing system was failing. A key aim was to identify ways to ensure that the courts pass sentences which reflect community expectations. The community has clearly indicated dissatisfaction with sentencing levels for certain serious offences; this bill will address these concerns so as to restore the faith and confidence of the public in the criminal justice system."

- 24 There is nothing to suggest that in making the increases to the maximum penalty for many offences the legislature turned its mind to *Campbell*. The amending provision itself makes no reference to the word "recklessly" or to the s 17 offence more generally. It is not to be overlooked that the presumption is one of interpretation which arises when the legislature enacts the same term or phrase which has been judicially considered. Here, the alteration made to the penalty at the foot of s 17, together with the explanation provided for it, would seem to provide no occasion for the operation of the presumption.

The 2013 amendments

- 25 The *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) introduced offences of intentionally and recklessly causing serious injury "in circumstances of gross violence" into the *Crimes Act*. The new offences appeared as ss 15A and 15B, the latter dealing with causing serious injury "recklessly". It may be observed that while the word "recklessly" was enacted in the new s 15B the legislature did so in a different context, in connection with the creation of a new offence. The focus of the legislature is likely to have been on matters arising with respect to that offence. Certainly there is nothing said in Parliament during the second reading of the Bill or in the Explanatory Memorandum which directs attention to what the legislature may have taken to be the meaning of "recklessly". There is no legislative history to assist the drawing of such an inference.

41 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 27 May 1997 at 1059.

26 The joint judgment's finding⁴², that the decision in *Campbell* may be seen to have been adopted in s 15B, relies upon the Report of the Sentencing Advisory Council, "Statutory Minimum Sentences for Gross Violence Offences"⁴³, and in particular the statement in it⁴⁴, with respect to the offence in s 17, that:

"[t]he element of 'recklessness' will be satisfied for this offence if the prosecution proves beyond reasonable doubt that the accused foresaw that his or her actions would probably cause serious injury and that he or she was indifferent as to whether or not serious injury would actually result"

and the fact that the passage contains a footnote to *Nuri*⁴⁵.

27 In the Second Reading Speech⁴⁶, all that is relevantly said concerning the Report is that consideration had been given to it and that many, but not all, of its recommendations were adopted. This is not a strong basis for an inference of legislative adoption of the particular passage.

28 There are other features of the Report which make it an unreliable basis for an inference as to the intention of the legislature. If an inference is to be drawn on the basis that the attention of the legislature, or those drafting, was given to every aspect of the Report, it would need to take account of a later statement concerning the offences of intentionally causing serious injury and recklessly causing serious injury. In stating what the Crown must prove concerning recklessness it is said that the standard to be applied is foresight of the *possibility* of serious injury⁴⁷:

42 *Director of Public Prosecutions Reference (No 1 of 2019)* (2020) 284 A Crim R 19 at 26 [25].

43 Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011).

44 Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011) at 4 [1.20].

45 [1990] VR 641 at 643.

46 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2012 at 5550.

47 Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011) at 47-48 [2.203].

"To be guilty of recklessly causing serious injury, the offender must have intended to commit the act or acts that caused the injury, *and foresaw that those actions could cause serious injury*, but was indifferent as to whether or not serious injury would actually result." (emphasis added)

29 The concerns of the Victorian Parliament might be thought more accurately to be reflected in the Terms of Reference given to the Sentencing Advisory Council⁴⁸. The Attorney-General sought advice on the introduction of statutory minimum sentences for the offences of intentionally causing serious injury and recklessly causing serious injury, when those offences are committed in circumstances of gross violence. More particularly, the terms of reference sought advice "on the way in which a minimum four-year non-parole period for adults, and a minimum period in detention of two years for children aged 16 or 17, might operate".

30 The Council was not asked to consider the merits of the proposed scheme. The Council was advised by the Attorney-General what the circumstances constituting gross violence were to be. In short summary, the Council was asked to advise on how exceptional circumstances in which a court may sentence below the statutory minimum could best be specified; how factors making an offence one of gross violence could best be specified; the effects of recommendations by the Council on sentencing levels and the numbers of persons serving custodial sentences; and any other matters the Council considered relevant.

Conclusion: error should be corrected

31 It cannot be concluded that, subsequent to *Campbell*, the Victorian Parliament adopted the meaning of "recklessly" given in *Campbell* by reference to the two amending statutes relied upon in the joint judgment. The Court of Appeal made wrong assumptions about the legislature's thinking concerning the 1997 amendments. In truth, no occasion for the application of the principle of construction arose. There is nothing beyond the mere repetition of the word "recklessly" in the 2013 amendments to support the application of the principle. That fact alone is insufficiently clear to warrant an inference of legislative approval and there are no other factors which support such an inference.

48 Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011) at viii.

32 It is not possible to characterise the broad subject of criminal justice as one of a "specialised and politically sensitive field"⁴⁹, such as industrial relations and taxation⁵⁰, to permit an inference to be drawn that the drafters must be taken to be aware of a particular judicial interpretation of the word "recklessly". It is more likely they were concerned with other issues relating to the new offences, as the Terms of Reference suggest. Otherwise one is left to speculate.

33 If the Parliament is taken to be aware of judicial decisions on the topic, it must also be taken to be aware that *Campbell* overturned a line of authority in Victoria to the contrary, as the Court of Appeal itself said in that case⁵¹; that the view generally in Australia as to the standard of foresight at the time of *Crabbe* was consistent with the cases overturned; and that the Court of Criminal Appeal of New South Wales had applied that standard with respect to a similar offence in 1990⁵², prior to *Campbell*, and that that position had been maintained⁵³.

34 The mere passage of time since *Campbell* was decided in 1995 does not provide support for the application of the principle of construction. The inaction of the legislature is not a firm basis for the application of the principle. It may equally be consistent with leaving any correction of an interpretation of a term to the courts, as is often the case. Correcting the decision in *Campbell* would not be productive of substantial injustice. The criminal justice system in Victoria is able to adapt to the correction. It did so when *Campbell* overturned a line of authority dating back some 30 or more years. Those who have stood trial since *Campbell* have not suffered. They have benefitted from the prosecution being required to prove the necessary mental element to a much higher standard. For those who have not yet been tried of an offence under s 17, and to whom the lesser standard will apply, it is difficult to accept that their conduct is likely to have been based on an understanding that in causing serious injury they would not have to face trial on the basis of their foresight of the possibility of such harm. In any event, whilst injustice or inconvenience is an important factor to be taken into account, there is

49 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 346-347 [81]; *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at 502-503 [15].

50 Herzfeld and Prince, *Interpretation*, 2nd ed (2020) at 168 [8.60].

51 [1997] 2 VR 585 at 593.

52 *R v Coleman* (1990) 19 NSWLR 467.

53 *Blackwell v The Queen* (2011) 81 NSWLR 119.

Kiefel *CJ*
Keane *J*
Gleeson *J*

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no support to be found in principle or authority for the proposition that a court should persist with a manifestly incorrect interpretation on those grounds⁵⁴.

Orders

35 The appeal should be allowed and the opinion of the Court of Appeal given in Order 1 made on 2 July 2020 set aside. In lieu thereof, the point of law raised for opinion should be answered:

The meaning of "recklessly" in the offence of recklessly causing serious injury (s 17 of the *Crimes Act 1958* (Vic)) is not as stated in *R v Campbell* [1997] 2 VR 585. It requires that an accused had foresight of the possibility of relevant consequences and proceeded nevertheless.

54 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13.

36 GAGELER, GORDON AND STEWARD JJ. Section 17 of the *Crimes Act 1958* (Vic), which came into force in March 1986⁵⁵, provides that "[a] person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence".

37 In 1995, in *R v Campbell*⁵⁶, the Court of Appeal of the Supreme Court of Victoria, invoking what was described as "[t]he spirit" of the decision of this Court in *R v Crabbe*⁵⁷ and following an earlier decision of the Full Court of the Supreme Court of Victoria in *R v Nuri*⁵⁸, held that in order for a person to be convicted of recklessly causing serious injury under s 17 of the *Crimes Act*, the prosecution must establish that the person foresaw that serious injury *probably* would result from the act or omission which in fact caused the serious injury⁵⁹. In reaching that decision, the Court of Appeal declined to follow a line of previous authority⁶⁰ which held that it was sufficient to establish the mental element of the offences of unlawful and malicious wounding or unlawful and malicious infliction of grievous bodily harm to demonstrate foresight of the *possibility* of harm.

38 In 2017, in *Aubrey v The Queen*⁶¹, in addressing "recklessness" for the purposes of the offence of maliciously inflicting grievous bodily harm under s 35(1)(b) of the *Crimes Act 1900* (NSW), this Court cast doubt on the correctness of *Campbell* and noted, in particular, that nothing said in *Crabbe* in relation to the degree of recklessness necessary to establish offences against the person other than murder required any shift from foresight of *possibility* to foresight of *probability* of harm. This Court nevertheless recognised that "[t]he requirements in States

55 See *Crimes (Amendment) Act 1985* (Vic), s 8.

56 [1997] 2 VR 585 at 593.

57 (1985) 156 CLR 464.

58 [1990] VR 641.

59 *Campbell* [1997] 2 VR 585 at 592-593.

60 *R v Smyth* [1963] VR 737; *R v Kane* [1974] VR 759; *R v Lovett* [1975] VR 488.

61 (2017) 260 CLR 305 at 328-329 [45]-[46].

other than New South Wales may vary according to the terms of each State's legislation"⁶².

39 This case concerns the present correctness of *Campbell*. It arises in this way. In February 2017, an accused was relevantly charged under s 17 of the *Crimes Act* with recklessly causing serious injury to a man who fell to the ground and suffered serious injury to the skull and brain. In August 2019, the accused was tried before a jury in the County Court of Victoria. The trial judge declined the invitation of the Director of Public Prosecutions ("the DPP") to charge the jury in relation to the mental element of recklessness in accordance with *Aubrey* and, instead, directed the jury consistently with *Campbell*. The accused was acquitted by the jury.

40 The DPP referred the correctness of the decision in *Campbell*, as a point of law, to the Court of Appeal for its opinion⁶³. The DPP submitted that, consistent with this Court's decision in *Aubrey*, the correct interpretation of recklessness for offences against the person other than murder (and, in particular, the offence of recklessly causing serious injury under s 17 of the *Crimes Act*) is that an accused had foresight of the *possibility* of the relevant consequences and proceeded nevertheless. The acquitted person, who appeared by counsel⁶⁴, submitted that the decision in *Campbell* should remain the law in Victoria. The Court of Appeal (Maxwell P, Priest, Kaye, McLeish and Emerton JJA) unanimously answered the point of law that "[u]nless and until it is altered by legislation, the meaning of 'recklessly' in s 17 of the *Crimes Act* ... is that stated by the Court of Appeal in ... *Campbell*".

41 By special leave to appeal, the DPP sought to have this Court reconsider *Campbell*. As these reasons will explain, the point of law was answered correctly by the Court of Appeal.

Section 17 of the *Crimes Act*

42 As has been observed, s 17 of the *Crimes Act* came into force in March 1986. It was one of three new offences introduced into the *Crimes Act*⁶⁵ –

⁶² *Aubrey* (2017) 260 CLR 305 at 329 [47].

⁶³ *Criminal Procedure Act 2009* (Vic), s 308(1) and (2).

⁶⁴ See *Criminal Procedure Act*, s 308(3).

⁶⁵ *Crimes (Amendment) Act*, s 8.

causing serious injury intentionally⁶⁶, causing serious injury recklessly⁶⁷ and causing injury either intentionally or recklessly⁶⁸ – based on the fourteenth report of the Criminal Law Revision Committee of England and Wales, published in 1980⁶⁹. The Committee had warned that there was not unanimity as to the meaning of recklessness in the criminal law⁷⁰ and that failure to define the term would result in a period of uncertainty until defined by the courts⁷¹. The Victorian Parliament chose not to define "recklessly". That task fell to the Full Court in 1989 in *Nuri* when the Court stated that "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"⁷². That meaning of recklessness was then adopted and applied in *Campbell* in 1995 when the Court of Appeal stated that "the appropriate test to apply" for recklessness in s 17 of the *Crimes Act* "is that it is possession of foresight that injury *probably* will result that must be proved"⁷³. That position has stood since 1989 in Victoria⁷⁴.

⁶⁶ *Crimes Act*, s 16.

⁶⁷ *Crimes Act*, s 17.

⁶⁸ *Crimes Act*, s 18.

⁶⁹ Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 25 September 1985 at 202.

⁷⁰ United Kingdom, Criminal Law Revision Committee, *Fourteenth Report: Offences against the Person* (1980) at 3 [6].

⁷¹ United Kingdom, Criminal Law Revision Committee, *Fourteenth Report: Offences against the Person* (1980) at 3-6 [6]-[12], especially at 3-4 [7].

⁷² [1990] VR 641 at 643, citing *Crabbe* (1985) 156 CLR 464.

⁷³ [1997] 2 VR 585 at 592.

⁷⁴ See, 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

43 Following the Court of Appeal's decision in *Campbell*, two relevant enactments were passed which directly concerned s 17 of the *Crimes Act – the Sentencing and Other Acts (Amendment) Act 1997* (Vic) ("the 1997 amendments") and the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) ("the 2013 amendments").

1997 amendments

44 The 1997 amendments increased the maximum penalty for recklessly causing serious injury in s 17 of the *Crimes Act* to 15 years' imprisonment, an increase of 50 per cent⁷⁵. Fifteen years' imprisonment remains the maximum penalty for the offence⁷⁶. The purpose of the amendments, informed by a "wide-ranging process of consultation", was to "identify ways to ensure that the courts pass sentences which reflect community expectations"⁷⁷. The amendments followed a "year-long review process"⁷⁸ including "a Crown Prosecutor interview[ing] over 100 judges, magistrates and other key stakeholders in the criminal justice system to identify problems and solutions to technical defects in the operation of the [*Sentencing Act 1991* (Vic)]"⁷⁹. As the plurality in the Court of Appeal in the present case stated⁸⁰:

149 at 179 [148]; *Ejupi v The Queen* [2014] VSCA 2 at [34]; *Phillips v The Queen* [2017] VSCA 313 at [43].

75 *Sentencing and Other Acts (Amendment) Act*, Sch 1, item 11.

76 The 1997 amendments also increased the maximum penalty for intentionally causing serious injury to 20 years' imprisonment and for intentionally causing injury to ten years' imprisonment: *Sentencing and Other Acts (Amendment) Act*, Sch 1, items 10 and 12.

77 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 27 May 1997 at 1059.

78 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 27 May 1997 at 1058.

79 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 27 May 1997 at 1058.

80 *Director of Public Prosecutions Reference (No 1 of 2019)* (2020) 284 A Crim R 19 at 25-26 [21].

"[T]he decision to increase the maximum for recklessly causing serious injury by 50% can only be understood on the basis that the legislature was aware of, and accepted, the *Campbell* interpretation. That is, the increased maximum was seen to be both necessary and appropriate given the high degree of culpability involved in the causing of serious injury in circumstances where the offender was aware of the probability that serious injury would result and proceeded nonetheless. This was, in effect, a re-enactment of s 17 – with a higher maximum – on the basis of the interpretation adopted in *Campbell*."

2013 amendments

45 Sixteen years later, the 2013 amendments effected three separate but interrelated changes to the criminal law – two amendments to the *Crimes Act* and an amendment to the *Sentencing Act*. For present purposes, it is sufficient to focus on the amendments to the *Crimes Act* – which, again, can only be "understood on the basis that the legislature was aware of, and accepted, the *Campbell* interpretation"⁸¹.

46 First, the definitions of "injury" and "serious injury" applicable to all relevant non-fatal offences, including s 17 of the *Crimes Act*, were revised⁸². This amendment was "derive[d] from work on possible reforms to fatal and non-fatal offences that the Department of Justice [had] been undertaking for some time"⁸³. In the second reading speech, the Attorney-General explained that the amendments were necessary because of the then existing "very low threshold for offences involving serious injury", which had meant that cases which should have been charged as causing injury and heard and determined in the Magistrates' Court of Victoria were instead charged as causing serious injury and heard in the

81 *Director of Public Prosecutions Reference (No 1 of 2019)* (2020) 284 A Crim R 19 at 25 [21].

82 *Crimes Amendment (Gross Violence Offences) Act*, s 3.

83 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2012 at 5550.

County Court⁸⁴. The new and "higher threshold for serious injury" was to "make it easier for prosecutors to determine the appropriate offence to charge"⁸⁵.

47 Second, the 2013 amendments inserted new "gross violence" offences – ss 15A and 15B of the *Crimes Act*⁸⁶. The insertion of these new aggravated forms of the existing causing serious injury offences (ss 16 and 17 respectively) was significant. As the Explanatory Memorandum to the amending Bill said⁸⁷:

"New section 15B introduces the new offence of causing serious injury recklessly in circumstances of gross violence, without lawful excuse. The maximum penalty for the offence is level 4 imprisonment (15 years maximum). *The new offence has the same maximum penalty as the offence of causing serious injury recklessly* (section 17 of the **Crimes Act 1958**).

*The new gross violence offences are intended to be a subset of the serious injury offences category under Subdivision (4) of Division 1 of Part I of the **Crimes Act 1958**. The new offences identify circumstances of offending that involve a particularly high level of harm and culpability. Adult offenders who are found guilty of one of the new gross violence offences are liable to be sentenced to a statutory minimum sentence of a term of imprisonment with a non-parole period of at least four years.*

There may be serious injury cases that involve a high level of harm and culpability but do not occur in the prescribed circumstances of gross violence. These cases will continue to be dealt with under the existing causing serious injury offences." (emphasis added)

48 The elements of the new gross violence offences were intended to, and did, "use the elements of the existing offences of causing serious injury intentionally

84 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2012 at 5550-5551.

85 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2012 at 5551.

86 *Crimes Amendment (Gross Violence Offences) Act*, s 4.

87 Victoria, Legislative Assembly, *Crimes Amendment (Gross Violence Offences) Bill 2012*, Explanatory Memorandum at 4.

or recklessly under sections 16 and 17 of the **Crimes Act**"⁸⁸, which (for s 17, at least) included the element of recklessness. In the second reading speech, the Attorney-General reinforced that "[t]he new gross violence offences [were] intended to capture a subset of the serious injury offences cases, namely those that involve a particularly high level of harm and culpability" and, not insignificantly, that "[i]n addition to the usual elements of causing serious injury offences, the prosecution must prove that the offence occurred in one of the listed circumstances of gross violence"⁸⁹ (emphasis added).

49

In introducing these reforms, the government stated that it had sought advice from, and "carefully considered" a report of, the Sentencing Advisory Council ("the SAC")⁹⁰. The SAC report was prepared in consultation "with a wide variety of criminal justice, governmental and non-governmental stakeholders" and with the benefit of extensive submissions⁹¹. The government adopted many of the SAC's recommendations⁹². The elements of the existing offences were addressed in the SAC report and, in relation to s 17 of the *Crimes Act*, it said⁹³:

"The element of 'recklessness' will be satisfied for this offence if the prosecution proves beyond reasonable doubt that the accused foresaw that his or her actions would probably cause serious injury and that he or she

88 Victoria, Legislative Assembly, *Crimes Amendment (Gross Violence Offences) Bill 2012*, Explanatory Memorandum at 4.

89 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2012 at 5550.

90 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2012 at 5550, referring to Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011). See *Sentencing Act*, Pt 9A, especially ss 108B and 108C.

91 Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011) at vii.

92 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2012 at 5550.

93 Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011) at 4 [1.20].

was indifferent as to whether or not serious injury would actually result [*R v Nuri* [1990] VR 641 at 643]."

50 As has been observed, the 2013 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. The extrinsic materials expressly state that to be so⁹⁴. A word or phrase, such as "recklessness", is presumed to have the same meaning at least when it is used in cognate or related provisions of an Act⁹⁵. That presumption has particular relevance and force where, consistent with a recommendation in the SAC report⁹⁶, the new gross violence offence introduced in 2013, s 15B, picked up the existing elements of the s 17 offence, and added *only* the gross violence element, so that s 17 was expressly made, and remains, the alternative verdict to s 15B⁹⁷. In addressing the 2013 amendments, Parliament was required to, and did, consider the nature and extent of the culpability and criminality of the existing offences – ss 16 and 17 – in creating the more serious offences of gross violence. For s 17 and, therefore, s 15B, the mental element of recklessness was identified and said to be that stated in *Nuri* and then in *Campbell*.

Re-enactment presumption

51 Where Parliament repeats words which have been judicially construed, it can be taken to have intended the words to bear the meaning already judicially attributed to them⁹⁸. The so-called "re-enactment presumption" has a long

94 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2012 at 5550. See also Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011) at 4 [1.20].

95 See, eg, *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 643; *Federal Commissioner of Taxation v Australian Building Systems Pty Ltd (In liq)* (2015) 257 CLR 544 at 560 [27]; *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456 at 466-467 [21].

96 Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011) at 19 [2.25]-[2.26].

97 *Crimes Amendment (Gross Violence Offences) Act*, s 5.

98 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 346-347 [81];

history⁹⁹, though its application has become more discerning as "parliamentary processes [have become] more exposed to examination by the courts"¹⁰⁰. Applied to a consolidating statute enacted in a legislative context in which periodical consolidation is practised, for example, the presumption can be "quite artificial"¹⁰¹. In specialised and politically sensitive fields, where legislation is often amended and judicial decisions carefully scrutinised by those responsible for amendments, in contrast the presumption can have "real force"¹⁰². In such areas, it is "no fiction" to attribute to the designated Minister and Department and, through them, Parliament, knowledge of court decisions dealing with their portfolio¹⁰³. Even outside specialised and politically sensitive fields, the presumption may be applicable because the legislative history shows an awareness by Parliament of a particular judicial interpretation. That awareness may be indicated by a specific legislative response that "followed upon an expert review of the law and presumably the case law"¹⁰⁴ including reports of law reform commissions¹⁰⁵ and subject-specific advisory

Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher (2015) 254 CLR 489 at 502 [15]; *Brisbane City Council v Amos* (2019) 266 CLR 593 at 606 [24], 615 [45], 615-616 [48]-[49], 617-618 [56]; *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1243-1244 [18]-[19], 1250 [52]; 374 ALR 1 at 6-7, 15-16.

99 See, eg, *Ex parte Campbell*; *In re Cathcart* (1870) LR 5 Ch App 703 at 706; *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 at 272, 283, 305-306; *Pillar v Arthur* (1912) 15 CLR 18 at 22; *Barras v Aberdeen Steam Trawling and Fishing Co* [1933] AC 402 at 412, 438, 442, 446; *Platz v Osborne* (1943) 68 CLR 133 at 141.

100 *Zickar v MHG Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329.

101 *R v Reynhoudt* (1962) 107 CLR 381 at 388.

102 Herzfeld and Prince, *Interpretation*, 2nd ed (2020) at 168 [8.60]. See also *Fortress Credit* (2015) 254 CLR 489 at 502 [15], quoting *Electrolux* (2004) 221 CLR 309 at 346-347 [81].

103 *Fortress Credit* (2015) 254 CLR 489 at 502 [15], quoting *Electrolux* (2004) 221 CLR 309 at 346-347 [81].

104 *Fortress Credit* (2015) 254 CLR 489 at 503 [15].

105 See, eg, *Brisbane City Council* (2019) 266 CLR 593 at 607-608 [25]-[26]; *Jackmain (a Pseudonym) v The Queen* (2020) 102 NSWLR 847 at 888-889 [175].

committees¹⁰⁶. Temporal proximity between a decision and an enactment may also be relevant¹⁰⁷. Express reference to a particular judicial decision in the parliamentary debates at the time of enactment may assist¹⁰⁸, although the presumption can apply despite the absence of explicit parliamentary reference to the decision in question¹⁰⁹.

52 Inevitably, the application of the presumption in any case will turn on its own circumstances having regard to the history of the specific statute under consideration and, in this appeal, that is s 17 of the *Crimes Act*.

Re-enactment presumption and s 17 of the *Crimes Act*

53 The 1997 and 2013 amendments were significant, substantive and direct. The 1997 amendments increased by 50 per cent the maximum penalty which could be imposed for a contravention of s 17¹¹⁰. And, insofar as the 2013 amendments changed the meaning of "serious injury"¹¹¹, that altered the scope of liability created by s 17. Plainly, these amendments were not a "[m]ere amendment of a statute not involving any re-enactment of the words in question" or a "re-enactment of the words in circumstances not involving any reconsideration of their meaning"¹¹².

106 See, eg, *Re Alcan* (1994) 181 CLR 96 at 107; *Fortress Credit* (2015) 254 CLR 489 at 503 [15]-[16].

107 *Electrolux* (2004) 221 CLR 309 at 324-325 [8], 346 [81], 370-371 [161]-[162], 398 [251]. See also *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 47.

108 *Vella* (2019) 93 ALJR 1236 at 1243-1244 [18]-[19], 1250 [52]; 374 ALR 1 at 6-7, 15-16.

109 See, eg, *Electrolux* (2004) 221 CLR 309 at 346-347 [81]; *Fortress Credit* (2015) 254 CLR 489 at 503 [16]. See also Pearce, *Statutory Interpretation in Australia*, 9th ed (2019) at 127-128 [3.51]; *Zickar* (1996) 187 CLR 310 at 329, quoting *Flaherty v Girgis* (1987) 162 CLR 574 at 594.

110 *Sentencing and Other Acts (Amendment) Act*, Sch 1, item 11.

111 *Crimes Amendment (Gross Violence Offences) Act*, s 3.

112 *Zickar* (1996) 187 CLR 310 at 329, quoting *Flaherty* (1987) 162 CLR 574 at 594.

54 As has been observed, 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 amendments¹¹³.

55 The 1997 and 2013 amendments also followed expert reviews and extensive consultation with key stakeholders in the criminal justice system¹¹⁴. Contrary to a submission made by the DPP, the fact that those reviews were not carried out by law reform commissions does not detract from their significance or context¹¹⁵. Criminal law is and had by 1997 become in Victoria a "specialised and politically sensitive field" in the sense contemplated in *Electrolux Home Products Pty Ltd v Australian Workers' Union*¹¹⁶. Criminal law has a "designated Minister" (the Attorney-General) and a "designated ... Department of State" (the Department of Justice)¹¹⁷. It is "no fiction" to attribute to the Attorney-General and the Department and, through them, Parliament, knowledge of decisions dealing with their portfolio, especially where, as here, the reviews were undertaken at the request of the Attorney-General¹¹⁸.

56 The application of the re-enactment presumption does not *depend* on expert reviews or specific legislative amendments directed towards the precise issue –

113 See fn 74 above.

114 See, eg, Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 27 May 1997 at 1058; Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011) at vii.

115 *Re Alcan* (1994) 181 CLR 96 at 107; *Fortress Credit* (2015) 254 CLR 489 at 503 [15]-[16].

116 (2004) 221 CLR 309 at 346-347 [81], quoted in *Fortress Credit* (2015) 254 CLR 489 at 502 [15]. See also *Jackmain* (2020) 102 NSWLR 847 at 888-889 [175].

117 *Electrolux* (2004) 221 CLR 309 at 347 [81].

118 Victorian Community Council Against Violence, *Community Knowledge and Perceptions of Sentencing in Victoria: A Report on the Findings of the Consultations* (1997) at viii-xv; Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011) at vii.

the meaning of recklessness in s 17¹¹⁹. However, adopting and adapting what was said in *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher*, it is difficult to imagine that the decisions in *Nuri* and *Campbell* – cases concerning the meaning of recklessness – were not known to those involved in the field as interpretive decisions of considerable significance¹²⁰. This is especially so given that the amending enactments significantly and directly altered the nature and extent of the criminality and culpability of a contravention of s 17 of the *Crimes Act*. In relation to the 2013 amendments, the SAC report *did* expressly identify the meaning of recklessness by reference to the decision in *Nuri* (which *Campbell* followed)¹²¹.

57 The identified error in *Campbell* – the adoption of a construction of the element of recklessness for the offence of recklessly causing serious injury under s 17 of the *Crimes Act* that an accused must have foresight of the *probability* and not the *possibility* of relevant consequences – is not insignificant. If the meaning of a statute is wrong, it should be corrected. The difference here is 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.

58 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. The maximum penalty for committing the s 17 offence in Victoria is 15 years' imprisonment, while the maximum penalty for the equivalent New South Wales offence is currently ten years' imprisonment¹²². Each State has taken a different view on the criminality to be ascribed to the conduct.

59 Other considerations reinforce the conclusion that the foresight of probability test in *Campbell* should stand unless addressed by the legislature in

119 See, eg, *Platz* (1943) 68 CLR 133 at 145-146, 146-147; *Thompson v Judge Byrne* (1999) 196 CLR 141 at 157 [40].

120 (2015) 254 CLR 489 at 503 [16].

121 Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011) at 4 [1.20].

122 *Crimes Act 1900* (NSW), s 35(2).

25.

Victoria. *Campbell* was decided in 1995, more than 25 years ago, and since that date it has been consistently followed in Victoria¹²³. This Court is reluctant to depart from long-standing decisions of State courts upon the construction of State statutes, particularly where those decisions have been acted on in such a way as to affect rights¹²⁴. That is especially so here, where unfairness would follow if the meaning of recklessness was changed retrospectively by this Court¹²⁵ with the result that potentially criminal conduct which occurred before this Court's decision – if that conduct has not yet been charged, or if it has been charged but not tried – would attract the lower standard of recklessness contended for by the DPP and where the DPP conceded that the decision of this Court on s 17 of the *Crimes Act* would have a "flow-on effect" for other offence provisions in Victoria.

Conclusion and orders

60 The appeal should be dismissed. There will also be an order, as the DPP sought, that it pay the acquitted person's reasonable costs.

¹²³ See fn 74 above.

¹²⁴ *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13-14, 22-23.

¹²⁵ *Giannarelli v Wraith* (1988) 165 CLR 543 at 584-586; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 358-359.

EDELMAN J.

Introduction

61 This appeal is from a decision of the Court of Appeal of the Supreme Court of Victoria¹²⁶ on a reference brought by the Director of Public Prosecutions¹²⁷ following an acquittal of the accused person. The Court of Appeal considered the meaning of recklessness in s 17 of the *Crimes Act 1958* (Vic). The offence in s 17 is committed where a person, "without lawful excuse, recklessly causes serious injury to another person". The Court of Appeal held that the courts of Victoria should not follow the approach unanimously taken by this Court in *Aubrey v The Queen*¹²⁸ to the meaning of "recklessness" in a differently worded New South Wales provision. Instead, it was held that the courts of Victoria should continue to follow the decision of the Court of Appeal of the Supreme Court of Victoria in 1995 in *R v Campbell*¹²⁹.

62 The appeal to this Court raises two important questions. The first is the meaning that Parliament intended for the word "recklessly" when s 17 of the *Crimes Act* was introduced by the *Crimes (Amendment) Act 1985* (Vic)¹³⁰. In light of the answer to the first question, the second question is whether this Court should give s 17 the meaning given to the concept of recklessness in *Aubrey* or the meaning given in *Campbell*.

63 The answer to the first question is that Parliament is best understood to have intended to leave the essential meaning and development of the concept of recklessness in s 17 to the judiciary. Parliament had eschewed the strong call to define the concept of recklessness, preferring simply to refer to the developing judicial concept of recklessness by which "in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time"¹³¹. The intention of Parliament was therefore

126 *Director of Public Prosecutions Reference (No 1 of 2019)* (2020) 284 A Crim R 19.

127 See *Criminal Procedure Act 2009* (Vic), s 308.

128 (2017) 260 CLR 305.

129 [1997] 2 VR 585.

130 *Crimes (Amendment) Act 1985* (Vic), s 8.

131 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 549 [23].

that the law as to the meaning of recklessness be developed and incrementally clarified in the manner of the common law¹³².

64 As to the second question, if the meaning of recklessness in s 17 were able to be developed in an unconstrained manner then, since s 17 concerns an offence of causing serious injury, the developed meaning given by all members of this Court in *Aubrey* would require recklessness in s 17 to mean: (i) that the accused person foresaw the possibility of harm¹³³ but proceeded nonetheless to take that risk; and (ii) that, although expressed in various ways in *Aubrey*, the risk was unreasonable in the circumstances known to the accused. To follow the decision in *Aubrey* would have the salutary effect of overruling *Campbell* in circumstances in which: (i) the result in *Campbell* is wrong; (ii) the result is arguably inconsistent with an approach that might have been expected at the time the provision was enacted; (iii) the result is likely to be inconsistent with the approach taken in other States; and (iv) the result is inconsistent with the approach that should be taken to other Victorian offences apart from murder and, possibly, endangerment of life offences.

65 I have, however, and not without considerable hesitation, reached the conclusion that recklessness in s 17 nevertheless should not bear the developed judicial meaning given to recklessness in *Aubrey*. Instead, the interpretation to be given to recklessness in s 17 should be that of the Court of Appeal in 1995 in *Campbell*¹³⁴. This is not a case where this Court is applying an essential meaning intended by Parliament in an unexpected way to new or different circumstances or practices¹³⁵. Nor is it a case where this Court is applying the essential meaning intended by Parliament in an unexpected way in light of a different understanding of facts and circumstances¹³⁶. Rather, in circumstances where the essential meaning of "recklessly" in s 17 was left to judicial development, this conclusion involves a judicial application, albeit an application that involves some

132 See, for instance, *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007 at 1021-1022 [63], 1026 [82]-[83], 1028 [93]; 372 ALR 555 at 569-570, 575-576, 578.

133 There was no issue in *Aubrey*, nor in this case, concerning whether foresight of the possibility of harm requires foresight of harm generally or harm of the same kind that occurred: see *Vallance v The Queen* (1961) 108 CLR 56 at 59.

134 [1997] 2 VR 585.

135 See *R v A2* (2019) 93 ALJR 1106 at 1141 [173]; 373 ALR 214 at 257.

136 See *Aubrey v The Queen* (2017) 260 CLR 305 at 320 [24].

inconsistency and lack of principle, which is necessary to preserve the fabric of the law in light of subsequent judicial decisions and statutory changes.

66 There are three significant constraining factors, explained in detail in the reasons below, which lead to this unusual conclusion on the second question. First, although the approach in *Aubrey* is more principled, prior to the decision in *Aubrey* the decision in *Campbell* could not have been thought to be plainly wrong. The difference is not as stark as might first appear between (i) the judicial meaning given to recklessness in *Aubrey*, and (ii) the judicial meaning given to recklessness in *Campbell*. In effect, *Campbell* aligns the meaning of recklessness in cases of offences involving the causing of serious injury with the meaning of recklessness in offences involving murder or, possibly, endangerment of life. Secondly, the decision in *Campbell* has formed part of the background for amendments to the penalties and related provisions in the *Crimes Act*. Although this is not a case where a provision – in this case, s 17 – has been subsequently amended or re-enacted with an intention to give the provision a particular meaning¹³⁷, the judicial development of the meaning of recklessness cannot ignore the subsequent amendment of provisions of the *Crimes Act* against the background of the judicially determined meaning in *Campbell*. Thirdly, the judicial meaning of recklessness in *Campbell* has been adopted in the courts of Victoria for 26 years without any obvious inconvenience. There could be real unfairness in the imposition of a new judicial interpretation which, in effect, would retroactively criminalise uncharged or untried conduct over that long period.

Section 17 and the principled meaning of recklessness

The developed meanings of recklessness

67 In *Aubrey*¹³⁸, one issue was the meaning of an "act ... done recklessly" within the definition of "maliciously" in s 5 of the *Crimes Act 1900* (NSW). In the joint judgment of Kiefel CJ, Keane, Nettle and Edelman JJ¹³⁹, with whom Bell J agreed on this point¹⁴⁰, it was observed that, since at least 1883, the notion of recklessness had been judicially developed to embrace "foreseeing the possibility

¹³⁷ Including a meaning that had been judicially attributed prior to the re-enactment. See *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106.

¹³⁸ (2017) 260 CLR 305.

¹³⁹ (2017) 260 CLR 305 at 327-328 [44].

¹⁴⁰ (2017) 260 CLR 305 at 331 [53].

of consequences and proceeding nonetheless"¹⁴¹. The joint judgment explained that this aspect of the usual judicially applied meaning of "recklessness" had been a long-standing position in Victoria¹⁴².

68 But this was not the only meaning of recklessness. An exception to this judicially applied meaning, recognised by this Court in *Aubrey*, is where recklessness is an element of the offence of common law murder or the offence contained in s 18 of the *Crimes Act 1900* (NSW) requiring "reckless indifference to human life"¹⁴³. The joint judgment in *Aubrey*¹⁴⁴ approved the reasoning of Hunt J in *R v Coleman*¹⁴⁵ that the "contemplation by the accused of the *probable* consequence of death is required for murder because it has to be comparable with an intention to kill or to do grievous bodily harm".

69 The difference between the meaning of recklessness for most offences (which focuses upon foresight of the *possibility* of the consequences) and the meaning in the context of murder and, possibly, offences involving reckless indifference to human life (which focuses upon foresight of the *probability* of the consequences) is not as stark as first appears. A further requirement has always been necessary before recklessness can be found on the test based upon foresight of the possibility of the consequences, although in many cases no further direction to a jury as to this additional requirement will be needed. That further requirement is that the risk must be unreasonable in the circumstances known to the accused. As explained below, this further requirement is not wholly separate from assessments of the probability or possibility of the consequences. Hence, it was said in the joint judgment in *Aubrey*¹⁴⁶ that "the reasonableness of an act and the degree of foresight of harm required to constitute recklessness in so acting are logically connected".

141 See Stephen and Oliver, *Criminal Law Manual Comprising the Criminal Law Amendment Act of 1883* (1883) at 7. See also *R v Welch* (1875) 1 QBD 23.

142 (2017) 260 CLR 305 at 328 [44], citing *R v Smyth* [1963] VR 737 at 738-739; *R v Kane* [1974] VR 759 at 760; *R v Lovett* [1975] VR 488 at 493.

143 (2017) 260 CLR 305 at 328-329 [45]-[46]. See *R v Crabbe* (1985) 156 CLR 464 at 469; *R v Coleman* (1990) 19 NSWLR 467 at 473-475.

144 (2017) 260 CLR 305 at 328-329 [46]-[47].

145 (1990) 19 NSWLR 467 at 476 (emphasis added).

146 (2017) 260 CLR 305 at 330 [49].

70 In *Aubrey*, the joint judgment gave examples of situations which illustrate the need for recklessness to contain the further requirement – in addition to the requirement of foresight of the possibility of the relevant consequence – by reference to acts such as driving a motor car or playing a contact sport¹⁴⁷. If recklessness required no more than mere foresight of the possibility of serious injury then any time a person drove a car or played a contact sport the person might be reckless. The joint judgment referred to the "social utility" of these acts and to the willingness of an accused to "run the risk", the notion of which was said to include the reasonableness of the act¹⁴⁸. Ultimately, however, it was not necessary for this Court in *Aubrey* to consider how to articulate the further requirement because no jury direction to that effect was needed: "there was never any question of the jury proceeding on the basis of foresight only of a bare possibility of harm"¹⁴⁹. Similarly, in this case it could not have been suggested that there was anything reasonable in the conduct by which serious injury was caused, which was alleged to be a kick by the acquitted person to the head of the victim.

71 In oral submissions in this Court, the appellant dealt with a different example, given by the English Law Commission¹⁵⁰:

"A professional variety artist, with many years of accident-free experience of juggling, is performing before an audience with a dozen Indian clubs. He admits that he foresaw that in such a performance he might misjudge a throw and wound a spectator but, in view of his long experience and skill, he thought there was no more than a very remote risk of a spectator being so injured. He in fact misjudges a throw, as a result of which a spectator is wounded."

The appellant correctly submitted that the juggler would not be reckless. Running the various threads in *Aubrey* together, the appellant equated the enquiry as to the "social utility" of juggling with the enquiry as to the reasonableness of the act in the circumstances known to the juggler, and with the enquiry as to whether the juggler had "run the risk". These various expressions, however, carry different connotations. The preferable formulation for the further requirement of

¹⁴⁷ (2017) 260 CLR 305 at 330 [49].

¹⁴⁸ (2017) 260 CLR 305 at 330 [49].

¹⁴⁹ (2017) 260 CLR 305 at 331 [51].

¹⁵⁰ The Law Commission, *Report on the Mental Element in Crime*, Law Com No 89 (1978) at 30-31 [57(c)].

recklessness, which has been adopted in England¹⁵¹, should be the unreasonableness of taking the risk in the circumstances known to the accused. As the joint judgment in *Aubrey* acknowledged, in cases where it becomes relevant (namely, where it was suggested to be reasonable to take the risk) it may be that "the kind of directions that are now given in England will prove to be of assistance"¹⁵².

72

The difficulty with the concept of social utility, apparently suggested by Glanville Williams¹⁵³ and Professor Fitzgerald¹⁵⁴, lies in its association with a Benthamite metric of overall welfare. But the sense in which it was used as a further requirement of recklessness was more closely aligned with an enquiry about the reasonableness of the risk in situations which are either normal or abnormal with the attendant considerations that apply to each. For instance, Glanville Williams said that "driving cars has social utility" and is "regarded as generally reasonable and as justifying the taking of some risks"¹⁵⁵. Because the activity is one which is normal, it is one in which society has accepted the reasonableness of the underlying risk¹⁵⁶. The same reasonableness enquiry can extend to abnormal activities which Glanville Williams described as involving social utility, such as a field surgeon performing an urgent operation which requires them to run the risk of choosing an unsterilised scalpel¹⁵⁷. Again, social utility is a label which conceals the real enquiry – the implicit reasonableness assessment – involving consideration of the "magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have"¹⁵⁸.

¹⁵¹ *R v G* [2004] 1 AC 1034.

¹⁵² (2017) 260 CLR 305 at 331 [50].

¹⁵³ Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 52.

¹⁵⁴ Fitzgerald, "Carelessness, Indifference and Recklessness: Two Replies" (1962) 25 *Modern Law Review* 49 at 54-55.

¹⁵⁵ Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 60.

¹⁵⁶ See Galligan, "Responsibility for Recklessness" (1978) 31 *Current Legal Problems* 55 at 70.

¹⁵⁷ Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 61.

¹⁵⁸ *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48.

73 As to the language of whether the accused was willing to "run the risk" of causing the same kind of harm as that alleged¹⁵⁹, this language was first suggested in later editions of Dr Kenny's work on criminal law¹⁶⁰. It was followed by Glanville Williams¹⁶¹. The difficulty with that expression is that *every* foreseen risk will be run when an accused person persists with the relevant conduct. And, as Glanville Williams recognised, almost every activity in society involves risks. In order to avoid running risks, he said, we "should have to abjure canned food, uncooked food, reheated food ... bath-tubs, gas fires, electric fires, coal fires, oil burners, stairs, lifts, machines of every kind"¹⁶². In an earlier text he had said that "everyone who drives a car knows that a possible consequence is that he will kill a pedestrian, but a killing is not for that reason reckless"¹⁶³.

74 The language of "risk-taking", as Glanville Williams observed, is really only legally relevant when it "becomes an act of negligence (whether inadvertent negligence or recklessness)" and this occurs "only when it is unreasonable in the circumstances"¹⁶⁴. Writing at around the same time, Professor Hart had spoken of recklessness as "wittingly flying in the face of a substantial, *unjustified* risk, or the conscious creation of such a risk"¹⁶⁵. This notion of an "unjustifiable" or "unreasonable" risk was followed by the American Law Institute in its Model Penal Code¹⁶⁶. And, in England in *R v G*¹⁶⁷, Lord Bingham of Cornhill, with whom

159 *Pemble v The Queen* (1971) 124 CLR 107 at 119; *Stokes & Difford* (1990) 51 A Crim R 25 at 40; *Miller v The Queen* (2016) 259 CLR 380 at 419-420 [115].

160 Turner, *Kenny's Outlines of Criminal Law*, 16th ed (1952) at 186. Dr Kenny was later the Downing Professor of the Laws of England.

161 Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 53.

162 Williams, *The Mental Element in Crime* (1965) at 30.

163 Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 60.

164 Williams, *The Mental Element in Crime* (1965) at 30.

165 Hart, "Negligence, *Mens Rea* and Criminal Responsibility", in *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 136 at 137 (emphasis added).

166 American Law Institute, *Model Penal Code* (1962), §2.02(2).

167 [2004] 1 AC 1034 at 1057 [41].

the other Lords of Appeal agreed, required that the risk taken was, in the circumstances known to the accused, unreasonable.

75 Once it is appreciated that recklessness always requires the taking of an unreasonable risk, then it can be seen that "[i]f foresight of possibility is to suffice then the justification should be founded on the distinct basis that the nature of the risk does not warrant the taking of even slight chances"¹⁶⁸. Other than such cases, the difference between foresight of possibility and foresight of probability can be much reduced by the additional element of unreasonableness.

The introduction of s 17 in 1986

76 Although the background of judicial exposition of an expression can be a significant factor in ascertaining the meaning intended by Parliament, the importance of such judicial background should not be overstated¹⁶⁹. The reasoning in *Aubrey* establishes that, at the time s 17 of the *Crimes Act* was enacted, recklessness in relation to serious injuries other than death was generally thought to require foresight of the possibility of the injury rather than the probability of the injury. Section 17 commenced operation in 1986 against the background that, in the context of a test for malice in relation to serious injuries, the foresight of the possibility of the consequences had prevailed as a requirement for recklessness in Victoria for more than 20 years¹⁷⁰.

77 Nevertheless, the precise meaning of recklessness was not clear. As Gummow, Hayne and Heydon JJ said in *Banditt v The Queen*¹⁷¹, "[t]he term 'reckless' has various uses as a criterion of legal liability". A different meaning of recklessness had been espoused for at least a decade in the context of murder¹⁷²,

168 Fisse, "Probability and the Proudman v Dayman Defence of Reasonable Mistaken Belief" (1974) 9 *Melbourne University Law Review* 477 at 480.

169 See *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159 at 174; *R v Reynhoudt* (1962) 107 CLR 381 at 388; *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106-107.

170 *R v Smyth* [1963] VR 737 at 738-739.

171 (2005) 224 CLR 262 at 265 [1].

172 *R v Hyam* [1975] AC 55 at 82, 86. See also at 96; *La Fontaine v The Queen* (1976) 136 CLR 62 at 76-77.

and was described as "settled law"¹⁷³ the year before s 17 came into force. Further, the additional requirement – the unreasonableness of the accused taking the risk in the known circumstances – had not yet been clearly enunciated. And it had been said of "malice", in which the Victorian approach to recklessness had been developed, that "[f]ew words have caused more trouble both at common law and in the interpretation of statutes"¹⁷⁴.

78 In the Second Reading Speech for the Bill that introduced s 17, the Attorney-General for Victoria said that the old sections concerned with malice were to be replaced with new ones. Although the Attorney-General said that the Bill was "not intended in any way to reduce the coverage of these serious offences"¹⁷⁵, he also observed that many of the proposals in it had been based on the fourteenth report of the Criminal Law Revision Committee of England and Wales¹⁷⁶. That report had observed that there was no unanimity as to the ordinary meaning of the word "recklessness" in the criminal law and that it would be "most unsatisfactory" to leave the term undefined since the courts would soon "find themselves bound to rule upon conflicting submissions by counsel"¹⁷⁷. In other words, in the absence of legislative definition, the development of recklessness would be left to the courts. The legislative definition proposed by the Criminal Law Revision Committee was: (i) that the accused foresaw that their act might cause the particular result; and (ii) that 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 accused¹⁷⁸.

79 Against this background, the intention of the Victorian Parliament in enacting s 17 must have been to leave the development of the meaning of recklessness in that section to the courts from 1986 when the section commenced.

173 *R v Crabbe* (1985) 156 CLR 464 at 469-470.

174 *Vallance v The Queen* (1961) 108 CLR 56 at 59.

175 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 25 September 1985 at 201.

176 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 25 September 1985 at 202. See England and Wales, Criminal Law Revision Committee, *Fourteenth Report: Offences against the Person* (1980).

177 England and Wales, Criminal Law Revision Committee, *Fourteenth Report: Offences against the Person* (1980) at 3-4 [6]-[7].

178 England and Wales, Criminal Law Revision Committee, *Fourteenth Report: Offences against the Person* (1980) at 5 [12].

Generally for the reasons given in *Aubrey* in relation to the enactment by the New South Wales Parliament of s 5 of the *Crimes Act 1900* (NSW), it might have been expected that the developed meaning of recklessness would require an accused person to have foresight of the possibility, not the probability, of injury of that kind. Indeed, in the Second Reading Speech in the Legislative Assembly it was observed that¹⁷⁹:

"where serious injury is inflicted there is a sufficient difference in moral turpitude – sufficient to justify distinct defences – between one who does so intentionally in the sense of desiring to cause serious injury and one who does so recklessly – aware that an injury *might* result to another but goes ahead anyway".

80 If Parliament had taken the approach advocated by the Criminal Law Revision Committee and defined the meaning of recklessness as recommended then if the decision in *Campbell* had still been given it would have been plainly wrong and there could be little argument against overturning it. Even the usual considerations that require restraint in acceding to a challenge to a long-standing prior decision of this Court "cannot allow previous error to stand in the way of declaring the true intent of the statute" where the prior decision is "plainly erroneous"¹⁸⁰. So too, a fortiori, where the prior long-standing decision is from a single judge or intermediate appellate court and is "clearly wrong"¹⁸¹. But where the essential meaning of a term or provision is intended by Parliament to be developed by the courts, the intention of Parliament is given effect by the development of the concept in the manner of the common law¹⁸²:

"A statute can pick 'up as a criterion for its operation a body of the general law' and 'in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time'. Generally, broadly expressed criteria can be expected to be given content as 'the technique of judicial interpretation [gives] content

179 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 1985 at 1040 (emphasis added). See also Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 25 September 1985 at 201.

180 *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 439-440, referring to *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13.

181 *Blair v Curran* (1939) 62 CLR 464 at 531.

182 *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236 at 1259 [86]; 374 ALR 1 at 27 (footnotes omitted).

and more detailed meaning on a case to case basis. Rules and principles emerge which guide or direct courts in the application of the standard."

Sometimes the judicial development of such statutory rules is simply described as "common law"¹⁸³, even where "the relevant common law that is relied on may itself have a statutory basis"¹⁸⁴. The description is not inapt because the "scope and purpose of the [term or provision] will expand, contract and diversify to follow the shifts in the common law"¹⁸⁵.

81 Just as a court is not confined by an originally expected application when applying the meaning intended by Parliament to new or different circumstances or practices¹⁸⁶ or in light of a different understanding of facts and circumstances¹⁸⁷, a court is also not confined by the expected application of the provision that was intended to be the subject of "common law" development, although that expectation can provide some anchor to the development of the meaning of the provision. Despite the likely expectations when Parliament passed the *Crimes (Amendment) Act 1985* (Vic) and despite the reasons of principle for overturning *Campbell*, there are three reasons, in combination, why the result in *Campbell* should not be disturbed in the process of judicial development of the meaning of recklessness in s 17.

(1) The decision in *Campbell* was not plainly wrong

The decision in Campbell

82 The issue in *Campbell* was whether the trial judge had erred in his directions to the jury concerning recklessness. The appellant had relevantly been charged with recklessly causing serious injury contrary to s 17 of the *Crimes Act*. The evidence was that the appellant's gun was discharged during an argument in which

183 *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007 at 1021-1022 [63], 1026 [82]-[83], 1028 [93]; 372 ALR 555 at 569-570, 575-576, 578. See also (2019) 93 ALJR 1007 at 1012-1013 [2]-[3], 1014 [16], 1016 [26]-[28], 1018 [39], 1019 [46], 1020 [53], [54]; 372 ALR 555 at 557, 559, 562, 565, 566, 567.

184 Burrows, "The Relationship Between Common Law and Statute in the Law of Obligations" (2012) 128 *Law Quarterly Review* 232 at 235.

185 Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Clarendon Law Lectures) (1999) at 7.

186 See *R v A2* (2019) 93 ALJR 1106 at 1141 [173]; 373 ALR 214 at 257.

187 See *Aubrey v The Queen* (2017) 260 CLR 305 at 320 [24].

several bystanders had become involved. Serious injury was caused to one bystander. In his directions, the trial judge told the jury that the offence required the appellant to have fired the gun knowing that serious injury might occur and taking the risk of doing so.

83 All the judges of the Court of Appeal held that the trial judge had erred in the part of his direction which only required knowledge that the serious injury *might* occur. In a joint judgment, Hayne JA and Crockett A-JA (with whom Phillips CJ relevantly agreed) held that the direction should have required that the jury could not convict unless the conclusion was reached that the accused had foresight that serious injury would *probably* occur, and that the direction using the word "might" had erroneously substituted a test of possibility for one of probability¹⁸⁸. Their Honours relied upon the decisions in *R v Crabbe*¹⁸⁹ and *R v Nuri*¹⁹⁰. In effect, the decision in *Campbell* applied the exceptional meaning of recklessness – requiring foresight of the probability of serious injury – rather than that which, as this Court in *Aubrey* later explained, was the more widely understood meaning in Victoria and elsewhere in relation to an offence of that nature. By applying the reasoning in *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, with the associated uncertainty that such thinking would have had for any reliance upon *Campbell* by Parliament or the public.

Different meanings of recklessness

84 As explained above, as a matter of principle the approach to recklessness in the context of serious injury when s 17 was enacted, as now, should require foresight only of the possibility of serious injury rather than foresight of the probability of serious injury. Nevertheless, there is difficulty in concluding that this is a clear, correct meaning of recklessness in circumstances in which: (i) the concept of recklessness was entangled historically with the concept of malice; (ii) recklessness bears a different meaning at least in the context of murder; (iii) there is uncertainty surrounding the manner of defining the additional requirement of unreasonableness before recklessness will be established; and (iv) the additional requirement of unreasonableness may have the effect in many cases of increasing the likelihood of the serious injury that must be foreseen.

188 [1997] 2 VR 585 at 586, 592-593.

189 (1985) 156 CLR 464 at 469-470.

190 [1990] VR 641 at 643.

85 Another development in the law prior to *Campbell* further highlights this difficulty. Prior to the decision in *Campbell*, the decision in *Nuri* extended the approach in Victoria to recklessness in relation to the element of "reckless indifference to human life" for the offence of murder to offences involving reckless endangerment of life generally. *Nuri* concerned the offence created by s 22 of the *Crimes Act* of recklessly engaging in conduct that places or may place another person in danger of death. That general endangerment offence replaced a large number of disparate offences concerning life-endangering behaviour that were previously found in the *Crimes Act*¹⁹¹. The Court of Criminal Appeal said in *Nuri* that the "expression 'recklessly' may not give rise to difficulty. It has for long been employed in statutory offences."¹⁹² There was no issue in dispute about the appropriate test for recklessness. It was assumed that the meaning of recklessness in the context of murder involving a reckless indifference to human life – which requires foresight by the accused of the probable consequences of their action – was the same in the context of reckless endangerment of human life.

86 The decision in *Nuri* was not considered by this Court in *Aubrey*. It is unnecessary in this case to consider whether the further contraction in *Nuri* was correct. It suffices to say that *Nuri* is a further illustration of the difficulty of drawing sharp lines around the different meanings of recklessness.

The contraction effected by Campbell should not be overstated

87 In *Annakin*¹⁹³, the Court of Criminal Appeal of New South Wales correctly observed that "[t]he line of division between probability and possibility is not an exact line, but a probability inevitably in law expresses a higher degree of certainty". Once the additional factor of unreasonableness is recognised as part of the traditional test, the line becomes even further blurred between (i) the traditional meaning of recklessness set out in *Aubrey* (including unreasonableness of the conduct) and (ii) the meaning in cases of murder and, perhaps, other cases involving reckless indifference to human life. Other things remaining equal, the lower the likelihood of serious injury, the less likely it is that an act will be unreasonable.

88 Nevertheless, there will be cases in which the different meanings of recklessness might lead to different results. In such cases, the application of the meaning of recklessness adopted in *Campbell* might lead to surprising results. Suppose that an accused person strikes a pedestrian, causing serious injury, while driving without headlights at a high speed. If the driving occurred on a quiet

191 [1990] VR 641 at 643.

192 [1990] VR 641 at 643.

193 (1988) 37 A Crim R 131 at 152.

country road at midnight, when it would not have been foreseen as probable that any person would be on the road, the accused might successfully defend a charge under s 17 of the *Crimes Act* which alleged that the accused contemplated that serious injury to another was a probable consequence of their action. By contrast, the accused would be much more likely to be convicted in the same circumstances on the basis of proof by the prosecution that in engaging in the act, the unreasonableness of which would not be in question, the accused person contemplated that serious injury to another was a possibility¹⁹⁴.

(2) Legislative changes surrounding s 17

89 A heavy focus of the submissions on behalf of the acquitted person, and in the reasoning of the Court of Appeal, was the legislative changes made by the Victorian Parliament to the *Crimes Act* after the decision in *Campbell*. Two sets of amendments are relevant.

90 The first set of amendments, in 1997, two years after the decision in *Campbell*, was contained in the *Sentencing and Other Acts (Amendment) Act 1997* (Vic). Those amendments made changes to the penalties in large swathes of criminal legislation, including at least 60 changes to the *Crimes Act* alone. The changes to the *Crimes Act* included increasing the maximum penalty for the s 17 offence from ten years' imprisonment to 15 years' imprisonment¹⁹⁵.

91 As senior counsel for the acquitted person submitted, the 1997 amendments followed an extensive review by a Crown Prosecutor. Prosecutions under s 17 were a large part of the work of the criminal division of the County Court of Victoria and the Crown Prosecutor interviewed over 100 judges, magistrates, and other stakeholders¹⁹⁶. The resulting increase in penalties was not wholly independent of the decision in *Campbell*, since the requirement from that decision of foresight of a probability of injury necessarily meant that the offending was, at least to some degree, more serious than would have been the case if the foresight required had only been of a possibility of injury.

92 The legislative changes did not involve repeal and re-enactment of s 17 of the *Crimes Act* with a new meaning to be attributed to s 17. But in circumstances where the intention of Parliament in originally enacting s 17 was to leave the development of recklessness to the courts, and since the statutory maximum

194 See also the example in *Blackwell v The Queen* (2011) 81 NSWLR 119 at 146 [155].

195 *Sentencing and Other Acts (Amendment) Act 1997* (Vic), Sch 1, item 11.

196 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 27 May 1997 at 1058.

sentence is context for interpretation of the meaning of s 17, the argument that s 17 should bear the meaning attributed to it in *Campbell* became stronger in 1997. Just as the "effect of [an] amending Act may be to alter the meaning which remaining provisions of the amended Act bore before the amendment"¹⁹⁷, so too an amending Act can constrain or alter the development of an open-textured statutory concept.

93 The second set of amendments occurred in 2013 by the *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic). The relevant changes made to the *Crimes Act* were to replace the definition of "serious injury" for offences, including s 17, and to insert new offences of "gross violence", including an aggravated form of the s 17 offence which involved gross violence¹⁹⁸. The reason for the replacement of the definition of "serious injury" was said to be that the relevant offences were engaged at "a very low threshold"¹⁹⁹. In other words, even with the higher threshold in *Campbell* of foresight of *probability* of injury, the offences were still seen as engaged at a low threshold. But the extent to which the 2013 amendments should constrain the further development of recklessness from the decision in *Campbell* depends upon whether *Campbell* could be taken to have been considered by Parliament in enacting the 2013 amendments.

94 On the one hand, it might be said that the 2013 amendments should not substantially constrain the development of the meaning of recklessness in s 17 because, at the time of the 2013 amendments, the correctness of the decision in *Campbell* had been called into question. In *Blackwell v The Queen*²⁰⁰, the Court of Criminal Appeal of the Supreme Court of New South Wales had declined to follow *Campbell*. Beazley JA (with whom James J agreed) relied in part upon the different legislative history of the New South Wales offence²⁰¹, which then concerned malice rather than recklessness. But her Honour added that the decision in *Campbell* was "inconsistent with authority in the High Court, New South Wales and in England"²⁰². The decision of the High Court to which her Honour had

197 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463. See also at 479.

198 *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic), ss 3, 4.

199 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2012 at 5550.

200 (2011) 81 NSWLR 119.

201 *Crimes Act 1900* (NSW), s 35 (as the provision then stood).

202 (2011) 81 NSWLR 119 at 134 [78].

referred was the decision in *Banditt*²⁰³, where, in the context of considering the meaning of recklessness as to consent to sexual intercourse in s 61R(1) of the *Crimes Act 1900* (NSW), Gummow, Hayne and Heydon JJ quoted from Sir John Smith with approval: "If D is aware that there is any possibility that P is not consenting and proceeds to have intercourse, he does so recklessly."

95 On the other hand, none of the extrinsic materials concerning the 2013 amendments referred to any of these decisions, or expressed any doubts about the correctness of the decision in *Campbell*. The existing legal position was considered by the Attorney-General for Victoria, who said in his Second Reading Speech that the government had "carefully considered" a report of the Sentencing Advisory Council²⁰⁴ and that it had "adopted many of" the Council's recommendations²⁰⁵. That report had said of s 17, with a footnote to *Nuri*²⁰⁶, that the element of recklessness will be satisfied by proof that "the accused foresaw that his or her actions would probably cause serious injury and that he or she was indifferent as to whether or not serious injury would actually result"²⁰⁷. On balance, the 2013 amendments are a source for some constraint in the development of the meaning of recklessness. Together with the 1997 amendments, however, that constraint becomes significant.

(3) Unfairness in departing from *Campbell*

96 The final reason that militates against overruling the decision in *Campbell* is the unfairness that would result from doing so. In *Babaniaris v Lutony Fashions Pty Ltd*²⁰⁸, Mason J referred to the strong authority for the view that a decision of long standing should not lightly be disturbed. Those considerations apply, a fortiori, to criminal law cases. The "retroactive removal of an actual freedom coupled with the gravity of consequences that may accompany a breach of the

203 (2005) 224 CLR 262 at 275 [35].

204 Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011).

205 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 December 2012 at 5550.

206 [1990] VR 641 at 643.

207 Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (2011) at 4 [1.20].

208 (1987) 163 CLR 1 at 13.

criminal law" has been described as a "particularly acute example of infraction by the state of individual liberty"²⁰⁹.

97 The unfairness concern enunciated by Mason J was qualified by the "countervailing consideration[]" in the case of statutory interpretation that if an appellate court "is convinced that a previous interpretation is plainly erroneous then it cannot allow previous error to stand in the way of declaring the true intent of the statute"²¹⁰. But, as explained above, this is not a case where Parliament intended that recklessness bear any particular essential meaning. That meaning was left to judicial development. Further, for the reasons that I have given in sections (1) and (2), the decision in *Campbell* was not plainly erroneous in 1995 and was certainly not plainly erroneous by the time of the 2013 amendments.

98 There was no suggestion in any of the extrinsic materials surrounding the 1997 or 2013 amendments that the meaning given to recklessness in *Campbell* had caused any difficulty in directions to juries. By contrast, if *Campbell* were overturned, it would mean that for 26 years in Victoria anyone who had acted unreasonably with a foresight of the possibility, but not the probability, of serious injury would retroactively be guilty of an offence.

Conclusion

99 The Court of Appeal answered the point of law referred to it as follows:

"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* [1997] 2 VR 585."

That answer was correct. The combination of the three reasons discussed above entrenched the meaning of recklessness taken in *Campbell* to the offence under s 17 of the *Crimes Act*.

100 It may be that the same result is also required for the alternative offence in s 15B, inserted in 2013²¹¹, and possibly for offences such as recklessly engaging in conduct that places or may place another person in danger of death²¹². But the error in *Campbell* in relation to s 17 has not necessarily entrenched this meaning

²⁰⁹ Juratowitch, *Retroactivity and the Common Law* (2008) at 52.

²¹⁰ *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13.

²¹¹ *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic), s 4.

²¹² *Crimes Act 1958* (Vic), s 22.

of recklessness for all other offences in the *Crimes Act*. 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. For instance, there are numerous offences involving recklessness where the laws of New South Wales and Victoria were enacted in nearly identical terms and thus plainly by reference to each other with the need for coherent operation: being reckless as to whether something is proceeds of crime²¹³; being reckless as to whether conduct corrupts a betting outcome of an event²¹⁴; being reckless as to the spread of fire to vegetation²¹⁵; and being reckless as to any impairment of access to, or the reliability, security or operation of, any data held in a computer²¹⁶.

101 Even in the application of the *Campbell* decision to s 17 in this confined way, the decision of a majority of this Court in this case (including myself) has some unattractive consequences. First, it creates incoherence in the application of the same statutory concept across different Australian States. The s 17 offence of recklessly causing serious injury to another person will be subject to a more onerous test for recklessness than the offence in New South Wales requiring that a person is "reckless as to causing actual bodily harm"²¹⁷. Secondly, in exceptional cases, the application of the Victorian approach could lead to surprising results²¹⁸. But, for the three reasons explained above, any development of the meaning of recklessness to address these consequences is a matter for Parliament. The development of the law by the exercise of legislative power, in its usual prospective operation and as a product usually of careful policy consideration, is not constrained in the same way as judicial power.

213 *Crimes Act 1900* (NSW), s 193B(3); *Crimes Act 1958* (Vic), s 194(3).

214 *Crimes Act 1900* (NSW), s 193P(1)(a); *Crimes Act 1958* (Vic), s 195E(1)(a).

215 *Crimes Act 1900* (NSW), s 203E(1)(b); *Crimes Act 1958* (Vic), s 201A.

216 *Crimes Act 1900* (NSW), s 308D(1)(c); *Crimes Act 1958* (Vic), s 247C(c).

217 *Crimes Act 1900* (NSW), s 35.

218 See above at [88].