HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

IN THE MATTER OF:

THE DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO. 1 OF 2019

APPELLANT'S REPLY

Part I:

1. These submissions are in a form suitable for publication on the internet.

Part II:

2. The meaning given to the concept of criminal recklessness for offences against the person, other than murder, in Victoria is entirely derived from and is a product of the common law. As the respondent notes, the legislature eschewed a statutory definition of recklessness when introducing the offence of recklessly casing serious injury and the allied offences in 1985. With one exception, in a particular context,[1] there remains to this day no statutory definition of criminal recklessness in Victoria.

3. In none of the instances of legislative change relied on by respondent[2] has the legislature adopted, authorised or approved the so-called 'settled interpretation'. None of those changes compels the conclusion that the legislature, by necessary implication, must have done so. Without expressly (or by necessary implication) adopting that interpretation, it remains a common law concept for Courts to consider and correct, if erroneous. The amendments to the meaning of injury and serious injury[3] concerned the 'result' element of the offence, ensuring only the causing of properly 'serious' injuries which reflected the gravity of offences liable to be charged as causing serious injury intentionally or recklessly. The then Attorney-General noted[4] the earlier practice of including 'a combination of injuries' amongst the previous definition of 'serious injury' allowed the inclusion of no more

[1] Section 318(2)(a) of the *Crimes Act* 1958 defines, for the purpose of the offence of culpable driving causing death, 'recklessly' as the conscious and unjustified disregard of a substantial risk that the death of or infliction of grievous bodily harm on another person would result from the driving of the accused.
[2] Respondent's Submissions [10]-[18].
[3] Ibid [16], [24].
[4] Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012, p5550 – 5551.

than a combination of bruises[5] as a 'serious injury'. This change says nothing about the proper construction of the mental element of the offence.

4. The appellant takes issue with the respondent's analysis of the then Attorney-General's second reading speech on the introduction of the relevant legislation.[6] While the second reading speech is an important and useful document when considering the appellant's overall contention in this reference, it ought be borne in mind that the Director is not seeking for this Court to intervene in settling a statutory interpretation quarrel from 1985. Rather, having considered this Court's judgment in *Aubrey*[7] it is apparent Victoria has suffered from the continuation of a long-standing misapplication of the common law, the appellant seeks this Court correct this line of authority which can be seen, now, to be wrongly decided.[8]

5. The respondent contends the 'settled interpretation' should prevail. However, they do not grapple at all with the contention this 'settled interpretation' represents the result of a misapplication of the common law and an error of principle[9]. The 'settled interpretation' traces its roots back to the misapplication of *Crabbe*[10] and into a context far broader than was intended in *Crabbe.* The fact that this error has continued over time does nothing to correct it. By the decision of this Court in *Aubrey* the repeated error in Victoria was made evident. The appellant contends past errors should not prevent the application of the contemporary understanding of the construction of criminal recklessness, as explained by this Court in *Aubrey*.

6. The respondent makes the point that in the years following *Campbell*,[11] the legislature did not act to correct the error arising from *Nuri*[12] and *Campbell* and legislate the foresight of possibility construction of recklessness - but nor has the legislature expressly or by necessary implication adopted the foresight of probability construction. Resultingly, the construction of the concept of criminal recklessness thereby remains firmly embedded in the province the common law.

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[5] In the second reading speech the Attorney-General used the example of two black eyes having been regarded as a serious injury under the previous definition.
[6] Respondent's Submissions [8], [41]–[42].
[7] *Aubrey v The Queen* (2017) 260 CLR 305 ('*Aubrey'*).
[8] Ibid [47].
[9] *Blackwell v The Queen* (2011) 81 NSWLR 119 [66]-[78], *Aubrey* [47].
[10] *R v Crabbe* (1985) 156 CLR 464 ('*Crabbe').*
[11] *R v Campbell* [1997] 2 V.R. 585 (*'Campbell'*).
[12] *R v Nuri* [1990] V.R. 641 (*'Nuri'*).

7. The respondent seeks support for his argument from sources such as the introductory paragraphs of a research report by the Sentencing Advisory Council through which, they suggest, Parliament must have accepted, and indeed adopted, the *Campbell* construction of recklessness. Taking that example, it is not persuasive to point to a research paper produced by an advisory group which simply recites the prevailing interpretation of the offence at the time. This hardly compels the conclusion that the legislature itself must therefore have accepted and adopted the C*ampbell* construction of recklessness. Moreover, issues of penalty and legislative sentencing regimes say nothing in themselves about the proper
10 construction of criminal recklessness in Victoria. If it is that the respondent is correct that the correction of the common law construction of recklessness to foresight of possibility results in a need to re-legislate certain penalty provisions then that is response that the legislature are uniquely able to take, if necessary.

8. Properly considered, nothing in the amendments to the C*rimes Act* and, even less so, the *Sentencing Act* relied on by the respondent compels the conclusion Parliament accepted and adopted the *Campbell* construction of recklessness. Rather, the current construction remains a product of the common law and is entirely appropriate for this Court to consider and correct.

The impact on offences other than RCSI

20 9. As there is no statutory definition of recklessness in Victoria to be altered, any change would be to the common law interpretation of that concept. A decision of this Court would mean that wherever an offence provision derives the meaning of recklessness from *Campbell* that case ought not be followed, and in future recklessness is to be interpreted as this Court determined in *Aubrey*.

10. The respondent relies on *Orbit Drilling*[13] to support their argument that the meaning of recklessness is "settled". A review of the relevant passage relied on by the respondent demonstrates the circular nature of their argument. The 'settled' meaning of recklessness stated in *Orbit Drilling* cites *Nuri* as the supporting authority for which in turn - wrongly[14] - draws on this Court's decision in *Crabbe.*

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[13] *Orbit Drilling Pty Ltd v R; Smith v R* (2012) 35 VR 399.
[14] See *Aubrey* [46]-[47].

Closely examined, the respondent's "building blocks" without exception trace their history back to the misapplication of *Crabbe* in Victoria in *Nuri* and *Campbell.*

11. The reach and impact of the misapplication of *Crabbe* in Victoria is plain, even in the respondent's example regarding the enactment of s.32 of the *Occupational Health and Safety Act* 2004. That section is in almost identical terms to s.23 of the *Crimes Act* 1958 (including only an additional reference to conduct occurring in a workplace), which was the section considered by the Court in *Nuri* - the very decision which misapplied this Court's decision of *Crabbe*. While perhaps 'aware' of the common law interpretation of recklessness at the time, it cannot be concluded necessarily the legislature adopted that definition as their own by the enactment of s.32 of the *Occupational Health and Safety Act* 2004. Certainly, the legislature did not include recklessness as a defined term in the legislation.

Retrospective expansion?

12. This respondent incorrectly asserts the Director seeks a 'retrospective expansion of the criminal law'. This is not the case. What is sought is a correction of error in the common law interpretation by Victorian Courts of criminal recklessness, an error which has significantly *contracted* the intended law's intended reach. That those who might have profited from this contraction and escaped liability for their criminal conduct could no longer do so is hardly a reason to not to make necessary change and restore the coverage of the criminal law to include the foresight of the possibility of the relevant consequence. It is noted the change would not make conduct lawful which was previously unlawful. Those who have been prosecuted and convicted for recklessness offences established to the *Campbell* construction standard will have been convicted on a more onerous test than that stated in *Aubrey.*

Consistency between the states

13. Fundamentally, differences between statutes in different states may well result in differences in practices and procedures. What is offered by the reference question is not merely consistency for consistency's sake, but the promotion of predictability and certainty. Like provisions ought to be treated alike, consistency between like provisions promotes confidence and trust in legal systems. Both New South Wales and Victoria owe the lineage of malice and recklessness in the context of offences

against the person to the same sources. All other things being equal, which they are, the concept of criminal recklessness should be interpreted consistently.

A brake on liability?

14. The appellant rejects the respondent's claim of any implicit concession[15] that injustice would result from a finding the correct interpretation of the meaning of the term 'reckless' for offences other than murder in Victoria should be, as stated by this Court, foresight of the possibility of the relevant outcome and proceeding in the face of the possibility of the occurrence of that outcome.[16]

15. Consistent with statements from this Court,[17] considerations of social utility may occasionally arise, but such considerations depend on the facts of the case and are no reason to adopt or maintain an erroneous construction of recklessness. To establish the offence of RCSI the prosecution must currently prove an accused's conduct was performed without lawful justification or excuse. Considerations of social utility, if they were to arise, would be expected do so in the context of a jury's consideration of this element, which would not be altered by an affirmative answer to the reference question.

Dated: 19 March 2021

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[15] Respondent's Submissions [46].
[16] *Aubrey* [46]-[47].
[17] *Aubrey* [48]-[51].