HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M131/2020**

IN THE MATTER OF:

THE DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE NO. 1 OF 2019

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ACQUITTED PERSON'S SUBMISSIONS

Part I: Suitability for internet publication

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

Part II: Statement of the issue

2. This appeal gives rise to the following issue:

> Should this Court discard the settled interpretation given to the word
20 'recklessly' in the Victorian offence of causing serious injury recklessly, and instead adopt the Director's postulated interpretation, thereby significantly expanding liability for that offence, notwithstanding that:
> - The extrinsic materials surrounding the enactment of the offence provide no, or very little, support for the postulated interpretation;
> - The legislature, perceiving that the offence being too readily established was a mischief that must be corrected, has acted to reduce the coverage of the offence; and
> - The legislature has relied on the settled interpretation in creating an aggravated version of the offence, and in setting new maximum and
30 mandatory minimum penalties for both the simple and aggravated version of the offence?

Part III: Notice

3. The Acquitted Person has considered whether notice should be given pursuant to s 78B of the Judiciary Act 1978. No such notice is required.

Part IV: Facts

4. There are no facts in dispute.

Part V: Argument

5. The issue which was dispositive in the Court of Appeal,[1] which should be dispositive in this Court also, was the history of legislative action subsequent to the word 'recklessly' coming to have a settled interpretation for the purposes of
10 s 17 of the *Crimes Act* 1958 (Vic). To alter the settled interpretation would frustrate the will of parliament, which relied upon the settled interpretation to construct an intricate statutory response to the determination of criminal liability and punishment for acts of violence against the person in Victoria. To adopt the Director's postulated interpretation would reduce the threshold of liability for offences that carry mandatory minimum sentences far below what was intended by the legislature when enacting those penalties. In the context of a settled interpretation that has endured for three decades without academic or judicial criticism, or any difficulties in the operation of the law, there is no justification for such a dramatic step.

20 6. It is necessary to commence by setting out the relevant statutory history.

The history of the causing injury offences in the Victorian *Crimes Act*

7. In 1980, the Fourteenth Report of the Criminal Law Revision Committee of the United Kingdom set out a series of recommendations designed to modernise the offences against the person.[2] They recommended the creation of three offences: intentionally causing serious injury (**ICSI**), recklessly causing serious injury (**RCSI**), and a single offence of intentionally or recklessly causing injury (**ICI** or

[1] [2020] VSCA 181 ('**Judgment below**').
[2] United Kingdom, Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person* 1980

RCI).[3] The Committee warned that there was no unanimity as to the meaning of 'recklessly' in the criminal law'[4] and therefore recommended that it be a defined term. The Committee favoured a definition of recklessness that had both qualitative and quantitative features; i.e. one that focussed on both the likelihood of the foreseen result, and whether it was objectively unreasonable to take the risk in the circumstances known to the defendant.[5] The Committee cautioned that a failure to include a definition of the word 'recklessly' would result in a period of uncertainty until an authoritative definition was settled upon by the Courts.[6]

8. On 25 September 1985, the *Crimes (Amendment) Bill* was read for the second time. It contained, in s 8(2), the three causing injury offences recommended by the Criminal Law Revision Committee. The Attorney-General identified the new offences against the person as based on the Committee's work.[7] Only in passing, whilst explaining why separate offences of ICSI and RCSI had been created, but ICI and RCI had been lumped together in one offence, did the Attorney advert to the concept of recklessness, to explain that there was a sufficient difference in moral turpitude between intentionally and recklessly causing serious injury to justify distinct causing *serious injury* offences, but not such a difference as to justify distinct causing *injury* offences.[8] That conclusion, too, was drawn from the Committee's report.[9]

9. Despite the Committee's warning, the legislature chose not to define the terms 'intentionally' and 'recklessly'. As foreseen by the Committee, the legislature having eschewed the task of defining the term 'recklessly', once the Victorian Courts determined the meaning to be given to that expression in the context of the new offences against the person, it was treated thereafter as settled law. In 1990, in *Nuri v R*,[10] the Court of Appeal observed that '[p]resumably conduct is relevantly reckless if there is foresight on the part of the accused of the probable

[3] Ibid at [152].
[4] Ibid at [6].
[5] Ibid at [11]-[12].
[6] Ibid at [7].
[7] Victoria, *Parliamentary Debates*, Legislative Council, 25 September 1985, p202.
[8] Ibid p201.
[9] United Kingdom, Criminal Law Revision Committee, *Fourteenth Report: Offences Against the Person* 1980, at [152].
[10] [1990] VR 641 at 643.

consequences of his actions and he displays indifference as to whether or not those consequences occur'. By 1995, when *R v Campbell*[11] was decided, the law had solidified into its current form. In that case, the Director of Public Prosecutions conceded that 'the prevailing practice in relation to s 17 and related sections of the Crimes Act 1958 is to direct a jury as to foreseeability that the injury would *probably* occur'.[12] Since then, the Court of Appeal has applied the established meaning of recklessness on numerous occasions.[13] The Director of Public Prosecutions has not, on any occasion in the intervening decades, sought to set the law upon what the Director now contends was its true path, or identified any vice in the settled approach.

10. In 1991, the *Sentencing Act* 1991 (Vic) was introduced. As part of the new approach to sentencing, maximum penalties underwent a wholesale realignment.[14] At that stage, the maximum penalty for ICSI was reduced to 12.5 years, thus closing the gap between the maxima for ICSI and RCSI (which still carried a maximum of 10 years). The offences of ICI and RCI became punishable by maxima of 7.5 and 5 years respectively.

11. In 1997, an 'extensive review of the maximum penalties available for the majority of indictable offences' was undertaken by the Justice Department.[15] By then, as already observed, the approach to the meaning of recklessness in this context had long-since been settled.[16] The review, and the reconfigured maximum penalties it produced, were informed by extensive consultations including a Crown Prosecutor's interviews with over 100 Judges, Magistrates and other 'stakeholders'.[17] In light of such extensive information, the utilisation of a Crown Prosecutor who was an expert in the day-to-day operation of the criminal law to

[11] [1997] 2 VR 585.
[12] Ibid at 592.
[13] It suffices, without any attempt to be exhaustive, to cite: *R v Ruano* [1999] VSCA 54 at [8], *R v Le Broc* (2000) 2 VR 43 at [56], *R v Kucma* (2005) 11 VR 472 at [4] and [29], *R v Wilson & Carman* [2005] VSCA 78 at [17], *R v Pota* [2007] VSCA 198 at [26], *R v Abdul-Rasool* (2008) 18 VR 586 at [67] – [69], *Ignatova v The Queen* [2010] VSCA 263 at [36] – [37], *Paton v The Queen* [2011] VSCA 72 at [46] – [49] and [68], *James v The Queen* (2013) 39 VR 149 at [148], *Ejupi v The Queen* [2013] VSCA 2 at [34], *Phillips v The Queen; Liszczak v The Queen* [2017] VSCA 313 at [43].
[14] The alterations were enacted by Sch 2 of the *Sentencing Act* 1991 (as enacted).
[15] Victoria, *Parliamentary Debates*, Legislative Council, 27 May 1997, p1059.
[16] See, eg, *R v Campbell* [1997] 2 VR 585.
[17] Victoria, *Parliamentary Debates*, Legislative Council, 27 May 1997, p1058.

gather information, the fact that the offences of ICSI, RCSI, ICI and RCI comprise approximately a quarter of that day-to-day operation,[18] it cannot but be concluded that the re-setting of the maximum penalties proceeded on the basis of the settled understanding of what was required in proof of those offences.

12. As a result of the review, the *Sentencing and Other Acts (Amendment) Act* 1997 was enacted, with the consequences that the maximum penalty for ICSI was increased to 20 years, that for RCSI was increased to 15 years, and those for ICI and RCI were set at 10 and 5 years respectively.[19]

13. In 2011, the Sentencing Advisory Council released a report entitled *Statutory Minimum Sentences for Gross Violence Offences*.[20] At the Attorney-General's request, the report dealt with sentencing for ICSI and RCSI, the introduction of mandatory minimum sentences for those offences when committed in particular circumstances, and provided estimates of the impact on the prison population of changes to those offences.[21] The authors of the report set out, in its introduction, the settled meaning of recklessness:[22]

> 'The element of recklessness will be satisfied for [RCSI] 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.'

14. The authors designed aggravated versions of ICSI and RCSI, and recommended their introduction.[23]

15. Following the Attorney-General's receipt of that report, the *Crimes Amendment (Gross Violence Offences) Act* 2013 was enacted. That Act introduced aggravated versions of ICSI and RCSI, where those offences are committed in

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[18] The causing injury offences generally comprise somewhere between 20% and 30% of the work of the criminal division of the County Court {County Court of Victoria, Annual Report 2015-16 at 16; County Court of Victoria, Annual Report 2016-17 at 14; County Court of Victoria, Annual Report 2017-18 at 17.}

[19] *Sentencing and Other Acts (Amendment) Act* 1997, s 60, Sch 1, Items 10, 11 and 12.

[20] Victoria, Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences, Report*, October 2011

[21] Ibid Chapter 7, at p111 *ff*

[22] Ibid at [1.20], p4.

[23] Ibid Recommendation 1, at xiv.

circumstances of gross violence.[24] In his second reading speech, the Attorney-General observed that the government had 'carefully considered' the report,[25] and 'adopted many of' the authors' recommendations.[26] Section 9 of the Act also introduced provisions mandating that conviction for the new offences must be met by the imposition of a gaol sentence with a non-parole period of not less than four years, in the absence of one of the specified special reasons. The mandatory minimum period was that recommended by the Sentencing Advisory Council,[27] and had been explicitly calibrated to the least serious conduct capable of falling within the offence, which involved foresight of the *probability* of serious injury.[28]

16. The *Crimes Amendment (Gross Violence Offences) Act* 2013 also significantly altered the coverage of the older causing injury offences, by replacing the definitions of both injury and serious injury in s 15 of the *Crimes Act* 1958.[29] The Attorney-General explained in his Second Reading speech that these changes, which were derived 'from work on possible reforms to fatal and non-fatal offences that the Department of Justice has been undertaking for some time', were intended to remedy the mischief that the serious injury offences were engaged at a 'very low threshold'.[30] That is, the legislature perceived as a mischief, and acted to correct, precisely that which the Director now seeks to achieve, namely a low threshold to the engagement of, inter alia, RCSI.

17. The *Sentencing Amendment (Emergency Workers) Act* 2014 built on the reforms of the year before. Section 4 of that Act introduced a new s 10AA into the *Sentencing Act* 1991. Notably, that provision introduced a new mandatory minimum non-parole period for the offences of ICSI and RCSI, when committed 'against an emergency worker on duty'. In 2016, the legislature extended that regime to encompass also the same offences committed against a 'custodial

[24] The aggravated offences are now contained in ss 15A and 15B of the *Crimes Act* 1958.
[25] Victoria, Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences, Report*, October 2011.
[26] Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012, p5550.
[27] Victoria, Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences, Report*, October 2011, Recommendation 1, at xiv.
[28] Ibid at [2.203], [2.209] -[2.210], p47 – 48.
[29] Section 3 of the Amending Act introduced the new definitions.
[30] Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 2012, p5550.

officer on duty'. That reform was made by s 3 of the *Crimes Legislation Amendment Act* 2016.

18. Finally, by ss 3 and 4 of the *Sentencing (Community Correction Order) and Other Acts Amendment Act* 2016, parliament introduced a new broad-ranging sentencing scheme which mandated, or prima facie required, the imposition of a custodial sentence for certain offences. In the case of defined 'Category 1' offences, a custodial sentence was mandated. In the case of defined 'Category 2' offences, a custodial sentence was prima facie required. By force of the definitions inserted by s 3 of the amending Act into s 3 of the *Sentencing Act* 1991, the aggravated versions of ICSI and RCSI that had been introduced by the 2013 amendments became Category 1 offences, and ICSI became a Category 2 offence. This new sentencing scheme was later amended, by force of s 73(1)(a) of the *Justice Legislation Miscellaneous Amendment Act* 2018, so that ICSI, RCSI, ICI and RCI were all treated as Category 1 offences if they were committed against on duty emergency workers, custodial officers or youth justice officers, and the offender 'knew or was reckless' as to that fact. The relevance of this new sentencing scheme to the present case is that it had the effect of introducing mandatory minimum penalties for RCSI.

19. The legislature has made other amendments to the causing injury offences which, although of less significance in the present context, nevertheless reinforce the proposition that Parliament has not been hesitant to intervene to correct any perceived mischief in operation of the causing injury offences.[31]

20. That history demonstrates six matters of some significance to the present proceeding. It is convenient to identify those matters, before turning to their relevance to the present case.

21. First, and contrary to the contention underlying the Appellant's argument, the offences against the person in the *Crimes Act* were not merely enacted to modernise the language used in the old offences against the person without

[31] For instance, in 2008, the definition of serious injury in s 15 of the *Crimes Act* was altered to exclude an abortion performed by one of a defined class of medical practitioners: see s 10 of the *Abortion Law Reform Act* 2008.

affecting the coverage of those offences.[32] Rather, the new offences formed part of a novel suite of offences intended to reform the law, in which the meaning of the word recklessly was not anchored to old concepts of malice.

22. Secondly, the legislature has not been reluctant to amend the operation of the causing injury offences to 'fine-tune' their operation or to correct perceived mischief in their operation.

23. Thirdly, having engaged in a detailed examination of, inter alia, the causing injury offences, the legislature recalibrated the maximum penalties to ensure they aligned with the criminality involved in those offences.

10 24. Fourthly, following considerable work done on the causing injury offences by the Department of Justice and the Sentencing Advisory Council, the scope of ICSI and RCSI was amended by parliament in 2013, to remedy the mischief that the offences were *too readily* made out, because the threshold for serious injury was *too low*. Self-evidently, it would frustrate parliament's purpose in making those amendments, to now lower the threshold for proof of RCSI in a different (and rather more dramatic) way.

25. Fifthly, the legislature has enacted an aggravated version of RCSI, which was explicitly formulated on the basis of the settled meaning of recklessness.

26. Sixthly, the legislature has enacted mandatory minimum penalties for both the
20 simple and aggravated forms of RCSI, which were based upon, and carefully attuned to, the lowest level of offending that could be made out upon the settled meaning of recklessness.

The relevance of the statutory history subsequent to enactment of s 17

27. The Appellant pays scant regard to the history set out above. Instead, the Appellant makes an argument based upon the legislative intention when s 17 was introduced in 1985, and downplays or ignores the subsequent history. Leaving aside for a moment the proper construction of the provisions if this Court were tasked with construing them in 1985, the key difficulty with the Appellant's

[32] *Cf* Appellant's Submissions, 29 January 2021, at [13].

revanchist approach is that it ignores the fundamental proposition that this Court is to construe the relevant provisions as they stand in 2021, not as they stood in 1985.

28. The numerous amendments that have been made to the *Crimes Act* 'form part of its legislative history and bear legitimately on its construction'.[33] They should be 'read together "as a combined statement of the will of the legislature"'.[34] The *Crimes Act*, in its amended form, 'must be read as an integrated whole'.[35] This is why an amending Act may even alter the meaning that *un*amended provisions had before the amending Act was passed.[36] The correct interpretation can only be reached by reading s 17 in its total context, including the legislative history until the present day.

29. Moreover, given the intertwined nature and histories of the *Crimes Act* and the *Sentencing Act*, the *Sentencing Act* forms an important part of the context in which the *Crimes Act* comes to be construed. That accords with the modern approach to statutory interpretation, which requires that context be considered in the first instance, and uses context in its widest sense,[37] such that it includes other sources of law which assist in fixing the meaning of the statutory word or phrase under consideration.[38]

30. It follows that the proper construction of s 17 of the *Crimes Act* cannot be approached in the manner of the Appellant's argument, by simply looking to the second reading speech accompanying the introduction of s 17, without regard to the legislative action subsequent to s 17 coming to have a settled meaning.

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[33] *Plaintiff S297 of 2013 v Minister for Immigration* (2014) 255 CLR 179 at [25] (Crennan, Bell, Gageler and Keane JJ).
[34] Ibid.
[35] *Comptroller-General of Customs v Zappia* (2018) 265 CLR 416 at [6] (Kiefel CJ, Bell, Gageler and Gordon JJ), [43] (Nettle J).
[36] *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463 (Brennan CJ, Dawson and Toohey JJ).
[37] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
[38] *R v Lavender* (2005) 222 CLR 67 at [36] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

The relevance of the settled interpretation

31. It is desirable to next identify the proper level of deference to be accorded to the fact that the settled interpretation has stood undisturbed, indeed unchallenged, for decades. Courts should be slow to overrule a construction of a statute that has stood for many years.[39] Before departing from their own precedents, appellate Courts must reach the conclusion that the interpretation is 'plainly wrong', or 'clearly erroneous'.[40] Similar deference is accorded by this Court to an interpretation of a statute by an intermediate appellate court, which has stood undisturbed for many years.[41]

10 32. The legislation in question having been amended after the settled interpretation has special significance. A court must uphold a settled interpretation if it can be inferred that parliament has, by subsequent legislation, approved that interpretation.[42] That principle is consonant with the fundamental objective of statutory interpretation, namely to give the words 'the meaning that the legislature is taken to have intended them to have'.[43] It is also consistent with the force given to the re-enactment principle (which holds that parliament, when re-enacting words, 'is taken to have intended the words to bear the meaning already "judicially attributed to them"'[44]) when it can be shown or inferred that the legislature was aware of the settled meaning of the phrase that has been re-
20 enacted.[45]

33. The importance of a settled interpretation having predated statutory action, even in the absence of any clear indication that the legislature has acted on the basis of the settled interpretation, may be seen in the various judgments in *Calidad Pty*

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[39] *Platz v Osborne* (1943) 68 CLR at 147 (Williams J), at 141 (Rich J), and at 145-6 (McTiernan J).
[40] *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), *Gett v Tabet* (2009) 254 ALR 506 at [293]-[294] (Allsop P, Beazley and Basten JJA).
[41] *Barbaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13-14 (Mason J), 22-24 (Wilson and Dawson JJ), 28-29 (Brennan and Deane JJ, in dissent). See also *Aubrey v R* (2017) 260 CLR 305 at [35]-[36] (Kiefel CJ, Keane, Nettle and Edelman JJ), [55] (Bell J).
[42] *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* (1974) 129 CLR 576 at 584 (Lord Diplock, Lord Hodson, Lord Devlin, Viscount Dilhorne and Lord Killbrandon).
[43] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 511 (McHugh, Gummow, Kirby and Hayne JJ).
[44] *Re Alcan Australia Ltd; Ex p Federation of Industrial Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106 (the Court).
[45] See, eg, *Electrolux Home Products v AWU* (2004) 221 CLR 309 at [81] (McHugh J), see also at [162] (Gummow, Hayne and Heydon JJ).

Ltd v Seiko Epson Corporation (2020) 94 ALJR 1044. Chief Justice Kiefel, Bell and Keane JJ, felt at liberty to depart from the implied licence doctrine because of the absence of extrinsic materials suggesting the adoption of the doctrine when the subsequent legislation was enacted,[46] and because the doctrine did not form an essential part of the reasoning of any Australian court.[47] The dissentients, Nettle, Gordon and Edelman JJ, considered that the enactment of the various iterations of patent legislation since the implied licence doctrine was accepted required that any decision to abandon that doctrine was a matter for parliament rather than the courts.[48] Had it been shown that the legislature 10 'assumed the continued application' of the doctrine when enacting subsequent patent legislation, Gageler J would have agreed with the dissentients.[49]

34. In an area of the law that is the subject of such vociferous political debate and such frequent legislative intervention as the criminal law generally, and the offences against the person in particular, the assumption that the legislature was aware of the settled meaning when it made the various legislative changes to the operation of s 17 since 1990 is inescapable.[50] However, in this case, it is not necessary to make any such assumption. The history laid out above demonstrates that the legislature was specifically aware of the settled interpretation of recklessness in the context of RCSI, and acted on the basis of 20 that interpretation.

35. Aware of the settled interpretation, the legislature re-set the maximum penalty. It altered the definition of 'serious injury' so that the offence of RCSI covered less territory. It enacted an aggravated version of the offence. It introduced mandatory minimum penalties; indeed, it enacted mandatory minimum penalties that were explicitly calibrated to the lowest level of culpability that could arise on a person having foresight of the *probability* of serious injury. Self-evidently, mandatory minima formulated on that basis would be entirely inappropriate for the lowest level of culpability that could arise on a person who merely had

[46] At [102].
[47] At [107]-[110].
[48] At [213].
[49] At [139].
[50] See, by analogy, *Electrolux Home Products v AWU* (2004) 221 CLR 309 at [81] (McHugh J).

foresight of the bare *possibility* of serious injury. In the circumstances, the plurality in the Court of Appeal was entirely right to conclude that 'any decision to change the test is properly to be regarded as a matter for Parliament'.[51]

36. Turning to the Appellant's criticism of this aspect of the plurality judgment in the Court of Appeal,[52] that criticism does not confront the true force of the statutory history. The Appellant notices just two aspects of the history subsequent to 1985, the revision of the maximum penalty for RCSI in 1997,[53] and the enactment of the aggravated version of RCSI in 2013.[54] The Appellant claims that the first 'could hardly be described as a considered examination of the substance of the offence'.[55] That assertion cannot be reconciled with the prominence of the offences of ICSI, RCSI, ICI and RCI in Victorian criminal law (they have historically been charged, often as sequential alternatives, in roughly a quarter of Victorian prosecutions), and the extensive examination that underpinned the reconfigured maxima (which included the extensive involvement of a Crown Prosecutor, and interviews with over 100 Judges, Magistrates and other 'stakeholders').[56] Next, the Appellant denies any significance in the enactment of the aggravated version of RCSI, on the basis that it was not concerned with 'the nature of the substantive offence' of RCSI.[57] This criticism disregards the extrinsic material, which demonstrates that the aggravated version was designed around the settled meaning,[58] and ignores the problems attending giving 'recklessly' a different meaning in the simple and aggravated version.[59] Moreover, the Appellant's criticism ignores entirely the mandatory minimum penalties enacted on the basis that they reflected the lowest level of criminality that could come within the settled interpretation.[60]

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[51] Judgment below at [29].
[52] Appellant's Submissions, 29 January 2021, at [34] – [40].
[53] Ibid at [35]-[36].
[54] Ibid at [37]-[39].
[55] Ibid at [35]-[36].
[56] As to which, see above at [11].
[57] Appellant's Submissions, 29 January 2021, at [39].
[58] See above at [13]-[15].
[59] The aggravated version is inevitably jointly charged with the simple version as an alternative, so that if different meanings were adopted, a jury hearing a trial would have to be directed that 'recklessly' has a different meaning in the two identical contexts. Similar difficulties would arise in other trials: Judgment below at [121] (Priest JA).
[60] See above at [15].

The impact on offences other than RCSI

37. The legislative history gives rise to a discrete but related consideration, which is implicitly recognised in the Director's Reference, though the Appellant's submissions in this Court do not advert to it. The Director's Reference calls for the Court's opinion on the correct meaning of 'recklessness' for 'offences other than murder' in Victoria. Though the scope of the Reference is properly limited to the Court's opinion on a point of law that arose on the trial of the Acquitted Person (i.e. the meaning of 'recklessly' in the context of s 17 of the *Crimes Act*),[61] the breadth of the Reference drafted by the Director recognises that the proliferation of offences of 'recklessness' since the settled interpretation was adopted presents a binary choice between the retention of the settled interpretation and a wholesale change to all those offences of recklessness that were enacted in light of the settled interpretation.

38. It is therefore necessary to give at least some idea of the scope of the change that the Director invites this Court to make. Since it came to have a settled meaning in Victoria, recklessness has become one of the standard building blocks utilised by the legislature in the creation of criminal offences. The concept of recklessness has been deployed, without definition, in numerous offences within the *Crimes Act*.[62] That settled meaning was 'well known' in Victoria when those offences were enacted.[63] It would be entirely inappropriate for this Court to alter the shape of that building block, long after the legislature consciously used it in the construction of new criminal offences. To do so would be to alter the structure of the criminal law from that which was intended by the legislature.

39. One example suffices to make the point. In *R v Nuri,*[64] the Full Court settled the meaning of 'recklessly' for the purposes of the reckless endangerment offence in s 22 of the *Crimes Act*. Fourteen years later, the legislature included in the *Occupational Health and Safety Act* 2004 a reckless endangerment offence that

[61] *Criminal Procedure Act* 2009, s 308.
[62] Judgment below at [123] (Priest JA).
[63] *Orbit Drilling Pty Ltd v R; Smith v R* (2012) 35 VR 399 at [21] (Maxwell P, Bongiorno and Kyrou JJA). It might be observed that Bongiorno JA, as the Director of Public Prosecutions for Victoria in the 1990's, was especially well placed to appreciate how well-settled and well-known the law concerning recklessness had long been.
[64] [1990] VR 641.

was based upon that examined by the Full Court in *R v Nuri*. The Attorney-General observed that 'the same standards, tests and penalty' would apply as in the reckless endangerment offence examined in *R v Nuri*.[65] The clear intent to adopt the settled meaning of recklessness should not now be subverted, as if by a sidewind, in a Director's Reference in which no consideration has been given to that or other provisions that stand in a similar position. That point is all the more forceful given that the Order sought by the Appellant would expose persons to liability beyond the confines of the offences as they were conceived by the legislature.

10 **Retrospective expansion of the criminal law**

40. Even restricting oneself to the offence of RCSI, the reinterpretation for which the Director advocates would result in persons who engaged in conduct that was not believed to be criminal at the time they engaged in that conduct being exposed to conviction for that past conduct, and also to a mandatory minimum penalty that was not intended by parliament to operate in such circumstances. The injustice of such a situation is 'elementary'.[66]

The extrinsic materials relating to the 1985 amendments

41. It is convenient at this point to return to the enactment in 1985 of the new offences against the person in the *Crimes Act*. Once the source of the new offences is
20 acknowledged, it is apparent that the authorities dealing with 'malice' before 1985 were of no real significance to the construction of 'recklessly' within the new causing injury offences. The designers of the new offences warned in their report that the concept of recklessness did not have any unitary accepted meaning, with the consequence that, if parliament did not define the term, there would be a period of uncertainty until the courts settled upon a meaning.[67] That directly engages the considerations identified in *Telstra Corporation Ltd v Treloar* (2000) 102 FCR 595, where it was observed that in circumstances where the 'generality of the statutory language is deliberate and allows the courts to develop a body of law

[65] Victoria, *Parliamentary Debates*, Legislative Assembly, 18 November 2004, at p1764.
[66] *Samuels v Songaila* (1977) 16 SASR 397 at 399 (Bray CJ).
[67] See above at [9].

to fill the gaps', it would be sound policy that once an interpretation has been settled upon by an appellate court 'then that should be the end of the matter'.[68]

42. Despite this, the Director points to a passing remark in the second reading speech to suggest a test of possibility rather than probability.[69] That passing remark was not directly addressing the meaning of recklessness, but rather was directed at explaining why the offences had been structured as they were.[70] That being so, Spigelman CJ's observation in *Harrison v Melhem* (2008) 72 NSWLR 380 at [12] that '[s]tatements of intention as to the meaning of words by ministers in a Second Reading Speech… are almost never useful' is particularly apt. Next, the Director highlights an observation in the second reading speech that it was not intended 'to reduce the coverage' of the offences against the person.[71] The observation relied upon was concerned to make the point that the totality of the new offences against the person, which were to appear in 16 separate sections (ss 15 to 31 of the *Crimes Act* inclusive), would cover no less terrain than the prior offences against the person, which had until then appeared in 32 separate sections (ss 11 to 13 and 15 to 43 of the *Crimes Act* inclusive). That observation about the scope of the entirety of the new offences says nothing of the specific scope of the offence of RCSI. The extrinsic material surrounding the introduction of the offences against the person in 1985 does not assist the Appellant.

The Director's call for 'consistency between the States'

43. The Appellant frames this appeal as concerned with the achievement of 'consistency, so far as desirable, between the states'.[72] Australia's federal structure results in the States having general responsibility for the enactment of criminal laws. Inevitably, the various States 'take often quite different views on the criminality to be ascribed to certain conduct'.[73] Such diversity inheres in a federal system in which State legislatures are accountable to their constituents, and State laws are correspondingly responsive to local conditions. Indeed, that

[68] *Telstra Corporation Ltd v Treloar* (2000) 102 FCR 595 at [27] (Branson and Finkelstein JJ).
[69] Appellant's Submissions, 29 January 2021, at [13]-[14]
[70] Victoria, *Parliamentary Debates*, Legislative Council, 25 September 1985, p201; and see above at [8].
[71] Appellant's Submissions, 29 January 2021, at [16].
[72] Appellant's Submissions, 29 January 2021, at [2](b).
[73] *Strickland (A pseudonym) v DPP (Cth)* (2018) 266 CLR 325 at [199] (Gordon J).

very point was implicitly recognised in this particular context by Kiefel CJ, Keane, Nettle and Edelman JJ in *Aubrey v R* (2017) 260 CLR 305 at [47], in observing that 'the requirements in States other than New South Wales may vary according to the terms of each State's legislation'. Eradication of the diversity that inheres in our federal system is neither a legitimate objective, nor a legitimate argument for the reinterpretation of the statute that is the cornerstone of the Victorian criminal law. Whether it is 'desirable' that the reach of statutory criminal offences enacted by the Victorian legislature should accord with the reach of analogous offences in New South Wales is a matter within the exclusive province of the Victorian legislature.

The Appellant's 'brake on liability'

44. In the Court of Appeal, the Appellant sought and was granted an amendment to the Reference so as to impose a 'brake on liability', to lessen the injustice that would result from a lowered threshold for criminal liability.[74] The Appellant thus introduced a new element to its postulated definition of recklessness. In doing so, it sought to introduce a test that had both quantitative and qualitative elements; a tribunal of fact would be required to assess the likelihood of serious injury and the reasonableness of the risk taken, in light of the social utility of the act being undertaken. A test of that general type had been included in the definition included in the draft of the legislation that was ultimately adopted in Victoria, but the legislature had determined not to enact such a definition. The Court of Appeal was right to respect the legislative rejection of such a definition.

45. Nor can the Appellant – having amended its postulated definition of recklessness to include a second element – legitimately complain that the Court of Appeal placed significance on that second element.

46. The Appellant's implicit concession in the Court below, that reducing the threshold for liability to foresight of a mere possibility of serious injury would result in injustice, such that it required a 'brake on liability',[75] is obviously right. However, the proper consequence is not for the Director to amend her postulated meaning, but to avoid the re-interpretation that is the cause of the injustice.

[74] Judgment below at [37] (Maxwell P, McLeish and Emerton JJA) and at [125] (Priest JA).
[75] Judgment below at [37] (Maxwell P, McLeish and Emerton JJA), at [125] (Priest JA).

Conclusion and orders

47. The Appeal should be dismissed.

48. The Appellant should be ordered to pay the Acquitted Person's reasonable costs, in accordance with the undertaking upon which the grant of special leave was conditioned.

Part VI: Argument in relation to Notice of Contention or Cross-Appeal

49. No notice of contention or cross-appeal has been filed.

Part VII: Time for argument

50. The Acquitted Person will require between 1 ½ and 2 hours for the presentation of oral argument.

Dated: 23 February 2021

Dermot Dann
Gorman Chambers
Telephone: 03 9225 6444
Email: Gorman@vicbar.com.au

Chris Carr
Gorman Chambers
Telephone: 03 9225 7777
Email: Gorman@vicbar.com.au

Annexure: Statutes referred to in these submissions

1. *Crimes Act* 1958 (Vic), Authorised Version No. 268, 1 February 2017
2. *Sentencing Act* 1991 (Vic), Authorised Version No. 180, 7 December 2016
3. *Sentencing and Other Acts (Amendment) Act* 1997 (Vic), Act 48 of 1997, 11 June 1997.
4. *Crimes Amendment (Gross Violence Offences) Act* 2013 (Vic), Act 6 of 2013, 26 February 2013.
5. *Sentencing Amendment (Emergency Workers) Act* 2014 (Vic), Act 69 of 2014, 23 September 2014
6. *Crimes Legislation Amendment Act* 2016 (Vic), Act 28 of 2016, 31 May 2016.
7. *Sentencing (Community Correction Order) and Other Acts Amendment Act* 2016 (Vic), Act 65 of 2016, 15 November 2016.
8. *Justice Legislation Miscellaneous Amendment Act* 2018 (Vic), Act 48 of 2018, 25 September 2018.
9. *Abortion Law Reform Act* 2008 (Vic), Act 1 of 2008, 23 October 2008.
10. *Criminal Procedure Act* 2009 (Vic), Version No. 69, 29 March 2019
11. *Occupational Health and Safety Act* 2004 (Vic), Authorised Version No. 001, 22 December 2004.