IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S274 of 2016

BETWEEN: MA
Appellant

and

10 THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication

20 1. It is certified that these submissions are in a form suitable for publication on the internet.

Part II: Concise statement of issues

2. Whether the word "inflicts" in the now repealed offence of maliciously inflict grievous bodily harm under s. 35 of the *Crimes Act* 1900 requires the application of violent bodily force to the victim.

3. Whether an act is done "recklessly" within the meaning of the now repealed
30 definition of "malicious" in s. 5 of the *Crimes Act* where the accused foresees the "possibility" of harm and yet determines to act despite this risk, or whether it is necessary for the accused to foresee the "probability" of harm and to determine to act despite this risk.

Part III: Section 78B of the *Judiciary Act*

4. It is certified that this appeal does not raise a constitutional question. The respondent has considered whether any notice should be given in compliance with s. 78B of the *Judiciary Act* 1903 (Cth). No such notice is required.

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Part IV: Statement of contested material facts

5. The respondent does not contest the appellant's outline of the facts of the offences in the appellant's written submissions ("AWS") [5] – [12], other than

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that the appellant was sentenced to a non-parole period of three years imprisonment (and not two years imprisonment).[1]

Part V: Applicable legislative provisions

6. In addition to the legislative provisions identified by the appellant, the following legislative provisions are relevant to the determination of this appeal:

Sections 39 and 61R of the *Crimes Act 1900* (NSW) (as at 2004)
Sections 7 and 24 of the *Criminal Law Amendment Act 1883* (NSW) (as enacted)

Part VI: Statement of Argument

Overview

7. The appellant was diagnosed with the Human Immunodeficiency Virus (HIV) in May 2002,[2] having contracted the illness after having unprotected sexual intercourse.[3] Following his diagnosis, the appellant was repeatedly warned by medical practitioners about the dangers of transmission and the need for safe sexual practices.[4]

8. The Crown case was that prior to initially having unprotected sexual intercourse with the appellant, the victim ("GB"), asked the appellant about his HIV status more than once and the appellant falsely assured GB that he was HIV negative. The appellant then infected GB with HIV by having unprotected anal sexual intercourse with him at some time between 1 January and 30 July 2004.

9. The appellant was charged with an offence of intentionally causing GB to contract a grievous bodily disease contrary to s. 36 of the *Crimes Act* and, in the alternative, an offence of maliciously inflicting grievous bodily harm contrary to s. 35(1)(b) of the *Crimes Act*. At the time of the alleged offence, the term "*maliciously*" was defined in s. 5 of the *Crimes Act* to include an "*act... done recklessly*".

10. At trial, the appellant contended that he did not intend to infect GB, but admitted that he knew that there was a possibility that he could infect GB by having unprotected anal intercourse. The appellant agreed that he "*went ahead with anal sex, knowing that there was a possibility that* [GB] *could be infected.*"[5] In the closing address to the jury, the appellant's counsel accepted that the appellant knew that there was a possibility that GB could be infected,

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[1] Cf AWS [11].
[2] Summing Up ("SU") at 52.21 [AB 104] and SU 58.59 [AB 110].
[3] Remarks on Sentence, ("ROS") at 7.5 [AB 139]; 12.48 [AB 144].
[4] ROS at 12 – 14 [AB 144 – 146].
[5] T610, cited in SU at 31.30 [AB 83].

and that he had been reckless.[6] The primary issue advanced by the appellant at trial in respect of count 2 was whether the Crown could prove that it was the appellant that infected GB, as opposed to GB having been infected by some other means.[7]

11. The jury acquitted the appellant of having intentionally caused GB to contract a grievous bodily disease (count 1), but found the appellant guilty of having recklessly inflicted grievous bodily harm (count 2).

12. The issues in the present appeal concern the question of whether it was open to the jury to find that the appellant had "inflicted" grievous bodily harm within the meaning of s. 35(1)(b) of the *Crimes Act* (Ground 1); and whether the trial judge correctly directed the jury that they could find that the appellant was reckless if "*at the time* [the appellant] *did the act he realised that some physical harm may possibly be inflicted upon* [GB] *by his actions, yet he went ahead and acted as he did*"[8] (Ground 2). For the reasons outlined below, both of these questions should be answered in the affirmative. The appeal should be dismissed.

Ground 1: Whether "inflicts" requires the application of violent bodily force to the victim

Introduction

13. At the relevant time, s. 35 of the *Crimes Act* relevantly prescribed an offence where a person maliciously "*by any means ... inflicts grievous bodily harm upon any person*".

14. As the Court of Criminal Appeal found in the first appeal (which was followed in the second appeal), the ordinary and natural meaning of the word "inflicts" includes "*to impose as something that must be borne or suffered*" or to "*impose (anything unwelcome)*".[9] However, the appellant contends that the word "*inflicts*" should be read more narrowly. In particular, the appellant submits that the word "*inflicts*" requires the prosecution to demonstrate that an accused has done an act that results in force being applied violently to the body of the victim. In support of this contention, the appellant relies on the limited meaning of the word "inflicts" ascribed to that term by a majority of the Queen's Bench Division in ***R v Clarence*** (1888) 22 QBD 23 and contained in *obiter dictum* of the Full Court of the Victorian Supreme Court in ***R v Salisbury*** [1976] VR 452. The appellant also contends that the enactment in 1990 of the offence of intentionally causing a person to contract a grievous bodily disease (s. 36 of the *Crimes Act*) would have been redundant unless the word "inflicts" required the application of violent physical force.

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[6] T28/8/13 at p. 763. (The transcript of the defence closing address will be supplied to the Court prior to the hearing of this appeal.)
[7] SU at 10.53; [AB 62]
[8] SU at 30.30; [AB 82].
[9] *R v Aubrey* [2012] NSWCCA 254 at [52]; [AB 26].

15. It is submitted that the ordinary and natural meaning of the word "*inflicts*" is the proper construction of that term as it appears in s. 35 of the *Crimes Act*. In particular, the respondent advances the following contentions:

    (i) Neither of the decisions relied upon by the appellant are binding precedent. The dissenting judgment in ***Clarence*** and authority in the United Kingdom which has since overruled ***Clarence*** is persuasive and constitutes a proper interpretation of the word "*inflicts*";

    (ii) There are textual differences between s. 35 and the legislation considered in ***Clarence*** and ***Salisbury,*** which confirm that a broad construction of the word "*inflicts*" was intended by the New South Wales legislature;

    (iii) The natural and ordinary meaning of the word "*inflicts*" does not render the enactment of s. 36 of the *Crimes Act* redundant; and

    (iv) The extrinsic materials demonstrate that the enactment of s. 36 of the *Crimes Act* was by way of abundant caution, and did not reflect an understanding that the word "*inflicts*" requires the application of physical force.

<u>The decisions in ***Clarence*** and following</u>

16. In ***R v Clarence***, the defendant had sexual intercourse with his wife whilst he was aware that he had gonorrhea. The defendant's wife was unaware he had the disease and became infected. The defendant was charged with causing grievous bodily harm and assault occasioning actual bodily harm. Section 20 of the *Offences against the Person Act* 1862 (UK) provided:

> *"Whosever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of an offence..."*

17. The defendant was convicted on both counts but his convictions were overturned on appeal. The Queen's Bench Division, by a majority of nine to four, quashed the conviction on the basis that the conduct of the defendant did not constitute an offence under either charge. Stephen J, who gave the principal majority judgment, stated that the *"infliction of bodily harm either with or without any weapon or other instrument"* means *"the direct causing of some grievous injury to the body itself with a weapon, as by a blow with a fist, or by pushing a person down. Indeed the word 'assault' is not used in the section, I think the words imply an assault and battery of which a wound or grievous bodily harm is the manifest immediate and obvious result."*[10] Wills J, also in the majority, separately concluded that the section required *"the infliction of direct and intentional violence"*.[11]

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[10] *Clarence* at 41.
[11] *Clarence* at 36-37.

18. In dissent, Hawkins J considered the defendant's contention that bodily harm could not be "*inflicted*" unless it had been brought about by an act amounting to an assault to be "*untenable*".[12] His Honour held that the words "*inflict*", "*cause*" and "*occasioning*" were synonymous.[13] Considering the context of the word "*inflicts*",[14] and noting that the word "*inflicts*" was also used by the legislature in the context of the offence of administering a poison,[15] his Honour concluded that the framers of the Act intended that:

> "*... where grievous bodily harm was maliciously caused by <u>any</u> means, the offender should be liable to a punishment of three years' penal servitude...*" (emphasis in original)[16]

19. ***Clarence*** was first considered in Australia in Victoria in 1976. In ***R v Salisbury*** the applicant was convicted pursuant to s.19A of the *Crimes Act* 1958 (Vic), which provided that *"[w]hosoever unlawfully and maliciously inflicts grievous bodily harm upon any other person shall be guilty of a misdemeanor and shall be liable to imprisonment for a term of not more than seven years."*

20. On appeal, the applicant in ***Salisbury*** asserted that the jury should have been directed that they were entitled to find him guilty of the lesser offence of assault occasioning actual bodily harm or common assault. In dismissing the appeal, the Victorian Full Court rejected that contention, holding that the offence was *"not drafted in a way which expressly limits the manner in which grievous bodily harm may be inflicted to it being inflicted by an assault upon the victim".*[17] The Court held that although the word "inflicts" may mean that a striking is involved, there was no particular reason to give this word such a narrow or restricted meaning.

21. The Court in ***Salisbury*** considered that the statements in ***Clarence*** that an assault was an essential ingredient was *obiter dictum* and that the language of Wills J *"brings out the essential ingredient when he speaks of 'the infliction of direct and intentional violence'".*[18] The Court went on to state that grievous bodily harm may be "inflicted" either where the accused has directly assaulted the victim or *"by doing something, intentionally, which, though it is not itself a direct application of force to the body of the victim, does directly result in force being applied violently to the body of the victim."*[19]

22. The approach taken in ***Salisbury*** was a clear departure from ***Clarence***.

23. In 1984, the House of Lords adopted the ***Salisbury*** analysis in ***R v Wilson; R v Jenkins*** [1984] 1 AC 242 and agreed that the infliction of grievous bodily

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[12] *Clarence* at 47.
[13] *Clarence* at 48 - 49.
[14] *Clarence* at 48 – 49.
[15] *Clarence* at 50.
[16] *Clarence* at 49.
[17] *Salisbury* at 454.
[18] *Salisbury* at 457.
[19] *Salisbury* at 461.

harm did not require an assault.[20] In so holding, the House of Lords recognised that the infliction of grievous bodily harm can involve *"interfering with the brakes or engine of a motor car as a result of which an occupant of the car is seriously injured in an accident. Putting a person in fear as a result of which in their attempt to escape they injure themselves. Making a hole in a boat in consequences of which a passenger therein nearly drowns. Omitting to give a sick person a prescribed drug."*[21]

24. ***Salisbury*** was also applied by the New South Wales Court of Criminal Appeal in ***R v Cameron*** (1983) 2 NSWLR 66. As in ***Salisbury*** and ***Wilson v Jenkins***, the Court held that a trial judge had erred in leaving an alternative verdict of assault occasioning actual bodily harm to the jury in circumstances where the indictment alleged a charge of malicious infliction of actual bodily harm with intent to have sexual intercourse.

25. The departure from ***Clarence*** continued with ***R v Ireland and Burstow*** [1998] AC 147. In ***R v Ireland and Burstow***, the House of Lords held that the accused were properly convicted where the complainants suffered psychiatric illnesses due to non-violent harassment. The issue on appeal was the scope of the word "*inflict*" in the charge of unlawfully and maliciously inflicting grievous bodily harm (s.20). It was contended that the word "*inflict*" required the application of physical force directly to the body of the victim and therefore could not include psychiatric injury.

26. In dismissing the appeal, Lord Steyn described ***Clarence*** as a "*troublesome authority*" that "*no longer assisted*" in respect of the scope of the word "*inflicts*".[22] Lord Steyn considered the question of whether as *"a matter of current usage the contextual interpretation of 'inflict' can embrace the idea of one person inflicting psychiatric injury on another."* Lord Steyn held that *"one can nowadays quite naturally speak of inflicting psychiatric injury."*[23] In a concurring judgment, Lord Hope of Craighead held that the words "*cause*" and "*inflict*" were interchangeable in the context of a criminal act, the only difference being that "*the word 'inflict' implies that the consequence of the act is something that the victim is likely to find unpleasant or harmful*" and "*invariably implies detriment to the victim of some kind*",[24] whereas the word "*'cause'... is neutral" and "may embrace pleasure as well as pain.*"[25]

27. In 2004, the Court of Appeal for England and Wales finally overruled ***Clarence***: ***R v Dica*** [2004] QB 1257. The Court of Appeal confirmed that the reckless transmission of HIV did in fact constitute an offence under s. 20 of the *Offences Against the Persons Act* 1961. Lord Justice Judge summarised the effect of ***Clarence*** and held that *"[t]he requirement for assault and an immediate connection between the violent action of the defendant and the onset of its consequences were plainly central to the decision that the conviction under*

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[20] *R v Wilson; R v Jenkins* at 359 – 260.
[21] *R v Wilson; R v Jenkins* at 250 – 251.
[22] *R v Ireland and Burstow* at 160.
[23] *R v Ireland and Burstow* at 161.
[24] *R v Ireland and Burstow* at 164; cf AWS at [39].
[25] *R v Ireland and Burstow* at 164.

s.20 should be quashed."[26] Lord Justice Judge then considered ***R v Wilson; R v Jenkins*** [1984] AC 242 and stated:

> *"This decision undermined, indeed destroyed, one of the foundations of the reasoning of the majority in Clarence, based on the view that an offence under s20, like that under s.47, required an assault resulting in a wound or grievous bodily harm. This represented a major erosion of the authority of Clarence in relation to the ambit of s.20 in the context of sexually transmitted disease."*[27]

28. Lord Justice Judge went on to discuss the recognition in ***R v Chan-Fook*** [1994] 1 WLR 689 and in ***R v Ireland and Burstow*** that bodily harm includes psychiatric injury and its effects.[28] His Honour found that the language used in this regard *"reflected contemporary ideas"* which are *"entirely contrary to the reasoning adopted by the majority in* ***Clarence****."*

29. Lord Justice Judge referred to the decline of ***Clarence*** and concluded:

> *"If psychiatric injury can be inflicted without direct or indirect violence, for the purposes of section 20 physical injury may be similarly inflicted. It is no longer possible to discern the critical difference identified by the majority in* ***Clarence*** *between an 'immediate and necessary connection' between the relevant blow and the consequent injury, and the 'uncertain and delayed' effect of the act which led to the eventual development of infection. The erosion is now complete.*
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> *In our judgment, the reasoning which led the majority in Clarence to decide that the conviction under section 20 should be quashed has no continuing application. If that case were decided today, the conviction under section 20 would be upheld. Clarence knew, but his wife did not know, and he knew that she did not know that he was suffering from gonorrhea. Nevertheless he had sexual intercourse with her, not intending deliberately to infect her, but reckless whether she might become infected, and thus suffer grievous bodily harm."*[29]

30. As a decision of the Queen's Bench, ***Clarence*** is not a binding statement of Australian law.[30] The decision in ***Clarence*** was not unanimous.[31] There was a powerful dissent. At the time of the enactment of the *Crimes Act* in 1900, ***Clarence*** had not been applied in New South Wales. Indeed, the decision in ***Clarence*** has never been relevantly applied in New South Wales.

31. The statement of the Victorian Court of Appeal in ***Salisbury*** that a person may "*inflict*" injury *"by doing something, intentionally, which, though it is not itself a*

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[26] *R v Dica* at [24].
[27] *R v Dica* at [26].
[28] *R v Dica* at [27]-[29].
[29] *R v Dica* at [30].
[30] See AWS at [32].
[31] It has been recognised that the decisions of the majority in *Clarence* "*are not wholly consistent with each other*": *R v Ireland* at 164.

direct application of force to the body of the victim, does directly result in force being applied violently to the body of the victim"[32] was not necessary to the result (which held only that an assault is not contained within an offence of malicious infliction of grievous bodily harm) and did not form a part of the *ratio decidendi* of the decision.[33] Accordingly, it was not necessary for the Court of Criminal Appeal to be satisfied that ***Salisbury*** was "plainly wrong" insofar as the decision suggested that the word "*inflicts*" requires the direct application of violent force.[34]

32. As neither ***Clarence*** nor ***Salisbury*** constitute binding precedent, the construction of the word "*inflicts*" accepted by the Court of Criminal Appeal does not constitute a change in the law. Accordingly, the appellant's reliance on ***Breen v Williams*** (1996) 186 CLR 71 and ***Momcilovic v The Queen*** (2011) 245 CLR 1 is inapposite.[35]

33. For the reasons stated in ***Dica*** and previously in ***Ireland***, ***Clarence*** should not govern the proper interpretation of the word "*inflicts*" in s. 35 of the *Crimes Act*. As a matter of ordinary usage, the word "*inflicts*" does not require the application of physical violence to the victim.[36] Nor is there any reason in principle or policy to imply such a requirement.

34. That the word "*inflicts*" does not require the application of physical violence to the victim is also confirmed by a contextual reading of the *Crimes Act*. As enacted in 1900 (and as in force at the time of the offence), s. 39 of the *Crimes Act* provided that it was an offence where a person "*maliciously administers to, or causes to be administered to, or taken by, any person, any poison or other destructive or noxious thing, so as to endanger the life of such person, or so as to inflict upon such person grievous bodily harm*" (emphasis added).[37] The use of the word "*inflicts*" to describe the causation of injuries resulting from the administration of poison demonstrates that the New South Wales legislature did not consider that that the term "*inflicts*" required the direct application of physical force.[38]

Textual differences in the provisions

35. Moreover, there are important differences in the statutory language between the provisions considered in ***Clarence*** and ***Salisbury***, on the one hand, and s. 35 of the *Crimes Act* on the other. In particular, the legislation considered in ***Clarence*** and ***Salisbury*** differed from s. 35, in that s. 35 prescribed an offence where grievous bodily harm was inflicted *"by any means"*. The additional words "*by any means*" express a legislative intention that the word

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[32] *Salisbury* at 461.
[33] *R v Aubrey* [2012] NSWCCA 254 at [57]; [AB 27].
[34] Cf AWS at [32].
[35] AWS at [35] – [37].
[36] See also *R v Aubrey* [2012] NSWCCA 254 at [53]; [AB 26].
[37] The reference to the infliction of grievous bodily harm by way of the administration of a poison has remained in the *Crimes Act* since its enactment. An equivalent to s. 39 was contained in s. 27 of the *Criminal Law Amendment Act 1883* (NSW).
[38] See similarly *Clarence* at 50, per Hawkins J.

"*inflicts*" should not be read narrowly. Indeed, it may be observed that the additional words used in s. 35 echo the language of the dissenting judgment of Hawkins J in ***Clarence***, specifically, in his Honour's finding that the framers of the Act intended that an offender should be liable to punishment where grievous bodily harm was maliciously caused "*by any means*".[39]

The enactment of s. 36

36. The appellant's contention[40] that the enactment in 1990 of the s. 36 offence of causing a person to contract a grievous bodily disease would have been redundant if the word "*inflicts*" were not read as requiring the application of bodily force should be rejected.[41]

37. Contrary to the appellant's submission, the offences prescribed by s. 33 (intentional infliction of grievous bodily harm) and s. 36 (intentionally causing a person to contract a grievous bodily disease) did not cover the same conduct. There was an overlap between the offences in that a grievous bodily disease may constitute (or may develop into) grievous bodily harm. However, as a grievous bodily disease may not necessarily manifest as grievous bodily harm, this overlap does not render s. 36 superfluous.

38. That is, where an accused intentionally caused another to contract a grievous bodily disease, and that grievous bodily disease never developed into grievous bodily harm (or had not, at the time of charge, so developed), the accused would be guilty of the offence under s. 36 of the *Crimes Act*, but would not be guilty of an offence under s. 33. However, where the grievous bodily disease immediately manifested as grievous bodily harm, or where the grievous bodily disease had manifested as grievous bodily harm at the time of the charge, the accused would be guilty of both an offence contrary to s. 33 and an offence contrary to s. 36. That there was overlap in such circumstances does not render the offence under s. 36 redundant. Such overlap is common in offences proscribed in criminal legislation such as the *Crimes Act*.

Extrinsic materials

39. In any event, the enactment of s. 36 could only shed light on the meaning of ss. 33 and 35 if the legislature proceeded on the basis that ss. 33 and 35 had a settled meaning at the time of the enactment of s. 36.[42] The extrinsic materials to the enactment of s. 36 (which may be considered in the first instance, in order to determine the purpose of the provision, and which may

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[39] *Clarence* at 49.
[40] AWS [15] – [28].
[41] The offence of intentionally causing a person to contract a grievous bodily disease was first enacted in s. 36 of the *Crimes Act* in 1990: *Crimes (Injuries) Amendment Act* 1990 (NSW). In 2007, s. 36 was repealed and the definition of "*grievous bodily harm*" in s. 4 of the Act was extended to provide that "*a reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease*": *Crimes (Amendment) Act* 2007 (NSW).
[42] *Deputy Federal Commissioner of Taxation (SA) v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-626.

also be used to confirm the ordinary meaning of the text)[43] demonstrate that the legislature was not of the view that s. 33 had a settled meaning. In introducing s. 36 in 1990, Minister Pickering stated that:

> "... *there is some doubt in the criminal law whether the contraction of a disease as a result of an assault constitutes bodily harm. This doubt results from the English decision in* R v Clarence. *A person who intentionally inflicts a serious disease upon another should be convicted of an offence that reflects the gravity of the harm. This bill, therefore, creates a new offence that removes any doubt as to whether such conduct can be treated appropriately by the criminal law...*" (emphasis added)[44]

40. Minister Pickering then explained that under the new offence, "*it is not a requirement that the disease be actually causing any ill effects at the time of the prosecution. All that is required is that the victim has the disease.*"[45]

41. In summary, the enactment of s. 36 in 1990 did not proceed upon the basis of any acceptance that the word "*inflicts*" required the application of violent bodily force.[46] Rather, the provision was enacted to avoid doubt in the application of the provisions, and, importantly, to ensure that an accused could be held responsible even where the victim had not yet suffered any ill effects as a result of contracting a grievous bodily disease at the time of the prosecution.[47]

Conclusion

42. For the reasons outlined above, the phrase "*by any means inflicts grievous bodily harm*" should be read in accordance with its ordinary and natural

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[43] *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408, per Brennan CJ, Dawson, Toohey and Gummow J; *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; 256 CLR 1 at [57], per French CJ, Hayne, Kiefel and Nettle JJ.

[44] Second Reading Speech to the *Crimes (Injuries) Amendment Bill*, NSW Legislative Council, Hansard, 4 December 1990, at p. 11738.

[45] Second Reading Speech to the *Crimes (Injuries) Amendment Bill*, NSW Legislative Council, Hansard, 4 December 1990, at p. 11738.

[46] As the Court of Criminal Appeal held, the intention of the legislature was to "*fill the gap, if there was one*": *R v Aubrey* [2012] NSWCCA 254 at [33] [AB 22].

[47] Similarly, it may be observed that in introducing amendments to the definition of grievous bodily harm in 2007, under which the definition of grievous bodily harm was amended to provide that a "reference to the infliction of grievous bodily harm includes a reference to causing a person to contract a grievous bodily disease", Parliamentary Secretary Mr Barry Collier described the area of the law relating to reckless or intentional infection as "*somewhat uncertain since the United Kingdom case of* R v Clarence" and also observed that that authority had been "*substantially eroded" by decisions in the United Kingdom, Canada and Western Australia*": Second Reading Speech to the *Crimes (Amendment) Bill,* NSW Legislative Assembly, Hansard, 25 September 2007 at p. 2258. The United Kingdom decision referred to by Mr Collier would appear to be the decision in *Dica.* The Canadian decision referred to by Mr Collier would appear to be the decision of the Canadian Supreme Court in *R v Cuerrier* [1998] 2 SCR 371, 1998 CanLII 796 (SCC). In *Cuerrier*, the Canadian Supreme Court declined to follow *Clarence*, holding that it was an aggravated assault under Canadian law to knowingly expose a sexual partner to HIV. The Western Australian decision referred to by Mr Collier is unclear. Mr Collier may have been referring to the decision of the Western Australian Court of Appeal in *R v Houghton* [2004] WASCA 20; (2004) (2004) 28 WAR 399. In *Houghton*, it was held that it was open to the jury to conclude that the infection of a complainant with HIV amounted to grievous bodily harm.

meaning, namely, "*to impose as something that must be borne or suffered*" or to "*impose (anything unwelcome)*". Accordingly, it was not necessary for the prosecution to establish that the appellant had done an act that resulted in force being applied violently to the body of the victim. Ground 1 should be dismissed.

Ground 2: Whether foresight of probability of harm is required for recklessness

Introduction

43. The trial judge directed the jury that "in *relation to count 2, 'maliciously' means that the accused when he committed the act of having unprotected anal sexual intercourse with* [GB] *acted recklessly*".[48] His Honour further explained that "*[t]he element of recklessness is made out if you are satisfied beyond reasonable doubt that at the time that the accused did the act he realised some physical harm may possibly be inflicted upon* [GB] *by his actions, yet he went ahead and acted as he did*".[49]

44. The trial judge's direction that it was necessary for the appellant to realise that there was a possibility of physical harm and to determine to act despite that risk was in accordance with well-established New South Wales authority concerning statutory offences of malice, where malice is established by recklessness.

45. For the reasons outlined below, the appellant's contention that the jury could only be satisfied that the appellant was "reckless" (and therefore "malicious") if he foresaw the probability (rather than the possibility) of physical harm and continued to act does not represent the law in New South Wales. In particular, the respondent advances the following contentions:

(i) It is well accepted in New South Wales that a person acts recklessly within the meaning of s. 5 of the *Crimes Act* where the person foresees the possibility that conduct will result in a particular kind of harm, and, with that awareness, engages in the conduct nonetheless. In so holding, New South Wales authority itself drew upon established authority in the United Kingdom concerning the meaning of the word "*malice*";

(ii) The decision of the High Court in ***The Queen v Crabbe*** (1985) 156 CLR 464, which held that an accused will be guilty of common law murder if the accused foresees the probability that harm or serious injury will result, has no application outside of offences of murder;

(iii) The phrase "*reckless indifference to human life*" in s. 18 of the *Crimes Act* is textually and contextually different to the phrase "*act... done recklessly*" in s. 5 of the *Crimes Act*. The phrases bear different meanings according to those contexts;

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[48] SU at 30.30 [AB 82.30].
[49] SU at 30.40 [AB 82.40]. See also 31.40 – 32.10 [AB 80.40 and 83.40 – 84.10].

(iv) The text and history of the definition of "*maliciously*" in s. 5 of the *Crimes Act* indicate that the purpose of the definition was to expand the common law definition of malice; and

(v) The interstate authorities referred to by the appellant do not support the contention that the meaning of the word "*recklessly*" in s. 5 of the *Crimes Act* requires that an accused foresee the "probability", rather than the "possibility", of harm.

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The meaning of recklessness and malice

46. At the time of the alleged offence, s. 5 of the *Crimes Act* defined the term "*maliciously*" to include an "*act... done recklessly*". In ***Zaburoni v The Queen*** [2016] HCA 12; (2016) 256 CLR 482 at [42], Kiefel, Bell and Keane JJ observed that "*[r]ecklessness describes a state of mind in which a person adverts to the risk that particular conduct may result in particular harm and, with that awareness, engages in that conduct. A person may be more or less reckless depending upon the person's awareness of the likelihood of the risk*
20 *materialising.*"[50]

47. This statement echoes the language of well-established principles concerning recklessness. In the 12th edition of *Russell on Crime*, Mr Turner observed that "*the reckless man is one who, while aiming at an end which he desires to attain, consciously takes the risk of bringing about some other risk also.*"[51] More recently, in *Glanville Williams Textbook of Criminal Law*, Mr Baker has stated "*The reckless person deliberately* 'takes a chance'".[52]

48. As Hunt J observed in ***R v Coleman*** (1990) 19 NSWLR 467, it has long been
30 accepted in New South Wales that the degree of recklessness required to establish that an act was done maliciously was that the accused subjectively realised that the particular kind of harm "*might, or may possibly*", be inflicted, yet determined to act despite that risk.[53]

49. Of course, as in the case of liability for joint criminal enterprise, to accept that an accused is reckless where he subjectively foresees the possibility of harm is not to say that "*since anything is possible*" an accused "*may be liable for a crime contemplated by him as no more than a fanciful possibility*": ***Miller v The Queen; Smith v The Queen; Presley v Director of Public Prosecutions***

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[50] See similarly at [72], per Nettle J ("*The most* [the evidence] *established was foresight of the risk of infection, and, therefore, reckless indifference.*") The statement of Kiefel, Bell and Keane JJ in *Zaburoni* at [10], that "*[t]o engage in conduct knowing that it will probably produce a particular result is reckless*" is not a statement of the test of recklessness; cf AWS at [60]. The context of the statement indicates that their Honours intended no more than to state that foresight of the probability of harm amounted to recklessness *rather than* intention.

[51] JW Cecil Turner, *Russell on Crime*, 12th ed (1964), at 42.

[52] D. J. Baker, *Glanville Williams Textbook on Criminal Law*, 3rd ed (2012) at [5.001].

[53] See *Coleman* at 475D and 476E (in which the possibility test was described by Hunt J as "*settled*" law); see also *R v Stones* [1955] SR (NSW) 25 at 34.

(SA) [2016] HCA 30 at [43].[54] As in joint criminal enterprise, a negligible or fanciful possibility will not suffice for liability.[55]

50. The decision of the Court of Criminal Appeal in ***Coleman*** as to the meaning of recklessness has stood for two and a half decades without legislative intervention.[56] Indeed, when the *Crimes Act* was amended in 2008 to replace the "*archaic*" language of malice with the modern language of recklessness, the Attorney General observed that the term "*recklessly*" is "*well known to the criminal law*"[57] and expressly referred to the "*leading*" decision of Hunt J in ***Coleman***, and in particular, quoted Hunt J's statement that recklessness means "*a realisation on the part of the accused that the particular kind of harm in fact done might be inflicted yet he went ahead and acted*".[58]

51. In holding that recklessness within the definition of malice in s. 5 requires subjective foresight of the possibility of harm, the Court of Criminal Appeal in ***Coleman*** drew upon well-established authority in the United Kingdom concerning the meaning of the word "*malice*". In particular, in 1957, the United Kingdom Court of Criminal Appeal held in ***R v Cunningham*** [1957] 2 QB 396 at 399 - 400 that:

> "*In any statutory definition of a crime malice must be taken not in the old vague sense of wickedness in general but as requiring either (i) an actual intention to do the particular kind of harm that in fact was done; or (ii) recklessness as to whether such harm should occur or not (ie the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it). It is neither limited to nor does it require any ill will towards 'the person injured'.*" (citing Professor Kenny, *Outlines of Criminal Law* (1002), emphasis added)

52. ***Cunningham*** itself is consistent with authority in the United Kingdom dating back to 1875. In ***R v Welch*** (1875) LR 1 QB 23, it was held that a trial judge had correctly directed a jury to convict of a statutory offence of maliciously

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[54] Cf AWS at [63].

[55] The present case was not a case where it could have been contended that the appellant considered that the risk was negligible; cf AWS at [66]. The appellant was advised by numerous medical practitioners of the risk of infection and of the need to engage in safe sexual practice. The appellant became more ill in October 2003 as a result of the progression of his HIV: ROS at 12 – 15 [AB 144 – 147]; see also *Aubrey v R* [2015] NSWCCA 323 at [65] [AB 183]. The appellant's false statement to GB that he was not HIV positive also demonstrated his awareness of the risk. Importantly, the appellant's counsel did not contend that the risk was negligible. Rather, in closing submissions before the jury, the appellant's counsel informed the jury that the appellant "*accepted*" that "*he acted within the framework of what constitutes recklessness*": T28/8/13 at p. 763. (The transcript of the defence closing address will be supplied to the Court prior to the hearing of this appeal.) See also *Aubrey v R* [2015] NSWCCA 323 at [29] [AB 171 - 172].

[56] See *Blackwell v The Queen* (2011) 81 NSWLR 119 at [68] and [76] – [78]; *R v Stokes v Difford* (1990) 51 A Crim R 24 at 40 – 41; *R v Baker* [1999] NSWCCA 129 at [28]; *R v Mostyn* (2004) 145 A Crim R 304 at 320; *Pengilley v R* [2006] NSWCCA 163 at [45]; *Cryer v R* [2010] NSWCCA 18 at [24]; *Chen v R* [2013] NSWCCA 116 at [34]; and *CB v DPP* [2014] NSWCA 134 at [46].

[57] The Hon John Hatzistergos, Second Reading Speech to the *Crimes Amendment Bill 2007*, Hansard, NSW Legislative Council, 26 September 2007 at 2319.

[58] The Hon John Hatzistergos, Second Reading Speech to the *Crimes Amendment Bill 2007*, Hansard, NSW Legislative Council, 26 September 2007 at 2319.

killing, maiming and wounding a mare if they found that the defendant in fact intended to kill, maim or wound the mare, or, in the alternative, if the defendant knew that what he was doing "*would or might kill, maim or wound the mare, and nevertheless did what he did recklessly and not caring whether the mare was injured or not*" (emphasis added).

53. ***Cunningham*** remained the law concerning malice in the United Kingdom until 1982,[59] when the House of Lords held that recklessness included a mental state where the accused had "*not given any thought to the possibility of there being [a] risk*", as well as where the accused had "*recognized that there was some risk involved and* [had] *nevertheless gone on to do it*": ***Commissioner of Police of the Metropolis v Caldwell*** [1982] 1 AC 341 at 354, per Lord Diplock.

54. ***Caldwell*** was overruled and ***Cunningham*** was reaffirmed in ***R v G*** [2004] 1 AC 1034, in which it was held that a person acts recklessly when (1) he or she is aware of a risk that exists or will exist or is aware of a risk that a result will occur, and (2) it is, in the circumstances, unreasonable to take the risk.[60] It is well accepted in the United Kingdom that the first limb of the test set out in ***R v G*** represents the test set out in ***Cunningham***.[61]

55. The second "justifiability" limb of the test in ***R v G*** did not appear in ***Cunningham***. Objective justifiability appears to have been first enunciated as a rider to liability for recklessness in ***R v Stephenson*** [1979] QB 695 at 703F. The second justifiability limb of ***R v G*** has now been adopted in the Criminal Codes of the Commonwealth, the Australian Capital Territory and the Northern Territory and in South Australian legislation.[62]

56. Contrary to the appellant's submission,[63] the second limb of justifiability is not equivalent to a requirement that the accused foresee the probability (as opposed to the possibility) of harm. The second limb is an objective test. It enables the jury to take into account their own assessment of the nature and severity of the foreseen outcome, as well as their own assessment of the accused's reasons for engaging in the conduct, despite having foreseen the risk of harm. In contrast, the "probability" test advanced by the appellant only addresses the likelihood that harm will eventuate.[64] Accordingly, the

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[59] *Cunningham* was applied in *R v Mowatt* (1968) 1 QB 421.
[60] *R v G* at 1047. See also *A-G's Reference (No 3 of 2003)* [2004] 2 Cr App R 367.
[61] D. Ormerod and K. Laird, *Smith and Hogan's Criminal Law*, 14th ed. (2015) at 5.2.2.2.
[62] Section 5.4 of the *Criminal Code (Cth)*; s. 174D of the *Criminal Code* (NT); s. 20 of the *Criminal Code 2002* (ACT) (which applies to specified offences in the *Crimes Act* 1900 (ACT): see s. 7A of the *Crimes Act* 1900 (ACT)) and s. 21 of the *Criminal Law Consolidation Act* 1935 (SA).
[63] AWS at [55] - [56] and [64].
[64] Apart from the provisions in the *Criminal Codes*, to our knowledge, it has never been suggested in Australia that recklessness is subject to a rider that the risk be objectively unjustifiable to take. It does not appear to be contended by the appellant that a second limb of "justifiability" applies to the recklessness definition contained in s. 5 of the *Crimes Act*. Such a contention is not within the scope of the grounds of appeal before this Court [AB 195]. In any event, even if a justifiability rider properly applied to the reckless conduct in s. 5 of the *Crimes Act*, there could be no error in the trial judge's failure to instruct the jury as to this limb in the circumstances of this case. The fundamental duty of the trial judge is to instruct the jury in accordance with the "real issues" in the case: *Alford v Magee*

recognition of the second limb of justifiability in ***R v G*** does not affect the statement in ***Cunningham*** that it is only necessary for the accused to foresee the possibility of harm.

Crabbe v The Queen

57. The appellant's reliance on ***The Queen v Crabbe*** [1985] HCA 22; (1985) 156 CLR 464 is misplaced.[65] ***Crabbe*** concerned a respondent who drove a road train through the wall and into the bar of a motel near Ayers Rock in the Northern Territory. Five persons died and many others were injured as a result of the respondent's actions. The respondent was charged with common law murder (the *Criminal Code* 1983 (NT) having not yet been passed at the time of the offence). The jury were instructed that the respondent was guilty of murder if he had blinded himself to the "possibility" that his actions would cause death or grievous bodily harm. In confirming the orders of the Full Court of the Northern Territory setting aside the conviction and ordering a new trial, the High Court concluded that:

> "*It should now be regarded as settled law in Australia that if no statutory provision affects the position, that a person who, without lawful justification or excuse, does an act knowing that it is probable that death or grievous bodily harm will result, is guilty of murder if death in fact results. It is not enough that he does the act knowing that it is possible but not likely that death or grievous bodily harm might result.*"[66]

58. It can be seen from the above that the decision in ***Crabbe*** was concerned with the offence of common law murder. Neither the *ratio* of ***Crabbe***, nor the Court's reasons for that decision, extend to offences other than murder.

59. In holding that foresight of the probability of harm was required and that foresight of the possibility of harm is not sufficient for an offence of murder, the High Court took account of first, the history of the requirement, as enunciated in Stephen's *Digest of Criminal Law* (1877);[67] second, previous decisions of the High Court which addressed the degree of foresight required to establish the offence of murder at common law (namely, ***Pemble v The Queen*** [1971] HCA 20; (1971) 124 CLR 107 at 118 – 121 and ***La Fontaine v The Queen*** [1976] HCA 52; (1976) 136 CLR 62);[68] and third, that, as a matter of principle, a person who foresees the probability of harm yet continues to act is just as "*blameworthy*" as one who does an act intending to kill or to do grievous bodily harm.[69]

(1952) 85 CLR 437 at 466, per Dixon, Williams, Webb, Fullagar and Kitto J. The appellant had been warned by many medical practitioners of the risk of infection, and the need to engage in safe sexual practices. The appellant was expressly asked by GB whether he was HIV positive shortly before they engaged in unprotected sexual intercourse. He falsely answered that he was not. In these circumstances, objective justifiability was not a "real issue" before the jury.

[65] AWS at [50].

[66] *Crabbe* at 469 - 470.

[67] *Crabbe* at 467 - 468.

[68] *Crabbe* at 468.

[69] *Crabbe* at 469.

60. No aspect of the Court's reasoning extends to offences other than murder. The Court's reference to *Stephen's Digest* related to a passage in the Digest that was expressly limited to murder offences. Specifically, article 223 of *Stephen's Digest*, which is entitled "*Murder and Manslaughter defined*" states that "[m]*urder is unlawful homicide with malice aforethought.*" Article 223 then states that "*malice aforethought*" includes "*[k]nowledge that the act which causes death will probably cause the death of, or grievous bodily harm to some person...*"

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61. Article 239 of *Stephen's Digest* is entitled "*Malicious wounding and similar acts punishable with five years penal servitude*" (the equivalent of s. 35 of the *Crimes Act*). Article 239 stated that the offence of malicious wounding was established where a person "*unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person either with or without any weapon or instrument*", citing 24 & 25 Vic. C 100, s. 20. There is no commentary in *Stephen's Digest* as to the meaning of the word "maliciously" in this provision. It is to be observed that the language in Article 239 and s. 20 (of "maliciously") differs from that used in Art 223 (of "malice aforethought"). *Stephen's Digest*
20 does not suggest that the terms are equivalent.

62. The previous decisions of the Court in ***Pemble*** and ***La Fontaine*** were likewise limited to offences of murder. None of the Court's judgments in either decision referred to offences other than murder and manslaughter.

63. The Court's analysis of principle also has no application to offences other than murder. The Court held that, as a matter of principle, the test for murder is one of probability, rather than possibility, because the conduct of a person who foresees the probability of harm, yet continues to act is "*just as blameworthy*"
30 as a person who does an act intending to kill or to do grievous bodily harm.[70] This is because, where there is a foresight of the probability of harm, the accused's "*state of mind is comparable with an intent to kill or to do grievous bodily harm.*"[71]

64. Such logic has no application to an offence of malicious wounding under s. 35 of the *Crimes Act*.[72] Indeed, if the word "*maliciously*" in s. 35 is read as requiring a state of mind that is "*comparable*" to intent, there would be little difference in the objective criminality of the offence of malicious wounding in s. 35 of the *Crimes Act* as compared with the offence of wounding with intent
40 in s. 33 of the *Crimes Act*, despite the maximum penalty of the former being 7 years imprisonment, in comparison to the maximum of the latter of 25 years imprisonment.[73]

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[70] *Crabbe* at 469.

[71] *Crabbe* at 469; see similarly *Royall v The Queen* [1990] HCA 27; (1990) 172 CLR 378 at 456, per McHugh J; *Boughey v The Queen* [1986] HCA 29; (1986) 161 CLR 10 at 43, per Brennan J (in dissent, but not on this point); *R v Stones* [1955] 56 SR (NSW) 25 at 34.

[72] *R v Coleman* (1990) 19 NSWLR 467 at 476C.

[73] As originally enacted in the *Criminal Amendment Act 1883* (NSW), the predecessor of s. 35 (s. 24) carried a maximum penalty of 5 years and the predecessor of s. 33 (s. 22) carried a maximum penalty of life.

Recklessness in ss 5 and 18 of the *Crimes Act*

65. Whilst the term "*reckless*" appears in both ss. 5 and 18 of the *Crimes Act*, the term is used in different contexts in each of those provisions, and bears different meanings according to those contexts.[74]

66. Those different contexts are demonstrated in the textual differences in the provisions. In s. 18, the word "*reckless*" is contained within the phrase "*reckless indifference to human life.*" In s. 5, the concepts of indifference and recklessness are deliberately detached, so as to include both acts done "*with indifference to human life and suffering*" and "*act[s]... done recklessly*". Moreover, the structure of s. 5, which commences with concepts of common law malice and intent, and then expands to include acts done recklessly, also confirms that the concept of an "*act... done recklessly*" is a broader concept than that of "*reckless indifference*".[75]

67. The historical context of the provisions also differs. It was established in ***Royall v The Queen*** [1990] HCA 27; (1990) 172 CLR 378 that the phrase "*reckless indifference to human life*" requires the prosecution to demonstrate that the accused foresaw the "probability" of death in a charge of murder: see at 394-395 (per Mason J); at 416-417 (per Deane and Dawson JJ); at 430-431 (per Toohey and Gaudron JJ); and at 455 – 456 (per McHugh J). The considerations that led to that conclusion (including the need to distinguish the offence of murder from that of manslaughter, and the unlikelihood of the legislature intending to radically depart from the elements of murder at common law) have no application outside of the context of the offence of murder prescribed by s. 18.

68. That the term "reckless" bears different meanings in the *Crimes Act* depending on its context is demonstrated by the use of the word in other provisions of the Act. In particular, it has been accepted that the word "*reckless*" in s. 61R of the *Crimes Act* includes a situation where the defendant is aware that there is a "*possibility*" that the victim is not consenting, but engages in sexual intercourse nonetheless: ***Banditt v The Queen*** [2005] HCA 80; (2005) 224 CLR 262.[76] As the word "reckless" has "*been used with different meanings in* [the *Crimes Act*]*, then the argument for consistent interpretation cannot stand.*"[77]

69. Accordingly, the use of the word "reckless" in the phrase "*reckless indifference to human life*" in s. 18 of the *Crimes Act* does not provide support for the appellant's proposition that the phrase "*act... done recklessly*" in s. 5 of the *Crimes Act* requires the accused to foresee the probability (as opposed to the possibility) of harm.

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[74] Cf AWS at [51].
[75] See further at para 70ff below.
[76] "*If D is aware that there is any possibility that P is not consenting and proceeds to have intercourse he does so recklessly*", *Banditt* at [35], per Gummow, Hayne and Heydon JJ, citing Smith and Hogan, *Criminal Law*, 10th ed (2002) at 471.
[77] Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at [4.7].

Text, history and purpose of s. 5 of the *Crimes Act*

70. As the appellant acknowledges,[78] as s. 5 of the *Crimes Act* supplanted the common law, it is necessary to consider the text, purpose and history of that provision. In this respect, the text, purpose and history of s. 5 of the *Crimes Act* demonstrate that the definition of the word "*maliciously*" was intended to extend beyond the common law concept of malice.

71. The word "*maliciously*" was relevantly defined in s. 5 of the *Crimes Act* as follows:

> "*Every act done of malice, ..., or done without malice but with indifference to human life or suffering, or with intent to injure some person or persons, or corporate body, in property or otherwise, and in any such case without lawful cause or excuse, or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.*" (emphasis added)

72. The structure of the section was to first declare that "*every act done of malice ... and without lawful cause or excuse ... shall be taken to have been done maliciously.*" The section then declared that certain acts done without malice shall be taken to have been done maliciously. Acts done without malice that are taken to have been done maliciously are:

- acts done with indifference to human life or suffering;
- acts done with intent to injure a person(s) or a corporate body in property or otherwise; and
- acts done recklessly or wantonly.[79]

73. Section 5 of the *Crimes Act* was a re-enactment of s. 7 of the *Crimes Act* 1883 (NSW).[80] In Stephen and Oliver's *Criminal Law Manual* (1883), the authors observe in the notes to s. 7 that the term "malice" has two different legal meanings, namely actual malice (or "malice in fact") and implied or constructive malice (or "malice in law"). After considering the malice required for murder and defamation, the authors first ask what is required for "*malicious injury within the meaning of the Malicious Injuries statutes*", and then ask what is required for "*malicious wounding, within the meaning of statutes relating to offences against the person*". The authors answer:

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[78] AWS at [57].

[79] The meaning of the word "*wantonly*" was discussed in *R v Lavender* [2004] NSWCCA 120; (2004) 41 MVR 492 at [248] – [251], per Giles JA. The Court of Criminal Appeal's decision in *Lavender* was overturned by the High Court in *The Queen v Lavender* [2005] HCA 37; (2005) 222 CLR 67 on other grounds. The High Court's decision did not address the meaning of the term "*wantonly*".

[80] It appears that s. 7 was unique to New South Wales at the time of its enactment. The provision does not appear to have been modelled on any provision in the United Kingdom.

"*Section 7 ... uses the word malice in its proper and ordinary, and only legitimate acceptation, and then expands its application for the purposes of the Act.*"[81] (emphasis added).

74. Accordingly, it can be seen that the purpose of s. 5 was to expand the common law definition of malice. In so doing, the section expressly included all acts done "recklessly", even where such acts may not have been considered "malicious" at common law.

Interstate decisions

75. The South Australian decisions referred to by the appellant concern legislation which did not define malice to include acts done recklessly. [82] Accordingly, these decisions do not assist in the construction of s. 5 of the *Crimes Act*.

76. Whilst Refshauge J held in ***R v Barker*** (2014) 242 A Crim R 339; [2014] ACTSC 153 at [21] that a "probability" test applies to recklessness in the Australian Capital Territory, other decisions of the Australian Capital Territory have followed the "possibility" test applied in New South Wales: see, for example, ***R v Levi Freeman-Quay (No 1)*** [2015] ACTSC 262 at [68], per Murrell CJ; ***R v Neish (No 2)*** (2013) 226 A Crim R 444; [2013] ACTSC 24 at [12], per Refshauge J; ***R v Shevlin*** [2013] ACTSC 88 at [29], per Refshauge J; ***R v Cameron*** [2001] ACTSC 57 at [47], per Crispin J; and ***Vann v Palmer*** [2001] ACTSC 12 at [25], per Crispin J.

77. The Victorian decisions relied on by the appellant (***R v Campbell*** [1997] 2 VR 585, ***R v Nuri*** [1990] VR 641 and ***Paton v The Queen*** [2011] VSCA 72) relate to offences of recklessness.[83] However, the basis for the Victorian Supreme Court's holding that foresight of probability is required in those decisions was said to be the "*spirit of the decision in Crabbe*".[84] For the reasons outlined above, neither the *ratio* of ***Crabbe***, nor the Court's reasons for that decision, extend to offences other than murder.[85]

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[81] Stephen and Oliver, *Criminal Law Manual* (1883), at p. 7.

[82] AWS at [58] and fn 54, citing *R v Hoskin* (1974) 9 SASR 531 at 537; *Selig v Hayes* (1989) 52 SASR 169 at 174; *Laurie v Nixon* (1991) 55 SASR 46 at 51; *Gillan v Police* (2004) 149 ACrimR 354 at 358 [19] (which each concerned prosecutions of unlawful wounding). At the time of those decisions, s. 23 of the *Criminal Law Consolidation Act* 1935 (SA) provided that "*Any person who unlawfully and maliciously wounds or inflicts any grievous bodily harm on any other person, either with or without a weapon or instrument, shall be guilty of an offence*". The *Criminal Law Consolidation Act* 1935 (SA) was amended in 2006 to insert Division 7A of Part 3, which contains a definition of recklessness: *Statutes Amendment and Repeal (Aggravated Offences) Act* 2005 (SA).

[83] Section 17 of the *Crimes Act* 1958 (Vic) provides that a "*person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence*". The previous decisions of the Victorian Supreme Court referred to by the Court of Criminal Appeal in *Coleman* at 475 (*R v Smyth* [1963] VR 737 at 738 – 739; *R v Kane* [1974] VR 759 at 760; and *R v Lovett* [1975] VR 488) related to offence of malice. Those previous decisions, which held that offences of malice required only foresight of the possibility of harm, were not formally overruled. Rather, they were held to be inapplicable to the offence created by s. 17: see *Campbell* at 593, per Hayne and Crockett JJ.

[84] *Campbell* at 593, per Hayne and Crockett JJ.

[85] In Tasmania, it has been said that "*For a principal offender to be guilty of the crime of causing grievous bodily harm, it is not necessary for that person to have intended to cause grievous bodily harm. An assailant is guilty of that crime if he or she foresees that his or her physical act is likely to*

Conclusion

78. The trial judge's direction that the appellant was reckless if, at the time of doing the act, he realised that some physical harm may possibly be inflicted upon GB by his actions, yet he went ahead and acted as he did, was in accordance with well-established principle concerning the proper interpretation of the word "recklessly" in s. 5 of the New South Wales *Crimes Act*. Ground 2 should be dismissed.

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Part VIII: Time estimate

It is estimated that 1 hour will be required for presentation of the respondent's oral argument.

Dated: 20 January 2017

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Lloyd Babb SC Director of Public Prosecutions	Huw Baker Crown Prosecutor	Belinda Baker Crown Prosecutor

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cause grievous bodily harm, and does that act with reckless indifference to that possibility": *Edwards v Tasmania* [2016] TASCCA 7 at [13]. As outlined at footnote 60 above, the test for recklessness is now codified in the Criminal Codes of the Commonwealth, in the Australian Capital Territory (for some offences) and in the Northern Territory. The Criminal Codes in Queensland and Western Australia provide that it is an offence where a person "*unlawfully does grievous bodily harm to another*": s. 320 of the *Criminal Code* 1899 (Qld) and s. 297 of the *Criminal Code Act* 1913 (WA). An accused will be guilty of this offence if they foresee the possibility of harm, and nonetheless act: *Zaburoni* at 504 – 505 per Nettle J.