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WHAT DOES PARLIAMENT WANT? *DIRECTOR OF PUBLIC PROSECUTIONS (VIC) REFERENCE NO 1 OF 2019* (2021) 392 ALR 413

I Introduction

Recklessness is both a prominent and problematic concept,[1] that has been subject to extreme divergences of views as to its correct meaning.[2] The difficulty of identifying the correct meaning escalates when Parliament chooses not to define recklessness and leaves its meaning to the interpretation of the judiciary.

This has resulted in Australian courts adopting different meanings of recklessness[3] — which has been further complicated by each state jurisdiction possessing their own varying criminal law statutes and accompanying offences.[4] In the context of offences against the person, a point of contention arose following the High Court's decision of *Aubrey v The Queen* ('*Aubrey*')[5] concerning New South Wales legislation, where the Victorian decision of *R v Campbell* ('*Campbell*')[6] was distinguished as it contained a different standard of recklessness for a similar offence.

The flow-on effect of *Aubrey* on the Victorian equivalent serious injury offence arose in the case of *Director of Public Prosecutions Reference No 1 of 2019* (2021) 392 ALR 413 ('*DPP Reference No 1 of 2019*'), where the High Court was asked to reconsider the correctness of the *Campbell* decision. This case note explores the High Court's decision and the decisions of the courts below. In doing so, consideration is given to the application of the presumption of re-enactment — a principle

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1 See Adam Webster, 'Recklessness: Awareness, Indifference or Belief?' (2007) 31(5) *Criminal Law Journal* 272, 272–3.

2 *DPP (Vic) Reference (No 1 of 2019)* (2020) 284 A Crim R 19, 28 [32] (Maxwell P, McLeish and Emerton JJA) ('*DPP Reference No 1 of 2019* (VSCA)').

3 Webster (n 1) 272.

4 Lorraine Finlay and Tyrone Kirchengast, *Criminal Law in Australia* (LexisNexis Butterworths, 2nd ed, 2020) 5–7. The relevant statutes include: *Crimes Act 1900* (ACT); *Criminal Code 2002* (ACT); *Crimes Act 1900* (NSW); *Criminal Code Act 1983* (NT); *Criminal Code Act 1899* (Qld); *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*'); *Criminal Code Act 1924* (Tas); *Crimes Act 1958* (Vic); *Criminal Code Act Compilation Act 1913* (WA).

5 (2017) 260 CLR 305 ('*Aubrey*').

6 [1997] 2 VR 585 ('*Campbell*').

of statutory interpretation that ultimately drives the High Court's decision to uphold the *Campbell* interpretation — even if *Aubrey* is the more principled approach.

II Background

Section 17 of the *Crimes Act 1958* (Vic) ('*Crimes Act*') came into force on 24 March 1986[7] and provided a new offence for causing serious harm:

> **17 Causing serious injury recklessly**
>
> A person who, without lawful excuse, recklessly causes serious injury to another person is guilty of an indictable offence.[8]

The new offence intended to simplify the earlier archaic assault offences adopted from the *Offences Against the Persons Act 1861* (UK).[9] In doing so, Parliament chose not to define 'recklessly' and left its meaning to a matter of judicial interpretation.[10] There have been several cases that have influenced the definition attributed to 'recklessness' in respect of s 17, or offences against the person generally.[11] These cases underpin the challenge against the correctness of *Campbell* in *DPP Reference No 1 of 2019.*

A *Relevant Case Law*

The meaning of 'recklessness' was considered in the case of *R v Crabbe* ('*Crabbe*'),[12] where the High Court regarded it to now be settled law that in respect of the common law offence of murder, a person will be found guilty if they 'act knowing that it is *probable* that death or grievous bodily harm will result'.[13] This decision was later relied upon in *R v Nuri* ('*Nuri*')[14] — when the Victorian Court of Appeal considered, for the first time, the meaning of recklessness in the offence of recklessly engaging

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

8 *Crimes Act 1958* (Vic) s 17 ('*Crimes Act*').

9 The relevant Bill was the Crimes (Amendment) Bill 1985 (Vic). The pre-existing offences formed part of legislation recognised by the Victorian Parliament as becoming 'anachronistic over the passage of 120 years' — where the offences had become 'outdated' with a 'convoluted old drafting style' that was causing complexity and confusion: Victoria, *Parliamentary Debates*, Legislative Council, 25 September 1985, 201 (JE Kennan, Attorney-General). See also *DPP Reference No 1 of 2019* (VSCA) (n 2) 34–7 [61]–[68] (Priest JA).

10 *DPP Reference No 1 of 2019* (VSCA) (n 2) 37 [68].

11 See below Part II(A).

12 (1985) 156 CLR 464 ('*Crabbe*').

13 Ibid 469–70 (emphasis added).

14 [1990] VR 641 ('*Nuri*').

in conduct that may place a person in danger of death, contrary to s 22 of the *Crimes Act*.[15] The Victorian Court of Appeal decided, citing *Crabbe*, that 'conduct is relevantly reckless if there is foresight on the part of an accused of the probable consequences of his [sic] actions'.[16] In doing so, the Court chose not to follow the 'foresight of the *possibility* of harm' test that applied to the related repealed provisions.[17]

1 *Campbell*

In *Campbell*, the accused had been charged with three offences including recklessly causing serious injury contrary to s 17 of the *Crimes Act*.[18] Following conviction, the accused appealed on the ground that the trial judge misdirected the jury by providing conflicting directions as to the meaning of recklessness: the first being the accused 'fired the gun "knowing that serious injury will *probably* occur …"';[19] and, the second being that he did so 'knowing that serious injury *might* occur …'.[20]

The Victorian Court of Appeal agreed the trial judge misdirected the jury,[21] and held that the standard of recklessness required foresight of the accused 'that injury *probably* will result'.[22] Justice of Appeal Hayne and Crockett AJA reasoned this approach as adopting the 'spirit of the decision in *Crabbe*' where the 'same principles [were] relevant' even though *Crabbe* applied to common law murder.[23] Following the decision in *Nuri*, their Honours further considered that the adoption of a 'test of "probability" in a kindred section' should be followed, for the purpose of having a consistent meaning of recklessness throughout the *Crimes Act*.[24]

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15 See generally *DPP Reference No 1 of 2019* (VSCA) (n 2) 37–9 [72]–[73] (Priest JA). Section 22 was another new offence created by the *Crimes (Amendment) Act 1985* (Vic), at the same time as s 17, for the purpose of creating a general endangerment offence: *Nuri* (n 14) 643.

16 *Nuri* (n 14) 643, citing *Crabbe* (n 12) 464.

17 *DPP (Vic) Reference No 1 of 2019* (2021) 392 ALR 413, 422 [37] (Gageler, Gordon and Steward JJ) (emphasis in original) ('*DPP Reference No 1 of 2019*'); *DPP Reference No 1 of 2019* (VSCA) (n 2) 38–9 (Priest JA).

18 *Campbell* (n 6) 588 (Hayne JA and Crockett AJA).

19 Ibid 592 (Hayne JA and Crockett AJA) (emphasis in original).

20 Ibid (emphasis in original).

21 Ibid 592 (Hayne JA and Crockett AJA, Phillips CJ agreeing at 586).

22 Ibid 592–3 (emphasis added).

23 Ibid 593.

24 Ibid. The majority disregarded earlier Victorian authority favouring the 'possibility' test for intent because they 'concern[ed] the now repealed offences of unlawful and malicious wounding': at 593. Earlier authority referred to included: *R v Smyth* [1963] VR 737; *R v Kan* [1974] VR 759; *R v Lovett* [1975] VR 488.

2 *Aubrey*

In *Aubrey*, the High Court considered the meaning of recklessness in respect of the offence of 'maliciously inflicting grievous bodily harm' contrary to s 35(1)(b) of the *Crimes Act 1900* (NSW) — wherein s 5 defined 'maliciously' to include 'recklessly'.[25] The Court held that to prove the accused acted recklessly, there must be foresight of the possibility (opposed to probability) by the accused that sexual intercourse would result in the other person's contraction of the grievous bodily disease.[26] The joint judgment acknowledged the *Campbell* decision,[27] where the High Court said the probability test adopted in *Crabbe* was confined to the offence of murder — however accepting that the requirements in states 'may vary according to the terms of each [s]tate's legislation'.[28]

B *Presumption of Re-Enactment*

Guided by the judicial history of the meaning of 'recklessness', the majority decision of the High Court in *DPP Reference No 1 of 2019* ultimately rests upon the application of the presumption of re-enactment. The High Court recognised the longstanding authority for this tool of statutory interpretation in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees*,[29] for

> the proposition that where … Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]'…[30]

Despite certain views that the presumption is 'of no great weight',[31] the presumption may have real force in circumstances of 'specialised and technical fields'[32] of law — that are generally subject to amendments, and those responsible for such amendments tend to be aware of relevant past judicial decisions.[33] Legislative

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25 *Aubrey* (n 5) 311–12 [1], [6] (Kiefel CJ, Keane, Nettle and Edelman JJ).

26 Ibid 327–9 [44], 328–9 [46]–[47], 331 [51] (Kiefel CJ, Keane, Nettle and Edelman JJ, Bell J agreeing at 331 [53]). The joint judgment maintained the longstanding judicial position as to the meaning of recklessness as being 'foreseeing the possibility of consequences and proceeding nonetheless': at 327–8 [44].

27 Ibid 328 [45].

28 Ibid 329 [47].

29 (1994) 181 CLR 96 ('*Alcan*').

30 Ibid 106 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), quoting *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402, 446.

31 *Flaherty v Girgis* (1987) 162 CLR 574, 594 (Mason ACJ, Wilson and Dawson JJ).

32 Thomas Prince and Perry Herzfeld, *Statutory Interpretation Principles* (Thomson Reuters, 2nd ed, 2020) 157.

33 Ibid. See also *DPP Reference No 1 of 2019* (n 17) 416–20 [10]–[30] (Kiefel CJ, Keane and Gleeson JJ).

history is a factor which tends to also strengthen the presumption's operation.[34] The awareness by Parliament of a particular judicial interpretation may also be evidenced by an 'expert review of the law and … case law' by a law reform commission or advisory committee.[35] This is particularly relevant because many of the aforementioned factors supporting the presumption's application are relied on by the majority in *DPP Reference No 1 of 2019*.[36]

III Decisions Below

A *County Court Trial*

In February 2017, following a fight in the streets of Melbourne, the accused was charged with recklessly causing serious injury contrary to s 17 of the *Crimes Act*.[37] During the fight, the accused kicked the victim in the head, resulting in serious injury to their skull and brain.[38] In submissions regarding the correct jury direction for the meaning of recklessness, the Victorian Director of Public Prosecutions ('DPP') submitted that the decision in *Campbell* is wrong; however, given the High Court confined its decision in *Aubrey* to New South Wales legislation, they considered the judge was 'probably bound by the Court of Appeal in *Campbell*'.[39] The trial judge held that they were bound to follow the decision in *Campbell* given its direct application to the relevant offence charged.[40]

B *Victorian Court of Appeal*

President Maxwell, McLeish and Emerton JJA, with whom Priest and Kaye JJA agreed, held that consistent with the trial judge, the correct interpretation of recklessness for the purposes of s 17 was the foresight of probability approach taken in *Campbell*.[41] The conclusion of the joint judgment relied upon the application of the re-enactment presumption, where subsequent amendments to the *Crimes Act* — increasing the maximum penalty for s 17 and 'creating a new "gross violence" version of the [s 17] offence' — demonstrated Parliament's awareness and endorsement

34 Prince and Herzfeld (n 32) 157; *Alcan* (n 29) 106; *Vella v Commissioner of Police for New South Wales* (2019) 269 CLR 219, 233 [19].

35 *DPP Reference No 1 of 2019* (n 17) 427 [51] (Gageler, Gordon and Steward JJ), quoting *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489, 503 [15].

36 See below Part IV(A).

37 *DPP Reference No 1 of 2019* (VSCA) (n 2) 33 [56] (Priest JA). The accused was also charged with intentionally causing serious injury pursuant to s 16 of the *Crimes Act 1958* (Vic).

38 *DPP Reference No 1 of 2019* (VSCA) (n 2) 33 [56].

39 Ibid 33 [57].

40 Ibid 33–4 [58].

41 Ibid 22 [5]–[6] (Maxwell P, McLeish and Emerton JJA, Priest JA agreeing at 34 [60], Kaye JA agreeing at 52 [127]).

of the *Campbell* interpretation.[42] Their Honours further considered the alternative definition of 'recklessness' proposed by the DPP as containing an unreasonableness qualification should remain a matter for Parliament.[43] For these reasons, the joint judgment considered it unnecessary for them to '*reach a concluded view*' about the correctness of *Campbell*.[44]

Both Priest and Kaye JJA, in their separate judgments, agreed with the reasons put forward by the joint judgment.[45] Their Honours additionally relied upon the settled nature of *Campbell* including how it has not attracted any judicial or academic criticism,[46] in addition to the probability test providing consistency to the meaning of recklessness throughout the *Crimes Act*.[47]

IV The Decision

By a slim majority, comprising Gageler, Gordon and Steward JJ, with whom Edelman J agreed, the High Court dismissed the appeal and held that the judicial interpretation of 'recklessness' in *Campbell* should continue to be followed in respect of s 17 of the *Crimes Act.* The decision was premised upon an application of the presumption of re-enactment and the unfairness of retroactively criminalising conduct by changing the meaning of 'recklessness'. Chief Justice Kiefel, Keane and Gleeson JJ dissented in a joint judgment. Despite the outcome, all three judgments identified the decision in *Campbell* as erroneous.[48]

A *The Majority*

Consistent with the Court of Appeal, the majority's decision relies upon application of the re-enactment presumption with reference to two amendments to the *Crimes Act* in 1997 and 2013. The 1997 amendments increased the maximum penalty for s 17 by 50% to 15 years' imprisonment.[49] The 2013 amendments included a revision of the definitions of 'injury' and 'serious injury', in addition to the insertion of ss 15A and 15B providing new gross violation offences.[50]

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[42] Ibid 22 [5], 25–6 [119]–[126] (Maxwell P, McLeish and Emerton JJA).

[43] Ibid 22 [5], 30–2 [39]–[51].

[44] Ibid 25 [17] (emphasis added).

[45] See ibid 50–1 [123], [125] (Priest JA), 55–6 [145], [147] (Kaye JA).

[46] Ibid 49 [122] (Priest JA, Kaye JA agreeing at 55 [144]).

[47] Ibid 49 [120]–[121] (Priest JA), 54–5 [141]–[143] (Kaye JA).

[48] See *DPP Reference No 1 of 2019* (n 17) 416 [7] (Kiefel CJ, Keane and Gleeson JJ), 428–9 [57] (Gageler, Gordon and Steward JJ), 431 [66], 441 [100] (Edelman J). There is a slight difference in Edelman J's comments that rather refer to *Campbell* as being less principled than *Aubrey*: at 431 [66].

[49] Ibid 424 [44] (Gageler, Gordon and Steward JJ).

[50] Ibid 424–5 [46]–[47].

In terms of the re-enactment presumption, these amendments were identified by the majority as 'significant, substantive and direct'[51] — where Parliament was undoubtedly aware of the higher degree of culpability associated with the probability test by increasing the maximum penalty for s 17.[52] According to the majority, the nature of the 2013 amendments by establishing aggravated offences of ss 16 and 17 — involving an adoption of the elements of the existing offences with the additional gross violence element[53] — required Parliament to have considered the culpability and criminality of the existing offences to establish the more serious offences.[54] Strengthening the application of the presumption, the majority also relied upon the temporal proximity between the decision in *Campbell* and the 1997 amendments, being two years after.[55]

The majority also went a step further than the Court of Appeal in recognising that since 1997, criminal law has been a '"specialised and politically sensitive field" in the sense contemplated in *Electrolux Home Products Pty Ltd v Australian Workers' Union*[56]'.[57] This was premised upon the existence of a designated Minister and Department of State to Criminal Justice ('Department of Justice').[58] According to the majority, this amounted to it being 'no fiction' that Parliament, through the Department of Justice and the Attorney-General, had an awareness of 'decisions dealing with their portfolio'.[59]

In terms of Parliament's awareness of the *Campbell* interpretation, the majority referred to the existence of 'expert reviews and extensive consultation with key stakeholders in the criminal justice system'[60] prior to the 1997 and 2013 amendments. This included a Sentencing Advisory Council Report that the government '"carefully

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51 Ibid 427 [53].

52 See ibid 424 [44], quoting *DPP Reference No 1 of 2019* (VSCA) (n 2) 25 [21].

53 *DPP Reference No 1 of 2019* (n 17) 425 [47]–[48]. The majority relied upon the Explanatory Memorandum to the amending Bill and the Second Reading Speech to support these assertions: at 425 [47]–[48].

54 Ibid 426 [50]. Section 17 was made the alternative verdict to s 15B: at 426 [50], citing *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 5.

55 *DPP Reference No 1 of 2019* (n 17) 428 [54] (Gageler, Gordon and Steward JJ).

56 (2004) 221 CLR 309 ('*Electrolux*').

57 *DPP Reference No 1 of 2019* (n 17) 428 [55] (Gageler, Gordon and Steward JJ), citing ibid 346–7 [81].

58 *DPP Reference No 1 of 2019* (n 17) 428 [55] (Gageler, Gordon and Steward JJ).

59 Ibid.

60 Ibid 428 [55], citing as examples: Victoria, *Parliamentary Debates*, Legislative Council, 27 May 1997, 1058 (Louise Asher); Sentencing Advisory Council, *Statutory Minimum Sentences for Gross Violence Offences* (Report, October 2011) vii ('*Statutory Minimum Sentences*').

considered’” in respect of the 2013 reforms[61] where the report expressly identified the probability test satisfying the element of recklessness, citing *Nuri*.[62] The majority therefore reasoned it as being ‘difficult to imagine’ that those involved in the field were unaware of significant decisions dealing with the meaning of recklessness — particularly when considering amendments that ‘significantly and directly altered the nature and extent of the criminality and culpability of a contravention of s 17’.[63]

Even if the decision in *Campbell* was wrong, the majority considered the reliance on the *Campbell* interpretation of recklessness in successive amendments could not be put to one side.[64] Noting the decision in *Campbell* had consistently been followed for more than 25 years, the majority were reluctant to depart from such longstanding authority.[65] They considered it unfair to retrospectively change the meaning of recklessness — noting it could affect uncharged criminal conduct occurring prior to their decision, and have a ‘flow-on effect’ for other offences in the *Crimes Act*.[66] Any correction of the meaning of recklessness was up to the Victorian Parliament.[67]

B *The Minority*

In the minority, Kiefel CJ, Keane and Gleeson JJ, held that the presumption of re-enactment does not apply to the interpretation of recklessness within s 17 of the *Crimes Act*.[68]

The minority initially set out several legal propositions underpinning, but also undermining, the use of the presumption.[69] Their Honours noted it should not be used to ‘perpetuate an erroneous construction of a statutory provision’, [70] particularly in circumstances where the legislature’s adoption of the judicial meaning assigned is less than ‘tolerably clear’.[71] Reference was made to comments of Dixon CJ in *R v Reynhoudt*,[72] who considered it ‘quite artificial’ to take mere repetition of

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61 *DPP Reference No 1 of 2019* (n 17) 425–6 [49] (Gageler, Gordon and Steward JJ), quoting Victoria, *Parliamentary Debates*, Legislative Assembly, 13 December 1012, 5550 (Robert Clark, Attorney-General).

62 *Statutory Minimum Sentences* (n 60) 4 [1.20].

63 *DPP Reference No 1 of 2019* (n 17) 428 [56] (Gageler, Gordon and Steward JJ).

64 Ibid 428–9 [57].

65 Ibid 429 [59].

66 Ibid.

67 Ibid 428–9 [57], [59].

68 Ibid 426–7 [51] (Kiefel CJ, Keane and Gleeson JJ).

69 See ibid 416–18 [10]–[17]. See further discussion above in Part II(B) about the re-enactment presumption.

70 Ibid 416 [11].

71 Ibid 416 [12].

72 (1962) 107 CLR 381 (‘*Reynhoudt*’).

a judicially considered phrase in legislation as approval.[73] Taking it one step further, the minority noted that amendments that do not re-enact the words in question or re-enact such words but fail to reconsider their meaning would seldom be taken as approval.

The minority rejected the application of the presumption in respect of the 1997 and 2013 amendments as evidencing legislative endorsement of *Campbell*. In respect of the 1997 amendment, the minority, disagreeing with the reasoning of the Court of Appeal,[74] considered there was no evidence to suggest the 'legislature turned its mind to *Campbell*' when deciding to increase the maximum penalty for various offences.[75] The minority instead noted the reform was a response to 'perceived public concern' and a dissatisfaction with sentencing levels for serious offences.[76] They also observed the amending provision made no reference to 'the word "recklessly" or to the s 17 offence more generally'.[77]

For the 2013 amendments, the repetition of the word 'recklessly' in s 15B was viewed as being in the context of creating a new offence — where no extrinsic materials indicated what the legislature intended 'recklessly' to mean.[78] The minority also disagreed that passages within the Sentencing Advisory Council Report could be relied on as evidencing Parliament's awareness of *Campbell*.[79] They observed the Council's Terms of Reference narrowed their advice to the operation of statutory minimum sentences and factors of gross violence rather than 'the merits of the proposed scheme'.[80]

The minority concluded that correcting the decision in *Campbell* would 'not be productive of substantial injustice' and the criminal justice system would be able to adapt as they did when *Campbell* overturned longstanding authority.[81] They accordingly viewed that such issues should not preclude the correction of a 'manifestly incorrect interpretation'.[82]

73 *DPP Reference No 1 of 2019* (n 17) 747 [14] (Kiefel CJ, Keane, Nettle and Edelman JJ), quoting *Reynhoudt* (n 72) 388 (Dixon CJ).

74 See *DPP Reference No 1 of 2019* (VSCA) (n 2) 25–6 [21] (Maxwell P, McLeish and Emerton JJA).

75 *DPP Reference No 1 of 2019* (n 17) 419 [24] (Kiefel CJ, Keane, Nettle and Edelman JJ).

76 Ibid 418–19 [23].

77 Ibid 419 [24].

78 Ibid 419 [25].

79 Ibid 419–20 [26]–[27].

80 Ibid 420 [30].

81 Ibid 421 [34].

82 Ibid.

C *Edelman J*

Writing his own judgment, Edelman J agreed with the majority, however, 'not without considerable hesitation'.[83] His Honour's reasons were akin to the majority,[84] however, he never explicitly referred to the re-enactment presumption. His Honour rather concluded the result of *Campbell* should not be disturbed[85] and the decision itself was not 'plainly wrong'.[86] In addition, Edelman J spent time analysing the test for recklessness formulated in *Aubrey* — particularly the possible inclusion of a reasonableness assessment in the recklessness requirement.[87]

V Comment

The outcome of *DPP Reference No 1 of 2019* does not clarify the concept of recklessness as a matter of judicial interpretation — save as to Edelman J's analysis of the reasonableness consideration in the recklessness requirement put forward by the High Court in *Aubrey*.[88] Instead, the decision demonstrates the effect of the presumption of re-enactment as a principle of statutory interpretation, in further constraining the nature of judicial power.

Despite there being abundant authority in support of the operation of the presumption,[89] this case makes clear that its application is not straightforward and is subject to contextual considerations that may vary in each case. Many earlier cases applying the presumption were noted by the minority as a clear case of legislative adoption.[90] However, when there is less certainty, as was the case here, the discrepancy in the approaches of the majority and minority have resulted in the requisite threshold to satisfy application of the presumption remaining unclear.

The speculative nature of the presumption's application also remains a contentious point, where the majority's reasons relied upon inferences drawing upon the conduct of Parliament — with no express indication of Parliament endorsing the *Campbell* interpretation.[91] In their Honours' judgment, this extends to their reliance on the role of the Department of Justice and Attorney-General as a conduit for

83 Ibid 430 [65] (Edelman J).

84 See ibid 438–40 [89]–[95], for consideration by Edelman J of legislative changes affecting s 17, and unfairness in departing from *Campbell*.

85 Ibid 436 [81] (Edelman J).

86 Ibid 431 [66].

87 Ibid 432 [69], quoting *Aubrey* (n 5) 350 [49].

88 See James O'Hara, 'Recklessness in Criminal Law: Possibilities and Probabilities' (2022) 46(1) *Criminal Law Journal* 67, 68.

89 See *DPP Reference No 1 of 2019* (n 17) 416 [10] (Kiefel CJ, Keane and Gleeson JJ).

90 Ibid 416–17 [12], citing *Alcan* (n 29) and *Electrolux* (n 56).

91 Cf *DPP Reference No 1 of 2019* (n 17) 418–19 [21], [23]–[25], 420 [31] (Kiefel CJ, Keane and Gleeson JJ).

Parliament's knowledge of particular judicial decisions dealing with meaning of 'recklessness'.[92] While such bodies are undoubtedly a well-regarded source of information for Parliament on criminal issues, is it a step too far to assume they brought the *Campbell* decision to Parliament's attention? Even so, such inferences were certainly still compelling, however, when weighed against the 'duty of appellate courts' to correct errors in the law,[93] at what stage should a court intervene — particularly when the entire Court accepted *Campbell* as erroneous.[94]

Moving forward, for the purposes of s 17, the High Court has left the decision in the hands of Parliament, as to whether they choose to adopt the *Aubrey* test or remain with the existing operation of *Campbell*. Given the greater infringement of individual liberties in criminal law[95] and possible flow-on effect of altering the standard of recklessness,[96] it is worthwhile that Parliament makes any such change since they will have the benefit of engaging in 'careful policy consideration[s]'.[97] Even so, this outcome still generates the unattractive consequence of inconsistency and incoherence across different Australian states in respect of the concept of recklessness in similar statutory offences.[98]

VI Conclusion

DPP Reference No 1 of 2019 provides some clarity as to the meaning of recklessness to be attributed to s 17 of the *Crimes Act*. It upholds the application of the *Campbell* interpretation, and therefore for the time being will not cause any injustice or inconvenience to the criminal justice system in Victoria. It is only a matter of time until we see whether the High Court correctly inferred the intentions of the Victorian Parliament. If it did not, it's entirely up to the power of the Parliament to clarify them.

The decision perpetuates inconsistency as to the meaning of 'recklessness' across state jurisdictions.[99] As it currently stands, the different ascribed meanings of the term include: in Victoria, a test of probable consequences;[100] in New South Wales, a test of possible consequences;[101] and, in South Australia[102] and at a Commonwealth

92 See ibid 428 [55] (Gageler, Gordon and Steward JJ).

93 Ibid 416–17 [12] (Kiefel CJ, Keane and Gleeson JJ).

94 See above n 48 and accompanying text.

95 See *DPP Reference No 1 of 2019* (n 17) 440 [96] (Edelman J).

96 Ibid 429 [59] (Gageler, Gordon and Steward JJ).

97 Ibid 441 [101] (Edelman J).

98 Ibid.

99 See ibid.

100 *Campbell* (n 6) 592–3 (Hayne JA and Crockett AJA).

101 *Aubrey* (n 5) 327 [44], 328–9 [46]–[47], 331 [51] (Kiefel CJ, Keane, Nettle and Edelman JJ, Bell J agreeing at 331 [53]).

102 *CLCA* (n 4) s 21 (definition of 'recklessly').

level,[103] a test of awareness of the 'substantial risk' of a person's conduct.[104] Any further consideration as to the meaning of 'recklessness' by Parliament should consider the test that would be most appropriate, and strive to achieve some sense of consistency. This case additionally raises new questions and a sense of uncertainty regarding the application of the presumption of re-enactment, as a tool of statutory interpretation. The presumption is a powerful tool that may constrain the exercise of judicial power to uphold the intentions of Parliament in the face of conflicting judicial authority. In these circumstances, uncertainty as to the exact threshold required for satisfying the presumption will, until clarified, create dissonance into the foreseeable future.

The outcome of *DPP Reference No 1 of 2019* is appropriate given the broader issues of policy and consequences that would attach to altering criminal liability. However, while understanding the intentions of Parliament is rarely black and white — the courts should not take this case as authority to refrain from correcting the law out of caution that it *might* not be what Parliament wants.

103 *Criminal Code Act 1995* (Cth) s 5.4.

104 Both tests also include an additional consideration that encapsulates there being no justifiable reason for engaging in the conduct despite the risk: *CLCA* (n 4) s 21 sub-s (b) (definition of 'recklessly'); *Criminal Code Act 1995* (Cth) ss 5.4(1)(b), 5.4(2)(b).