The significance of re-enactment

Eric Balodis, Crown Prosecutor reports on *Director of Public Prosecutions Reference No 1 of 2019*

In *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26, Gageler, Gordon and Steward JJ in a joint judgment applied the principle that the repetition of words in legislation after those words have been judicially construed allows for a conclusion that the legislature has adopted that judicial definition to hold that the definition of 'recklessness' in the Victorian *Crimes Act* required proof of foresight of *probable* harm. In dissent, Kiefel CJ, Keane and Gleeson JJ declined to apply the re-enactment principle, and would have found that recklessness only requires proof of foresight of *possible* harm, consistently with High Court authority concerning proof of recklessness in an offence of malicious infliction of grievous bodily harm under the NSW *Crimes Act*. Justice Edelman, taking a somewhat different approach, agreed with Gageler, Gordon and Steward JJ to dismiss the Director's appeal.

The Decision of the Victorian Court of Appeal

Section 17 of the *Crimes Act 1958* (Vic) provides that it is an offence to 'recklessly' cause serious injury to another person without lawful excuse. In 1990 and again in 1997, the Victorian Court of Appeal held that the element of 'recklessness' in s 17 requires proof of foresight of 'probable' harm: *R v Nuri* [1990] VR 641 and *Campbell v R* [1997] 2 VR 585.

In 2017, the High Court ruled that the element of 'recklessness' in a provision of the *Crimes Act 1900* (NSW) that created an offence of 'malicious infliction of grievous bodily harm' required only foresight of 'possible' harm: *Aubrey v The Queen* (2017) 260 CLR 305 at [43] – [47].

The Victorian jury in *Director Reference* had been directed that the element of 'recklessness' in s 17 requires proof of a foresight of probable harm in accordance with *Campbell*. The accused was acquitted. The Victorian Director of Public Prosecutions referred the question of whether that direction was correct to the Victorian Court of Appeal, contending that the trial judge should have followed

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the decision of the High Court in *Aubrey*. The Victorian Court of Appeal held that *Campbell* should continue to be followed and that juries should be directed that a 'probability' of harm test applied: *Director of Public Prosecutions Reference (No 1)* (2020) 284 *A Crim R* 19. The Crown appealed that decision to the High Court.

Legislative History of s 17

Section 17 was introduced into the Victorian *Crimes Act* in 1986. It replaced s 19A of the Victorian *Crimes Act*, which created an offence of unlawful and malicious wounding or infliction of grievous bodily harm. The term 'reckless' was not defined in the legislation.

As outlined above, in 1990, and then again in 1997, the Victorian Court of Appeal held that the term 'recklessness' required foresight of 'probable' harm. In so holding, the Court of Appeal read the term consistently with *Crabbe v The Queen* (1985) 156 CLR 464, in which the High Court decided that at common law the *mens rea* for murder requires a foresight of death or grievous bodily harm as a 'probable consequence'.

Two later enactments affected s 17. In 1997, the *Sentencing and Other Acts (Amendment) Act 1997* (Vic) increased the maximum penalty in s 17 from 10 to 15 years (as were the maximum penalties for other offences of causing injury). The substance of the provision was not affected by the amendment, but there was an obvious and substantial increase in the maximum penalty after a thorough consultative process involving various stakeholders in the criminal justice system.

In 2013, an aggravated form of s 17, causing serious injury recklessly in circumstances of gross violence, was inserted as s 15B of the Victorian *Crimes Act*. A circumstance of gross violence included an offender being in company or the premeditated use of a weapon.

The Victorian Sentencing Advisory Council Report (Statutory Minimum Sentences for Gross Violence Offences, 2011) which recommended the inclusion of s 15B, had made two references to the definition of the term 'reckless'. In one, it referred to the foresight of probable harm and footnoted a reference to *Nuri* (at [26] and [49]). In another, it referred to the foresight that those actions could cause serious injury (at [28]). The Second Reading Speech which enacted s 15B made reference to the Report and noted that some, but not all, of its recommendations were adopted.

The High Court's decision

Like the plurality of the Victorian Court of Appeal, Gageler, Gordon and Steward JJ did not find it necessary to determine whether *Campbell* was wrongly decided, although their Honours noted that the difference between the two standards of recklessness was not insignificant. Rather, their focus was upon the legislative history of s 17. Their Honours noted that the legislature had left it to the courts to define recklessness in the sections in the Victorian *Crimes Act* dealing

with the infliction of injury including s 17.

It has been recognised as a principle of statutory interpretation that the repetition of words in legislation after those words have been judicially construed allows for a conclusion that the legislature has adopted that judicial definition ('the re-enactment principle'): *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106. With reference to this principle, Gageler, Gordon and Steward JJ noted that, in 1997, the maximum penalty for s 17 had been increased in circumstances where the legislature must have taken into account the higher culpability commensurate with a foresight of probable, and not merely possible harm (at [44]).

With respect to the 2013 amendments, their Honours noted that Sentencing Advisory Council had referred to recklessness as the foresight of probable harm in discussing offences such as s 17, for which new aggravated offences such as s 15B would be introduced. Their Honours also noted that the Second Reading Speech had expressly referred to new offences involving circumstances of gross violence as having the same elements as the non-aggravated offences (at [48] and [50]). These were significant because they addressed the aggravated form of s 17. Again, their Honours considered that this indicated that the legislature was aware of and accepted *Nuri* and *Campbell* (at [50]).

Their Honours took into account the length of time that *Campbell* had stood as an authority and the possible unfairness that would be occasioned by declaring that a different interpretation of s 17 (in particular, that cases might now be able to be commenced which would not have previously been able to be commenced) (at [59]). Their Honours were of the view that the legislature must have known how s 17 had been interpreted, observing in this respect that the criminal justice system is a politically sensitive field with its own Department and Minister, and that the amendments in 1997 and 2013 both included consultations with stakeholders (at [55]).

In dissent, Kiefel CJ, Keane and Gleeson JJ concluded that *Campbell* was wrongly decided (at [7]). Their Honours held that the reasoning in *Crabbe* only applies to offences of murder, where the equivalence of the foresight of the probable consequence of death or grievous bodily harm is the equivalent to an intention to do either (at [1]).

The minority treated the application of the re-enactment principle with much greater circumspection to the joint judgment of Gageler, Gordon and Steward JJ, noting that in different authorities the principle been described as 'valuable' on the one hand and 'of no great weight' on the other. Their Honours concluded that, regardless of the value of the principle, it should not be allowed to perpetuate error (at [11] and [13]). Their Honours limited the application of the re-enactment principle to circumstances where it is tolerably clear that the legislature intended to adopt the meaning of a word that has been judicially construed (at [12] and [15]). In this respect, their Honours made reference to authorities which make clear that mere repetition of words does not engage the principle (at [14]).

Their Honours concluded that it was not possible to infer that the legislature had any knowledge of the decision in *Campbell*. In direct contrast to Gageler, Gordon and Steward JJ, the minority was of the view that criminal justice is not a politically sensitive field where the legislature would be assumed to understand the effect of previous decisions of courts. Their Honours also noted that the 1997 and 2103 amendments were concerned with matters other than the *mens rea* of s 17 (at [31] – [32]).

Against this background, the minority judges drew very different inferences from the 1997 and 2013 amendments to those drawn by Gageler, Gordon and Steward JJ. In particular, the minority considered that the amendment of the maximum penalty was a mere amendment to the concluding words of the section. In this respect, their Honours noted that while the 2013 amendment took into account the Sentencing Advisory Council's Report, the legislature expressly did not adopt all of its recommendations (at [27]). Their Honours also noted that the purpose of the report was not to address the *mens rea* for any of the sections dealing with the causing of injury (at [26] – [30]). In these circumstances, their Honours held that it was therefore not possible to conclude that the legislature had adopted the definition of recklessness in *Campbell*.

Justice Edelman agreed with Gageler, Gordon, and Steward JJ but 'not without considerable hesitation' (at [65]). His Honour was particularly concerned about imposing criminal activity for acts that may have social utility, but which necessarily carry a risk of possible harm (for example, driving a car or playing contact sport). However, his Honour concluded that, because recklessness includes the taking of an unreasonable risk, the difference between the foresight of the possibility of harm and concluded that the foresight of probable harm 'can be reduced' (at [75]). His Honour also took into account that when s 17 had been first inserted into the *Crimes Act*, the precise definition of recklessness was not settled, and inferred that the legislature must have decided to leave it to the courts to define the term (at [76] – [79]).

Edelman J therefore concluded that *Campbell* was not plainly wrong. His Honour did not treat the amendments to s 17 in 1997 as the re-enactment of the section. However, his Honour held that the amendments could nonetheless affect the development of what his Honour described as an 'open textured' statutory concept. In particular, his Honour held that the 1997 amendments constrained the meaning to be given to the concept of recklessness (at [92]). When the 2013 amendments were considered, the constraint upon the continuing development of the concept of 'recklessness' became significant.

Finally, his Honour concluded that it would be unfair to overrule *Campbell* because it was longstanding and would retroactively inculpate a class of persons who were not previously guilty of breaching s 17.

In conclusion, the case reveals how open textured a principle of statutory construction may be, and the difficulty of overruling an authority that has stood for 26 years, when the legislature had two opportunities to do so. BN