

**Submission to
Victorian Law Reform Commission
in relation to its inquiry into
Improving the Response of the Justice System to Sexual Offences**

Issues Paper I: Sexual Offences: “Grab and Drag”

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6 April 2021

Introduction

1. This is a submission in relation to the Victorian Law Reform Commission’s (VLRC’s) Issues Paper I: *Sexual Offences: “Grab and Drag”*, as part of its broader inquiry into Improving the Response of the Justice System to Sexual Offences. I previously made a submission (dated 23 December 2020) to the VLRC in relation to Issues Paper C: *Defining Sexual Offences*. This submission supplements that earlier submission. I am grateful to the VLRC for the opportunity to make a second submission.
2. I am a senior lecturer in the School of Law at La Trobe University (teaching and researching in criminal law), though I make this submission in my private capacity. I should also note that I was formerly a senior legal policy officer in the Department of Justice 2010–2015, during which time I worked on reforms to sexual offences. However, the present submission to the VLRC contains only my own opinions and does not purport to reflect the views, past or present, of the Department of Justice and Community Safety.
3. For reasons of time, this submission addresses only a few selected issues raised by the VLRC’s Issues Paper I on the mooted “grab and drag” offences. I have not had time to do research into the issues, so this submission only briefly outlines some ideas relevant to Issue Paper I. I am, again, very happy to provide further information on specific issues if that would assist the VLRC at a later time.
4. In summary, this submission recommends that consideration be given to the creation of a new offence: “unlawful act causing fear of a sexual offence”. This new offence would be intended to recognise and protect victims from the harm of being put in fear of being sexually assaulted or raped. This offence would thus focus on the effect on the victim of an unlawful act, such as assault, rather than the intent of the offender. The new offence would also help contribute to a shift toward requiring people, especially males, to take greater responsibility for the consequences of their actions even when they do not intend to cause such fear.

A. The decision in *DPP(Vic) v Williams*

5. I have not been able to access the text of the decision in *DPP(Vic) v Williams*, and so my comments here are necessarily very limited and are based only on what is said of the case in Issues Paper I. But it does seem necessary to say something here as this seems to be a good example of a controversy based on misunderstanding.
6. The trial judge's task was to assess the evidence presented by the prosecution to see if it satisfied all the elements of the s 42 offence (assault with intent to commit a sexual offence) beyond reasonable doubt. That is a high standard of proof. As reported in the Issues Paper, the judge was very careful to lay out the reasons for why they thought that that standard was not met. The fact that the judge could not rule out that the accused had some other, non-sexual intention, means that the prosecution had not proved that the accused had the requisite intent. The judge did not find as a matter of fact that the accused had no such intent. That was not the judge's task. Their task was simply to assess the prosecution evidence to see if it proved the allegation beyond reasonable doubt.
7. It is very likely that a jury, properly instructed and assessing only the evidence presented, would have come to the same decision as the judge.
8. Reasonable minds can disagree about assessments of the strength of certain pieces of evidence. But, from a legal point of view, there seems to be nothing exceptional about the judge's decision to find the charge not proven beyond reasonable doubt. The graphic and disturbing nature of the video footage does not increase its probative value in relation to proof of intent to commit a sexual offence.
9. I have not read any of the criticisms of the decision, but it would seem very difficult to say that the judge's assessment of the *strength of the evidence* has anything to do with any sort of inadequacy with *the terms in which s 42 is drafted*. It is not as if the elements of s 42 could be redrafted in a way that would have enabled the judge to find that the evidence *did* prove intent to commit a sexual offence beyond reasonable doubt. The issue here is not the terms of the statutory provision but the strength of the evidence. No amount of legislative redrafting of s 42 will change this, unless the change was to lower the standard of proof in sexual offence trials to "on the balance of probabilities". That is not a reform that could be expected to be taken seriously by anyone who understands the principles underpinning criminal justice.
10. The case of *DPP(Vic) v Williams* does not, in itself, seem to provide any particular reason for reforming the existing sexual offences in the *Crimes Act*.
11. However, the discussion and debate prompted by the case does raise the question whether there could be *other* offences created which did not focus on the intent of the accused but instead focused on the effect on the victim.

B. The mooted "grab and drag" offence

12. One such new offence is, it seems, the mooted offence of "grab and drag" discussed in the Issues Paper. The elements of the mooted offence are left undeveloped in the Issues Paper. If its elements are simply that the offender grabbed and dragged a victim, then this is already clearly a kind of assault. There is no "gap" in the criminal law here.

13. If, however, the concern is to create a specific, *aggravated* kind of assault, with a higher penalty than common assault or unlawful assault, then that's a different matter. But it is hard to see how grabbing and dragging in themselves amount to a more aggravated form of assault than some other forms of assault, such as a punch to the face or a push to the ground. There would need to be a full review of what particular sorts of assault are more serious than others.
14. Alternatively, what could aggravate the offence is the fault element attached to conduct of grabbing and dragging. However, if the mooted offence is to have a fault element of *intention to commit a sexual offence*, then this is already covered by s 42. There would be nothing gained by the creation of a specific "grab and drag" version of this already existing general offence.
15. It is not clear what other fault elements are envisaged for the mooted "grab and drag" offence. If it were to be a matter of the accused "being aware that the victim would likely be put in fear of an imminent sexual assault", then that would be a distinctive and arguably useful offence.
16. Such an offence would seem to require that such fear on the victim's part is also an element to be proved. This would shift the focus of the offence to the *effect on the victim* of the assault rather than the intent of the accused in assaulting the victim. This would give greater attention to the perspective of the victim of the assault, and treat the resultant fear they suffer as a harm which the criminal law should seek to prevent.
17. But limiting the conduct that gave rise to that fear to just grabbing and dragging would be very narrowing. If someone assaulted another person and thereby produced that fear, it should be largely irrelevant what particular kind of physical assault it was. If the conduct were a matter of tripping someone over or pushing them into a car, such actions would not involve "grabbing and dragging". But if those actions caused the victim to fear they were about to be raped or sexually assaulted, then it would be absurd for the new offence not to cover the scenario simply because the accused did not actually grab and drag the victim, but only tripped or pushed them.
18. Accordingly, this submission will now present some ideas for a new offence of "unlawful act causing fear of a sexual offence".

C. Possible new offence of unlawful act causing fear of a sexual offence

19. It would seem very safe to assume that the victim in the *Williams* case would have been terrified by the attack itself and also greatly fearful of what further acts the offender was intending. Certainly, many if not most victims in such a circumstance would have such a fear. Section 42, rightly, does not directly address such fears — that is not the role of that offence. But perhaps a new kind of sexual offence *could* be created that addresses just such fears.
20. Many sexual offences are (rightly) focused on the accused's conduct, the absence of the victim's consent, and the state of mind of the accused. Sexual offences are generally not "result-based offences", i.e. they do not concern themselves with what effect on the victim the accused's conduct had. This is not at all to suggest that sexual offences such

as sexual assault and rape do not have serious consequences for victims. They clearly do in the vast majority of cases. It is simply that the law on sexual assault and rape does not require proof of any particular consequence of the acts constituting the offence. Such harm that results is not an element of these offences. Similarly, assault with intent to commit a sexual offence (s 42) and threat to commit a sexual offence (s 43) do not require proof of any particular effect on the victim.

21. The law on these sexual offences is right to be limited in this way. But there is room to consider whether there is scope for the creation of new sexual offences that do focus on the effect of offender behaviour on victims. Given how unsuccessful existing laws have been in helping to create safe places for women and girls, it is worth exploring new options that might provide at least some tools for reshaping male behaviours toward women and girls.
22. This submission thus recommends that the VLRC consider whether a new offence of “unlawful act causing fear of a sexual offence” could be created to play this sort of role.
23. The elements of the new offence could be as follows:

Unlawful act causing fear of a sexual offence

A person (A) commits an offence if:

- (a) A performs an unlawful act in relation to another person (B);
- (b) B, as a result of A’s unlawful act, fears that A or another person is likely soon to commit a sexual offence against B;
- (c) B’s fear is reasonable in the circumstances; and
- (d) either:
 - i. A knows that B will probably experience that fear; or
 - ii. a reasonable person would, in the circumstances, know that B will probably experience that fear.

24. The elements of this proposed new offence will now be briefly explained.

Unlawful act.

25. This element would consist of the performance of a criminally unlawful act by the offender in relation to the victim. This would make it clear that the conduct that the offender engaged in was already a criminal offence. This can be called the base offence. “In relation to” means that the same person will be the victim of both the base offence and the proposed new offence. (It would be possible to cast the offence in broader terms, such that the victim of the base offence need not be the victim of the new offence, but it is appropriate to be reasonably conservative in the creation of a new criminal offence.)
26. The base offence will most often be an assault of some sort, i.e. intentional or reckless non-consensual application of force, or putting a person in fear of the application of force. However, other offences could also be covered here, such as false imprisonment, making threats to cause injury, endangerment, or stalking, for example. The list of possible offences here should remain open. (In this way, the unlawful act element is

very similar to the unlawful act element in the offence of unlawful and dangerous act manslaughter.)

27. What the proposed new offence then does is identify further elements which, in effect, make the new offence an aggravated version of the base offence.

Fear of a sexual offence.

28. This is a result element — a state of affairs caused by the conduct in question (the unlawful act). The result here is a mental state of fear on the part of the victim. Fear has both an emotional aspect (a feeling of distress and anxiety) and a belief aspect (the belief that the feared event is likely soon to eventuate). Here the feared event is a sexual offence against themselves (the victim). That offence could be sexual assault, rape or some other sexual offence.
29. The offence thus targets behaviour that, in its effect, causes fear on the victim's part. Even if the offender does not intend to commit a sexual offence, the conduct causes the victim to fear that this is what is about to happen. This fear is thus a harm caused by the offender's conduct. This means the offence is primarily a result-based offence: the harm that justifies criminalisation and that is sought to be prevented is the harm of fearing one is about to be the victim of a sexual offence.
30. The fear could be that either person A *or another person* (C) would commit a sexual offence. This would allow the offence to cover situations in which, for example, person A falsely imprisons person B, but gives B reason to think that a third person, C, will be the one who will commit the sexual offence.

Reasonable fear.

31. In the circumstances, the fear is a reasonable one to have. That is, it is reasonable for the victim to form the relevant belief, and it is reasonable to feel distressed and anxious about it. Clearly the notion of a reasonable fear is a complex one that would be a matter for juries or magistrates to decide in the specific circumstances. But it would seem appropriate to have this requirement in the offence to make clear that people with unusually nervous dispositions won't set the minimum standard here for a criminal offence by another person. There is, however, the argument that, in cases of recklessness, if an accused did in fact know that the other person was likely to fear a sexual attack, then the accused should not knowingly bring about such a fear, even if it would be unreasonable to form that fear. Knowingly frightening a person, even if you know their fear is irrational, is still a matter of causing someone fear. However, as this would be a new criminal offence, it would be appropriate to keep the standard for criminal conduct that little bit higher and require the fear to be reasonable.
32. Importantly, the fear does not need to be true, in the sense that the underlying belief in the imminent sexual offending does not need to be proved to be true. It is not ultimately the truth of the belief that matters here but the harm suffered in experiencing that fear.

Knowledge of result.

33. There are two, alternative fault elements in relation to that result element: recklessness (knowledge/awareness of the likely result) and a reasonable person standard. The first fault element is a straightforward recklessness fault element: awareness of a probable

result. Intention is not appropriate as a fault element here, as that is already covered by the offence of making a threat to commit a sexual offence.

Reasonable person standard.

34. The second fault element is a reasonable person standard. This would be an objective standard and reflects the 2015 amendments to rape and sexual assault, which brought in an objective standard for the fault element with regard to lack of consent in rape and sexual assault. It also reflects the third alternative fault element in stalking (the accused “ought to have understood” the effects of their conduct). Such an objective standard is appropriate in this offence because the offence is seeking to create minimal standards of respect and concern for others’ welfare that everyone should adopt. For cases where a reasonable person standard might be thought to be too harsh on a particular individual, that can be catered for by clarifying that the reasonableness standard is to be partly subjectivised, in the same way that it is in the case of rape and sexual assault (see the *Jury Directions Act 2015 (Vic)*, s 47).

Scenarios

35. The offence would cover situations such as the following:
36. *Scenario A:* Mary, 19, is a student at a suburban university. She is walking across campus after dark to the bus stop. A young man, Will, approaches her and asks if she knows where the sports centre is. (Mary and Will are strangers to each other.) The sports centre is several hundred metres away. Mary tells Will “Yes, it’s over that way, about two or three hundred metres from here”. Will asks Mary to come with him to show him the way. She says, “Sorry, I can’t. I’ve got to catch my bus.” Will replies, insistently, “You have to show me the way. You have to come with me and show me how to get there. I don’t know my way around here and I need you to come with me to show me.” Mary repeats, “I’m really sorry, but I can’t come with you. I have to get to my bus.” Will then puts his hand on Mary’s shoulder, not forcefully, and says, angrily, “But I need you to show me. Why won’t you help me?” As a result of Will’s contact with her shoulder, and in the context of preceding conversation, Mary is very frightened that Will is likely to commit a sexual offence against her. She knows that the way to the sports centre is dark and secluded and she fears that this person is trying to get her into a vulnerable situation so he can sexually assault her. Will does not actually have any such intention, but he is aware that his behaviour is likely to have caused such a fear in Mary. However, he doesn’t care about that, as he is really keen to find the sports centre where he has a basketball team meeting. Alternatively, even if Will lacked that awareness, a reasonable person in Will’s position would have known this.
37. *Scenario B:* Ling, 38, has caught a taxi home late after dinner with friends in the city. During the drive, the driver, Daniel, has asked many questions about Ling, her work and her family life. She has told him that her husband is away that weekend and that she’ll be alone in the house. Ling lives on a large, bushy block just off the suburban fringe, with a long, 100 metre drive way from the road to her house. When the taxi turns into the drive, Ling tells Daniel, “Just stop here and I’ll walk the rest of the way”. Daniel says he insists on driving her up the drive way and letting her out at her house. Ling insists that Daniel stop the car and let her out. Daniel then presses the central locking button and locks all the doors, and continues driving up the drive. Ling shouts, “I said stop the car! I want to get out. I’ll pay you what you are owed. But stop now!” Daniel says, calmly, “Just relax. Your husband isn’t home, so I want to make sure you

get into your house safe and sound”. He then pats her gently on the thigh, and then continues driving the taxi up the drive way. Ling is fearful that Daniel is going to try to take her into her house and commit a sexual offence against her. Daniel does not actually have any such intention and genuinely, if patronizingly, wants to make sure Ling gets into her house safely, but he is aware that his behaviour is likely to have caused such fear in Ling. Alternatively, if he lacks that awareness then at least a reasonable person in Daniel’s position would have known this.

38. *Scenario C*: Fatima, 27, is waiting at a tram stop in Fitzroy early on a Friday evening, waiting for a tram to take her to city, where she will meet some friends for drinks and dinner before going on to a night club. Jack (not known to Fatima and vice versa) is also heading into the city for the evening, to catch up with some mates. He gets to the tram stop and sees Fatima. There is no one else at the tram stop. He thinks she is very good looking. He sits down next to her on her left, and tries to strike up a conversation with her. “Where you going tonight?” he asks Fatima. Fatima looks away from him and gets out her mobile phone and starts scrolling through her text messages. Jack asks again, “Hey, come on, I’m just asking where you going. You going into the city? You look like you’re dressed for a good time.” Fatima continues to ignore him and keeps scrolling through her messages. “Come on, babe,” says Jack, “don’t give me the cold shoulder. I’m just being friendly.” Fatima finally turns to Jack and says, “Look, I don’t know you and I don’t want to know you. I’m just waiting for a tram and reading my messages, OK. We’ve got nothing to talk about.” Jack then says, “So you do have a voice, eh? Sexy one too, I reckon. Your boyfriend is a lucky guy. You must have a boyfriend, a girl like you? If not, I’m not doing anything tonight, if you’d like to hang out.” Fatima then turns her body to face the opposite direction and dials a friend on her phone. While the phone is ringing, Jack tries to pull Fatima’s right hand (which is holding the phone) away from her ear and tries to stop the call, saying “Hey come on, why are you making a call? I thought *we* were having a conversation here?” Fatima is very afraid that Jack is about to commit a sexual offence against her. Jack does not in fact have such an intention, but he is aware that he is causing Fatima to be afraid of him. However, he thinks this is all just part of the sport of flirting and teasing, and thinks it’s OK because he knows he’s never going to commit any sexual offence. He’s just playing with her, he thinks. Alternatively, at least a reasonable person in Jack’s position would have known his behaviour was causing Fatima to be afraid he was likely to commit a sexual offence against her.
39. In each of these scenarios, the male is committing an offence of assault (and, in Daniel’s case, also false imprisonment). But the offence of assault with intent to commit a sexual offence would not apply, as there is no such intent. But the victim in each case reasonably fears that a sexual offence is imminent, and the male either is aware of that fear or, at least, a reasonable person in that situation would have been aware of this effect of their actions. The offence of assault (or false imprisonment) does not do justice to the actual experience of the victim, which is one of fear. The assaults (non-consensual touching) in themselves were not sexual assaults, and they were not painful or causing injury. But in the context of the male’s conduct, that touching gave rise to a reasonable fear that a sexual offence (e.g. sexual assault or rape) was imminent. It is the causing of that fear which, it is argued, it is appropriate for the criminal law to target.

Policy rationale

40. The policy intent behind such an offence would be to enable the criminal law to better recognise and respond to the kinds of intimidation victims can experience. Such an offence could also promote the idea that people should take responsibility for their actions if they are at risk of causing someone to fear (reasonably) that they are about to be sexually attacked, even though the offender has no such intent. In such cases, the offender cannot say “but I never intended to sexually assault her”; they need to take responsibility for their actions so as to prevent such fears arising. A responsible male does not content himself with thinking “I am not intending to sexually assault or rape anyone”. A responsible person would want not to cause such fears in another.
41. If a person intends only to steal from the victim, and commits an assault in doing so, but they do so in a way that they know is likely to cause the victim to fear rape (or they ought to have known that such fear was likely), they cannot retreat to the idea that their motive was somehow innocent because it was only to rob and not to sexually assault or rape. If the mugger’s behaviour has such a consequence and he knew or ought to have known that that effect was likely, then the mugger should be responsible for that consequence.
42. Whether this proposed offence should be classified as a sexual offence or give rise to registration as a sex offender, are issues for another time. I would not press for either of these outcomes. A lower tier of sexual offences that deal with lesser behaviour may in fact be helpful in combatting sexually intimidatory behaviour without being treated as full-blown sexual offences.

D. Possible additional new offence of conduct causing fear of sexual offence

43. The above proposed offence requires proof of an unlawful act (the base offence). It may also be worth considering whether there would be value in creating a further offence which covers *otherwise lawful conduct* that gives rise to the same fear of an imminent sexual offence. The basis for criminalising the otherwise non-criminal conduct is that resultant fear on the part of victims.
44. In each of the three scenarios sketched above, the facts could be revised to remove the conduct forming the base offence (the assaults and false imprisonment), but with the other behaviour being sufficient to cause the relevant fear of the likelihood of an imminent sexual offence.
45. The difference here is that the accused’s conduct need not *in itself* amount to a criminal offence. What would make the conduct criminal now is its effect on the victim and the fact that the accused was aware of the likelihood of that effect or ought to have known (in the sense that a reasonable person would have known).
46. Note that this would not be a threat offence. The conduct in question is not one of making a threat — or, at least, in such cases, s 43 would already apply. Instead, this offence would cover other kinds of behaviour (which could sometimes be described as threatening or intimidating) which fall short of actual threats but do involve putting another person in fear. The fault element is not an intention to do so, but either

recklessness as to that fear or failing to be aware of what a reasonable person would have known in the circumstances.

47. Because this would be a distinctive offence, not involving previously criminal conduct, it would be appropriate for it to be a summary offence not subject to a penalty of imprisonment.
48. This would be a notable expansion of the criminal law, but, it is argued, it is worth considering, given the scale on which women and girls are made to feel unsafe as they go about their lives. A cultural change is needed in how males understand the effects of their behaviour, and the criminal law does have a role in setting some minimal standards of behaviour in this regard.
49. A new offence of conduct causing fear of a sexual offence could partner the possible new offence of aggravated sexual harassment outlined in my earlier submission (23 December 2020).

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50. I thank the VLRC for the opportunity to make this submission.

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6 April 2021