SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION

ISSUES PAPER I – SEXUAL OFFENCES: 'GRAB AND DRAG'

CRIMINAL BAR ASSOCIATION

I INTRODUCTION

1. The Criminal Bar Association ('**the CBA**') is grateful for the opportunity to provide submissions in response to the Commission's Issues Paper I on the 'grab and drag' offences ('**the Issues Paper**'), which are being considered as part of the Commission's broader review into the justice system's response to sexual offences. We have already made a submission in relation to that broader review, and this submission should be read in the context of our earlier comments.

2. The CBA is the peak body for Victorian barristers practising in criminal law. We represent barristers who principally prosecute, who principally defence, and those who have a mixed practice. Our members comprise almost one quarter of all Victorian barristers. We are involved in the continuing legal education scheme of the Victorian Bar, prepare and contribute to submissions on law and policy reform, issues media releases, and meet regularly with the judiciary, government, and others involved in the criminal justice system. Members of the CBA appear in criminal cases of all types, in Victoria and across the State and Territories of Australia. Such appearances involve all facets of criminal law: State and Commonwealth, indictable and summary.

3. The CBA does not support a new offence specifically dealing with 'grab and drag' offending (Option 1 in the Issues Paper), nor any changes to the existing law (Option 2 in the Issues Paper). This position is held for the following reasons:
   a. Existing offences appropriately capture conduct associated with assaults that may lead to sexual offending. There is no 'gap' in the law;
   b. Enacting a new offence with the structure proposed in paragraph 44 of the Issues Paper would involve creating an unfairly broad test that would undermine the presumption of innocence;
   c. No research supports either the assertion that 'grab and drag' behaviour increases the risk of sexual violence, nor that it is more likely a person who 'grabs and drags' another intends to commit a sexual act (as opposed to, for

example, a robbery or assault). A serious sexual offence underpinned by these assumptions should not be introduced without being supported by evidence;

d. Successfully drafting a new offence or amending current offences would prove to be extremely difficult; and

e. Enacting a new or amended offence would not address the cause of the public outcry generated by the *Williams* case (which, it must be noted, was based on selective/incomplete media reporting of Her Honour's judgment, and thereafter the perceived inadequacy in the sentence Mr Williams received).

II ADEQUACY OF EXISTING LAW

4. It is the position of the CBA that existing offences adequately capture 'grab and drag' assaults in the context of attempts or preparatory conduct related to causing sexual harm.

5. There are several available offences that capture 'grab and drag' conduct. We refer to *Table 1* of the Issues Paper, which identifies some of these offences.

6. In addition to the offences identified in *Table 1*, the following offences may also be relevant in capturing conduct preparatory to the commission of a sexual assault:

Section	**Offence**	**Maximum penalty**
Common Law	False imprisonment	10 years (level 5)
Common Law	Kidnapping	25 years (level 2)
Section 63A *Crimes Act 1958* (Vic)	Kidnapping	25 years (level 2)

7. Section 42 of the *Crimes Act* 1958 (Vic) ('**the *Crimes Act***') provides for the offence of 'Assault with intent to commit a sexual offence'. The offending outlined in that section appropriately captures the exact conduct contemplated by a new or amended offence.

8. In introducing s 42, Parliament took appropriate steps to broaden the scope of the offence (replacing a narrower charge of *assault with intent to rape*) to adequately cover the conduct in question. This was achieved by expanding the offence to cover assaults committed with the intention of committing a sexual assault as well as rape, and by removing the requirement to demonstrate physical harm.

9. The CBA notes that the structure of s 42 is already broader than the equivalent offences in other states and territories.[1]

10. It is submitted that introducing a new or amended offence as an alternative to s 42, with an even broader fault element than the current offence, would unduly complicate trial directions and risk confusing a jury. A jury, no matter how well directed, could struggle to understand the distinction between a new offence and s 42.

11. Further, where either the new or amended offence invites the jury to presume a sexual intention from prescribed conduct, a properly directed jury would similarly struggle to reconcile this with the presumption of innocence.

[1] See Issues Paper I at [29].

III NEW TEST FOR REQUISITE INTENTION

12. Paragraph 44 of the Issues Paper suggests two approaches that would distinguish the new offence from existing offences. These were:
    a. That the 'fault' element of the offence remains linked to 'grab and drag' conduct but with a higher penalty in recognition of the general risk of future sexual offending; or
    b. An offence containing the presumption that a person who engages in 'grab and drag' conduct intends to commit a sexual offence.

    The CBA holds grave concerns about both these approaches.

A *The First Approach*

13. In the absence of any research, it is submitted that there is no valid basis for an offender to be sentenced to a greater penalty based on a speculative risk of sexual harm.

14. It is acknowledged that offences with harsher penalties designed to address increased risk associated with a behaviour can be justified in some circumstances (the example raised in the Issues Paper being strangulation in the context of family violence).

15. It is, however, the CBA's view that to sentence a person based on a possible risk that may not ultimately manifest, there ought to be cogent peer-reviewed evidence supporting the link between the offending and the risk. Unlike in the example of strangulation, there is no such evidence that proves a correlation between 'grab and drag' behaviour and increased likelihood of sexual assault.

B *The Second Approach*

16. In relation to the second proposed approach, the CBA holds similar concerns where criminal responsibility (particularly for a sexual offence) is attributed to a person on a basis of a general presumption ('a person who grabs and drags a person intends to sexually harm them') that has no academic basis.

17. A test that operates to enliven a presumption with respect to a specific intention, irrespective of the circumstances of the assault and the characteristics of the offender, would produce unjust outcomes that reverse the burden of proof.

18. If such a presumption were to apply, it is clear that an accused (who in some cases may have vulnerabilities such as cognitive functioning or mental health issues and includes accused who are children) may be forced to rebut the presumption by giving evidence about their intention at the time of the commission of an assault. This in turn raises other questions about unfairness to an accused and ultimately may lead to an infringement upon their rights pursuant to the *Charter of Human Rights and Responsibilities 2005* (Vic) ('**the *Charter***').[2]

19. In the event a new offence (or amendment to an existing offence) adopted this approach it would be necessary to particularise behaviour that would justify presuming the existence of intention to cause sexual harm.

20. Given the importance of ensuring the presumption did not apply too broadly, drafters would be required to provide an exhaustive list of acts or circumstances that amounted to proof of sexual intent. Such an approach may then have the effect of creating presumptions about sexual intent which have no academic and/or evidentiary basis.

21. In light of the serious consequences of the operation of such a presumption, it is the CBA's view that any list enlivening a presumption should be made with appropriate specificity and supported by clear research. Thus, in the absence of any such research, the CBA believes this approach should not be adopted.

[2] *Charter of Human Rights and Responsibilities 2005* (Vic) s 25 (2)(k), (3).

22. More broadly, the CBA holds serious concerns that introducing either a new or amended offence in a form containing a presumption of specific intention, would encourage a future trend in enacting offences that similarly presume a particular intention on the part of the offender without any evidential basis for doing so. Again, such an approach is at odds with the *Charter*.

IV DIFFICULTIES IN DRAFTING

23. As acknowledged in Issues Paper I, appropriately drafting either a new offence or an amendment to an existing offence in a form that captures the conduct, without giving rise to unjust convictions, would be a significant challenge (whether it contained an element of sexual harm or otherwise).

24. While the CBA acknowledges the strong public reaction to the *Williams* case, the CBA notes that the offending in *Williams* is not commonplace. There have been no published decisions considering similar incidents prosecuted pursuant to s 42.

25. In the absence of any clear pattern of relevant offending the following questions are examples of issues that the drafters would need to determine in deciding the scope of the new or amended offence:
    a. Should the offence only apply to male accused and/or female complainants?
    b. Should the proposed offence only apply where an accused is not known to the complainant?
    c. Would there be a requirement for the complainant to have been dragged a specific distance or to a new location?
    d. How would a 'drag' be distinguished from other, more commonplace, types of encounters that may be present in assaults?
    e. Would the offending need to occur in a public place?

26. The CBA maintains that the complexities in appropriately drafting a new or amended offence, coupled with the adequacy of the current available offences, support the ultimate conclusion that law reform is not required.

V IMPACT ON AND OF THE *SEX OFFENDERS REGISTRATION ACT 2004* (VIC) ('**SORA**')

27. In the event the proposed offence is classified as a sexual offence, the CBA is concerned that a sentencing court may be invited to consider whether to declare the offender a "registrable offender" pursuant to the SORA.

28. There is a risk that such a course may cause people to be placed on the Sex Offender Register, where the only 'evidence' they represent a risk of further sexual offending is the finding of guilt for an offence that itself lacks any academic/evidentiary basis demonstrating a clear causal link between the conduct (grab and drag) and the future risk.

29. This has flow on effects for the community as well, both in terms of the costs associated with supervising people on the Sex Offender Register, but also in creating additional workload for those tasked with such supervision that could, and should, be directed towards more appreciable risks.

VI RELEVANCE OF GRABBING AND DRAGGING IN CURRENT SENTENCING PRACTICES

30. While there is not currently a specific 'grab and drag' offence, the CBA is of the opinion that where such conduct exists it represents a highly relevant aggravating aspect of the offending that would be taken into account in sentencing an offender.

31. Sentencing involves an instinctive synthesis of a broad range of factors as set out in the *Sentencing Act 1991* (Vic). One of the matters a sentencing court must consider is the objective seriousness of the specific offending.[3]

32. The act of grabbing and dragging a person to an isolated space in order to assault them (and thus reducing the likelihood of escape or third-person intervention) is a highly aggravating feature of any assault that would increase its objective seriousness and call for a harsher sentence to reflect this.

[3] *Sentencing Act 1991* (Vic) s 5(2)(c); see also *R v Towle* (2009) 54 MVR 543, 563 [66], [68].

33. This reasoning was adopted by Her Honour Judge Fox in considering the seriousness of the offending in the *Williams* case. Her Honour characterised the offending as serious.

34. It is noted that in the case of *Williams*, the Crown conceded that a combination sentence, comprising the time Williams had already spent in remand and a Community Corrections Order (CCO) was within range, in light of a number of compelling mitigatory matters before the Court.

35. At the conclusion of the matter the Crown indicated it had reviewed the sentence imposed and formed the view that it was within permissible range.

36. The CBA notes that the public reaction to the *Williams* case primarily focused on the perceived inadequacy of the penalty imposed at the conclusion of the trial. The introduction of a new offence (or amending an existing offence) does not address any issue relating to the perceived inadequacy in sentencing.

37. It is acknowledged that reporting and public comment on matters progressing through the court system is an important part of ensuring confidence in the justice system and ongoing accountability. Inaccurate or inadequate reporting of matters broadly leads to a lack of understanding as to why, or why not, a court has reached a particular decision.

38. In contemplating law reform in response to public reaction, it is the CBA's submission that Parliament must carefully scrutinise the matter in question to satisfy themselves as to whether there has been a failure on the part of the existing law justifying reform. It is the CBA's opinion that this is particularly important in circumstances where relevant information and legal principles, material to the decision to impose a particular sentence, may not have been reported to the public in a balanced manner that enabled them to gain a fair and adequate appreciation of competing factors considered by the judicial officer.

39. In the *Williams* case, in arriving at the sentence imposed, Her Honour balanced the objective seriousness of the offending with other factors such as age, aboriginality, time in residential rehab facility, extra-curial punishment, remorse and prospects of rehabilitation.

40. Ultimately, the CBA's opinion is that the current sentencing laws enable judicial officers to place appropriate weight on 'grab and drag' conduct in assessing the objective seriousness of an offence. In fulfilling their function to reflect on community values in crafting their sentences, the CBA is of the view that the sentencing court will continue to impose increasingly significant penalties for offences involving sexual violence and violence against women. Law reform is not required at this time.

41. Whilst a number of CBA members had input into this submission,[4] if you have any questions or wish to clarify anything, please contact Ffyona Livingstone Clark in the first instance. The CBA remains happy to assist the Commission in any way it can with its future work on this matter and welcomes the opportunity for further consultation should this be of assistance.

CRIMINAL BAR ASSOCIATION
9 APRIL 2021

[4] Principally David De Witt, Felicity Fox, and Ffyona Livingstone Clark.