Submission to
Victorian Law Reform Commission
in relation to its inquiry into Stalking

by Dr Steven Tudor
Senior Lecturer, School of Law,
La Trobe University
Victoria 3086
[redacted]

and

Greg Byrne PSM
Legal Policy Consultant
PhD candidate, Monash University
[redacted]

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Introduction

1. This is a submission in relation to the Victorian Law Reform Commission's (VLRC's) inquiry into stalking. We are grateful to the VLRC for the opportunity to make a submission.

2. Steven Tudor is a senior lecturer in the School of Law at La Trobe University (teaching and researching in criminal law), but makes this submission in his private capacity. He was formerly a senior legal policy officer in the Department of Justice 2010–2015, but the present submission does not purport to reflect the views, past or present, of the Department of Justice and Community Safety.

3. Greg Byrne is an independent legal policy consultant and is undertaking a PhD in the Faculty of Law at Monash University. He formerly held positions as an executive and special counsel in the Department of Justice 2001–2018, but the present submission does not purport to reflect the views, past or present, of the Department of Justice and Community Safety.

4. For reasons of time, this submission addresses only issues raised in Chapter 5 of the VLRC's *Stalking Consultation Paper* (June 2021) and issues concerning appeals from Chapter 4. This submission will be focused primarily on the question of the drafting of the stalking offence. It is commonly agreed that the current drafting of s 21A, *Crimes Act 1958* (Vic) is far from ideal. We propose that the current offence be redrafted to clarify the three distinct offences (intentional, reckless and objective fault forms of stalking), so that the elements of the different offences are more clearly laid out and the different degrees of culpability are more clearly shown. We also propose that a distinct offence of covert stalking be created to clearly cover cases where a person stalks another with the intention that their conduct not be discovered.

5. We also gratefully acknowledge the very valuable comments provided by Katya Zisserman on an earlier draft of this submission. We remain solely responsible for the final version of this submission.

Clarification of the existing three stalking offences

6. Section 21A(2) currently provides that stalking involves "the intention to cause physical or mental harm to the victim, including self-harm, or of arousing apprehension or fear in the victim for his or her own safety or that of any other person."

7. Sub-section (3) then provides that such an "intention" can also exist where either (a) "the offender knows that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear" or (b) "the offender in all the particular circumstances ought to have understood that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result."

8. Such drafting is, with respect, conceptually garbled and confused. It is simply inconsistent with contemporary criminal law principles to deem that the fault element of intention can be satisfied by recklessness or by an objective fault element. It is especially convoluted to provide that the latter applies only where the harm or fear does eventuate. That makes a physical element (a result) effectively a constituent part of a fault element (intention).

9. There is no need for the offences to be drafted in such a condensed and confusing manner. More importantly, it also obscures the different gradations of culpability that normally attach to different levels of fault.

10. It would be highly desirable for the three current versions of the offence of stalking to be much more clearly provided for in the *Crimes Act*. There need be no major changes to the basic meaning of the elements. The point of the redrafting is primarily to make the distinct offences clearer and avoid the conceptual contortions involved in the current drafting.

11. The proposed elements of the different stalking offences are laid out below. The approach is to make stalking a conduct element, which then allows different fault elements to be applied to it to create the distinct offences. This kind of formulation makes the offences much simpler and clearer.

Intentional and reckless stalking

12. Intentional and reckless stalking both involve subjective fault elements. It is appropriate for intentional and reckless stalking to be provided for in the one statutory provision, since they are closely neighbouring offences. However, the elements can be more clearly delineated and the fiction that recklessness is a form of intention can and should be avoided.

13. These two subjective fault forms of stalking should be defined in the following way:

A person (A) commits an offence if:

(a) A stalks another person (B); and

(b) A intends to cause or believes that their conduct will probably cause:

i. physical or mental harm to B; or

ii. B to believe that there is a risk to the safety of B or of another person.

14. This presents stalking as consisting of a conduct element (stalking) with two alternative subjective fault elements (intention and recklessness). In this case the fault elements are ulterior fault elements in that they do not relate to a physical element that is to be proved. (This reflects the current scope of s 21A in relation to intentional and reckless stalking.) Combining intentional and reckless forms of an offence in the one provision is already found in the *Crimes Act*, e.g. s 18.

15. The proposed penalties align with those applying to causing injury intentionally or recklessly. Intentional stalking would be the most serious form of stalking and should remain punishable by Level 5 imprisonment (maximum of 10 years). The lower culpability of reckless stalking should be reflected in a Level 6 penalty (maximum 5 years imprisonment).

Conduct element of stalking

16. The conduct element of stalking can then be defined separately, largely along the lines already found in s 21A:

A person (A) ***stalks*** another person (B) if A engages in a course of conduct which includes any of the following: *[then adopt the list found in s 21A(2)(a)–(g)]*

17. The "catch-all" provision in s 21A(2)(g) is currently cumbersome and unclear. It would be better revised to read:

acting in any way that could reasonably be expected to cause:

(a) physical or mental harm to B; or

(b) B to believe that there is a risk to the safety of B or of another person.

18. The current formulation in s 21A(2)(g)(ii) in terms of apprehension or fear in the victim is cumbersome. The key matter should be what the victim *believes* about their safety or that of another. The person need not be experiencing the emotion of fear, and "apprehension" is unhelpfully ambiguous — it can mean either belief or fear. Casting the matter in terms of belief that there is a risk to the safety of B or another person is simpler and clearer.

Course of conduct

19. "Course of conduct" is admittedly a somewhat vague concept, but it needs to be so in order to cater for a wide range of situations. The case law on this issue is reasonably well-settled and so the term probably does not need to be statutorily defined.

20. Alternatively, if such statutory clarification were attempted, it should only seek to put in statutory form what the case law has already provided for. In brief, that would be something like:

> A person (A) engages in a ***course of conduct*** in relation to another person (B) if A's acts are:
>
> (a) committed on more than one occasion or are protracted in nature; and
>
> (b) amount to a pattern of conduct that shows a continuity of purpose in relation to B.

Physical and mental harm

21. Physical and mental harm can then be defined inclusively as they currently are, with the additional clarification that physical harm includes self-harm, as follows:

> ***Physical harm*** includes physical injury and self-harm
>
> ***Mental harm*** includes harm to mental health and suicidal thoughts

22. "Physical injury" and "harm to mental health" are currently defined in s 15 of the *Crimes Act*. It should be stressed that the proposed definitions above are inclusive and should not detract from the meaning of the terms relating to physical injury and mental health under s 15.

23. The notion of "mental harm" as currently used in s 21A is not further defined in the *Crimes Act 1958* (Vic). The case law says that the words should be given their ordinary English meaning (see *R. R. v R* [2013] VSCA 147; *R v Hoang* (2007) 16 VR 369). Unfortunately, it is not at all clear that the phrase "mental harm" does have an ordinary and uncontested English meaning that can be predictably applied. This means that different fact-finders (juries and magistrates) may well be applying different understandings of what the term covers. The above definitions in para 21 would provide better guidance to fact-finders.

Serious humiliation as a kind of mental harm

24. There are cases of stalking where the offender is seeking to humiliate or shame the victim, or to undermine their sense of self-worth, as in cases of serious bullying and some cases of so-called "revenge porn". The intention (or known risk) in such cases is not to cause physical harm but rather severe embarrassment and loss of self-worth, often involving public exposure and inviting others to have contempt for the victim. Such experiences for victims can sometimes be worse than physical harms.

25. Humiliation is clearly a serious kind of painful emotional reaction, but in some cases it may not be accepted by a jury that the humiliation amounts to mental or psychological harm. In other cases, a person's robust mental health may mean that they can deal with significant humiliation without it resulting in a psychological harm. But, it is submitted, some cases of humiliation can be very serious and harmful indeed.

26. The 2011 amendments to s 21A were intended to ensure that the offence covered a range of behaviours that could be described as bullying. "Bullying" is not a technical or formal legal term, and there is no universally agreed definition of the term, but many of the typical instances of bullying involve behaviours that are intended to humiliate and degrade the victim rather than cause physical harm or fear of physical harm.

27. It would be appropriate, then, for the VLRC to include in its report a discussion of serious humiliation as one of the kinds of mental harm that stalking can cause, and be intended to cause, in addition to harm to mental health, psychological harm or suicidal thoughts. This may or may not need to be specifically and explicitly covered in the definitions used in the *Crimes Act*. But it would be useful for raising awareness of this aspect of stalking for the VLRC report to include some discussion of it.

Intention

28. Intentional stalking under s 21A currently has two alternative versions. This is essentially preserved in the above proposal. The first is an intention to cause physical or mental harm. The second is an intention to cause the victim to believe there is a risk to their safety or that of another person. This captures the threatening nature of some instances of stalking. The degree of risk does not need to be defined. It will be read as more than minor but not needing to be a high risk.

29. In neither case of intentional stalking need the intended outcome be proved to have occurred. This means that the intention in this offence is an "ulterior" fault element, i.e. it relates to a state of affairs which is not an element of the offence needing to be proved. In many cases of intentional stalking the relevant harm or belief as to risk *is* in fact caused, but it will not be necessary for the prosecution to prove that it did.

30. In the original version of s 21A in 1994, the intended result *was* an element to be proved. That was, rightly, removed in 2003. That should remain the law, as stalking is, at base, not limited to being a "causing injury" offence but is also, and mainly, a species of threatening behaviour offence.

Recklessness

31. Recklessness in this context is a belief on the offender's part that their conduct will probably cause the relevant harm or belief as to risk to safety. This essentially matches the scope of the current version of reckless stalking under s21A(3)(a). "Likely" is replaced by "probable" as a plainer and clearer term to contrast with possibility. "Believes" replaces "knows" because the focus is on the subjective state of mind of the accused and there is no need to prove, as a distinct element, the fact of the harm being probable (the object of the knowledge).

Objective fault stalking

32. There is, unfortunately, no simple, settled term to use for this kind of fault element. ("Negligent" stalking would, for example, not be an appropriate term.) So, this submission will simply refer to it as objective fault stalking. If the first two offences are

described as "intentional and reckless stalking", it may be possible to simply refer to this offence as "stalking".

33. This version of stalking should be defined as consisting of three elements (a conduct element, a result element, and an objective fault element with regard that result):

> A person (A) commits an offence if:
> (a) A stalks another person (B); and
> (b) A's conduct causes:
> i. physical or mental harm to B; or
> ii. B to believe that there is a risk to the safety of B or of another person; and
> (c) a reasonable person in A's position would know that their conduct would probably cause such a result.

34. The phrase currently used in s 21A, "ought to have understood", is relatively uncommon as an objective fault element. Usually, objective fault is defined in terms of some sort of reasonableness standard, rather than by use of the word "ought". In this context, "ought" is somewhat ambiguous. Does it mean that the accused ought *morally* to have understood, i.e. that there was some sort of moral obligation on their part to understand their conduct? Or does it mean that, as a matter of rationality, the accused, if they were thinking rationally, *would* come to that understanding? In *R v Hoang* [2007] VSCA 117, Neave JA (at [99]–[106]) approved the trial judge's formulation in terms of the accused "ought *reasonably* to have understood what he was doing". That seems to favour the rational sense of "ought". The *Victorian Criminal Charge Book* model directions to the jury (see section 7.4.12.1) presents it as a reasonable person test: it is a matter of what a reasonable person ought to [= would?] have understood in the same circumstances.

35. Given this interpretation of the phrase "ought to have understood" it seems much simpler and clearer to avoid the ambiguity of "ought" and make the objective fault element a more straightforward reasonable person test, as proposed above. This would be clearer and more consistent with other criminal offences.

36. Objective fault offences are generally regarded as less culpable than recklessness. However, if reckless stalking is made subject to a Level 6 penalty (5 years), making objective fault stalking subject to a Level 7 (2 years) penalty would make it a summary offence. That would not be appropriate for any of the stalking offences. Objective fault stalking is a result-based offence: it is stalking that does in fact cause harm. The most serious instances of objective fault stalking can readily involve very damaging harms to the victim. Indeed, there is no reason to suppose that the harm caused in objective fault stalking cases will necessarily or even generally be less serious than the harm that intentional or reckless stalking will often cause (even though such harm does not need to be proved in those cases). Objective fault stalking should, then, remain as an indictable offence triable summarily, with a Level 6 penalty (5 years).

Creation of new offence of covert stalking

The problem of covert stalking

37. The original meaning of "stalk" is "to pursue or approach stealthily", e.g. "a cat stalking a bird" (New Oxford Dictionary of English). Thus, a key element of stalking in this original sense is that the target of the stalking remains unaware of the stalker's conduct. Moreover, the stalker intends this to be so; their conduct is deliberately surreptitious or covert.

38. This sense of stalking as a covert or surreptitious kind of conduct has been partially obscured in the criminal offence of stalking, which most often applies to cases where the victim is indeed all-too aware of the offender's behaviour. (Indeed, it is arguable that the offence should never have been called "stalking" and should instead have been identified as a form of aggravated harassment.)

39. There is a need, it is submitted, for the offence of stalking to more clearly make room for cases of intentional covert stalking.

40. The current stalking offences can cover some but not all cases where the victim remains unaware of the offender's conduct. For example, a person could stalk someone with intention to cause them fear for their safety but for some reason the victim remains unaware of the conduct. The stalker would nonetheless satisfy the elements for intentional stalking. Also, in a case of reckless stalking, it could be the case that it was probable that the victim would be caused relevant harm or fear but it just so happened that they did *not* become aware of the conduct. (Just because something is probable does not mean that it has to happen.)

41. However, it is possible in some cases for an accused charged with reckless stalking to argue that, because they took great care not to be noticed by the person they stalked, it was *not* probable that the victim would be caused relevant harm or fear. For example, a person could surreptitiously follow the victim, keep them under surveillance, or access their email account without the victim ever becoming aware of these activities, and this is what the stalker intends.

42. Would such an accused "know that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear" (as is currently required by s 21A(3)(a))? If the victim is not aware of the accused's conduct, and the accused intends that they remain undiscovered, then it would seem that it is *not* in fact probable that they would cause harm or fear and so the accused would not in fact *know* that harm or fear was probable.

43. Such an offender could, quite reasonably on the evidence, argue that they were *not* at risk of causing any harm or fear to the victim precisely because they were a very good covert stalker. Because they in fact posed no or very minimal risk of being discovered by the victim, they could argue, they are not guilty of reckless stalking.

44. There is, perhaps surprisingly, very little authority on this issue. There is a Magistrates' Court decision which supports the above interpretation: *VPOL v JV* [2013] VMC 26 (15

March 2013). In this case the accused secretly filmed various family members and friends in the bathroom and lounge areas of three premises over a 10-year period. The images were stored in various formats, including VHS tapes. The victims were unaware of being filmed until one of them found a VHS tape containing some of the footage. The rest of the recordings were found after the execution of search warrants. The accused's covert actions were thus not known by the victims during the time of the relevant conduct, and the accused had clearly intended this to be so and had taken pains to keep the conduct covert.

45. In interpreting the elements of reckless stalking under s 21A(3)(a), the magistrate held as follows (at paras [14]–[15)]:

> Section 21A (3)(a) requires knowledge on [the accused's] part that his conduct was "likely to cause harm". *I accept as correct, the submission made by the accused that s 21A (3)(a) can not be expanded to apply to situations where a person's conduct "would be likely to cause harm" if discovered by the victims.* The intention to do harm is more likely to be inferred in cases where an accused covertly films victims as here, but distributes them via the internet or other means as in such situations the intention to do harm is more likely.
>
> Accordingly, I find that the accused's conduct in covertly recording those who used the lounge and bathroom premises over a protracted period did not amount to a "course of conduct" as is required for the charges to be proven, and furthermore, it has not been demonstrated beyond reasonable doubt *that he knew at the time that by engaging in that conduct it would be likely to cause such harm or arouse such apprehension or fear* as is required pursuant to S 21A (3)(a) of the Act. [emphases added]

46. In other words, if the conduct was *not* discovered by the victims, then it would *not* be likely to cause harm, and so, if the accused knew that the conduct was not discovered, then he did *not* know that his conduct was likely to cause harm. Indeed, the accused would know that his conduct was *not* likely to cause harm, because he was careful to keep the conduct hidden.

47. This approach fits with the common law offence of non-contact assault (i.e. where there is no application of force but the complainant apprehends the immediate application of force). In that offence, the complainant must know about the accused's actions in order to apprehend the immediate application of force. If they are unaware of what the accused is doing, there can be no assault. (See *Pemble v R* [1970] HCA 20; (1971) 124 CLR 107.)

48. This means, then, that the current version of the stalking offence is more concerned with overt stalking behaviour that actually causes or is likely to cause harm or fear, and not with stalking behaviour as such, whether covert or overt. This does, however, reward the skilfully surreptitious stalker who is careful not to be found out. In contrast, the clumsy stalker who tried but failed to remain covert would be within the scope of the offence.

49. The problem of covert stalking is particularly important in the era of cyberstalking. The internet, mobile phones and various other forms of information and communications technology have greatly increased the scope for people to engage in covert stalking behaviours toward others. There are now manifold possibilities for covert stalking that were unimagined when the original stalking offence was drafted nearly 30 years ago

50. This submission contends the covert stalking loophole should be closed, as it rewards the determined and successful covert stalker.

51. It is certainly reasonable that stalking behaviour that in fact had no harmful consequences for the victim should, all other things being equal, be treated as a less serious instance of offending than one that does have harmful consequences. But there are still grounds for seeking to denounce and deter serious covert stalking by its criminalisation. It is behaviour that already intrudes on the right to privacy, it encourages the stalker to continue and expand the range of their behaviours, and it can readily escalate to the point where the conduct does become a risk of causing very serious harm or fear to the victim.

52. A covert stalking offence also serves as a kind of attempt offence. Attempted stalking (that is applying the generic attempt offence under s 321M of the *Crimes Act* to s 21A) can be hard to prove where there is no result of the conduct (as under intentional and reckless stalking). Having a covert stalking offence creates a particular kind of attempt offence more closely tailored to the elements of stalking. The conduct is more than merely preparatory to full stalking, since the conduct is under way. It is also "immediately and not remotely connected with the commission of the offence" in that the conduct is exactly the conduct that constitutes stalking, simply with the added dimension that the accused is engaging in it in a way that seeks to avoid detection, where detection would be the trigger for the harm being caused.

53. The analogy with an attempt offence also addresses the situation where police discover the stalking conduct while the accused is still engaged in the course of conduct. At the time of police intervention, it may be unknown what path the stalking will continue to take without police intervention. Police should not need to let a course of conduct continue until it is discovered in order for it to constitute an offence that they can take action to stop.

54. There is also a sense in which covert stalking could be seen as a kind of risk-creation (or endangerment) offence. The conduct is creating a risk of harm to a victim, if it should happen that the victim becomes aware of the conduct. This is consistent with endangerment offences, where the victim does not need to have been actually put in danger and it is sufficient to prove that the accused's conduct had the potential to place a person in danger of harm (see *R v Abdul-Rasool* (2008) 18 VR 586).

55. Thus, though covert stalking does not itself cause harm, it is behaviour that is socially very undesirable and sufficiently close to the actual causation of harm, for it to warrant being criminalised.

Proposed elements of new covert stalking offence

56. This submission proposes that the new offence of covert stalking be enacted, defined as follows:

> A person (A) commits an offence if:
> (a) A stalks another person (B);

(b) A intends that B remain unaware of A's stalking during the period of the stalking;
(c) if B had become aware of A's stalking, B would probably:
    i. have been caused physical or mental harm; or
    ii. have believed that there is a risk to the safety of B or of another person; and
(d) a reasonable person in A's position would have known that if B had become aware of A's conduct, B would probably:
    i. have been caused physical or mental harm; or
    ii. have believed that there is a risk to the safety of B or of another person

Elements explained

57. The offender needs to have intended their conduct to be covert. This is a defining feature of covert, surreptitious behaviour: it is intended to be concealed.

58. The third element is a counterfactual circumstance element: the circumstances in which the conduct occurs are such that *if* the conduct *were to be* discovered, then certain things would result. This is relatively uncommon when put in such terms, but the basic idea underlies endangerment offences generally. That is, what is problematic and serves as the basis for criminalisation is the unjustified creation of a risk of a certain harm being realised.

59. Here, though, there does not need to be any particular *degree* of risk of the conduct being discovered but there must be a probability of harm ensuing if the conduct were to be discovered. To only make the offence applicable where the risk of discovery is probable (or higher) would be to reward the competent covert stalker and punish the clumsy stalker. It is precisely the extra efforts of the covert stalker to remain hidden which is part of what makes them culpable.

60. The fault element is a reasonable person standard. The covert stalker is very likely to well know what situation they are creating (the possibility of the victim being harmed, etc). But the offence should not depend upon what the stalker happens to know in this regard. Given the deliberate nature of their conduct, it is not fair to allow the offender to evade responsibility by saying they did not in fact realise the potential effects of their conduct.

Penalty for covert stalking

61. The recommended maximum penalty for covert stalking is 3 years, with the offence being indictable triable summarily. The offence should be seen as generally at a lower level of culpability than objective fault or reckless stalking, but it is not so less serious that it should be a summary offence. The Victorian penalty scale does not provide for a penalty level in between 5 and 2 years, but it would not be appropriate for a stalking offence to be a Level 7 offence (2 years), which would make it a wholly summary offence.

Defences to stalking

62. The current exceptions and defences to stalking in s 21(4) and (4A) should continue to apply. However, it may be worthwhile clarifying what "without malice" means. This phrase appears not to have been judicially interpreted (in the context of s 21(4A)). The *Victorian Criminal Charge Book* model direction (7.4.12.1) interprets it as meaning without any spite or ill-will and without intention to cause harm. That could be made clearer in the statute.

63. This defence does effectively allow those persons who come within the scope of s 21A(4A) (i.e. those engaged in the course of a lawful business, trade, profession or enterprise) to engage in what would amount to reckless or objective fault stalking. Lacking an intention to cause harm is not a defence in reckless or objective fault stalking generally but it becomes a defence when the person is engaged in a lawful business, etc.

64. However, this raises the question of what kinds of "lawful business" would properly involve a person knowingly causing harm or fear of harm. There may therefore be a need for a further element of the defence, to provide that it was a *legitimate part or consequence of the lawful business*, etc to cause or risk the relevant harm or fear. Especially in an age of autonomous and amateur "citizen journalists," who have a mobile phone and a social media account, but no editorial supervision, there is a greater need to be able to identify clearly when intrusive and harassing behaviour has a public interest or free speech justification.

65. In the case of the proposed new offence of covert stalking, it might also be desirable to make express provision for people such as private investigators who have a legitimate reason for remaining covert and who are otherwise acting within the law.

Appeals

66. Chapter 4 of the Consultation Paper asks whether the appeals process for intervention orders should be changed to improve the experience of victim survivors. The short answer is yes. It is well known that the intervention order process can be very challenging for victim survivors especially if they need to give evidence on multiple occasions. The appeals system can further traumatise the victim, irrespective of whether that is the intention of the appellant. Victoria has recently removed one of those possibilities by removing the ability of a respondent to an intervention order appealing against an interim order. However, as noted in the Consultation Paper, the de novo appeals system means that a victim survivor may still be cross-examined twice by the person who they allege stalked them. A victim survivor should not be cross-examined more than once if at all possible.

67. The *Justice Legislation Amendment (Criminal Appeals) Act 2019* introduced long overdue reforms to de novo appeals from the summary jurisdiction. The second reading speech for this Bill, delivered by the Hon Jill Hennessy, then Attorney-General, sets out the policy framework that should govern appeals. Policy considerations concerning the importance of an appeal, the modernisation of the courts, and 'avoiding unnecessary traumatisation of victims and witnesses' apply with equal force to the need for reform

of appeal processes governing intervention orders. Further, once the reforms to criminal appeals commence, if the appeals process for intervention orders is not changed, it will be much more confusing and cumbersome to have a different appeals system applying to intervention orders. The new criminal appeals system should be adapted so that a similar type of appeals process also applies to intervention orders.

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68. We thank the VLRC for the opportunity to make this submission.