

Improving the Justice System Response to Sexual Offences:

Supplementary Report on 'Grab and Drag' Conduct

VICTORIAN
**LAW
REFORM***
COMMISSION

December 2021



Published by the Victorian Law Reform Commission

The Victorian Law Reform Commission was established under the *Victorian Law Reform Commission Act 2000* (Vic) as a central agency for developing law reform in Victoria.

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This publication of the Victorian Law Reform Commission follows the Melbourne University Law Review Association *Australian Guide to Legal Citation* (4th ed, 2017).

This report reflects the law at 30 November 2021.

Title:

Improving the Justice System Response to Sexual Offences: Supplementary Report on 'Grab and Drag' Conduct

Series:

Report (Victorian Law Reform Commission) 43

ISBN: 978-0-6452812-2-4

Ordered to be Published

Victorian Government Printer

PP 335, Session 2018–2022.

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Supplementary Report on 'Grab and Drag' Conduct

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Recommendations

- 1 The Victorian Government should amend section 320A of the *Crimes Act 1958* (Vic) to introduce an aggravating circumstance where the assault would raise an apprehension of an imminent sexual offence.
- 2 The recommended aggravating circumstance should include an objective test for the fault element as an alternative to a subjective fault element. The court should be able to take into account all the particular circumstances in which the assault occurred in applying the objective test.
- 3 The recommended aggravating circumstance should have a maximum term of level 5 imprisonment (10 years maximum).
- 4 The recommended aggravating circumstance should be an indictable charge triable summarily.

CHAPTER
01

Introduction

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1. Introduction

About this supplementary report

- 1.1 The Victorian Law Reform Commission has been asked to recommend ways to improve the justice system response to sexual offences. We delivered the sexual offences report to the Attorney-General on 20 September 2021, and it was released on 12 November 2021.¹
- 1.2 This supplementary report is about whether there should be a 'grab and drag' offence. The Attorney-General asked us to look at this issue as part of our extended terms of reference.²
- 1.3 This supplementary report was prompted by the case of *Director of Public Prosecutions (Vic) v Williams* (the Williams case).³ The Williams case is outlined later (see Chapter 2). The extended terms of reference noted community concerns about the laws and penalties for assaults that may lead to sexual offending. Many people were concerned that they did not 'adequately reflect the gravity of such conduct'.⁴

Our process

Submissions we received

- 1.4 On 23 February 2021 we published an issues paper to ask if there should be a change to the law. We invited submissions by 2 April 2021.
- 1.5 We received 15 submissions (see Appendix). We published the submissions on our website, except for those that were confidential.

Consultations we held

- 1.6 We held a roundtable with Victoria Police, the Victims of Crime Commissioner, Sexual Assault Services Victoria and Victoria Legal Aid to test reform options. The Office of Public Prosecutions and Victoria Legal Aid sent us written responses to the roundtable discussion paper.⁵

1 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021).
2 We received an extension to our terms of reference on 26 November 2020 from the former Attorney-General, the Hon. Jill Hennessy MP.
3 *DPP (Vic) v Williams* [2020] VCC 1662.
4 Letter from Attorney-General (Vic) to Victorian Law Reform Commission, 26 November 2020.
5 Written response to roundtable discussion paper from Victoria Legal Aid to Victorian Law Reform Commission, 8 November 2021; Written response to roundtable discussion paper from Office of Public Prosecutions to Victorian Law Reform Commission, 16 October 2021.

- 1.7 We held formal consultations with Victoria Police and Dr Steven Tudor, Senior Lecturer, School of Law, La Trobe University, to discuss their submissions in more detail.⁶

A note on language

- 1.8 We used the term 'grab and drag' in our issues paper because that was the term our extended terms of reference used. In our issues paper we explained that it is 'an everyday term that refers to the act of physically restraining or seizing a person, and pulling or moving them, against their will'.⁷
- 1.9 Some people told us that the term is degrading and we should replace it with a more suitable term.⁸
- 1.10 We understand why the term might be seen as insensitive. We have avoided using it in this report except where we need to for clarity (for example, when quoting or referring to our issues paper). Mostly we refer to this type of force as 'conduct'.
- 1.11 If the government adopts our recommendation, we expect that the term will be replaced by the aggravating circumstance we recommend.
- 1.12 In the box below, we explain key terms we use in this supplementary report. The sexual offences report defines other terms we use.⁹

Terms used in this report

Sexual offences: a sexual offence is sexual violence that is against the law. Specific sexual offences in Victorian law include rape and sexual assault.

Sexual violence: sexual activity that happens without consent. It includes violence that is not a sexual offence and violence that is not physical, such as sexual harassment. Sexual assault is used instead when it is the term used in the context (for example, when people we quote have used the term).

Person harmed: a person who is a victim of crime, whether or not they have reported the crime or the accused person has been found guilty. We also use the term 'complainant' in the context of a criminal case.

Accused person: a person who is charged with an offence.

6 Consultations 2 (Victoria Police), 3 (Dr Steven Tudor).

7 Victorian Law Reform Commission, *Sexual Offences: 'Grab and Drag'* (Issues Paper I, February 2021) 3.

8 Submission 4 (Sexual Assault Services Victoria); Consultation 1 (Roundtable on grab and drag conduct).

9 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021) xvii–xxi.

Strengthening the law on 'grab and drag' conduct

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2. Strengthening the law on 'grab and drag' conduct

Overview

- Conduct known in the media as 'grab and drag' is violent. The impacts can be serious and traumatic, especially if the person harmed believes they are about to be subjected to sexual violence.
- But in some cases the law does not recognise the conduct as anything more serious than common law assault, with a five-year maximum term of imprisonment.
- The law should clearly recognise this conduct and treat it more seriously than it does now.
- An 'aggravating circumstance' for common law assault should be introduced in the *Crimes Act 1958* (Vic). This should apply where the assault would raise an apprehension of an imminent sexual offence.
- The maximum penalty for this aggravated circumstance should be 10 years' imprisonment (Level 5).
- The aggravating circumstance should be an indictable charge triable summarily.

Introduction

- 2.1 In *Director of Public Prosecutions (Vic) v Williams* (the Williams case) the accused person grabbed a woman who was walking down the street. He dragged her into an alley while she struggled. He covered her mouth and lay on top of her for around 20 seconds with his face near her face, until a passer-by stepped in.¹
- 2.2 The accused person was charged with, and pleaded guilty to, common law assault.² He pleaded not guilty to an alternative second charge of assault with intent to commit a sexual offence under section 42 of the *Crimes Act 1958* (Vic). He was acquitted on this charge.³
- 2.3 He was sentenced for common law assault to a two-and-a-half-year community correction order and 200 hours of community work. The sentence took into account the 42 days he had already served.⁴

1 *DPP (Vic) v Williams* [2020] VCC 1662, [73].

2 An indictable common law offence in Victoria: *R v Patton* [1998] 1 VR 7, (Victorian Supreme Court of Appeal, Phillips CJ, Winneke P and Southwell AJA, 29 August 1996). The plea of guilty 'was not accepted by the prosecution in satisfaction of the indictment': *DPP (Vic) v Williams* [2020] VCC 1662, [88].

3 *DPP (Vic) v Williams* [2020] VCC 1662, [3], [89].

4 When determining the sentence, the judge considered many factors, including that this was a serious example of common assault and the accused person's personal circumstances. These included that the accused person was aged 19 at the time; had a borderline IQ of 71; had no prior convictions; had shown genuine remorse; and had been subject to racial abuse, death threats and vigilante behaviour by the public. As he was a youthful offender, punishment based on rehabilitation was important to avoid further offending: *DPP (Vic) v Williams* [9]–[37], [44]–[45].

- 2.4 Following media coverage of the case people began advocating for the sentence to be appealed. At the time of writing, a petition calling for an appeal had 112,966 electronic signatures.⁵
- 2.5 The petition expressed the view that the offending was of a sexual nature.⁶ The judge had concluded, after analysis of CCTV footage of the assault, that an intention to commit a sexual offence could not be proved beyond a reasonable doubt.⁷ We discussed the judge's decision in detail in our issues paper.⁸ The petition also criticised how lenient the sentence was.⁹ Prosecutors decided not to appeal the sentence because it did not fall outside the range of available sentences for common law assault.¹⁰
- 2.6 In this context, a new 'grab and drag' offence was proposed by the petition, with the aim of protecting women. This conduct was said to be a precursor to serious sexual offending.¹¹ As we discuss below, there is not enough research yet to support this view.
- 2.7 It is true that a different judge or jury could have decided this case differently.¹² Some people told us this means the law should not change.
- 2.8 While most sexual violence is committed by someone the person harmed knows,¹³ the Williams case is not a 'one-off'. It is an example of a violent crime, which can have serious negative consequences for the person harmed. Crimes like this happen often enough for Victoria Police to view them as a problem that needs its own legal response.¹⁴ It is conduct that occurs against a backdrop of violence against women and concerns about women's safety in public spaces.
- 2.9 Yet the conduct—assaulting someone in a way that would raise a belief they are about to be subjected to sexual violence—is sometimes invisible under the law. In some cases, a person may be charged with 'common law assault', the same offence that covers less serious assaults.¹⁵
- 2.10 We think the law should clearly recognise this conduct as criminal, in name and penalty. In this report we explain how the law can achieve this.

What is the current law on this conduct?

- 2.11 In our issues paper we set out several indictable offences¹⁶ that can apply to 'attempts' to rape or sexually assault or acts that are 'preparatory'.¹⁷ One example is the offence of 'assault with the intention to commit a sexual offence',¹⁸ of which the accused person in the Williams case was acquitted.

5 Emm Jones, 'Petition: Keep Women Safe from Sexual Predators. Introduce a #GrabAndDrag Law', *Change.Org* (Web Page) <<https://www.change.org/p/appeal-jackson-williams-sexual-assault-verdict>>.

6 Ibid.

7 *DPP (Vic) v Williams* [2020] VCC 1662, [86].

8 Victorian Law Reform Commission, *Sexual Offences: 'Grab and Drag'* (Issues Paper I, February 2021) 5–6.

9 Emm Jones, 'My Follow up Email to Our AG', *Change.Org* (Web Page, 10 December 2020) <<https://www.change.org/p/keep-women-safe-from-sexual-predators-introduce-a-grabanddrag-law/u/28196123>>.

10 Prosecutors chose not to appeal on the basis that the sentence did not fall outside of the range of available sentences for common assault. See Simone Fox Koob and David Estcourt, 'Prosecutors Won't Appeal Sentence of Man Who Dragged Woman into Alleyway', *The Age* (online, 16 December 2020) <<https://www.theage.com.au/national/victoria/prosecutors-won-t-appeal-sentence-of-man-who-dragged-woman-into-alleyway-20201216-p56nwn.html>>.

11 Benita Kolovos, 'Vic "Grab and Drag" Law Proposed', *Canberra Times* (online, 26 November 2020) <<https://www.canberratimes.com.au/story/7030196/vic-grab-and-drag-law-proposed/?cs=14231>>.

12 The Williams case was heard by a judge alone due to Covid 19 measures, following an application finding that it would be in the interests of justice to do so: *DPP (Vic) v Williams [No 1]* [2020] VCC 1235. Cases involving serious indictable offences are normally heard before a jury.

13 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021) [2.12]. See also Australian Institute of Health and Welfare (Cth), *Sexual Assault in Australia* (In Focus Report, 28 August 2020) 8–9 <<https://www.aihw.gov.au/reports/domestic-violence/sexual-assault-in-australia/contents/summary>>.

14 Consultation 2 (Victoria Police).

15 Judicial College of Victoria, '7.4.8 Common Law Assault', *Victorian Criminal Charge Book* (Online Manual, 1 November 2014) [6] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/4957.htm>>.

16 Indictable offences are serious crimes mostly tried in the County Court of Victoria: *County Court Act 1958* (Vic) s 36A.

17 Victorian Law Reform Commission, *Sexual Offences: 'Grab and Drag'* (Issues Paper I, February 2021) 4 table 1.

18 *Crimes Act 1958* (Vic) s 42.

- 2.12 A person commits this offence if they:
- intentionally apply force to another person and the other person does not consent to the force
 - intend that the other person take part in a sexual act
 - do not reasonably believe that the other person would consent to taking part in that sexual act.¹⁹
- 2.13 While the physical element of the offence is one of general assault, 'the "sexual" aspect of this offence is in the fault element'.²⁰
- 2.14 This offence is usually charged together with sexual assault, rape, attempted rape, and false imprisonment. A person may be charged with common law assault as an alternative to this offence.²¹
- 2.15 Cases suggest that the offence is often charged where the conduct is overtly sexual.²² For example, in one case the accused person said that he wanted to have sex with the complainant,²³ and in another case the accused person removed clothing from the complainant.²⁴
- 2.16 The Williams case turned on whether the accused person had intended that the complainant take part in a sexual act (when applying force).²⁵ The judge found that she could not be satisfied of sexual intent beyond reasonable doubt, because based on the evidence it was possible that he might have intended other things. For example, the judge reasoned that the accused person could have intended to steal the complainant's belongings. The accused person also did not say or do anything consistent with sexual assault, such as trying to touch her breasts.²⁶

What do we know about this conduct?

- 2.17 There is not yet much research about this conduct being a precursor to sexual offending. A number of submissions we received pointed this out.²⁷ This is unlike the offence of strangulation, which in recent years has been recognised as having a clear connection with family violence, and has a high penalty to recognise its seriousness.²⁸
- 2.18 Liberty Victoria explained:
- There is a real danger in introducing an offence to address a presumed risk of further harm, when there is no evidence which supports the likelihood of this risk actually occurring. Any new offences that are introduced by the legislature should be supported by evidence.²⁹
- 2.19 The County Court of Victoria stated:
- there does not appear to be any research or evidence to support the introduction of such an offence. The Court is not aware of any research that suggests sexual offending is more likely to occur after 'grab and drag' actions ... Further, creating an offence for a policy reason that is not supported by credible research would not engender confidence in the law.³⁰

19 Ibid s 42(1).

20 Department of Justice (Vic), *Review of Sexual Offences* (Consultation Paper, September 2013) [4.4.2] <<http://www.justice.vic.gov.au/review-of-sexual-offences-consultation-papers>>.

21 See, eg, *DPP (Vic) v Williams* [2020] VCC 1662, [5].

22 See, eg, *DPP (Vic) v Douglass (a pseudonym)* [2018] VCC 242; *DPP (Vic) v Drake* [2019] VSCA 293; *DPP (Vic) v Patil (a Pseudonym)* [2019] VCC 1674; *Murphy v The Queen* [2019] VSCA 189; *AS v The Queen* [2019] VSC 260.

23 See also *Murphy v The Queen* [2019] VSCA 189; *DPP (Vic) v Douglass (a pseudonym)* [2018] VCC 242, [15].

24 *AS v The Queen* [2019] VSC 260, [10].

25 *DPP (Vic) v Williams* [2020] VCC 1662, [12].

26 Ibid [82], [85]–[86].

27 Submissions 1 (County Court of Victoria), 4 (Sexual Assault Services Victoria), 5 (Liberty Victoria), 13 (Criminal Bar Association), 15 (Victorian Women Lawyers).

28 See, eg, Tom Gotsis, 'NSW's Strangulation Offence: Time for Further Reform' (Issues Backgrounder No 3, Parliamentary Research Service, Parliament of NSW, September 2018) 2–4 <<https://www.parliament.nsw.gov.au/researchpapers/Documents/NSW%20strangulation%20offence.pdf>>.

29 Submission 5 (Liberty Victoria).

30 Submission 1 (County Court of Victoria).

- 2.20 We did receive some submissions with anecdotal reports of people attacking women by engaging in this conduct. They did not have the opportunity to commit a sexual offence, if this is what they intended, because they were interrupted by bystanders, or the person harmed escaped.³¹
- 2.21 The Victims of Crime Commissioner described 'horrific cases' where people who have been harmed, often women, 'have been violently grabbed and dragged to places where there are few passers-by and less opportunity for offences to be interrupted'.³²
- 2.22 Victoria Police gave us examples of accused people who had targeted women in public spaces, following them or trying to interact with them, before seizing and restraining them. Bystanders prevented these attacks, or the person harmed broke free, before another offence could be committed.³³
- 2.23 Some people were harmed during the day and restrained for prolonged periods just out of sight of passers-by. In some cases the accused people wore face coverings or used chains, canvas straps and other tools to choke and drag the person harmed. Most of the people harmed were female. Victoria Police told us that in these cases the accused person often chose a person to target at random, but the offending itself was usually pre-planned.³⁴
- 2.24 In the most serious examples, Victoria Police told us that this conduct could indicate a pattern of escalating behaviour.³⁵ The media has reported cases in which similar conduct is alleged to have happened.³⁶
- 2.25 People who commit sexual violence have different backgrounds, motivations and criminal histories.³⁷ It is difficult to predict if a person will go on to commit sexual offences based on their past offending. Some people convicted of sexual offences may have committed violent crimes in the past, such as kidnapping, causing injury, robbery, burglary or arson.³⁸ However, some people who have committed sexual offences may have no criminal history.³⁹
- 2.26 There is not yet research indicating that this conduct is a precursor to sexual offending. However, the cases we are aware of, as highlighted by Victoria Police and in media reporting, indicate it is conduct that is violent and can cause significant harm, especially where it raises an apprehension of sexual violence.⁴⁰

Is there a problem with the law on this conduct?

- 2.27 In our issues paper we asked if there should be a change to the law to address this conduct. People we heard from agreed this conduct is serious and harmful. They agreed that preventing and responding to this conduct properly is important. But we received mixed responses about changing the law.

31 Submissions 3 (Stuart Grimley MP), 14 (Victims of Crime Commissioner).

32 Submission 14 (Victims of Crime Commissioner).

33 Consultation 2 (Victoria Police).

34 Ibid.

35 Ibid.

36 See, eg, 'Chilling Moments before Alleged Abduction Attempt Caught on Camera', *7NEWS* (online, 27 November 2020) <<https://7news.com.au/news/vic/hawthorn-attempted-abduction-accused-caught-on-camera-moments-before-alleged-melbourne-attack-c-1662969>>; 'Man Covered Woman's Face in "brazen" Attack after Following Her Home, Police Say', *ABC News* (online, 20 January 2020) <<https://www.abc.net.au/news/2020-01-21/melbourne-woman-almost-abducted-outside-southbank-apartment/11884690>>; Jack Paynter, 'Man Charged over Alleged Violent Kidnapping of Woman East of Melbourne', *news.com.au* (online, October 2021) <<https://www.news.com.au/national/victoria/crime/man-charged-over-alleged-violent-kidnapping-of-woman-east-of-melbourne/news-story/1780cbaeb89af3baa2ba2546d2a40efd>>.

37 Denise Lievore, *Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy* (Report, Australian Institute of Criminology, 2004) 14.

38 Ibid 48. See also Amelie Pedneault, Danielle A Harris and Raymond A Knight, 'An Examination of Escalation in Burglaries Committed by Sexual Offenders' (2015) 59(11) *International Journal of Offender Therapy and Comparative Criminology* 1203.

39 Denise Lievore, *Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy* (Report, Australian Institute of Criminology, 2004) 48–9.

40 Consultation 2 (Victoria Police). See, eg, 'Chilling Moments before Alleged Abduction Attempt Caught on Camera', *7NEWS* (online, 27 November 2020) <<https://7news.com.au/news/vic/hawthorn-attempted-abduction-accused-caught-on-camera-moments-before-alleged-melbourne-attack-c-1662969>>; 'Man Covered Woman's Face in "brazen" Attack after Following Her Home, Police Say', *ABC News* (online, 20 January 2020) <<https://www.abc.net.au/news/2020-01-21/melbourne-woman-almost-abducted-outside-southbank-apartment/11884690>>; Jack Paynter, 'Man Charged over Alleged Violent Kidnapping of Woman East of Melbourne', *news.com.au* (online, October 2021) <<https://www.news.com.au/national/victoria/crime/man-charged-over-alleged-violent-kidnapping-of-woman-east-of-melbourne/news-story/1780cbaeb89af3baa2ba2546d2a40efd>>.

- 2.28 About half of those who responded to our issues paper supported changing the law so it responds to this conduct by creating a new offence or changing a current offence. The other half were against any change to the law. They told us the law already covers this conduct.⁴¹

What we heard from people who wanted the law to change

- 2.29 Victoria Police, Sexual Assault Services Victoria (SAS Victoria), the Victims of Crime Commissioner, Dr Steven Tudor, Mr Stuart Grimley MP and others supported a change to the law.⁴²
- 2.30 We heard that there is a gap in the law where the conduct falls short of the offence of 'assault with the intention to commit a sexual offence'⁴³ and where the common law assault offence does not reflect how serious the conduct is.⁴⁴ Reasons for changing the law to fill this gap included:
- recognising the gravity of the harm caused
 - defining the conduct clearly in the law
 - improving community awareness about the conduct and helping to change behaviour.⁴⁵

This harm is serious and should be recognised

- 2.31 SAS Victoria explained that this conduct causes serious harm and significant trauma. They said that women and girls are especially likely to fear a sexual assault if they experience this conduct.⁴⁶
- 2.32 Victoria Police told us the conduct was likely to result in significant harm because of the 'predatory and deliberate conduct' using physical force.⁴⁷
- 2.33 The Victims of Crime Commissioner said:
- such conduct, even without any sexual elements, may be more serious than common assault. This is due to the increased fear imposed on the victim and the increased danger by virtue of being suddenly restrained and forcibly removed from where they were without lawful excuse.⁴⁸
- 2.34 The Victims of Crime Commissioner noted that some in the community may be more traumatised than others by this conduct, such as those 'who have experienced a history of violence by virtue of gender identity, sexual orientation, disability, race or cultural identity'.⁴⁹ In our sexual offences report we explain that people from some communities experience sexual violence at higher rates than others (for example Aboriginal women, women with disability and women from migrant and refugee backgrounds).⁵⁰

There is a gap in the law relating to this conduct

- 2.35 The Victims of Crime Commissioner told us that changing the law 'would fill a gap in the law where sexual intent cannot be proved beyond reasonable doubt and assault offences may be an insufficient alternative'.⁵¹

41 For those supporting a change to the law: Submissions 2 (Robyn Vincent), 3 (Stuart Grimley MP), 4 (Sexual Assault Services Victoria), 8 (Victoria Police), 10 (Madison), 11 (Steve H), 12 (Dr Steven Tudor), 14 (Victims of Crime Commissioner). For those against a change to the law: Submissions 1 (County Court of Victoria), 5 (Liberty Victoria), 6 (Office of Public Prosecutions), 7 (Victoria Legal Aid), 9 (Law Institute of Victoria), 13 (Criminal Bar Association), 15 (Victorian Women Lawyers).

42 Submissions 2 (Robyn Vincent), 3 (Stuart Grimley MP), 4 (Sexual Assault Services Victoria), 8 (Victoria Police), 10 (Madison), 11 (Steve H), 12 (Dr Steven Tudor), 14 (Victims of Crime Commissioner).

43 *Crimes Act 1958* (Vic) s 42.

44 Submissions 3 (Stuart Grimley MP), 14 (Victims of Crime Commissioner); Consultation 2 (Victoria Police).

45 Submissions 4 (Sexual Assault Services Victoria), 12 (Dr Steven Tudor), 14 (Victims of Crime Commissioner).

46 Submission 4 (Sexual Assault Services Victoria); Consultation 1 (Roundtable on grab and drag conduct).

47 Submission 8 (Victoria Police).

48 Submission 14 (Victims of Crime Commissioner).

49 Ibid.

50 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021) [2.14]–[2.25].

51 Submission 14 (Victims of Crime Commissioner).

- 2.36 Mr Stuart Grimley MP agreed there is a gap in the law and that a 'grab and drag law' would 'bridge the gap of unlawful assault and intent to commit sexual assault'.⁵²
- 2.37 Victoria Police explained that in these cases, where the accused person does not admit they had a sexual intent or evidence does not point to sexual intent, the accused person will likely be prosecuted for a less serious offence such as common law assault. Some prosecutions for common law assault are heard summarily in the Magistrates' Court of Victoria instead of the County Court of Victoria, which runs trials for more serious crimes.⁵³
- 2.38 Victoria Police told us that these outcomes showed a gap in the law. Victoria Police was also concerned that these outcomes led to people harmed not wanting to continue with the case because they think the harm they experienced is not being taken seriously.⁵⁴

What we heard from people who did not want a change to the law

- 2.39 About half of those we heard from did not support any change to the law. This included the County Court of Victoria, the Office of Public Prosecutions, Victoria Legal Aid, the Criminal Bar Association, Liberty Victoria, Victorian Women Lawyers and the Law Institute of Victoria.⁵⁵

There is no gap in the law

- 2.40 The primary reason given was that there is no gap in the law.⁵⁶ The offences that could cover this conduct are set out in Table 1.

Table 1: Existing offences under the *Crimes Act 1958 (Vic)* and at common law relevant to this conduct

Crimes Act section	Offence	Maximum penalty
63A, 320	Kidnapping	25 years (level 2)
321P	Attempted rape	20 years (level 3)
42	Assault with intent to commit a sexual offence	15 years (level 4)
47	Abduction and detention for a sexual purpose	10 years (level 5)
320	False imprisonment	10 years (level 5)
31(1)(a)	Assault with intent to commit an indictable offence	5 years (level 6)
43	Threat to commit a sexual offence	5 years (level 6)
321P	Attempted sexual assault	5 years (level 6)
320	Common law assault	5 years (level 6)

52 Submission 3 (Stuart Grimley MP).

53 Some indictable offences may be tried summarily in the Magistrates' Court of Victoria: *Criminal Procedure Act 2009 (Vic)* s 28(1)(b) (ii).

54 Consultation 2 (Victoria Police).

55 Submissions 1 (County Court of Victoria), 5 (Liberty Victoria), 6 (Office of Public Prosecutions), 7 (Victoria Legal Aid), 9 (Law Institute of Victoria), 13 (Criminal Bar Association), 15 (Victorian Women Lawyers).

56 Submissions 1 (County Court of Victoria), 5 (Liberty Victoria), 6 (Office of Public Prosecutions), 7 (Victoria Legal Aid), 9 (Law Institute of Victoria), 13 (Criminal Bar Association), 15 (Victorian Women Lawyers); Consultation 1 (Roundtable on grab and drag conduct); Written response to roundtable discussion paper from Victoria Legal Aid to Victorian Law Reform Commission, 8 November 2021; Written response to roundtable discussion paper from Office of Public Prosecutions to Victorian Law Reform Commission, 16 October 2021.

- 2.41 Mr Jim Shaw, speaking for the Criminal Bar Association, said in a roundtable meeting that there was no legal gap because the conduct would not 'fall between the cracks and be completely lawful'.⁵⁷
- 2.42 Victoria Legal Aid explained that current offences could support a prosecution for this conduct, even where 'a person's intentions cannot be proved beyond reasonable doubt, as occurred in [the Williams case] where he was convicted of common law assault'.⁵⁸

Changing the law would create practical challenges

- 2.43 We also heard that changing the law to deal with this conduct may make it unnecessarily complex. It could cause charges to overlap and make decision making harder for juries.⁵⁹ These concerns were shared by some of those who supported a change to the law.⁶⁰
- 2.44 The Criminal Bar Association explained that changing the law to include 'an even broader fault element ... would unduly complicate trial directions and risk confusing a jury'. It said 'a jury, no matter how well directed, could struggle to understand the distinction between a new offence and [assault with the intention to commit a sexual offence]'.⁶¹
- 2.45 We heard that changing the law could lead to unintended outcomes. For example, a high penalty may discourage accused people from pleading guilty, which would add to delay in the criminal justice system.⁶²

The law should not change because of one case

- 2.46 We heard from some stakeholders that the Williams case is a single case decided on its facts and does not highlight a problem with the law.⁶³
- 2.47 The County Court of Victoria told us:
- Legislative reform narrowly defining new offences in response to single cases leads to a voluminous and unnecessarily complicated legal code. The community should be able to easily understand the law, so the situation where there are several offences covering the same conduct should be avoided.⁶⁴
- 2.48 Mr Jim Shaw, speaking for the Criminal Bar Association, explained that generally the law should not be changed because of a single case. He noted a different judge or a jury may have decided the case differently.⁶⁵
- 2.49 The Criminal Bar Association told us the offending in the Williams case is not common and no other court decisions involving assault with the intention to commit a sexual offence have detailed similar conduct.⁶⁶
- 2.50 Liberty Victoria and the Law Institute of Victoria echoed this view.⁶⁷

57 Consultation 1 (Roundtable on grab and drag conduct).

58 Submission 7 (Victoria Legal Aid).

59 Submissions 1 (County Court of Victoria), 5 (Liberty Victoria), 6 (Office of Public Prosecutions), 7 (Victoria Legal Aid); Consultation 1 (Roundtable on grab and drag conduct); Written response to roundtable discussion paper from Office of Public Prosecutions to Victorian Law Reform Commission, 16 October 2021.

60 Submissions 4 (Sexual Assault Services Victoria), 8 (Victoria Police), 14 (Victims of Crime Commissioner).

61 Submission 13 (Criminal Bar Association).

62 Submission 5 (Liberty Victoria).

63 Submissions 1 (County Court of Victoria), 5 (Liberty Victoria), 9 (Law Institute of Victoria).

64 Submission 1 (County Court of Victoria).

65 Consultation 1 (Roundtable on grab and drag conduct).

66 Submission 13 (Criminal Bar Association).

67 Submissions 5 (Liberty Victoria), 9 (Law Institute of Victoria).

Sentencing already takes the seriousness of this conduct into account

2.51 We heard that sentencing already considers the conduct's seriousness and its impact on people harmed.⁶⁸ The Office of Public Prosecutions explained:

Any 'grab and drag' features of the conduct can be relied upon as aggravating features of such an offence [of common law assault]. The 5-year maximum sentence that common law assault attracts is sufficient for sentencing courts to impose a higher sentence for these types of offences that recognises that 'grab and drag' conduct includes serious features such as the victim fearing for their safety due to being restrained, and that moving someone from a public space to a less public space increases the risk to the victim.⁶⁹

2.52 The Criminal Bar Association told us:

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.⁷⁰

2.53 Victoria Police explained there may be some cases where sentencing may not factor in that the person harmed believed they were going to be sexually assaulted, especially where the convicted person was not prosecuted for any sexual offences.⁷¹

The focus should be on stopping sexual violence before it starts

2.54 Victoria Legal Aid said that while it supports raising community awareness and behaviour change in relation to women's safety in public spaces, it does not think that changing the law would achieve these aims.⁷²

2.55 Victorian Women Lawyers supported more investment into strategies that targeted the causes of sexual assault.⁷³

2.56 In the sexual offences report we made recommendations to improve community awareness and early intervention to stop sexual violence before it happens or prevent it from continuing.⁷⁴

The law should change to address this conduct

2.57 Whether the law should change in relation to this conduct was a finely balanced issue. This was reflected in discussions within the Commission and in the views of people we heard from.

2.58 The Commission recognises the level of trauma that the people harmed by such conduct can experience. On balance, a majority of Commissioners recommend changing the law to address this conduct. The gravity of the conduct and the level of trauma it causes, beyond the conduct typical of common law assault, need to be specifically recognised in legislation, along with an appropriate higher penalty than that applying to other forms of common law assault.

68 *Sentencing Act 1991* (Vic) s 5.

69 Submission 6 (Office of Public Prosecutions).

70 Submission 13 (Criminal Bar Association).

71 Consultation 2 (Victoria Police).

72 Written response to roundtable discussion paper from Victoria Legal Aid to Victorian Law Reform Commission, 8 November 2021.

73 Submission 15 (Victorian Women Lawyers).

74 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021) Recommendations 1–2, 47.

The law should recognise the reality of this harm

I think out of my friends a lot of the crime that some of the boys might have experienced is getting into a fight or getting beaten up which is a different thing to if you're walking along and someone attacks you or does something like that. It's not really the same type of crime. There's a different fear. And I know a lot of boys have been mugged which is sort of a bit different because you give them your things and then they go away. I mean they might be violent, but it's just that the fear of being raped, it's horrible.⁷⁵ — Lucy, interviewed by Fiona Vera-Grey, in *The Right Amount of Panic: How Women Trade Freedom for Safety* (2018)

- 2.59 As SAS Victoria explained, it is important to acknowledge that women and girls have a particular fear of sexual violence and that this fear is reasonable, given how much sexual violence exists.⁷⁶ Research indicates that this fear reflects broader concerns about women's safety in public spaces, sexual harassment and sexual violence.⁷⁷
- 2.60 Lievore explains that 'women's fears about sexual victimisation are neither unfounded nor irrational' since 'females of all ages are disproportionately more likely to be sexually assaulted than males'.⁷⁸

Women's fear of sexual victimisation is often based on the notion that sex crimes are perpetrated by a small number of habitual offenders—usually strangers—who may be identifiable by their deviant sexual preferences or pathological characteristics. Yet the notion of 'stranger danger' is at odds with reality, as most victims of sexual assault know the offender. While persistent sex offenders are thought to comprise a small proportion of the total sex offender population, their impact upon women's feelings of safety is nevertheless substantial, as they are often associated with more severe and highly publicised sexual assaults.⁷⁹

- 2.61 Vera-Gray further notes that 'this means that when women experience a robbery they at the same time experience the possibility of sexual assault: this possibility is lived as an ever-present potential for women'.⁸⁰
- 2.62 Research also indicates that women do 'safety work' in public spaces to 'stop the violence happening at all'.⁸¹ These are changes they make to their behaviour to minimise the risk they will be victimised or blamed for being victimised.⁸² A community member who made a submission described the strategies people used to keep safe:

It is also imperative for authorities to acknowledge that members within the community are already paranoid and feel unsafe when travelling to destinations they need to get to, such as to go to work, buy groceries, meet someone, etc, and they will constantly check their surroundings, speed walk if they feel unsafe or make a phone call to feel less alone.⁸³

- 2.63 We believe that there should be consequences for people who commit an assault that would raise an apprehension of a sexual offence being committed.

75 Fiona Vera-Gray, *The Right Amount of Panic: How Women Trade Freedom for Safety* (Policy Press, 2018) ch 2.
76 Consultation 1 (Roundtable on grab and drag conduct). See also Fiona Vera-Gray, *The Right Amount of Panic: How Women Trade Freedom for Safety* (Policy Press, 2018) ch 2.
77 Michael L Chataway and Timothy C Hart, 'A Social-Psychological Process of "Fear of Crime" for Men and Women: Revisiting Gender Differences from a New Perspective' (2019) 14(2) *Victims & Offenders* 143, 145; Fiona Vera-Gray and Liz Kelly, 'Contested Gendered Space: Public Sexual Harassment and Women's Safety Work' (2020) 44(4) *International Journal of Comparative and Applied Criminal Justice* 265, 268.
78 Denise Lievore, *Recidivism of Sexual Assault Offenders: Rates, Risk Factors and Treatment Efficacy* (Report, Australian Institute of Criminology, 2004) 9 (citations omitted).
79 Ibid.
80 Fiona Vera-Gray, *The Right Amount of Panic: How Women Trade Freedom for Safety* (Policy Press, 2018) 31.
81 Fiona Vera-Gray and Liz Kelly, 'Contested Gendered Space: Public Sexual Harassment and Women's Safety Work' (2020) 44(4) *International Journal of Comparative and Applied Criminal Justice* 265, 269.
82 Ibid 268–9. See also Hannah Bows, 'Sarah Everard: Why Women Shouldn't Have to Risk Trading Their Freedom for Safety', *The Conversation* <<http://theconversation.com/sarah-everard-why-women-shouldnt-have-to-risk-trading-their-freedom-for-safety-157029>>.
83 Submission 10 (Madison).

- 2.64 As SAS Victoria said regarding such experiences of women and girls, it is important that 'a law recognises their reality'.⁸⁴ Changing the law would acknowledge that an assault can have significant negative impacts if the victim believes they are about to be subjected to sexual violence, which may be the likely reaction of many women. Dr Steven Tudor, Senior Lecturer, School of Law, La Trobe University, explained that a change to the law 'would also help contribute to a shift toward requiring people, especially males, to take greater responsibility for the consequences of their actions'.⁸⁵
- 2.65 Most of the community response to the Williams case and the feedback we received focused on the experiences of women. We agree with the Victims of Crime Commissioner that people in the community will have different reactions to being assaulted depending on previous experiences of violence, including people of different genders.⁸⁶

Changing the law has practical benefits

- 2.66 It is clear this conduct happens, and Victoria Police has provided examples of women being assaulted in this way. In practical terms, changing the law would help law enforcement agencies deal with it.⁸⁷ A change would:
- make sure the conduct is treated more seriously in the justice system and any criminal justice outcomes fit the conduct's seriousness
 - give the sentencing court more accurate information about the relevant offending and assist the court to tailor a sentence, including conditions that require a convicted person to address their conduct
 - help collect data on how common this offending is—this is a current gap.
- 2.67 We acknowledge the concerns that a change to the law could create practical challenges. Any change to the law could make it more complicated than it is now, and the consequences will not be known until it is put into practice. But we think a carefully crafted and narrow amendment to the law to deal with this specific conduct will address concerns about making the law more complex. We discuss how the law could be changed next.

The current law is not enough to address this conduct

- 2.68 We acknowledge that some offences do already cover this conduct and sentencing courts can take offending seriousness into account.⁸⁸ But these options do not address situations where:
- the accused person raises an apprehension that a sexual offence is about to be committed because of the circumstances in which the assault has occurred
 - there are insufficient 'markers' that point to the accused person's sexual intent beyond a reasonable doubt.
- 2.69 In these cases the offence of common law assault—in its elements and penalty—does not capture the serious and harmful nature of this conduct. Common law assault covers a broad range of assaults.
- 2.70 Conduct in these cases will likely fall short of serious offences (see Table 2).

84 Consultation 1 (Roundtable on grab and drag conduct).
 85 Submission 12 (Dr Steven Tudor).
 86 Submission 14 (Victims of Crime Commissioner).
 87 Consultation 2 (Victoria Police).
 88 *Sentencing Act 1991* (Vic) s 5.

Table 2: Reasons why more serious offences may not be established

Offence	Reasons why offence may not be established
Assault with an intention to commit a sexual offence ⁸⁹	Where there is a lack of evidence pointing to an intention to commit a sexual offence during the assault. For example, where there is no evidence of the accused person sexually touching the person harmed, removing their clothing or using sexual language.
Abduction or detention for a sexual purpose ⁹⁰	Where the person harmed is not taken away or detained, or where there is a lack of evidence pointing to an intention to commit a sexual act without consent.
Stalking ⁹¹	Where any predatory behaviour such as following the person harmed does not amount to the 'course of conduct' needed for stalking.
An attempted sexual offence	Where the accused person's conduct does not amount to an attempted sexual offence, such as an attempted rape or sexual assault. Attempts require an intention to commit a sexual offence and conduct that is 'more than merely preparatory to the commission of the offence' or 'nothing remains to be done but to commit the crime'. ⁹²

2.71 Changing the law would signal to the community that the gravity of this conduct may result in serious harm, and ensure the justice system process leads to outcomes that reflect its seriousness.

2.72 We agree with the views expressed by the Victims of Crime Commissioner about clearly labelling and sanctioning this conduct:

There is something about addressing this [conduct] in a more deliberate way—the way you make law sends a message to the community. If certain behaviour is treated as an assault, what message does this send, to women and girls, and also others? Labelling behaviour and its consequences has communicative and social force and is important. If all of this conduct is allowed to just come out in the wash during sentencing, it seems like there's a danger that this conduct is not treated as having an important impact.⁹³

2.73 Criminalising conduct in a specific way may be justified if it is serious and harmful enough for the public to recognise it as wrong.⁹⁴ The response to the Williams case suggests that some in the community expect that this conduct should receive a strong criminal justice response.

2.74 There is also value in marking out the legal differences between offences and degrees of wrongdoing.⁹⁵ As Professor Andrew Ashworth notes, the principle of fair labelling in the criminal law requires that 'widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law'. Further, 'offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking'.⁹⁶

89 *Crimes Act 1958* (Vic) s 42.

90 *Ibid* s 47.

91 *Ibid* s 21A.

92 *Ibid* s 321N(1)(a); Department of Justice (Vic), *Review of Sexual Offences* (Consultation Paper, September 2013) 61 [4.4] <<http://www.justice.vic.gov.au/review-of-sexual-offences-consultation-paper>>, citing *R v Worland* [1964] VR 607, [610]–[611], (Supreme Court of Victoria, Monahan J, 14 May 1964).

93 Consultation 1 (Roundtable on grab and drag conduct).

94 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 22.

95 James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217, 219–20.

96 Consultation 3 (Dr Steven Tudor), citing Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th ed, 2009) 78.

- 2.75 This differentiation is a common practice in legislative design. The law already differentiates between murder and manslaughter;⁹⁷ rape and sexual assault;⁹⁸ burglary and home invasion, and their aggravated versions.⁹⁹ Assaults of a sexual nature are already differentiated from other assaults—this is clear given the number of sexual offences that already exist.¹⁰⁰ There are also versions of ‘general’ offences that specifically recognise sexual violence. For example, the offence of ‘threats to inflict serious injury’ has as a counterpart offence ‘threat to commit a sexual offence’.¹⁰¹
- 2.76 In the same way, the approach we recommend differentiates assault that would raise an apprehension of a sexual offence from common law assault.
- 2.77 While sentencing may take the seriousness of offending into account, this is done on a case-by-case basis. Changing the law would make sanctioning this type of conduct more consistent than it is now. It would also require the sentencing judge to take into account any higher maximum penalty.¹⁰²

How should the law be changed?

- 2.78 In our issues paper we asked if a new offence should be created to target this conduct or if existing offences should be amended.
- 2.79 We outlined a few ideas about how a new offence could work:
- a ‘general’ offence could apply whenever someone engages in this conduct, even if they did not intend or attempt any other act
 - a specific offence could be created that is related to sexual violence, with a high penalty to recognise any known relationship between this conduct and future sexual offending
 - presuming an intention to commit a sexual offence if the accused person engaged in this conduct (as defined in legislation).¹⁰³
- 2.80 We also outlined ideas for amending existing offences. For example, including this conduct as an example of the physical element for ‘assault with the intention to commit a sexual offence’ or ‘abduction and detention for a sexual purpose’.¹⁰⁴ We noted the idea of ‘presuming intention’ in an existing offence if certain physical elements were proved.¹⁰⁵
- 2.81 Most of those who supported a change to the law also supported creating a new offence, but they differed in how they thought a new offence should be designed.¹⁰⁶ A small group preferred amending the existing law.¹⁰⁷

What we heard about a new offence

- 2.82 We received some support for a new general offence that focused on the act of restraining and moving a person without lawful excuse.¹⁰⁸ For example, the Victims of Crime Commissioner explained that a new offence would recognise the ‘inherent harm’ of this conduct.¹⁰⁹

97 *Crimes Act 1958* (Vic) ss 3, 5.

98 *Ibid* ss 38, 40.

99 *Ibid* ss 76, 77, 77A, 77B. Liberty Victoria noted in its submission that it ‘has opposed the creation of new offences which are, in reality, aggravated versions of existing offences, such as carjacking and home invasion’: Submission 5 (Liberty Victoria).

100 See generally *Crimes Act 1958* (Vic) pt 1 div 1 sub-div 8.

101 *Ibid* ss 21, 43.

102 *Sentencing Act 1991* (Vic) s 5(2)(a).

103 Victorian Law Reform Commission, *Sexual Offences: ‘Grab and Drag’* (Issues Paper I, February 2021) 7–8.

104 *Crimes Act 1958* (Vic) ss 42, 47.

105 Victorian Law Reform Commission, *Sexual Offences: ‘Grab and Drag’* (Issues Paper I, February 2021) 9.

106 Submissions 2 (Robyn Vincent), 3 (Stuart Grimley MP), 10 (Madison), 12 (Dr Steven Tudor), 14 (Victims of Crime Commissioner).

107 Submissions 4 (Sexual Assault Services Victoria), 8 (Victoria Police), 11 (Steve H).

108 Submissions 3 (Stuart Grimley MP), 14 (Victims of Crime Commissioner).

109 Submission 14 (Victims of Crime Commissioner).

- 2.83 Dr Steven Tudor told us that a new offence focusing on the harmful effect of the assault, such as putting the person harmed in fear of an imminent sexual assault, 'would be a distinctive and arguably useful offence'.¹¹⁰
- 2.84 He suggested a new offence: an 'unlawful act causing fear of a sexual offence'. This offence would focus on the fear of sexual violence the person harmed experiences because of the accused person's conduct. The accused person's intention to commit a sexual offence would not be a matter that needed to be proved. The new offence would aim to recognise and protect people from the harm of being put in fear of being sexually assaulted or raped.¹¹¹
- 2.85 We received a submission from a community member who supported changing the law through a new offence.¹¹²
- 2.86 On the other hand, others viewed a new offence as leading to complex and overlapping laws and unintended outcomes.¹¹³ Liberty Victoria explained:
- A specific 'grab and drag' offence related to sexual harm may overlap with existing offences, further complicating existing law. Liberty Victoria has repeatedly highlighted the potential for confusion, misuse, inconsistent application and overcharging where there is potential overlap between proposed and existing offences.¹¹⁴

What we heard about amending the existing law

- 2.87 SAS Victoria preferred amending existing law because a new offence could make the law confusing. However, it acknowledged that a new offence may have some benefits:
- encouraging people harmed to report the crime
 - recognising the harm caused
 - more appropriate maximum penalties and sentencing to reflect the harm caused
 - behaviour change in the community.¹¹⁵
- 2.88 SAS Victoria supported some ideas in our issues paper, such as including examples of 'grab and drag' conduct in existing offences or 'presuming' the intention of the accused person where the physical elements of the offence are proved.¹¹⁶ It said that in making a change to the law there is 'a strong need to shift the focus onto the fear experienced by the victim'.¹¹⁷
- 2.89 Victoria Police also preferred amending existing law. It noted challenges with having a standalone offence. For example, a standalone new offence could be 'potentially problematic from a charge perspective' and lead to overlap with other offences.¹¹⁸
- 2.90 Victoria Police suggested introducing aggravating circumstances on this conduct for the offence of common law assault.¹¹⁹

110 Submission 12 (Dr Steven Tudor).

111 Ibid.

112 Submission 10 (Madison).

113 Submissions 1 (County Court of Victoria), 4 (Sexual Assault Services Victoria), 5 (Liberty Victoria), 6 (Office of Public Prosecutions), 7 (Victoria Legal Aid), 8 (Victoria Police), 13 (Criminal Bar Association), 15 (Victorian Women Lawyers).

114 Submission 5 (Liberty Victoria).

115 Submission 4 (Sexual Assault Services Victoria).

116 Ibid.

117 Consultation 1 (Roundtable on grab and drag conduct).

118 Submission 8 (Victoria Police).

119 Ibid.

We recommend introducing an aggravating circumstance for common law assault

- 2.91 To respond to this conduct, any change to the law should be clear, tailored and practically workable. We agree that a new offence could make things complex in 'an already difficult jurisdiction'.¹²⁰
- 2.92 For this reason, we recommend introducing an aggravating circumstance for common law assault under section 320A of the Crimes Act. We view this as a simpler change than creating a new offence.
- 2.93 The aggravating circumstance should cover situations where the assault would raise an apprehension of an imminent sexual offence being committed by the accused person. The aggravating circumstance should include an objective test for the fault element.

What are aggravating circumstances?

- 2.94 An aggravating circumstance is a more serious version of an underlying offence. It can have a higher penalty than the underlying offence. The prosecution would need to prove the aggravating circumstance beyond a reasonable doubt.
- 2.95 As Dr Steven Tudor notes, aggravating versions of offences can take many forms, for example:
- a particular result (for example 'causing injury' offences)¹²¹
 - a kind of associated conduct (for example, assault with kicking or a weapon)¹²²
 - a particular circumstance (for example, a particular victim or target, such as assaulting an emergency worker)¹²³
 - a particular fault element (for example, assault with intent to commit an indictable offence).¹²⁴

This approach would build on existing law

- 2.96 There are already aggravating circumstances for common law assault:
- where a person assaults a police officer or protective services officer while telling them about or showing them an offensive weapon or firearm
 - the conduct arouses apprehension or fear.
- 2.97 If these circumstances exist, the maximum penalty increases from level 6 (five years' imprisonment) to level 5 (10 years' imprisonment) for an offensive weapon or level 4 (15 years' imprisonment) for a firearm.¹²⁵
- 2.98 Introducing an aggravating circumstance to common law assault would be less likely to make the law more complex, compared to creating a new offence. Having common law assault as the 'base offence' is useful because its physical and fault elements are already established. There is also no need to prove the accused person actually had sexual intent under our recommended aggravating circumstance (we discuss this below). This would reduce the risk of overlap with other offences, such as assault with the intention to commit a sexual offence,¹²⁶ while recognising how serious this conduct is. It would be a narrow and tailored amendment.

120 Submission 5 (Liberty Victoria).

121 *Crimes Act 1958* (Vic) ss 16–18.

122 *Summary Offences Act 1966* (Vic) s 24(2).

123 *Crimes Act 1958* (Vic) s 31(1)(b).

124 *Ibid* s 31(1)(a); Consultation 3 (Dr Steven Tudor).

125 *Crimes Act 1958* (Vic) s 320A.

126 *Ibid* s 42.

- 2.99 We agree that making a person believe they are about to be subjected to sexual violence is a serious harm. We have suggested the aggravating circumstance recognise these situations. The law already criminalises conduct that raises an apprehension of harm in the victim. For example:
- The stalking offence applies where an accused person has engaged in a course of conduct likely to arouse apprehension or fear in the person harmed for their or someone else's safety.¹²⁷
 - Common law assault not involving the application of force includes as an element an apprehension of immediate force.¹²⁸
- 2.100 For the stalking offence an accused person may be found responsible for arousing apprehension or fear of the other person's safety, even if they did not actually intend this. An accused person's intention may be established if they 'ought to have understood, in all the particular circumstances, that engaging in a course of conduct of that kind would be likely to cause such harm ... and it actually did have that result'.¹²⁹ The focus of this 'objective test' is on what the accused person should have understood and the effect their actions had on the person harmed.¹³⁰
- 2.101 Compared to creating a new offence, creating an aggravating circumstance in legislation for common law assault would avoid the challenge of defining this conduct in a physical element, which some people noted.¹³¹
- 2.102 We acknowledge that as a matter of legislative design, there might be better ways of formulating aggravated assaults.¹³² The government may wish to review the overall design of these offences in the Crimes Act.

How should the aggravating circumstance be formulated?

Common law assault would be the 'base offence'

- 2.103 As mentioned earlier, common law assault is a well-established offence. Its physical and fault elements will need to be proved by the prosecution, along with our recommended aggravating circumstance.

127 Ibid s 21A.

128 Judicial College of Victoria, '7.4.8 Common Law Assault', *Victorian Criminal Charge Book* (Online Manual, 1 November 2014) [29] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/4957.htm>>, citing *Knight v The Queen* (1988) 35 A Crim R 314, (New South Wales Court of Criminal Appeal, Lee, Carruthers and Loveday JJ, 15 September 1988); *Fisher v Police* [2004] SASC 232, (2004) 154 A Crim R 511; *ACN 087 528 774 Pty Ltd v Chetcuti* [2008] VSCA 274, (2008) 21 VR 559; *Slaveski v State of Victoria* [2010] VSC 441; *White v State of South Australia* [2010] SASC 95, (2010) 106 SASR 521.

129 *Crimes Act 1958* (Vic) s 21A(3)(b). See also *R v Hoang* [2007] VSCA 117, (2007) 16 VR 369.

130 Judicial College of Victoria, '7.4.12 Stalking', *Victorian Criminal Charge Book* (Online Manual, 7 June 2011) [43] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/46773.htm>>, citing *R v Hoang* [2007] VSCA 117, (2007) 16 VR 369.

131 Submissions 1 (County Court of Victoria), 8 (Victoria Police), 12 (Dr Steven Tudor), 13 (Criminal Bar Association).

132 For example, Dr Steven Tudor suggested an amendment to section 31 of the *Crimes Act 1958* (Vic) which includes aggravated forms of assault: Consultation 3 (Dr Steven Tudor).

Common law assault elements

Common law assault involving the application of force has three elements:

- the accused applied force to the complainant's body
- the application of force was intentional or reckless
- the application of force was without lawful justification or excuse

Common law assault not involving the application of force has three elements:

- the accused committed an act that caused the complainant to apprehend the immediate application of force to their body
- the act causing such apprehension was intended or reckless as to that outcome
- causing the complainant to apprehend the application of immediate force was without lawful justification or excuse.¹³³

The aggravating circumstance should include an objective fault element

2.104 The aggravating circumstance should be established based on:

- a subjective fault element
- alternatively, an objective test for the fault element.

2.105 A subjective fault element relates to the accused person's own state of mind (for example, what they intended or that they knew their conduct would have certain consequences). If the subjective fault element is proved by the prosecution beyond a reasonable doubt, then the objective fault element does not need to be considered.

2.106 Alternatively, the objective fault element relates to whether the accused should have understood their conduct would have those consequences.¹³⁴ Objective fault elements can be found in existing aggravating circumstances for common law assault and the offence of stalking. In these offences the objective fault element is an alternative to a subjective fault element.¹³⁵

2.107 An objective fault element can be expressed as the accused person 'ought to have understood'¹³⁶ or 'ought to have known'¹³⁷ that in all the particular circumstances the assault would have a particular result, such as arousing an apprehension or fear.

2.108 For the offence of stalking, the objective fault element can be established through an objective assessment:

the required state of mind is not the actual state of mind of the [accused person], but what 'that [accused person]' in those circumstances 'ought to have understood.'¹³⁸

2.109 An objective fault element can also be applied as 'what a reasonable person ought to have understood in the same circumstances'.¹³⁹

2.110 Including a similar objective test focusing on what the accused person ought to have understood in all the particular circumstances has benefits. First, what the person harmed actually believed does not need to be proved. This avoids what they believed being 'put on trial'. It addresses concerns we heard that a formula that focuses on the harmed person's individual beliefs could result in them facing lengthy cross-

133 Judicial College of Victoria, '7.4.8 Common Law Assault', *Victorian Criminal Charge Book* (Online Manual, 1 November 2014) [4]. [28] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/4957.htm>>. See also *R v Pritchard* [1999] NSWCCA 182, (1999) 107 A Crim R 88; *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439.

134 Judicial College of Victoria, '7.4.12 Stalking', *Victorian Criminal Charge Book* (Online Manual, 7 June 2011) [42]–[43] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/46773.htm>>; *R v Hoang* [2007] VSCA 117, (2007) 16 VR 369, [103]–[104].

135 *Crimes Act 1958* (Vic) ss 21A, 320A.

136 *Ibid* s 21A(3)(b).

137 *Ibid* ss 320A(1)(e)(ii), (2)(e)(ii).

138 *R v Hoang* [2007] VSCA 117, (2007) 16 VR 369, [103]–[104].

139 Judicial College of Victoria, '7.4.12 Stalking', *Victorian Criminal Charge Book* (Online Manual, 7 June 2011) [7.4.12.1] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/46773.htm>>.

examination.¹⁴⁰ That said, the person harmed would have most likely apprehended the risk of imminent sexual violence in these cases. Dr Steven Tudor explained:

It is desirable to avoid victims being liable to cross-examination about their actual responses to the accused's conduct. However, it can be safely expected that in the great majority of cases where the aggravated form of the offence applied, the victim would indeed have such a fear. In the cases where they did not, the victim is not likely to make a complaint to police.¹⁴¹

2.111 Second, assessing what the accused person ought to have understood is a safeguard against views that might be formed by the person harmed based on stereotypes. Roundtable participants cautioned that some people may apprehend sexual violence based on prejudices against racial, cultural or other groups of people.¹⁴² Victoria Legal Aid explained there was:

the potential to disproportionately impact people who already experience social discrimination, as it may be easier to allege a fear of sexual offending against these cohorts, such as people who are experiencing mental health issues, people of colour, LGBTIQ people, people with cognitive impairments, young people and homeless people.¹⁴³

2.112 While an objective test has these benefits, there will be cases where the court does not find the evidence proves the aggravating circumstance beyond reasonable doubt. The court might decide that the accused person, in all the particular circumstances, would not have understood that the assault would raise an apprehension of an imminent sexual offence. In these cases the person harmed may feel like their apprehension of sexual violence was not believed.

2.113 Like many cases of sexual violence, there will be cases that result in disappointment for the person harmed. As we note in the sexual offences report, a criminal trial is not an inquiry into 'the truth'¹⁴⁴ and it is usual for cases to 'drop off' after they enter the justice system.¹⁴⁵ While this might be a concern in some cases, we do not think it outweighs the benefits of an objective test, or the broader aim of recognising this conduct as serious.

2.114 A consideration of 'all the particular circumstances' should be relevant to the objective test recommended. We discuss this below.

2.115 A subjective fault element, such as where the accused person 'knows' they will raise an apprehension of a sexual offence, is not intended to overlap with existing threat offences, such as 'threat to commit a sexual offence'.¹⁴⁶ The recommended aggravating circumstance is intended to address assaults that might lack overtly sexual markers but where the accused person knows the assault would raise an apprehension of a sexual offence. On the other hand, the offence of 'threat to commit a sexual offence' requires the accused person to have used words or conduct to convey an intention to rape or sexually assault, which they intended the person harmed to believe.¹⁴⁷

140 Consultation 1 (Roundtable on grab and drag conduct).

141 Consultation 3 (Dr Steven Tudor).

142 Consultation 1 (Roundtable on grab and drag conduct).

143 Written response to roundtable discussion paper from Victoria Legal Aid to Victorian Law Reform Commission, 8 November 2021.

144 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021) [19.6], citing Jill Hunter et al, *The Trial: Principles, Process and Evidence* (Federation Press, 2nd ed, 2021) 3.

145 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021) [1.45]–[1.52].

146 *Crimes Act 1958* (Vic) s 43.

147 Or where the accused person believed the person harmed would probably believe the threat: *Ibid* s 43(1)–(2).

Other aspects of the aggravating circumstance

- 2.116 The final formulation of the aggravating circumstance will be a matter for any legislative process implementing the recommendation. However, we explain other aspects of the aggravating circumstance below to assist with this process.
- 2.117 If our recommendation is implemented, the government may also wish to consider its implications for sentencing, alternative verdicts on charges, and bail.¹⁴⁸

Would raise an apprehension

- 2.118 We have used the word 'apprehension' instead of 'believe' or 'fear'. This is in line with the language of the base offence of common law assault. Common law assault not involving the application of force requires the person harmed 'to apprehend the immediate application of force' to their body.¹⁴⁹ Other aggravating circumstances for common law assault also use 'apprehension'.¹⁵⁰ The focus for the prosecution should be on proving that the accused person's conduct would raise an apprehension of an imminent sexual offence, rather than on the harmed person's response.
- 2.119 Using the language of common law assault will make the aggravating circumstance consistent with it. However, we note that 'believe' is also a term legislative drafters could use and is the term used in sexual offences. 'Fear' is less clear and relates to an emotional state instead of a cognitive state.¹⁵¹

In all the particular circumstances

- 2.120 A consideration of 'all the particular circumstances' should be relevant to the objective test recommended. This is the approach taken in the offence of stalking.¹⁵² It requires a judge or jury to take into account the circumstances in which the assault occurred to determine what the accused 'ought to have understood' about the effect of their actions in those circumstances.¹⁵³
- 2.121 In the context of the offence of stalking:
- The reference to 'in all the particular circumstances' requires the jury to take account of the particular circumstances in which the course of conduct has occurred, in order to decide whether the accused 'ought to have understood' the effects of the behaviour on the victim.¹⁵⁴
- 2.122 The particular circumstances will depend on each case. They could include any planning or steps by the accused person leading up to the assault and the nature of the assault (for example, if the location of the assault was dark or isolated). Where the accused person is known to the person harmed, the particular circumstances could also include any actions on previous occasions.¹⁵⁵

148 For example, the presumption of cumulation of multiple sentences: *Sentencing Act 1991* (Vic) s 16(3E)(b), whether the base offence of common law assault will be available as a statutory alternative: *Criminal Procedure Act 2009* (Vic) s 239 and which bail test applies: *Bail Act 1977* (Vic) s 4AA.

149 Judicial College of Victoria, '7.4.8 Common Law Assault', *Victorian Criminal Charge Book* (Online Manual, 1 November 2014) [29] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/4957.htm>>, citing *Knight v The Queen* (New South Wales Court of Criminal Appeal Lee, Carruthers and Loveday JJ, 15 September 1988), (1988) 35 A Crim R 314; *Fisher v Police* [2004] SASC 232, (2004) 154 A Crim R 511; *ACN 087 528 774 Pty Ltd v Chetcuti* [2008] VSCA 274, (2008) 21 VR 559; *Slaveski v State of Victoria* [2010] VSC 441; *White v State of South Australia* [2010] SASC 95, (2010) 106 SASR 521.

150 *Crimes Act 1958* (Vic) s 320A(1)(e), (2)(e).

151 In its review of sexual offences, the Victorian Department of Justice and Regulation (as it was known then) replaced the word 'fear' with 'belief' for the offence of threat to commit a sexual offence (*Crimes Act 1958* (Vic) s 43) 'to avoid any suggestion that the nature of the emotional response of the other person is relevant': Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, Criminal Law Review, June 2015) [9.2] <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.

152 *Crimes Act 1958* (Vic) s 21A(3)(b).

153 Judicial College of Victoria, '7.4.12 Stalking', *Victorian Criminal Charge Book* (Online Manual, 7 June 2011) [43] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/46773.htm>>, citing *R v Hoang* [2007] VSCA 117, (2007) 16 VR 369.

154 *R v Hoang* [2007] VSCA 117, (2007) 16 VR 369, [103]–[104].

155 See, eg, *ibid* [79].

Imminent

- 2.123 By 'imminent' we mean that the apprehension of the accused committing a sexual offence should arise in the immediate future and not at some distant point in the future.¹⁵⁶ In other words the aggravated circumstance and the assault should be closely linked.

Sexual offence

- 2.124 The apprehension does not need to relate to a specific sexual offence or sexual act. Even if it is unclear what particular sexual offence or sexual act the apprehension related to, it will be enough if the apprehension relates to sexual acts.¹⁵⁷ This is similar to common law assault where there is no need to apprehend a specific violent act.¹⁵⁸
- 2.125 There should be no need to prove that the person harmed did not consent to a sexual act. What is being addressed is an apprehension of sexual violence being committed by the accused person, not that an actual sexual act occurred.¹⁵⁹

How would this aggravating circumstance have worked in the Williams case?

If it could not be proved that the accused person 'knew' that an apprehension of an imminent sexual offence would arise, a judge or jury could assess this objectively based on what the accused person 'ought to have known' in all the particular circumstances.

Conduct such as seizing the complainant, moving her into an alley, pinning her down, lying on top of her for a period of time, and stopping only because a passer-by intervened, could have satisfied a judge or jury that objectively the accused 'ought to have known' that in all the particular circumstances such conduct would raise an apprehension of an imminent sexual offence. This would prove our recommended aggravated circumstance.

Our recommended aggravating circumstance could have been charged as an alternative to the offence of 'assault with the intention to commit a sexual offence'.¹⁶⁰

While the Williams case involved an assault by a stranger, the aggravating circumstance could also cover conduct in contexts where the accused person is known to the person harmed, such as in a family violence context.

156 Judicial College of Victoria, '7.4.8 Common Law Assault', *Victorian Criminal Charge Book* (Online Manual, 1 November 2014) [40] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/4957.htm>>, citing *R v Gabriel* [2004] ACTSC 30, (2004) 182 FLR 102.

157 Or, for example, if the apprehension relates to the accused person 'taking part in a sexual act', a defined term used in existing sexual offences: *Crimes Act 1958* (Vic) s 35C.

158 Judicial College of Victoria, '7.4.8 Common Law Assault', *Victorian Criminal Charge Book* (Online Manual, 1 November 2014) [32] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/4957.htm>>, citing *Smith v Chief Superintendent, Woking Police Station* (1983) 76 Cr App R 234, (Divisional Court, Kerr, LJ and Glidewell J, 18 January 1983); *R v Ireland* [1998] AC 147, (House of Lords, Lords Goff, Slynn, Steyn, Hope and Hutton, 24 July 1997). Additionally, the Department of Justice (as it was known then) noted that for the offence of assault with the intention to commit a sexual offence (*Crimes Act 1958* (Vic) s 42) 'In many cases, it may be difficult to discern the precise sexual act that the accused intended.'; Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, Criminal Law Review, June 2015) [9.1] <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.

159 This is similar to the reasoning of the Department of Justice (as it was known then) in relation to the offence of assault with the intention to commit a sexual offence (*Crimes Act 1958* (Vic) s 42): Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, Criminal Law Review, June 2015) [9.1] <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.

160 *Crimes Act 1958* (Vic) s 42.

What other models did we rule out?

- 2.126 Victoria Police suggested that the aggravating circumstance should be based on apprehending any further indictable offence, not just sexual offences, for example being killed or mugged.¹⁶¹ It submitted that this 'would provide utility to police, and to [people harmed], where intent is difficult to prove but also, in many cases, immaterial to the trauma which has been inflicted'.¹⁶²
- 2.127 Later Victoria Police explained that limiting any change to the law to apprehending sexual violence would not be enough to achieve the policy aim of targeting such conduct.¹⁶³
- 2.128 While a broader aggravating circumstance may make this conduct easier to prove in court than the recommended aggravating circumstance, our terms of reference are limited to the justice system response to sexual offences. Changing the law about offences that are not sexual offences is outside our inquiry's scope.
- 2.129 We also agree with concerns about offences that are too broad. For example, the Office of Public Prosecutions cautioned that 'introducing ... aggravating circumstances that are overly broad and ill-defined would undermine the successful prosecution of such offences and potentially erode public confidence in the criminal justice system'.¹⁶⁴ A broad aggravating circumstance might also overlap with other existing offences, for example 'assault with the intention to commit an indictable offence'.¹⁶⁵
- 2.130 We agree with concerns about 'presuming' the accused person's intention in a new or current offence. The feedback we received in submissions noted that this could:
- undermine fundamental criminal law principles, such as the presumption of innocence
 - disproportionately impact people with diverse needs or experiences, such as Aboriginal people or people with cognitive disabilities
 - make it difficult in practice to differentiate between accused people who did not intend to sexually offend (for example, who intended to rob) and those who did have sexual intent, which could lead to unfair punishment for the former category of accused people.
 - work as a quasi-strict liability or absolute liability offence, which could create serious human rights implications.¹⁶⁶

The maximum penalty should be 10 years

- 2.131 In our issues paper we asked what the maximum penalty should be for any new offence.¹⁶⁷ We are not recommending a new offence, but introducing an aggravating circumstance into the Crimes Act which allows for a different statutory penalty for common law assault.
- 2.132 SAS Victoria told us that people harmed are likely to experience high levels of trauma after fearing for their safety and anticipating sexual violence. This risks a 'significant impact on their ability to resume regular activities'. They said that penalties need to reflect the 'potential impact' on the person harmed, even if they were not sexually assaulted.¹⁶⁸

161 Consultation 1 (Roundtable on grab and drag conduct).

162 Submission 8 (Victoria Police).

163 Consultation 2 (Victoria Police).

164 Written response to roundtable discussion paper from Office of Public Prosecutions to Victorian Law Reform Commission, 16 October 2021.

165 *Crimes Act 1958* (Vic) s 31(1).

166 Submissions 1 (County Court of Victoria), 5 (Liberty Victoria), 6 (Office of Public Prosecutions), 9 (Law Institute of Victoria), 13 (Criminal Bar Association), 15 (Victorian Women Lawyers).

167 Victorian Law Reform Commission, *Sexual Offences: 'Grab and Drag'* (Issues Paper I, February 2021) 9.

168 Submission 4 (Sexual Assault Services Victoria).

- 2.133 Mr Stuart Grimley MP suggested a maximum sentence involving imprisonment to reflect the 'community expectation that people who commit offences, such as grabbing and dragging, are taken out of the community'.¹⁶⁹
- 2.134 The Victims of Crime Commissioner told us that a change to the law 'would need to be compatible with the current sentencing hierarchy with related assault and sexual assault offences'. The Victims of Crime Commissioner suggested a penalty that fell somewhere in between common law assault or threat to commit a sexual offence (a maximum of five years' imprisonment), and abduction or detention for a sexual purpose (a maximum of 10 years' imprisonment).
- 2.135 Victoria Police supported matching other level 4 offences and suggested a maximum of 15 years' imprisonment.¹⁷⁰ Victoria Police said this 'would provide an appropriate sanction that is just in the circumstances, and in line with what the community would reasonably expect'.¹⁷¹
- 2.136 A community member who made a submission supported a sentence ranging from 8–15 years' imprisonment depending on the circumstances of the case.¹⁷² The online petition calling for a new offence supports a maximum penalty of 15 years' imprisonment.¹⁷³
- 2.137 An assault raising an apprehension of a sexual offence should be treated more seriously than common law assault. We think a higher sentence should apply than common law assault (five years' imprisonment), but less than assault with the intention to commit a sexual offence (15 years' imprisonment). A maximum penalty of 10 years' imprisonment (level 5) would be a suitable middle ground. This is the same penalty as for the offence of stalking.
- 2.138 A maximum penalty applies to the most serious cases of an offence. The maximum penalty will not apply in every case of assault raising an apprehension of sexual offences. Sentencing is a complex area of law and requires a sentencing judge to weigh many different factors.¹⁷⁴

The charge should be indictable triable summarily

- 2.139 The recommended aggravating circumstance is intended to be an indictable charge. However, in some situations it may be more appropriate for the charge to be triable summarily in the Magistrates' Court.
- 2.140 The maximum penalty that can be imposed following conviction in the Magistrates' Court is two years' imprisonment.¹⁷⁵ There will be cases for which this is a more appropriate response, depending on factors such as the seriousness of the alleged offending and the sentences available to the court.¹⁷⁶
- 2.141 We recommend that the court should have discretion to decide whether a charge relating to this recommended aggravated circumstance should be tried summarily. This may be achieved by amending the *Criminal Procedure Act 2009* (Vic). This recommended aggravating circumstance could be included in the schedule setting out which indictable offences may be heard and determined summarily. To make the law clear and consistent on how common law assault and its aggravated versions are heard, common law assault, and its other aggravated versions with a maximum 10 year penalty, should be scheduled into the Act in a similar way.¹⁷⁷ Consequential amendments may also be

169 Submission 3 (Stuart Grimley MP).

170 Submission 8 (Victoria Police).

171 Submission 14 (Victims of Crime Commissioner). See *Crimes Act 1958* (Vic) ss 43, 47, 320.

172 Submission 10 (Madison).

173 Emm Jones, 'Petition: Keep Women Safe from Sexual Predators. Introduce a #GrabAndDrag Law.', *Change.Org* (Web Page) <<https://www.change.org/p/appeal-jackson-williams-sexual-assault-verdict>>.

174 *Sentencing Act 1991* (Vic) s 5.

175 *Ibid* s 113.

176 *Criminal Procedure Act 2009* (Vic) s 29(2).

177 *Ibid* s 28(1)(a), sch 2.

needed for the section in that Act which sets rules for scheduled offences 'qualified by reference to a specified amount or value or a specified kind of property'.¹⁷⁸ This would make sure the schedule would always apply for common law assault and its aggravating versions with a maximum 10 year penalty.

Should the Register of Sex Offenders apply?

2.142 Victoria Police told us that there are cases involving this conduct that are highly violent and predatory. In these cases, it says that post-sentence measures could be useful, such as registration on the Register of Sex Offenders.¹⁷⁹ The aims of the register are:

- to prevent people from reoffending
- to make it easier to investigate and prosecute someone if they reoffend
- to prevent people who have committed child sexual offences working in child-related employment
- to allow the making of prohibition orders to prevent people from engaging in certain conduct.¹⁸⁰

2.143 Victoria Police was concerned about cases where the accused person is interrupted before committing a sexual offence and therefore does not meet the requirements for registration.¹⁸¹

2.144 We note that comparable non-penetrative sex offences against adults, such as 'assault with the intent to commit a sexual offence'¹⁸² and 'threat to commit a sexual offence',¹⁸³ are Class 4 offences under the *Sex Offenders Registration Act 2004* (Vic). For these offences, registration is not mandatory but up to the court's discretion. The court may order registration if the person poses a risk to the sexual safety of others in the community.¹⁸⁴

2.145 We do not make a recommendation that our aggravated circumstance for common law assault be scheduled under this Act. We note Victoria Legal Aid's concerns about 'the potential to produce unfair outcomes' where a change to the law 'would invoke sex offender registration'.¹⁸⁵ We also did not consult extensively on whether or how the Sex Offenders Registration Act should apply.

2.146 In the sexual offences report, we recommended sharpening the Register's focus and limiting its use to those most likely to reoffend. For children, we recommended a presumption against registration.¹⁸⁶

2.147 We do, however, acknowledge Victoria Police's concerns about managing people who have been convicted of an offence who are considered to pose a high risk of escalating behaviour. We note the legislation allows the prosecution to apply to register a convicted person who has committed any offence. The court may order registration for any offence if it is satisfied beyond a reasonable doubt that the convicted person 'poses a risk to the sexual safety of one or more persons or of the community'.¹⁸⁷

178 Ibid s 28(3).

179 Consultation 2 (Victoria Police).

180 *Sex Offenders Registration Act 2004* (Vic) s 1.

181 Consultation 2 (Victoria Police).

182 *Crimes Act 1958* (Vic) s 42.

183 Ibid s 43.

184 *Sex Offenders Registration Act 2004* (Vic) s 11(3), sch 4.

185 Written response to roundtable discussion paper from Victoria Legal Aid to Victorian Law Reform Commission, 8 November 2021.

186 Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report No 42, September 2021) 285–7, Recommendation 9.

187 *Sex Offenders Registration Act 2004* (Vic) ss 11(1), (3).

Recommendations

- 1 The Victorian Government should amend section 320A of the *Crimes Act 1958* (Vic) to introduce an aggravating circumstance where the assault would raise an apprehension of an imminent sexual offence.
- 2 The recommended aggravating circumstance should include an objective test for the fault element as an alternative to a subjective fault element. The court should be able to take into account all the particular circumstances in which the assault occurred in applying the objective test.
- 3 The recommended aggravating circumstance should have a maximum term of level 5 imprisonment (10 years maximum).
- 4 The recommended aggravating circumstance should be an indictable charge triable summarily.

Appendix: Submissions

Appendix: Submissions

- 1 County Court of Victoria
- 2 Robyn Vincent
- 3 Stuart Grimley MP
- 4 Sexual Assault Services Victoria
- 5 Liberty Victoria
- 6 Office of Public Prosecutions
- 7 Victoria Legal Aid
- 8 Victoria Police
- 9 Law Institute of Victoria
- 10 Madison
- 11 Steve H
- 12 Dr Steven Tudor, Senior Lecturer, School of Law, La Trobe University
- 13 Criminal Bar Association
- 14 Victims of Crime Commissioner
- 15 Victorian Women Lawyers

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Improving the Justice System Response to Sexual Offences: Supplementary Report on 'Grab and Drag' Conduct

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