

Supplementary Submission to the
Victorian Law Reform Commission

Sexual Offences: 'Grab and Drag' Issues Paper

April 2021

Contents

Introduction	2
1. About this submission	3
1.1. Terminology	3
2. The need for a new offence	4
3. Preferred option: a new 'grab and drag' offence	5
3.1. Recognising the inherent harm of grab and drag conduct	5
3.2. Capturing a victim's fear for their safety	6
3.3. Not requiring proof of intent to commit further acts	6
4. Additional considerations	7
4.1. Legislative drafting	7
4.2. Sentencing	7

Introduction

I welcome the opportunity to make a supplementary submission to the Victorian Law Reform Commission's (VLRC) inquiry: *Improving the Response of the Justice System to Sexual Offences*.

All Victorians have a right to be and feel safe when they are moving through public spaces—whether that be in a park, a CBD laneway or a suburban street.

The fear and harm experienced by victims when subjected to 'grab and drag' conduct must be acknowledged and validated by our criminal justice system.

There have been some horrific cases in Victoria where victims, often women, have been violently grabbed and dragged to places where there are few passers-by and less opportunity for offences to be interrupted. Thinking about the fear that must have been experienced by victims in these circumstances has outraged many Victorians.

Community concerns about the outcome in a recent case involving a woman subject to 'grab and drag' conduct (but fortunately interrupted) has revealed that many Victorians feel there is a gap in the law. It is clear that many people in the community expect that this conduct should receive a strong criminal justice response.

As noted by the former Attorney-General, the Hon. Jill Hennessy MP, the laws and penalties relating to assaults that may lead to sexual offending, but where attempt or intention to sexually assault is not able to be proven, may not adequately reflect the gravity of such conduct.

In this submission, I support the introduction of a new offence capturing 'grab and drag' conduct. I believe such an offence would recognise the inherent risk and corresponding harms associated with such conduct.

While this new offence would apply regardless of the identity of the victim, it must be recognised that for certain members of our community, 'grab and drag' conduct causes such significant harm because of a history of violence by virtue of gender identity, sexual orientation, disability, race or cultural identity.

We must send a clear signal that 'grab and drag' conduct—conduct that makes Victorians experience such fear as they move around the community—will not be tolerated in Victoria.

Fiona McCormack
Victims of Crime Commissioner

1. About this submission

This submission supplements the Victims of Crime Commissioner's previous submission to the VLRC on its broader inquiry: *Improving the Response of the Justice System to Sexual Offences*.

This submission relates only to the VLRC *Issues Paper: 'Grab and Drag'* (Issues Paper).

1.1. Terminology

The way in which those harmed by crime identify themselves, and their experience of crime, is deeply personal. As noted in the VLRC's *Guide to Our Issues Papers*, those who have experienced sexual harm may use one or more of the following terms:¹

- victim
- survivor
- victim-survivor
- complainant or witness

Some people may not identify with any of these terms.

In this supplementary submission, the term 'victim' is predominantly used because it aligns with the Victims of Crime Commissioner's legislative functions and powers under the *Victims of Crime Commissioner Act 2015* (Vic) and the definition of victim in the *Victims' Charter Act 2006* (Vic). However, it is acknowledged that these terms may not represent all experiences.

The phrase 'grab and drag' is used in this submission as it aligns with the terminology used in the Issues Paper. This does not represent support for any possible new offence to use this same terminology.

¹ Victorian Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences: Guide to Our Issues Papers* (2020) 8.

2. The need for a new offence

As stated in the Issues Paper, Victoria currently has a range of offences that seek to address attempted sexual assaults or assaults with 'intent' to commit a sexual offence.

As was seen in the Williams case cited in the Issues Paper,² these offences rely on proving, beyond reasonable doubt, that the accused either attempted or intended to sexually assault the victim.

In the above case, the judge could not be satisfied of sexual intent beyond reasonable doubt because other inferences beyond sexual intent were reasonably open on the evidence:

In this trial I have clear evidence of an intentional and violent assault. It may be that the accused was intending to sexually touch or sexually penetrate the complainant, but was interrupted, or met with a level of resistance he did not expect, so abandoned his plan. However other inferences are reasonably open on the evidence. It may be that he was intending to rob the complainant and similarly was met with resistance or interrupted. I find it less likely that he had no intention beyond physically assaulting the complainant, but it is the question of what that additional intention was that causes me difficulty and ultimately doubt.³

Current offences do not do enough to capture 'grab and drag' acts that may lead toward a sexual assault, but where there is no clear evidence of sexual intent.

Where 'grab and drag' actions may not be covered by existing offences⁴ because sexual intent cannot be proved beyond reasonable doubt, assault offences may be an insufficient alternative.

While the Issues Paper suggests it is unclear if 'grab and drag' conduct often leads to sexual offending, the Commissioner suggests that criminalising 'grab and drag' conduct as a stand-alone offence is justified because it is serious and harmful enough in its own right. Common assault offences may not always reflect the gravity of this conduct and the harm caused to victims when they are overpowered by an offender and forcibly dragged.

² Victorian Law Reform Commission, *Issues Paper I: Sexual Offences: 'Grab and Drag'* (2020) 3, 5-6.

³ Victorian Law Reform Commission, *Issues Paper I: Sexual Offences: 'Grab and Drag'* (2020) 6.

⁴ Existing offences of Assault with Intent to Commit a Sexual Offence (*Crimes Act 1958* (Vic) s 42) or Sexual Assault (*Crimes Act 1958* (Vic) s 40).

3. Preferred option: a new 'grab and drag' offence

A new offence articulating the elements of 'grab and drag' conduct is preferred because such an offence would:

- recognise the inherent harm caused by grab and drag conduct, even without sexual conduct, or inferences of possible sexual conduct, being made out
- recognise a victim's apprehension or fear for their safety based on the conduct
- respond to the increased vulnerability that may be experienced by a victim as a result of this conduct
- not require proof of intent to commit further acts, therefore making it easier to prosecute.

3.1. Recognising the inherent harm of grab and drag conduct

A new offence articulating the elements of 'grab and drag' conduct recognises that 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.

The 'grab' element of such an offence would recognise that someone who is physically restrained is much more likely to experience significant fear for their safety and apprehend the likelihood of further harm.

The 'drag' element of such an offence recognises the increased risk to victims by virtue of removing a victim from one location, usually with the result of making it harder for bystanders to intervene or making it less likely the conduct will be interrupted.

In this way, such an offence could act as a general deterrent to 'grab and drag' conduct, regardless of whether a person intends to sexually assault someone.

While this new offence would apply regardless of the identity of the victim, it is also noted that for certain members of our community who have experienced a

history of violence by virtue of gender identity, sexual orientation, disability, race or cultural identity, the level of trauma caused by 'grab and drag' conduct would be even more heightened.

3.2. Capturing a victim's fear for their safety

The construction of a new offence could be articulated in such a way that it captures a victim's apprehension or fear for their safety based on the conduct.

As noted in the Issues Paper, this is similar to the law relating to stalking under section 21A of the *Crimes Act 1958* (Vic), which includes a course of conduct 'with the intention of causing 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'.

Similarly to section 21A, it should be enough that the offender reasonably ought to have known or 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.'⁵

3.3. Not requiring proof of intent to commit further acts

A new offence that clearly articulates the elements of 'grab and drag' conduct would not require proof of intent to commit further acts. This would assist in the successful prosecution of the offence. It would also reduce the potential for re-traumatisation of victims during cross-examination, as a sexual connotation would not need to be shown or disputed.

As the offence would not presume any intent to commit further acts, it would fill the gap between common assault and conduct that amounts to 'attempt' or 'preparatory' sexual offences.

Recommendation 1: That a new 'grab and drag' offence be introduced that:

- **recognises the inherent harm of grab and drag conduct**
- **acknowledges a victim's increased vulnerability and fear for their safety as a result of grab and drag conduct**
- **does not require proof of intent to commit further acts (whether presumed or determined by having regard to surrounding circumstances)**

⁵ *Crimes Act 1958* (Vic) s 21A(3).

4. Additional considerations

4.1. Legislative drafting

The Commissioner notes that caution should be exercised in creating new offences, particularly where to do so would duplicate or add undue complexity to the law.

However, for the reasons outlined in detail above, the Commissioner suggests that rather than duplicate existing offences, a new 'grab and drag' offence would fill a gap in the law where sexual intent cannot be proved beyond reasonable doubt and assault offences may be an insufficient alternative.

The Issues Paper suggests a new 'grab and drag' offence may add complexity to the law because the circumstances of a case might give rise to several possible offences. However, the Commissioner notes that this is not unique to 'grab and drag' cases—it is often the case that multiple offences can be pursued in relation to a single incident.

The Commissioner also suggests that legislative guidance, particularly in the form of legislative 'examples' and explanatory memorandum, can provide additional guidance about Parliament's intention with respect to the application of the offence.⁶

The Issues Paper also suggests it may be difficult to specifically define how the physical elements of the proposed offence would differ from other existing offences, such as common assault, and that this may add complexity to the law.

The Commissioner suggests that careful legislative drafting defining the distinct elements of the offence, including what would constitute 'grabbing' and 'dragging', would overcome such confusion. The definition of 'grabbing' and 'dragging' would have regard to the elements of existing offences, such as common assault.

4.2. Sentencing

The new offence would need to be compatible with the current sentencing hierarchy with related assault and sexual assault offences. If a new offence were introduced, it is possible that such an offence might fall somewhere between

⁶ For example, section 5 of the *Family Violence Protection Act 2008* (Vic) provides examples of behaviour that may constitute family violence under the definition of family violence contained in that Act.

common assault or threat to commit a sexual offence (maximum five years), and abduction / detention for a sexual purpose (maximum ten years).

As noted in the Issues Paper, the introduction of a stand-alone offence may not address community concerns about sentencing, given sentencing depends upon many factors. Just as sentencing for common assault can result in sentences of less than three months to four years depending on the circumstances of the offence and offender,⁷ an offence relating to 'grab and drag' conduct would also likely have variability in sentences applied. However, the introduction of a stand-alone offence highlights the seriousness of this conduct and demonstrates Parliament's intention to address this conduct.

Key considerations

- Rather than duplicate existing offences, a new 'grab and drag' offence would fill a gap in the law where sexual intent cannot be proved beyond reasonable doubt and assault offences may be an insufficient alternative
- Legislative guidance (such as the use of legislative examples and explanatory memorandum) should provide guidance about Parliament's intention with respect to the application of a new 'grab and drag' offence
- Careful legislative drafting would be required to define the elements of the offence, including what would constitute 'grabbing' and 'dragging', particularly having regard to the elements of other existing offences
- A possible new 'grab and drag' offence might fall somewhere between common assault or threat to commit a sexual offence (maximum five years), and abduction / detention for a sexual purpose (maximum ten years).

⁷ Sentencing Advisory Council, *SACStat Higher Courts: Common law assault* (1 July 2014 to 30 June 2019).



GPO Box 4356 Melbourne VIC 3000 | victimssofcrimecommissioner.vic.gov.au