VICTORIAN WOMEN LAWYERS

SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION ON THE INQUIRY INTO IMPROVING THE RESPONSE OF THE JUSTICE SYSTEM TO SEXUAL OFFENCES

Submitted by:	Victorian Women Lawyers Association Inc (**VWL**)
Submitted:	By email
Contact:	Vanessa Shambrook, VWL President
Prepared by:	Amanda Emonson, VWL Law Reform Committee Member Dr Andrea de Silva, VWL Co Chair Law Reform Committee Anita Nair, VWL Co Chair Justice Committee Claire Rapson, VWL Co Chair Law Reform Committee Shijing Wong, VWL Justice Committee Member

About us

Victorian Women Lawyers (**VWL**) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 700 members and is the peak representative body for women lawyers in Victoria, and a recognised association of Australian Women Lawyers (**AWL**). VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community. Since 1996, VWL has advocated for the equal representation of women at all levels of the legal profession and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in the law and in the legal system, to achieve justice and equality for all women. Details of our publications and submissions are available at www.vwl.asn.au under the 'Publications' tab.

Overview of submission

VWL welcomes the opportunity to make this submission to the Victorian Law Reform Commission (**VLRC**) into its inquiry into Improving the Response of the Justice System to Sexual Offences. The VLRC was requested to review and report on Victoria's legislation relating to rape, sexual assault and associated adult and child sexual offences, identify opportunities to report, and make recommendations to improve the justice system's response. Although the Inquiry encompasses eight key issues, this submission specifically addresses the proposed 'grab and drag' offence.

In August 2020, the County Court of Victoria handed down its decision in the matter of *Director of Public Prosecutions v Williams (***Williams***).*[1] In this case, the accused dragged the complainant into an alleyway, covered her mouth and lay on top of her for around 20 seconds until a passer-by intervened. The accused was acquitted of the higher charge of intent to commit a sexual offence under section 42 of the *Crimes Act 1958* (Vic) (**Crimes Act**). The primary evidence before the Court was CCTV footage of the incident taking place.[2] On the basis of this evidence, His Honour Judge Murphy could not be satisfied beyond reasonable doubt that the accused intended to partake in a sexual act with the complainant without her consent. The accused was convicted of the lower offence of common law assault and sentenced to a two and a half year community corrections order and 200 hours of community service.

[1] *Director of Public Prosecutions v Williams*
[2] *DPP (Vic) v Williams* Fox J, 18 November 2020) [87].

Prosecutors determined not to appeal the conviction or sentence as it was within the sentencing range applicable to common law assault.

Following the decision in the *Williams* case, former Attorney General, the Honourable Jill Hennessy MP, requested that the VLRC consider whether Victorian law should include a 'grab and drag' offence. The purpose of such a 'grab and drag' offence is to close the current legislative gap between conduct that falls short of intent to commit a sexual offence however is of such a severity that it warrants a higher conviction (and consequentially sentence) than common law assault.

As defined by the Australian Institute of Health and Welfare (AIHW),[3] sexual assault is a type of sexual violence that involves any physical contact, or intent of contact, of a sexual nature against a person's will, using physical force, intimidation or coercion. According to the 2016 Australian Bureau of Statistics (ABS) Personal Safety Survey (PSS), almost 2 million Australian adults had experienced at least 1 sexual assault since the age of 15, with the majority of victims of sexual assault being women.[4] This survey estimated that 1 in 6 women (17%, or 1.6 million) had experienced at least 1 sexual assault since the age of 15, compared to only 1 in 25 men (4.3%, or 385,000).[5]

VWL also notes the prevalence of sexual offences is increasing. Between 2010 and 2018 the rates of sexual assault victimisation recorded to police Australia-wide rose by more than 30%.[6] The 2016 PSS also showed there was an increase in the percentage of women who had been sexually assaulted at least once in the 12 months before the survey, increasing from 1% in 2012 to 1.6% in 2016.

The Victorian justice system must provide a systematic and targeted response to such conduct. However, VWL is concerned about the appropriateness and effectiveness of the proposed 'grab and drag' offence in addressing sexual assault. This Submission addresses the following key areas of concern:

1. The need for primary prevention strategies.

---

[3] Austra an Inst tute of Hea th and We fare, 'Sexua assau t n Austra a', August 2020 <https://www.a hw.gov.au/getmed a/0375553f 0395 46cc 9574 d54c74fa601a/a hw fdv 5.pdf.aspx? n ne=true>.
[4] Ib d.
[5] Ib d.
[6] Ib d.

2. The erosion of the fundamental common law and legislative right to the presumption of innocence and the disproportionate effects on vulnerable and minority communities;
3. The need for robust research evidence to inform changes to the law; and
4. The importance of minimising legal complexity.

VWL strongly believes that legal reform is needed in order to assist in protecting female-identifying members of the community, however this particular approach does not seem to be the right instrument for that reform. It has the potential to subvert the entrenched common law right of the presumption of innocence and increase the complexity of criminal law.

1. The need for primary prevention

Considering the broader context of sexual offending, VWL strongly supports the need for further investment into primary prevention strategies which target the root causes of sexual assault. Sexual assault is not a women's issue: it is a societal issue, which every Australian, the Government and workplaces can contribute to addressing and preventing. Whilst the proposed grab and drag offence has the effect of capturing and punishing the offending conduct, it does not address the root cause of sexual assault or the emotional and physical impact of sexual assault on victims, which are largely women.

2. The Erosion of the Presumption of Innocence

The presumption of innocence is a fundamental tenant of the Victorian criminal justice system. Every Victorian accused of a criminal offence, whether indictable or summary, is afforded such protection under the *Victorian Charter of Human Rights and Responsibilities 2006* (Vic) (**Charter**). Section 25 of the Charter provides that a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law.[7]

The presumption of innocence dates back to 18th century English law, with William Blackstone famously stating that *'it is a maxim of English law that it is better that ten guilty men should escape than that one innocent man should suffer'.*[8] Former Chief Justice of the High Court, French J in the case of *Momcilovic v The Queen*[9] called the presumption of innocence '*an*

[7] *Victorian Charter of Human Rights and Responsibilities 2006* (V c), s 25.
[8] W am B ackstone, *Commentaries on the Laws of England* (The Lega C ass cs L brary, 1765) 352.
[9] *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [44] (French CJ).

important incident of the liberty of the subject'. Professor Andrew Ashworth, has aptly described the rationale behind the presumption of innocence as follows:

" [T]he presumption is inherent in a proper relationship between State and citizen, because there is a considerable imbalance of resources between the State and the defendant, because the trial system is known to be fallible, and, above all, because conviction and punishment constitute official censure of a citizen for certain conduct and respect for individual dignity and autonomy requires that proper measures are taken to ensure that such censure does not fall on the innocent".[10]

VWL notes that the potential option of the 'grab and drag' offence presented by the VLRC has the effect that where an accused satisfies the definition of the offending conduct (as would be set out in the legislation), they are automatically presumed to have intended to have committed a sexual offence. Under this approach the accused is not afforded the opportunity to present evidence rebutting the presumed intention that at the time of 'grabbing and dragging' they intended to commit a sexual act. Citing the words of Ashworth, such an intrusion into the rights and liberties of Victorian citizens would impede on the proper relationship between citizen and State and undermines the autonomy of accused persons that all reasonable steps are taken to ensure that they are not wrongfully convicted of an offence.

a. A rebuttable presumption

VWL submits that, if a presumed intention is included in the new proposed offence, then the intention should be a rebuttable one. This would create a reverse onus of proof offence, with the accused carrying the burden of proving that at the time of performing the actus rea of the offence (being the grabbing and dragging), they did not intend to commit a sexual offence without the consent of the complainant.

Whilst there is a risk that a reverse onus of proof may also encroach on the presumption of innocence, intentional human rights case law has stated that '*reverse onus provisions do not necessarily violate the presumption of innocence as long as they are within reasonable limits which take into account the importance of what is at stake and maintain the rights of the*

[10] Andrew Ashworth, 'Four Threats to the Presumpt on of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 251.

defence'.[11] In discussing the effect of presumed intent and reverse onus of proof, VWL relevantly note the comments of UK House of Lords judge, Lord Bingham who has stated;

'The substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption'.[12]

Lord Bingham further observed that any test for whether onus of proof is justifiable cannot be resolved by a rule of thumb, but rather, on examination of all the facts and circumstances of the particular provision as applied in the particular case.[13]

VWL submits that the incorporation of a rebuttable presumption/reverse onus into the proposed 'grab and drag' offence will assist in ensuring that any Victorian charged with the 'grab and drag' offence is afforded the opportunity to present evidence that they had no intention to commit a sexual act, as well as maintaining an accused's right to the presumption of innocence. A reverse onus also provides the Court with the opportunity to examine all available evidence which supports or does not support an accused's intention.

b. Consideration of impacts on minority groups and vulnerable community members

VWL highlights that a reverse onus of proof can disproportionality impact vulnerable members of the community. In particular, VWL notes that the ability to present evidence to rebut this assumption is dependent on access to legal services and legal literacy. Disadvantaged community members and minority groups will face considerable barriers in presenting such evidence.

[11] Sa ab aku v. France (1988) 141 Eur Court HR (ser A); (1991) 13 EHRR 379.
[12] Attorney Genera 's Reference No 4 of 2002; She drake v DPP [2005] 1 AC 264, [21].
[13] Ib d.

2. The need for evidence-based law and prevention strategies

The proposed 'grab and drag' offence has garnered significant media attention, with an e-petition gaining some 107,623 electronic signatures in support of the introduction of the new offence. There has been additional media coverage regarding the public reaction to the *Williams* decision. VWL notes that whilst there has been a plethora of media attention around this one County Court decision, there is a notable lack of empirical evidence in support of a need to change the law. There is no evidence to suggest that if a perpetrator grabs and drags someone, there is an increased risk of a sexual offence being committed. This is dissimilar to strangulation where it has been shown that strangulation results in an increased risk of family violence.[14]

It must also be noted that in this case, the offender is a young Aboriginal male. This may be related to the inflated media attention and call for harsher sentencing from some segments of the community. A recent study found that community perception of Indigenous Australians is a significant predictor of punitive attitudes in addition to factors of the Crime–distrust model.[15] This model, described by Simon (2007), proposes that both the fear of crime and distrust in government institutions fuel the public rational for harsher sentences.[16] Alongside this model, the Racial–animus theory proposes that a significant factor in determining punitive attitudes towards offenders is based on a negative perception of cultural minority groups.[17] Brookman and Weiner found that public perception of Indigenous communities may function as predictors of punitive attitudes[18]. Their study noted there were additional factors, such as media representations of minority groups, which may explain the association between negative perception of Indigenous Australians and public punitive attitudes.

Research such as this cannot be ignored when considering suitable responses to the public's demand for harsher sentences. VWL supports the review into legislative reform but urges that decisions are evidence-based and not driven by community misperceptions, biases or structural racism when designing statutory reform.

---

[14] Nat ona Domest c V o ence Book, *Factors Affecting Risk* June 2020, <https://dfvbenchbook.a a.org.au/dynam cs of domest c and fam y v o ence/factors affect ng r sk/>

[15] Brookman, Ruth and Kar W ener, 'Pred ct ng pun t ve att tudes to sentenc ng: Does the pub c's percept ons of cr me and Ind genous Austra ans matter?' December 2015 *Australian and New Zealand Journal of Criminology* 50(1) DOI:10.1177/0004865815620702

[16] C ted n Brookman and We ner.

[17] See c tat ons n Brookman and We ner (above n 14).

[18] Ib d.

3. Complexity in the law

A key concern of creating a new offence to encapsulate 'grab and drag' offending is that it can add further complexity to an already complex area of law as overlapping offences may be created. There are a range of offences in the *Crimes Act* that cover offending of this nature including:

- assault with intent to commit a sexual offence (section 42),
- threat to commit a sexual offence (section 43),
- abduction and detention for a sexual purpose (section 47),
- statutory kidnapping (section 63A),
- common law kidnapping, and
- common law assault.

If a new grab and drag offence relating to sexual harm is created, this may further complicate the existing legal regime and result in inconsistent application of law or confusion.

Conclusion

VWL welcomes measures to deter and punish sexual assault and supports the review of the law into sexual offending in order to effectively protect women, deter offending and appropriately punish offenders. However, VWL is concerned that the proposed 'grab and drag' offence may erode the fundamental right to the presumption of innocence, increase complexity in the law, and disproportionately impact on disadvantaged and minority community members.

We urge decisionmakers to create evidence-based law, with legislative changes anchored in the best available contemporary evidence. Further, given the potential unintended consequences the introduction of this offence may have, particularly on legal protections and minority communities, it is also imperative that the VLRC work alongside and consult human rights and community groups to co-design the response.