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1 April 2021

Victorian Law Reform
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Further Submission to the Victorian Law Reform Commission

Improving the Response of the Justice System to Sexual Offences: A Proposed 'Grab and Drag' Offence

1. The Victorian Law Reform Commission has been asked to make recommendations to improve the response of the justice system to sexual harm.
2. On 12 October 2020, the Commission released eight issues papers for feedback on what works well and what can be improved. Liberty Victoria has previously provided a submission to the Commission in response to those issues papers (the primary submission).¹
3. In response to the County Court of Victoria case of *Director of Public Prosecutions v Williams* (*Williams*), the former Attorney-General, the Honourable Jill Hennessy MP, asked the Commission to additionally consider if there should

¹ Liberty Victoria Submission: Improving the Response of the Justice System to Sexual Offences (25 January 2021): <https://libertyvictoria.org.au/content/improving-response-justice-system-sexual-offences>.

be a 'grab and drag' offence, citing community concerns that the laws and penalties that applied did not 'adequately reflect the gravity of such conduct'.

4. Since that time, the Commission has published Issues Paper I - Sexual Offences: 'Grab and Drag'. The issues paper asks if the law in Victoria needs to change to better address 'grab and drag' conduct. Liberty Victoria welcomes the opportunity to provide a further submission which addresses question 3 of the Issues Paper.
5. This submission should be read in conjunction with Liberty Victoria's primary submission.
6. This is a public submission and is not confidential.

Question 3: Is there a need to change the law to deal with 'grab and drag' actions?

7. 'Grab and drag' is an everyday term that refers to the act of physically restraining or seizing a person, and pulling or moving them, against their will. We use the term 'grab and drag' to describe this conduct.
8. Liberty Victoria has long argued that 'cautious and selective evolution' of the criminal justice system is necessary to avoid adding greater complexity to an already difficult jurisdiction.²
9. Liberty Victoria opposes changes to the *Crimes Act 1958 (Vic)* (*Crimes Act*) to deal specifically with 'Grab and Drag' offences. As noted in Issues Paper I, there are many indictable offences in the *Crimes Act* that cover the criminal conduct sought to be targeted by these proposed laws. These include:
 - Section 42 - assault with intent to commit a sexual offence;
 - Section 43 - threat to commit a sexual offence and;
 - Section 46 - administration of an intoxicating substance for sexual purpose;
 - Section 47 - abduction and detention for a sexual purpose;

² Ibid, [17].

- Section 321N - attempts, including attempted rape and sexual assault; and
 - Kidnapping and/or false imprisonment contrary to the common law.
10. 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.³
 11. Further, where such new offences may attract presumptive or mandatory sentences, this creates a litany of problems, including a disincentive for accused persons to plead guilty, delay in proceedings, erosion of judicial discretion. Liberty Victoria is also concerned that these kinds of offences will lead to key decisions being made by prosecution authorities as to whether to proceed with such offences, which may operate unfairly and could lead to ambit claims to encourage plea negotiation by accused.⁴
 12. Liberty Victoria has opposed the creation of new offences which are, in reality, aggravated versions of existing offences, such as carjacking and home invasion.⁵ As we have previously stated:

Liberty Victoria is again strongly of the view that there is simply no need for this proposed offence to be added to the statute books. The offence of Aggravated Burglary already properly and comprehensively deals with the very kind of conduct at which the proposed offence is directed. A sentencing judge will already, as a matter of course, deal with and address factors in home invasions such as that an accused acted with two or more persons, that an accused entered a home both carrying a weapon, and/or that an accused did so while aware or reckless as to the fact that a person would be present. These are generally considered to be aggravating factors for sentencing purposes. There is no need for this further offence. Current

³ See, for example, Liberty Victoria Submission: Crimes Amendment (Carjacking and Home Invasion) Bill (September 2016): <https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-submission-CrimesAmendment-Carjacking-and-Home-Invasion-Bill-2016-20160914-web.pdf>; and Liberty Victoria Submission: Justice Legislation Amendment (Police and Other Matters) Bill 2019 (2019): [police and other matters bill 2019.pdf](https://libertyvictoria.org.au/sites/default/files/police_and_other_matters_bill_2019.pdf) (libertyvictoria.org.au)

⁴ Liberty Victoria Submission: Sentencing Guidance Reference (8 February 2016) <https://libertyvictoria.org.au/sites/default/files/Liberty%20Victoria%20%28SAC%20Submission%29%20Web%2020160208.pdf>.

⁵ Liberty Victoria Submission: Crimes Amendment (Carjacking and Home Invasion) Bill (September 2016): <https://libertyvictoria.org.au/sites/default/files/LibertyVictoria-submission-CrimesAmendment-Carjacking-and-Home-Invasion-Bill-2016-20160914-web.pdf>.

offences adequately deal with the behaviour sought to be addressed in the proposed offences.⁶

13. The same observations apply with regard to the potential creation of a 'grab and drag' offence. Normally, the action of abduction and/or physical violence in connection with a sexual offence would be either treated as a discrete offence, such as an assault or false imprisonment, or as a circumstance of aggravation.
14. In particular, we are concerned about the creation of new offences on the basis of media coverage of a single court decision (which decision has not been appealed on the basis of any question of law by the Director of Public Prosecutions), as opposed to any qualitative and quantitative research about whether there is a more widespread issue with capturing particular conduct.
15. The suggestion of there being a 'presumed intent' to commit a sexual offence if a person does the act of 'grabbing and dragging' is also particularly troubling and should be opposed. As the Commission notes, this would undermine the presumption of innocence as protected by *Victoria's Charter of Human Rights and Responsibilities*.⁷ It would erode a 'golden thread' of the criminal law,⁸ that it is for the prosecution to prove each element of an offence beyond a reasonable doubt. Further, a 'presumed intent' to commit a sexual offence would likely operate to create a quasi-strict or absolute liability offence, which is usually reserved for regulatory offences. It is our view that the legislature should not create offences which operate to reverse the onus of proof from the prosecution to accused, particularly where the offence carries a serious penalty.
16. Such a reform would create a situation where a fact-finder (be it a jury or a judicial officer) may have a reasonable doubt about whether an accused person had an intent to commit a sexual offence (as in *Williams*), but because the accused person did not discharge their onus they fall to be found guilty of a serious sexual offence with criminal intent.
17. As noted in our primary submission, this may have consequences with persons being exposed to imprisonment, registration under the *Sex Offenders*

⁶ Ibid, [17].

⁷ Section 25.

⁸ *Woolmington v DPP* [1935] AC 462, 481. See further *R v Momcilovic* (2010) 25 VR 436, 475-7 [145]-[154]

Registration Act 2004 (Vic) (SORA) and post-sentence detention or supervision under the *Serious Offenders Act 2018 (Vic)* (SOA).⁹ Such consequences demonstrate why the onus should remain on the prosecution to establish the relevant intent to the criminal standard.

18. Further, as argued in our primary submission, we have previously submitted:¹⁰

Liberty Victoria submits that criminal offences, and particularly serious criminal offences, should as a matter of principle have a subjective fault element (and with regard to rape, more than the subjective fault element of intending to engage in an act of sexual penetration). While there are exceptions to this principle in the criminal calendar, that is often in the circumstance of gross negligence, and not of itself a reason to further diminish the importance of subjective fault elements in the criminal law.¹¹

19. It is notable that in other contexts, such as drug trafficking laws, prosecuting authorities have acknowledged that reverse onuses are not necessary for the effective prosecution of crime.¹²

20. It has been famously observed that ‘hard cases make bad law’. The Government should not undermine centuries old protections for accused persons in the criminal justice system because of one difficult, high-profile case. Such a course would provide a precedent that would almost certainly see the future erosion of the protections of the criminal law in response to further, difficult cases, where the prosecution has not discharged its onus.

21. Undoubtedly any erosion of the presumption of innocence will disproportionately impact vulnerable members of our community, including but not limited to Indigenous Australians, and persons with a mental illness or intellectual disability.

22. It is notable that between 2014 and June 2019, 9 of the 10 recorded convictions for s 42 offences resulted in a sentence of imprisonment. There is no suggestion

⁹ At [16].

¹⁰ At [32].

¹¹ Liberty Victoria Submission to the Department of Justice Review of Sexual Offences (Web Page, 17 January 2014):

<https://libertyvictoria.org.au/sites/default/files/LV%20Subm%20Sexual%20Offences%20Jan%202014%20web.pdf>, [21]

¹² *R v Momcilovic* (2010) 25 VR 436, 475 [135]. Resulting in a declaration of inconsistent interpretation which was set aside by the High Court in *Momcilovic v The Queen* (2011) 245 CLR 1.

by the Government that sentences in these circumstances failed to meet community standards. Further, there are already correct channels and proper protections to pursue the appeal of inadequate sentences if necessary. Notably, in *Williams* the DPP determined not to appeal against sentence because the sentence was within range.

23. We do not accept that there is evidence that a new 'grab and drag' offence can be justified by comparing the risk of further escalating harm and the offence of strangulation. As recognised in the issues paper,¹³ there is no quantitative or qualitative research which supports this justification. This is in stark contrast to the evidence that exists in respect of increased risk where strangulation occurs in a family violence context. As noted above, should reforms be introduced persons may be found guilty of such an offence in circumstances where there was no risk of escalation at all because they did not intend to commit a sexual offence. 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.
24. The case for reforms to the laws and penalties applied to existing assault offences has not been made out. As highlighted above there is a real risk that the introduction of new legislation may overlap with existing criminal offences, and cause further confusion in an already complex jurisdiction. There is a significant potential for miscarriages of justice and persons being sentenced as sexual offenders in circumstances where there is a reasonable doubt as to their intent. Inconsistent application will disproportionately impact vulnerable groups. There is no evidence that sentencing for such conduct has failed to meet community standards.
25. Accordingly, Liberty Victoria opposes the introduction or amendment of legislation to deal with 'grab and drag' offences.

¹³ Issues Paper I - Sexual Offences: 'Grab and Drag' at paragraph 62.

If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Julia Kretzenbacher, Policy Committee Member Michael Stanton or the Liberty office on 9670 6422 or info@libertyvictoria.org.au.