Submission to the VLRC Sexual Offences Review – Proposed 'Grab and Drag' offence

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Victoria Legal Aid

Contents

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Acknowledgement of country

Victoria Legal Aid operates on Aboriginal country throughout Victoria. We acknowledge the traditional custodians of the land and respect their continuing connections to land, sea and community.

About Victoria Legal Aid

Victoria Legal Aid (**VLA**) is an independent statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. VLA assists people with legal problems such as family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy.

In 2018–19, VLA provided assistance to over 100,000 unique clients from our 14 offices across Victoria. Our clients are diverse and experience high levels of social and economic disadvantage. Almost half of our clients are currently receiving social security and one in three of our clients receive no income at all. Over 25,000 people disclosed having a disability or experiencing mental health issues and a significant proportion live in regional Victoria or are from culturally and linguistically diverse backgrounds.

VLA has the state's largest criminal defence practice specialising in sexual offences. We have specialist experience in providing advice and representation to people charged with sexual offending. In addition, VLA has a Family and Children's Law Program that prioritises women and children experiencing or at risk of experiencing family violence, which includes sexual violence. Our Civil Law Program also provides assistance to victims of crime through the Victims of Crime Assistance Tribunal (VOCAT).

In 2019-20, VLA provided 2,674 criminal legal services to people whose primary (or most serious) charge was for sexual offending. This includes legal information, legal advice, duty lawyer services, grants of legal assistance and minor work files.[1] Most of these clients were adults accused of sexual offences, with 97 of these services being provided to children charged with sexual offences. A proportion of the sexual offending was in the context of family violence.

Legal assistance for people accused of sexual offending are a substantial component of VLA's criminal law practice in all jurisdictions. In 2019-20, the most common sexual offences for clients assisted by VLA were charges of rape, indecent assault, sexual penetration of a child under the age of 16, indecent act with a child under the age of 16 and breach of *Sex Offenders Registration Act 2004* (Vic).

[1] As a breakdown of service delivery, VLA lawyers provided legal information to 878 people charged with sexual offending, provided legal advice to 315 people, represented 555 people in court through VLA's duty lawyer service and conducted 47 minor work files. Both VLA lawyers and private practitioners obtained grants of legal assistance for 879 people where sexual offending was the primary (most serious) charge.

Overview

VLA supports measures that will improve the experience of victims of sexual offending and eliminate violence against women in the community.

We welcome the opportunity to provide feedback on whether a specific 'grab and drag' offence should be created in Victoria, and whether existing offences should be changed to specifically address this offending behaviour. The consideration of this issue by the Victorian Law Reform Commission (VLRC) was prompted by community concern that the laws and penalties that applied to assaults that may lead to sexual offending did not 'adequately reflect the gravity of such conduct'.[2]

This was prompted by the matter of *DPP (Vic) v Williams* ("*Williams*").[3] In that case, a young man was charged with 'assault with intent to commit a sexual offence' under section 24 of the *Crimes Act 1958* and common assault following an incident that included grabbing and dragging a young women into a laneway in the Melbourne CBD. The incident was captured on CCTV footage.

The case was heard by a judge alone due to the COVID-19 pandemic. The accused was convicted of common assault but acquitted of the more serious charge of assault with intent to commit a sexual offence. The judge could not be satisfied beyond reasonable doubt that the accused intended to commit a sexual offence. He was sentenced to 42 days imprisonment (time served on remand) in combination with a Community Corrections Order (CCO) with the condition that he complete 200 hours of community work and continue to engage in treatment and rehabilitation.

While we acknowledge that the circumstances of this case are distressing, VLA does not support a change in the law to create a separate grab and drag offence. We consider the existing criminal law and penalties are sufficient to respond to this conduct. We do not support changes to the law that respond to a single case where all elements of an offence could not be proven beyond reasonable doubt. In addition, we do not support reform to existing offences to include the specific conduct of grabbing and dragging. This conduct is already covered by assault and related offences.

Creation of a new 'grab and drag' offence

VLA does not support the creation of a new 'grab and drag' offence on the basis that a range of existing offences are already available to address this type of offending. In our view, changing the law to create new criminal offences to respond to single examples where a charge cannot be established beyond reasonable doubt should be avoided.

The creation of new offences where there are existing offences available to respond to the offending conduct can lead to duplication and overlap which can result in unnecessary complexity in the law. It can also result in multiple charges being laid for the same conduct which is undesirable.

In our view, the offence of 'assault with intent to commit a sexual offence' is available to respond to grab and drag offending where there is proof of intention to commit a sexual offence.[4]

To be found guilty of a section 42 offence, the prosecution must prove beyond reasonable doubt the following elements:

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[2] VLRC Issues Paper I, Sexual Offences: 'Grab and Drag', p.2.

[3] *DPP (Vic) v Williams (County Court of Victoria, Fox J, 18 November 2020)*

[4] *Crimes Act 1958* (Vic), s.42.

- That the accused intentionally applied force to the complainant;
- That there was no consent to the application of that force by the complainant;
- That, at the time of applying that force, the accused intended the complainant to take part in a sexual act; and
- That the accused did not reasonably believe that the complainant would consent to that sexual act.

The scope of this offence was expanded in 2015. The offence replaced 'assault with intent to commit rape' in 2015, with the new offence capturing a broader range of sexual offending. The maximum penalty for the offence was also increased from 10 years to 15 years imprisonment with those reforms.

There is no equivalent 'grab and drag' offence in other Australian jurisdictions. Current Victorian law (including section 42 of the *Crimes Act 1958*) already goes further than other states in responding to sexual offending. Existing offences including attempted rape or sexual assault,[5] assault with intent to commit a sexual offence,[6] false imprisonment[7] and threat to commit a sexual offence[8] are all available in circumstances where there is evidence that an accused has grabbed and dragged a victim to a location for the purpose of committing a sexual act or other form of assault.

Grab and drag circumstances may also be present in cases of robbery and assault with intent to rob,[9] where a person uses force in order to steal from a victim, rather than perform a sexual act. Where there is insufficient evidence of either a sexual intention, or an intention to steal from the victim, common assault is available to address 'grab and drag' actions.

VLA does not support the creation of an offence that would make all grab and drag' behaviour a criminal offence, including in circumstances where there was no evidence of sexual intention. The VLRC issues paper notes that the Commission "is not aware of any research that suggests that sexual offending is more likely after grab and drag actions, in public spaces that do not amount to abductions".[10] Her Honour Judge Fox, in the case of *Williams*, similarly determined that she could not rule out the possibility of robbery being the intention of the accused when dragging the victim into the laneway.

VLA consider that the creation of a separate offence for grab and drag offending may lead to unintended consequences in circumstances where other offences are already available to respond to this type of offending. In the case of *Williams*, it was open for the defendant to be found guilty of the charge of assault with intent to commit a sexual offence, but it was determined that this could not be proven beyond reasonable doubt.

We also note that VLA clients who have used grab and drag actions in the commission of a sexual offence have been convicted for this offending. This includes being sentenced to a term of imprisonment, as well as being placed on the Sex Offender Register and subjected to post-sentence monitoring and supervision pursuant to the *Serious Offenders Act 2018.*

While we do not currently support creating a new offence, we note that the current form of section 42 of the *Crimes Act 1958* has only been in operation for around five years. We encourage the ongoing

[5] *Crimes Act 1858* (Vic), s.321N.

[6] Ibid, s.42.

[7] Ibid, s.320.

[8] Ibid, s.43.

[9] Ibid, s.75.

[10] VLRC Issues Paper I, Sexual Offences: 'Grab and Drag', p 7.

evaluation of offence data in order to determine whether there are more cases, beyond *Williams*, that demonstrate a broader deficiency in the criminal justice response to this form of offending.

Changes to existing offences to respond to grab and drag offending

VLA does not support changes to existing offences to explicitly cover 'grab and drag' actions on the basis that existing offences already cover this conduct and could support a prosecution for this type of offending. This includes in circumstances where a person's intentions cannot be proved beyond reasonable doubt, as occurred in *Williams* where he was convicted of common assault.

Responding to grab and drag offending

We understand that part of the concern about the *Williams* case was the non-custodial sentence imposed. VLA support sentencing outcomes that respond to the individual circumstances of the case.

While it was open to the judge in the *Williams* case to sentence the accused to a maximum penalty of five years imprisonment, the accused received time served and a CCO. This sentence was not appealed by the Director of Public Prosecutions.

In this case, Her Honour Judge Fox focused on rehabilitation, noting a number of significant factors which contributed to her decision to impose a CCO rather than a further period in custody. Her Honour took into account the accused's young age at the time of offending, his lack of any prior criminal record, his relatively low IQ (71), his sustained effort to rehabilitate while in custody (including abstaining from alcohol use for the two years since the offence took place), his lack of reoffending and his demonstrated remorse for his offending (including sending a letter of apology to the victim).