

Issues Paper C

# Defining Sexual Offences



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### Introduction

- 1 This paper is for:
  - people who work in, or have experience of, the criminal justice system in relation to sexual harm
  - counsellors, intermediaries, and others who support or work with those who have experienced sexual harm
  - researchers and others interested in the subject.
- 2 We also encourage people who have experienced sexual harm, and those who have supported them, to answer any questions in this paper that interest them.
- 3 In this paper, we ask if any changes need to be made to sexual offences under Victorian law. We also ask if there are other kinds of sexual harm that should be reflected in new offences, including emerging kinds of sexual harm.

Issues Paper C is one of eight papers.  
View them at [https://lawreform.vic.gov.au/sex\\_offences\\_2020/issues\\_papers](https://lawreform.vic.gov.au/sex_offences_2020/issues_papers).  
We encourage you to tell us your views on all the issues you are interested in.

### What are sexual offences?

- 4 Sexual offences make it a crime to commit various kinds of sexual harm, such as to touch someone sexually or sexually penetrate them without consent. In this paper, we use the term 'sexual offence' to describe a sexual harm that is criminalised under an offence. The main sexual offences in Victoria are set out in Table 1.
- 5 These offences may occur in broader contexts of violence and abuse. They can occur as part of family violence or sexual exploitation.<sup>1</sup>
- 6 People may commit sexual offences together with other state or federal offences (for example, forced marriage, female genital cutting or stalking).<sup>2</sup>
- 7 Sexual offences can be 'indictable' (serious crimes mostly tried in the County Court of Victoria) or 'summary' (less serious crimes mostly tried in the Magistrates' Court of Victoria).<sup>3</sup> Most indictable sexual offences can be heard and determined summarily in the Magistrates' Court, except offences such as rape and sexual penetration of children.<sup>4</sup>

**Table 1: Sexual offences in Victoria**

Category	Key offences	Description
Rape, sexual assault and associated sexual offences <sup>5</sup>	Rape, sexual assault, assault with intent to commit a sexual offence, threats to commit a sexual offence.	Rape is non-consensual sexual penetration and is the most serious offence. Sexual assault involves non-consensual sexual touching.
Sexual offences against children <sup>6</sup>	Sexual penetration of a child, grooming a child for sexual conduct, persistent sexual abuse of a child.  It is also an offence for an adult who reasonably believes another adult has committed a sexual offence against a child to fail to report to police. <sup>7</sup>	Maximum penalties are heavier for offences against children under 12 years. <sup>8</sup>  Children under the age of 16 cannot consent to sexual activity. <sup>9</sup> There are exceptions and defences where the child is over 12 and under 16 years old and consents, and the accused is up to two years older than the child. <sup>10</sup> If a child aged 16 or 17 consents, an offence may still be committed if the child is in the care, supervision or authority of the accused. <sup>11</sup>
Child exploitation material <sup>12</sup>	Possession of child exploitation material.  Federal offences may also apply where this type of material is distributed online or through telecommunication services. <sup>13</sup>	Also known as 'child abuse material' or 'child pornography'. <sup>14</sup> Material depicts or describes sexual situations or activities involving a child or a person implied to be a child, which reasonable people would regard as being offensive in the circumstances. <sup>15</sup>
Sexual offences against people with a cognitive impairment or mental illness <sup>16</sup>	Sexual penetration, sexual assault, sexual activity in the presence of a person with a cognitive impairment or mental illness.	Offences committed by a person or worker who provides treatment or support services. Consent is not a relevant factor.
Other sexual offences	Incest, sexual servitude, summary sexual offences. <sup>17</sup>	Summary offences include sexual exposure in public spaces and image-based abuse offences. <sup>18</sup>

- 8 Rape covers all sexual penetration without consent. The maximum sentence for rape is 25 years' imprisonment.<sup>19</sup> In recent years people have been imprisoned most commonly for between four to under five years.<sup>20</sup>
- 9 The New South Wales Law Reform Commission recently considered if there should be another offence with a lower maximum penalty.<sup>21</sup> This offence could be used in cases where it may be hard to secure a conviction otherwise, because it would be hard to prove a lack of consent.
- 10 An offence with a lower maximum penalty may lead to more convictions, encourage guilty pleas and improve complainants' satisfaction with outcomes. However, it may also be seen as reducing the seriousness of the sexual harm, and may discourage the prosecution of rape.<sup>22</sup>
- 11 There has been recent review and reform of many sexual offences in Victoria.<sup>23</sup> Some of these changes did not include transitional provisions,<sup>24</sup> which can make settling on charges difficult.
- 12 We want to hear if other changes are needed to sexual offences, and if so, what changes.

## Question

- 1 Is there a need to change any of Victoria's sexual offences, or their application? If so, what changes?

*You might think about:*

- the elements of sexual offences
- the relationship between different sexual offences
- how the offences work in practice.

## Communicative consent model and reasonable belief in consent

- 13 A key question in most sexual offences involving adult complainants is whether the complainant consented to sex. The *Crimes Act 1958 (Vic)* states that the aim of the laws is 'to uphold the fundamental right of every person to make decisions about [their] sexual behaviour and to choose not to engage in sexual activity'.<sup>25</sup>
- 14 In Victoria the prosecution must prove:
  - that the complainant did not consent to the sexual act
  - that the accused did not reasonably believe in consent (the 'fault element').<sup>26</sup>
- 15 Victoria's laws are based on a model of 'communicative consent'.<sup>27</sup> This requires that consensual sex should 'only take place where there has been communication and agreement between the parties'.<sup>28</sup>

- 16 This model is reflected in:
- the definition of consent as ‘free agreement’<sup>29</sup>
  - circumstances in the law that ‘negate’ consent (for example, there is no consent if a person did not say or do anything to indicate consent)<sup>30</sup>
  - jury directions about consent (for example, that a person who is not consenting to a sexual act might not protest or physically resist the act)<sup>31</sup>
  - the requirement that the accused did not reasonably believe in consent<sup>32</sup> for some offences, such as rape and sexual assault.
- 17 The prosecution can prove that the accused did not reasonably believe in consent if they can prove that:
- the accused believed that the complainant was not consenting
  - the accused did not believe the complainant was consenting (including if the accused gave no thought as to whether the complainant was consenting)
  - any belief in consent was not reasonable in the circumstances, which could include taking into account if the accused took steps to find out if the person consented.<sup>33</sup>
- 18 It is not a defence in Victoria that a person held an honest but mistaken belief that a person was consenting.<sup>34</sup>
- 19 It has been suggested that Victoria’s model will result in ‘modest if any improvements’,<sup>35</sup> or does not go far enough because it does not require a person to ‘take steps’ to ensure consent.<sup>36</sup>
- 20 The Queensland Law Reform Commission recently reviewed consent laws and the excuse of mistake of fact, and did not recommend adopting a model of communicative consent.<sup>37</sup> The New South Wales Law Reform Commission also explored adopting a communicative consent model.<sup>38</sup>
- 21 We want to hear if there is any need to improve the law of consent in Victoria.

## Question

- 2 How well is Victoria’s model of communicative consent working? Should there be any changes?

*You might think about:*

- the strengths and weaknesses of the communicative consent model
- cases that have been affected by the requirement of reasonable belief in consent.

## Technology-facilitated sexual offences

- 22 New technology makes it easier to commit sexual offences and has made new forms of sexual harm possible.<sup>39</sup>
- 23 One common example is ‘image-based abuse’. This involves sharing and distributing intimate images without consent. Image-based abuse comes in forms commonly described as ‘revenge pornography’,<sup>40</sup> ‘upskirting’<sup>41</sup> and ‘deepfake’<sup>42</sup> pornography. Such abuse can occur in contexts such as family violence, sexual harassment, cyber-bullying and sextortion.<sup>43</sup>
- 24 In Victoria, it is a crime to intentionally distribute, or threaten to distribute,<sup>44</sup> intimate images to another without consent if it is contrary to community standards of acceptable conduct.<sup>45</sup> It is also an offence to intentionally record the genital or anal region of another person, and distribute these images.<sup>46</sup>
- 25 It is a federal offence to make available or disseminate ‘private sexual material’ through a carriage service.<sup>47</sup> The federal eSafety Commissioner can issue fines or a removal notice if intimate images are posted online without consent.<sup>48</sup> If this happens repeatedly, this can be a special aggravated offence.<sup>49</sup>
- 26 We want to hear how well technology-facilitated sexual offences are working, and if any improvements are needed.

### Question

- 3 Is there a need to change any of Victoria’s technology-facilitated sexual offences, or their application? If so, what changes?

*You might think about:*

- the elements of these sexual offences, such as image-based abuse offences
- the relationship between different sexual offences
- how these offences work in practice.

## Are other sexual offences needed?

- 27 There may be other forms of sexual harm that should be recognised to bring the law in line with what the community expects and prevent such harm from happening. We discuss two examples below, but there may be other sexual harms that you would like to see become a crime.

### Sending unsolicited sexual images

- 28 Social media and instant messaging can allow a person to send sexual images to someone else who has not asked for them or may not even know the other person. For example, someone can share an image of an erect penis (a ‘dick pic’)<sup>50</sup> through Apple’s AirDrop technology to someone nearby. This is sometimes called ‘cyberflashing’.<sup>51</sup>
- 29 This has been described as a form of image-based abuse and sexual harassment.<sup>52</sup> People receiving these images can find them intrusive and feel shocked and embarrassed.<sup>53</sup> Research from the United Kingdom shows that this is a common experience for women.<sup>54</sup>

- 30 This kind of sexual harm is not a specific crime but could be prosecuted under offences such as ‘committing sexual activity directed at another person’<sup>55</sup> or the federal offence of ‘using a carriage service to menace, harass or cause offence’.<sup>56</sup>

### Non-consensual condom removal

- 31 Removing a condom without consent during sex (sometimes referred to as ‘stealthing’ or ‘protection deception’) has been described as a violation of consent.<sup>57</sup> It can also be a form of ‘birth control sabotage’ (also known as ‘contraceptive control’ or ‘reproductive coercion’).<sup>58</sup>
- 32 Such behaviour can cause emotional distress, trauma and other significant harm. For example, infections and viruses may be transmitted, and it may cause an unintended pregnancy.<sup>59</sup> Recent research suggests this sexual harm is commonly experienced but not often reported. People who work in the sex industry are more likely to experience this behaviour.<sup>60</sup>
- 33 This sexual harm is not specifically defined as an offence in Victoria.<sup>61</sup> However, people have been charged for this behaviour under offences such as rape, sexual assault, and ‘procuring a sexual activity by fraud’.<sup>62</sup>
- 34 The Queensland Law Reform Commission found that there was value in considering this as an offence, but it recommended that such behaviour should not mean that there was no consent in cases of rape or sexual assault.<sup>63</sup> The New South Wales Law Reform Commission considered whether to recognise this sexual harm in legislation.<sup>64</sup>
- 35 We want to hear if there should be any new sexual offences or changes to existing offences to address other forms of sexual harm, including emerging forms of harm.

## Question

- 4 Are new offences or changes to offences needed to address existing or emerging forms of sexual harm? If so, what new offences or changes?

*You might think about:*

- other kinds of sexual harm that we have not addressed in this paper
- how a specific offence could improve the reporting or prosecuting of such behaviour
- how a specific offence could improve the understanding of such behaviour, including any trends.

## Endnotes

- 1 See eg, *Family Violence Protection Act 2008* (Vic) s 5; *Crimes Act 1958* (Vic) s 37A(b).
- 2 See *Criminal Code Act 1995* (Cth) ss 270.7A–B; *Crimes Act 1958* (Vic) ss 21A, 32.
- 3 *Magistrates' Court Act 1991* (Vic) s 25; *County Court Act 1958* (Vic) s 36A.
- 4 *Criminal Procedure Act 2009* (Vic) s 28 specifies that the following indictable offences may be heard and determined summarily, unless the contrary intention appears in the Act or other legislation or subordinate instruments: level 5 or level 6 offences; offences punishable by level 5 or level 6 imprisonment, fine or both; offences punishable by a term of imprisonment of not more than 10 years, a fine of not more than 1200 penalty units or both; or offences listed in schedule 2 of the Act. Such offences can only be heard summarily if the Magistrates' Court considers that it is appropriate to hear and determine the charge summarily and the accused consents to a summary hearing: *Criminal Procedure Act 2009* (Vic) s 29.
- 5 *Crimes Act 1958* (Vic) pt 1, sub-div 8A.
- 6 *Ibid* pt 1, sub-div 8B.
- 7 *Ibid* s 327.
- 8 See eg, *ibid* s 49A(2).
- 9 See eg, *ibid* s 49B.
- 10 See eg, *ibid* s 49U–V.
- 11 See eg, *ibid* ss 49C, 49E.
- 12 *Ibid* pt 1, sub-div 8D.
- 13 See eg, *Criminal Code Act 1995* (Cth) ss 474.22, 474.22A, 474.23.
- 14 The term 'child pornography' is not a preferred descriptor of this behaviour as the word 'pornography' treats child exploitation material as a 'legitimate subgenre of adult pornography': Jeremy Prichard and Caroline Spiranic, University of Tasmania, *Child Exploitation Material in the Context of Institutional Child Sexual Abuse* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, September 2014) 8 [1.0].
- 15 *Crimes Act 1958* (Vic) s 51A ("child abuse material").
- 16 *Ibid* pt 1, sub-div 8E.
- 17 *Summary Offences Act 1966* (Vic) s 19, div 4A; see eg, *Crimes Act 1958* (Vic) pt 1, sub-divs 8C, 8F.
- 18 *Summary Offences Act 1966* (Vic) s 19, div 4A.
- 19 *Crimes Act 1958* (Vic) s 38(2).
- 20 This covers sentences between 2013–14 to 2017–18: Sentencing Advisory Council (Vic), *Sentencing Trends in the Higher Courts of Victoria 2013–14 to 2017–18* (Sentencing Snapshot No 230, May 2019) 3 <[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Snapshot\\_230\\_Rape\\_May\\_2019.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Snapshot_230_Rape_May_2019.pdf)>. Rape committed on or after 1 February 2018 is subject to a standard sentence of 10 years: *Crimes Act 1958* (Vic) s 38(3).
- 21 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Consultation Paper No 21, October 2018) 76–7 [5.60]–[5.67], Question 5.6 <[www.lawreform.justice.nsw.gov.au](http://www.lawreform.justice.nsw.gov.au)>.
- 22 See Law Reform Commission of Ireland, *Knowledge or Belief Concerning Consent in Rape Law* (Report No 122-2019, November 2019) 91–2 [4.1]–[4.8], Recommendation 4.01 <<https://www.lawreform.ie>>; Legal Aid NSW, Submission No CO33 to New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (February 2019) 10–11 <<https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Consent/Submissions/CO33.pdf>>; Victorian Law Reform Commission, *Sexual Offences* (Interim Report, June 2003) 340 n 740 <<https://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-interim-report>>.
- 23 See Department of Justice (Vic), *Review of Sexual Offences* (Consultation Paper, September 2013) <<http://www.justice.vic.gov.au/review-of-sexual-offences-consultation-paper>>; Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>; Criminal Law Review, Department of Justice and Regulation (Vic), *Crimes Amendment (Sexual Offences) Act 2016: An Introduction* (Report, June 2017) <[https://www.justice.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2020/06/40/4b9b996e6/crimes\\_amendment\\_sexual\\_offences\\_act\\_2016%2B\\_an\\_introduction.pdf](https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/40/4b9b996e6/crimes_amendment_sexual_offences_act_2016%2B_an_introduction.pdf)>; *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic); *Crimes Amendment (Sexual Offences) Act 2016* (Vic).
- 24 Judicial College of Victoria, '7.3.1.1 Consent and Reasonable Belief in Consent (From 1/7/15)', *Victorian Criminal Charge Book* (Online Manual, 19 March 2018) [15] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/56177.htm>>.
- 25 *Crimes Act 1958* (Vic) s 37A(a).
- 26 *Ibid* s 38(1)(b)–(c).
- 27 Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) 12–13 [6.3] <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>. This communicative model has its origins in Victorian Law Reform Commission, *Sexual Offences* (Report No 5, July 2004) <<https://www.lawreform.vic.gov.au/projects/sexual-offences/sexual-offences-final-report>>.
- 28 Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) 13 <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.
- 29 *Crimes Act 1958* (Vic) s 36(1).
- 30 *Ibid* s 36(2).
- 31 See eg, *Jury Directions Act 2015* (Vic) s 46(3)(d)(ii). Jury directions are outlined in Issues Paper B.
- 32 *Crimes Act 1958* (Vic) s 38(1)(c).
- 33 *Ibid* s 36A(2); Judicial College of Victoria, '7.3.1.1 Consent and Reasonable Belief in Consent (From 1/7/15)', *Victorian Criminal Charge Book* (Online Manual, 19 March 2018) [52] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/56177.htm>>.
- 34 Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) 13 [7] <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.
- 35 Wendy Larcombe et al, 'Reforming the Legal Definition of Rape in Victoria—What Do Stakeholders Think?' (2015) 15(2) *QUT Law Review* 30, 49.
- 36 See Rachael Burgin, 'Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform' (2019) 59(2) *The British Journal of Criminology* 296, 3–4; Wendy Larcombe et al, "'I Think It's Rape and I Think He Would Be Found Not Guilty': Focus Group Perceptions of (Un)Reasonable Belief in Consent in Rape Law' (2016) 25(5) *Social & Legal Studies* 611, 623; Wendy Larcombe et al, 'Reforming the Legal Definition of Rape in Victoria—What Do Stakeholders Think?' (2015) 15(2) *QUT Law Review* 30, 49. Indeed the Department of Justice and Regulation (as it was known then) explains that the relevant reform 'does not, strictly speaking, impose a legal duty on a person initiating sexual contact to take active steps to ascertain whether the other person consents. Nonetheless, a failure to do so will be a factor that the jury can take into account in assessing any subsequent belief that the other person was consenting': Criminal Law Review, Department of Justice and Regulation (Vic), *Victoria's New Sexual Offence Laws: An Introduction* (Report, June 2015) 17 <<https://www.justice.vic.gov.au/victorias-new-sexual-offence-laws-an-introduction>>.
- 37 See Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) v [28]–[32].
- 38 See New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Draft Proposals, October 2019) 7 [4.2]–[4.3], Proposal 4.1 <[https://www.lawreform.justice.nsw.gov.au/443/Pages/lrc/lrc\\_current\\_projects/Consent/Consent.aspx](https://www.lawreform.justice.nsw.gov.au/443/Pages/lrc/lrc_current_projects/Consent/Consent.aspx)>.
- 39 See generally Nicole Bluett-Boyd et al, Australian Institute of Family Studies (Cth), *The Role of Emerging Communication Technologies in Experiences of Sexual Violence: A New Legal Frontier?* (Research Report No 23, February 2013) <<https://aifs.gov.au/publications/role-emerging-communication-technologies-experience>>.
- 40 The term 'revenge pornography' has been critiqued for a number of reasons including that it 'focuses attention on the content of the image, rather than on the abusive actions of perpetrators': Nicola Henry, Asher Flynn and Anastasia Powell, *Responding to 'Revenge Pornography': Prevalence, Nature and Impacts* (Criminology Research Advisory Council Report No CRG 08/15-16, 2019) 13 <[https://researchmgt.monash.edu/ws/portalfiles/portal/264678641/08\\_1516\\_FinalReport.pdf](https://researchmgt.monash.edu/ws/portalfiles/portal/264678641/08_1516_FinalReport.pdf)>.

- 41 This is where an image up a person's skirt is taken, distributed or threatened to be distributed, without their permission. Another similar  
behaviour is known as 'downblousing' where these non-consensual images relate to the person's cleavage: Ibid 36.
- 42 This is where technology is used to digitally alter images showing a person's face superimposed or 'stitched' on a pornographic image.  
This is also known as 'morph porn': Ibid 14.
- 43 See generally Hadeel Al-Alosi, 'Cyber-Violence: Digital Abuse in the Context of Domestic Violence' (2017) 40(4) *UNSW Law Journal* 1573;  
Office of the eSafety Commissioner (Cth), *Image-Based Abuse National Survey* (Summary Report, 2017) 14 <<https://www.esafety.gov.au/sites/default/files/2019-07/Image-based-abuse-national-survey-summary-report-2017.pdf>>; 'Sextortion Trends and Challenges—Position  
Statement', *eSafety Commissioner* (Web Page, 4 August 2020) <<https://www.esafety.gov.au/about-us/tech-trends-and-challenges/sextortion>>.
- 44 *Summary Offences Act 1966* (Vic) ss 41DA–41DB.
- 45 Community standards of acceptable conduct includes standards of conduct having regard to the following: the nature and content of the  
image; the circumstances in which the image was captured; the circumstances in which the image was distributed; the age, intellectual  
capacity, vulnerability or other relevant circumstances of a person depicted in the image; and the degree to which the distribution of the  
image affects the privacy of a person depicted in the image: Ibid s 40 ('community standards of acceptable conduct').
- 46 Ibid ss 41B–41C.
- 47 *Criminal Code Act 1995* (Cth) s 474.17A(1). This is an aggravated version of the underlying offence of using a carriage service to menace,  
harass or cause offence under s 474.17(1). Private sexual material is material that depicts a person over 18 engaged in a sexual pose or  
sexual activity, or sexual organs or the anal region, in circumstances that a reasonable person would regard is giving rise to an expectation  
of privacy: s 473.1 ('private sexual material').
- 48 *Enhancing Online Safety Act 2015* (Cth) pt 5A.
- 49 *Criminal Code Act 1995* (Cth) s 474.17A(4).
- 50 See Morten Birk Hansen Mandau, "'Directly in Your Face": A Qualitative Study on the Sending and Receiving of Unsolicited "Dick Pics"  
among Young Adults' (2020) 24(1) *Sexuality & Culture* 72; Susanna Paasonen, Ben Light and Kylie Jarrett, 'The Dick Pic: Harassment,  
Curation, and Desire' (2019) 5(2) *Social Media + Society*; Matthew Smith, 'Four in Ten Female Millennials Have Been Sent an Unsolicited  
Penis Photo', *YouGov (UK)* (Web Page) <<https://yougov.co.uk/topics/politics/articles-reports/2018/02/16/four-ten-female-millennials-been-sent-dick-pic>>.
- 51 Asher Flynn, 'Cyberflashing Isn't Playful, It's Image-Based Sexual Abuse', *Monash Lens* (Blog Post, 6 September 2019) <<https://lens.monash.edu/@politics-society/2019/09/06/1376441?slug=cyberflashing-the-latest-form-of-digital-sexual-harassment>>; See also Gian  
De Poloni and Kate Leaver, 'Cyber Flashing Is the New iPhone Safety Threat as AirDrop Used to Share Porn, Explicit Content', *ABC News*  
(online, 12 May 2019) <<https://www.abc.net.au/news/2019-05-12/cyber-flashing-porn-sent-to-iphones-using-airdrop/11092974>>; Nicole  
Precl, 'Ursula Didn't Know What Cyber Flashing Was until the Day at the Museum', *The Sydney Morning Herald* (online, 20 June 2019)  
<<https://www.smh.com.au/national/ursula-didn-t-know-what-cyber-flashing-was-until-the-day-at-the-museum-20190512-p51mm6.html>>.  
This behaviour is different to 'sexting', which is the consensual sharing of nude 'selfies' or other sexual images.
- 52 Asher Flynn, 'Cyberflashing Isn't Playful, It's Image-Based Sexual Abuse', *Monash Lens* (Blog Post, 6 September 2019)  
<<https://lens.monash.edu/@politics-society/2019/09/06/1376441?slug=cyberflashing-the-latest-form-of-digital-sexual-harassment>>;  
Susanna Paasonen, Ben Light and Kylie Jarrett, 'The Dick Pic: Harassment, Curation, and Desire' (2019) 5(2) *Social Media + Society* 2–3.  
Morten Birk Hansen Mandau, "'Directly in Your Face": A Qualitative Study on the Sending and Receiving of Unsolicited "Dick Pics" among  
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Curation, and Desire' (2019) 5(2) *Social Media + Society* 3.
- 53 Matthew Smith, 'Four in Ten Female Millennials Have Been Sent an Unsolicited Penis Photo', *YouGov (UK)* (Web Page) <<https://yougov.co.uk/topics/politics/articles-reports/2018/02/16/four-ten-female-millennials-been-sent-dick-pic>>.
- 54 *Crimes Act 1958* (Vic) s 48.
- 55 *Criminal Code Act 1995* (Cth) s 474.17. Offences relating to child sexual abuse or child exploitation material could also apply where a child  
is involved in an incident.
- 56 Alexandra Brodsky, "'Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal' (2017) 32(2) *Columbia Journal  
of Gender and Law* 183, 185; Rosie Latimer et al, 'Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in  
Melbourne, Australia' (2018) 14(12) *PLOS ONE* e0213316, 11.
- 57 Alexandra Brodsky, "'Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal' (2017) 32(2) *Columbia Journal of  
Gender and Law* 183, 184 n 6.
- 58 Brianna Chesser and April Zahra, 'Stealthling: A Criminal Offence?' (2019) 31(2) *Current Issues in Criminal Justice* 217, 220; Rosie Latimer  
et al, 'Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia' (2018) 14(12) *PLOS ONE*  
e0213316, 7.
- 59 Rosie Latimer et al, 'Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia' (2018)  
14(12) *PLOS ONE* e0213316, 11–13. Latimer et al state that victim-survivors may also be less inclined to identify their experience as a form  
of sexual violence due to 'real rape' myths and as a way to avoid the distress that may be experienced by labelling oneself a victim of  
crime: 13.
- 60 Brianna Chesser and April Zahra, 'Stealthling: A Criminal Offence?' (2019) 31(2) *Current Issues in Criminal Justice* 217, 219.
- 61 In Victoria a person has been charged with rape and sexual assault for non-consensual condom removal. The case has not yet been tried  
in court. See: *Medical Board of Australia v Liang Joo Leow* [2019] VSC 532; In another Victorian incident, a person was charged and  
convicted of procuring a sexual activity by fraud: *Crimes Act 1958* (Vic) s 45; *DPP v Diren* [2020] CCA 61.
- 62 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) 144 [6.142]–  
[6.143]. Legal experts and commentators have also made suggestions for further clarification of the law in this area; for example by  
introducing a specific offence or tort for non-consensual condom removal, or establishing non-consensual condom removal as a consent-  
negating circumstance. For a more detailed discussion of the issues and possible reforms in this area, including international approaches  
see: Melissa Marie Blanco, 'Sex Trend or Sexual Assault: The Dangers of Stealthling and the Concept of Conditional Consent Comments'  
(2018) 123(1) *Penn State Law Review* 217; Alexandra Brodsky, "'Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom  
Removal' (2017) 32(2) *Columbia Journal of Gender and Law* 183; Andrew Dyer, 'Mistakes That Negate Apparent Consent' (2018) 43(3)  
*Criminal Law Journal* 159; Brianna Chesser and April Zahra, 'Stealthling: A Criminal Offence?' (2019) 31(2) *Current Issues in Criminal  
Justice* 217.
- 63 New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Draft Proposals, October 2019) 11 [5.11]–[5.13],  
Proposal 5.6 <[https://www.lawreform.justice.nsw.gov.au:443/Pages/lrc/lrc\\_current\\_projects/Consent/Consent.aspx](https://www.lawreform.justice.nsw.gov.au:443/Pages/lrc/lrc_current_projects/Consent/Consent.aspx)>.
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