Submission to
Victorian Law Reform Commission
in relation to its inquiry into
Improving the Response of the Justice System to Sexual Offences

by Dr Steven Tudor
Senior Lecturer, School of Law,
La Trobe University
Victoria 3086
Email: s.tudor@latrobe.edu.au
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Introduction

1. This is a submission in relation to the Victorian Law Reform Commission's (VLRC's) inquiry into Improving the Response of the Justice System to Sexual Offences. I am grateful to the VLRC for the opportunity to make a submission.

2. I am a senior lecturer in the School of Law at La Trobe University (teaching and researching in criminal law), though I make this submission in my private capacity. I should also note that I was formerly a senior legal policy officer in the Department of Justice 2010–2015, during which time I worked on reforms to sexual offences. However, the present submission to the VLRC contains only my own opinions and does not purport to reflect the views, past or present, of the Department of Justice and Community Safety.

3. For reasons of time, this submission addresses only a few selected issues raised by the VLRC's Issues Papers, focusing mainly on Issues Paper C *Defining Sexual Offences*. Moreover, I have not had time to do further research into the issues, so this submission is only a summary document addressing a few select issues rather than a fully argued and integrated submission. I am, however, very happy to provide further information on specific issues if that would assist the VLRC at a later time.

4. In summary, this submission:
   a. recommends that consideration be given to amending the *Crimes Act 1958* (Vic) (CA) to augment the communicative model of consent by providing that there is no consent if the complainant does not *continue* saying or doing something to indicate *ongoing* consent to the sexual act,
   b. recommends that there be no amendment to make 'taking reasonable steps to ascertain consent' an obligation as such,
   c. recommends that the CA be amended to clarify that the non-consensual removal of a condom ('stealthing') comes within the scope of rape and other sexual offences,
   d. recommends that consideration be given to amending the CA to clarify that permitted 'wake up sex' is not non-consensual,
   e. recommends that consideration be given to creating a new criminal offence of 'aggravated sexual harassment', and

f. supports calls for restorative justice processes being made available for victim-survivors of sexual offences.

A. Communicative model of consent: continuing consent

5. Issues Paper C, Question 2 asks: 'How well is Victoria's model of communicative consent working? Should there be any changes?'

6. CA s 36(2)(l) provides that a person does not consent to an act if 'the person does not say or do anything to indicate consent to the act'. This was inserted into the CA in 2015. It embodies a core feature of the communicative model of consent.

7. There have, to my knowledge, been no appeal cases that have concerned this new provision since its enactment. This is some evidence that the provision is working well, in the sense that its legal meaning does not appear to have been a contested matter to a significant degree.

8. Even so, it would be worthwhile for the VLRC to look into whether the communicative model could be augmented by a further provision that clarified that there is no consent where the person does not *continue* saying or doing something to indicate *continuing* or *ongoing* consent during the sexual act. This would reinforce the communicative model of consent by making it clear that an accused cannot say there was consent 'because she said "yes" at the start, and then she just went still and quiet, but she never said "no" or "stop" and never did or said anything positively to withdraw consent, so I just assumed it was OK to continue'.[1]

9. Arguably, s 36(2)(l) already implies this notion of a continuing communication of consent, but it might be worth making the small amendment needed to make this clear and to reinforce the idea that consent is not a one-off granting of permission that, no matter what the complainant is subjectively feeling, holds until it is expressly revoked. Rather, consent is, instead, a continuing state of mind of the complainant that is expressed in ongoing words and actions.

10. The amendment being considered here might not need to be a distinct provision alongside s 36(2)(l). It could, instead, be simply a note to that provision, to clarify the full scope of the existing meaning of s 36(2)(l).

11. It might be argued by some that a failure to indicate continuing consent amounts to a form of "withdrawing" consent. That is very debatable, but even if it were true, the amendment being considered here could help to make that clearer.

12. A person is certainly free to withdraw consent that had previously been given (see CA s 36(2)(m)). The above issues concern the situation where consent has been given or indicated, but where consent has not yet been expressly withdrawn. (Indeed, there may

[1] I am using gendered pronouns in this context as such offending predominantly involves male offenders and female complainants.

be no positive withdrawal of consent in that sense, simply a cessation of consent and a cessation of words or actions indicating continuing consent.)

13. I discuss this issue further in the extract from *Waller & Williams Criminal Law: Text and Cases*, which is reproduced in the Appendix to this submission. The extracted text is text for which I was primarily responsible.

B. Reasonable steps to ascertain consent

14. Currently CA 36A(2) provides in effect that steps taken by an accused to find out about consent are among the circumstances relevant to the assessment of reasonableness of belief in consent. Issues Paper C (at p 5) raises the question whether the CA does not 'go far enough because it does not require a person to "take steps" to ensure consent'. While the intention here (presumably to encourage people to be responsible and actively ensure consent when engaging in sexual activity) is laudable, it would be a mistake to amend the law to provide that a person has a legal obligation to take steps to ascertain that the other person in consenting. Such a provision would actually make the law more complicated and result in fewer successful prosecutions for rape and sexual assault.

15. Such a statutorily created obligation would have to be fitted into the surrounding law. I am assuming that the proposal is not to create a free-standing criminal offence of 'failing to take reasonable steps to ascertain consent', regardless of what further conduct occurred or in what circumstances. Rather, the only plausible way to make taking reasonable steps an 'obligation' in this context would be for it to be somehow incorporated into the existing statutory provisions on rape and sexual assault. The best way to do that would be for the law to either deem or rebuttably presume that a person does not reasonably believe in consent if they have not taken *reasonable* steps to ascertain consent. It would need to be a requirement to take *reasonable* steps (and not a requirement simply to take steps) because in some situations there is no need to take *any* steps to ascertain consent. Such situations would include where person B sexually propositions person A, expressly stating that they want to have sex with A. It is not clear that A needs to take any steps at that point to ascertain whether B is consenting.

16. To create such a deeming provision or rebuttable presumption might sound appealing in the abstract but would create a set of new problems about defining what is reasonable in legislation. This is something best left to the jury to decide in particular cases. It will be very rare that a jury would be assisted in getting things right by such a provision. Under the current law, if the jury is aware that the accused took no steps to ascertain consent, but still decides that the accused's belief in consent was reasonable, then they will have a good reason for this, unless they were some sort of rogue jury. If the statute requires them to override that good reason and say that the accused's belief is deemed by the law to be unreasonable simply on the basis that no steps were taken, then that would be an unfortunate legislative interference with the jury's assessment of the particular evidence in the particular case. It will either simply confirm what the jury would have little trouble deciding for itself or force the jury to find facts against the evidence as they see it. (If it is a rogue jury, it's not at all clear that yet another legislative provision

will rein them in.) A rebuttable presumption would be less constraining, but would still complicate the jury's task for no real gain.

17. What such a reform would very likely lead to is a host of appeals debating the fine points about what amounts in law to 'reasonable steps taken to ascertain consent' which will not do anything to make it easier to secure convictions, but quite the opposite. If such a provision were to be created, there would need to be guidance as to what 'reasonable steps' were in the circumstances. Such guidance would probably have to be something like 'what it would be reasonable in the circumstances *to do* to ascertain consent'. But that would not make the jury's task easier or increase the chances of conviction. It will still be up to the jury to work out what it was in fact *reasonable for the accused to do* in those circumstances. Moreover, the jury would be doing all this on the way to working out — as a further, and more fundamental, question — what it was *reasonable for the accused to believe*. This means that the proposal would complicate the jury's task for little or no gain. It is simplest just to keep the element as lack of reasonable belief in consent and let the jury work out in each case whether or not it is satisfied, without being directed to make a decision as to matters of fact or having to go through making presumptions and testing them to see if they are rebutted.

18. The New South Wales Law Reform Commission (NSWLRC), in its recent report *Consent in Relation to Sexual Offences* (Report 148, September 2020) provides a useful discussion of this issue (at paras 7.107–7.121), concluding that a requirement to take steps should not be included in NSW law. Those arguments essentially also apply in Victoria.

19. In arguing against the proposal to make it obligatory to take steps to ascertain consent, I am not arguing that, in itself, it does not matter if people engage in sexual activity without bothering the find out if the other person consents. It is clear that any morally decent person will be doing this. But the key point here is that the criminal law is not a good behaviour code. The criminal law is not intended to provide a script for *good* behaviour when it comes to sexual activity. It is intended to define what amounts to *criminal behaviour* in the context of sexual activity. To try to incorporate elements of a code of good or desirable behaviour into statutes whose task is to define criminality are fraught with difficulty and threaten to weaken the capacity of the criminal law to do its job.

C. Non-consensual removal of condom

20. The VLRC's Issues Paper C (at p 7) raises the issue of non-consensual removal of a condom and its criminality. It is strongly arguable that such behaviour would already count as a vitiation of consent (and so come within rape), and it is virtually certain that such cases would come within the existing offence of procuring a sexual act by fraud (CA s 45). However, out of an abundance of caution it would appropriate for the CA to be amended to make these points clear. (There is no problem in the same act being chargeable as either rape or procuring a sexual act by fraud. These two offences inescapably overlap already and in fact should do so.)

21. The CA s 36 should be amended to clarify that consent to sex with a condom is not consent to sex without a condom. This follows, in essence, the formulation by the NSWLRC in its report on *Consent in relation to Sexual Offences* (p 67). This is a simple and effective way to address the issue and does not require any new offence or alternative offence elements. It has the benefit of keeping the focus on the consent of the complainant and not on the deceptiveness of the accused. Any deceptiveness on the accused's part can be treated as relevant to the fault element of rape or of the fraud offence.

22. This amendment also has the benefit of being limited in scope and does not open up the very wide and contested field of conditional consent. It is true that many people have sex with another person on certain conditions, e.g. cases where the person has said 'I'm only having sex with you if you're religious/rich/in love with me, etc.' If it happens to be that such a condition has not been met (whether through the deception or fault of the other person, or otherwise), it would be too broad to say that in all such circumstances, the consent is vitiated (for the purposes of rape law). However, where the condition stipulated is closely related to the nature of the sexual act (such as the wearing of a condom), then this, it is argued, is something the law should accommodate. If there are other kinds of conditional consent that should come within rape, alongside stealthing (e.g. 'I'll only have sex with you if you don't have an STI or if you have had a vasectomy') then they can be added specifically, as with condom removal.

23. In the broader types of conditional consent, the deceptiveness could well already come within the scope of the offence under s 45, procuring a sexual act by fraud.

24. See further the extract from *Waller & Williams* reproduced in the Appendix to this submission.

D. Permitted 'wake up sex'

25. CA s 36(2)(d) currently provides that a person does not consent to an act where the person is asleep or unconscious. This seems an unquestionably appropriate provision, but it does lead on to the question of what is the situation where one person has given consent to (indeed has requested) another person to wake them up in the morning with sexual activity of some sort.

26. Of course, where such activity is consented to (whether as requested or agreed to), it is highly unlikely to be the subject of a complaint to the police. But it would nonetheless seem arguable that the person performing the relevant act is in fact committing a sexual offence (rape or sexual assault) when they commence the act, since at that time the other person is asleep and so is (by virtue of s 36(2)(d)) not consenting.

27. Many will respond to this concern by saying that the prior *given* consent holds and applies at this time. However, the provisions of the CA do not really accommodate this, I would argue, leaving the situation as a legal grey area. From one point of view, such activity is clearly not consensual under the CA. But, I would predict, a sizeable proportion of the community would not regard such activity as non-consensual, and so

there is an issue about whether and how the law should reflect community views on this.

28. Accordingly, I would recommend that the VLRC look into whether it would be feasible and, if so, desirable that CA be amended to clarify explicitly that permitted 'wake up sex' is not non-consensual, even though at the time of the sexual act the person is asleep. I do not yet recommend that such an amendment should be made, as it is an issue that requires further research and consultation. But it is an issue that could be worth clarifying.

29. If there were to be such amendment, it would most likely be best if it specified that the person's prior consent to be woken up by a specific person performing a specified sexual act on them should be treated as covering that act when performed in accordance with the consent given. Of course, from the point in time when the person wakes up, they could positively withdraw consent. Moreover, the communicative model of consent would apply and so the consent of the person now awake would need to be ongoing and communicated. That is, the person's consent to the continuation of the act from that point would need to be manifested by their saying or doing something (and continuing to say or do it) to indicate continuing consent. There are, though, difficulties in neatly dividing the time when a person is asleep and the time when the person is fully awake.

30. It may be that such a scenario is unlikely to come before the courts, and so it might be argued that legislating to accommodate such situations is likely to be an idle exercise. However, in principle, a criminal statute should try to avoid gaps of this sort arising so that the precise scope of what is criminalised can be readily ascertained.

31. See further the extract from *Waller & Williams* reproduced in the Appendix to this submission.

E. Possible new offence: 'aggravated sexual harassment'

32. The wide extent of sexual harassment has been an appropriately newsworthy issue in recent years. The Australian Human Rights Commission's 2017 report *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* reported a very disturbingly high rate of such cases. In addition, the recent high-profile findings of sexual harassment in the High Court and at the University of Adelaide also indicate problems with institutional cultures that fail to detect or deter the sexually harassing behaviour of powerful individuals.

33. Part of the challenge in responding to these problems is changing institutional cultures, and indeed the wider culture. The law is a fairly blunt tool in trying to shift cultures, but in this instance it may well be worthwhile investigating whether a new criminal offence of aggravated sexual harassment is warranted. Such an offence could amount to a clear statement that our community regards serious sexual harassment of an individual as a significant wrong against the person and as a wrong that concerns the community as a whole, and is not just a private matter. This could, in turn, help to educate the public

and shift attitudes, so that such behaviour is not thought to be acceptable or merely a minor problem that sexually harassed people (overwhelmingly women) should simply tolerate.

34. I have not done enough research into this matter to feel justified in straightforwardly recommending such an offence, so I am simply recommending that it be considered by the VLRC.

35. A new criminal offence should not try to reinvent the offence from the ground up but could be based upon the existing civil provisions covering sexual harassment under the *Equal Opportunity Act 2010* (Vic), and provide for further elements that will create an aggravated criminal version of sexual harassment. Of course, further research and consultation on the appropriate elements of such an offence would be needed. It might be, for example, that the aggravated element would be where a person makes *repeated* sexual advances or engages in *repeated* conduct of a sexual nature. Also, there might need to be clarification of what amounts to the complainant not 'welcoming' the advances or the conduct. Perhaps another concept would be appropriate here for a criminal offence, such as the complainant being made to feel offended, pressured, intimidated, distressed, or humiliated by the conduct. Further, as a criminal offence, there would need to be a fault element, and so work would need to be done on what kind of fault was appropriate. It could, for example, be based on the objective fault element for rape and sexual assault (e.g. lack of reasonable belief in the conduct being welcomed or lack of reasonable belief that the conduct would not or did not have the effect that it did).

36. The offence, if enacted, should be a summary offence. The offence need not be restricted to workplaces or institutions such as universities, schools or hospitals. Note that the behaviour here could well in some cases amount to stalking or sexual assault. More serious instances of it should be charged accordingly.

F. Restorative justice in sexual offence cases

37. The VLRC's Issues Paper G raises the question whether a restorative justice model should be adopted for sexual offences.

38. Very briefly, in this submission I simply want to record my strong support for restorative justice processes being made available in sexual offence cases where (i) this is the complainant's choice and preference, (ii) the accused admits responsibility, and (iii) a judge or magistrate approves. In such cases, the magistrate/judge could adjourn or defer sentencing to allow a restorative justice conference or similar to take place.

39. The law should generally give more control to sex offence complainants to have the offending against them addressed in ways that meet their needs. There are obvious risks associated with this, but with some judicial oversight, it could open up a much more constructive process alongside traditional criminal trials. The current level of dissatisfaction among sexual offence complainants means that such innovations should at the very least be trialled. There is little to lose in doing so.

40. There is also the question of whether restorative justice procedures could also be made available outside of the criminal justice system. That is, in addition to offering restorative justice within the criminal justice process, there is the possibility of making restorative justice procedures available without need of a criminal charge or even complaint to police. Perhaps some sort of model drawing upon dispute resolution processes under the *Equal Opportunity Act 2010* could provide another avenue worth exploring in this context. It is well-known that the majority of victim-survivors of sexual offences do not report the offending to the police. If there were some sort of non-criminal restorative justice process in place, this could provide more options to those reluctant to complain to the police.

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41. I thank the VLRC for the opportunity to make this submission.

Dr Steven Tudor
Law School
La Trobe University

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Appendix

Extracts from Ch 4 of Penny Crofts, Thomas Crofts, Stephen Gray, Tyrone Kirchengast, Bronwyn Naylor and Steven Tudor, *Waller & Williams Criminal Law: Text and Cases* 14th ed. (Sydney: LexisNexis 2020) pp. 223–227; 239–240.

Consent as a state of mind or performance?

The definition of consent as 'free agreement' and the communicative model of consent together connote the idea that consent is something *given to* another person. This implies that a situation in which there is consent is a situation in which there are at least two people: one who gives the consent and the other (or others) to whom that consent is given. In such a situation there can thus be said to be an agreement or understanding *between* two (or more) people. Is this the best way to understand consent in relation to sexual activity? A number of academic commentators draw a distinction between consent understood as a particular subjective state of mind and consent understood as particular type of behavior. (See, for example, J McGregor, *Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Ashgate 2005); H M Malm, 'The Ontological Status of Consent and Its Implication for the Law on Rape' (1996) 2(2) *Legal Theory 147*; A Wertheimer, *Consent to Sexual Relations* (Cambridge University Press, 2003); I Leader-Elliott and N Naffine, 'Wittgenstein, Rape Law and the Language Games of Consent' (2000) 26(1) *Monash University Law Review* 48.) Consent as a state of mind is a mental attitude of willingness or acceptance of something. Consenting to a sexual act is, on this view, a matter of having that state of mind. Such an internal state of mind could potentially exist without any specific outward sign of it existing. An *absence* of consent understood as a state of mind would thus be

a matter of that state of mind not existing, which could be either a lack of the relevant state of mind or the presence of a contradictory state of mind such as revulsion or disgust. The English Court of Appeal can be seen as endorsing this subjective approach to consent in *R v Olugboja* [1982] QB 320 at 331–2 (a common law decision pre-dating the Sexual Offences Act 2003 (UK)):

> ["Consent"] covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other. … [The jury] should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances; and in particular, the events leading up to the act and her reaction to them showing their impact on her mind.

Consent as a type of behavior, in contrast, involves doing something that gives another person permission to do something. Consenting to a sexual act is, on this view, a matter of performing the relevant consent-giving actions. An *absence* of consent, then, will involve either contradictory behavior that refuses or denies permission or a simple absence of the relevant permission-giving behavior. The two conceptions of consent are not necessarily in tension. Indeed, consent as permission is arguably *best* performed when the person gives consent by indicating by their words and/or actions that they have the state of mind of consent.

The adoption of the communicative model of consent is generally thought to have been a progressive reform. However, there is a risk that an exclusive focus on consenting behavior could lock a person into having consented just because of what they said or did, even where their inner attitude was *not* one of willingness or acceptance. Such consent-giving actions could be due to factors (such as threats) that will negate the consent supposedly given, but there could also be cases where the performance of those acts was due to other pressures or expectations that might not, in law, be enough to negate consent, such as not wanting to upset the other person by refusing sex. In some such cases, it may be reasonable for the accused to believe the complainant was consenting. But the complainant's claim that they were not actually consenting could well be rejected by the jury (on the conduct-focused view) on the basis that what the complainant did and said in fact amounted to the giving of consent, and how they inwardly felt about what was happening is not relevant. That would seem problematic, to say the least.

Would it be desirable for the law to define consent as requiring *both* internal and external components; that is, both a state of mind of willingness *and* actions that give consent by indicating that state of mind? The Queensland Court of Appeal has held that consent under the Queensland Criminal Code has these two aspects and that both need to be satisfied if there is to be consent. Section 348 of the Code states that '"consent" means consent freely and voluntarily given by a person with the cognitive capacity to give the consent'. In *R v Makary* [2018] QCA 258 at [49]–[50] (citations omitted), Sofronoff P (with whom the other members of the court agreed) held:

> "Consent" was thus defined to require two elements. First, there must in fact be "consent" as a state of mind. This is also because the opening words of the definition define "consent" tautologically to mean, in the first instance, "consent". The complainant's state of mind remains elemental. Second, consent must also be "given" in the terms required by the section.
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> The giving of consent is the making of a representation by some means about one's actual mental state when that mental state consists of a willingness to engage in an act. Although a representation is usually made by words or actions, in some circumstances, a representation might also be made by remaining silent and doing nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, evaluated against a pattern of past behaviour.

It is not clear that the current legal definitions of consent in New South Wales and Victoria have these two distinct sub-elements. Should the law be amended to ensure they do? A question arises here that if consent consists of two essential sub-elements, and if one of the elements of rape is the *absence* of

consent, then will the absence of consent be proved by proving that just one of the two sub-elements of consent was absent, even where the other was accepted as existing? That is, could non-consent be proved by proving the absence of the relevant state of mind, even though consent was in fact ostensibly given? And could non-consent be proved by proving there was no giving of consent, even though the complainant did have the relevant state of mind? (Of course, if the complainant did have the relevant state of mind, then they would be unlikely later to make a complaint, but in principle the question could arise.) The problem is then further complicated when it comes to working out what a reasonable but mistaken belief in consent amounts to where consent has these two essential dimensions. (See further Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact: Consultation Paper* (WP No 78, December 2019), Ch 3; and NSWLRC, *Consent in Relation to Sexual Offences: Consultation Paper 21* (October 2018), Ch 3.)

The problem of a mis-match between the attitudinal and performative conceptions of consent can become particularly pointed in cases involving the withdrawal (or attempted withdrawal) of consent. If A and B commence mutually consensual sexual penetration, but B subsequently ceases to be willing to continue, then, if B does not say or do anything to indicate a *withdrawal* of consent, the fear is that B will in effect be locked into their previously given consent. In cases where complainants 'freeze up' and find themselves unable to say or do anything to withdraw consent, this would amount to a kind of entrapment by one's own prior words or actions. One way of solving or avoiding this kind of problem would be for the law to require that the communicative indications of consent to sex need to be *continuing*. This would mean that consent to sexual activity is not given by a once-off act, at the beginning of the activity, and applies by default until there is an express and positive withdrawal of consent. Rather, on this approach, the consent to sex needs to be continually sustained by the ongoing actions and words of the person giving the consent. In the absence of that continuing performance of consent, on this view, there will be no consent even if there was an appropriate giving of consent at the start. On this approach, if a person who began engaging in mutually consensual sex subsequently 'freezes up' and says or does nothing to indicate *continuing* consent, then they will be taken to have withdrawn their consent to the activity continuing, even though they have not expressly said or done anything to indicate a withdrawal of consent. There can, of course, still be things said or done which serve positively to withdraw consent. But, on this view, withdrawal of consent can also be a matter of ceasing to indicate ongoing consent by ceasing the performance of consent-giving words and actions.

Another problematic scenario involving a mismatch between consent as state of mind and consent as giving of permission is the phenomenon of permitted 'wake up' sex. In this situation, one person (B) gives their sexual partner (A) prior permission to wake them up in the morning with sexual activity (such as oral sex). The difficulty with this kind of scenario is that at the time of the sexual activity, B is asleep and so, according to s 36(2)(d) of the Crimes Act (Vic) and s 61HE(5)(b) of the Crimes Act (NSW), B cannot be consenting to the activity. However, on this scenario, B gave clear permission to A to engage in that activity; indeed, B may well have positively and unilaterally requested it of A. Does that prior express granting of consent override the absence of a consenting state of mind at the time of the sexual activity? Of course, if B, upon being woken up by A's sexual activity, decided they did not want the activity to continue and indicated this fact, but A continued regardless, then it would clearly be a case of non-consensual activity. But while B is still asleep and the activity is continuing, is this a case of non-consensual sexual activity? It is submitted that the law on this point is not clear: it is not clear whether consent-as-state-of-mind or consent-as-granted-permission would prevail.

Although these scenarios of unexpressed withdrawal of consent and 'wake up' sex are arguably not uncommon, they rarely reach the courts, and so these sorts of issues still await judicial determination. Should the legislature step in to clarify these matters? Or is this nest of problems too complex to be amenable to statutory resolution?

The Canadian Supreme Court in its decision in *R v Ewanchuk* [1999] 1 SCR 330 addressed issues concerning subjective and behavioral conceptions of consent in the context of discussing whether

Canadian criminal law recognised 'implied consent' to sexual activity; that is, consent which was to be attributed to the complainant on the basis of their conduct, regardless of their actual state of mind. The majority judges held (at 348–350) (citations and paragraphing omitted):

> The absence of consent … is subjective and determined by reference to the complainant's subjective internal state of mind towards the touching, at the time it occurred …. Confusion has arisen from time to time on the meaning of consent as an element of the *actus reus* of sexual assault. Some of this confusion has been caused by the word "consent" itself. A number of commentators have observed that the notion of consent connotes active behaviour. While this may be true in the general use of the word, for the purposes of determining the absence of consent as an element of the *actus reus*, the actual state of mind of the complainant is determinative. At this point, the trier of fact is only concerned with the complainant's perspective. The approach is purely subjective. …. While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent. … The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry. … Counsel for the respondent submitted that the trier of fact may believe the complainant when she says she did not consent, but still acquit the accused on the basis that her conduct raised a reasonable doubt. Both he and the trial judge refer to this as "implied consent". It follows from the foregoing, however, that the trier of fact may only come to one of two conclusions: the complainant either consented or not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the *actus reus* of sexual assault is proven. The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law.

Would Victorian and New South Wales courts agree with this approach? Should they? If the subjective state of mind of the complainant is determinative, what is the role of the communicative model of consent in the context of proving the absence of consent? Is agreement not a matter of agreement *between* two or more people, but solely a matter of what the complainant subjectively desires? Does a lack of anything objectively said or done to indicate consent merely *support* the complainant's claim that there was no consent, rather than prove it directly?

….

Conditional consent and 'stealthing'

Whether a mistaken belief comes within the scope of the 'sexual nature' of the act or is merely a 'collateral' matter is not always clear. Is the wearing of a condom during penetrative sex an integral part of the sexual nature of the act or a collateral matter? It could be argued that the new emphasis on the communicative dimension of consent should give a greater prominence to the idea that proper consent must be properly and fully informed consent and that this should widen the scope of what is seen as integral to the sexual nature of the act, such that a mistaken belief about it would vitiate consent.

As an alternative strategy, it may also be argued that fully respecting sexual autonomy should require that wherever a person consented to sex on the condition that certain facts existed or that certain things were done (for example, that the other person is free of sexually transmitted disease or that they wear a condom), but those facts did not exist or the things were not done, then the person's consent should be regarded as

vitiated, regardless of whether those matters are part of the 'sexual nature' of the act or are 'collateral matters'. Here the argument is less that the person's consent is vitiated by a mistaken belief regarding the circumstances in which sexual activity is taking place. Rather, the argument is that if a person has consented to sex upon certain conditions, and the other party has agreed to those conditions but then deliberately fails to uphold their end of the bargain and does not disclose this fact to the other person, then the initial consent should be regarded as vitiated and the agreement between the parties considered annulled. This is especially apt if consent is viewed as an ongoing matter between the parties, not a once-off permission being given at the start that applies until expressly revoked.

The phenomenon known as 'stealthing' is a topical case in point. Stealthing involves a person removing their condom during sexual activity, without telling their sexual partner they have done so (and therefore doing so without the partner's consent). Where the wearing of a condom was a condition of the partner's consent to engaging in penetrative sex, the removal of it can be seen as breaching the conditions consented to and thereby vitiating the consent given. This has yet to be tested in the courts, but in September 2018 a medical practitioner was charged with rape under the Crimes Act (Vic) in relation to a stealthing incident involving another medical practitioner. In November 2018, the Medical Board of Australia suspended the accused's medical registration on the basis of the criminal charges against him, but this was overturned by the Victorian Civil and Administrative Tribunal: see *CJE v Medical Board of Australia (Review and Regulation)* [2019] VCAT 178 (26 February 2019). An appeal by the Board to the Supreme Court of Victoria was dismissed by Niall JA on 12 August 2019. The accused has been committed for trial in the County Court: see <https://www.theage.com.au/national/victoria/stealth-rape-accused-surgeon-allowed-to-keep-treating-patients-20190813-p52gil.html>. If the matter goes to trial, it is possible that some judicial light will be shed on whether, and how, stealthing vitiates consent. If it turns out that stealthing does not vitiate consent for the purposes of rape or sexual assault under Victorian law, it is arguable that it would in any case fall foul of the offence of procuring a sexual act by fraud under s 45 of the Crimes Act (Vic). On the issues of conditional consent and stealthing, see B Chesser and A Zahra, 'Stealthing: A Criminal Offence?' (2019) 31(2) *Current Issues in Criminal Justice* 217; A Clough, 'Conditional Consent and Purposeful Deception' (2018) 82(2) *Journal of Criminal Law* 178; G Doig and N Wortley, 'Conditional Consent? An Emerging Concept in the Law of Rape' (2013) 77(4) *Journal of Criminal Law* 286.

In *Assange v Swedish Prosecution Authority* [2012] EWCA 2849 (Admin), the Queen's Bench Division of the High Court of England and Wales gave some support to a more expansive approach to the circumstances in which consent is vitiated by mistaken belief or the non-fulfilment of a condition of consent. The case concerned the extradition of Julian Assange to Sweden to face questioning in relation to possible sexual offences. One of the issues decided by the court was whether, for the purposes of extradition, the matters alleged against Mr Assange in Sweden corresponded to sexual offences under English law. In the course of affirming that they did, the court shed some light on situations where consent to sex is conditional; for example, conditional upon the use of a condom. The court had to consider the 'conclusive presumptions' regarding consent contained in the Sexual Offences Act 2003 (UK) s 76, which have no counterpart in the Victorian and New South Wales legislation. However, the court also considered the nature of consent more generally. While this decision is not binding in Victoria or New South Wales, it is of interest because the Victorian legislation drew upon the English legislation under consideration, for example in borrowing the language of 'reasonable belief in consent' and affirming that consent is free agreement and requires capacity and freedom of choice: see Jury Directions Act 2015 (Vic) s 46(3)(a).