

Victorian Law Reform Commission
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23 December 2020

Dear Commission Members,

Victorian Law Reform Commission Submission: Non-Consensual Condom Removal

Introduction

I am pleased to provide this Submission to the Victorian Law Reform Commission on 'Improving the Response of the Justice System to Sexual Offences'. This submission addresses the following term of reference for the inquiry:

Issues Paper C: Question 4

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

I will be focussing on the issue of non-consensual condom removal; commonly referred to as 'stealthing'. This submission will focus on the importance of making the role of consent central to discussions about criminalising stealthing. This is then followed by a comparative discussion of jurisdictions that have criminalised stealthing, to canvass the benefits and detriments of the various criminalisation avenues.

I am a legal academic in the Faculty of Law, Monash University, and I research, publish and teach in the area of criminal law and procedure. My interest in this inquiry is in the policy and legal issues associated with improving the response of the criminal justice system to sexual offences. I consent to this submission being made public.

Stealthing

'Stealthing' –the non-consensual removal of a condom during sexual intercourse - has been described as a “disgraceful practice” that can lead to unplanned pregnancies and sexually

transmitted infections, and can cause psychological harm in victims.¹ Victims of ‘stealthing’ have reported feeling violated² and denied of autonomy.³ According to research conducted by Alexandra Brodsky, ‘stealthing’ appears to be a ‘common practice among young, sexually active people.’⁴ A Monash University study conducted in 2019, found that one in three female respondents and one in five male respondents had been subjected to stealthing.⁵

The Role of Consent

Research to date has largely focussed on the fact that stealthing can result in physical harms - such as an increased risk of unintended pregnancy and potential STI transmissions⁶ - and that it can result in psychological and emotional harm such as depression and anxiety.⁷ Although it is important to recognise the harms that are associated with stealthing, it is submitted that for the purpose of criminalisation the focus ought to be primarily on the autonomy of an individual consenting to sexual activity with the use of a condom. The central element in sexual offences is the element of consent which transforms what would otherwise be lawful conduct into a criminal offence. Consent and autonomy are inextricably linked. In terms of sexual autonomy, ‘[t]he emotional vulnerability and potential physical danger attached to sexual interaction make effective legal safeguards at least as important for sex as they are for the sale of land or the purchase of a used car ... A decent regime for safeguarding fundamental rights should place sexual autonomy at the center of attention and protect it directly, for its own sake, just as we protect physical safety, property, labor, and informational privacy, the principal interests of every human being.’⁸

¹ Brianna Snacks, "Stealthing" Should Be Classified As Rape And These Lawmakers Want Congress To Talk About It, 5 October 2017 (BuzzFeed) https://www.buzzfeed.com/briannasacks/lawmakers-call-for-stealthing-hearing?utm_term=.igMEBKrijq#.dsAvnkjXb.

² Sophie Maullin, ‘Stealthing isn’t a ‘sex trend’. It’s sexual assault – and it happened to me’ *The Guardian* 22 May 2017.

³ Alexandra Brodsky, “‘Rape-Adjacent’: Imaging Legal Responses to Nonconsensual Condom Removal’ 2017 32(2) *Columbia Journal of Gender and Law* 183, 184.

⁴ Alexandra Brodsky, “‘Rape-Adjacent’: Imaging Legal Responses to Nonconsensual Condom Removal’ 2017 32(2) *Columbia Journal of Gender and Law* 183, 185.

⁵ Latimer RL, Vodstrcil LA, Fairley CK, Cornelisse VJ, Chow EPF, Read TRH, Bradshaw CS. Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia. *PLoS One*. 2018 Dec 26;13(12):e0209779. doi: 10.1371/journal.pone.0209779. eCollection 2018.

⁶ Alexandra Brodsky, “‘Rape-Adjacent’: Imaging Legal Responses to Nonconsensual Condom Removal’ 2017 32(2) *Columbia Journal of Gender and Law* 183, 185.

⁷ Ibid

⁸ Stephen J Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*(Harvard UP 1998) 101–2.

The right to sexual autonomy is distinct from other personal rights⁹ and ‘includes the right to decide with whom one will have sexual activity, where and when one will have it, and under what additional circumstances.’¹⁰ By placing consent at the core of the discussion, the criminalisation of stealthing is justified because an individual has autonomy to consent to sexual activity under specific circumstances – in this case, the use of a condom. For example, in the Victorian decision of *DPP v Diren* the complainant ‘insisted on ... a condom ... and did not wish to participate in sexual activity ...without that condition being met.’¹¹

Bringing consent to the forefront of the discussion would also bring sexual offences in line with other criminal offences that involve consent. For example, in the area of property offences, consent for the purpose of appropriation is considered to be vitiated if it is obtained by fraud, deception or false representation. It appears to be inconsistent to suggest that autonomy and consent are of utmost importance in the context of sexual offences, and yet to suggest that if a defendant had obtained a complainant’s consent to sexual intercourse by fraud, that consent is not vitiated, unless it is to the narrow circumstances of the identity of the person or the nature of the act.¹²

Criminalising Stealthing: A Comparative Approach

In Victoria, there are a number of avenues available for the criminalisation of ‘stealthing’. If the removal of a condom vitiates consent to sexual intercourse than it may constitute the offence of rape. This is closely tied with the argument that consent and autonomy is central in the context of sexual activity, and that an individual has a right to exercise their autonomy to consent to sexual activity in specific circumstances. Further, it may be argued that consent to protected sex relates to the nature of the act, and mistakes as to the nature of the sexual act are considered to vitiate consent. Unprotected sex may be considered as fundamentally different so as to vitiate consent and render such conduct as rape.¹³

Alternatively, stealthing may be criminalised as sexual assault, however the same issues in respect of the nature of consent would arise.

⁹ Ibid.

¹⁰ Matthew Gibson, ‘Deceptive Sexual Relations: A Theory of Criminal Liability’ (2020) 40(1) *Oxford Journal of Legal Studies* 82-109.

¹¹ *DPP v Diren* [2020] VCC 61 (7 February 2020) at 16 per Judge Wraight.

¹² *Cf R v Clarence* (1888) 22 QBD 23 at 27.

¹³ See, Alexandra Brodsky, ‘“Rape-Adjacent”: Imaging Legal Responses to Nonconsensual Condom Removal’ 2017 32(2) *Columbia Journal of Gender and Law* 183.

More clearly applicable is section 45 of the *Crimes Act 1958* (Vic): procuring sexual act by fraud. This provision was the subject of a recent guilty plea in a stealthing context in the County Court decision of *DPP v Diren*.¹⁴

This is of course a lesser offence than rape. However, in Victoria, and more broadly Australia, whether stealthing can be considered as rape - remains largely unresolved. This lack of clarity can leave victims unsure as to the harm that they have suffered, and the appropriate legal avenue for redress. For police, the lack of a clear legal framework can impact on the way that such incidents are treated during the reporting stage and subsequent prosecution. There is evolving jurisprudence in cognate jurisdictions that suggests that such conduct may be prosecuted as rape.

United Kingdom

The courts in the United Kingdom have adopted an expanded approach to the concept of consent and stealthing. In the extradition hearing of *Assange v Swedish Prosecution Authority*, it was alleged that defendant had sexual intercourse with the complainant who had consented to sexual intercourse, but on the condition a condom would be used. It was further alleged, that Assange, who was aware of this precondition, did not do so and had unprotected sex with the complainant without her knowledge.

Under the relevant UK legislation, 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice.' The Court drew an analogy with earlier cases where an accused had failed to disclose his or her sexually transmittable disease. In such cases courts have traditionally held that any consent provided without knowledge of the sexually transmittable disease, would be vitiated. In the case of Assange, the Court held that consent would equally be vitiated in circumstances where an accused has acknowledged that consent has been provided on the condition that a condom be used during sexual intercourse and the accused does not do so; 'deception in relation to the use of a condom would be likely to be held to remove any purported free agreement...'¹⁵

Canada

In Canada, the appropriate mechanism for criminalising stealthing is currently subject to judicial debate. The leading authority is the Supreme Court of Canada decision of *R v Hutchinson*, in which it was held that the use of a condom was not integral to consent in the context of sexual activity.¹⁶ Following this approach, Canadian law would arguably allow for

¹⁴ *DPP v Diren* [2020] VCC 61 (7 February 2020).

¹⁵ *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 at [89] Sir John Thomas.

¹⁶ 2014 SCC 19.

a person to limit their consent to intercourse by requiring that a condom be used. The non-consensual removal of a condom would be considered as deception and analysed under the fraud provision of section 265(3)(c) of the *Criminal Code* (Can) (R.S.C., 1985, c. C-46). Such an analysis was made up of two steps: 'first, consideration of whether the complainant voluntarily agreed to the "sexual activity in question"; and second, whether this agreement was obtained in circumstances vitiating consent, such as fraud.'¹⁷

As a result of the *Hutchinson* decision a trial judge could find that in circumstances of stealthing, an individual could be guilty of sexual assault because they had 'deceived the complainant about condom use and thus that any consent she gave was vitiated by fraud because there was a significant risk of serious bodily harm through an increased risk of pregnancy for the complainant.'¹⁸

The second approach would be to find the person guilty of sexual assault on the basis that the complainant did not consent to the sexual activity; that is intercourse without a condom. This latter approach was not thought to be a strong one as it was believed that the *Hutchinson* decision had ruled out this view on the basis of the fact that 'effective condom use is a method of contraception and protection against sexually transmitted disease; it is not a sex act.'¹⁹ However, as noted above, such an approach is placing physical harm at the core of the debate rather than autonomy and consent.

In the 2020 decision of the Court of Appeal for British Columbia in *R v Kirkpatrick*²⁰ the majority suggested that the approach advanced in *Hutchinson* 'would leave the law of Canada seriously out of touch with reality, and dysfunctional in terms of its protection of sexual autonomy.'²¹ For this reason, the majority held that the complainant in *Kirkpatrick* did not consent to sex without a condom and therefore the accused could be found guilty of sexual assault without having to employ the doctrine of fraud. According to the minority judgment of Justice Bennett however, such an approach 'fails to apply binding Supreme Court of Canada authority.'²²

¹⁷ *R v Kirkpatrick* 2020 BCCA 136 at [46] per Madam Bennett.

¹⁸ Lisa Gotell and Isabel Grant, 'Does "No, Not Without a Condom" Mean "Yes, Even Without a Condom?": The Fallout from *R v Hutchinson*' (2020) 43(2) *Dalhousie Law Journal* 1.

¹⁹ *R v Kirkpatrick* 2020 BCCA 136 at [47] per Madam Bennett.

²⁰ 2020 BCCA 136.

²¹ *R v Kirkpatrick* 2020 BCCA 136 at 3.

²² *R v Kirkpatrick* 2020 BCCA 136 at [45] per Madam Bennett.

The decision of *Kirkpatrick* is one of many recent Canadian decisions²³ that attempt to determine the correct approach to the criminalisation of stealthing following the Supreme Court's decision of *Hutchinson*.

Singapore

Consistent with the approach adopted in Victoria and other jurisdictions, in 2019 Singapore introduced a new regulation relating to fraudulent sex. Prior to this amendment, consent for both sexual and non-sexual offences under the Penal Code was addressed by section 90 which states that:

'consent is not such a consent as is intended by any section of this Code —

(a) if the consent is given by a person —

(i) under fear of injury or wrongful restraint to the person or to some other person; or

(ii) under a misconception of fact,

and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;

(b) if the consent is given by a person who, from unsoundness of mind, mental incapacity, intoxication, or the influence of any drug or other substance, is unable to understand the nature and consequence of that to which he gives his consent; or

(c) unless the contrary appears from the context, if the consent is given by a person who is under 12 years of age.

This meant that that in theory, fraud in any regard would vitiate consent irrespective of whether the offence was a sexual offence or a property offence.

However, the *Criminal Law Reform Act 2019* (Singapore) introduced a limitation in respect of consent in terms of sexual offences. Pursuant to section 377CB of the *Penal Code Act* (Singapore):

(1) Despite section 90(a)(ii), a consent for the purposes of an act which is the physical element of a sexual offence is not a consent given by a person under a misconception of fact only if it is directly related to —

(a) the nature of the act, namely that it is not of a sexual nature;

(b) the purpose of the act, namely that it is not for a sexual purpose; or

(c) the identity of the person doing the act,

and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such misconception.

²³

See for example, *R v Dadmand* 2016 BCSC 1565, *R v Lupi* 2019 ONSC 3713 and *R v Rivera* 2019 ONSC 3918.

However, the imposition of this limitation is mitigated by the further introduction of section 376H - Procurement of sexual activity by deception or false representation:

- (1) Any person (A) shall be guilty of an offence if —
 - (a) A intentionally touches another person (B) or intentionally incites B to touch A or B or another person;
 - (b) the touching is sexual and B consents to the touching;
 - (c) A fraudulently obtains B's consent by means of deception or false representation practised or made by A for that purpose;
 - (d) the deception or false representation mentioned in paragraph (c) relates to —
 - (i) the use or manner of use of any sexually protective measure; or
 - (ii) whether A or another person whom B is incited to touch is suffering from or is a carrier of a sexually transmitted disease; and
 - (e) A knows or has reason to believe that the consent was given in consequence of such deception or false representation.
- (3) For the purposes of subsection (1) —
 - (a) a person makes a false representation if it is untrue or misleading, and that person knows that it is, or might be, untrue or misleading;
 - (b) a representation may be express or implied; and
 - (c) a "sexually protective measure" means —
 - (i) where B is female, a device, drug or medical procedure to prevent pregnancy or sexually transmitted diseases as a result of sexual intercourse; or
 - (ii) where B is male, a device, drug or medical procedure to prevent sexually transmitted diseases as a result of sexual intercourse.

This framework provides clarity about which misconceptions of fact are relevant in the context of sexual offences and expressly criminalises stealthing. By expressly criminalising stealthing complainants are provided with clarity in terms of the harm that they have suffered with both appropriate terminologies to label the harm suffered, and legal avenue for redress. It therefore provides clarity around what constitutes a deception for this purpose, which is currently missing from section 45 of the *Crimes Act 1958* (Vic), and does not rely on the courts to fill the gap.

Conclusion

It seems likely that stealthing may be prosecuted pursuant to section 45 of the *Crimes Act 1958* (Vic), procuring sex act by fraud. There is, however, limited jurisprudence on this to date, and it may be prudent to expressly criminalise this conduct in the provision. Further,

section 45 of the *Crimes Act 1958* (Vic) arguably does not reflect the gravity of the conduct, and does not sufficiently protect the autonomy of complainants.

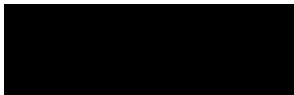
This raises the question of whether stealthing should be prosecuted as the more serious offence of rape. As the law currently stands in Victoria, there is considerable ambiguity whether deception as to condom use would vitiate consent.

In light of the above I would recommend:

1. That the central focus for the criminalisation of sexual offences ought to be on individual consent and autonomy, with consideration of physical, mental and psychological harms complementary to this primary focus.
2. In line with evolving Canadian and UK jurisprudence, if person A consents to sexual intercourse with a condom based only on the fact that person B will wear a condom during intercourse, person A has not consented to the unprotected intercourse. This ought to be expressly incorporated into the existing rape framework in section 38 of the *Crimes Act 1958* (Vic).
3. In the alternative, in line with the Singapore approach, section 45 of the *Crimes Act 1958* (Vic) should be reformed to expressly criminalise stealthing.

Thank you for considering my submission. I am happy to provide further information on any of these, or associated issues.

Yours Faithfully,



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