

Issues paper 4.73 - Should the list of circumstances in which there is no consent include stealthing?

One of the specific matters our Terms of Reference ask us to consider is the practice of stealthing. This occurs where person A consents to a sexual act on the basis that person B will use a condom but, without telling person A, person B does not do so or removes the condom part way through the sexual act. Of a similar nature are cases in which person B sabotages or tampers with the condom in some way, so that it no longer functions properly. In each of these cases person A lacks relevant information about the sexual act which is taking place: they believe they are engaging in sex with a functional condom when they are not. There is an argument to be made that this lack of information undermines their consent. In this regard, it is important to note that not only does such behaviour violate a person's sexual autonomy and bodily integrity, but it may create a risk of pregnancy or the transmission of a sexually transmissible infection (STI).

As a preliminary matter, we note that concerns have been expressed about the use of the term stealthing. Some people consider that it glamourises or minimises the seriousness of the issue, while others are concerned that it is an emotive and stigmatising term. Consequently, it has been suggested that it would be preferable to use a term such as 'non-consensual condom removal' instead. While we acknowledge these concerns, we use the term stealthing as it is the term that is used in our Terms of Reference. It is also a term that is commonly used in the community.

We welcome submissions on whether we should continue to use this term in our future publications.

While there is little research about how common this practice is, a 2017 study of more than 2000 people who visited the Melbourne Sexual Health Centre over three months from December 2017 found that 32% of women and 19% of men had experienced stealthing.

There appears to be a particularly high incidence of this behaviour in the sex industry. For example, in its submission to the VLRC's review of sexual offences, Project Respect informed the VLRC that 14% of women it had met during outreach in brothels in 2018–19 experienced the removal of a condom during a booking. It claimed that 'this form of sexual assault is increasing exponentially'. Despite the prevalence of such behaviour, research suggests that it is not commonly reported to the police.

It is unclear whether stealthing is covered by the *Code's* consent provision and in particular, whether it is covered by the list of circumstances in which there is no consent. In its preliminary submission, the ODPP noted that it was not aware of any WA cases which had raised this issue, but suggested that it would arguably 'be open for the State to prosecute an accused who had removed or deliberately damaged a condom (where the complainant had consented to sexual activity with a condom) on the basis of the current *Code* definition of "consent"'.

This issue was addressed by the Canadian Supreme Court in *R v Hutchinson*, which considered the application of consent and fraud provisions similar to those in WA. Different approaches were taken by the majority and minority judges. The majority held that where the complainant participated in a sexual activity on the basis that a condom would be used, but it was not used, they have nevertheless consented. This is because they have agreed to the physical act (for example, vaginal or anal intercourse). The use of a condom is irrelevant to this issue: it simply relates to the manner in which the act is performed (for example, with or without birth control). However, where the accused was dishonest about the condom use,

and the sexual activity involved a significant risk of serious harm (which includes pregnancy), their consent is negated by fraud.

By contrast, the minority did not think there had been any consent in these circumstances. They were of the view that ‘when a woman agrees to have sexual intercourse with a condom, she is consenting to a particular sexual activity. It is a different sexual activity than sexual intercourse without a condom’. They considered such an act to be non-consensual regardless of the risk of harm.

The approach has also been taken by the UK court in *Assange v Swedish Prosecution Authority*:

It would plainly be open to a jury to hold that, if [the complainant] had made clear that she would only consent to sexual intercourse if Mr Assange used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom without her consent.

Some support for this approach can also be seen in the Queensland case of *R v RAD* where the complainant said that she told the accused to put on a condom. He refused to do so but had sexual intercourse with her anyway. He was charged with rape on the basis that the complainant had not consented to ‘sexual activity without a condom’. The prosecution argued that she did not consent or that her consent was not free and voluntary. His conviction was not overturned on appeal.

The NSWLRC noted in its review that there ‘is broad acceptance in submissions and survey responses, supported by relevant academic literature and in the media, that where a person has agreed to sexual activity involving use of a condom, and the other person engages in “stealthing” ..., then that other person’s conduct should be a crime’. The NSWLRC that it should be expressly addressed in legislation. It was of the view that this would:

- encourage people to report cases of stealthing to the police
- assist police and prosecutors when deciding whether to investigate and prosecute stealthing cases
- assist community education initiatives aimed at preventing stealthing.

The NSWLRC recommendation was accepted by the NSW Government, and included the following provision in its section defining consent:

A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.

Example – A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.

We note that it has been included as a negative indicator of consent rather than as a circumstance which negates consent.

The VLRC also considered this matter in its review of sexual offences. While it similarly concluded that stealthing should be criminalised, it instead recommended that it be added to the list of circumstances in which a person does not consent. This recommendation was accepted by the Victorian Government, which enacted a provision which states that a person does not consent to a sexual activity if:

the person engages in the act on the basis that a condom is used and either—

- before or during the act, any other person involved in the act intentionally removes the condom or tampers with the condom; or
- the person who was to use the condom intentionally does not use it.

The ACT has also recently added stealthing to its list of circumstances, enacting a provision which states that a person does not consent if they participate in a sexual act 'because of an intentional misrepresentation by another person about the use of a condom'. A similar provision has recently been passed by the South Australian Parliament and is awaiting assent.

By contrast, the QLRC did not recommend amending Queensland's consent provision to specifically address the issue. While not made explicit, it appears that this was due to a belief that the conduct was already covered by Queensland's consent provisions. A similar view was expressed by the Law Society of WA in its preliminary submission.

A different approach was taken by the Queensland Taskforce. It stated that the 'overwhelming feedback that the Taskforce received in consultation forums across Queensland and in submissions was that the practice of stealthing amounts to sex without consent, that is, rape'. It was of the view that legislation that expressly addressed the issue would clarify the law and would 'send a message to the community that the conduct constitutes a crime. This may encourage both victims to make a complaint about this conduct and police to investigate it, resulting in more such charges progressing through the courts'. It recommended that Queensland adopt the NSW approach.

Magenta in its preliminary submission argued that removing a condom during sex is a 'special type of sexual offending', which is not as severe as sexual penetration without consent but is more severe than indecent assault. Consequently, it recommended the enactment of a specific offence to address such conduct.

By contrast, the WAAC opposed the creation of a separate offence in its preliminary submission. It expressed concern that 'creating a separate offence of stealthing lacks a consistent principle that underlies it and could be used as an over-criminalisation (and unnecessary stigmatisation) of an issue that can already be prosecuted under the Criminal Code'. It noted that the purported justification of the ACT's reforms in this area was the risk of STI transmission and unplanned pregnancy. If it is the case, it queried why the reforms focus solely on condom use, rather than on other more effective forms of birth control or STI prevention. It was of the view that the law was using HIV stigma to justify criminalisation of such conduct, and that 'laws targeting stealthing are particularly gendered and incapable of encompassing the attitudinal factors salient in relations among gay and bisexual men'.

The creation of a new offence was considered by the VLRC, which found that:

There may be advantages to a separate offence. Some people may consider this a different type of harm to rape and sexual assault. People who experience this form of sexual violence could find labels of 'rape' or 'sexual assault' stigmatising. Standard sentencing requirements for rape and sexual assault would limit sentencing options. However, there are disadvantages to a separate offence. Creating a separate offence can suggest that this behaviour is less serious than rape or sexual assault and fails to properly recognise what consent means. Further, we are conscious of the challenges associated with creating new sexual offences, including issues with interpretation and possible appeals.

In light of these disadvantages, the VLRC did not recommend the creation of a separate offence. This approach was also rejected by the NSWLRC, which was of the view that as

'English authority provides good reason for thinking that stealthing is already caught by the existing provisions, it is preferable simply to clarify that that is so, rather than to create a new offence'.

Should stealthing or a broader conception of it be addressed in the Code?

If stealthing is to be addressed in the Code, various matters will need to be determined.

First, it will need to be decided whether to include the provision about stealthing in the list of circumstances that do not constitute consent, address it as a negative indicator of consent as part of the general definition of consent, or create a separate offence? This issue is discussed above.

Secondly, it will need to be decided whether the relevant provision should only apply to condoms, or whether it should extend to all measures people use to protect themselves against pregnancy or STIs?

In this regard, the NSWLRC initially proposed that the relevant provocation refer to 'a device that prevents transmission of sexually transmitted infections'. This proposal was criticised for 'being wordy or unclear', and for potentially increasing stigmatisation of people with STIs. The NSWLRC noted that the intent of the provision was target stealthing. Consequently, in its Final Report it instead recommended using the expression 'sexual activity using a condom'.

By contrast, the VLRC recommended that the provision should apply to all cases in which a person 'consented to sexual activity with a device to prevent sexually transmitted infections or contraceptive device'. It was of the view that the language used in the provision 'should be inclusive of the different devices people use to protect themselves during sexual activities. People may use condoms to prevent STIs, not just for contraception. People may also use other protective devices such as dental dams'. However, this recommendation was not accepted by the Victorian Government. Instead, it enacted a provision relating solely to the use of condoms, as has the ACT.

An example of a broader approach is provided by the Singapore Penal Code. It includes a provision that states that Person A fraudulently obtains Person B's consent if they make a deceptive or false representation about 'the use or manner of use of any sexually protective measure'. A 'sexually protective measure' is defined to mean:

- 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.

Thirdly, if the provision focuses on condoms, should it only refer to condom use (the ACT and NSW), or should it also explicitly refer to condom removal or tampering (Victoria)? What about other forms of contraceptive sabotage, such as tampering with a person's contraceptive pill?

In its preliminary submission, Sexual Health Quarters recommended that the provision be sufficiently broad to cover all forms of contraceptive sabotage, noting that:

Contraceptive sabotage as a coercive tactic is a form of intimate partner violence. Someone who has had any form of contraception tampered with should be protected legally, whether the contraceptive is Long-Acting Reversible Contraception (LARC), the contraceptive pill, emergency contraception, or barrier contraception... While 'stealthing' should be criminalised in WA, the law needs to include tampering with, hiding, or destroying someone's birth control method in addition to non-consensual removal of condoms and other barrier contraceptive methods during sex. This should include the use of coercion and/or violence to prevent a person's access to emergency contraception and medical termination.

In this regard, the Centre for Women's Safety and Wellbeing noted in its preliminary submission that:

there is an inextricable connection between reproductive coercion and intimate partner sexual violence. Intimate partner sexual violence refers to sexual activity without consent in heterosexual and non-heterosexual intimate [relationships]. It includes ... tactics used to control decisions around reproduction (e.g., refusing to wear a condom).

Research highlights that intimate partner violence interferes with reproductive and sexual autonomy through pregnancy promotion, contraceptive sabotage and pregnancy outcome control.

While contraceptive sabotage and pregnancy outcome control are self-explanatory, pregnancy promotion refers to the ignoring or disregard by a sexual partner for reproductive preferences through behaviours that prevent effective contraceptive use, including the removal or sabotage of contraceptive devices (i.e., vaginal rings and intrauterine devices).

Research suggests that domestic and family violence does not facilitate safe negotiation of contraception or sex, reproductive coercion often co-occurs with other violent controlling behaviours, and women may consent to sexual activity to prevent the escalation of physical violence...

It is important to ensure that any person engaging in sexual activity can indicate that their consent hinges upon the use of a condom (or other safer sex paraphernalia) irrespective of whether their intended use is to prevent the transmission of sexually transmitted diseases, or for reason of reproductive control.

Fourthly, should a provision addressing stealthing only apply to intentional misrepresentations about the relevant matter, or should it apply to all false representations or mistaken beliefs?

In this regard, we note that concern has been expressed about criminalising unintentional contraceptive failures. It has been noted that contraceptives 'can fail for a variety of reasons so the language around vitiation of consent needs to ensure that people are not unfairly targeted due to improper use. Incorrect condom use or engaging in behaviours that decrease contraceptive efficacy without intent could unintentionally be criminalised'.

Fifthly, should a provision addressing stealthing require proof that the conduct involved a significant risk of serious harm, as is the case in Canada, or should proof of the relevant act be sufficient?

A full discussion of these issues is contained in Discussion Paper vol 1 paras 4.147–4.174.