



GRIFFITH JOURNAL OF  
**LAW & HUMAN DIGNITY**



# GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

---

*Editor-in-Chief*

Lisa Neubert

*Executive Editors*

Elizabeth Danaher

Danyon Jacobs

Dillon Mahly

*Editors*

Vanessa Antal

Stuart Brown

Tara Byrne

Ana-Catarina De Sousa

Lenett Hillman

Dylan Johnson

Iva Markova

Olivia Morgan-Day

Samantha Reay

Natasha Robbemand

*Consulting Executive Editor*

Dr Allan Ardill

---

Volume 7 Issue 1

2019

Published in September 2019, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

## CONTENTS

---

ANNA KERR	<i>CUPS OF TEA, JOYRIDING AND SHAKING HANDS – THE VEXED ISSUE OF CONSENT</i>	1
ANDREW DYER	<i>YES! TO COMMUNICATION ABOUT CONSENT; NO! TO AFFIRMATIVE CONSENT: A REPLY TO ANNA KERR</i>	17
ANNA KERR	<i>A REPLY TO ANDREW DYER’S RESPONSE</i>	57
ANDREW DYER	<i>THE DANGERS OF ABSOLUTES – AND A FEW OTHER MATTERS: A RESPONSE TO ANNA KERR’S REPLY</i>	64
ERIN LEACH	<i>‘DOING HER TIME’: A HUMAN RIGHTS ANALYSIS OF OVERCROWDING IN BRISBANE WOMEN’S CORRECTIONAL CENTRE</i>	76
JULIAN R MURPHY	<i>HOMELESSNESS AND PUBLIC SPACE OFFENCES IN AUSTRALIA – A HUMAN RIGHTS CASE FOR NARROW INTERPRETATION</i>	103
ZEINA ABU-MEITA	<i>INTERNATIONAL LAW AND ITS DISCONTENTS: STATES, CYBER-WARFARE, AND THE PROACTIVE USE OF TECHNOLOGY IN INTERNATIONAL LAW</i>	128
BEN WARDLE	<i>THE REVOLUTIONARY POTENTIAL OF LAW SCHOOL</i>	147
PETER MCLAREN	<i>TEACHING AGAINST THE GRAIN: A CONVERSATION BETWEEN EDITORS OF THE GRIFFITH JOURNAL OF LAW &amp; HUMAN DIGNITY AND PETER MCLAREN ON THE IMPORTANCE OF CRITICAL PEDAGOGY IN LAW SCHOOL</i>	173

# CUPS OF TEA, JOYRIDING AND SHAKING HANDS — THE VEXED ISSUE OF CONSENT

ANNA KERR\*

*This manuscript is the first of a four-piece conversation between Anna Kerr and Andrew Dyer, on the topic of affirmative consent, published in this issue. Our Journal has been invested in the conversation surrounding a shift toward communicated consent, and the ‘Yes means yes’ movement. As a Board we felt that this reply series would be an important and timely contribution to consent laws in Australia.*

## CONTENTS

I	THE ISSUE?.....	2
II	‘YES MEANS YES’ IN OTHER JURISDICTIONS.....	3
III	WHY ANYTHING LESS THAN YES IS NOT ENOUGH.....	4
IV	DO WE HAVE CLEARER BOUNDARIES OVER THE USE OF CARS THAN WOMEN’S BODIES? .....	6
V	GENDERED NATURE OF THE DEBATE.....	6
VI	CONSENT AFTER PERSUASION? SEXUAL COERCION .....	8
VII	OPENING THE FLOODGATES? .....	9
IX	THE IMPORTANCE OF COMMUNITY EDUCATION.....	10
X	CONCLUSION.....	12

---

\* Anna Kerr is a founder of the Feminist Legal Clinic Inc, which undertakes research and law reform work focused on advancing the human rights of women and girls. She has worked as a solicitor for over 25 years and as a sole practitioner is currently a member of Legal Aid's domestic violence practitioner scheme. She also does some casual teaching in criminology and is the mother of four children. Sincere thanks and acknowledgments to Sophie Duffy and Madeleine Bosler who assisted with the research for this article.

## I THE ISSUE?

The NSW Law Reform Commission is currently conducting a review into consent regarding sexual assault. The review is a response to community outrage over the notorious case *R v Lazarus*,<sup>1</sup> where at retrial Judge Robyn Tupman found Saxon Mullins had not asked Lazarus to stop and 'did not take any physical action to move away'.<sup>2</sup> The NSW District Court Judge found Lazarus had a genuine and honest belief, based on reasonable grounds, that Mullins was consenting to anal sex even though 'in her own mind'<sup>3</sup> she was not. He was acquitted of the crime at retrial.

Currently, the *Crimes Act 1900* (NSW) s 61HE(2) defines consent as free and voluntary agreement to sexual intercourse. The introduction of this statutory definition was intended to promote communication around consent and acceptable standards of sexual behaviour.<sup>4</sup> The current statutory framework imputes knowledge of non-consent if the defendant has no reasonable grounds for believing the other person has consented.<sup>5</sup> To make such a finding, all circumstances of the case must be considered, including any steps taken by the accused person to ascertain whether the other person consents.<sup>6</sup>

Unfortunately, these provisions are insufficient. As the Lazarus case highlights, courts are empowered to find a party has not consented to sexual intercourse, but nonetheless acquit given lack of knowledge or a 'reasonable mistake'.<sup>7</sup> Despite various safeguards contained in the existing legislation, Lazarus was able to overturn his conviction by claiming that he interpreted the complainant's body language as consent.<sup>8</sup> Thus, this paper argues that Section 61HE(2) of the NSW Crimes Act must be strengthened to require positive confirmation of consent.

---

<sup>1</sup> [2017] NSWCCA 279 ('*Lazarus*').

<sup>2</sup> *Ibid* 110.

<sup>3</sup> *Ibid* 108.

<sup>4</sup> James Monaghan and Gail Mason, 'Reasonable reform: Understanding the knowledge of consent provision in section 61HA of the Crimes Act 1900 (NSW)' (2016) 40(5) *Criminal Law Journal* 246, 249.

<sup>5</sup> *Crimes Act 1900* (NSW) s 61HE(3)(c).

<sup>6</sup> *Ibid* s 61HE(3)(d).

<sup>7</sup> Kathleen Calderwood, 'Luke Lazarus Case Highlights the Need to Change Our Conversation about Sexual Consent' *ABC News* (online, 8 June 2017) <<https://www.abc.net.au/news/2017-05-06/luke-lazarus-case-should-make-us-reconsider-consent/8502144>>.

<sup>8</sup> *Lazarus* (n 1).

The use of the defence of ‘mistaken belief on reasonable grounds’ has the inevitable outcome that ‘reasonable grounds’ are the behaviours of the alleged victim.<sup>9</sup> Thus effectively placing victims on trial and making their actions, rather than those of the defendant, subject to the closest scrutiny.<sup>10</sup> Following the Lazarus case, it appears necessary to amend s 61HE to require evidence of a positive indication of consent to refute a charge of sexual assault. This would reduce the scope for juror misinterpretation and manipulative defenses based on knowledge of consent, while upholding an important educative role for the community.

The majority of preliminary submissions to the NSW Law Reform Commission’s (NSWLRC) review into consent in sexual assault cases support the adoption of an affirmative model of consent. In other words, ‘Yes means yes’, where anything less is insufficient in defending a charge of sexual assault. This is consistent with the United Nations recommendation that a definition of sexual assault ‘[r]equires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting’.<sup>11</sup> We now await publication of the final submissions and NSWLRC’s report.

## II ‘YES MEANS YES’ IN OTHER JURISDICTIONS

Other jurisdictions have already implemented ‘Yes means yes’. In Tasmania, a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused did not take reasonable steps to ascertain that the complainant was consenting.<sup>12</sup> Before relying on the defence, the accused will need to demonstrate positive evidence of the reasonable steps taken to ascertain consent.<sup>13</sup> In Victoria, jury directions stipulate

---

<sup>9</sup> *Crimes Act 1900* (n 5).

<sup>10</sup> See Julia Quilter, ‘Re-framing the Rape Trial: Insights from Critical Theory About the Limitations of Legislative Reform’ (2011) 35(1) *Australian Feminist Law Journal* 23.

<sup>11</sup> Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, UN Doc ST/ESA/329 (July 2009) 26 [3.4.3.1].

<sup>12</sup> *Criminal Code Act 1924* (Tas) s 14A(1)(c).

<sup>13</sup> Helen Cockburn, ‘The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials’ (PhD Thesis, University of Tasmania, 2012) 6.

that the fact the alleged victim did not say or do anything indicating free agreement to a sexual act is enough to show that act took place without that person's free agreement.<sup>14</sup>

The Canadian Supreme Court has also limited a mistaken belief to the immediate and affirmative communication of consent.<sup>15</sup> *R v Ewanchuk*,<sup>16</sup> established that

[F]or the purposes of mens rea, consent is now established based on the accused's perception of the complainant's words or actions and not on the accused's perception as to the complainant's desire for sexual conduct.<sup>17</sup>

The principle adopted in the case is that 'silence, passivity and ambiguity do not connote consent'.<sup>18</sup> This enshrined there that there must be 'an affirmative unequivocal indication of consent to sexual touching'<sup>19</sup> with consent provided through words or conduct. The defence of 'mistaken consent' is still available, but 'only a mistaken belief that the complainant communicated consent will raise a reasonable doubt as to mens rea — not a mistaken belief that the complainant was consenting'.<sup>20</sup>

### III WHY ANYTHING LESS THAN YES IS NOT ENOUGH

There must be a positive obligation before engaging in sexual intercourse to take active steps to ascertain consent. In other words, there must be explicit permission to have sex. Where no action is taken to determine the existence of consent, and the complainant has not said or done anything to indicate consent, it should be assumed that there was no consent. Silence should not be construed as consent given 'the variety of reasons women are not necessarily empowered to express dissent'.<sup>21</sup> Equally, consent is not unequivocal, and can be withdrawn at any time.<sup>22</sup> The requirement of an affirmative consent standard

---

<sup>14</sup> *Crimes Act 1958* (Vic) s 37.

<sup>15</sup> *Criminal Code*, RSC 1985, s C-46, s 153.1(2).

<sup>16</sup> [1999] 1 SCR 330.

<sup>17</sup> Elaine Craig, 'Ten Years after Ewanchuk the Art of Seduction is Alive and Well: An Examination of The Mistaken Belief in Consent Defence' (2009) 13(3) *Canadian Criminal Law Review* 247, 251.

<sup>18</sup> *Ibid* 252.

<sup>19</sup> *Ibid* 258.

<sup>20</sup> *Ibid* 251.

<sup>21</sup> Helen Cockburn (n 13) 27, quoting Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of the Law* (Harvard University Press, 1998) 272.

<sup>22</sup> *Crimes Act 1900* (NSW) s 61HA(d).

is likely to assist women in asserting their legal right in 'situations where the existence of coercive factors prevents the victim from rejecting or avoiding sex'.<sup>23</sup> Consent given under coercion, duress or peer pressure does not constitute consent.<sup>24</sup> The onus cannot rest on the complainant to debunk the perpetrator's defence that the perceived consent was given.

The current law does not require that consent must have been clearly communicated, which leaves consent open to interpretation by the perpetrator rather than providing a definitive standard protecting victims. The law as it stands tells women that whilst no means no, everything else might mean maybe, or at least be sufficient for the accused to claim they had reasonable grounds for believing there was consent. When 'one in five young people between the ages of 12 and 20 believe it's "normal" for a male to pressure a female into sexual acts',<sup>25</sup> consent should be requested rather than interpreted. A research survey of young people around Australia 'showed that 22 per cent of participants believed it's a female's responsibility to make it very clear when sex isn't wanted'.<sup>26</sup> Rather than continuing to place responsibility on women, those initiating sexual intercourse should be responsible for ensuring consent is communicated positively, eliminating any misinterpretation of behaviour.

The scope for interpretation of behaviour is further complicated by the attitudes of jurors; '[j]urors do not (because they cannot) make objective judgements about consent and guilt based on the facts presented to them in court'.<sup>27</sup> Jurors may be influenced by rape myths and victim blaming narratives and may look for overt signs the complainant was not consenting. If the complainant's resistance was not active, a juror may query

---

<sup>23</sup> Helen Cockburn (n 13) 27. See also Moira Carmody, Georgia Ovenden and Amy Hoffman, "The program really gives you skills for dealing with real life situations": Results from the evaluation of the Sex + Ethics Program with young people from Wellington, New Zealand' (Research Report, Centre for Educational Research, University of Western Sydney, June 2011).

<sup>24</sup> See *Crimes Act 1900* (NSW) s 61HE(5).

<sup>25</sup> Luke Cooper, 'One in Five Young People Think it's OK for a Man to Pressure a Women into Sex' *Huffington Post* (online, 23 February 2017) <[https://www.huffingtonpost.com.au/2017/02/22/one-in-five-young-people-think-its-okay-for-a-man-to-pressure-a\\_a\\_21719078/](https://www.huffingtonpost.com.au/2017/02/22/one-in-five-young-people-think-its-okay-for-a-man-to-pressure-a_a_21719078/)>, discussing *The Line, Sex, Love and Gender Roles: Views on 'what's ok' and 'What's not' in sex, dating and relationships* (Research Report, May 2017).

<sup>26</sup> *Ibid.*

<sup>27</sup> Natalie Taylor, 'Juror attitudes and biases in sexual assault cases' (Research Paper No 344, Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, August 2007) 6.



'how a defendant could reasonably be expected to know that the complainant was not consenting'.<sup>28</sup> An affirmative model of consent may correct these kinds of juror attitudes.

#### IV DO WE HAVE CLEARER BOUNDARIES OVER THE USE OF CARS THAN WOMEN'S BODIES?

To avoid this outcome in future, one solution is shifting the evidential burden of consent onto the defendant with clarification that acquiescence is insufficient. If someone took your property without your express permission, the onus should not be on you to prove that this is not what you wanted. The existing framework for larceny requires that where the accused asserts a claim of right to the taking of property, they then bear the evidential burden to raise this as a possibility.<sup>29</sup> This does not seem to attract the same outcry in relation to reversing the onus of proof or eroding the element of mens rea as it does in the case of sexual assault.

Indeed, the offence of 'taking a conveyance without consent of owner'<sup>30</sup> does not evoke the same debate over the element of consent. Even if an owner leaves their car unlocked with the keys in the ignition, they are unlikely to be subjected to harrowing cross-examination that places blame upon them. Furthermore, it is accepted that a criminal transgression has occurred even if a vehicle is returned unscathed after a quick joy ride. It would seem society is clearer about its boundaries in relation to the use of someone's car than the use of a woman's body. As with consent in these crimes, it should not be possible for a defendant to escape conviction based purely on the simple defence of 'mistaken belief on reasonable grounds' in circumstances where no positive consent was given.<sup>31</sup>

#### V GENDERED NATURE OF THE DEBATE

Notably, current support for adopting a positive model of consent is gendered and this is illustrated in the preliminary submissions to the NSWLRC which were made by

---

<sup>28</sup> Ibid 3.

<sup>29</sup> Elyse Methven and Ian Dobinson, Submission No PC077 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018) 18-19, citing *R v Fuge* (2001) 123 A Crim R 310, 314-315.

<sup>30</sup> *Crimes Act 1900* (NSW) s 154A.

<sup>31</sup> Ibid s 61HE(3)(c).

academics or on behalf of services focused on victim's interests and in most cases were signed by women. In contrast, submissions that either favoured retaining the status quo or explicitly opposed to strengthening the requirement for positive consent almost all contained at least one male signatory, with few exceptions. These submissions also appeared to represent legal establishment interests with a focus on defendant rights.<sup>32</sup> It is impossible to ignore the gendered nature of this debate, with patriarchal interests fighting a strong rear-guard action against the outrage of women working in community services.<sup>33</sup>

Sexual assault continues to be a gendered crime in which the overwhelming majority of perpetrators are male and victims are female,<sup>34</sup> and attempts to shy away from recognising this reality should be resisted. Women are four and a half times as likely to be the victim than men.<sup>35</sup> Sexual assault is gender-based violence about power and control and is an abuse of a woman's human rights. Women remain devalued and subordinated in society and the prevalence of sexual violence ensures that women experience fear throughout their lives. Women are constantly subjected to unwanted sexual behaviour. One in six women in Australia have experienced sexual assault,<sup>36</sup> with young women aged 18-24 the most likely victims.<sup>37</sup> Problems associated with how the justice system deals with sexual assault include 'the extremely low level of the reporting of sexual assault, a high level of attrition of cases following an initial report and a low level

---

<sup>32</sup> See, eg, NSW Bar Association, Submission No PC047 to New South Wales Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018); The Law Society of NSW, Submission No PC073 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (27 June 2018).

<sup>33</sup> Equitable Briefing Working Group, *Review of the Application in New South Wales of the Equitable Briefing Policy of the Law Council of Australia* (Report August 2015) 2-3; New South Wales Bar Association, Submission to *the National Inquiry into Sexual Harassment* (18 February 2019) 13-15; see generally Jerome Doraisamy, 'Turning targets into quotas may be necessary for equality at the bar', *Lawyers Weekly* (online, 3 October 2018) <<https://www.lawyersweekly.com.au/politics/24165-turning-targets-into-quotas-may-be-necessary-for-equality-at-the-bar#!/comment-comment=11323>>; Grace Ormsby, 'NSW bar stats give insight into female barristers', *Lawyers Weekly* (online, 10 October 2018) <<https://www.lawyersweekly.com.au/wig-chamber/24214-nsw-bar-stats-give-insight-into-female-barristers>>.

<sup>34</sup> Australia's National Research Organisation for Women's Safety, 'Violence against women: Additional Analysis of the Australian Bureau of Statistics Personal Safety Survey' (Research Report, Horizons, October 2015), 50.

<sup>35</sup> *Ibid.* 50.

<sup>36</sup> *Ibid.* 48.

<sup>37</sup> *Ibid.* 52.

of conviction following trial'.<sup>38</sup> This indicates a systemic failure to protect women from male violence and an urgent need for not only legislative reform but also community education to address a widespread culture of victim blaming.

#### VI CONSENT AFTER PERSUASION? SEXUAL COERCION

Sexual violence is a gendered crime and is characterised by inherent power inequalities. In this context, it is essential to consider the question of when 'persuasion' becomes duress or when coercion has eroded consent. In their preliminary submission to the NSW LRC Review, the NSW Bar Association's assertion that 'consent after persuasion is still consent'<sup>39</sup> is reminiscent of comments on the acceptability of 'rougher than usual handling'<sup>40</sup> and leaves ambiguous what constitutes acceptable persuasion. Does this refer to flowers and a massage? Or instead does persuasion consist of financial incentives, veiled threats, bargaining and relentless badgering?

Currently, only threats of physical violence negate consent.<sup>41</sup> However, threats of violence that are not proximate, including within a context of domestic violence, do not currently negate consent.<sup>42</sup> Nor are patterns of coercive control within relationships<sup>43</sup> or economic coercion such as fraud<sup>44</sup> recognised as negating consent. There is a need to take account of power imbalances between the parties, a history of abuse or other coercive elements such as economic duress in assessing whether consent is freely given.

This would capture not only coercive activity in the context of sex work<sup>45</sup> but in the workplace generally and any other circumstances where there is an imbalance in

---

<sup>38</sup> Lesley Townsley and Ian Dobinson, 'Sexual assault reform in New South Wales: Issues of consent and objective fault' (2008) 32(3) *Criminal Law Journal* 152, 152, citing Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (Report, December 2005) 8-18.

<sup>39</sup> NSW Bar Association (n 32) 2.

<sup>40</sup> Lynne Spender, 'Legal studies: Justice Bollen, community attitudes, the power of judges' (1993) 18(2) *Alternate Law Journal* 90, 90, quoting *R v David Norman Johns* (Supreme Court of South Australia, Bollen J, 26 August 1992).

<sup>41</sup> *Crimes Act 1900* (NSW) s 61HE(5)(c). See also *R v Aiken* [2005] NSWCCA 328.

<sup>42</sup> Rape & Domestic Violence Services Australia, Submission No PC088 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018) 17.

<sup>43</sup> Australia's National Research Organisation for Women's Safety, Submission No PC0105 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (13 July 2018) 8.

<sup>44</sup> Sex Workers Outreach Program, Submission No PC0103 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (11 July 2018) 11.

<sup>45</sup> Feminist Legal Clinic Inc. supports adoption of the Nordic Model in relation to the regulation of prostitution.

bargaining power with women vulnerable to the kind of *#MeToo* experiences currently being widely reported.<sup>46</sup> This would ensure ‘Yes means yes’, except when there is a context of duress or coercion, in which case it means ‘Not really’. There is a need not only for an affirmative consent model but also an expanded list of factors that negate consent.

## VII OPENING THE FLOODGATES?

If all forms of coercive sex are criminalised, will the legal system be overwhelmed and the prisons bursting with a sizable portion of the male population? As a community, we cannot progress towards ideal standards of behaviour if we forever shy away from articulating these standards for fear of opening the floodgates. Currently less than a fifth of all sexual assaults are reported to the police,<sup>47</sup> and it is likely most low-level assaults, whether sexual or just common assault, will continue to go unreported.

As Germaine Greer points out in her recent musings on the subject, most rapes are ‘just lazy, careless and insensitive’ and don’t involve injury.<sup>48</sup> She distinguishes between violent rapes causing significant injury and banal non-consensual sex that is occurring more widely. Her suggestion is that the latter crime should be punishable by 200 hours community service and perhaps an ‘r’ tattooed on the perpetrator’s hand, arm or cheek.<sup>49</sup>

Some organisations suggest introducing a lesser charge for cases involving mere recklessness in relation to consent, as in the case of intoxicated perpetrators.<sup>50</sup> Certainly many offences would be more readily prosecuted by applying an objective standard of proof rather than insisting on strictly establishing mens rea in relation to consent. Indeed, there is an argument that a conviction for a less serious offence would be preferable to the current situation where most cases of non-consensual sex fail to be reported,<sup>51</sup> let alone result in conviction.

---

<sup>46</sup> Christina Pazzanese and Colleen Walsh, ‘The women’s revolt: Why, now and where to’ *The Harvard Gazette* (online, 21 December 2017) <<https://news.harvard.edu/gazette/story/2017/12/metoo-surge-could-change-society-in-pivotal-ways-harvard-analysts-say/>>.

<sup>47</sup> Australian Bureau of Statistics, *Personal Safety Survey Australia: Reissue* (Catalogue No 4906.0, 21 August 2006).

<sup>48</sup> ‘Germaine Greer: “Rape is rarely a violent crime” and four other controversial quotes’, *The Week* (online, 31 May 2018) <<https://www.theweek.co.uk/93968/germaine-greer-rape-is-rarely-a-violent-crime-and-four-other-controversial-quotes>>.

<sup>49</sup> *Ibid.*

<sup>50</sup> See New South Wales Bar Association (n 39).

<sup>51</sup> Australian Bureau of Statistics (n 47).

Greer suggests that in cases of obviously violent rape, courts should concentrate on the degree of violence rather than having lengthy trials in which women are humiliated for long periods being cross-examined on often uncontentious questions of consent.<sup>52</sup> This is in line with suggestions that we adopt a new offence which eliminates consent as an element and requiring only that harm be established.<sup>53</sup> However, this raises questions about the scope for prosecution of sexual assault which does not include physical violence, and the extent to which emotional harms such as a victim's distress, anger and grief should be incorporated into the definition of harm. If excluded, this clearly sends a problematic message — that there is no crime if there is no physical harm done to the victim.<sup>54</sup>

Removing the element of consent altogether therefore does not constitute the solution. While there is a need not to trivialise more serious violent crimes by grouping them with milder instances of non-consensual sex, it is nevertheless essential that the criminality of both are acknowledged.

#### VIII THE IMPORTANCE OF COMMUNITY EDUCATION

A video on YouTube 'Consent — It's as simple as Tea' has received over seven million views and provides a simple and amusing explanation of consent which sanctions against making people drink tea against their wishes or when they are unconscious.<sup>55</sup> It concludes: 'Whether it's tea or sex, consent is everything'.<sup>56</sup> This seems like clear advice.

However, the video is from the perspective of the one making the tea rather than the one consenting (or not) to drink it. This conceptualisation is a bit back to front. Watching someone else drink tea is hardly a compelling desire for many people. Drinking the tea is more likely to have a certain element of compulsion. What if the individual was claiming to be parched? It could be more difficult to refuse them tea in these circumstances, even

---

<sup>52</sup> Marks Brown, 'Germaine Greer Calls for Punishment for Rape to be Reduced', *The Guardian* (online, 31 May 2018) <<https://www.theguardian.com/books/2018/may/30/germaine-greer-calls-for-punishment-for-to-be-reduced>>.

<sup>53</sup> Peter Rush and Alison Young Submission No PC059 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018).

<sup>54</sup> Conversely it is also flawed in that it would also capture consensual sex that has caused harm, such as through the unwitting transmission of a sexually transmitted disease.

<sup>55</sup> Blue Seat Studios, 'Tea Consent' (YouTube, 13 May 2015)

<<https://www.youtube.com/watch?v=oQbei5JGiT8>>.

<sup>56</sup> *Ibid* 0:02:39-0:02:45.

if the tea was in your personal water bottle and you harboured significant reservations about the other individual's personal hygiene. Unfortunately, many men conceptualise and portray satisfying their sexual urges as a compelling need equivalent to thirst and feel somewhat entitled to have this need met as though it were a human right. Until we address this narrative of male entitlement, we are not really addressing the issue.

Another video has sprung up in response to the Tea video. This video is entitled 'Tea — A bad idea'.<sup>57</sup> By analogy, this video appears to insinuate that sex is never a good idea because women are inherently untrustworthy and prone to fabrication. In this video, the tea drinker consents freely to the tea but later claims not to have consented as it was actually pretty bad tea. This video is misogynist propaganda, with a strong incel flavour, implying that a woman is likely to claim rape when what she experienced was just unsatisfactory sex.

Disturbingly, this emphasis on performance is a common theme, even in materials focused on educating people about consent. For example, one workshop activity advertised online uses handshakes as a way of teaching students about sexual consent by opening discussion 'about how we ask for our needs to be met'.<sup>58</sup> The workshop focuses on the importance of negotiation and the need to balance fun and spontaneity. This training places a disturbing focus on the mechanics of the handshaking rather than on more basic concerns such as the cleanliness of your hands, are you squeezing too hard and hurting the person, and whether the person really wanted to shake hands in the first place or just felt compelled to do so by social convention. Community education must not entrench a view of sex as an essential need or a performance sport, and is paramount in addressing current sexual assault trends,<sup>59</sup> that must accompany legislative change.

---

<sup>57</sup> Cusper Lynn, 'Tea, it's a bad idea' (YouTube, 24 November 2015) <<https://www.youtube.com/watch?v=yX6va9glqgA>>.

<sup>58</sup> Justin Hancock and Meg John Barker, 'Three Handshakes — An activity for learning how consent feels' *Bishtraining* (online, 25 March 2015) <<https://bishtraining.com/three-handshakes-an-activity-for-learning-how-consent-feels/>>.

<sup>59</sup> Terry Goldsworthy, 'Yes means yes: moving to a different model of consent for sexual interactions' *The Conversation* (online, 30 January 2018) <<https://theconversation.com/yes-means-yes-moving-to-a-different-model-of-consent-for-sexual-interactions-90630>>.

## IX CONCLUSION

To summarise, victims must no longer be subject to harrowing cross examination in efforts by defence lawyers to establish that they have given consent. Judges and juries must be directed to understand that a lack of physical resistance does not constitute consent. In the absence of explicit permission, a victim's assertion that there was no consent should be accepted and any consent should also be negated in cases where there was any incapacity on the part of the victim or the presence of a coercive element. In cases involving obvious signs of violence or physical injury, the need to establish that sexual activity took place without consent should be dispensed with altogether. Certainly, steps should be taken to eliminate a Lazarus defence of mistaken belief. Finally, more must be done to educate the community not only that 'Yes means yes', but also that a 'Yes' obtained by coercion is not really a yes at all.

## REFERENCE LIST

*A Articles/Books/Reports*

Australia's National Research Organisation for Women's Safety, 'Violence against women: Additional Analysis of the Australian Bureau of Statistics Personal Safety Survey' (Research Report, Horizons, October 2015)

Carmody, Moira, Georgia Ovenden and Amy Hoffman, "'The program really gives you skills for dealing with real life situations": Results from the evaluation of the Sex + Ethics Program with young people from Wellington, New Zealand' (Research Report, Centre for Educational Research, University of Western Sydney, June 2011)

Cockburn, Helen, 'The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials' (PhD Thesis, University of Tasmania, 2012)

Craig, Elaine, 'Ten Years after Ewanchuk the Art of Seduction is Alive and Well: An Examination of The Mistaken Belief in Consent Defence' (2009) 13(3) *Canadian Criminal Law Review* 247

Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (Report, December 2005)

Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, UN Doc ST/ESA/329 (July 2009) 26

Equitable Briefing Working Group, *Review of the Application in New South Wales of the Equitable Briefing Policy of the Law Council of Australia* (Report August 2015)

Methven, Elyse and Ian Dobinson, Submission No PC077 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018)

Monaghan, James and Gail Mason, 'Reasonable reform: Understanding the knowledge of consent provision in section 61HA of the Crimes Act 1900 (NSW)' (2016) 40(5) *Criminal Law Journal* 246



NSW Bar Association, Submission No PCO47 to New South Wales Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018)

Quilter, Julia, 'Re-framing the Rape Trial: Insights from Critical Theory About the Limitations of Legislative Reform' (2011) 35(1) *Australian Feminist Law Journal* 23

Spender, Lynne, 'Legal studies: Justice Bollen, community attitudes, the power of judges' (1993) 18(2) *Alternate Law Journal* 90

The Line, *Sex, Love and Gender Roles: Views on 'what's ok' and 'What's not' in sex, dating and relationships* (Research Report, May 2017)

Townsley, Lesley and Ian Dobinson, 'Sexual assault reform in New South Wales: Issues of consent and objective fault' (2008) 32(3) *Criminal Law Journal* 152

#### B Cases

*R v Aiken* [2005] NSWCCA 328

*R v David Norman Johns* (Supreme Court of South Australia, Bollen J, 26 August 1992)

*R v Ewanchuk* [1999] 1 SCR 330

*R v Fuge* (2001) 123 A Crim R 310

*R v Lazarus* [2017] NSWCCA 279

#### C Legislation

*Crimes Act 1900* (NSW)

*Crimes Act 1958* (Vic)

*Criminal Code Act 1924* (Tas)

*Criminal Code*, RSC 1985

#### D Other

Australian Bureau of Statistics, *Personal Safety Survey Australia: Reissue* (Catalogue No 4906.0, 21 August 2006)

Australia's National Research Organisation for Women's Safety, Submission No PCO105 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (13 July 2018)

Blue Seat Studios, 'Tea Consent' (YouTube, 13 May 2015)

<<https://www.youtube.com/watch?v=oQbei5JGiT8>>

Brown, Mark, 'Germaine Greer Calls for Punishment for Rape to be Reduced', *The Guardian* (online, 31 May 2018)

<<https://www.theguardian.com/books/2018/may/30/germaine-greer-calls-for-punishment-for-to-be-reduced>>

Calderwood, Kathleen, 'Luke Lazarus case highlights the need to change our conversation about sexual consent' *ABC News* (online, 8 June 2017)

<<https://www.abc.net.au/news/2017-05-06/luke-lazarus-case-should-make-us-reconsider-consent/8502144>>

Cooper, Luke, 'One In Five Young People Think It's OK For A Man To Pressure A Woman Into Sex' *Huffington Post* (online at 23 February 2017)

<[https://www.huffingtonpost.com.au/2017/02/22/one-in-five-young-people-think-its-okay-for-a-man-to-pressure-a\\_a\\_21719078/](https://www.huffingtonpost.com.au/2017/02/22/one-in-five-young-people-think-its-okay-for-a-man-to-pressure-a_a_21719078/)>

Doraisamy, Jerome, 'Turning targets into quotas may be necessary for equality at the bar', *Lawyers Weekly* (online, 3 October 2018)

<<https://www.lawyersweekly.com.au/politics/24165-turning-targets-into-quotas-may-be-necessary-for-equality-at-the-bar#!/comment-comment=11323> >

Goldsworthy, Terry, 'Yes means yes: moving to a different model of consent for sexual interactions' *The Conversation* (online, 30 January 2018)

<<https://theconversation.com/yes-means-yes-moving-to-a-different-model-of-consent-for-sexual-interactions-90630>>

'Greer, Germaine, 'Rape is rarely a violent crime' and four other controversial quotes',

*The Week* (online, 31 May 2018) <<https://www.theweek.co.uk/93968/germaine-greer-rape-is-rarely-a-violent-crime-and-four-other-controversial-quotes>>

Hancock, Justin and John Meg Barker 'Three Handshakes – An activity for learning how consent feels' Bishtraining (online, 24 March 2015) <<https://bishtraining.com/three-handshakes-an-activity-for-learning-how-consent-feels/>>

Lynn, Cusper, 'Tea, it's a bad idea' (YouTube, 24 November 2015)  
<<https://www.youtube.com/watch?v=yX6va9glqgA>>

Ormsby, Grace, 'NSW bar stats give insight into female barristers', *Lawyers Weekly* (online, 10 October 2018) <<https://www.lawyersweekly.com.au/wig-chamber/24214-nsw-bar-stats-give-insight-into-female-barristers>>

Pazzanese, Christina and Walsh, Colleen, 'The women's revolt: Why, now and where to' *The Harvard Gazette* (online, 21 December 2017)  
<<https://news.harvard.edu/gazette/story/2017/12/metoo-surge-could-change-society-in-pivotal-ways-harvard-analysts-say/>>

Rape & Domestic Violence Services Australia, Submission No PC088 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018)

Rush Peter, Alison Young, Submission No PC059 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (29 June 2018)

Sex Workers Outreach Program, Submission No PC0103 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (11 July 2018)

Taylor, Natalia 'Juror attitudes and biases in sexual assault cases' (Research Paper No 344, Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, August 2007)

The Law Society of NSW, Submission No PC073 to NSW Law Reform Commission, *Review of Consent and Knowledge of Consent in relation to Sexual Assault Offences* (27 June 2018)