Grappling with Consent: to Know and to No

NSW sexual assault law reform as a case study for why the criminal justice system alone cannot protect young Australians from unwanted sex .

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INTRODUCTION

Unwanted sex is prevalent among young Australians, particularly young women in a heterosexual relationship/acquaintance context. This issue must be addressed because experiences of unwanted sex whether forced, coerced or pressured, have significant implications for women's sexuality and sexual health, including negative psychological and social outcomes, and risk of re-victimisation in adulthood.[1] This thesis examines the extent to which current sexual assault law is able to protect and represent young women's interests. It argues that relying on the criminal justice system to solve the problem is insufficient: educative, primary prevention tactics are an essential part of the solution.

Chapter I examines the prevalence of unwanted sex among young Australians, how and why it occurs. Typically in the relationship/acquaintance context, this unwanted sex takes the form of forced/coerced sex, or sex which is consented to due to social pressure to engage in sexual activity. These pressures are felt because young people are adopting the norms of the penetrative/coercive model of sexuality, which position young men as aggressive, sexual pursuers, and young women as passive, selfless sexual 'givers'.

Chapter II examines how law reform efforts have attempted to better protect women by combating the norms of that model, using the 2007 reform in New South Wales as an example. This thesis specifically looks at the statutory expansion of the definition of 'consent' and the inclusion of an objective test to establish mistaken belief in consent in the *Crimes Act 1900* (NSW). By these reforms, the NSW Government aimed to mitigate

[1] N Sakar & R Sarkar, 'Sexual assault on woman: Its impact on her life and living in society' (2005) 20 *Sexual and Relationship Therapy* 4, 407-419.

the impact of the penetrative/coercive model on sexual assault cases in the criminal justice system, to educate the broader community of a 'communicative model' of sexuality and to ultimately reduce the incidence of sexual assault. These reform efforts may go some way to achieving these aims and addressing some traditional problems of sexual assault in the law, but they cannot address the problems outlined in Chapter I which face young Australians and lead to unwanted sex.

Chapter III explores evidence that solutions to the problems lie largely outside the law. Research into educative/primary prevention measures demonstrates that such tactics are more effective than tertiary intervention. This thesis demonstrates how research into young Australians' sexual behaviour can be used to design preventative education schemes that teach skills in negotiating consent and promote ethical sexual activity, thereby acting in concert with tertiary intervention to reduce the incidence of unwanted sex.

CHAPTER I

UNWANTED SEX AMONG YOUNG AUSTRALIANS – REASONS FOR ITS PREVALENCE

There is a high prevalence of unwanted, pressured or coerced sexual activity among young Australians, primarily occurring between acquaintances or within (heterosexual) relationships. It is occurring firstly where consent is not present and sexual activity is forced on the non-consenting party, and secondly where consent is given, but its quality is compromised by broader pressure on young people to consent to sexual activity. Such pressure arises from young Australians' adoption of the myths about sexuality and consent which characterise the predominant 'penetrative/coercive' model of sexuality in Australian society. The adoption of these myths manifests in norms of sexual conduct within the context of acquaintance/relationships.

I. THE PREVALENCE OF UNWANTED SEX AMONG YOUNG AUSTRALIANS

Over the past 15 years, several studies of Australian youth have consistently concluded that many young Australians are engaging in unwanted, pressured or coerced sexual activity. In 1995, Patton and Mannison revealed a high level of miscommunication between young Australian males and females (teenagers in their high school years) about the level of sexual intimacy desired: '53% of young women report…overestimation by male partners of the level of sexual intimacy desired, and 45% of males [report] that female partners underestimated the level of sexual intimacy desired.'[2] This resulted in instances of coercion to 'sex play' and/or intercourse, most

[2] Wendy Patton and Mary Mannison, 'Sexual Coercion in High School Dating' (1995) 33 *Sex Roles* 447, 454.

frequently in the 16-18 age demographic.[3] In 1996 women aged 18-24 were more likely to be sexually assaulted than women in other age groups,[4] and in 2000, young women were three to four times more likely to be subjected to sexual violence than older women.[5] In 2002, young men aged 15-25 were found to be responsible for more sexual assaults than older males.[6] In 2008, 38% of young women (in grades ten to twelve) had experienced unwanted sex, compared with 19% of young men.[7] Significantly, unwanted sexual intimacy amongst young Australians primarily occurs between acquaintances/within relationships.[8]

Powell's 2007 study indicates, together with other Australian and international studies,[9] that 'there is something about the everyday negotiations of sexual encounters that lends itself to pressured/unwanted sex experienced particularly by young women, and that indeed sexual violence is still fairly hidden and normalised.'[10] That 'something' is the backdrop of the broader social pressure to engage in sexual activity informing young people's negotiation of sexual consent. This social pressure arises because young people

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[3] Ibid, 455.
[4] Australian Bureau of Statistics, *Women's Safety Report* (1996) 5.
[5] Young, Margrette, Julie Byles, and Annette Dobson, 'The Effectiveness of Legal Protection in the Prevention of Domestic Violence in the Lives of Young Australian Women' (2000) 48 *Trends and Issues in Crime and Criminal Justice*, 1; Michael Flood and Clive Hamilton, 'Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects' (Discussion Paper No 52, The Australia Institute, 2003) 47.
[6] Australian Institute of Criminology 'Sexual assault, male offenders by age, rate per 1000,0000 persons, 1995-1996 and 2000-2001.' (2002) *Australian Crime: Facts and Figures 2001.*
[7] Anthony Smith et al., *Secondary Students and Sexual Health: Results of the 4th National Survey of Australian Secondary Students, HIV/AIDS and Sexual Health* (2009) 32.
[8] Patton and Mannison, above n. 2, 454; Tanya Davis and Christina Lee, 'Sexual Assault: Myths and Stereotypes among Australian Adolescents' (1996) 34 *Sex Roles* 787, 788; Australian Bureau of Statistics, *Personal Safety Survey* (2006).
[9] Margot Rawsthorne, 'Creating Healthy Sexuality for Rural Young People', (Paper presented at *Expanding Our Horizons: Understanding the Complexities of Violence against Women*, University of Sydney, Sydney, 18-22 February 2002); Deborah Tolman, *Dilemmas of Desire: Teenage Girls Talk about Sexuality* (2002); Allen, Louisa, *Sexual Subjects: Young People, Sexuality and Education* (2005).
[10] Anastasia Powell, 'Sexual Pressure and Young People's Negotiation of Consent' (2007) 14 *Australian Centre for the Study of Sexual Assault Newsletter* 8, 13.

adopt the norms of the 'penetrative/coercive model' of sexuality, which informs their sexual behaviour in acquaintance or dating relationships.

Before examining how this social pressure leads to unwanted sex, it is necessary to define 'unwanted'. Kelly argues: 'women's experiences of heterosexual sex…exist on a continuum moving from choice to pressure to coercion to force.'[11] The studies referred to above consistently show that 'unwanted' sex experienced by young Australians falls in two places along this continuum: firstly when sex is obtained by coercion/force, and secondly when sexual consent is in the form of compliance due to broader social pressure to engage in sexual activity.

In the first situation, young people engage in forced sex where there is a lack of consent, usually on the part of the woman.[12] In 2001, up to 20% of young women aged 12-20 reported that a boyfriend had tried to force them to have sex, and 6% reported they had been physically forced to have sex.[13] In the second situation, unwanted sex is occurring when there is consent given, but the quality of that consent is compromised because it has been given under pressure. In 1987, Kelly found: '[p]ressurised sex seemed to cover situations in which women chose not to say no but in which they were not freely consenting.'[14] This pressure either comes from the other party directly, or arises out of broader social norms of sexual behaviour. For example, '21-30% of young women…have experienced unwanted or pressured sexual intercourse.'[15] Powell cites a 2002 survey,

[11] Liz Kelly, 'The Continuum of Sexual Violence' in Jalna Hanmer and Mary Maynard (eds), *Women, Violence and Social Control* (1987) 46, 54.
[12] Australian Bureau of Statistics, above n. 8.
[13] Department of Education Training and Youth Affairs, and National Crime Prevention, *Young people and domestic violence: national research on young people's attitudes to and experiences of domestic violence. Full report.* (2001), 114 and 115.
[14] Kelly, above n. 11, 56.
[15] Anastasia Powell, *Sex, Power and Consent: Youth Culture and the Unwritten Rules* (2010) 2.

and its 2008 repeat,[16] which both found that '"pressure" from a partner was cited as the most common reason for young women's unwanted sexual experience.'[17]

Both of these forms of 'unwantedness' will be explored in further detail later in this chapter, and will be relevant to the discussion of legal definitions of consent in Chapter II. Both forms centre on notions of consent: whether it is present and, if it is, whether the quality of that consent is undermined by pressure. In analysing these circumstances and how they lead to unwanted sex it is relevant to examine theoretical arguments about consent and how notions of consent are embodied by the dominant 'penetrative/coercive' model of sexuality.

A. WHY DOES CONSENT MATTER?

Consent is the pivotal issue in relation to sexual activity in the common law world. Its presence or absence defines whether or not any given sexual encounter constitutes harm. Although some theorists have envisaged a construction of sexual assault which does not refer to consent,[18] for the purposes of this thesis it is appropriate to proceed using the 'common view [that] consent is the only rule in the sex game'.[19] The reason for this focus begins with Western notions of harm. The Western paradigm is individualist and autonomous, and understands most intrusions on an individual's autonomous free will to constitute harm.[20] Coercing another to engage in sexual activity constitutes a violation of that individual's autonomy and the physical boundaries of their body,

[16] Anthony Smith et al., *Secondary students and sexual health 2002* (2002); Smith et al., above n. 7.
[17] Powell, above n. 15, 19.
[18] See Catherine MacKinnon, *Towards a Feminist Theory of the State* (1989) 175); Simon Bronitt 'Rape and Lack of Consent' (1992) 16 *Criminal Law Journal* 289; Joan McGregor, *Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (2005) 104-138.
[19] David Archard, *Sexual Consent* (1998) 2.
[20] Immanuel Kant, *Foundations of the Metaphysic of Morals* (1785); John Stuart Mill, *On Liberty* (1859).

resulting in harm. Sexual assault can be considered harmful because it can operate to 'deprive victims of liberty, threaten their lives or physical integrity, or produce psychological harm.'[21]

Consent has been posited as central to sexual engagement because it (ideally) operates to protect individual autonomy from such harm. This is because consent is morally transformative and changes normative relationships:[22] it is the 'gatekeeper for protecting individuals' autonomy,'[23] and by doing so 'allows individuals to control important issues in their lives by changing their rights and responsibilities.'[24] Finally, 'consent is…the mechanism by which we treat each other as equals.'[25] In an egalitarian, liberal society where people of varying genders are considered equals, the presence of consent of all parties to a sexual encounter is essential to avoid this harm. Yet to operate as adequate protection, consent needs to be a positive, intentional act and therefore must be understood in performative terms – it cannot simply be a state of mind.[26] The relevance of this imperative will be explored later in this chapter.

For the purposes of this thesis it is less important to dwell on why sexual activity without consent constitutes harm, because it is well established in contemporary Western/common law thought that it does. What is contentious is the definition of consent and how consent is negotiated. As many feminists have argued, understandings of consent have historically been informed by the male experience, and the female

[21] Denise Lievore, *Non-reporting and Hidden Recording of Sexual Assault: an International Literature Review* (2003), 28.
[22] Ibid, 106-110; see also Archard, above n. 19, 3-4.
[23] McGregor, above n. 18, 196.
[24] Ibid, 107.
[25] Ibid.
[26] Ibid, 116-131; Archard, above n. 19, 3-4.

experience has been left invisible.[27] These understandings are embodied in the dominant model of sexuality, which has been coined the 'penetrative/coercive' model: the implications of this are particularly significant for young people.

B. THE PENETRATIVE/COERCIVE MODEL OF SEXUALITY

Feminists have long been concerned by the social attitudes and discourses which are informed by myths and stereotypes about both female and male sexuality, at the core of which are notions of consent. These stereotypes characterise the 'penetrative/coercive' model of sexuality and consent,[28] which not only normalises those stereotypes, but also reflects embedded ideas that support sexual inequality more generally.[29] This model is argued to be based upon two heteronormative assumptions:

> The first is that sexuality is somehow centred upon the act of penetration and the second is that women enjoy being "coerced" or persuaded to engage in sexual intercourse. In relation to the latter…there is a general belief that the art of "seduction" allows for any reservations on the part of the woman to be rightfully overcome by the persistence of the man…women are viewed as submissive…[30]

The key stereotypes which constitute the penetrative/coercive model are: 'woman as passive/masochist and man as dominant/pursuer', and 'woman as whore.'[31] The former understands women to require and desire some force in sexual intimacy by the man, who is the pursuer and unable to control his rampant sexuality.[32] This is linked to the

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[27] MacKinnon, above n. 18; Lois Pineau, 'Date Rape: A Feminist Analysis', in Leslie Francis (ed), *Date Rape* (1996); Jennifer Temkin, *Rape and the Legal Process* (2nd ed, 2002) 123-126; McGregor, above n. 18.
[28] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2nd ed, 2010) 617.
[29] McGregor, above n. 18, 19.
[30] Bernadette McSherry, 'Constructing Lack of Consent' in Patricia Easteal (ed) *Balancing the Scales* (1998) 27-28.
[31] Jennifer Temkin, above n. 27, 123-126.
[32] Ibid, 124; Powell, above n. 10, 14; Powell, above n. 15, 64-65; McGregor, above n. 18, 197.

latter, which is more commonly referred to as the 'no means yes' myth: that a woman's resistance is token and she is simply acting to abide by cultural codes of feminine virtue when she actually means 'yes'.[33] McGregor claims there are 'hundreds of…culture narratives…[reinforcing] the stereotype that women say "no," resist, and yet mean "yes."'[34]

These gendered stereotypes give rise to further beliefs about notions of consent, such as that reluctant consent given after 'persuasion' is sufficient, and that resistance must be physical or verbal, and silence can be taken as tacit consent.[35] These stereotypes, including that men are unable to control their 'insatiable' sexuality, downplay perpetrators' responsibility and criminality while shifting blame towards the victim.[36] This effect of the penetrative/coercive model is also evident in the positioning of women as '"gatekeepers" of sex and responsible for managing men's sexual behaviour.'[37] This places responsibility on women to vigilantly mitigate risks,[38] requiring women not to dress or behave in ways that might be perceived as encouraging sexual advances. This 'victim-blaming' legitimises the social perception that if men rape it is not their fault.

Finally, the penetrative/coercive model operates to deny female experience of unwanted or coerced sexual experiences by constructing the 'real rape' trope. This is the notion that where sexual assault does not comply with the traditional conception of rape – that is, a violent attack by a weapon-wielding stranger upon an innocent woman

[33] Temkin, above n. 27, 122; Pineau, above n. 27, 12.
[34] McGregor, above n. 18. 203. See also David Wong, *5 Ways Modern Men are Trained to Hate Women* (2012) Cracked.com <http://www.cracked.com/article_19785_5-ways-modern-men-are-trained-to-hate-women_p2.html> at 10 April 2012.
[35] Powell, above n. 15, 18 and 65.
[36] Susan Brownmiller, *Against our will: Men, women and rape* (1975)
[37] Powell, above n. 10, 14.
[38] See, for example, Moira Carmody and Kerry Carrington, 'Preventing Sexual Violence?' (2000) 33(3) *The Australian and New Zealand Journal of Criminology,* 12.

who did nothing to encourage the attack – it does not constitute a sexual assault.[39] This trope operates to deny the fact that sexual assault is most commonly experienced by women at the hands of somebody they know, in a private context.[40]

In a patriarchal society the penetrative/coercive model has been able to become dominant because it embodies the male experience. It attains dominance through conventionalisation (and institutionalisation, which will be examined in the next chapter). In outlining several ways in which consent may be given, including 'express' and 'tacit' consent,[41] Archard shows that tacit consent is problematic in the context of sexual intimacy, as it is a giving of consent implied by action. He argues implications by action are based on conventions of behaviour – and therein lies the problem. Many myths and stereotypes embodied by the penetrative/coercive model have come to be understood as 'conventions,' but '[t]he fact that even the simplest conventions may not apply everywhere reminds us that it should not be assumed that a person's behaviour can be read as consent.'[42] This is why it is vital that consent be performative and not based on a mental state, because the conventions of the dominant group make assumptions about what mental state is present. Yet although these 'conventions' are in fact myths about heterosexual conduct and female sexuality, historically such stereotypes have been circulated in medical, psychoanalytical, legal and general social discourse in order to 'justify a treatment of women which denies their autonomy'.[43]

[39] Patricia Easteal, 'Survivors of sexual assault: A national survey' in Patricia Easteal (ed) *Without consent: Confronting adult sexual violence* (1993); Lievore, above n. 21, 29.
[40] Australian Bureau of Statistics, above n. 8.
[41] Archard, above n. 19, 7-14.
[42] Archard, above n. 19, 9.
[43] Temkin, above n. 34, 122.

II. HOW DO YOUNG PEOPLE ENGAGE WITH THE PENETRATIVE/COERCIVE MODEL?

Young Australians are continuing to adopt the myths/'conventions' which characterise the penetrative/coercive model – reflecting such stereotypes in their sexual interaction, particularly in the relationship context. Davis and Lee claim that '[e]vidence for widespread sexual violence supports the feminist view that sexual assault is sustained by social structures which regard coercive sex and male aggression as normal...'[44] Furthermore, they give evidence that sexual assault myths are already established among adolescents, with one-third of 14 year old Australian boys in a 1992 survey believing it was acceptable to physically force a girl to have sexual intercourse with him if she 'led him on.'[45]

Their of students in an Australian high school showed that 'there was evidence for support of sexual assault myths by both genders, although boys showed stronger endorsement on many items.'[46] Such myths included that girls were to blame for being assaulted if they wore revealing clothing or behaved in an arousing way, and that a boy had a right to sex if he had spent a lot of money on a girl.[47] The authors also felt that older respondents, who displayed belief in such stereotypes less frequently, 'simply had a clearer idea of expected attitudes and showed a stronger social desirability bias.'[48]

[44] Davis and Lee, above n. 8, 788.
[45] Ibid, citing: Queensland Domestic Violence Resource Centre, *Boys will be…A report on the survey of year nine males and their attitudes to forced sex* (1992).
[46] Ibid, 799.
[47] 40% of adolescent boys held this belief: J. Goodchilds, G. Zellman, R. Johnson & R. Giarrusson, 'Adolescents and their perceptions of sexual interactions,' in A. Burgess (ed.) *Rape and sexual assault* (1988).
[48] Ibid.

Launching VicHealth's 2009 report on community attitudes to violence against women,[49] CEO Todd Harper lamented that 'people, particularly young men and women are not clear about what constitutes sexual…violence, if and when it can be excused…'[50] Furthermore, while Harper said the report showed that, overall, Australian attitudes were changing for the better, the findings also included that:

- 13% of people still agree that women 'often say no when they mean yes' and 16% agree that a woman 'is partly responsible if she is raped when drunk or drug-affected.
- 34% of people still believe that rape results from men being unable to control their need for sex.
- 25% of people still believe that women falsify or exaggerate claims of rape and domestic violence.[51]

Although there are 'complex ways in which women and men perform gender,'[52] in 2010, Powell's study concluded 'that these unwritten rules [of the penetrative/coercive model] are still circulating as the predominant meanings with which many youth make sense of their love/sex relationships.'[53] For example, she found that some young women reported consistently with 'social norms positioning women as somewhat dependent upon men, and [the reproduction of] the myth that women are at greater danger from

[49] VicHealth, *National Survey on Community Attitudes to Violence Against Women: Changing Cultures, Changing Attitudes* (2009)
[50] VicHealth, 'Young People Hold the Key to Ending Violence against Women' (Media Release, 7 April 2010).
[51] VicHealth, above n. 49.
[52] Moira Carmody, 'Conceptualising the Prevention of Sexual Assault and the Role of Education,' (2009) 10 *ACSSA Issues* 1-18, 4.
[53] Powell, above n. 15, 53.

strangers rather than known men.'[54] She also found that, for young people, the penetrative/coercive 'discourses of sexuality…are largely taken for granted as "normal", "natural", or "the way things are,"'[55] demonstrating the conventionalisation of this model in youth culture. Powell demonstrates that '…social institutions such as the law, the family and education play a significant role in both reflecting and reinforcing particular understandings of love and sex that are circulating in broader society.'[56] It is these messages and expectations that are brought by young people into their sexual encounters, often without knowing it.[57] While the role of the law and education in perpetuating this norm will be explored in greater detail in the following chapters, other forums which advance and normalise the penetrative/coercive model include: the market, internet, pornography and sporting cultures.[58]

Thornton has argued 'the market has…insidiously entrenched conventional notions of gender,'[59] and points to the hedonism of 'raunch culture' as culpable in the perpetuation of penetrative/coercive norms via its normalisation of the commodification of sexualised bodies.[60] The use of the internet by young people to perpetuate misogyny and sexism is becoming increasingly problematic: according to the Huffington Post, a poll found that sexist slurs used on the internet are not being received with offence by young people. '41% of women deem "slut" deeply offensive, compared with…28% of men.'[61] In their study of the likely effects of pornography on Australia's youth, Flood and

[54] Powell, above n. 15, 37.
[55] Ibid, 65.
[56] Powell, above n. 15, 65.
[57] Moira Carmody, *Sex & Ethics: Young people and ethical sex* (2009) 41.
[58] Ibid.
[59] Margaret Thornton, '"Post Feminism" in the Legal Academy?' (2010) 95 *Feminist Review* 92, 93.
[60] Ibid, 96.
[61] Connie Cass and Jennifer Agiesta, 'Young People See Online Slurs as Just Joking, Poll Shows', *The Huffington Post*, 20 September 2011.

Hamilton found that '[r]egular consumption of pornography… is likely to intensify attitudes among young men that support rape and erode both males' and females' empathy for women who are the victims of sexual violence.'[62] The authors also refer to a Canadian study which found that '[t]here was a significant correlation between boys' frequent consumption of pornography and their agreement with the idea that it is acceptable to hold a girl down and force her to have intercourse.'[63] Sporting cultures are another site in which penetrative/coercive norms are promulgated. Wedgwood argues that 'school football is a major masculinising institution in Australia,'[64] showing that many of the boys involved in this culture embody hegemonic, heterosexist masculinity and misogynist beliefs, and that those who do not seek to 'pass' as doing so.[65]

These findings indicate that the penetrative/coercive model lives on and the myths it propounds are still upheld by significant proportions of Australia's population. Young Australians are continuing to adopt the norms of this model, and as a result continue to experience unwanted sex.

III. HOW ENGAGEMENT WITH THE PENETRATIVE/COERCIVE MODEL LEADS TO UNWANTED SEX

Considering the aforementioned two forms of 'unwantedness' in sexual activity experienced by young Australians, it is evident that their engagement with the penetrative/coercive model gives rise to both of these circumstances. That is, because the myths/stereotypes about sexuality and consent are adopted by young Australians,

[62] Flood and Hamilton, above n. 5, 47.
[63] Ibid, 39-40, referencing J. Check 'Teenage training: The effects of pornography on adolescent males', in Laura Lederer and Richard Delgado (eds) *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography* (1995) 91.
[64] Nikki Wedgwood, 'Aussie Rules! Schoolboy football and masculine embodiment,' in Stephen Tomsen and Mike Donaldson (eds) *Male Trouble: Looking at Australian Masculinities* (2003) 180.
[65] Ibid, 184-186.

unwanted sex will occur in the context of acquaintance or relationships, either when there is no consent from one party and sex is obtained by coercion, or when there is consent which has been given due to pressure.

Given that it is most often in the context of 'dating', friendship or acquaintance that unwanted sexual intimacy occurs for young Australians, it is necessary to consider the effect of the dynamics inherent in that context. With respect to the first circumstance of 'unwantedness', the dynamics of relating and interacting which are at play between young people who are in a relationship often support the coercion of young women into sexual activity by young men. This is because the following ideas are often supported by that context: that coerced sexual activity does not truly constitute assault if it is not committed by a stranger; spending money on a young woman entitles a young man to physically force her to have intercourse; and the normalisation of the subjugation of a woman's needs to her male partner's.

The acquaintance/relationship dynamics are also relevant to the second circumstance of 'unwantedness', as these dynamics often result in the background social pressure on women to consent to sexual intimacy. This is often because the pressure is derived from anxiety experienced by women not to offend or 'disappoint' the other party, to avoid awkwardness or to avoid a situation of explicit coercion,[66] or because they feel they owe it to the other party to 'open the gate' to sex due to some social convention (such as having been taken on a date), or simply feel an unspoken pressure to consent to sex.[67] Some studies of young people's relationships have demonstrated how these factors, as part of the penetrative/coercive norms of sexuality and consent, manifest into sexual

[66] M. Blythe et al., 'Incidence and correlates of unwanted sex in relationships of middle and late adolescent women' (2006) 160 *Archives of Pediatric & Adolescent Medicine* (6) 591, 593.
[67] Kelly, above n. 11, 54-58; Powell , above n. 9; Powell, above n. 15, 58.

coercion and/or a pressure to consent to sexual intimacy. For example, in 2005, Chung's study found: 'unequal power relations are maintained in young people's current heterosexual dating relationships.'[68] Young women also undertook 'equalising strategies' to justify their male partners' behaviour (for example, abuse and sexual coercion) so as not to disrupt hegemonic heterosexual masculinity; that is, often young women in relationships constructed such behaviour as expressions of 'love'.[69] This is supported by Powell's findings in 2007 that 'young women describe pressures that appear consistent with a traditional understanding of femininity; a role of nurturing and putting their boyfriends' needs before their own.'[70] In 2009, 18% of students who had had unwanted sex did so because their partner felt they should.[71]

Powell's 2010 study of young Australians' relationships is instrumental to the analysis of the negotiation of consent within this demographic. She found that young women '[struggle] to attain their ideal relationship…against discourses of emphasised femininity and romantic love, which suggest that women should compromise, submit and seek to achieve their own happiness through ensuring his.'[72] This manifests into

> …a pressure [described by young women] either from within themselves or from elsewhere, which tells them what they *should* do in a relationship… [drawing] on romantic love discourses: reproducing 'love' in relationships for women as acquiescence…In this way, women's power to assert their own needs and desires in relationships appears constrained by dominant discourses that position them as selfless.[73]

[68] Donna Chung, 'Violence, control, romance and gender equality: Young women and heterosexual relationships' (2005) 28 *Women's Studies International Forum* 445, 445.
[69] Ibid, 450-452.
[70] Powell, above n. 10, 12.
[71] Smith et al., above n. 7, 31.
[72] Powell, above n. 15, 28.
[73] Ibid, 39.

Powell found that this pressure 'can make it difficult for women to assertively say 'no' to unwanted sex.'[74] This 'tends to place young men in situations where they are complicit in young women's experiences of pressured and unwanted sex.'[75]

There are alternative discourses to the convention that makes women sexually passive, such as contemporary 'raunch culture', in which young women are 'increasingly encouraged, even *expected,* to display an active…sexuality through their behaviour and dress.'[76] Yet the penetrative/coercive convention of active male sexuality against female passivity 'still holds considerable sway, especially in young people's relationships.'[77] Such conflicting discourses force young women to navigate a confusing landscape of appropriate sexual behaviour, walking the fine line between 'slut and frigid',[78] whilst both ultimately operate to pressure women to consent to sex.

Therefore, it is clear that the conventions embodied by the penetrative/coercive model give rise to unwanted sex amongst young Australians, either through promoting direct sexual coercion, or by creating a broader 'social pressure' upon young people, particularly young women, to consent to sexual activity. The next chapter will examine how the law has attempted to combat this prevalence of unwanted sexual activity, and whether it is, or is capable of, reducing the incidence of unwanted sex, particularly by protecting young Australians from broader pressures to consent to sexual activity.

[74] Ibid, 64.
[75] Ibid 59.
[76] Ibid, 65.
[77] Ibid.
[78] Ibid, 50.

CHAPTER II

ADDRESSING THE INCIDENCE OF SEXUAL ASSAULT VIA LEGAL REFORM

I. THE PENETRATIVE/COERCIVE MODEL INSTITUTIONALISED

Doctrinally, the man's perspective of the woman's desires determines whether she is deemed violated. [79]

As explored in Chapter I, the penetrative/coercive model of sexuality and sexual behaviour embodies a number of myths about male and female sexuality which operate to deny female sexual autonomy. The law is a chief institution in which this denial has been systematically entrenched. A male-dominated institution, female experience has long been invisible in the law, and sexual assault law is no exception: the '[u]nequal status which women still possess in society results in a situation in which what they have to say is for many purposes discounted or reinterpreted for them. So it is in the context of sex.'[80]

It is the violation of sexual autonomy that sexual assault entails that provides the rationale for criminalisation of such acts.[81] In the legal definition of sexual assault/rape in Australia, consent plays a dual role: '[n]ot only must sexual intercourse occur without consent, but the accused's mental attitude (knowledge or recklessness) must relate to the victim's lack of consent.'[82] Yet it is in the legal construction of notions of consent that the myths characterising the penetrative/coercive model have been embodied, hence many reform efforts have been concentrated here, for example recent reform efforts in NSW.

[79] MacKinnon, above n. 18, 180.
[80] Temkin, above n. 34, 122.
[81] Bronitt and McSherry, above n. 28, 629.
[82] Bronitt, above n. 18, 289.

II. THE NEW SOUTH WALES EXAMPLE

A. *THE CALM BEFORE THE REFORM: THE COMMON LAW MODEL*

Before major amendments were made in 2007, sexual assault law in NSW was governed by the common law model, embodied in section 61R of the *Crimes Act 1900* (NSW). There was no explicit definition of consent, and the test for determining the presence of consent was a subjective one: it required the prosecution to prove the accused knew of, or was reckless to, the complainant's non-consent. Even a mistaken belief in consent on the part of the accused would leave the *mens rea* element unsatisfied and result in an acquittal. Before the United Kingdom case of *DPP v Morgan*[83] such a mistake had to be honest and reasonable, but in that case the House of Lords ruled that an accused would not be guilty if he had a mistaken belief in consent, however unreasonable that belief was. This was affirmed in NSW in *R v McEwan*[84] and more recently in *Regina v Banditt.*[85]

The common law model has met criticism, leading to law reform in various jurisdictions in relation to consent in sexual assault matters,[86] because the common law approach to consent allows penetrative/coercive norms to enter the courtroom. Without statutory guidance, the defining of consent and the determination of its presence/absence is left to the key participants within the criminal justice system, who are predominantly male.[87] Hence a woman's refusal to consent has historically been interpreted within the context of the 'conventions' which are embodied by the penetrative/coercive model of sexuality found in the common law approach. For example, a 2007 study of biases and attitudes of jurors in sexual assault cases found that '[j]uror judgments in rape trials are

[83] *DPP v Morgan* [1975] 2 All ER 411; (1975) 61 Cr App R 136.
[84] *R v McEwan* [1979] 2 NSWLR 926.
[85] *Regina v Banditt* [2004] NSWCCA.
[86] For example, Canada, the United Kingdom and Victoria: Attorney-General of NSW Criminal Justice Sexual Offences Task Force, *Responding to sexual assault: the way forward* (2006).
[87] Women's Law Collective, 'Experiences of Women in the Courtroom' (Speech delivered at the Melbourne University Law School, Melbourne, 11 August 2003).

influenced more by the attitudes, beliefs and biases about rape that jurors bring with them…than by the objective facts presented, and that stereotypical beliefs about rape and its victims still exist within the community.'[88] These stereotypical beliefs include those explored in Chapter I, such as 'no' means 'yes', that women who are raped often ask for it, and that rape results from men not being able to control their sexuality.[89]

Therefore, feminists argue that comprehensive definitions of consent must be codified and that the 'mistaken belief defence' should not be part of the law;[90] or at least that mistaken belief should only exonerate where that belief was objectively reasonable.[91] This is because the 'injury of rape lies in the meaning of the act to its victims, but the standard for its criminality lies in the meaning of the same act to the assailants.'[92] Hence a common solution has been to codify a definition of consent and a test for establishing the presence of consent, which together endeavour to encompass the female experience and undermine the penetrative/coercive model.

B. *ARGUMENTS FOR THE ADOPTION OF A 'COMMUNICATIVE MODEL'*

Archard has argued that because consent is a positive intentional act that is morally transformative, 'where and when the question arises of whether consent has been given, we should normally presume that it has not been given.'[93] Indeed, this is the status quo in other areas of law which revolve around the issue of consent; for example, obtaining consent from a patient to undergo a medical procedure is essential.[94]

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[88] Natalie Taylor, 'Juror attitudes and biases in sexual assault cases' (2007) 34 *Australian Institute of Criminology Trends & Issues in Crime and Justice*, 1.
[89] Ibid; Natalie Taylor & Jenny Mouzos, *Community attitudes to violence against women survey 2006: full technical report* (2006).
[90] Temkin, above n. 34, 96-99, 176-177; McGregor, above n. 18.
[91] Susan Estrich, *Real Rape* (1987).
[92] MacKinnon, above n. 18, 652.
[93] Archard, above n. 19, 15.
[94] Rogers v Whitaker [1992] HCA 58.

However, in the context of sexual intimacy Archard's standard has often not been applied due to the 'conventions' of heteronormative sexual intimacy and female sexuality, as they are understood by the penetrative/coercive model. Furthermore, Archard argues that 'the more likely it is that a behaviour is open to different interpretations – the more certain we should be that it can be interpreted as conveying consent,' and that 'it is wrong to rely on risky/uncertain convention when doing so is not necessary.'[95]

Such ideas have produced alternative models of sexuality constructed around mutuality and communication.[96] Such a 'communicative' model of sexuality is one where consent is assumed by the *presence* of 'active' verbal or physical indication, as opposed to the *absence* of refusal or struggle.[97] This model has been advanced as a better alternative to the 'penetrative/coercive' model,[98] and provides a solution to the question of what should be expected and demanded of men in ambiguous situations.[99] It promotes the equality of women by requiring the *subjective* presence of consent, regardless of the stereotypes or 'conventions' of consent as understood by the penetrative/coercive model. This model

> does not accept that it is reasonable for one partner to assume that there is consent because of another's apparent compliance or non-resistance; it makes it clear…there is a responsibility for all partners in a sexual encounter to take steps to ascertain that consent is freely given.[100]

For example, Temkin argued that 'where a woman demonstrates her lack of consent it is no hardship for a man to enquire whether her consent is present, and that as a matter of

[95] Archard, above n. 19, 15-16.
[96] Bronitt and McSherry, above n. 28, 637.
[97] Powell, above n. 10, 9.
[98] Pineau, above n. 27.
[99] Estrich, above n. 91.
[100] Powell, above n. 15, 91.

policy the law should demand that he do so.'[101] Indeed, the *United Nations Handbook for Legislation on Violence against Women* recommends that the accused be required to prove the steps taken to 'ascertain whether the complainant was consenting.'[102]

Mandatory jury directions have been introduced in Victoria[103] which promote a communication standard in sexual relationships, confronting the 'penetrative/coercive' model of sexuality.[104] Some have argued that these laws do not reflect contemporary ideas about sexual relations (an argument which has been disputed).[105] However, it has been pointed out that the criminal law has a role to play in setting sexual standards, not merely reflecting them: 'criminal law in its…function of controlling behaviour should promote standards of acceptable consensual sexual behaviour of the community…'[106] Thus it was with a view to making such a move from a penetrative/coercive model to a communicative model of sexuality and sexual conduct that the NSW law with respect to sexual assault and consent was amended in 2007. It should be noted that there are potential problems with the communicative standard, which will be explored below in Chapter III.

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[101] Jennifer Temkin, *Rape and the Legal Process* (1st ed, 1987) 84.
[102] United Nations, *Handbook for Legislation on Violence Against Women* (2010) 26.
[103] *Crimes Act 1958* (Vic) section 37.
[104] Bronitt and McSherry, above n. 28, 639.
[105] The Government believed that the reforms reflected the views of the 'greater majority of the community of New South Wales who strongly reject those out-dated views': Attorney-General John Hatzistergos, New South Wales, *Second Reading,* Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007, 3584.
[106] *R v Tolmie* (1995) 37 NSWLR 660 at 672 per Kirby P; see also Robin Weiner "Shifting the Communication Burden: A Meaningful Consent Standard in Rape" (1983) 6 *Harvard Women's Law Journal* 143, 160-161.

C. *AMENDING THE LAW IN NEW SOUTH WALES*

In November 2007, after lengthy debate in the community,[107] the NSW Attorney-General John Hatzistergos introduced the Crimes Amendment (Consent – Sexual Assault Offences) Bill 2007, which significantly amended the sexual assault provisions in the *Crimes Act 1900* (NSW). The amendments inserted a statutory definition of consent via section 61HA[108] and, removing section 61R, codified an objective test for establishing the *mens rea* of knowledge, recklessness or unreasonable mistaken belief in section 61HA (3)(c). In drafting the amendments, the Attorney-General relied upon the report of the Sexual Offences Taskforce, which was established to investigate 'alternate methods' to the common law model in other jurisdictions.[109] Jurisdictions including Victoria, Queensland, Western Australia, Canada and the UK have had similar approaches as those instituted by the NSW amendments, for some time.[110]

The Government adopted the Taskforce recommendation to include a statutory definition of consent, in order to 'enact a more contemporary and appropriate definition than [that] available under the common law'[111] which defined consent 'in positive terms…to give greater effect to the protection of the sexual autonomy of the complainant.'[112] This definition requires consent to have been given 'freely and voluntarily', and lists factors which operate to negate consent (such as unconsciousness

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[107] New South Wales, *Parliamentary Debates,* Legislative Council, 13 November 2007 (Fred Nile) 3900.
[108] See Appendix.
[109] Attorney-General of NSW Criminal Justice Sexual Offences Task Force, above n. 86.
[110] Whilst Victoria followed *Morgan* until as late as 2006 (with a more objective approach introduced in the *Crimes (Sexual Offences) Act 2006,* the *Crimes (Sexual Offences) (Further Amendment) Act 2006* and the *Crimes Amendment (Rape) Act 2007*), in 1991 s 37 *Crimes Act 1958* (Vic) was inserted, providing that an 'objective reasonableness test' direction should be given to juries when assessing belief in consent; *Queensland Criminal Code 1899* (Qld) ss 24 (mistake of fact) and 349 (rape); *Criminal Code Act 1912* (WA) s 325; *Criminal Code* (Department of Justice, Canada) ss 271–273 and *R v Ewanchuk* [1991] 1 SCR 330; *Sexual Offences Act 2003* (UK) Section 1.
[111] Hatzistergos, above n. 105.
[112] Ibid, 35.

or threat of force) and grounds on which it may be established that a person did not consent (including intoxication, intimidatory/coercive conduct and abuse of a position of authority/trust).[113] The Taskforce concluded that this definition would ensure that 'standard directions are given to juries.'[114] Despite objections that an objective test would be inconsistent with general principles of criminal responsibility (discussed below), this test was adopted because the subjective test 'reflects archaic views about sexual activity.'[115] The Attorney-General argued the removal of the subjective test was necessary because the subjective test for belief in consent did not 'adequately protect victims of sexual assault when the offender has genuine but distorted views about appropriate sexual conduct.'[116]

Significantly, by drafting the amendments to include a definition of consent and an objective reasonableness test, the Government sought to achieve the ultimate goal of educating the community about a 'communicative model' of sexuality. It was hoped that this, alongside the anticipated increase in conviction rates,[117] would reduce the incidence of sexual assault. The Government argued that the reforms would '[bring] about…a cultural shift in the response to victims of sexual assault by the community and by key participants within the criminal justice system.'[118] In response to criticism of this approach, Hatzistergos claimed:

> It has been said that the Government should not influence the way people interact in the community, and that it wants to affect sexual relationships and make people much more civilised in terms of their behaviour...Where sexual assault is concerned, this

[113] See Appendix.
[114] Hatzistergos, above n. 105.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid; see supporting statements for this aim, indicating the breadth of support for the reform and its aims: New South Wales, *Parliamentary Debates,* Legislative Council, 13 November 2007 (Fred Nile) 3901 and Lee Rihannon at 3902.

> Government makes no apologies for passing laws that have an educative impact, in addition to resolving issues of confusion. [119]

III. WILL SEXUAL ASSAULT LAW REFORM BETTER PROTECT AND REPRESENT WOMEN'S INTERESTS?

Although a review of the reforms has been mandated,[120] at the time of writing such a review was yet to be concluded; hence it is uncertain whether the aims of the NSW Government's reforms will be achieved by the operation of the amended law. However, this section of the thesis will examine the likely ability of the reforms to address 'traditional' problems in sexual assault law is limited, let alone the pressures facing young Australians as outlined in Chapter I.

A. *THE OBJECTIVE TEST*

The objective test will likely combat issues raised by *Morgan*, by limiting the ability of the law to ignore the female experience in favour of the male experience (in removing the avoidance of culpability through a 'mistaken belief' in consent). However, there have been some objections to the introduction of the objective test, including that it may not have the desired effect.

The objective reasonableness test met with criticism on the basis of its inconsistency with general principles of criminal responsibility; that is, the approach in *Morgan* was seen to be proper and perfectly consistent with the *mens rea* requirement in all other areas of criminal law.[121] Despite historical support for this argument,[122] more recently it and the *Morgan* approach have been rejected and the inclusion of an objective standard

[119] New South Wales, *Parliamentary Debates,* Legislative Council, 13 November 2007 (John Hatzistergos) 3901.
[120] New South Wales, *Agreement in Principle,* Legislative Assembly, 14 November 2007 (Verity Smith) 4172.
[121] Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990), 336.
[122] Her Majesty's Stationery Office, *Report of the Advisory Group on the Law of Rape* (1975); Law Reform Commission of Victoria, *Rape and Allied Offences: Substantive Aspects* (1987) 7, 25.

in varying forms has been increasingly accepted as the appropriate approach.[123] For example, Pickard questions the need for consistency in the criminal law, arguing that the law should not always seek to remove the context from its decision making and that a blanket application of subjectivity to *mens rea* in all areas of the criminal law 'necessarily sacrifices subtlety to simplicity...'[124] Temkin has argued that the '[u]ltimate question which arises…is whether a commitment to subjectivism should override all other considerations regardless of circumstances or social cost.'[125] That is, it has been argued that the law should ensure a 'reasonable standard of care is taken to ascertain whether a person is consenting before embarking on what could be potentially damaging behaviour.'[126] By doing so, the criminal law would strengthen the autonomy individuals have over their own bodies by supporting that autonomy with criminal sanctions, with a view to maintaining the overarching priority of the criminal law to protect individuals' autonomy to avoid unwanted bodily invasions.[127]

While the objective test provides scope for the inclusion of the female experience of consent, its practical sufficiency has been questioned. Feminists have queried whether introducing the reasonableness test would see improvement in the treatment of women by this area of law: deciding what constitutes reasonableness will still be left largely to the primary players in the legal system who are predominantly male and have been shown to retain penetrative/coercive beliefs. For example, Scutt has argued that 'what a *woman* actually believes is reasonable and what the law has traditionally regarded as

[123] See those jurisdictions mentioned above n. 110.
[124] Toni Pickard, 'Culpable Mistakes and Rape: Relating Mens Rea to the Crime' (1980) 30 *University of Toronto Law Journal* 75.
[125] Temkin, above n. 27, 125.
[126] Attorney-General of NSW Criminal Justice Sexual Offences Task Force, above n. 86, 45
[127] McGregor, above n. 18, 100-101.

reasonable are quite different.'[128] For Pineau, '[w]hat is often missing is the voice of the woman herself…an account of what is reasonable from *her* standpoint.'[129] Similarly, Bronitt has questioned whether the objective approach stops the 'conventions' of the penetrative/coercive model from entering the courtroom: '[t]he question then arises whether the legal fiction of the "reasonable man" should be given familiar male stereotypes about female sexuality, for example, that women...enjoy being hurt in sexual encounters and that "No means Yes".[130]

Nevertheless, in the context of an approach to sexual assault law which is framed around the issue of consent, the inclusion of the objective test demonstrates the Government's commitment to making visible the female experience in the law, as well as a standard of appropriate sexual conduct and beliefs about sexuality. However, the inclusion of this test will need to be supported by other measures which may better achieve the desired practical result of ensuring a general social understanding of what is 'reasonable' from a woman's point of view, as well as from a man's, which will be explored in Chapter III.

B. *DEFINITIONAL ISSUES: DOES THE EXPANSION OF 'CONSENT' CONTEMPLATE THE WHOLE SEXUAL VIOLENCE CONTINUUM?*

Despite the expansion of the definition of consent in section 61HA, there are aspects of it which will continue to leave victims of unwanted sexual intimacy unprotected by the law. Particularly, the instances of 'unwanted sex' faced by young Australians which fall closer to the choice/pressure end of the Kelly continuum are unlikely to be interpreted as being within the ambit of the amended definition.

[128] Jocelynne Scutt, *Women and the Law* (1990), 479.
[129] Pineau, above n. 27.
[130] Bronitt, above n. 18, 306.

The expansion of the definition of 'consent' to include the negating factors of unconsciousness and threat of force, and the grounds of 'intimidatory/coercive' conduct and abuse of position or authority as a means of showing lack of consent, demonstrates the Government's intention to incorporate the female experience of consenting to sexual intimacy. For example, by allowing intimidatory/coercive conduct to potentially show there was no consent, the 'convention' that women enjoy being 'persuaded' to consent to sex could theoretically be undermined (although it is unclear whether this is likely, and is explored below). This definition also acknowledges that non-physical coercion is still coercion, and undermines the myth that a woman is partly responsible if she is raped when drunk or drug-affected.

However, although the definition of consent in section 61HA includes as a ground which *may* show lack of consent any intimidatory/coercive conduct on the part of the accused, it is questionable whether interpretations of this definition will contemplate conduct that women might find intimidatory or coercive. This is because historically the female experience of subordination to male dominance is invisible in the law, even in the context of sexual intimacy: '[i]nterpretations of…statutes don't include women's perceptions of what is frightening or intimidating, and women's normal reactions to those circumstances (for example, submission…)'[131] MacKinnon argues that 'rape law takes women's usual response to coercion – acquiescence [in the face of] unequal odds – and calls that consent,'[132] because 'the law of rape presents consent as free exercise of sexual choice under conditions of equality of power without exposing the underlying structure of constraint and disparity.'[133]

[131] McGregor, above n. 18, 10.
[132] MacKinnon, above n. 18, 168.
[133] MacKinnon, above n. 18, 175.

Given the recency of the NSW reform, the extent to which the ambit of 'intimidatory/coercive' conduct will cover circumstances of unwanted sex experienced by young Australians, as explored in Chapter I, is unclear.[134] Were a young man to hold down a young woman and physically force her to have sex with him, because he believes he is entitled to do so having spent money on her or because she has "led him on," there would be no consent given 'freely and voluntarily.' Yet there remain circumstances of 'unwanted sex' where it is less clear whether consent will be found to be lacking on grounds of intimidatory/coercive conduct.

Hypothetically, for example: a young woman accompanying a young man home after a date, consents to kissing/petting, not intending to engage in intercourse. He then expects they will have intercourse, thinking she has led him to believe it will eventuate. She voices her disinclination, and he continues to indicate his desire to have intercourse, alternating between expressing his desire for her and accusing her of misleading him. Having been socialised to believe that male sexuality is uncontrollably aggressive, she is uncertain as to whether she has in fact misled him, and for fear of provoking a violent encounter, she acquiesces to intercourse, for the sake of 'getting it over with.'[135] It is unclear whether at law such an occasion will be viewed as involving intimidatory/coercive conduct. As explored above, the law has traditionally viewed such acquiescence as consent, and does not contemplate conduct that *women* may find intimidatory/coercive. Moreover, as most unwanted sex occurs within relationships/between acquaintances, MacKinnon's caution that the law makes presumptions about consent depending on the women's relationship with the men in

[134] In Victoria, where similar reforms have taken place, it remains unclear how such a definition of consent will operate in any given case: Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report* (2011).
[135] Adapted from Pineau's example: Pineau, above n. 27, 6-7.

question remains pertinent.[136] Victims are aware of this presumption, too: many such experiences are not reported as sexual assault because often victims themselves do not consider it to be sexual assault, or fear 'reprisal [or] not being believed [or] being stigmatised and further harmed.' [137]

It is even less likely that the broader social pressure to consent to sex, rather than direct pressure as in the above example, will come within the ambit of 'intimidatory/coercive conduct.' As explored in Chapter I, this pressure manifests in individual situations due to the adoption of the penetrative/coercive conventions of 'romance' and sexual behaviour by young people. It would be inappropriate for the law to find individuals guilty of sexual assault because socially entrenched norms of behaviour amounted to 'intimidatory/coercive' conduct. It is contrary to principles of criminal responsibility that individuals should be held accountable for the flaws of their society. Therefore, although the definition of consent in the amended provisions cannot protect victims who feel broader social pressure to consent to sexual activity, it is inappropriate that it does so. The real solution lies elsewhere – outside the law – which will be explored in the next chapter.

C. *USING THE LAW TO SHIFT COMMUNITY ATTITUDES*

It was argued by the NSW Government that the amendments would operate to shift community attitudes, combating the penetrative/coercive norms and promoting a more communicative model of sexuality in the broader community. While this may be one way the reforms might better mitigate the problems facing young Australians, its efficacy in achieving this aim is limited.

[136] McGregor, above n. 18, 79.
[137] Carmody and Carrington, above n. 38, 3-4.

Carol Smart warns against the 'siren call of the law' to achieve significant social change.[138] Indeed, reforms to Victoria's sexual assault laws have not resulted in greater reporting rates, nor have attrition rates decreased, nor do the changes appear to have had an educative effect on the wider community.[139] With respect to young Australians, Powell's study demonstrates that

> It is clear from young people's talk about [experiences of sex at the coercion/force end of the sexual violence continuum] that despite significant changes to legal definitions of rape, many of them continued to adhere to long-standing gendered norms or rape myths surrounding sexual violence.[140]

She argues that: 'changing the law around consent to make it more communicative has not been enough to change the more subtle gender norms and discourses at play at the level of individual practice…in the everyday negotiation of consent.'[141]

Changed community attitudes towards standards of sexual conduct, which would ideally see a decline in the incidence of sexual assault, are unlikely to be achieved by legislative reform. Given the complexity of the social forces and the operation of the law in this area, sexual violence is difficult to prevent: 'Combating sexual violence is disagreeable to…quick-fix solutions so popular among politicians and crime prevention specialists.'[142] Firstly, it is unlikely that lay people will be aware of how the amended law, with its expanded definition of consent and objective test, will operate to increase the chances of reaching a conviction in sexual assault cases.[143] Waterstreet argues that an objective statutory definition of consent does not clarify for lay people what constitutes consent, not even to the point of understanding that a sleeping person does

[138] Carol Smart *Feminism and the Power of Law* (1989) 160.
[139] Success Works, above n. 134.
[140] Powell, above n. 15, 60.
[141] Ibid, 92.
[142] Carmody and Carrington, above n. 38, 1-5.
[143] This was found to be the case in Victoria, post-reforms: Success works, above n. 134, 180.

not have the opportunity to consent.[144] Carmody found that the young people in her 2009 study had 'little concept [of] laws about sexual consent. They did not seem very aware that these were aimed at protecting them from exploitative sex, or as an avenue for criminal redress...'[145]

Secondly, even if the broader community was to understand the nuances of the amendments and their flow-on effects, it is questionable whether the amendments would act as a deterrent.

> The ability of laws…to impact on regulating people's behaviour is…contested. While many individuals support and follow consent prohibitions, the high incidence of exploitative sexual encounters in most communities suggest that the threat of coercive power over individuals is not enough. Intimate relations between individuals are more complex...[146]

Finally, despite the changes made by the amendments, attrition rates for sexual assault crimes are likely to remain high.[147] Even if legal reform such as that implemented in NSW better protects victims via the *application* of the law, such high attrition rates diminish the opportunities for the law to achieve this. Considering these factors, it is unlikely the legislative reforms will act as a deterrent to potential offenders.

It is evident that the drafting of the amended definition of consent in section 61HA of the *Crimes Act 1900* (NSW) may not protect victims of unwanted sexual intimacy in the circumstances outlined in Chapter I. It is necessary to examine whether the criminal justice system is in fact the most appropriate instrument to combat the

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144 Charles Waterstreet, 'Laws of Attraction', *The Sydney Morning Herald* (Sydney), 13 February 2011.
145 Carmody, above n. 57, 95.
146 Moira Carmody, 'Ethical Erotics: Reconceptualising Anti-Rape Education' (2005) 8 (4) *Sexualities* 465, 469.
147 For example, they have remained high in the UK: Attorney-General of NSW Criminal Justice Sexual Offences Task Force, above n. 89; and in Victoria: Success works, above n. 134.

'penetrative/coercive' model and the pressures it gives rise to, both explicit and socially imposed, on women to consent to sexual intimacy.

CHAPTER III

ALTERNATIVE MEASURES TO THE CRIMINAL LAW

According to Powell

> Thirty years of law reform, programs and education to try to prevent sexual violence have not been enough to truly change the experiences of young women [or] the old rules of negotiating sex and consent. It is time to seriously re-think our approach to reducing sexual violence. We need to engage both young women and young men in challenging a culture that continues to allow sexual violence to occur.[148]

This chapter will examine alternative measures to criminal law for educating young Australians about different norms of sexual conduct than those embodied by the 'penetrative/coercive' model, and for reducing the incidence of unwanted sex among young Australians.

I. PRIMARY PREVENTION VS TERTIARY INTERVENTION

While legislative reform is an

> Important [initiative] and may contribute to the prevention of further harm or the reduction in repeat offending, [it constitutes] an intervention after the initial offence, and thus [does] not embody a primary preventative potential.[149]

As well as being limited by its punitive operation, the efficacy of using sexual assault legislation to improve the lives of women is limited by the high attrition rate for sexual assault[150] and the added trauma experienced by victims due to the legal process.[151] Criminal litigation is by its nature reactive, not preventative; therefore, notwithstanding the amendments and their inherent limitations, the criminal justice system only assists

[148] Powell, above n. 15, 3.
[149] Carmody and Carrington, above n. 38, 1.
[150] Attorney-General of NSW Criminal Justice Sexual Offences Task Force, above n. 86; Carmody and Carrington, above n. 38.
[151] Bronitt, above n. 18, 310.

victims of sexual assault *after* the fact. Given so few victims even enter the legal process,[152] let alone are successful in achieving convictions, those that the legal process assist are few. Furthermore, it has been shown in this thesis that top-down policy initiatives such as the NSW reforms are unlikely to shift community attitudes.

Powell argues 'challenges to gendered discourses *must* occur consistently across multiple sites of intervention to achieve significant social change':[153] despite the value of legislative reform, such measures alone are insufficient. Research into educative/primary prevention measures demonstrates that an increased focus on primary prevention tactics is overdue. Such measures aim to 'prevent sexual violence in the general population before it occurs.'[154] Various schemes have been implemented, including: social marketing campaigns;[155] youth participatory and action research models;[156] working with families;[157] community-based education[158] and school-based education schemes. This chapter will closely examine the latter two preventative measures.

II. PREVENTATIVE EDUCATION MEASURES

> [Skills in negotiating consent are] not what we're taught in high school. We're given a lot of stuff on STDs and pregnancy…but we're not taught how to have these conversations, so at the end of the night…you're in this room and there's all this pressure bearing down on both people...[159]

[152] Denise Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions* (2005).
[153] Powell, above n. 15, 160.
[154] Powell, above n. 15, 156; and Carmody above n. 60, 5.
[155] See 'The Line' campaign: Australian Government, *The Line* (2010) <http://www.theline.gov.au> at 28 May 2012
[156] La Trobe University, *Counselling services 2008 annual report* (2008) 1.
[157] Powell, above n. 15, 166-167.
[158] Carmody, above n. 57. Kath Albury et al., 'Playing by the rules: researching, teaching and learning sexual ethics with young men in the Australian National Rugby League,' (2011) 11 (3) *Sex Education* 339.
[159] Nina Funnell: Special Broadcasting Service, 'Sexual Consent', *Insight*, Tuesday 4 August 2009 <http://www.sbs.com.au/insight/episode/transcript/97/Sexual-consent> at 15 March 2012.

Prevention measures need to work to combat difficulties faced by young Australians in negotiating consent, as well as to challenge the norms of the penetrative/coercive model giving rise to pressure on young Australians to consent to sexual activity. It has been shown that the criminal law cannot protect many young Australians from incidents of unwanted sex arising out of the broader social pressure to consent to sex, either through the avenue of criminal redress for a particular incident, or via the broader educative effects hoped to be achieved by the legal reforms. Whilst governments need to develop multi-level strategies to reduce the incidence of sexual assault and to educate the community as to a communicative standard of consent, 'education is privileged as a key strategy…because it has the capacity to be delivered to a cohort before instances of sexual violence occur – so that it does not occur.'[160] In 2010, 'managing peer influence, relationships…sexual activity and decision making…were among the most frequently taught topics [in Australian secondary school sex education].'[161] This chapter will explore how such education can be developed to better teach young Australians skills in negotiating consent and combating penetrative/coercive norms.

Chapter I showed that most unwanted sex occurs among young Australians, who are at a critical point in their personal and social development,[162] providing a 'window of opportunity for sexuality education to challenge…traditional gendered expectations.'[163] It is vital that prevention education schemes are aimed at young Australians in secondary schools to combat the prevalence of unwanted sex, but also to teach them the attitudes to carry into adulthood. For example, Davis and Lee's study '[supports] the

[160] Carmody, above n. 52, 7.
[161] Anthony Smith et al., *Sexuality Education in Australian Secondary Schools* (2011) 5.
[162] VicHealth, *Preventing Violence Before it Occurs* (2007)
[163] Powell, above n. 10, 13.

need for intervention aimed at changing dysfunctional attitudes related to sexual assault [that] should occur within the school environment.'[164] In 2009, Harper argued that '[w]orking with young people to build a new generation of healthy relationships, where respect and equity are valued, will be key to [combating] inequity and violence against women.'[165]

There has been much research investigating the efficacy of primary prevention measures involving educative schemes in high schools and colleges to achieve this aim. Carmody's extensive work evaluating various models of educative schemes for the prevention of sexual assault has illuminated some necessary elements for any such scheme, as well as some approaches which may operate counter-productively.

A. *PROBLEMS WITH SOME MODELS*

Carmody argues that prevention is impossible in a framework which is defined by strong feminist theories such as those which employ the universalization of men as violent and women as passive recipients of violence.[166] Such approaches perpetuate and reinforce dominant gender relations,[167] making invisible the dynamic nature of negotiating desire and pleasure[168] thereby limiting the potential to reduce incidences of sexual assault. Moreover, it is within this framework that 'rape prevention' programs which are in fact 'risk avoidance' programs have developed, although they have recently received criticism from feminist researchers.[169] Such programs attempt to educate women about risk and teach them to assertively say 'no' to unwanted sex. This is problematic because it: reinforces women's sense of fear; denies negotiation; positions

[164] Davis and Lee, above n. 8, 801.
[165] VicHealth, above n. 50.
[166] Carmody, above n. 146, 468.
[167] Carmody, above n. 146, 467.
[168] Ibid, 478.
[169] Powell, above n. 15, 157.

women as responsible for managing another's sexuality; reinforces gendered expectations about who initiates sex; and maintains some expectations that 'no' might mean 'yes', after some convincing.[170] It is also counter-productive to rely on explicit communication refusing consent as the 'key or only signifier of non-consent.'[171]

Other problems which have been illuminated include: poor and/or inconsistent evaluation methods of educative programs,[172] the employment of a heterosexist bias, inconsistency in delivery, and the use of teachers who are 'rarely specifically resourced or trained.'[173] Powell has also illuminated some issues with existing sexuality education in schools (that is, programs not specifically designed to combat sexual assault/unwanted sex). She argues that generic sex education in schools tends to reproduce the discourses of the penetrative/coercive model, constructing a 'male active and uncontrollable sexuality against a female passive and receptive sexuality'[174] and emphasising a definition of sex in terms of penetrative vaginal sex.[175] She also argues that such education is unlikely to engage and inform young people, because it 'reproduces a discourse of youth sex as essentially risky [and young people] do not experience their sexual lives in such narrow terms.'[176] This is particularly pertinent, as the National Curriculum's Health/Physical Education Phase is currently being rolled out,[177] and appears to retain a traditional focus on reproductive issues and sexually

[170] Carmody, above n. 146, 468.
[171] Powell, above n. 15, 157.
[172] Susan Evans, Chris Krogh and Moira Carmody, '"Time to get cracking": The challenge of developing best practice in Australian sexual assault prevention education' (2009) 11 *ACSSA Issues.*
[173] Powell, above n. 15, 128.
[174] Ibid, 127.
[175] Ibid, 129.
[176] Ibid, 127.
[177] Australian Curriculum, Assessment and Reporting Authority, *Draft Shape of the Australian Curriculum: Health and Physical Education* (2012).

transmitted diseases, with minimal mention of the broader societal issues facing young Australians or any of the ideal elements explored below.[178]

B. *NECESSARY ELEMENTS*

Principally, prevention education programs must utilise research on young people's sexuality and negotiation of consent, as well as understand differences in communication patterns between men and women.[179] In doing so, such programs can better teach skills for negotiation within the specific context of intimate relationships.

1. A COMMUNICATIVE MODEL?

In order to link young people's attitudes to sexual conduct and educative program design, it is first necessary to examine the efficacy of the communicative model advanced as a solution for the prevalence of unwanted sex amongst young Australians. As examined in Chapter II, this model has been lauded by some feminists as a worthy replacement of the penetrative/coercive model, especially within the criminal law framework. Harris has argued, however, that for 'date rape to be taken truly seriously as a crime, communicative sexuality must be a social as well as a legal norm.'[180] Yet it has been shown in Chapter II that legal reform which promotes this model is unlikely to have an educative effect on the broader community, and Powell has argued that a communicative model of consent has yet to enter the norms of young people's everyday sexual encounters.[181]

[178] Ibid, 2, 14, 16-17.
[179] Moira Carmody, 'Preventing Adult Sexual Violence Through Education?' (2006) 18 (2) *Current Issues in Criminal Justice* 342, 349; Patton and Mannison, above n. 2, 454.
[180] Angela Harris, 'Forcible Rape, Date Rape, and Communicative Sexuality: A Legal Perspective,' in Leslie Francis (ed), *Date Rape* (1996) 52.
[181] Powell, above n. 10, 10.

Moreover, focus on an idealised form of communicative sexuality has been criticised for its limited practical relevance.[182] For example, Powell's argument for bringing a more communicative negotiation of consent into young people's everyday practice is tempered by her caution against reliance on this as a panacea.[183] Her study demonstrates how complex and contradictory the communication of sexual consent is, particularly for young people: at times young women are 'not equipped with a sense of, or language for, negotiating the terms of [sexual encounters when] the choice they are presented with is simply 'yes' or 'no' to a predetermined scenario.'[184] Moreover, she argues that '…consent is not usually something that is explicitly verbally articulated. Rather, consent is a process; it is a bodily communication…'[185] Powell's study also showed that both 'first-time sexual encounters and those in an established relationship tend to rely on the interpretation of subtle signs and cues,'[186] not simply on verbal or explicit communication.

When it comes to explicit communication of refusal to consent, Powell points out that

> When talking about an unwanted casual sexual encounter [some] young women are ambivalent as to what the right response might be. They express difficulty in assertively saying 'no'. There appears to be a general acceptance that simply saying 'no' isn't necessarily the right response, whether because of the socially sanctioned perception of 'leading him on', or because it simply is not going to be very effective…[187]

Therefore, an effective program must also teach young people how to negotiate and establish consent within a context where non-verbal communication is heavily relied upon, social/unspoken pressure to consent is experienced and fear of 'awkwardness' or

[182] Mark Cowling, 'Rape, Communicative Sexuality and Sex Education' in Mark Cowling & Paul Reynolds, *Making Sense of Sexual Consent* (eds) (2004).
[183] Powell, above n. 15, 99.
[184] Ibid, 63.
[185] Ibid, 97.
[186] Powell, above n. 10, 10.
[187] Powell, above n. 15, 57.

of offending is high.[188] Carmody's 2009 study found that both 'women and men felt there was a need to teach people how to pay attention to verbal and non-verbal communication in intimate encounters,'[189] as well as a need to equip people with skills to recognise and respect changing feelings about sexual intimacy in an encounter, which can often happen quickly.[190]

2. COMBATING PENETRATIVE/COERCIVE DISCOURSES AND NORMS

Chapter II demonstrated that legal reforms aiming to have an educative effect on the community about a different standard of sexual behaviour are unlikely to achieve that goal. The broader community, including young people, continue to adopt the norms such reform efforts are attempting to combat. The solution lies elsewhere: Powell notes that young men and women are able to, and do, challenge the unwritten rules of the penetrative/coercive model,[191] and so educative schemes must capitalise on this and work with young people to unpack and undermine those norms. Rawsthorne has argued that school or health based education programs must provide 'young people with the skills to "peel back" the layers of meaning surrounding sexuality,'[192] in order to challenge relationship dynamics and penetrative/coercive norms of behaviour in the context of young people's relationships.

Such schemes must work to undermine the forces which give rise to the social pressure to seek or consent to sex, for example by unpacking and combating dominant models of

[188] Kelly, above n. 11; Powell, above n. 10, 10.
[189] Carmody, above n. 57, 48.
[190] Ibid, 50.
[191] Powell, above n. 15, 51-52.
[192] Rawsthorne, above n. 9.

masculinity and femininity, without risking the 'backfire' effect.[193] Thus, although incorporating feminist theories must be approached with caution, there is a

> Need to redefine policy initiatives within a framework that acknowledges the power of cultural constructions of femininity and masculinity and develop multi-level prevention strategies, which promote an alternative cultural landscape of sexual practices and gender norms.[194]

There is 'increasing acknowledgement of the importance of including men in prevention efforts'[195] in order to combat the power of the penetrative/coercive norms in young Australians' relationships. Powell emphasises the importance of making available acceptable alternative models of masculinity for young men, in order to mitigate the expectation upon young men to be sexually experienced: 'Rules about sex that reinforce and expect male sexuality to be uncontrollable both deny the agency and diversity of young men's experiences, and simultaneously provide a context in which pressure and coercion can become associated with a 'normal' male sex drive.'[196]

Banyard, Moynihan and Plante recommend programs to combat potential male resistance to prevention messages which 'get both men and women to really listen to prevention messages and find ways to target all community members rather than select groups of at-risk individuals.'[197] Carmody shows how programs which advocate the inclusion of men in prevention measures, 'rather than constructing men as inherently dangerous…[attempt] to build the skills of men – particularly young college men – as

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[193] Some programs aimed at changing male behaviour can have a rebound effect by unintentionally reinforcing domineering masculine behaviour among the participants: Carmody, above n. 183, 344.
[194] Carmody and Carrington, above n. 38, 24.
[195] Carmody, above n. 52, 11.
[196] Powell, above n. 15, 45-47.
[197] Victoria Banyard, Mary Moynihan and Elizabethe Plante, 'Bystander Education: Bringing a Broader Community Perspective to Sexual Violence Prevention', (2004) 32 (1), *Journal of Community Psychology*, 65.

active bystanders who can use their status as role models to intervene or prevent violence against women.'[198]

3. OTHER IDEAL ELEMENTS

In their research, both Carmody and Powell found that young people nominated several approaches/elements they thought fundamental to sexuality education and methods of combating pressure to consent, including 'real life' discussions about the kinds of sexual situations they were likely to encounter and strategies for dealing with them, and talking to other young people their own age who had gained such experience.[199] Young women suggested to Powell that programs working to build confidence in young women would be useful, particularly for negotiating sex assertively.[200] To this, Powell argued that

> In this context young women need access to an alternative discourse that consistently positions them as experiencing sexual desires and being entitled to decide on what terms those desires might be acted upon, more than they need to be taught assertiveness in negotiating sex. But this is more than can be done in short-term education programs; it requires a cultural change in other fields as well.[201]

Powell strongly advocates for educative programs which extend beyond short, sexual education classes, arguing for 'examination of the ways in which gendered norms are reproduced in formal and informal school policy, curriculum and cultures: a whole-of-school approach to the prevention of sexual pressure and coercion amongst youth.'[202] She acknowledges that education policy and curriculum documents cannot easily make explicit reference to 'sexual pleasure' or 'supporting students to make active sexual choices' without attracting community and media criticism (due to the common view

[198] Carmody, above n. 52, 11.
[199] Powell, above n. 15, 135; Carmody, above n. 57, 56-7.
[200] Powell, above n. 15, 136-137.
[201] Powell, above n. 15, 137-138.
[202] Ibid, 140.

that high school students should not be sexual at all).[203] However, she suggests some ways of combating these norms, whilst 'remaining astute to taboos regarding young people and sex;'[204] for example, she suggests objectives to unpack and challenge penetrative/coercive norms of sex and sexuality to be implemented in school curricula outside sex education.[205]

Other recommendations for the design of such programs look at particular features of educators and their ability to manage gender dynamics of class settings, as well as peer education programs.[206] Finally, programs need to move 'beyond a belief that increasing awareness of sexual violence will prevent it from occurring,'[207] and '[i]t is not enough for campus administrators to fund a program; there needs to be a commitment to systematic evaluation.'[208]

III. WHAT NEXT FOR AUSTRALIAN GOVERNMENTS?

Of paramount concern is the need for a structured implementation of such education programs within Australia. For example, the Federal U.S. Government now mandates rape prevention efforts on college campuses that receive federal funds;[209] this social policy directive does not apply in Australia, where governments have only gone as far as recommending education programs, but have stopped short of tying their implementation to funding.[210] In order to influence deep-seated community beliefs,

[203] Ibid 138-140; Carmody, above n. 57, 61.
[204] Powell, above n. 15, 141.
[205] Ibid.
[206] Ibid, 143.
[207] Carmody, above n. 179, 345.
[208] Ibid, 345.
[209] M. Hepper, C. Humphrey, T. Hillenbrand-Gunn and K. DeBord, 'The Differential Effects of Rape Prevention Programming on Attitudes, Behaviour and Knowledge', (1995) 42 (4) *Journal of Counselling Psychology* 508.
[210] Carmody, above n. 146, 466.

attitudes and practices about sex, sexuality and consent, governments need to consider such measures.

The education prevention strategies outlined above have been shown to be substantially more effective at shifting community attitudes and combating the prevalence of unwanted sex amongst young Australians than the tertiary prevention strategies which have been implemented by Australian governments thus far, such as expanding statutory definitions of consent and increasingly relying on heavier penalties for offenders.[211] It has been argued that for greatest effect, such schemes should be implemented in high schools, colleges and universities, but also in 'non-school community settings [in order that] young people receive multiple and consistent messages about ethical negotiation of sexual consent.'[212]

Furthermore, Braithwaite argues that 'a shift of investment from [tertiary intervention measures] to evidence-based crime prevention can bequeath a safer society'[213] and that, 'by being evidence-based on…matters, policymakers can be convinced that excessively tough justice that is expensive to deliver is not as effective as emotionally intelligent justice.'[214] Such an approach is economically beneficial too: '[s]ome of the most effective forms of crime prevention…are costly, but…efficient because of other benefits they bring...Certain crime prevention initiatives have proved profitable for the Australian economy.[215]

[211] Carmody, above n. 179, 345.
[212] Powell, above n. 15, 163.
[213] John Braithwaite, 'Less Prison, Better Prevention of Crime' (2012), Autumn, *ANU Reporter* 32.
[214] Ibid.
[215] Ibid.

CONCLUSION

This thesis has examined how the criminal justice system alone cannot adequately protect young Australians from the prevalence of unwanted sex occurring in that demographic. It is not only young victims who deserve protection; the long-term consequences of unwanted sex are damaging our society from the cumulative effects of the individual harm that such behaviours entrench.

Legal reform efforts to combat the norms of the penetrative/coercive model of sexuality within the criminal justice system are vital, but cannot alone dissipate the dominance of this model within the broader community and ultimately reduce the incidence of unwanted sex for young Australians. In order to achieve this, Australian governments must commit to continued research, implementation and evaluation of sexual assault prevention education programs in schools. Combined with the legal reforms discussed in Chapter II, such actions could more effectively counteract the norms of the penetrative/coercive model. Such actions can stop this damaging norm from being constantly reinforced and give young Australians knowledge of ethical sexual conduct as well as practical skills in how to negotiate sexual consent.

It is only fair to give young Australians the protection of learning how to negotiate consent. There will always be those who refuse to acknowledge lack of consent and it is these individuals whom the criminal justice system can deal with: the two-pronged approach outlined in this thesis points the way towards real prevention, so that fewer young Australians become victims of unwanted sex.

APPENDIX

CRIMES ACT 1900 (NSW): 61HA CONSENT IN RELATION TO SEXUAL ASSAULT OFFENCES

(1) Offences to which section applies: This section applies for the purposes of the offences under sections 61I, 61J and 61JA.

(2) Meaning of consent: A person "consents" to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.

(3) Knowledge about consent: A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:

(a) the person knows that the other person does not consent to the sexual intercourse, or

(b) the person is reckless as to whether the other person consents to the sexual intercourse, or

(c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:

(d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but

(e) not including any self-induced intoxication of the person.

(4) Negation of consent: A person does not consent to sexual intercourse:

(a) if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or

(b) if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep, or

(c) if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or

(d) if the person consents to the sexual intercourse because the person is unlawfully detained.

(5) A person who consents to sexual intercourse with another person:

(a) under a mistaken belief as to the identity of the other person, or

(b) under a mistaken belief that the other person is married to the person, or

(c) under a mistaken belief that the sexual intercourse is for medical or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means),

does not consent to the sexual intercourse. For the purposes of subsection (3), the other person knows that the person does not consent to sexual intercourse if the other person knows the person consents to sexual intercourse under such a mistaken belief.

(6) The grounds on which it may be established that a person does not consent to sexual intercourse include:

(a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or

(b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or

(c) if the person has sexual intercourse because of the abuse of a position of authority or trust.

(7) A person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

(8) This section does not limit the grounds on which it may be established that a person does not consent to sexual intercourse.

BIBLIOGRAPHY

ARTICLES/BOOKS/REPORTS

Allen, Louisa, *Sexual Subjects: Young People, Sexuality and Education* (2005)

Australian Bureau of Statistics, *Women's Safety Australia* (1996)

Australian Bureau of Statistics, *Personal Safety Survey* (2006)

Australian Curriculum, Assessment and Reporting Authority, *Draft Shape of the Australian Curriculum: Health and Physical Education* (2012)

Australian Institute of Criminology, *Australian Crime: Facts and Figures 2001* (2002)

Albury, Kath, et al., 'Playing by the rules: researching, teaching and learning sexual ethics with young men in the Australian National Rugby League,' (2011) 11 (3) *Sex Education* 339

Archard, David, *Sexual Consent* (1998)

Attorney General of NSW Criminal Justice Sexual Offences Task Force, *Responding to sexual assault: the way forward* (2006)

Banyard, Victoria, Mary Moynihan and Elizabethe Plante, 'Bystander Education: Bringing a Broader Community Perspective to Sexual Violence Prevention', (2004) 32 (1), *Journal of Community Psychology*, 61-79

Blythe, M., et al., 'Incidence and correlates of unwanted sex in relationships of middle and late adolescent women' (2006) 160 Archives of Pediatric & Adolescent Medicine (6) 591

Braithwaite, John, 'Less Prison, Better Prevention of Crime' (2012), Autumn, *ANU Reporter* 32

Brownmiller, Susan, *Against our will: Men, women and rape* (1975)

Carmody, Moira and Kerry Carrington, *Preventing Sexual Violence?* (2000) 33 (3) *The Australian and New Zealand Journal of Criminology*

Carmody, Moira, 'Ethical Erotics: Reconceptualising Anti-Rape Education' (2005) 8 (4) *Sexualities* 465

Carmody, Moira, 'Preventing Adult Sexual Violence Through Education?' (2006) 18 (2) *Current Issues in Criminal Justice* 342

Carmody, Moira *Sex & Ethics: Young people and ethical sex* (2009)

Carmody, Moira, 'Conceptualising the Prevention of Sexual Assault and the Role of Education,' (2009) 10 *ACSSA Issues* 1

Chung, Donna, 'Violence, control, romance and gender equality: Young women and heterosexual relationships' (2005) 28 *Women's Studies International Forum* 445

Cowling, Mark 'Rape, Communicative Sexuality and Sex Education' in Mark Cowling & Paul Reynolds, *Making Sense of Sexual Consent* (eds) (2004)

Crites, Laura and Winifred Hepperle (eds), *Women, the Courts and Equality* (1987)

Crofts, Thomas, 'Rape, the Mental Element and Consistency in the Codes' (2007) 7(1) *Queensland University Of Technology Law And Justice Journal* 1

Davis, Tanya and Christina Lee, 'Sexual Assault: Myths and Stereotypes among Australian Adolescents' (1996) 34 *Sex Roles* 787

Department of Education Training and Youth Affairs, and National Crime Prevention, 'Young people and domestic violence: national research on young people's attitudes to and experiences of domestic violence. Full report.' (2001)

Easteal, Patricia, *Balancing the Scales: Rape, Law Reform & Australian Culture* (1998)

Easteal, Patricia 'Survivors of sexual assault: A national survey,' in Easteal, Patricia (ed.), *Without Consent: Confronting Adult Sexual Violence* (1993)

Easteal, Patricia, *Less than Equal: Women and the Australian Legal System* (2001)

Estrich, Susan, *Real Rape* (1987)

Evans, Susan, Chris Krogh and Moira Carmody, '"Time to get cracking": The challenge of developing best practice in Australian sexual assault prevention education' (2009) 11 *ACSSA Issues*

Flood, Michael and Clive Hamilton, 'Youth and Pornography in Australia: Evidence on the Extent of Exposure and Likely Effects' (Discussion Paper No 52, The Australia Institute, 2003)

Goodchilds, J., G. Zellman, R. Johnson & R. Giarrusson, 'Adolescents and their perceptions of sexual interactions,' in A. Burgess (ed.) *Rape and sexual assault* (1988)

Graycar, Regina and Jenny Morgan, *The Hidden Gender of Law* (1990)

Harris, Angela, 'Forcible Rape, Date Rape, and Communicative Sexuality: A Legal Perspective,' in Leslie Francis (ed), *Date Rape* (1996)

Hepper, M, Humphrey, C., Hillenbrand-Gunn, T, and K. DeBord, 'The Differential Effects of Rape Prevention Programming on Attitudes, Behaviour and Knowledge', (1995) 42 (4) *Journal of Counselling Psychology* 508

Kant, Immanuel, *Foundations of the Metaphysics of Morals* (Lewis White Beck trans, 1990 ed) [trans of: *Grundlegung zur Metaphysik der Sitten*(first published 1785)]

Kelly, Liz 'The Continuum of Sexual Violence' in Jalna Hanmer and Mary Maynard (eds), *Women, Violence and Social Control* (1987) 46

La Trobe University, *Counselling services 2008 annual report* (2008)

Larcombe, Wendy, 'The 'Ideal' Victim v Successful Rape Complainants: Not What You Might Expect' (2002) 10 *Feminist Legal Studies* 131

Larcombe, Wendy, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 Feminist Legal Studies 27

Lievore, Denise *Non-reporting and Hidden Recording of Sexual Assault: an International Literature Review* (2003)

Lievore, Denise *No Longer Silent: A Study of Women's Help-Seeking Decisions* (2005)

Loizidou, Elena, 'The Trouble with Rape: Gender Matters and Legal 'Transformations' (1999) 7 Feminist Legal Studies 275

MacKinnon, Catherine, *Towards a Feminist Theory of the State* (1989)

Marsh, Jeanne, Alison Geist and Nathan Caplan, *Rape and the Limits of Law Reform* (1982)

McGregor, Joan, *Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (2005)

Mill, John Stuart, *On Liberty* (1859)

Munro, Vanessa and Carl Stychin, *Sexuality and the Law: Feminist Engagements* (2007)

Naffine, Ngaire, *Gender, Crime and Feminism* (1995)

Naffine, Ngaire, *Feminism and Criminology* (1997)

Patton, Wendy and Mary Mannison, 'Sexual Coercion in High School Dating' (1995) (1995) 33 *Sex Roles* 447

Philadelphoff-Puren, Nina 'Contextualising consent: the problem of rape and romance' (2005) 20 *Australian Feminist Studies* 31

Toni Pickard, 'Culpable Mistakes and Rape: Relating Mens Rea to the Crime' (1980) 30 *University of Toronto Law Journal* 75

Pineau, Lois, 'Date Rape: A Feminist Analysis', in Leslie Francis (ed), *Date Rape* (1996)

Powell, Anastasia, 'Sexual Pressure and Young People's Negotiation of Consent' (2007) 14 *Australian Centre for the Study of Sexual Assault Newsletter* 1

Queensland Domestic Violence Resource Centre, *Boys will be…A Report on the Survey of Year Nine Males and Their Attitudes to Forced Sex* (1992)

Sakar, N. & R Sarkar, 'Sexual assault on woman: Its Impact on her Life and Living in Society' (2005) 20 *Sexual and Relationship Therapy* 4

Scutt, Jocelynne, *Women and the Law* (1990)

Smart, Carol, *Feminism and the Power of Law* (1989)

Smith, Anthony, et al., *Secondary Students and Sexual Health 2002* (2002)

Smith, Anthony, et al., *Secondary Students and Sexual Health: Results of the 4th National Survey of Australian Secondary Students, HIV/AIDS and Sexual Health* (2009)

Smith, Anthony, et al., *Sexuality Education in Australian Secondary Schools* (2011)

Stevenson, Kim 'Unequivocal Victims: the Historical roots of the Mystification of the Female Complainant in Rape Cases' (2000) 8 *Feminist Legal Studies* 343

Success Works, *Sexual Assault Reform Strategy: Final Evaluation Report* (2011)

Tang, Kwong-leung, 'Rape Law Reform in Canada: the Success and Limits of Legislation' (1998) 42(3) *International Journal of Offender Therapy and Comparative Criminology* 258

Taylor, Natalie. 'Juror Attitudes and Biases in Sexual Assault Cases' (2007) 34 *Australian Institute of Criminology Trends & Issues in Crime and Justice* 1

Taylor, Natalie & Jenny Mouzos, *Community Attitudes to Violence against Women Survey 2006: Full Technical Report* (2006)

Thornton, Margaret, '"Post Feminism" in the Legal Academy?' (2010) 95 *Feminist Review* 92

Tolman, Deborah, *Dilemmas of Desire: Teenage Girls Talk about Sexuality* (2002)

United Nations, *Handbook for Legislation on Violence Against Women* (2010)

VicHealth, *Preventing Violence Before it Occurs* (2007)

VicHealth, *National Survey on Community Attitudes to Violence Against Women: Changing Cultures, Changing Attitudes* (2009)

Wedgwood, Nikki, 'Aussie Rules! Schoolboy football and masculine embodiment,' in Stephen Tomsen and Mike Donaldson (eds) *Male Trouble: Looking at Australian Masculinities* (2003)

Robin Weiner 'Shifting the Communication Burden: A Meaningful Consent Standard in Rape' (1983) 6 *Harvard Women's Law Journal* 143.

Xenos, Sophia and David Smith, 'Perceptions of Rape and Sexual Assault among Australian Adolescents and Young Adults' (2001) 16 *Journal of Interpersonal Violence*, 1103

Young, Margrette, Julie Byles, and Annette Dobson, 'The Effectiveness of Legal Protection in the Prevention of Domestic Violence in the Lives of Young Australian Women' (2000) 48 *Trends and Issues in Crime and Criminal Justice*, 1

CASES

DPP v Morgan [1975] 2 All ER 411; (1975) 61 Cr App R 136

R v Ewanchuk [1991] 1 SCR 330

R v McEwan [1979] 2 NSWLR 926

R v Mueller [2005] 62 NSWLR 476

R v Tolmie (1995) 37 NSWLR 660

Regina v Banditt [2004] NSWCCA

Rogers v Whitaker [1992] HCA 58

Question of Law (No 1 of 1993) (1993) 59 SASR 214

LEGISLATION

Crimes Act 1900 (NSW)

Crimes Act 1958 (Vic)

Crimes (Sexual Offences) Act 2006, amending *Crimes Act 1958* (Vic)

Crimes (Sexual Offences) (Further Amendment) Act 2006, amending *Crimes Act 1958* (Vic)

Crimes Amendment (Rape) Act 2007, amending *Crimes Act 1958* (Vic)

Criminal Code Act Compilation Act 1913 (WA)

Criminal Code Act 1899 (Qld)

OTHER SOURCES

Attorney-General John Hatzistergos, New South Wales, *Second Reading,* Crimes Amendment (Consent-Sexual Assault Offences) Bill 2007

Australian Government, *The Line* (2010) <http://www.theline.gov.au> at 28 May 2012

Brown, Ruth, 'Matthew Johns, what Happened and what People are Saying about it' (14 May 2009) < http://www.crikey.com.au/2009/05/14/matthew-johns-what-happened-and-what-people-are-saying-about-it-2/> at 26 April 2012

Cass, Connie and Jennifer Agiesta, 'Young People See Online Slurs as Just Joking, Poll Shows', *The Huffington Post*, 20 September 2011

De Brito, Sam, 'Group Mentality' (14 May 2009) The Sydney Morning Herald <http://blogs.smh.com.au/lifestyle/allmenareliars/archives/2009/05/do_aussie_men_like_women.html> at 26 April 2012

Fink, Jesse, 'Shame on the ABC and Nine for their Wrecking of Matthew Johns' (13 May 2009) SBS.com.au: Sport <http://www.sbs.com.au/sport/blog/single/109524/Shame-on-the-ABC-and-Nine-for-their-wrecking-of-Matthew-Johns/> at 26 April 2012

Gilmore, Heath and Matthew Benns, 'Row over Sex Education' (8 November 2009) The Sydney Morning Herald <http://www.smh.com.au/national/row-over-sex-education-20091107-i2sl.html> at 28 May 2012

Herbert, Bronwyn, *Unwanted Teen Sex on the Rise: Report* (4 August 2009) ABC News <http://www.abc.net.au/news/2009-08-04/unwanted-teen-sex-on-the-rise-report/1378084> at 25 April 2012

Lauder, Simon 'Sex Education Group Raises HIV Alarm' (30 November 2011) ABC News <http://www.abc.net.au/news/2011-11-30/experts-call-for-national-sex-education/3705010> at 28 May 2012

London Feminist, *Rape Culture in 140 Characters* (2012) Storify, <http://storify.com/londonfeminist/rape-culture-in-up-to-140-characters> at 25 April 2012

New South Wales, *Parliamentary Debates,* Legislative Assembly, 17 October 2007 (Carmel Tebbutt, Morris Iemma)

New South Wales, *Parliamentary Debates,* Legislative Council, 13 November 2007 (Fred Nile, Lee Rhiannon, Catherine Cusack, John Hatzistergos, Amanda Fazio, John Ajaka)

New South Wales, *Agreement in Principle,* Legislative Assembly, 14 November 2007 (Verity Smith)

New South Wales, *Parliamentary Debates,* Legislative Council, 4 December 2007 (Amanda Fazio, John Hatzistergos)

O'Neill, Brendan, 'The Campaign to "Stamp Out Misogyny Online" Echoes Victorian Efforts to Protect Women from Coarse Language' (7 November 2011) TheTelegraph <http://blogs.telegraph.co.uk/news/brendanoneill2/100115868/the-campaign-to-stamp-out-misogyny-online-echoes-victorian-efforts-to-protect-women-from-coarse-language/> at 26 April 2012

Rawsthorne, Margot, 'Creating Healthy Sexuality for Young People' (Paper presented at *Expanding Our Horizons: Understanding the Complexities of Violence against Women*, University of Sydney, Sydney, 18-22 February 2002)

Sherriff, Lucy, 'UniLad Magazine Forced to Pull 'Surprise' Rape Article after Twitter Backlash' (31 January 2012) Huffington Post: Universities and Education <http://www.huffingtonpost.co.uk/2012/01/31/unilad-magazine-forced-to-pull-surprise-rape-article-after-twitter-backlash_n_1244173.html> at 25 April 2012

Special Broadcasting Service, 'Sexual Consent', *Insight*, Tuesday 4 August 2009 <http://www.sbs.com.au/insight/episode/transcript/97/Sexual-consent> at 15 March 2012

Support Matthew Johns (2009) Facebook <https://www.facebook.com/groups/82715187546/> at 26 April 2012

Sweet, Melissa, 'What do Australians Really Think about Violence against Women? A New Survey', *Crikey,* 7 April 2010

University of Surrey, 'Are Sex Offenders and Lads' Mags Using the Same Language?' (6 December 2011) <http://www.surrey.ac.uk/mediacentre/press/2011/69535_are_sex_offenders_and_lads_mags_using_the_same_language.htm?utm_source=dlvr.it&utm_medium=twitter> at 25 April 2012

VicHealth, 'Young People Hold the Key to Ending Violence against Women' (Media Release, 7th April 2010)

Waterstreet, Charles, 'Laws of Attraction', *The Sydney Morning Herald* (Sydney), 13 February 2011

Wong, David, *5 Ways Modern Men are Trained to Hate Women* (2012) Cracked.com <http://www.cracked.com/article_19785_5-ways-modern-men-are-trained-to-hate-women_p2.html> at 10 April 2012

Women's Law Collective, 'Experiences of Women in the Courtroom' (Speech delivered at the Melbourne University Law School, Melbourne, 11 August 2003)