

## **“A kiss is not a contract”**

### **School Law: Sexual Assault, Consent and Crime Conference**

#### **Opening Address**

**26 May 2021<sup>1</sup>**

I acknowledge the traditional custodians of all the lands upon which we meet and pay my respects to their elders, past, present, and emerging. I acknowledge that sovereignty over these lands was never ceded.

#### **The problem**

As long ago as 2008, New Zealand folk comedy duo Flight of the Conchords made a significant contribution to the jurisprudence about sexual consent by observing that “a kiss is not a contract”. As they elaborated:

Just because you’ve been exploring my mouth

Doesn’t mean you get to take an expedition further south, no.

But like so much of what we admire in the Land of the Long White Cloud, this statement of the almost obvious did not glide unhindered across the ditch.

The 2017 National Community Attitudes towards Violence Against Women Survey revealed that, while most Australians reject attitudes that support sexual violence against women, many still don’t understand the meaning of sexual consent; that “a kiss is not a contract”.

- 12 per cent of those surveyed considered that women often say “no” when they mean “yes”.
- 30 per cent believed that, if a woman sends nude images to her male partner, then she is partly to blame if he shares the images without her permission.
- 10 per cent considered that, if a woman is drunk and starts having sex with a man, but then falls asleep, it is understandable that he will continue to have sex anyway.<sup>2</sup>

A 2018 study by Monash University found that one in three women and one in five men who have sex with men have experienced “stealthing”—the non-consensual removal of a condom.<sup>3</sup>

In another 2018 study, the National Survey of Secondary Students and Sexual Health, 15 per cent of sexually active male students and 37 per cent of sexually active female students answered “yes” to the question, “Have you ever had sex when you didn’t

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<sup>1</sup> I express my thanks to my associates, Rose Estanislao and Ross Mackey, for their assistance in the preparation of this address.

<sup>2</sup> Australia’s National Research Organisation for Women’s Safety, *Are We There Yet?: Australians’ Attitudes Towards Violence Against Women & Gender Equality* (Summary Report, March 2018) <[https://ncas.anrows.org.au/wp-content/uploads/2019/04/300419\\_NCAS\\_Summary\\_Report.pdf](https://ncas.anrows.org.au/wp-content/uploads/2019/04/300419_NCAS_Summary_Report.pdf)> at 12.

<sup>3</sup> Rosie L Latimer et al, ‘Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia’ (2018) 13(12) *PLoS One* 2.

want to?”. In other words, a quarter of the sexually active students who were surveyed and 2.5 times more young women than men said that they had had sex when they didn't want to.<sup>4</sup>

These statistics have been humanised by the recent high-profile allegations of real people.

On 15 February 2021, Brittany Higgins told the media that she was raped by a male colleague in Senator Reynolds' office while she was intoxicated and slipping in and out of consciousness.<sup>5</sup> Her allegations launched several inquiries, including inquiries into workplace culture and support for parliamentary staffers.<sup>6</sup> The Australian Federal Police are investigating the allegations.<sup>7</sup>

In the same week that Brittany Higgins came forward, Chanel Contos, an alumna of an elite Sydney private girls' school, launched a petition calling for “sexual consent to be at the forefront of educational issues [in schools] from a young age”. The petition states:

Those who have signed this petition have done so because they are sad and angry that they did not receive an adequate education regarding what amounts to sexual assault and what to do when it happens. These are uncomfortable conversations to have with young teenagers but it is far more uncomfortable to live knowing that something happened to you, or a friend, or perhaps that you were even the perpetrator of it, and it could have been avoided.<sup>8</sup>

Ms Contos started the petition after realising that she and a friend were sexually assaulted by the same person (a male student in the year above) when they were 13 years old.<sup>9</sup> The petition has more than 40,000 signatures and contains more than 6,000 stories of sexual assault. Some women said that they were as young as 12 when it happened.<sup>10</sup>

Consciously or subconsciously, many people still believe that women bear some responsibility for ensuring that they are not sexually assaulted; conversely, if they are assaulted, they may be to blame.

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<sup>4</sup> Christopher Fisher et al, *National Survey of Secondary Students and Sexual Health 2018* (Report, Australian research Centre in Sex, Health and Society, June 2019) <<http://teenhealth.org.au/resources/Reports/SSASH%202018%20National%20Report%20-%20V10%20-%20web.pdf>> at 39.

<sup>5</sup> Samantha Maiden, 'Young Staffer Brittany Higgins Says She Was Raped at Parliament House' *News.com.au* (online, 15 February 2021) <<https://www.news.com.au/national/politics/parliament-house-rocked-by-brittany-higgins-alleged-rape/news-story/fb02a5e95767ac306c51894fe2d63635>>.

<sup>6</sup> Mostafa Rachwani, 'Brittany Higgins' Rape Allegation Has Launched Five Inquiries. Here's the Breakdown', *The Guardian* (online, 23 February 2021) <<https://www.theguardian.com/australia-news/2021/feb/23/brittany-higgins-allegation-has-launched-five-inquiries-heres-the-breakdown>>.

<sup>7</sup> 'Brittany Higgins: Federal Police Reveal Five Officers Investigating Rape Allegation', *The Guardian* (online, 7 April 2021) <<https://www.theguardian.com/australia-news/2021/apr/07/brittany-higgins-afp-investigation-australian-federal-police-five-officers>>.

<sup>8</sup> Teach Us Consent Petition <<https://www.teachusconsent.com/>>.

<sup>9</sup> See generally Natassia Crysanthos, 'Hundreds of Sydney Students Claim They Were Sexually Assaulted', *Sydney Morning Herald* (online, 19 February 2021) <<https://www.smh.com.au/national/hundreds-of-sydney-students-claim-they-were-sexually-assaulted-and-call-for-better-consent-education-20210219-p57449.html>>; Chanel Contos, 'Do They Even Know They Did This To Us?': Why I Launched The School Sexual Assault Petition', *The Guardian* (online, 15 March 2021) <<https://www.theguardian.com/commentisfree/2021/mar/15/do-they-even-know-they-did-this-to-us-why-i-launched-the-school-sexual-assault-petition>>.

<sup>10</sup> Contos (n 9).

In early March 2021, General Angus Campbell reportedly told new Australian Defence Force Academy recruits in Canberra that they “needed not fall victim to the ‘four A’s’: alcohol, out after midnight, alone and attractive”—otherwise, they may become a target for sexual assaults.<sup>11</sup>

It is a sad reality that people (mostly women) do take precautions to keep themselves safe—for example, by not walking alone at night or using only well-lit paths, or—in some cases—being alone with a male work colleague. Most men never have to think about such defensive behaviour. I suppose that we should be grateful that some men talk to their wives to “clarify” their thinking about the impact on women of a sexually predatory work environment.

“Rape myth acceptance”, where victims do not recognise that they have experienced sexual offences or blame themselves for what has occurred, is a barrier to victims’ reporting of sexual offences.<sup>12</sup> Fear of being retraumatised by the criminal justice process is another significant disincentive.

Although many young people are understandably reluctant to pursue allegations of sexual assault—or maybe they just don’t realise that what occurred was an illegal assault—some such allegations do find their way into the courts.

A recent case before the ACT Supreme Court, *R v Smith (a pseudonym)*,<sup>13</sup> involved two 17-year-olds who were seeing each other but not “dating”. The complainant said that she had consented to kissing and digital penetration, but not to penile/vaginal penetration, yet the accused went ahead anyway, apparently thinking—or hoping—that “no” meant “yes”. The accused said that the complainant had consented to intercourse. The trial judge believed the young woman, but the case has gone on appeal; one of the grounds is that the evidence of the young woman was not strong enough to be accepted beyond reasonable doubt (the very high standard of proof that is required for a conviction).

### **What does the law say?**

While the legal definitions of “rape”, “sexual assault” and “sexual intercourse without consent” (and other offences such as “act of indecency without consent”) vary between different Australian states and territories, at their core, all definitions have two elements in common:

1. The prosecution must prove beyond reasonable doubt that the complainant did not consent (an element that looks at the complainant’s state of mind).
2. The prosecution must prove beyond reasonable doubt that the accused knew that the complainant did not consent/was reckless about whether she

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<sup>11</sup> See Anthony Galloway, ‘Defence Chief Angus Campbell Tells Cadets to Avoid Being “Prey” To Predators’, *Sydney Morning Herald* (online, 3 March 2021) <<https://www.smh.com.au/politics/federal/defence-chief-angus-campbell-tells-cadets-to-avoid-being-prey-to-predators-20210303-p577bf.html>>; Elias Visontay, ‘ADF Chief’s Advice to Cadets Not To Go Out Alone While “Attractive” Criticised as Dangerous’, *The Guardian* (online, 3 March 2021) <<https://www.theguardian.com/australia-news/2021/mar/03/adf-chief-criticised-for-advising-cadets-against-going-out-alone-while-attractive-to-avoid-sexual-predators>>.

<sup>12</sup> Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions About Sexual Offending: Creating an Evidence-Based Resource for Police and Legal Practitioners* (2017) <[https://apo.org.au/sites/default/files/resource-files/2017-09/apo-nid107216\\_1.pdf](https://apo.org.au/sites/default/files/resource-files/2017-09/apo-nid107216_1.pdf)> at 3.

<sup>13</sup> [2020] ACTSC 142.

consented/is taken to know that the complainant did not consent (an element that looks at the accused's state of mind or presumed state of mind).

Unfortunately, many people (including many lawyers) confuse these concepts.

### *Consent*

The definition of consent varies across Australia but, generally, to “consent” to a sexual act means to freely and voluntarily agree to the particular sexual act in question. In South Australia, New South Wales and the Northern Territory, consent is defined as “free and voluntary agreement”. In Victoria and Tasmania, it is “free agreement”. In Queensland and Western Australia, consent must be “freely and voluntarily given”.

Over time, the legal definition of “consent” has changed to reflect changing social norms.

- The original common law definition of rape was “carnal knowledge of a woman against her will”.<sup>14</sup> This was a gendered definition of rape—only men could commit the offence, and only women could be the victim.
- In earlier times, sexual intercourse without consent within a marriage was not considered “rape”.<sup>15</sup>
- Consent could not be withdrawn once sexual intercourse had commenced.<sup>16</sup>
- Judges could direct the jury that consent could be given hesitantly, grudgingly, or even tearfully.<sup>17</sup> Fortunately, this is no longer good law.<sup>18</sup> However, as recently as 2005, the New South Wales Court of Criminal Appeal stated that, as a matter of law, consent given reluctantly or only after a deal of persuasion was still consent.<sup>19</sup>

Things have changed. These days, most laws on consent spell out that apparent consent is negated if obtained:<sup>20</sup>

- (a) by force or violence (or fear of force or violence), threats, or intimidation;
- (b) by deception or fraudulent means;
- (c) by abuse of a person's authority, or professional or other trust;
- (d) by the victim's physical helplessness, age, or mental incapacity to understand the nature of the act;
- (e) through unlawful detention;
- (f) when the victim is asleep, unconscious, or intoxicated;
- (g) where there is a mistake as to the sexual nature of the act or the identity of the person; or
- (h) due to a mistaken belief that the act is for a medical, health or hygienic purpose.

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<sup>14</sup> *Papadimitropoulos v The Queen* (1957) 98 CLR 249, 260-1

<sup>15</sup> *PGA v The Queen* [2012] HCA 21; 245 CLR 355 at [64] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; *R v L* (1991) 174 CLR 379.

<sup>16</sup> K J Arenson, “The Chaotic State of the Law of Rape in Victoria: A Mandate for Reform” (2014) 78 *Journal of Criminal Law* 326, 327.

<sup>17</sup> See *Holman v The Queen* [1970] WAR 2.

<sup>18</sup> *Ibbs v The Queen* [1988] WAR 91; *R v Winchester* [2014] 1 Qd R 44.

<sup>19</sup> *R v Mueller* [2005] NSWCCA 47.

<sup>20</sup> Andrew Norris, “Non-consensual intercourse”, *Halsbury's Laws of Australia* (online, 25 October 2020) at [130-2015].

Most—if not all—of these “clarifications” obscure the idea that consent is, fundamentally, free and voluntary agreement.

The law about what amounts to “consent” (whether, from the complainant’s perspective, she consented) is already clear and satisfactory.

#### *Accused’s knowledge of lack of consent*

The more difficult problem is that, before convicting an accused person of the serious offence of rape (which, for example, in the ACT carries a maximum penalty of 12 years’ imprisonment), the prosecution is required to prove that the accused had criminal intent (or “mens rea”).

The rationale is that it is neither fair nor useful to subject an accused person to criminal punishment for conduct that was unintended or consequences that were unforeseen. Generally, the criminal law punishes those who have knowingly chosen the criminal behaviour in question.<sup>21</sup>

For sexual offences, there are two main states of mind that can be used to prove criminal intent—that the accused actually knew that the complainant was not consenting, or that the accused was reckless about whether the complainant was consenting.

In deciding whether an accused person actually knew that the complainant was not consenting or was “reckless” about whether she was consenting, the factfinder (usually a jury, sometimes a judge) must decide what was going on—subjectively—in the accused’s mind.

Proving actual knowledge is the simpler of the two tests (at least, conceptually). For example, if the accused resorted to threats or violence to secure submission, the factfinder may readily infer that the accused actually knew that the complainant did not freely and voluntarily agree to the act in question.

However, such cases are relatively rare.

Studies in the USA and in Denmark have found that the majority of complainants did not resist (physically and/or verbally) during the offence.<sup>22</sup> Anecdotally, that is also the experience in Australia.

If it is difficult to prove actual knowledge of lack of consent, what about the alternative of recklessness?

Recklessness is established if the accused was aware that there was a possibility that the complainant was not consenting but went ahead anyway, not caring one way or the other. In that case, recklessness is established, and the accused can be convicted.<sup>23</sup>

However, as the law does not require a complainant to actively communicate consent (e.g. by saying “yes”) or non-consent (e.g. by protesting or resisting), an accused

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<sup>21</sup> Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 2013) 155

<sup>22</sup> Australian Institute of Family Studies and Victoria Police (n 12) at 7.

<sup>23</sup> *Banditt v The Queen* [2005] HCA 80; 224 CLR 263

person may infer that, because the complainant did not object or resist, she consented—or the accused may say that they inferred that she was consenting.<sup>24</sup>

Some jurisdictions have tried to address this difficulty by inserting the concept of “reasonableness”; that belief in consent must be “reasonable”. Reasonableness may be relevant when the accused seeks to excuse their conduct by saying that they mistakenly believed that the complainant was consenting.

In Tasmania, any mistaken belief must be “honest and reasonable”. A belief by the accused as to the existence of consent is not “honest and reasonable” if the accused did not take “reasonable steps ... to ascertain that the complainant was consenting to the act”.<sup>25</sup> In other words, there is a requirement to take reasonable steps to ensure positive consent.

New South Wales has not gone that far.<sup>26</sup> In New South Wales, if an accused believes that the complainant is consenting, they may still be convicted if there are no reasonable grounds for that belief (according to accepted community standards). In deciding whether belief in consent was “unreasonable”, the factfinder must consider any “steps taken” by the accused to ascertain whether the complainant consented. But there is no requirement to take any active steps (let alone “*reasonable* steps”) to ascertain whether the complainant consents. The term “steps taken” has been interpreted broadly. It may be enough for the accused to simply direct their mind to the question of consent, without taking any active measures—physical or verbal—to find out whether the complainant is consenting.<sup>27</sup> For example, the accused may suggest that they “took steps” by considering the complainant’s lack of overt objection or resistance, her failure to alert bystanders, the skimpy clothes that she wore, or the fact that she consented to prior sexual acts. In other words, an accused may avoid conviction because their thinking was informed by outdated stereotypes.

Because of these problems, there has been discussion of a model of consent that relies on active communication of consent.<sup>28</sup>

### **Positive communication of consent**

On 1 January 2021, Denmark strengthened its laws on rape to include situations where “both parties do not consent to sex”.<sup>29</sup> In response, a group of Danish

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<sup>24</sup> *R v Makary* [2018] QCA 258 at [50] (per Sofronoff P), cited in Rachael Burgin and Jonathan Crowe, ‘The New South Wales Law Reform Commission Draft Proposals on Consent in Sexual Offences: A Missed Opportunity?’ (2020) 32(3) *Current Issues in Criminal Justice* 346 at 347.

<sup>25</sup> *Criminal Code Act 1924* (Tas) s 14A.

<sup>26</sup> As this speech was delivered, NSW announced sweeping changes to its laws on sexual offences, including amendments to the necessary state of mind of the accused. When the changes become law, an accused person’s mistaken belief in consent will not be reasonable unless they said or did something to ascertain consent: see Tim Swanston, ‘NSW unveils sweeping changes to sexual assault laws, including changes to definition of consent’, *ABC News* (online, 26 May 2021) <<https://www.abc.net.au/news/2021-05-25/nsw-unveils-sweeping-changes-to-sexual-assault-laws/100162870>>.

<sup>27</sup> Burgin and Crowe (n 24) at 349

<sup>28</sup> *Ibid*.

<sup>29</sup> ‘Denmark Strengthens Rape Laws, Outlawing Sex Without Explicit Consent’, *The Guardian* (online, 18 December 2020) <<https://www.theguardian.com/world/2020/dec/18/denmark-strengthens-laws-outlawing-sex-without-explicit-consent>>.



developers created an app called “iConsent”, where users could press a button to indicate permission for “one intercourse”, valid for 24 hours.<sup>30</sup>

The app was not widely adopted; in the early days, it had less than 5,000 downloads.<sup>31</sup>

In March 2021, New South Wales Police Commissioner Mick Fuller proposed the use of a similar app.<sup>32</sup> When there was a backlash, he quickly conceded that “this could be the worst idea I have had all year”.<sup>33</sup> I hope it is.

Commentators pointed out that such an app would do little if anything to protect a complainant; in fact, it would protect the accused. If “consent” evidence through the app was admitted in a trial, it could be used to discredit the complainant. The app would not address circumstances where consent is withdrawn partway through intercourse, where consent is coerced or forced, or where a complainant consents to some sexual acts, but not others.

The next bright idea was in April 2021, when the Federal Government created a series of videos, including skits about tacos, milkshakes, and swimming with sharks, in an attempt to tackle very serious concepts of consent and sexual assault.

The videos were widely criticised. The messaging was labelled “bizarre”, “confusing and concerning”, and the campaign was criticised for “failing to tackle the seriousness of the topics” in question.<sup>34</sup> Somehow, the government had managed to produce several videos about consent without once mentioning the word “consent”. Many young people considered that the videos insulted their intelligence.

But don’t worry—the video production cost only \$3.8 million dollars, or approximately 55 schoolteachers’ salaries.<sup>35</sup>

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<sup>30</sup> Derek Scally, ‘Danish “Sex Consent” App Sparks Derision and Amusement’, *The Irish Times* (online, 27 January 2021) <<https://www.irishtimes.com/news/world/europe/danish-sex-consent-app-sparks-derision-and-amusement-1.4469425>>.

<sup>31</sup> Kevin Nguyen and Paige Cockburn, ‘Consent App Proposed by NSW Police Commissioner Mick Fuller to Address Growing Rate of Sexual Assaults’, *ABC News* (online, 18 March 2021) <<https://www.abc.net.au/news/2021-03-18/nsw-sexual-consent-app-proposed-by-mick-fuller/100015782>>.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> See e.g. Jacob Kagi, ‘Milkshake Video Panned for “Confusing” Attempt at Teaching Consent to Teens’, *ABC News* (online, 19 April 2021) <<https://www.abc.net.au/news/2021-04-19/government-consent-video-milkshake-taco-slammed/100079682>>; Emma Brancatisano, ‘Government’s Consent Videos Featuring Tacos and Milkshakes Slammed as “Concerning and Confusing”’, *SBS News* (online, 19 April 2021) <<https://www.sbs.com.au/news/government-s-consent-videos-featuring-tacos-and-milkshakes-slammed-as-concerning-and-confusing>>; Daniella White, ‘Government’s “Bizarre” Consent Video Featuring Milkshakes Criticised’, *Sydney Morning Herald* (online, 19 April 2021) <<https://www.smh.com.au/politics/federal/government-s-bizarre-consent-videos-featuring-milkshakes-criticised-20210419-p57kqh.html>>.

<sup>35</sup> Wendell Hussey, ‘PM Defends Disaster Milkshake Consent Video: “It Only Cost Us 55 School Teacher Salaries”’, *The Betoota Advocate* (satirical) (online) <<https://www.betootaadvocate.com/breaking-news/pm-defends-disaster-milkshake-consent-video-it-only-cost-us-55-school-teacher-salaries/>>.

## The solution?

Australian police forces continue to explore ways to encourage the reporting of sexual offences. Most police forces have special units staffed by officers who are trained to support people who allege sexual assault.

As a result of Chanel Contos' petition, NSW Police collaborated with her to launch Operation Vest, enabling complainants to report a sexual assault without initiating a criminal investigation. The report can be used later, to support other complainants who choose to initiate an investigation with police, or if the complainant later changes their mind and decides to proceed with criminal charges.<sup>36</sup>

Ms Contos will also meet with Scott Morrison to discuss reforms to discuss sex consent education.<sup>37</sup>

Most jurisdictions are or have introduced the early video recording of the evidence of complainants (thereby preserving a more complete and accurate early account of events). Most have facilities for the complainant to give evidence from a comfortable room remote from the court room where the accused and their lawyer are located.

Recently, the New South Wales Law Reform Commission published a report on consent relating to sexual offences,<sup>38</sup> which recommended changes designed to promote a communicative model of consent whereby:

- (a) every person has a right to choose whether or not to participate in a sexual activity;
- (b) consent to a sexual activity is not to be presumed; and
- (c) consensual sexual activity involves ongoing and mutual communication, decision-making and free and voluntary agreement between the persons participating in the sexual activity.

The Report recommended that the law spell out that a person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity (in effect, "a kiss is not a contract").

The Report also recommended that, where appropriate, judges should direct juries that:

- (a) non-consensual sexual activity can occur in many different circumstances and between different kinds of people (including those who know one another or are in a relationship with or married to each other);
- (b) there is no typical or normal response to non-consensual sexual activities, that people may respond in different ways (including by freezing and not saying or doing anything), and that the jury must avoid making assessments based on

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<sup>36</sup> Natassia Crysanthos, "We Will Listen": Police and Consent Activist Launch Operation to Urge Victims to Come Forward', *The Age* (online, 23 March 2021) <<https://www.theage.com.au/national/nsw/we-will-listen-police-and-consent-activist-launch-operation-to-urge-victims-to-come-forward-20210323-p57d98.html>>

<sup>37</sup> Paul Karp, 'Chanel Contos to Meet with Scott Morrison to Discuss Sex Consent Education Reforms', *The Guardian* (online, 21 May 2021) <<https://www.theguardian.com/australia-news/2021/may/21/chanel-contos-to-meet-scott-morrison-to-discuss-sex-consent-education-reforms>>.

<sup>38</sup> New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020).



preconceived ideas on how people respond to non-consensual sexual activity;  
and

- (c) it should not be assumed that a person consented because they wore particular clothing or had a particular appearance, consumed alcohol or any other drug, or were in a particular location.

Currently, there are several moves to amend consent laws. The ACT Opposition Leader, Elizabeth Lee, is seeking to explicitly criminalise “stealthing”.<sup>39</sup> In April, a man was sentenced to prison in what is believed to be New Zealand’s first conviction for sexual intercourse without consent by “stealthing”.<sup>40</sup>

In NSW, Greens MP Jenny Leong introduced a bill calling for sexual consent to be “enthusiastic consent”.<sup>41</sup>

If adopted, such changes to the law will make some difference. However, as most proposed changes are directed to the complainant’s state of mind rather than the accused’s mens rea (criminal intent), their impact is likely to be quite limited.<sup>42</sup>

The law is not the best vehicle to address the more fundamental problem of stereotyped community thinking (particularly male thinking). Until these stereotypes are addressed, we will continue to experience widespread sexual assaults on girls and women by boys and men who just don’t “get it”.

A 2013 study found that some of the most significant risk factors for sexual violence perpetrators are attitudes towards sex, gender and violence (such as rape myth acceptance, hostility towards women/adversarial sexual beliefs, adherence to traditional gender roles, and hypermasculinity) and socio-emotional deficits (such as lack of empathy and cue misinterpretation).<sup>43</sup>

A proper understanding of consent and how to communicate about consent should be central to sex education in homes and in schools.

Victoria is making consent education mandatory in public schools.<sup>44</sup>

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<sup>39</sup> Rafqa Touma, “Stealthing is Rape”: The Australian Push to Criminalise the Removal of a Condom During Sex Without Consent, *The Guardian* (online, 1 May 2021) <[https://www.theguardian.com/society/2021/may/01/stealthing-is-the-australian-push-to-criminalise-the-removal-of-a-condom-during-sex-without-consent?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/society/2021/may/01/stealthing-is-the-australian-push-to-criminalise-the-removal-of-a-condom-during-sex-without-consent?CMP=Share_iOSApp_Other)>.

<sup>40</sup> Katie Harris, ‘Man Sentenced to Jail for Rape After Removing Condom Without Consent’, *New Zealand Herald* (online, 22 April 2021) <<https://www.nzherald.co.nz/nz/man-sentenced-to-jail-for-rape-after-removing-condom-without-consent/NVRGH4GJNZLIEKSENRIUHZJMI/>>.

<sup>41</sup> Crimes Amendment (Enthusiastic Consent) Bill 2021 (NSW); ‘Greens Move On Enthusiastic Consent Bill’ (Media Release, The Greens, 16 March 2021) <<https://greens.org.au/nsw/news/greens-move-enthusiastic-consent-bill>>.

<sup>42</sup> As this speech was delivered, NSW announced a number of reforms to consent laws that relate to the accused’s mens rea: see Swanston (n 26).

<sup>43</sup> Andra Teten Tharp et al, ‘A Systematic Qualitative Review of Risk and Protective Factors for Sexual Violence Perpetration’ (2013) 14(2) *Trauma, Violence & Abuse* 133, cited in Madeline Schneider and Jennifer S Hirsch, ‘Comprehensive Sexuality Education as a Primary Prevention Strategy for Sexual Violence Perpetration’ (2020) 21(3) *Trauma Violence Abuse* 439.

<sup>44</sup> ‘Consent Education to Become Mandatory in Victorian State Schools’, *ABC News* (online, 21 March 2021) <<https://www.abc.net.au/news/2021-03-21/consent-education-to-become-mandatory-in-victorian-state-schools/100019522>>.

However, the timing, delivery and messaging taught in sex education vary widely between states and territories, schools, and individual teachers.

Research shows that the concept of consent must be taught from a very young age. The formulation of gender roles and cognition begins in childhood. Socio-emotional skills such as empathy, recognising and managing emotions (one's own and others'), and maintaining positive relationships are acquired by young children and developed through adolescence.

Schneider and Hirsch argue that education about consent should begin at kindergarten, as engaging in prevention during these developmental windows is crucial in preventing sexual violence perpetration.<sup>45</sup>

This means that "empathy training" should begin in childhood, not after a person becomes a member of Parliament.

The Harvard Graduate School of Education has developed a teaching module called "Consent at Every Age", which aims to assist educators who are teaching consent and respect for boundaries to children from early education to high school.<sup>46</sup> Similarly, the Victorian Consent Education Guideline tailors consent education to different age groups:

- Early and mid-primary school: focuses on body autonomy, appropriate and inappropriate forms of touch, expressing permission or consent in communications with others, and help-seeking in relation to abuse and harassment by peers or adults
- Later Primary school: provides instruction about what constitutes sexual harassment, sexual assault and abuse, strategies for help-seeking, peer support and positive bystander responses, and the concept of consent in relationships
- Secondary schools: teaches students about sexual consent, sexual harassment, sexual assault and abuse, respect within intimate relationships, positive bystander responses, and provides strategies for help-seeking, peer support and positive bystander responses.<sup>47</sup>

In a perfect world, young women would boldly state their boundaries, men would not hesitate to respect those boundaries, and the 40 per cent of trial judges who spend their time presiding over sexual assault prosecutions would be put out to pasture, at considerable saving to the community. As teachers and leaders, I hope that you will embrace the opportunity that you have to build this perfect world, by impressing on your students that "a kiss is not a contract".

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<sup>45</sup> Schneider and Hirsch (n 43) at 449.

<sup>46</sup> Grace Tatter, 'Consent at Every Age' (online, Harvard Graduate School of Education, 19 December 2018) <<https://www.gse.harvard.edu/news/uk/18/12/consent-every-age>>.

<sup>47</sup> Victoria State Government Education and Training, *Consent Education Guidance* (16 April 2021) <<https://fusecontent.education.vic.gov.au/ae359f66-8638-435f-9aa9-8bf849bd6c09/Consent%20Education%20Guidance.pdf>>.