No! (means no?)

Bernadette McSherry

Rape law reform in Victoria can legislation change social attitudes?

Man is the hunter; woman is his game;
The sleek and shining creatures of the chase,
We hunt them for the beauty of their skins;
They love us for it, and we ride them down.

Alfred Lord Tennyson: The Princess v, l.147

There is nothing new in stating that the themes of dominance and submission in heterosexual relationships are constantly reinforced in literature, film and television. From popular romance novels to 'mens' magazines, there are two main assumptions which circumscribe what is generally perceived as 'normal' sexual behaviour. The first is that sexuality is somehow centred on the act of penetration. The second is that women enjoy being 'coerced' or persuaded to engage in sexual intercourse. 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.

These conceptions of sexuality have shaped the context of how rape has been defined by the criminal law. The traditional masculine concern in defining rape has been that the act of sexual penetration can be seen as either physically pleasurable and lawful or unwanted and unlawful depending on the whim of the woman involved.

In Australia, the crime of rape (or sexual assault in certain jurisdictions) is generally defined as some form of sexual penetration, be it vaginal, oral or anal, without the victim's consent. This emphasis on whether or not the victim consented to sexual penetration has reflected male assumptions about women's sexuality rather than women's own experience. Women continue not to report rape partly because of the justifiable fear that the legal system will not view the situation from their point of view.

Changing the law of rape to take into account women's perceptions of sexual violation necessitates challenging the two assumptions of 'normal' heterosexual intercourse. This is of course not an easy task, but recent changes to the Victorian *Crimes Act* 1958 provide a vehicle for addressing the problematic nature of current conceptions of consent.

This article will explore how s.37(a) of the Victorian *Crimes Act* has altered the presumption of consent in rape trials and how it has paved the way for a new understanding of sexuality based on a communicative rather than a penetrative/coercive model.

The penetrative/coercive view of sexuality

Various authors in recent years have explored the notion that social beliefs and attitudes are crucial in determining whether an act should or should not be labelled rape. Before examining how judges and academics have defined rape, it is necessary to look more closely at the assumptions which underlie how sexuality is viewed in our society.

Smart emphasises the importance of the concept of phallocentrism in defining sexuality. She writes that sexuality 'is comprehended as the plea-

Bernadette McSherry teaches law at Monash University.
This article is based on a paper presented at the Australian Institute of Criminology Conference on Confronting Adult Sexual Violence, 28 October 1992.

sure of the Phallus, and by extension the pleasures of penetration and intercourse — for men'.[1] The complexities of female sexuality are simply ignored in favour of an assumption that female pleasure simply coincides with sexual penetration.

This assumption can be found in the general belief that rape must be pleasurable for the woman because it involves penetration. Gager and Schurr write that '[p]robably the single most used cry of rapist to victim is "You bitch . . . slut . . . you know you want it. You all want it" and afterward, 'there now, you really enjoyed it, didn't you?'[2]

Other authors have examined the link between cultural values celebrating male aggression and rape. Brownmiller describes rape as a structured mechanism of male social control over women which keeps the latter in a constant state of fear and intimidation. She argues that 'the ideology of rape is fuelled by cultural values that are perpetuated at every level of our society' and condensed in the term 'machismo' or 'the theory of aggressive male domination over women as a natural right'.[3]

More recently, MacKinnon has challenged the view that rape is a crime about violence, not about sex. She argues that sexual intercourse must be seen as a social construct and our society has constructed a sexuality which can be and is often linked to violence. From MacKinnon's perspective, women are socially denied the right to refuse sex and therefore attempts to draw a sharp line delineating what is rape and what is not are doomed to failure.[4]

It certainly appears that 'normal' heterosexual intercourse has been constructed in terms of a submissive, receptive woman and an active, aggressive man. Films, television and literature reinforce this model by portraying women as enjoying sex only after their sexuality has been awakened by a determined lover who overcomes their resistance.

Yet, at the same time, women are viewed as agents of precipitation; their very appearance can be portrayed as arousing men's sexual desire. This explains why in rape trials there is such an emphasis on the victim's actions. The Real Rape Law Coalition writes that:

> . . . a women's engagement in everyday social activities — such as accepting a car ride, a dinner invitation, making a friendly response to a conversation — or the mere fact of her physical appearance, is misread or intentionally rationalised on the part of the perpetrator as a sign of consent to participate in anything and everything, including sexual intercourse.[5]

The penetrative/coercive model of sexuality in which women simply inspire and react to sexual desire rather than experience it, represses women's ability to explore sexual pleasure and undermines women's credibility in rape trials.

The presumption of consent

Although terminology may differ between Australian jurisdictions, in general, in order to establish the crime of rape, it is necessary for the prosecution to prove beyond reasonable doubt that the victim did not consent to sexual penetration by the accused.

English courts first began to use the concept of 'lack of consent' in the mid-19th century in order to include within the definition of rape the situation where the victim was asleep or inebriated or where there was fraud as to the nature of the act.

Occasionally, judges have remarked that it is not necessary for the prosecution to prove that consent was vitiated by force, the fear of force or fraud and that there may be other occasions where the victim did not consent.[6] In certain jurisdictions, provisions exist which state that a failure to offer physical resistance to a sexual assault does not of itself constitute consent.[7]

However, in reality, the courts often refer to the amount of 'resistance' a woman must show in order to prove that she did not consent.[8] Fisse writes:

> . . . although in theory D is not entitled to make any presumption of consent, the fact that P must prove non-consent as part of his case means in practice that if V consciously submits with passive acquiescence, subject only to a mental reservation, D should be acquitted unless V's acquiescence is explicable in the context as arising from fear of the consequences of resistance. V must make it clear to D, up to the moment of intercourse, that she does not consent, but in so doing she is not required to incur the risk of brutality.[9]

The assumption that women enjoy aggressive incommunicative sexual penetration has therefore influenced the way in which the courts have traditionally viewed rape. In jurisdictions outside Victoria, there is an onus on the woman to show that she effectively communicated her lack of consent to the accused.

Before examining how the introduction of s.37(a) has changed this presumption of consent in Victoria, it is worthwhile exploring precisely what conduct has been viewed by the courts as constituting consent.

Consent as physical inaction

In *Holman v R* [1970] WAR 2 at 6 Jackson CJ stated that consent 'to intercourse may be hesitant, reluctant, grudging or tearful, but if [the woman] consciously permits it . . . it is not rape'. While the English Court of Appeal stated in *R v Olugboja* [1981] 3 All ER 443 at 448 that there was certainly a difference between consent and submission, it also stated that consent 'covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other'.

Even in the case of *R v Maes* [1975] VR 541 at 548 where Nelson J talked of consent as 'active acquiescence' rather than submission, he went on to say that a woman may convey her consent to a man 'by the very fact that she remains physically inactive'.

Thus, the 'lie back and think of England' syndrome seems to be alive and well in relation to the way in which consent is viewed by the courts and legal academics. A woman's physical inactivity or passive acquiescence is considered enough to signal consent.

In most jurisdictions there are now provisions defining those circumstances which may negate consent or which show that there has been no free agreement to sexual penetration. These provisions mostly follow along the lines of the common law in relation to consent being negated by force or fraud.

However, by providing a negative definition of consent these provisions do not solve the considerable confusion as to what is and what is not consent. The notion remains that 'passive acquiescence' or 'physical inaction' usually equal consent.

The presumption of consent running through the case law dealing with rape obviously needs to be altered. It is now necessary to turn to an exploration of recent changes to the Victorian *Crimes Act* in order to identify how the penetrative/coercive view of sexuality can be changed to take women's experience into account.

Recent changes to the Victorian Crimes Act

As a result of a number of reports by the Victorian Law Reform Commission between 1987 and 1990, the Victorian *Crimes Act* was amended midway through 1991 and again at the beginning of 1992.

The *Crimes (Sexual Offences) Act* 1991, which came into force on 5 August 1991, repealed and replaced nearly all the existing provisions relating to sexual assaults. With regard to the crime of rape, the Act expanded the definition of sexual penetration to include penetration of the anus or vagina by any part of the body, thus extending the crime to acts involving digital penetration.

The *Crimes (Rape) Act* 1991, which came into force on 1 January 1992 abolished the common law offence of rape as well as the previous statutory offence of rape with aggravating circumstances. The maximum penalty for rape was increased to 25 years. This Act also repealed and redefined the provisions dealing with rape and indecent assault without losing the main amendments inserted by the *Crimes (Sexual Offences) Act* 1991.

Consent is now given a 'negative' definition in s.36 of the *Crimes Act*. This section states that 'a sexual act with another person takes place without that person's consent if she or he does not freely agree to it'. This is followed by a set of circumstances in which a person is taken not to be freely agreeing to an act.

The real change to the law, however, occurs in relation to jury directions on consent and in particular s.37(a) which states:

> 37. In a relevant case the judge must direct the jury that
>
> (a) the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement.

According to this direction, where a woman 'lies back' and does nothing to indicate free agreement, this is normally enough to show that she is *not* consenting. Physical inactivity or passive acquiescence now means non-consent rather than the opposite. The use of the word 'normally' in this section seems to imply that the presumption of non-consent in such circumstances may be displaced if evidence can be produced showing that for some reason physical inactivity or silence did amount to consent.

Through one provision, therefore, the presumption of consent has been transformed into a presumption of non-consent and social attitudes about dominance and submission challenged.

The Victorian Law Reform Commission makes no secret of its desire to use these jury directions as an educative vehicle:

> Another benefit of expressing these directions in legislative form is that the community in general will be made aware of what type of evidence is, or is not, sufficient to prove lack of consent.[10]

The Commission also states that 'it is not acceptable for men to cling to outdated myths about seduction, sexual conquest and female sexuality'.[11] It is significant that this jury direction is mandatory; a judge *must* direct the jury that the absence of any indication of free agreement normally means the absence of consent in 'a relevant case'. It is to be expected that this direction will be used often, as consent is by far the most common defence raised in rape trials.[12]

The Victorian Bureau of Crime Statistics and Research is currently documenting the use and effect of jury directions under s.37. It is too early to say at this stage whether or not the direction under s.37(a) will have an effect on the way in which rape trials are run. What is important, however, is that the provision exists and, if nothing else, it will cause judges and juries to reassess the former notion of 'passive acquiescence' as akin to consent.

The significance of s.37(a) in relation to social attitudes

The importance of s.37(a) in relation to social attitudes concerning sexuality is that the concept of 'free agreement' now means that consent must be positively communicated either verbally or by unequivocal non-verbal behaviour. It is no longer open for an accused to claim that he thought the victim was consenting simply because she did not resist.

This alteration to the presumption of consent has wider repercussions in relation to the penetrative/coercive model of sexuality. The necessity for consent rather than non-consent to be communicated opens the way for an alternative model of sexuality to come to the fore.

A 'communicative' model of sexuality leads to women becoming agents of their own sexuality rather than simply conforming to a male version of sexual pleasure. It enables a woman's lack of consent to a man's sexual actions to be respected.

Pineau argues that both 'science' and women's own perceptions concur in concluding that aggressive incommunicative sex is not what women want. Where such sex takes place, the rational presumption is that it was not consensual.[13]

A communicative model of sexuality implies that there must be ongoing positive and encouraging responses by both parties. The focus in rape trials can therefore change from considering whether or not the victim/survivor resisted or whether or not she was in a fearful or intimidated state of mind considering what actions the accused took to ensure that there was free agreement to sexual penetration:

> [The cross-examiner] could use a communicative model of sexuality to discover how much respect there had been for the dialectics of desire. Did he ask her what she liked? If she was using contraceptives? If he should? What tone of voice did he use? How did she answer? Did she make any demands? Did she ask for penetration? How was that desire conveyed? Did he ever let up the pressure long enough to see if she was really interested? Did he ask her which position she preferred?[14]

A communicative model of sexuality emphasises the importance of mutuality of desire and is far better suited to women's experience of sexual pleasure than the penetrative/coercive model. It also provides a framework for the legal system to appreciate that 'passive acquiescence' and 'physical inactivity' is not enough to establish consent to sexual penetration.

Conclusion

Sally Brown, the Chief Magistrate of Victoria, has been quoted as saying: 'Legislation alone doesn't change culture, but it can be a powerful tool'.[15] Section 37(a) is a 'powerful tool' in that it provides an opportunity to reassess the assumptions pertaining to 'normal' sexuality.

The educative role of rape reform legislation is always significant in that it means an immediate change in the behaviour or practice of those involved in the legal system. The inclusion of s.37 in the *Crimes Act* means that judges have no choice except to comply with the mandatory requirement to give jury directions in 'a relevant case' whether or not there is individual agreement with the policy objectives of the reform.

Changing the presumption of consent means that there must also be an immediate change in trial practice and procedure. This will hopefully have a flow-on effect in that other professionals, notably the police and hospital personnel will become aware of the effect of s.37 in changing the law as to consent.

Other Australian jurisdictions may benefit from examining the reforms to the Victorian law of rape, but it must be remembered that rape laws exist in a social context and case law inevitably reflects cultural norms and values. Section 37(a) has changed the presumption of consent in the legal context. It now remains to be seen whether or not it can also inspire a reassessment of social attitudes towards sexuality.

References

1. Smart, C., *Feminism and the Power of Law*, Routledge, London, 1989, p.28.
2. Gager, N. and Schurr, C., *Sexual Assault: Confronting Rape in America*, Grosset and Dunlap, New York, 1976, p.244.
3. Brownmiller, S., *Against Our Will*, Simon and Schuster, New York, 1975, p.389.
4. MacKinnon, C.A., *Feminism Unmodified*, Harvard University Press, Cambridge, 1987; MacKinnon, C.A., *Toward a Feminist Theory of the State*, Harvard University Press, Cambridge, 1989.
5. The Real Rape Law Coalition, Appendixes to Interim Report No. 42, Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure*, p.161.
6. *R v Olugboja* [1981] 3 All ER 443, p.448; *R v Maes* [1975] VR 541, p.548.
7. ACT *Crimes Act* 1900 (NSW) in its application to the ACT, s.92P(2); NSW *Crimes Act* 1900, s.61R(2)(d); SA *Criminal Law Consolidation Act* 1935, s.48; WA *Criminal Code* 1913, s.324G and Victoria *Crimes Act* 1958, s.37(b)(i).
8. *R v Howard* [1965] All ER 684 at 685; *R v Chadderton* (1908) 1 Cr App Rep 229; *R v Harding* (1938) 26 Cr App Rep 127; *R v Lang* (1975) 62 Crim App Rep 50; *R v David Ram Singh* No. 226 of 1990, 18 December 1990, Vic CCA, pp.7-8.
9. Fisse, B., *Howard's Criminal Law*, The Law Book Co. Ltd, Sydney, 1990, p.179.
10. The Law Reform Commission of Victoria, Report No. 43, *Rape: Reform of Law and Procedure*, 1991, p.8.
11. The Law Reform Commission of Victoria, as above, p.16.
12. The Law Reform Commission of Victoria, Appendixes to Interim Report No. 42, *Rape: Reform of Law and Procedure*, 1991, p.86.
13. Pineau, L., 'Date Rape: A Feminist Analysis', (1989) 8 *Law and Philosophy*, pp.217-243, p.232.
14. Pinneau, as above, p.241.
15. The Law Reform Commission of Victoria, Appendixes to Interim Report No. 42, 1991, p.170.

References continued from p. 11

3. Murray, J.M., 'The Development of Contemporary Justice and Correctional Policy' in A. Borrowski and J.M. Murray (eds), *Juvenile Delinquency in Australia*, Methuen, Sydney, 1985; Schneider, A.L., *Deterrence and Juvenile Crime: Results from a National Police Experiment*, Sage, 1990.
4. The Queensland Police caution the majority of juvenile offenders. However, most are cautioned from minor offences — see O'Connor, above.
5. Juvenile Justice Branch, Department of Family Services and Aboriginal and Islander Affairs, *New Legislation to Deal with Juvenile Offenders*, 1992.
6. Schneider, above; see also Braithwaite, J., *Crime, Shame and Re-integration*, Cambridge University Press, Cambridge, 1989.
7. Australian Law Reform Commission, *Child Welfare*, Report No. 18, 1981.
8. Morris, A.D., Giller, H., *Understanding Juvenile Justice*, Croon Helm, London, 1987.
9. See for most recent research and summary of the literature Alder, C., O'Connor, I., Warner, K. and White, R., *Perceptions of the Treatment of Juveniles in the Legal System*, National Clearinghouse for Youth Studies, Tasmania, 1992.
10. See for example Alder, and others, above; Faine, J., 'Just a Phone Call: Privilege or Right' in I. Freckelton and H. Selby (eds), *Police in our Society*, Butterworths, Sydney, 1988; Federation of Community Legal Centres (Vic.), *Report into the Mistreatment of Young People by Police*, June 1991; Human Rights and Equal Opportunity Commission, *Our Homeless Children*, AGPS, Canberra, 1989, at Chapter 21; MacMillan, A., 'A National Approach to Juvenile Justice', paper presented to the Australian Institute of Criminology, National Conference on Juvenile Justice, Adelaide, 22-24 September 1992; O'Connor, I. and Sweetapple, P., *Children in Justice*, Longman Cheshire, Melbourne, 1988; Youth Justice Coalition, *Kids in Justice*, Youth Justice Coalition, Sydney, 1990.
11. O'Connor, 1992 above; and on the overstatement of the impact of the welfare model in the Children's Court in Australia, see Seymour, J., *Dealing with Young Offenders*, Law Book Co., Sydney, 1988.
12. Naffine, Wundersitz and Gale, above, p.204.
13. The importance of symbolism of the sentencing options was evident in the Labor Party's response to the Liberal Party's law and order campaign in the 1992 State election campaign. The Labor Party proudly boasted in its commercials that it had introduced legislation that provided for the detention of juveniles for up to 14 years, as well as introducing laws providing for indeterminate sentences for adult offences!
14. The Premier was reported in the *Courier-Mail* (14.11.91) as expecting that the new Act would result in more young people in detention, but for shorter periods!
15. Braithwaite, above.
16. Pitts, J., *Working with Young Offenders*, MacMillan, London, 1990.
17. O'Connor, I., 1992, above.
18. Royal Commission into Aboriginal Deaths in Custody, *Final Report*, AGPS, Canberra, 1991; White, R., *No Space of Their Own: Young People and Social Control in Australia*, Cambridge University Press, Melbourne, 1990.
19. See O'Connor, 1992, above.
20. For example, Braithwaite, above.
21. The Opposition's major objection was that the Act provides for the raising of the age of a juvenile to 18 years at some later date.
22. A significant proportion of young offenders are released from detention centres to youth refuges.