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A REPLY TO ANDREW DYER'S RESPONSE

ANNA KERR*

This paper is not subject to peer-review and is the third instalment of this Right to Reply series, published in this issue.

Dyer is concerned that an affirmative consent model would turn sexual assault into a crime of absolute liability and result in the wrongful conviction of morally innocent men who have simply made a mistake.¹ But are men who have non-consensual sex with women ever morally innocent? Could such a mistake ever be reasonable? At worst, they actually knew there was no consent but pretend otherwise and are willing to lie and trash a woman's reputation to protect their own. At best, they have inflicted harm on a woman through a shocking lack of sensitivity and empathy.

Men, like Lazarus,² who claim they simply made a mistake are not morally innocent. They are culpable for inflicting harm upon a woman through their negligent failure to ascertain her true feelings and for a complete lack of concern for the impact of their actions on a woman's physical and psychological well-being. In a society where young men are increasingly receiving their sexual education from violent pornography, it is essential that women are protected from male misapprehensions about what women seek from a sexual encounter.

Dyer seems to think that having an intellectual disability or even Asperger's syndrome should enable an individual to rape women with impunity.³ He seems to accept with

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¹ Andrew Dyer, 'Yes! To Communication about Consent; No! to Affirmative Consent: A Reply to Anna Kerr' (2019) 7(1) *Griffith Journal of Law & Human Dignity* (in this issue).

² *R v Lazarus* [2017] NSWCCA 279 ('Lazarus').

³ Dyer (n 1).

equanimity, the idea that individuals of limited ability to discern the feelings of others should be free to commit sexual assault without consequence. The rights of victims basically do not feature in this reasoning. He also seems unaware that in practice, a person suffering a mental condition (whether intellectual disability or mental illness) would be dealt with under mental health provisions and be committed to a psychiatric facility if they pose a risk to the safety of others. In relation to the somewhat unconvincing hypothetical of an accused who is suffering from 'non-self-induced intoxication', we would suggest that if a man is so paralytic that he is unable to form criminal intent, he is also equally unlikely to be able to carry out a substantive sexual assault.

Dyer also claims an affirmative consent model perpetuates notions of female passivity. But if we want to encourage women to take control of their sexuality, we must first provide them with recourse should they be sexually assaulted, instead of endlessly providing men with excuses and ways to avoid the consequences of their morally reprehensible behaviour. If a man has sex with a woman, he needs to be completely certain that she is freely and voluntarily consenting or otherwise accept the risk of prosecution. The focus here should not be on women needing to be more sexually assertive but on men learning to be more cautious and considerate of women's feelings in intimate encounters.

Particularly in the scenario of sadomasochistic sex in which an individual is causing physical injury to another, there must be very clear communication of consent and even then, a sadistic lover should be prepared to accept the real risk of conviction should the other individual at any point change their mind about the wisdom of the activity. Dyer questions '*If the injured person willingly participated in the intercourse that took place... why should it be possible to convict of sexual assault the person who inflicted such injuries?*'⁴ It is strange that Dyer must ask this question at a time when euthanasia is still banned in most Australian jurisdictions. The major difficulty is that men inevitably claim there was consent in circumstances in which even major injuries have been inflicted, thus making it difficult to prosecute even serious cases.

⁴ Dyer (n 1) 32.

This is exemplified by the recent notorious case in the United Kingdom, where a man escaped a prosecution for murder by running a defence citing *Fifty Shades of Grey* and claiming that he had been engaged in consensual rough sex with his partner.⁵ It is clearly not in the public interest to accept a defence of this nature. Women's safety and well-being is currently being put at risk by a narrative that women enjoy being hurt, without due consideration for the social context in which many women are under extreme pressure to satisfy increasingly violent male sexual demands, fuelled by unregulated pornographic content. Men who wish to hurt women to satisfy their sexual proclivities must be willing to assume the risk of prosecution. There is no public interest in exempting men from liability for injuries to women.

For Dyer, the balancing of the rights of complainants against the rights of the accused is one in which the scales are firmly rigged in the accused's favour. He is very concerned by the potential for an accused to be falsely convicted but gives no thought to the social cost where masses of women are unable to achieve justice for heinous crimes due to a misogynistically calibrated legal system. Dyer fears that an affirmative consent model would be draconian and authoritarian. However, he does not seem to consider that the existing patriarchal legal system that empowers men to rape and injure women with impunity is exactly why women are unable to resist male violence in their daily lives.

Men routinely escape conviction on the basis that the offence boils down to her word against his. In most cases, the matter does not even result in a charge because police are familiar with the difficulty of prosecuting these crimes and regularly advise women that their account is insufficient evidence upon which to proceed. In cases where the matter does proceed to trial, there are too many legal loopholes through which men can currently escape conviction. For example, as Dyer has identified, Section 61HE(9)⁶ does provide that submission is not the same as consent, but Judge Tupman nevertheless failed to give a direction to the jury to this effect in the Lazarus case. Furthermore, due to the use of the

⁵ Sophie Wilkinson, "Rough Sex" Doesn't Kill, Domestic Violence Does', *Grazia* (online, 18 December 2018) <<https://graziadaily.co.uk/life/real-life/domestic-violence-natalie-connelly-john-broadhurst-sentence-harriet-harman-attorney-general/>>.

⁶ *Crimes Act 1900* (NSW).

word 'may', section 61HE(8) fails to provide that substantial intoxication automatically negates consent as should have been the case in the Lazarus matter.

Dyer could be regarded as trivialising the issue by comparing a woman coerced into having sex with his being persuaded to drive his wife in the heavy rain. He also compares it with a man reluctantly participating in planned, formulaic sexual intercourse as part of fertility treatment. The factor missing in Dyer's analysis is the complete lack of recognition of the power imbalance and physical disparities that typically exist between men and women. Is the man persuaded by his wife to participate in planned formulaic sexual intercourse acting under threat of violence or even withdrawal of much needed financial support? Is this taking place in a context of a relationship characterised by coercion and control? What will be the consequences of not consenting? Indeed, if the man does not share his partners enthusiasm for conceiving a child or even the mechanics to achieve this outcome, it is a good question why he is consenting? Are the social pressures to reproduce so intense that he feels compelled to comply, despite his own lack of interest? If so, perhaps this individual should indeed be seeking counselling and support to leave what is clearly a very oppressive situation.

Certainly, it is hazardous to draw comparisons, even between the different types of sexual assault. For example, it is difficult to say which is more injurious, a random violent attack by a stranger or years of non-consensual marital sex? Or to speculate what is more damaging, short term physical injury or long term psychological damage? Certainly, some scenarios may prove easier to prosecute but it is like comparing an acute and a chronic illness which is ultimately counterproductive. What is clear is that both are serious, and the legislation should be adequate to ensure that perpetrators of all forms of sexual violence can be successfully prosecuted.

Comparisons with other crimes are also fraught with difficulty, but nevertheless we maintain that society has clearer boundaries in relation to the use of someone's car than the use of a woman's body. Dyer argues that it is 'unusual for a person to consent to be struck or to allow a perfect stranger to break into his or her car and then go on a "joyride"'.⁷

⁷ Dyer (n 1) 22.

But in fact, there are many scenarios in which people consent to being struck, such as martial arts, other contact sports, medical procedures, games with children etc. Is giving a stranger access to your car less likely than consenting to violent anal penetration? I think most women would much rather hand over their car keys. So why is consent specifically an issue in relation to sexual offences but not in relation to larceny? Clearly this is because of misogynistic suggestions that women are motivated to falsely claim sexual assault. Any legislative definition of consent should relate to the range of criminality and not just to sexual offences.

The scales of justice are misogynistically calibrated with the sexual and privacy rights of males outweighing women's rights to safety and wellbeing. For example, failing to disclose HIV status or to use a condom may place a sexual partner's life at risk and should be considered a crime. However, in Dyer's view, the right to privacy can trump a woman's right to informed consent or at least when it comes to disclosing sexual or gender history. Ultimately, this position seems to reflect a male perspective which prioritises sex as a fundamental need that eclipses women's rights to safety and autonomy. There is a complete failure to acknowledge that *informed* consent should be required in sexual matters and to recognise that only permission granted in full knowledge of all relevant facts should suffice.⁸

Rather than endlessly expand the list of circumstances and mistaken beliefs that can negate consent and further complicate the existing prolix provisions, it is instead suggested that the legislation be amended to read:

*A person consents if they freely and voluntarily **communicate** their agreement to an activity or action in relation to which they have not been deceived or misled in any significant regard.*

A person shall not be considered to have provided consent if:

⁸ See Abbey Ellin, 'Is Sex by Deception Rape?', *New York Times* (online, 23 April 2019) <<https://www.nytimes.com/2019/04/23/well/mind/is-sex-by-deception-a-form-of-rape.html>>.

- i. *they did not have capacity to do so, because of factors such as age, cognitive incapacity, substantial intoxication or because they were unconscious or asleep;*
- ii. *they were threatened, coerced, intimidated or acting under duress, including financial duress;*
- iii. *they were misled or not informed of relevant facts before providing their consent.*

The offence of sexual assault in section 61I of the NSW Crimes Act should be amended to read:

*Any person who has sexual intercourse with another person, **intentionally** without the consent of the other person, is liable to imprisonment for 14 years.*

In addition, it is suggested that an offence of negligent rape should be added:

Any person who has sexual intercourse with another person, and is negligent in obtaining their consent, is liable to imprisonment for 10 years.

Negligence is commonly defined as failing to take proper care over something and certainly this would at least have seen Mr Lazarus convicted if it had been available as a backup charge.

Much of the opposition to a positive consent test has been from those representing the legal establishment and is therefore primarily focused on the defendant's interests. They are influential and clearly may impede reform in this area. I agree with Dyer that the presence of a rule in another jurisdiction is not necessarily an argument in favour of it and defer to his deeper knowledge of the legislation and case law on this point. Nevertheless, I think this is a situation in which it is in everyone's interests to see the legislation simplified and clarified. This would ensure men understand their obligations during intimate encounters and are not able to escape justice when they have willfully or negligently ignored a woman's feelings in their rush to satisfy their sexual urges.

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