



The Age of Consent

A Law Reform Proposal

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This paper identifies a problem in New South Wales law in dealing with teenage sex. It proposes an amendment to extant laws to provide for 'teen sexual exploration.' To evidence this proposal the paper notes the disjunct in the construction in the law and its stated intention. It also brings forth evidence regarding the prevalence of teenage sexual conduct. Ultimately the paper proposes that the law adopt and 'age gap' defence as found in Victoria and the ACT.



Introduction

Public outrage and media focus on sexual offences against children have pressured Parliament to take a tough stance on sexual predators. With this 'law and order' populism comes the creation of new offences,¹ the narrowing of sentencer discretion² and of defences³ and the introduction of inter-jurisdictional offences⁴ and extra-curial punishments.⁵ The legislation and the political debate behind it are drafted and spoken in the language of predation and abuse.⁶ This language and zeal ignores the 'offenders' who are themselves minors in consenting relationships, who then become the by-catch of this legislation.

The purpose of this paper is to identify the perceived problem of uniform and absolute ages of consent when considering 'Teen Sexual Exploration.' This paper will define that term as the 'consenting sexual interaction between two young people of similar age.' In pursuit of that purpose this paper will confine itself with the extant laws of New South Wales and their purpose and justifications. This paper will then discuss the central distinctions between acceptable sexual conduct and abusive conduct and will introduce sociological evidence to examine the current normative practice. Finally this paper will propose an alternative construction to the law.

¹*Crimes Amendment (Aggravated Sexual Assault in Company Act) 2001 (NSW)*

²*Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*

³*Crimes Amendment (Sexual Offences) Act 2003*

⁴*Criminal Code Act 1995 Div272*

⁵*Crimes (Serious Sex Offenders) Act 2006; Child Protection (Offenders Registration) Act 2000*

⁶The Department of the Attorney General; *Child Sexual Exploitation Laws (2010)*, Australian Government Attorney General's Department

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(966BB47E522E848021A38A20280E2386\)~Fact+Sheet+-+Child+sexual+exploitation+laws+-+pdf.PDF/\\$file/Fact+Sheet+-+Child+sexual+exploitation+laws+-+pdf.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(966BB47E522E848021A38A20280E2386)~Fact+Sheet+-+Child+sexual+exploitation+laws+-+pdf.PDF/$file/Fact+Sheet+-+Child+sexual+exploitation+laws+-+pdf.PDF) at 4 May 2011



The Law as it is and as it Was

The *Crimes Act 1900*⁷ defines most sexual offences that are operative in the state. This paper is most concerned with the offences prescribed in s66C, as the primary concern is with this section a portion of it is provided here:

“(3) Child between 14 and 16

Any person who has sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years is liable to imprisonment for 10 years.

(4) Child between 14 and 16—aggravated offence

Any person who has sexual intercourse with another person who is of or above the age of 14 years and under the age of 16 years in circumstances of aggravation is liable to imprisonment for 12 years.”⁸

These offences deal with sexual offences against children. These are sometimes called the ‘statutory rape laws.’⁹ This section defines a minimum threshold age for a participant in sexual intercourse, which is 16 in NSW. At first glance the legislation the offences appear to be of strict liability, however the truth is more complex and will be discussed later.

In 2003 the Parliament introduced the *Crimes Amendment (Sexual Offences) Act 2003* primarily to update the discriminatory and archaically named ‘carnal knowledge offences.’¹⁰ The discrimination involved was the disparity between offences against boys and those against girls as well as offences which involved homosexual conduct as opposed to heterosexual conduct.¹¹ Attached to these amendments were increased ‘safeguards’ as Robert Debus, the then Attorney General, called them. He

⁷*Crimes Act 1900* (NSW) Divs10, 10A

⁸*Crimes Act 1900* (NSW) subss66C(3)& (4)

⁹Keith Burgess-Jackson, *Rape: A Philosophical Investigation*(1st Ed 1996) Chpt 9 at pg 163

¹⁰New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 374 – 377 (Mr Robert Debus Attorney General and Minister for the Environment)

¹¹*Ibid.* at 374



noted in his second reading speech that the increase in safeguards was designed to protect children from sexual exploitation.¹² One such safeguard was the abrogation of the ‘reasonable mistake of age defence.’¹³

The defence allowed a defendant to argue that he; it was usually a man, reasonable and honestly believed that the victim was at least 16 years of age if not older. This defence would only apply if the victim had consented and was over the age of 14. It is based on the ‘reasonable mistake of fact’ concept and is substantively similar to the *Proudman v Dayman* defence.¹⁴ The common law defence, however, does not require the child to be over 14.

There are other laws relating to sexual offences against minors. For the purpose of this paper it is important to mention what may befall anyone charged under s66C. A convicted person would become a registrable person.¹⁵ They would thus be subject to reporting requirements¹⁶ and possibly prohibition orders.¹⁷ They would be unable to secure any employment if it dealt with children even obliquely and while prohibition orders and reporting requirements are of limited term offenders remain registrable persons for their whole lives. Given the nature of the offences and the likely penalties the offender’s convictions can never be spent.¹⁸ This can result in young offenders being affected well into their adulthood.¹⁹

¹² *Ibid.* at 376

¹³ *Crimes Act 1900* (NSW) s77(2); as amended by *Crimes Amendment (Sexual Offences) Act 2003* (NSW)

¹⁴ *Proudman v Dayman* (1941) 67 CLR 536

¹⁵ *Child Protection (Offenders Registry) Act 2000*

¹⁶ *Child Protection (Offenders Registry) Act 2000*

¹⁷ *Child Protection (Offenders Prohibition Orders) Act 2004*

¹⁸ *Criminal Records Act 1991* (NSW) ss7(1)(a) & (b)

¹⁹ *UY v NSW Commission for Children and Young People* [2010] NSWADT 283; *DR v NSW Commission for Children and Young People* [2008] NSWADT 137



The case of CTM

By removing the statutory defence Parliament was attempting to make an absolute age of consent. This is noted by Mr Debus's declaration that because of the abrogation 'it will be no longer possible to argue that a uniform age of consent of 16 years creates an effective age of consent of 14 years.'²⁰

This assertion was tested in *CTM v The Queen*.²¹ The facts of that case involved a young man, CTM aged 17, who was charged with raping a young girl, aged 15. At the trial the jury found him not guilty of rape however he was convicted under s66C.

The young man appealed to the Court of Criminal Appeal arguing the *Proudman v Dayman* defence. The court held that the defence did not apply to charges under s66C. The court reasoned that while the defence under s77(2) was in force the *Proudman v Dayman* defence did not apply, the statutory defence clearly intended to take its place.²² When the Parliament repealed the statutory defence they did so with an intention to narrow the available defences.²³ To assume that the repeal of the statutory defence would reactivate the common law defence would have been contrary to Parliamentary intent. The offence therefore became one of absolute liability.

The young man appealed again this time to the High Court. The High Court held, by majority, that the appropriate interpretation of the law does not exclude the application of the *Proudman v Dayman* defence.²⁴ The Court reasoned that an absolute liability offence should not be presumed without the explicit statement of that intention from Parliament.²⁵ The court affirmed its position that conduct involving serious penal consequences should have the defence of reasonable mistake of fact

²⁰New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 376 (Mr Robert Debus Attorney General and Minister for the Environment)

²¹*CTM v R* [2007] NSWCCA 131

²²*Ibid*, 65 (Hodgson JA)

²³*Ibid*, 122 & 123 (Roden J)

²⁴*CTM v The Queen* [2008] HCA 25 at 35 per Gleeson CJ, Gummow, Crennan & Keifel JJ

²⁵*Ibid* at 66 per Kirby J



available.²⁶ The court noted that the reactivation of the wider defence did provide a wider scope than the previous statutory defence.

The appeal was dismissed, however, because the young man failed to satisfy the evidentiary burden.

Kirby J noted that 'if the Court refuses a retrial, all of the learned disquisitions in the opinions of the Justices in this case represent little more than *obiter dicta*.'²⁷

Interestingly enough, the Appellate Committee in the United Kingdom arrived at the same conclusion in 2008.²⁸ They held that the age related ingredient of a statutory offence requires a fault element. In doing so they overturned the principle in *R v Prince*²⁹ which was precedent that mistake of age was no defence to a prosecution of sex with a minor. *Prince* was also precedent in Australia even into the middle of the 20th Century and it is at odds with the High Court's decision in *CTM* that the availability of the defence rests on fundamental values.³⁰

The Critical Viewpoints on Age of Consent Laws

Before discussing the purpose of age of consent laws it is beholden upon this paper to discuss in general some critical viewpoints of these laws.

Any philosophical discussion of age of consent laws will ultimately take place in dialectic between the liberal and the protectionist.³¹ Other critical standpoints such as feminism or liberalism will fall into one of these two camps. A liberal viewpoint may support age of consent laws on the grounds of moral

²⁶ He Kaw The v The Queen (1984) 157 CLR 523

²⁷ *Ibid* at 132 per Kirby

²⁸ *B v DPP* [2000] AC 428

²⁹ (1875) LR 2 CCR 154

³⁰ Mr Justice P W Young AO, *Recent Cases* (2008) 82 Australian Law Journal 693, 695 per Bill Pinkus QC

³¹ Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (1st ed 2005) pg1



protection as espoused by Lord Devlin.³² Another liberal will see the laws as impinging on the liberty and individuality of a person as well as infringing on the private realm.³³

Feminist commentators are placed in an intriguing quandary. The history of the laws is obviously and inarguably based in sexist and patriarchal values.³⁴ However in their modern format there is a disjunct between distinct feminist viewpoints.

On the one hand there are views that support the seemingly patriarchal protectionist view. This view is supported by conservative interests specifically the 'religious right'. These seem strange bedfellows for feminists. However they argue; the age of consent laws should remain rigid in the interests of protecting girls from the machinations of men. The view is founded, not unjustly, that young girls are those most likely to be the victims of statutory rape and that men are most likely to be the aggressors.³⁵

The other feminist view is that young girls should be masters of their sexuality. This feminist position rallies against the patriarchal 'protection' of women by male lawmakers from the actions of other males. Thus the good men protect girls from the bad men³⁶, the girl is only an object to be protected or defiled. The feminist seek to give the young woman agency. This would mean that a restrictive or unqualified age of consent would be an inappropriate sanction on the sexuality of young girl. This concept is usually qualified with the need to protect the young from coercion. It is this view that Waites supports asserting that prohibitive age of consent laws infringe on a child's 'sexual citizenship'.³⁷

Thus we can see that the philosophical distinction sits primarily with the liberal and protectionist viewpoints with different schools of thought or forms of critique falling comfortably into either camp.

³²Stephen Bottemley & Simon Bronitt, *Law in Context* (3rd ed, 2006) pg25

³³Keith Burgess-Jackson, *Rape: A Philosophical Investigation* (1st Ed 1996) pg 170

³⁴Dianne Kirkby (ed), *Sex Power and Justice: Historical Perspectives on the Law in Australia* (1st ed 1995) pg19 - 32

³⁵Keith Burgess-Jackson, *Rape: A Philosophical Investigation* (1st Ed 1996) pg 167

³⁶Dianne Kirkby (ed), *Sex Power and Justice: Historical Perspectives on the Law in Australia* (1st ed 1995)

³⁷*Ibid.* at 35 to 39



This paper proposes a primarily liberal view and therefore will examine justifications for the law and regard what is sought to be protected and is being protected.

The Purpose of Age of Consent Laws

From inception to present day the justifications for statutory rape and age of consent laws have changed and reflected the values of the relevant community.³⁸ Today age of consent laws attempt to be universal in their application. They no longer discriminate as they once did against young women,³⁹ homosexual conduct⁴⁰ and 'loose women.'⁴¹

The primary justification for age of consent laws is the protection of young people and children from harm. Duff in his book '*Answering for Crime*'⁴² suggests that there are two kinds of harm which are to be averted. The first is exploitation; the sexual use of a child by an adult. The other is endangerment; exposing a child to the dangers of sexual interaction before they are mature enough to understand.⁴³

Waites in his book notes that a distinction must be drawn between these two kinds of harm.⁴⁴ Most discussions of child sexuality use the language of abuse, however, even in the case of adult-child sexual interaction not all such interactions will result in harm to the child. However, even in the absence of actual harm adult-child interactions may put the child at risk of harm, with recurring interactions causing a recurring pattern of risk.⁴⁵

Part of the risk involved concerns the uneven power relationships between children and adults. Typically children are in a position requiring obedience to authority figures such as teachers and older relatives.

³⁸Keith Burgess-Jackson, *Rape: A Philosophical Investigation* (1st Ed 1996) Chpt 9 at pg 163

³⁹Dianne Kirkby (ed), *Sex Power and Justice: Historical Perspectives on the Law in Australia* (1st ed 1995) Chpt 2

⁴⁰*Crimes Act 1900* (NSW) ss78, 78I, 78J, 78K, 78L, 78N, 78O and 78P as amended by the *Crimes Amendment (Sexual Offences) Act 2003*

⁴¹*State v Vicars*, 186 Neb. 311, 183 N.W.2d 241, 243 (1971)

⁴²R A Duff, *Answering for Crimes*, (1st ed, 2007)

⁴³*Ibid* pg168

⁴⁴Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (1st ed 2005) pg 30

⁴⁵*Ibid*.



Children are also typically less capable of understanding complex social relationships as well as the consequences or risks of their actions in a sexual context.⁴⁶

Some reasons for a universal or absolute application of an age of consent law are that they operate not only to prevent harm but to prevent the risk of harm.⁴⁷ Thus they must operate to ban all child sexual interactions. Another reason for their universal application is that laws given to allow a mistake of fact defence are subject to the possibly fallible judgement of the individual. Laws that have no such defence offer a stronger safety net of protection for children.⁴⁸

As mentioned earlier, Duff notes two possible reasons for Age of Consent Laws. The first being exploitation and the second being endangerment. These are the wrongs or *mala in se* as he calls them that the legislation intends to address.⁴⁹ Duff notes though that the laws themselves, *malumprohibitum*, are not formulated to correspond with the wrongs they seek to address. The manner in which they are formulated both fails to fully address their purpose as well as interfering where their purpose would not be achieved. This is seen in cases were those who are intellectually immature but over the age of consent are sexually exploited⁵⁰ and where those who are not in criminally exploitative relationships but are under the age of consent engage in 'sexual exploration.'

Age of consent laws do not only operate as criminal prohibitions. As we will see later age of consent laws are moral pronouncements; a declaration of expected practice based on community standards. It is on these standards that age limit is based rather than scientific or psychological evidence.⁵¹

⁴⁶*Ibid.* pg31

⁴⁷*Ibid.*

⁴⁸R A Duff, *Answering for Crimes*, (1st ed, 2007) pg171

⁴⁹*Ibid*pg168

⁵⁰ The *Crimes Act 1900* (NSW) provides a separate offence for sexual intercourse with a person suffering cognitive impairment by someone with authority under s66F

⁵¹Keith Burgess-Jackson, *Rape: A Philosophical Investigation*(1st Ed 1996) pg164 to 165; Gail Ryan et al., *Juvenile Sexual Offending: Causes, Consequences & Offending* (3rd ed, 2010) pg4



As explained above age of consent laws operate in their present manner to provide a strong safety net. They are designed to protect children from harm and the risk of harm inherent in adult-child relationships. This paper will now discuss abuse as it relates to intercourse between two consenting teenagers.

Consent, Equality & Coercion

This paper proposes that there are some sexual interactions involving people under the age of consent which are not criminally harmful. As we have seen above, the law seeks to address the problem of the sexual abuse of a child. Thus we look now at how abuse is constructed and whether this construction logically extends to consenting teenagers.

Gail Ryan in her book, *Juvenile Sexual Offending*, dictates three factors which define the nature of a relationship and the presence or absence of abuse. These three factors are consent, equality and coercion.⁵² Equality includes equality of knowledge. Ryan notes that 'acts that constitute sexual abuse cannot be approached in terms of behaviour alone. Relationships, dynamics and impact must be considered because most behaviour could also be non-abusive.'⁵³ This formula is favoured in most scholarship on this subject⁵⁴ and so this paper will adopt it. As we will see these factors are closely interlinked.

Coercion is of course a factor which, if present, would indicate abuse. Coercion operates in both the case law⁵⁵ and the *Crimes Act*⁵⁶ to negate consent. In the context of age of consent laws coercion must be a concern. This is particularly the case because of the perceived inequalities between children and adults.

⁵²Gail Ryan et al., *Juvenile Sexual Offending: Causes, Consequences & Offending* (3rd ed, 2010) pg3

⁵³*Ibid*

⁵⁴Wendy O'Brien, Australian Crime Commission, *Problem Sexual Behaviour in Children: A Review of the Literature*, (2008) pg 6

⁵⁵R v Clark [1998] NSWSC; *Ibbs v R* [1988] WAR 91

⁵⁶*Crimes Act 1900* (NSW) S61HA



The *Crimes Act* provides situations where consent may be negated.⁵⁷ Among these are inequalities concerning the purpose of which consent is given. This position is supported by case law.⁵⁸ In the case of rape between two adults there is a presumption of equality in the absence of these or other similar factors. However in matters between adults and children there is a presumed inequality. Thus the law dictates that a child cannot consent,⁵⁹ and in statutory rape cases consent is viewed as dispositive.⁶⁰

The law seems to fall in line with Ryan's factors. It bundles coercion and inequality into factors concerning consent. Should either be present consent may be negated. However the law also presumes an inequality in any interaction which takes place involving two people under the age of consent. The idea of this is that children are presumed to be too immature to understand, they do not have equality of knowledge. They are in a position of obedience to adults, there is no equality generally and coercion may be suspected. Thus children would be best protected if they are deemed unable to consent.

However, an inequality severe enough to demand legal protection should not be assumed. In cases of children of similar age, maturity and social position it is unlikely that there will be an inequality strong enough to merit the intervention of the law. There is, as Ryan suggests, a need to look to relationships, dynamics and impact to ascertain if abuse has occurred.

Additionally the age of consent is an arbitrary age, it is based on community standards rather than scientific evidence.⁶¹ It is also an absolute threshold created as a surrogate for maturity.⁶² However maturity is not amenable to a universal threshold, it is a question of the developmental psychology of

⁵⁷*Crimes Act 1900* (NSW) S61HA

⁵⁸*R v Williams* [1923] 1 KB 340

⁵⁹*Crimes Act 1900* (NSW) S61HA, Henry Campbell Black, *Black's Law Dictionary: Definitions of Terms and Phrases of American and English Jurisprudence, Ancient and Modern* (6th ed 1990) pg1266

⁶⁰Keith Burgess-Jackson, *Rape: A Philosophical Investigation*(1st Ed 1996) pg164

⁶¹Gail Ryan et al., *Juvenile Sexual Offending: Causes, Consequences & Offending* (3rd ed, 2010) pg 4

⁶²Keith Burgess-Jackson, *Rape: A Philosophical Investigation*(1st Ed 1996) pg165



the individual. Thus the law relies on a crude but absolute standard based on automatic presumptions of inequality.

Thus there is a form of intellectual disjunct when prosecuting a teenager for engaging in sexual intercourse with his or her contemporary. Consent is only valid if the person understands what is being consented to, equality of knowledge. The law presumes that a person under 16 is incapable to such an understanding and therefore incapable of consent. In a situation where both parties are under 16 both parties are deemed incapable of consent. However, should such a matter proceed to prosecution the law will then apportion to the older the criminal responsibility for the action. The older will be guilty of engaging in sexual intercourse with a minor while the younger will be cast as a victim. The disjunct is that, given the arbitrary nature of age of consent laws it may well be possible that the individual with the lesser understanding will be prosecuted for a crime to which she is truly the 'victim.'

Therefore the extant laws are created on sound reasoning and principle as they relate to adult-child relations. These relations are inherently unequal and carry the suspicion of coercion about them.

However, that same logic does not extend to teenager-teenager relations. There should be no presumed inequality. If either a lack of consent or coercion is involved in such cases there are other sections of the act which protect the young person.⁶³ Thus the problem with the law is that it extends its reasoning for adult-child relationships to relationships between teenagers.

Evidence as to Teen Sexual Interactions

What is the current evidence regarding the sexual interactions of teenagers? There have been many surveys performed in the public realm by the popular media⁶⁴ and interested companies⁶⁵. Surveys of

⁶³*Crimes Act 1900* (NSW) s61I for rape generally; *Crimes Act 1900* (NSW) s61HA(4) for abuse of authority or coercion.

⁶⁴One such magazine is Zoo Weekly Australian Men's Magazine which publishes a yearly sex survey. www.zooweekly.com.au

⁶⁵One such survey can be found at <http://www.sexcensus.com.au/>. It is an Australian sex census presented by Red Hot Pie an adult dating service. Their numbers reveal 34.6% of men and 47.8% of women lost their virginity at 16



this nature, even those undertaken by academic bodies, are typically of a voluntary and self-reported nature, which of course, they must be. This does mean that views from the more conservative end of the spectrum are missing and the survey as a whole may be less than completely representative. It is with this disclaimer that the paper proceeds to the sociological evidence.

In 2003 La Trobe University's Australian Research Centre in Sex, Health & Society (ARCSHS) performed a survey of almost 20,000 Australians publishing the finished report as the Australian Study of Health and Relationships (ASHR). The Report makers described it as the largest such work undertaken in the country.⁶⁶

The findings of this survey were that in the last 50 years the median age of first vaginal intercourse for men declined from 18 to 16 years of age, for women the decline was more marked but the resultant age the same, from 19 to 16 years.⁶⁷

The report indicates that 21% of all male respondents and 13% of all female respondents had reported to have engaged in sexual intercourse before the age of 16. The percentage was higher among the younger respondents between 16 and 19 years of age with a nearly a quarter of young men and young women partaking in sexual intercourse under the age of 16.⁶⁸

Typically first sexual intercourse took place with partners who were within 5 years of the respondent's age.⁶⁹ Though, within this bracket women were much more likely to be younger than their partners. The relationship with the partner of first sexual intercourse was more likely to be with a steady partner,

years or younger. However the survey did not publish its sampling and methodology so it is provided here only for interest.

⁶⁶Australian Research Centre in Sex, Health & Society, *Sex in Australia: Summary findings of the Australian Study of Health and Relationships* (2003) La Trobe University

<http://www.latrobe.edu.au/ashr/papers/Sex%20In%20Australia%20Summary.pdf> at 6 June 2011

⁶⁷Rissel et al., *First Experience of Vaginal Intercourse and Oral Sex Among a Representative Sample of Adults* (2003) 27 Australian and New Zealand Journal of Public Health 133

⁶⁸*Ibid.* pg135

⁶⁹*Ibid.* pg134



fiancé, husband or de facto partner. This statistic was most superlative in the case of women, 83% of whom first had intercourse with a partner who fell into the above defined groups.

This study did not discuss pre-coital behaviours except to note that the age of first oral sex with a person of the opposite gender has decreased substantially and is in line with the age of first vaginal intercourse.⁷⁰ A 1990 survey of college students in the US found that oral sex is a pre-coital behaviour displayed by the majority of its respondents.⁷¹

A study of high-school virgins⁷² undertaken in the United States of America is referred to by the ASHR. That study reported that in the year prior to taking the survey around 30% of the respondents reported undertaking mutual masturbation, 10% reported oral sex and, 1% reported participating in anal sex.⁷³

In the years 1992, 1997, 2003& 2008 the Australian Research Centre in Sex, Health & Society ran a survey of year 10 and year 12 students between the ages of 15 and 18 years old from around the country. This survey is called the *National Survey of Secondary Students, HIV/AIDS and Sexual Health* (NSASS). The 1997 study of found that the median age that first sexual touching was 15 years and the median age for first sexual intercourse was 17 years.⁷⁴ In the study in 2008 found over 88% of the respondents from year 12 and 70% of the respondents from year 10 had reported engaging in kind of sexual activity.⁷⁵ 27% of the year 10 students, divided quite evenly between males and females, had reported having previously had penetrative intercourse⁷⁶. Of that 27% who report having had sexual

⁷⁰*Ibid.*

⁷¹*Ibid.* pg 137

⁷²⁷²Virgins in this study means those who have not participated in vaginal intercourse rather than those who have not participated in any sexual activity.

⁷³*Ibid.*

⁷⁴Smith et al., 2009 *Secondary Students and Sexual History 2008*, Monograph Series 70, Melbourne: Australian Research Centre in Sex, Health & Society, La Trobe University.

⁷⁵This is defined as deep kissing, sexual touching, oral sex, sex without a condom or sex with a condom. Smith et al., 2009 *Secondary Students and Sexual History 2008*, Monograph Series 70, Melbourne: Australian Research Centre in Sex, Health & Society, La Trobe University. pg26

⁷⁶Smith et al., *Secondary Students and Sexual History 2008*, 2009, Monograph Series 70, Melbourne: Australian Research Centre in Sex, Health & Society, La Trobe University. Pg27



intercourse; 43% of the males noted their most recent partners were under the age of 16 as did 22% of the females.⁷⁷

Justice Health NSW has produced many studies into the health of inmates, the latest surveys were taken in 2009.⁷⁸ These surveys found that the mean age for first intercourse for adult inmates was 14 years for men and 15 years for women. The majority of respondent undertook first sexual intercourse with their contemporaries, that is to say the same age or up to four years older.⁷⁹ 97% of males and 71% of females reported not being victims of sexual violence. Of the remaining 29% of females 7% reported only once occasion of sexual violence and the remainder reported multiple occasions.

A survey in the same year of juvenile offenders found that the median age of first sexual intercourse was 14 years for non-Aboriginal offenders and 13 years for Aboriginal offenders.⁸⁰ 80% of the respondents were sexually active by the age of 14. Surprisingly over 90% of respondents, male, female, Aboriginal or otherwise, reported never having had sex against their will. This is at odds with the survey of Secondary School Students mention above which found that 26% of students had had 'unwanted sex' in the past.⁸¹ An investigation into the definition of 'unwanted' in that survey shows that it includes pressure from their partner, and being too drunk. These two reasons are the most common given for having had 'unwanted sex.' These reasons are not, in themselves, analogous to abuse or sexual assault.⁸²

The dominant paradigm that seems to be suggested in these surveys is that teenagers are likely to undertake sexual intercourse around the age of 16. They are likely to undertake it with a long term or

⁷⁷ *Ibid.* Pg34

⁷⁸ Indig et al., (2010) *2009 NSW Inmate Health Survey: Key Findings Report*. Justice Health. Sydney

⁷⁹ *Ibid.* pg126

⁸⁰ Indig et al., (2011) *2009 NSW Young People in Custody Health Survey: Full Report*. Justice Health and Juvenile Justice. Sydney. Pg 109 to 114

⁸¹ Smith et al., 2009 *Secondary Students and Sexual History 2008*, Monograph Series 70, Melbourne: Australian Research Centre in Sex, Health & Society, La Trobe University. Pg 30

⁸² However substantial intoxication can be grounds to show a lack of consent *Crimes Act 1900* s61HA(6)



semi-long term partner who is the same or similar age to the teenager. Males are typically older than their sexual partners.

In regards to social perception regarding age of consent laws amongst young people Waites notes two surveys involving young people and their attitude to the interplay between age of consent and the law. One study found that 30% of young men and 37% of young women viewed sex before the age of 16 years as wrong.⁸³ Another study found that young people generally favoured an age of consent of 16 years and supported an increase to 18 years rather than a decrease to 14 years. However that same study found that young people 'did not recognize the authority of the law to determine their sexual practices.'⁸⁴

This evidence clearly indicates that a significant proportion of teenagers are taking part in sexual intercourse prior to the age of consent. It would also appear that other forms of sexual activity takes place prior to sexual intercourse. This would make a significant proportion of Australians guilty of sexual offences or victims of sexual offences. Of course very few teenagers taking part in consensual sex are charged. There is prosecutorial discretion to save them from the weight of the law. However of course, prosecutorial discretion may be wielded unfairly and capriciously.⁸⁵ CTM would probably not have been convicted of offences under 66C(3) had he not been charged and acquitted of more serious charges.⁸⁶ Kirby J in that case noted "the existence of prosecutorial and sentencing discretion does not diminish the gravity of the consequences that can follow from being convicted of such an offence."⁸⁷

⁸³Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (1st ed 2005) pg 215

⁸⁴Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (1st ed 2005) pg 216

⁸⁵Susannah Hodson, *CTM v The Queen: A Challenge to the Fundamental Presumption of Mens Rea*, (2010) 34 Criminal Law Journal 187 pg189

⁸⁶*Ibid*

⁸⁷*CTM v The Queen* [2008] HCA 25 Kirby J at 64



Proposed Solution

Taking only Australian Jurisdictions; all other local jurisdictions have defences along the lines of that which existed in NSW before the 2003 amendments.⁸⁸ The ACT, Victoria and Tasmania have provisions where consent is a defence where the victim and accused are within a close age of each other.⁸⁹

The law from the ACT is provided here as an example:

It is a defence to a prosecution for an offence against subsection (2) if the defendant establishes that—

- a) he or she believed on reasonable grounds that the person on whom the offence is alleged to have been committed was of or above the age of 16 years; or
- b) at the time of the alleged offence—
 - i. the person on whom the offence is alleged to have been committed was of or above the age of 10 years; and
 - ii. the defendant was not more than 2 years older; and that that person consented to the sexual intercourse.⁹⁰

The law provides that a defence is available to an accused should they be able to show that they are within 2 years of the age of the victim and that the victim consented. In Victoria the act defines ‘consent’ as a defence should the accused show an age gap of no more than two years⁹¹. These defences are sometimes called ‘Romeo & Juliet Laws’ in reference to the fictional teen couple. Both these defences require that the victim is over the age of 10 years this is in line with Araji’s guidelines regarding

⁸⁸*Crimes Act 1900 (ACT) s55; Criminal Code Act 1983 (NT)s127; Criminal Code Act 1899 (QLD) Schd 1 s215; Criminal Law Consolidation Act 1935 (SA) s49; Criminal Code Act 1924 (TAS) Schd 1 s124; Crimes Act 1958 (VIC) s45; Criminal Code Compilation Act 1913(WA) Appendix 1 s321*

⁸⁹*Crimes Act 1900 (ACT) s55; Crimes Act 1958 (VIC) s45; Criminal Code Act 1924 (TAS) Schd 1 s124*

⁹⁰*Crimes Act 1900 (ACT) s55*

⁹¹*Crimes Act 1958 (VIC) s45*



sexual interactions amongst children, which state that any sexual interaction involving a child under 10 is worrisome.⁹²

There is a real need to protect young people from sexual abuse both from adults and their peers. However the law has come to a problem where the need for protection from exploitation has criminalised exploration. There exist already many offences which deal with coercive, unequal, forceful or non-consensual sexual abuse, of both children and adults. How s66C differs from these other sections is that it presumes inequality, coercion or abuse when no grounds exist to support that assumption.

This paper proposes this defence as a solution to the problem of teen sexual exploration and it does so for the reasons discussed previously throughout. However, since this paper is proposing a new defence where one may already exist, there is a need to show why the 'Romeo & Juliet' construction is to be favoured over the extant 'reasonable mistake' construction.

This paper does not propose that the 'reasonable mistake' defence be excluded; however, the purpose of this paper is to advocate a defence be available to young people who take part in sexual experimentation with other young people in a consensual relationship. The case of *CTM v R* is a case of teen sexual exploration but the case itself is not fertile ground for a discussion on teen sexual exploration.⁹³ The evidence provided by the ARCSHS indicates that first sexual intercourse is usually undertaken with a steady partner. These youths would be the least blameworthy 'offenders'; however they would not have access to the defence of 'reasonable mistake' as they would know the age of their

⁹²Wendy O'Brien, Australian Crime Commission, *Problem Sexual Behaviour in Children: A Review of the Literature*, (2008) pg 8

⁹³Susannah Hodson, *CTM v The Queen: A Challenge to the Fundamental Presumption of Mens Rea*, (2010) 34 Criminal Law Journal 187 pg187



steady partner. Conversely, someone who undertakes unattached sexual intercourse with indifference to the age of the other participant would have reasonable prospects of exculpation.⁹⁴

Rather, the Romeo and Juliet construction is to be preferred. It allows young people to participate in ‘teen sexual exploration.’ In criticism of the construction, it could be said that it employs an arbitrary age consideration, that of two years difference. But then so is the age of consent which it modifies.⁹⁵ The defence would ameliorate the crude application of an arbitrary age of consent. The Romeo and Juliet construction would be a sound protection that had it existed would have protected CTM from prosecution as well as Geranlowe Wilson⁹⁶, had that young man’s charge been brought in NSW, and assuredly many others.

What it also protects from is particularly capricious prosecution from either the ‘offended party’ complaining to the police after the relationship had cooled, as in the case of CTM, or the prosecutor persisting with charges to the lesser crime when consent has been established in relation to the greater crime, as in Geranlowe Wilson’s case.

This Romeo & Juliet formulation is also what Waites suggests in his book, though in relation to his native jurisdiction, England. He notes that a two year age span difference with the age of consent set to 16 years of age would allow 16 year olds to engage in intercourse with 14 year olds and 17 year olds with

⁹⁴Susannah Hodson, *CTM v The Queen: A Challenge to the Fundamental Presumption of Mens Rea*, (2010) 34 Criminal Law Journal 187 pg188

⁹⁵Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (1st ed 2005)pg77

⁹⁶A case from Georgia, USA. The young man had been charged with engaging in oral sex with a young woman two years his junior and under the age of consent. A quiddity in Georgian law meant that oral sex, unlike vaginal penetration, was a felony and Mr Wilson was sentenced to 10 years imprisonment among other sanctions. The young woman testified to court and to the public that the sex was purely consensual. *Humphrey v Wilson. Wilson v The State* [2007]282 Ga. 520; 652 S.E.2d 501



15 year olds but it would not allow adults, anyone over the age of 18, to engage in sexual intercourse with anyone under the present age of consent.⁹⁷

Conclusion

It has been seen that the purely protectionist view has created a strong protection for children against abuse by adults. In doing so the law uses the age of consent as a surrogate for maturity, a universal standard that is not amenable to individual psychology. The irony of this situation is that the law seeks to make criminal the taking advantage of the immature and the incapable but in doing so it may we prosecute those it deems to be immature and incapable.

This is the ultimate philosophical point of the paper. There is a gulf between behaviour that is rash, uninformed or foolish and behaviour that is criminal. The criminal law should not be used as a 'best practice model' and should be amended to allow the operation of an 'age gap' defence to protect from prosecution those that may be too immature to understand the nature of their actions.

It has been shown that teenagers engage in sexual intercourse and that a prohibitive law will have little effect on their choice in this regard. The discussion has shown that sexual interaction between consenting teenage contemporaries should not be presumed to be abusive. Thus this paper proposes the 'Romeo and Juliet' defence to allow young, consenting couples to explore their sexuality without the fear of unnecessary prosecution.

⁹⁷Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (1sted 2005)pg238



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