Sex and Sexual Violation: Consent, Negotiation and Freedom to Negotiate: Abstract

This paper presents the key findings of a doctoral thesis which explored how the boundary between sex and sexual violation might be represented within the criminal law. The Sexual Offences Act 2003 is used as a starting point from which to critique consent as a standard for distinguishing sex from sexual violation. Two of the key issues with consent are the unilateral nature of the initiation-consent dynamic, and the all-or-nothing nature of consent vs non-consent / capacity to consent vs lack of capacity. Michelle Anderson’s negotiation standard, as further developed by Sharon Cowan, is explored as a possible alternative to consent.

These initial findings are refined and developed through analysis of telephone interviews which were carried out with 19 self-selecting individuals and 2 caseworkers from a charity supporting street-based sex workers, and focus groups with police officers and domestic violence support workers. Analysis of the empirical data in tandem with an exploration of relevant theoretical literature (drawing especially on the work of Drucilla Cornell, Nicola Lacey and Sharon Cowan) led to the conclusion that the context within which the negotiation of a sexual encounter takes place is more important than the content of the negotiation itself. In doing so I also drew on Liz Kelly’s concept of ‘spaces for action’.

This paper ends by setting out what a ‘freedom to negotiate’ standard might look like, what its implications might be for sexual offences law – particularly in cases which have traditionally proved difficult to bring within the ambit of the criminal law such as sexual violation occurring within abusive relationships – and the details that remain to be clarified in order to incorporate a ‘freedom to negotiate’ standard into sexual offences law.