WIRRINGA BAIYA
ABORIGINAL WOMEN'S LEGAL CENTRE INC.
Wirringa Baiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or have been victims of violence.

15 February 2019

By email: nsw-lrc@justice.nsw.gov.au

New South Wales
Law Reform Commission

Dear Commissioners,

CONSENT IN RELATION TO SEXUAL OFFENCES: CONSUTLATION PAPER 21

We refer to the above and to our initial submission dated 29 June 2018.

Please find below our submissions in response to the consultation paper. Please note that we have not responded to all of the questions raised in the paper.

Our Centre

Wirringa Baiya Aboriginal Women's Legal Centre (Wirringa Baiya) is a New South Wales state-wide community legal centre for Aboriginal women, children and youth. The focus of our service is to assist victims of violence, primarily domestic violence, sexual assault and child sexual assault. We have been operating a legal service for twenty-two (22) years.

Our Governing Committee is comprised of Aboriginal women. We currently have four Aboriginal identified positions and our legal staff consist of two full-time solicitors and three part-time solicitors.

We acknowledge that we do not have experience prosecuting or defending people charged with sexual assault offences. However, we have extensive experience working with, and supporting Aboriginal whom have experienced sexual assault and other forms of sexual violence. We work with many other services, workers and members of the Aboriginal community who do the same.

Although our service is available to both Aboriginal and Torres Strait Islander women, children and young people, close to 99% of our clients are Aboriginal. For this reason, throughout this submission we will refer to the issues and needs of Aboriginal women and their communities.

✉ PO Box 785 Marrickville, NSW 1475 Building 13, 142 Addison Road, Marrickville, 2204.
Phone: (02) 9569 3847 Freecall: 1800 686 587 Fax: (02) 9569 4210 www.wirringabaiya.org.au Email: Wirringa_Baiya@clc.net.au
Wirringa Baiya is a non-profit organisation managed by Aboriginal women.
ABN: 60 382 206 441

Scope of the review

The NSW Law Reform Commission (NSWLRC) notes in its paper that "sexual assault is a complex problem that cannot be addressed solely by reforming the law." The NSWLRC states that the review is limited to "whether the approach to consent in the law should be reformulated."

We think it is unfortunate that that the review is limited. In recent years legislation has been reviewed and amended a number of times to improve prosecution of sexual assaults, and yet it is being interpreted and applied in such ways to see little improvement in conviction rates. The *Lazarus* case[1], as focused on the consultation paper, is one such example. So, while efforts to improve legislation are to be applauded, changes to community views about sexual assault are essential. It is well understood that sexual assault is a difficult crime to prove. It is a crime that mostly happens in private spaces and often by people known to the victim. But it must be reinforced that it is mostly committed by men against women (in NSW males made up to 97.5% of alleged perpetrators in the period March 2017 to March 2018).[2]. While legislators have amended the law to define what is lack of consent, it is always in response to what our Anglo patriarchal culture has defined as female sexuality and asserted as consent. This will continue while sexist views and rape myths persist at large within the community from which juries are selected, and also amongst those who work in the criminal justice system (be it police, prosecutors, defence lawyers and members of the bench).

Two studies conducted by the Australian Institute of Criminology showed that:

> " juror judgements in rape trials are influenced more by the attitudes, beliefs and biases about rape which jurors bring with them into the courtroom than by the objective facts presented, and that stereotypical beliefs about rape and victims of it still exist within the community. As jurors are members of the community and are randomly drawn in order to be representative of it, the two studies together indicate that successful prosecutions of sexual assault will remain low until we acknowledge that jurors interpret what they see in light of their own beliefs, experience and expectations." [3]

Affirmative consent standard

In principle we agree with an affirmative consent standard and submit that the *Crimes Act NSW 1900 (*the *Act)* should be amended to define consent requiring affirmative action by words or other conduct communicated to the person receiving it. We have no firm views about how such a provision should be worded.

---

[1] *R v Lazarus [2017] NSW CCA 279*

[2] NSW Bureau of Crime Statistics and Research (2018), *NSW Crime Tool*, available at http://crimetool.bocsar.nsw.gov.au/bocsar/ (accessed 19 June 2018). Males were recorded as person of interest in 3,291 (of a total of 3,375) in incidents of sexual offence reported to NSW Police in the 12 months to March 2018 as cited in *NSW Sexual Assault Strategy 2018-2021*

[3] Taylor N. 2007. *Juror attitudes and biases in sexual assault cases*. Trends & issues in crime and criminal justice No. 344. Canberra: Australian Institute of Criminology. https://aic.gov.au/publications/tandi/tandi34

While we think an affirmative consent standard is a step in right direction to facilitate cultural change, and give fact finders better guidance as to whether there was consent, we are of the firm view that any such amendment is not a panacea. We note the consultation paper refers to a number of people expressing concern that the affirmative standard will mean that the complainant's behavior will be the subject of detailed cross-examination.

Given that an accused does not have to give evidence in a criminal trial, and sexual assaults mostly occur in private spaces, the main evidence is mostly going to be complainant's evidence, which has always been and will continue to be closely scrutinized.

This was emphasized by the Australian Institute of Criminology in it its paper *Juror attitudes and biases in sexual assault cases*:

> "Since defendants can, and often do, choose not to give evidence in court, the credibility of the complainant is crucial to whether she is likely to be believed, the ability of the prosecution to convince a jury beyond reasonable doubt and, hence, the probability of a guilty verdict.
>
> ..... In cases where only the complainant gives evidence, she and the story she is telling are all that jurors have available to them. Since there is no objective way to test the truth of the complainant's testimony, her perceived credibility becomes crucial to the judgements that jurors make. However, the credibility of a complainant is not objectively determined. Whether a juror perceives a complainant as credible is not simply related to the consistency of her story or the manner in which the testimony is presented. This was shown clearly in a recent Australian experimental mock sexual assault trial study in which 210 members of the general public participated as jurors (Taylor & Joudo 2005). Across 18 trials and despite the fact that only the manner in which the complainant presented her testimony varied (in court, CCTV or via pre-recorded video) – everything else was held constant – jurors had different opinions about her credibility and the plausibility of her story. Even within the same jury, opinions about her credibility differed, which could not be attributed simply to how she presented her testimony or what she said since all jury members watched exactly the same trial." [4]

An Australian Institute of Criminology study of prosecutorial decision- making in adult sexual assault matters found that "[t]he prosecutors were unanimous about the importance of victims' credibility in adult sexual assault trials."[5] This study interviewed 24 Crown Prosecutors in a number of jurisdictions across the country. The interviewees reported that assessments of credibility may be affected by age, intelligence, socio-economic status and cultural background [6]. In the experience of the Crown Prosecutors interviewed, certain group of victims can be disadvantaged in the trial process, and this included victims from

---

[4] Ibid, pages 1 and 4

[5] Lievore, D, *Victim Credibility in Adult Sexual Assault Cases, Trends and Issue in crime and criminal justice* November 2004, Australian Institute of Criminology p,4.

[6] Ibid, page 4

"Indigenous or non-English backgrounds...if, for example they are unable to explain why they acted in certain ways."[7]

We also suggest that what may be seen as 'lack of credibility' is likely due to a lack of understanding of the impact of trauma, as discussed further below.

Should there be a lesser offence for "negligent" sexual assault?

The Bar Association has submitted that the objective standard contained in section 61HA(3)(c) should be removed, arguing people who honestly believe that there was consent, but have no reasonable grounds for that belief, should not be liable to conviction for sexual assault. It was also submitted by the Association that if the objective component remains, then a separate lesser offence for negligent sexual assault should be created. We state again that statistics clearly show us that it is mostly men who are the perpetrators of sexual assault. Therefore, it would be mostly men who would have this 'honest but not on reasonable grounds belief' that there was consent. When the Bar Association refers to concerns about the no reasonable grounds test, we would suggest that they are informed by the concerns of overwhelmingly men whom are accused of sexual assault. It is the dominance of the sexist male narrative in sexual assault law and proceedings that is the problem and must be challenged and changed.

We do not agree that there should be a lesser offence for 'negligent' sexual assault. We submit that all sexual assaults should be seen as serious. As a matter of principle, we support a reasonableness test in deciding whether the accused believed there was consent.

Negating consent

As discussed in our preliminary submission, we work with and support many women whom experience sexual violence in their intimate relationships. Clients describe often not being able to say no to any sexual activity in fear of physical violence or other forms of abuse and control. We have had a client tell us that every one of her 8 children with her violent ex-partner were conceived in rape.

There is often no immediate threat of violence before the sexual activity, but clients are caught in a relationship where regular control, threats, physical abuse and intimidation are utilized to instill and maintain ongoing fear. For Aboriginal women their partner's threats to take off with the children or report them to Family and Community Services (FACS) if she refuses his sexual demands, is an especially powerful one- given the complex family law system and the epidemic of Aboriginal children in the care system.

However, we do not want to suggest that every woman in a relationship where there is domestic violence is always having non-consensual sex with their partner. The cycle of violence is different for every woman, and it may be that there are periods of relative harmony in that relationship. A woman in a relationship where there is domestic violence

---

[7] Ibid, page 5

will know and identify when the dynamics of the relationship change to a period of escalating control, abuse and fear.

This fear needs to be recognized and understood by police, prosecutors and fact-finders in trials. Fact finders should be able to hear evidence of the domestic violence and the escalating control and abuse which places a woman in a state of fearfulness such that she is not freely agreeing to sexual acts.

We note that section 61HE(8)(b) states that no consent may be found if the person consents to the sexual activity because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force. We do not know if this section (previously section 61HA(6)(b)) has been used in trials to argue that there was no consent because of intimidation or coercive conduct in a domestic violence context, and if so, with what success.

We submit that the *Act* needs to be amended to recognise that there is no consent when a person submits to sexual activity because of fear of harm **of any type** to the victim, or another person, pet or damage to property.

Criminal justice system needs reform

As stated previously, we support the call for a comprehensive review of the criminal justice response to complaints of sexual assault and the establishment of specialist sexual assault courts. While we note that there are a number of specialist court models to consider, we submit that comprehensive and holistic criminal justice support is required throughout the process, from the police investigation through the court process and post final court outcome. And for Aboriginal victims of sexual violence such support must be provided by Aboriginal specialists. We submit that services such as our Centre are well placed to provide this support, provided we are given additional resources to do so.

Any review should begin with a study of sexual assault trials of recent years, similar to that of the groundbreaking study of the then NSW Department of Women in 1996, which resulted in the *Heroines of Fortitude Report*.[8] This would assist in understanding more comprehensively what is occurring in sexual assault trials in all its aspects.

Specialisation

We once again submit that specialisation is required by all who work in the criminal justice system when dealing with sexual assault matters. This means specialist police, specialist prosecutors, court staff and judiciary. Integral to such specialisation is a strong trauma informed practice. Police, prosecutors and fact finders especially need to understand the impact of trauma on memory and how accounts are given about sexual assault. It is increasingly being understood by practitioners in the criminal justice system in other jurisdictions that trauma significantly affects memory, and the way those who have

[8] *Heroines of Fortitude: The experiences of women in court as victims of sexual assault*, Department for Women (NSW), 1996

experienced violence recount their experiences when being interviewed. See for example the work of Russell W Strand, who writes:

> "Stress and trauma routinely interrupt the memory process thereby changing the memory in ways most people do not accurately appreciate. One of the mantras of the criminal justice system is "inconsistent statements equals a lie." Nothing can be further from the truth when stress and trauma impact memory, research shows.
>
> In fact, good solid neurobiological science routinely demonstrates that, when a person is stressed or traumatized, inconsistent statements are not only the norm, but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma."[9]

To this end, interview techniques such as the Forensic Experiential Interview have been developed to help practitioners in the criminal justice system better interview people who have experienced violence.[10]

For the Aboriginal community a strong understanding of transgenerational trauma that many Aboriginal people experience is essential, especially as it makes the trauma of the sexual assault that much more complex. In addition, an understanding of the significant barriers, deep shame and fears that Aboriginal woman experience when disclosing sexual violence must also be understood. We submit that our service is well placed to provide such education.

As we, and many have already submitted, that despite legal reform community values and rape myths held by fact-finders in a sexual assault trial will influence their finding about whether there was free and voluntary agreement. We once again submit that those values and rape myths may include racist views about Aboriginal women and promiscuity. This was identified in the 1996 report: *"Heroines of Fortitude- The Experiences of Women in Court as Victims of Sexual Assault."* We would submit that these racist myths still persist and pervade in the criminal justice system, an example being the significant delay in prosecuting the brutal sexual assault and killing of Lynette Daley.

Cultural change and prevention

The NSWLRC refers to the Sexual Assault Strategy developed by the State Government. Our Centre was on the expert panel that worked with Women's NSW in relation to this strategy. We were very disappointed with the final Strategy developed by Minister Goward. It was a missed opportunity by the Government to make significant investment in primary prevention, support services and legal systems that work with people whom have experienced sexual assault. Most of the statements about what the State Government "will do" in the Strategy are the continuation of existing programs and policies, or vague

---

[9] Russell W Strand "The Forensic Experiential Trauma Interview (FETI) USA Army Military School http://www.mncasa.org/assets/PDFs/FETI%20-%20Public%20Description.pdf, pages 1 and 2.

[10] See Russel W Strand's article, as cited above.

statements such as "provide input." We acknowledge the *Make No Doubt* campaign[11] developed as part of the Strategy, but submit that it is not well known, and not highly visible on social media pages where issues of consent would be discussed. It is also submitted that it would have little appeal to Aboriginal communities.

It essential that significant investment is made in primary and secondary prevention of sexual assault. This requires a significant prevention strategy that is multi-layered, utilising multiple strategies in all domains of social and public life and is appropriate to Aboriginal communities as well as other diverse communities. Education must focus on what is a respectful and healthy relationship and how to engage in sexual activity in an ethical way.

Any primary prevention that seeks to prevent sexual assault must seek to dismantle sexism and change our patriarchal culture which gives space for sexual assault to occur. At the same time, it must aim to end other forms of oppression and prejudice such as racism and homophobia.

Work must also be done with perpetrators of sexual violence to engineer behaviour change and aim to prevent further violence. Behaviour change programs must be multi-faceted targeting perpetrators of all ages, genders, sexual orientation and cultural backgrounds.

The Government's response to sexual violence needs to be approached within a human rights framework. In particular sexual violence needs to be understood as gender- based violence, which is prohibited under international human rights law.[12] Freedom from gender- based violence needs to be accepted as just as important as other human rights, such as the right to life, security and education. Governments must accept and take responsibility for the protection of this fundamental human right. The Government must invest in the most effective social, legal and support systems that protect women's rights to live a life free from gender-based violence.

Support services generally

We again submit that a number of support services are required to support a person who has experienced sexual assault to recover. This will include: immediate crisis support; ongoing therapeutic support; medical support; housing support; support for family; court support and legal support. We refer to A Safe State platform, developed by the NSW Women's Alliance, which our Centre is a member.[13] This platform makes a number of recommendations about how to improve and enhance support systems for people experiencing sexual violence, and a number of recommendations specific to the Aboriginal community.

---

[11] https://www.women.nsw.gov.au/news/2018/make-no-doubt-consent-at-the-heart-of-new-campaign

[12] See the *International Convention to Eliminate all forms of Discrimination Against Women* which Australia has signed and ratified.

[13] https://www.safensw.org.au/49_recommendations

If you have any questions about this submission, or wish to speak to our Centre staff further, please do not hesitate to contact Rachael Martin on 02-9569 3847 or email- r.martin@wirringabaiya.org.au

Yours faithfully,
Wirringa Baiya Aboriginal Women's Legal Centre

[redacted]

Per: Rachael Martin [redacted]
Principal Solicitor