



WIRRINGA BAIYA

ABORIGINAL WOMEN'S LEGAL CENTRE INC

Wurringga Baiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or who have been victims of violence.

14 September 2012

The Director
Criminal Law Review
NSW Department of Attorney-General and Justice
GPO Box 6
SYDNEY NSW 2001

By email: lpclrd@agd.nsw.gov.au

Dear Director,

RE: INQUIRY INTO THE CONSENT PROVISIONS OF THE CRIMES ACT 1900

The work of our Centre

Wurringga Baiya Aboriginal Women's Legal Centre (Wurringga Baiya) is a New South Wales statewide 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.

Over the fifteen (15) years of our operation we have given advice and support to many hundreds of women and children who have been victims of violence. We have also acted for many clients in applications for statutory victims compensation for the violence they have endured. Furthermore, we have provided numerous community legal education workshops to community members in New South Wales, in both regional and metropolitan locations.

In addition to our day-to-day advice and casework services, we also provide legal advice clinics in several outreach locations including in women's correctional centres and community centres. We also provide support to women through our involvement with the Women's Domestic Violence Court Advocacy Service (WDVCAS) at the Downing

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Wurringga Baiya is a non-profit organisation managed by Aboriginal women.

ABN: 60 382 206 441

Centre and Waverly Court and have some exposure in this capacity to the process of obtaining and enforcing ADVOs.

As we are not a criminal practice, we cannot comment on the specific provisions of consent legislation. However, we work exclusively with Aboriginal women who are the victims of violence and have found that an emerging issue for our clients is experiencing sexual assault within domestic violence relationships. We note that this issue was recognised and discussed in the Australian Law Reform Commission and New South Wales Law Reform Commission's joint report "Family Violence – A National Legal Response" (ALRC Report 114). Crime statistics consistently show that Aboriginal women and children are over-represented as victims of violence.¹ Further to this, forty to forty-five per cent of women who are physically abused by their intimate partners are also forced into sexual activities by them.² Our primary concern is whether these provisions adequately respond to the rights of women in these relationships. In this sense we are concerned with the educative function of this legislation in shaping the responses of the police, magistrates, jurors and wider community when responding to, and supporting women who have been the victims of rape within a domestic violence relationship.

Introduction

Marital rape immunity has been formally abolished by the common law in all jurisdictions in Australia since 1981.³ However, it seems that the archaic concept of women as 'chattel', who make an irrevocable agreement to sex once married, still

¹ A recent NSW Bureau of Crime and Statistics analysis of domestic violence trends and patterns in the last ten years showed that Aboriginal women in NSW continue to be dramatically over-represented as victims of violence see: NSWBOCSAR, *"Trends and Patterns in domestic violence assaults: 2001 to 2010"*, May 2011 at p 8. The rate of domestic violence for Aboriginal women is six times more likely than that for non-Aboriginal women.

It has also been found that nationally Indigenous women are 31 times more likely than other Australian women and men to be hospitalized for family violence related assaults (Steering Committee for the Review of Government Service Provision, *"Overcoming Indigenous Disadvantage: Key Indicators 2011"* Productivity Commission, Canberra at page 23).

² Campbell, J., & Soeken, K. (1999). Forced sex and intimate partner violence: Effects on women's risk and women's health. *Violence Against Women*, 5(9), 1017–1035.

³ *R v L* (1991) 174 CLR 379.

pervades attitudes towards consent and sexual assault by a partner today.⁴ For one in ten adult women who are sexually assaulted, the perpetrator will be their partner.⁵ This is compounded by the fact that forty to forty-five per cent of women who are physically abused by their partners are also forced into sexual activities by them.⁶ Sexual assault by a partner is the least likely form of sexual assault to be reported⁷ and frequently occurs within domestic violence relationships. The repetitive and controlling nature of domestic violence means that women will often do anything to “survive” in the relationship, including sex. In our experience these relationships are exceedingly complex and require the police, judiciary and jurors to turn their mind to the unique circumstances of women experiencing domestic violence when assessing whether there has been consent. We do not know how many perpetrators, who sexually assault intimate partners, are being charged with sex offences and successfully prosecuted in NSW courts. However, what we do know is that women in violent relationships rarely disclose sexual assault and we believe that community education, sparked by legislative change will encourage an environment where women feel more confident, comfortable and supported in disclosing.

Sexual assault in domestic violence relationships: A unique set of circumstances

We note that current consent provisions outline a list of circumstances that negate consent and a list of circumstances, which *may* negate consent. It is our proposition that domestic violence relationships constitute a set of circumstances so unique as to be specifically addressed within the second tier list.

The issue of consent within intimate partner relationships is complex. It is further compounded if there is a history of violence. Sexually abusive behaviour by a partner is likely to be violent and repeated, it forms part of a controlling pattern of behaviour, designed to dominate, humiliate and denigrate a victim.⁸ It is important to understand the unique set of

⁴ Easteal, P., & Feerick, C. (2005). Sexual Assault by Male Partners: Is the Licence Still Valid? *Flinders Journal of Law Reform* 185

⁵ Australian Bureau of Statistics. Personal Safety Survey. 2005

⁶ Campbell, J., & Soeken, K. (1999). Forced sex and intimate partner violence: Effects on women's risk and women's health. *Violence Against Women*, 5(9), 1017–1035.

⁷ Australian Bureau of Statistics. Personal Safety Survey. 2005

⁸ Braaf Rochelle., (2011) Preventing Domestic Violence Death – Is Sexual Assault A Risk factor? Australian Domestic and Family Violence Clearing House., University of New South Wales, Sydney, p.1

circumstances of women in these relationships when assessing consent. Eastaer in her research identifies four types of coercion in wife or partner rape. These are: social coercion, interpersonal coercion, threat of physical force, and physical force.⁹ Interpersonal coercion could be a threat made by the husband to leave, and social coercion is exemplified by religious teachings around the “duties of the wife”.¹⁰ The literature suggests that survivors may experience a combination of these types of coercion, which will change throughout the relationship. It is a combination of these types of coercion, which can be used to distinguish this form of sexual assault from sexual assault by a stranger. It is important to note too here that women may not experience an immediate threat or violent act, but are coerced into sex by the cumulative effect of their experiences of domestic violence.

There are a number of myths that pervade attitudes to sexual assault within intimate partner relationships. These myths create serious barriers to adequately responding to these claims within the justice system. ‘Despite the extent of the research on domestic and sexual violence, many jurors still believe stereotypes about sexual and domestic violence victim behavior.’¹¹ Furthermore, ‘the behaviors of sexual assault victims—particularly non-stranger sexual assault victims—also frequently conflict with the type of behavior the public expects from a “real” victim.’¹² These myths are the result of a distinct lack of understanding of domestic violence and its effects on women.

Intimate partner sexual assault has a devastating impact on the lives of women and the greater community. It has been shown that women who are forced to have sex by their partners may be at a greater risk of being killed by them.¹³ The violence often takes place within the home affecting family members and children. Women in these circumstances struggle to develop and maintain their own mental, physical and emotional wellbeing. As the violence takes place within an intimate relationship the victim may have complex feelings towards their partner

⁹ Eastaer, P., & Feerick, C. (2005). “Sexual Assault by Male Partners: Is the Licence Still Valid?” *Flinders Journal of Law Reform* 185

¹⁰ *ibid*

¹¹ Washington Coalition of Sexual Assault Programs, (2009) “Intimate Partner Sexual Violence; Sexual Assault in the Context of Domestic Violence”, p.23, accessed 5 September 2012, <http://www.wcsap.org/intimate-partner-sexual-violence>

¹² Washington Coalition of Sexual Assault Programs, (2009) “Intimate Partner Sexual Violence; Sexual Assault in the Context of Domestic Violence”, p.23, accessed 5 September 2012, <http://www.wcsap.org/intimate-partner-sexual-violence>

¹³ Campbell, J., & Soeken, K. (1999) “Forced sex and intimate partner violence: Effects on women’s risk and women’s health” *Violence Against Women*, 5(9), 1017–1035.

and the act, they may blame themselves or they may still hold feelings for their partner. ‘As a result, intimate partner sexual assault victims often “suffer long-lasting physical and psychological injuries as severe—or more severe—than stranger rape victims”’.¹⁴

A key issue for us at Wirringa Baiya is the low rates of disclosure of sexual assault in domestic violence relationships. Our experience confirms intimate partner sexual violence is more difficult for women to talk about than other types of abuse. This may be for any number of reasons; shame, complex feelings towards their partner, or the victim may not even realize the acts of their partner constitutes rape. Therefore, one cannot assume that sexual violence will be disclosed. It is not enough to ask about domestic violence, health and community workers and police must also ask about sexual violence. We would submit such workers, especially police, would need to be appropriately trained about how to elicit this information in a culturally appropriate and sensitive way. For disclosure rates to increase we believe two things must happen:

- The legislation should reflect the seriousness and unique circumstances of sexual assault within domestic violence relationships; and
- There should be broad community education around consent in order to reduce the stigma and damaging myths around consent and sexual assault within intimate partner relationships.

These propositions are discussed in more detail in the recommendations below.

Current consent provisions in NSW

Wirringa Baiya welcomed the 2007 amendments to consent provisions in relation to the offence of Sexual Assault. Notably, the introduction of the statutory definition of consent, the expansion of a list of circumstances that negate consent and the inclusion of a list of circumstances which *may* negate consent as well as the move to provide an objective fault test. We note that the Attorney General provided the following background in the Second Reading Speech to this legislative change:

¹⁴ Washington Coalition of Sexual Assault Programs, (2009) “Intimate Partner Sexual Violence; Sexual Assault in the Context of Domestic Violence”, p.23, accessed 5 September 2012, <http://www.wcsap.org/intimate-partner-sexual-violence>

"This amendment serves a dual purpose. First, the definition will clearly articulate what does and does not amount to consent. It will have an educative function for both the community and jurors and it will ensure that standard directions are given to juries. Lack of consent is ultimately a matter of fact to be determined by a jury. It is essential that the courts give clear and consistent guidance as to what this means. Secondly, the introduction of this statutory definition of consent provides the opportunity to enact a more contemporary and appropriate definition than is currently available under the common law."

While the changes demonstrated a positive move to recognising the rights of sexual assault victims, we believe there is further work to be done in educating the wider community about this offence and specifically about the notion of consent. Our primary concern is to ensure the educative function of these provisions extends to educating the legal and justice system about women who experience sexual assault in domestic violence relationships.

Gaps in consent provisions

The joint report of the Australian Law Reform Commission and New South Wales Law Reform Commission "Family Violence – A National Legal Response" (ALRC Report 114) discussed a number of options for the legislation to address the realities of women who are the victims of sexual assault in a domestic violence relationship (see para 25.117):

1. "Include the type of intimidation that can be generated in a marital or intimate relationship"¹⁵;
2. "Prescribe family violence as a circumstance where there is no consent, or recognize family violence as an environment characterized by threats of force or terror and prescribe that there is no consent where it is obtained by such threats"¹⁶;

¹⁵ P Eastal, *Submission FV 38*, 13 May 2010 in Australian Law Reform Commission and NSW Law Reform Commission, 2010, *Family Violence: A National Legal Response; Final Report*, ALRC Report 114, NSWLRC Report 128, Accessed 3 September 2012, HYPERLINK

"http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf"http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf

¹⁶ Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Jenny's Place Women and Children refuge, *Submission FV 54*, 28 May 2010 in Australian Law Reform Commission and NSW Law Reform Commission, 2010, *Family Violence: A National Legal Response; Final Report*, ALRC Report 114, NSWLRC Report 128, Accessed 3 September 2012, HYPERLINK

"http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf"http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf

3. Emphasise “that actual threats or coercive behavior need not be immediately present to affect the validity of consent and prescribed circumstances should refer to a history of force and intimidation.”¹⁷

It is our view that if better codified in law (as described above), individuals, community and health workers, police and the justice system will better identify and respond to these issues, breaking down the barriers to access to justice.

To conclude, our recommendations are as follows:

Recommendation 1

- (a) The legislation should reflect the seriousness and unique circumstances of sexual assault within domestic violence relationships.
- (b) Consideration should be given to legislative changes that:
 - (i) includes the type of intimidation that can be generated in a marital or intimate relationship;
 - (ii) prescribes family violence as a circumstance where there is no consent, or recognize family violence as an environment characterized by threats of force or terror and prescribe that there is no consent where it is obtained by such threats; and
 - (iii) emphasises that actual threats or coercive behavior need not be immediately present to affect the validity of consent and prescribed circumstances should refer to a history of force and intimidation.

Recommendation 2

There should be broad community education around the law of consent in order to reduce the stigma and damaging myths around consent and sexual assault within intimate partner relationships

¹⁷ Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV212*, 28 June 2010 in Australian Law Reform Commission and NSW Law Reform Commission, 2010, *Family Violence: A National Legal Response; Final Report*, ALRC Report 114, NSWLRC Report 128, Accessed 3 September 2012, HYPERLINK "http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf"http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf

If you have any questions about this submission please contact Rachael Martin of this office on (02) 9569 3847.

Yours faithfully,

Wirringa Baiya Aboriginal Women's Legal Centre

A handwritten signature in black ink, appearing to read 'Rachael Martin', with a long horizontal flourish extending to the right.

Per: Rachael Martin
Principal Solicitor