



WIRRINGA BAIYA

ABORIGINAL WOMEN'S LEGAL CENTRE INC

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

21 March 2014

Mr Bruce Barbour
NSW Ombudsman
Level 24, 580 George Street
Sydney
NSW 2000

By email: review@ombo.nsw.gov.au
kmcdonald@ombo.nsw.gov.au

Attention: Kate McDonald, Senior Review Officer

Dear Mr Barbour,

REVIEW OF THE NEW CONSORTING PROVISIONS CONTAINED WITHIN DIVISION 7, PART 3A OF THE CRIMES ACT 1900.

Thank you for the opportunity to participate and respond to this inquiry.

Wurringa Baiya Aboriginal Women's Legal Centre

Wurringa Baiya Aboriginal Women's Legal Centre (Wurringa Baiya) is a New South Wales based 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 and although our work is at the periphery of the criminal law, we are not criminal lawyers.

We are not cognisant of all the issues raised in the Issues Paper and the potential impact of these. As such, we defer to our colleagues with more experience of the operation of these laws within the legal profession and note that the criminal lawyers at Legal Aid and the Aboriginal Legal Service are likely to have more relevant experience in this field. We also note the submissions made to this inquiry by other community legal centres and particularly note the contributions made by the Intellectual Disability Rights Service and Kingsford Legal Centre, many of whose views with which we concur.

Wurringa Baiya's relevant experience

A number of our clients have experiences as both victims and offenders, and their offending behaviour is often linked to their victimisation or institutionalisation through welfare agencies. Additionally, given the over-representation of Aboriginal people in the criminal justice system, our clients have regular contact with other people who may have a criminal conviction such as husbands and partners, parents, children, siblings,

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

ABN: 60 382 206 441

uncles, aunts and so on. The proximate relationships in some Aboriginal communities means that people with or without criminal convictions will necessarily be associating with family, friends, neighbours and community who may knowingly or unknowingly have criminal convictions. To criminalise these relationships and associations will further marginalise Aboriginal people. This is a concern for our service which helps inform our views expressed herein.

Wirringa Baiya has contact with women in prison through a project called *Legal Education and Advice in Prison Project*. Through this work, and the experiences of our clients who are or have been victims of violence more generally, we are aware that victimisation is often the beginning of a pathway towards criminalisation and institutionalisation. We note that Aboriginal women and children are over-represented as victims of crime and that the use of the consorting provisions over the past twelve month period resulted in Aboriginal children and women being cautioned at a higher rate than non-Aboriginal groups.

Based on our experience and knowledge, we have some limited understanding and view as to how the new consorting provisions may impact Aboriginal communities and especially women and children. In light of these experiences, we are making a very discrete submission to this review and hope that our contribution will be considered by the NSW Ombudsman.

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.

Primary Recommendation

We are of the view that this legislation should be repealed.

We are of the view that the legislation is unnecessary and is having unfair and unjust consequences for many already marginalised groups. We have concerns about the impact on Aboriginal communities and especially on the rights of young people and women.

Notwithstanding this view, we are cognisant of the reality that the law may remain or be amended in light of this review. Should provisions relating to consorting remain, we make the following observations and recommendations for reform.

Wirringa Baiya's general observations and concerns

1. Over-representation of Aboriginal people in the criminal justice system.

According to the analysis observed in the Issues Paper, 46% of all Aboriginal men in NSW have been convicted of an indictable offence in the last 10 years compared to 5.3% of all men; and half (49%) of the Aboriginal male population aged over 30 years have indictable convictions compared to 5% of the total male population of the same age range. In relation to adult women, 15% of Aboriginal women in NSW have indictable convictions received in the last 10 years, compared to 1.3% of all women.

Aboriginal people are over-represented generally as victims of crime and are over-represented in criminal justice processes – the reasons for which are complex and will not be explored at length here. We are concerned about any policy or strategy which further criminalises or marginalises Aboriginal people and the short history of this law demonstrates that this is occurring, notwithstanding this may be an unintended, yet not unexpected consequence.

2. Wirringa Baiya is concerned about current policies and practices such as consorting provisions that have the effect of further criminalising Aboriginal children, young people and women – groups which are already severely disadvantaged in our community.

As a state-wide service we are aware of the problems faced by Aboriginal people who live in over-policed communities where racism, sexism and marginalisation are common and relationships between Aboriginal communities and police are fraught – the use of additional police powers in such communities is a concern.

We are particularly concerned about the high numbers of Aboriginal adults and young people who are charged by police, refused bail and incarcerated in state institutions and note that Aboriginal youth in Australia are massively over represented in juvenile detention – by 21 times the proportion of their population.¹

It is for these reasons that we recommend repeal of this legislation.

We are concerned about any policy or strategy which further criminalises or marginalises Aboriginal people and as noted, although this law has not been in force for long, it has already had the effect of disproportionately affecting Aboriginal people.

Responses to Consultation Questions

Use in relation to disadvantaged and vulnerable groups

11. What, if any, protections should be put in place to ensure that Aboriginal people are not unfairly affected by the consorting provisions?

¹ Taylor, Natalie (2007), Juveniles in detention in Australia, 1981–2006, Technical and Background Paper, no. 26, Canberra: Australian Institute of Criminology.

We defer to our criminal solicitor colleagues for comprehensive guidance on this issue as we are not aware of how criminal sanction and laws operate in practise, nor are we qualified in drafting legislative provisions. However, we would like to pick up the problems identified in the Issues Paper and based on this, we note some disparity between the intention of the legislation and the effect that it is having in the community.

We note that the purpose and intention of the legislation to ensure:

“...that the provisions of the [Crimes] Act remain effective at combating criminal groups in NSW...” and that the NSW Police Force *“has adequate tools to deal with organised crime”*² and that the intention of the new law was not to *“not to criminalise individual relationships... [and] it is not the intention of the section to criminalise meetings where the defendant is not mixing in a criminal milieu or establishing, using or building up criminal networks...”*³

The second reading speech highlighted the discretion afforded to police officers to determine which circumstances would be suitable and appropriate for the use of the consorting provisions. We note the comment that:

*“...this bill puts police in a position to do what they do best every day and make a judgment about whether observed behaviour reaches the level sought to be addressed by the bill, that is, behaviour which forms or reinforces criminal ties...”*⁴

However, it has been noted elsewhere that *“the overrepresentation of Indigenous young people in the criminal justice system is one of Australia’s most significant social problems”* and one that was highlighted as early as 1991 following the Royal Commission into Aboriginal Deaths in Custody. Although significant resources have been allocated to reduce this overrepresentation, the problem remains. The causes for indigenous over-representation in the criminal justice system are complex – while not able to be explored in full here, we note a blend of economic and social disadvantage, the blurring between welfare and crime and ongoing processes of colonisation⁵ contribute.

We note, as we have done in other similar submissions, that Police at the frontline and general duties police sometimes use their powers inappropriately especially when interacting with vulnerable groups, especially children, young people, Aboriginal communities, women and people with intellectual disabilities or mental health concerns. Rather than providing police with greater powers to arrest, caution, warn and detain people, better understanding of complex issues such as mental health, social and economic disadvantages, systemic racism and the effect of institutionalisation would be preferable in order for police to adequately work within the powers that they already have available.

² Parliamentary Secretary, Second reading speech

³ Consorting Issues Paper, page 2, Referencing the Hon. David Clarke MLC, NSWPD, (Hansard), Legislative Council, 7 March 2012, p. 9091-9093.

⁴ Ibid, at page 9093.

⁵ The over-representation of Indigenous peoples in Australia’s penal and criminal justice systems is now well documented see Cunneen, Chris (2001), *Conflict, Politics and Crime: Aboriginal Communities and Police*, Sydney: Allen & Unwin; Chen, Shuling, Matruglio, Tania, Weatherburn, Don and Hua, Jiuzhao (2005), ‘The transition from juvenile to adult criminal careers’, *Contemporary Issues in Crime and Criminal Justice*, no. 86, Sydney: NSW Bureau of Crime Statistics and Research. [http://www.cso.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB86.pdf/\\$file/CJB86.pdf](http://www.cso.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB86.pdf/$file/CJB86.pdf).

We note that the Consorting Issues Paper has highlighted worrying statistics about the impact of the consorting provisions on Aboriginal communities. The Issues Paper notes that:

- The majority of cautions were issued by general duties police in that general duties police accounted for 85% of the use of consorting warnings and cautions in NSW and only 15% were issued by specialist squads
- Aboriginal people are over-represented as the recipients of the use of consorting provisions: around 40% of the cautions and warnings issued were issued to Aboriginal people while Aboriginal people comprise only 2.5% of the population in NSW
- 2/3 of the children and young people issued with cautions and warnings were Aboriginal and
- Over half of the women issued with cautions were Aboriginal.

It has been noted elsewhere that a myriad of reasons abound as to the over-criminalisation of Aboriginal women and children. Likewise, countless reports as far back as *Bringing them Home*⁶ have recommended for justice institutions including police undergo better training and awareness of the issues faced by these groups such as:

- long term effects of family separation
- dislocation from country
- transgenerational complex trauma⁷
- domestic and family violence, child sexual assault
- disabilities, mental and physical health conditions
- geographic isolation, and
- social and economic disadvantage

in order to better interact with marginalised groups.

We refer to the NSW Police Aboriginal Strategic Direction which states that the NSW Police intend to:

“work with Aboriginal communities and other justice agencies to investigate the implementation of culturally appropriate policing strategies for Aboriginal communities and seek the cooperation of Aboriginal people in their promotion... and seek to provide employment, education and training to Aboriginal people at every opportunity while at the same time educating our officers on Aboriginal history, culture and society.”

We also note the recommendations made by the Mental Health Coordinating Council in relation to trauma informed practices and note that this service in collaboration with ASCA (Adults Surviving Child Abuse), ECAV (Education Centre against Violence) and PMHCCN Private Mental Health Consumer Carer Network Australia are advocating for a cultural and philosophical shift to promote Trauma informed Care and Practice be adopted broadly across

⁶ Australian Human Rights Commission, 1997. See <http://mhcc.org.au/sector-development/recovery-and-practice-approaches/trauma-informed-care-and-practice.aspx>

⁷ including trauma informed training as recommended by the Mental Health Coordinating Council see: <http://mhcc.org.au/sector-development/recovery-and-practice-approaches/trauma-informed-care-and-practice.aspx>

a range of service systems in Australia. We fully support this work and below adopt this

Recommendation

In light of this and the points highlighted above, we recommend the following practical steps to help ensure that Aboriginal people are not unfairly affected by the consorting provisions:

Regular training for Government agencies connected to justice system, including NSW Police in relation to:

- Cultural awareness in working with Aboriginal communities
- Understanding the complexities of Stolen Generation and the trans-generational trauma caused by this policy
- The ongoing marginalisation and institutionalisation of children exposed to violence and maltreatment
- Mental health awareness
- Social and economic disadvantage
- The impact of ongoing family separation
- Cognitive and learning disabilities such as intellectual disabilities
- Trauma informed practices

recommendation.

12. One of the defences listed in section 93Y of the Crimes Act is ‘consorting with family members’. Should ‘family’ be defined within the legislation or in the Consorting SOPs and if so, what definition of ‘family’ should be adopted?

The Consorting Issues Paper identifies the problem that there is no specific reference to use in relation to Aboriginal people in the *Consorting Standard Operating Procedures* (Consorting SOPs) and no guidance for officers about whether they should consider kinship ties between Aboriginal people as falling within the definition of ‘family’ in section 93Y(a) of the *Crimes Act 1900*.⁸

We would echo the observations made in the Issues Paper that “*kinship ties are broader than lineal or blood relations and assist in structuring Aboriginal people’s relationships with each other...*” (page 28). The NSW and Australian Law Reform Commissions had the opportunity to consider the definition of family in *Family Violence—A National Legal Response*, the report into family violence. Recommendation 7-6 of the Report held that family should be defined as follows:

- past or current intimate relationships, including dating, cohabiting, and spousal relationships, irrespective of the gender of the parties and whether the relationship is of a sexual nature;
- family members
- relatives

⁸ Consorting Issues Paper, page 28.

- children of an intimate partner;
- those who fall within Indigenous concepts of family; and
- those who fall within culturally recognised family groups.

Understanding the concept of “family” for Aboriginal people

The conceptualisation of the notion of ‘family’ can be complex for Aboriginal people and communities due to the process of colonisation of Aboriginal people in Australia. Traditionally, Aboriginal people lived in large groups considered all members of such groups to be “kin” whether related by blood lines or not. In traditional communities extended family including grandparents, aunts, uncles, cousins and other relatives have responsibilities to each other and especially to the rearing of children and the continuation of cultural practises. The settlement of Australia and separation of families which resulted in the Stolen Generation and Forgotten Australians meant that Aboriginal people lost these cultural ties and bonds and for far too many Aboriginal people, aspects of their cultural heritage and identity was lost or not passed on, due to forced physical separation and attempted assimilation.

For many Aboriginal people today, the legacy of Stolen Generation is not a historical construction but a daily reality and profound sadness that there are parts of their cultural heritage which will never be known or passed on to the next generation. Language, stories, cultural practises and identities are key among these lost traditions for many Aboriginal people. As such, the notion of family and the right to associate and have close emotional and physical bonds to communities and kin is imperative.

The seminal 1997 report “*Bringing them Home*”⁹ adopted a broad definition of “family” so as to properly recognise the cultural identity of Aboriginal people which includes not only immediate family, but extended family members, family through marriage ties or child rearing responsibilities and other family responsibilities and obligations.

Recommendation

We note the detrimental impact of family separation. We note that this practice is not only a historic issue, but a continuous process through forced child removal and family separation. We recommend that the Consorting SOPs and any legislation pertaining to consorting should adopt the definition of “family” which was adopted by the NSW and Australian Law Reform Commissions in their report, *Family Violence—A National Legal Response*.

⁹ Australian Human Rights Commission, 1997. See <http://mhcc.org.au/sector-development/recovery-and-practice-approaches/trauma-informed-care-and-practice.aspx>

The importance of maintaining cultural practices through family relationships

The United Nations Declaration on the Rights of Indigenous People provides that Aboriginal people possess numerous rights pertaining to the importance of maintaining family networks and extended community associations, including:

- **Article 11:** Right to practice and revive culture and traditions.
- **Article 12:** Right to practice spiritual and religious traditions.
- **Article 13:** Right to know and use language, histories and oral traditions and the right to recover, use and pass on to future generations their histories and languages, oral traditions, writing systems and literature and to use their own names for communities, places and people.

Recommendation

We submit that the NSW Government, NSW agencies and institutions have an overriding obligation to ensure that Aboriginal people and communities are free to practice, protect and revive and keep alive their cultures, spiritual, religious and knowledge traditions. It is logical that this is necessarily done through maintaining kin relationships, associating with family, friends and kin in both public and private spaces and practising other cultural activities with members of their family and kin.

We submit that any law which seeks to make an incursion on these rights, limit association, prohibit certain relationships or which construes such relationships as acts of “consorting” is unjust and that serious consideration should be given to Australia’s national and international obligations to Aboriginal communities.

Issues relating to the offence

20. Should the consorting provisions require police officers to provide official warnings in writing in addition to giving an oral warning?

Yes – if this legislation is to remain, we recommend that Police are compelled to provide written warnings at the same time as, or as soon as practical after, the issuing of a verbal warning. This would enable the person the subject of the warning to fully understand the warning, or enable a solicitor or advocate to explain the warning to the person. This would also encourage police to be more accountable and to use warnings only in circumstances in which their use is justified.

21. Should police officers be able to issue official warnings pre-emptively? If yes, in what circumstances would it be appropriate for police officers to issue warnings in this way?

No – we disagree with this suggestion.

24. Should the consorting provisions provide for a process for review of official warnings? If yes, what kind of review process would be appropriate?

Yes – we are of the view that a right to an internal review would assist in providing a defendant an opportunity for procedural fairness.

25. Should police formally establish an internal review process to assess the validity of warnings upon the request of the person warned?

Yes.

26. Should the defences to consorting be expanded to include any of the following:

- consorting between people who live together
- consorting between people who are in a relationship
- consorting that occurs in the provision of therapeutic, rehabilitation and support services
- consorting that occurs in the course of sporting activities
- consorting that occurs in the course of religious activities
- consorting that occurs in the course of genuine protest, advocacy or dissent?

Yes – we concur that the defences to consorting provisions should be expanded to include the above listed defences.

27. Should the list of defences be an inclusive list instead of an exhaustive list?

Yes.

29. Should definitions of ‘family members’ and ‘health service’ be included in section 93Y? If yes, how should these terms be defined?

Yes, please refer to our submissions above in relation to family members.

30. What guidance, if any, should be provided to police about how they should exercise their discretion in relation to the defences?

We do not have a view.

31. Should the consorting provisions be amended to provide that the prosecution must satisfy the court that the consorting was not reasonable in the circumstances?

Yes, we are of the view that this would provide a better approach to ensuring natural justice and procedural fairness and shift the onus of proof properly, back to the responsibility and role of the Prosecution.

If you have any queries in relation to the above submission please do not hesitate to contact Rachael Martin, or Christine Robinson of this office on (02) 9569 3847.

Yours faithfully,

Warringa Baiya Aboriginal Women's Legal Centre

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

**Rachael Martin
Principal Solicitor**

A handwritten signature in black ink, appearing to read 'Thea Deakin-Greenwood', with a large circular flourish at the beginning.

**Thea Deakin-Greenwood
Solicitor**