



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.

29 June 2018

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

New South Wales
Law Reform Commission

Dear Commissioners,

REVIEW OF CONSENT IN RELATION TO SEXUAL OFFENCES

Thank you for the opportunity to make a preliminary submission. Due to current resource and time constraints our submission will be brief. However, we would welcome the opportunity for any further discussion on this issue, and the criminal justice response to sexual assault generally.

Our Service

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.

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.

We regularly provide advice to Aboriginal women who have experienced sexual assault in adulthood, and provide casework in the form of applications for victims support (previously victims compensation). When resources allow we also provide court support to Aboriginal women going through the court process.

Our submissions are informed by the Aboriginal women we work with and the clients we support.

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.

Our submission

We note the significant submissions of Rape and Domestic Violence Services Australia (RDVSA) and Community Legal Centre NSW. We support many of the recommendations made in those two respective submissions. Our submissions below seek to highlight some of the issues of particular concern and relevance to our clients.

Section 61 HA

In short, we recommend that section 61HA should be amended to provide a clear endorsement of the communicative model of consent. That is, consent must be communicated in an affirmative way by words or other conduct, that consent is being given to the person receiving it.

RDVSA's submission refers to the many legal academics that raise the point that despite legal reform, the community values and rape myths held by fact-finders (juries and the judiciary) in a sexual assault trial will influence their finding about whether there was free and voluntary agreement. We submit that those values and rape myths may include racist views about Aboriginal women and promiscuity. This was identified in the groundbreaking 1996 report of the then NSW Department for Women: *"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.

Sexual violence in a domestic violence context

Like RDVSA, we submit that the current definition of consent does not adequately capture sexual violence that occurs within relationships where there is domestic violence. Sexual violence is a common feature of the violence that our clients disclose when discussing domestic violence, although it is the form of violence the most difficult to talk about and last to be disclosed. In some matters actual violence, or threats of violence were made immediately before the sexual violence to ensure submission. But mostly our clients describe a general fear to say no to sexual activity in a relationship where regular control, threats, physical abuse and intimidation are utilized to instill and maintain ongoing fear. For Aboriginal women threats of removing children, or reporting them to Family and Community Services (FACS) if she refuses a partner's demand, is an especially powerful one- given the complex family law system and the epidemic of Aboriginal children in the care system.

We note that this complex issue of sexual violence in the context of domestic violence was discussed in the 2010 report of the Australian Law Reform Commission and NSW Law Reform Commission *"Family Violence – A National Perspective"*.

We recommend that legislation be amended to recognise that consent is vitiated 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

We agree with the RDVSA, and such academics as Professor Annie Cossins, that the criminal justice system also needs reform.

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.

Specialisation

It is our view 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. But 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 women experience when disclosing sexual violence must also be understood. We submit that our service is well placed to provide such education.

Cultural change and prevention

It is also 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. However, any strategy must be culturally appropriate for the Aboriginal community.

To this end we submit that NSW government should establish a crime prevention unit staffed by Aboriginal workers of different expertise to focus exclusively on early intervention and prevention of sexual assault (and domestic violence) in Aboriginal communities. These specialists would come from a range of disciplines/skill backgrounds including counselling, early childhood education, middle childhood education, adult education, refuge services, child protection, law enforcement, legal, health, employment and housing. This unit would need to look at state-wide, regional and local strategies.

This unit would serve as:

- a) a policy and advisory body to the NSW government;
- b) as well as being a resource unit for Aboriginal communities and services to access when developing community managed strategies.

We submit that a dedicated and separate budget for early intervention and prevention of sexual and domestic violence in Aboriginal communities be allocated to the specialist unit proposed above. The budget will include investment in long-term strategies of a minimum period of 5 years.

Support services generally

We also submit that a sexual assault victim's journey is a long one, whether they engage with the criminal justice system or not. A number of support services are required to support that person to recover. This will include: immediate crisis support; ongoing therapeutic support; medical support; housing support; support for family; court support and legal support. Any number of civil and family law issues may be triggered by a sexual assault, which can include: victims support; civil remedies for compensation; Apprehended Violence Order proceedings; possible Family Court or Children's Court proceedings when there are children of a sexually violent relationship.

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

Support services need to be well resourced by the State to achieve recovery and change. This means: sufficient workers to provide the support; a workforce that is highly skilled; sufficient physically 'on the ground' services to provide support to all that need it, in all communities across the state. For Aboriginal communities support services must, at the very least, be culturally appropriate, but ideally provided by Aboriginal controlled services. Services must also be locality appropriate. That is, what may work for an Aboriginal community in metropolitan Sydney may be quite different for an Aboriginal community in a rural area. That is not to suggest that Aboriginal communities in rural areas are the same, as that is far from the case. The same applies to Aboriginal communities in metropolitan areas.

Therefore, we ask the Government to provide significant *additional* funding for all relevant services, including relevant legal services such as our Centre.

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@wurringabaiya.org.au

Yours faithfully,

Wurringa Baiya Aboriginal Women's Legal Centre



**Per: Rachael Martin
Principal Solicitor**