



1 March 2019

NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

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

Dear Commissioners

Re: Submission on consent in relation to sexual offences

We thank the Law Reform Commission for the opportunity to provide submissions regarding consent in relation to sexual offences.

1. Introduction

The Western NSW Community Legal Centre ('WNSWCLC') was established in 1996 under the then Government's Justice Statement. WNSWCLC provides legal advice, casework and representation on a variety of civil and family law issues. WNSWCLC also engages in community legal education, law reform and offers media comment on issues of importance. We are strong advocates of social justice for people experiencing disadvantage; many of whom have been denied a voice.

Western Women's Legal Support ('WWLS') is WNSWCLC's specialist domestic/family violence unit. WWLS was established in 2015 after the federal government identified WNSWCLC's service areas as having some of the highest rates of domestic/family violence in NSW. WWLS is one of two specialist domestic/family violence services in the state, specifically funded to provide a unique wrap around service to women experiencing domestic/family violence. WWLS provides legal and non-legal support alongside specialist Aboriginal and Torres Strait Islander workers.

WNSWCLC and WWLS provide free legal assistance to those experiencing social, economic or geographic disadvantage. We outreach to the majority of the Orana/Central West area and service over 13 regional, rural or remote ('RRR') towns covering an area of approximately 200,000 square kilometres.

Our area spans four main traditional land custodian groups; the Wiradjuri, Kamilaroi, Wongaibon and Wailwan people. We continually learn from our communities – these submissions were created without the benefit of wider community consultation due to time constraints and we recognise this is a significant limitation of our submission.

While we do not directly prosecute or defend sexual assault matters, we regularly provide support and legal assistance to victim-survivors who are engaged with the criminal justice system. Our RRR location and client base provides us with unique insight into the systematic barriers victim-survivors, and in particular women experiencing disadvantage, face in accessing the justice system in RRR locations.



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We acknowledge that the Inquiry's terms of reference are limited to a legislative response to 61HA/61HE, however we firmly endorse Community Legal Centres NSW's (CLCNSW) assertion that legislative reform is insufficient to address some of the concerns raised in the consultation paper.

In identifying high attrition rates, low reporting rates, the continuation of rape myths and the treatment of complainants during trials, as some of the indicators the legislation is not meeting its objectives, we feel it is impossible to address s61HA/61HE in isolation and without reference to underlying structural and systematic issues that further isolate and disempower victim-survivors of sexual assault. There are a number of structural and systematic issues specific to RRR victim-survivors which affect the ability to secure convictions under the legislation as it stands, which we wish to address in our submission.

2. Recommendations for Legislative Reform

We endorse CLCNSW's recommendation numbers [1] – [8] and submissions, and add:

2.1. Reject creation of 'negligent sexual assault' offence

We endorse CLCNSW's recommendation number [6].

In addition, we submit that the creation of a lessor negligent sexual assault offence as proposed by the Bar Association, which has the effect of enlivening the jurisdiction of the Local Court, would have a disproportionate impact on victim-survivors in RRR communities.

2.1.1. Lack of local court infrastructure

Many of the Local Courts in RRR areas are small, they may not have security or seats for support services in the gallery.¹ The registry may only be open at certain times of the month² and the Court generally runs on a circuit,³ meaning the town knows when Court is sitting, and by extension when a matter is likely to be heard even if the victim-survivors name is suppressed. Some Courts do not have safety rooms (and may only have portal witness rooms),⁴ or if they do, they are close to rooms used to conference defendants.⁵ Courts may not have AVL facilities.⁶ In many small towns there is only one entrance to the Court.⁷

In RRR areas, the perpetrator or their associates are likely to live in the area, or may be from the same community. The victim-survivor may already fear community judgement or retribution by reporting. If a victim-survivor is then required to access the justice system in a manner which offers little privacy or protection, it would further dissuade victim-survivors from seeking legal redress.

2.1.2. Greater police involvement in the prosecution process

If an offence of negligent sexual assault is created enlivening the Local Court jurisdiction, the DPP should prosecute rather than police prosecutors (who generally prosecute NSW offences heard in the Local Court).

¹ E.g. Lightning Ridge Local Court.

² E.g. Coonamble, Coonabarabran, Cobar, Warren and Lightning Ridge Local Courts.

³ E.g. Ibid and Mudgee, Brewarrina, Bourke, Walgett and Nyngan Local Courts.

⁴ E.g. Lightning Ridge, Coonamble, Cobar and Brewarrina Local Courts.

⁵ E.g. Wellington Local Court.

⁶ E.g. Brewarrina and Lightning Ridge Local Courts.

⁷ E.g. Brewarrina, Lightning Ridge, Wellington.



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We oppose the police prosecuting sexual assault matters for the following reasons:

- (a) Police prosecutors lack the time, resources and expertise required to prosecute sexual assault in a manner which adequately reflects the seriousness of the offence;
- (b) Police often fail to understand domestic/family violence and by extension sexual assault that occurs within relationships (discussed further at [3.1.1]); and
- (c) Police lack the infrastructure for victim-survivor support (i.e. victim liaison officers).

2.2. Inclusion of domestic/family violence in section 61HA/61HE

Preliminary submissions have recognised the difficulty of proving non-consent in circumstances where the victim-survivor knew the offender⁸ and the effect this has on continuing the myth that rape involves a violent attack by a stranger. In RRR communities, a previous relationship of some description between the victim-survivor and offender is likely solely due to the size of the town.

The myth that “real rape”⁹ is perpetrated by someone unknown to the victim-survivor, can also prevent women from identifying unwanted sexual contact during a relationship as sexual assault. In our experience, there is still a belief that sexual assault cannot occur during a relationship and consequently victim-survivors will not report offending.

In order to overcome entrenched rape myths, greater and specific protections in the legislation are needed to demonstrate to the community that unwanted sexual contact within a relationship is an offence and a form of domestic/family violence. The legislation should recognise and reflect an understanding of domestic/family violence as a dynamic of coercion and control, even when immediate threats of violence are not present at the time of a sexual assault offence. We therefore endorse CLCNSW’s and Rape and Domestic Violence Service Australia’s submissions and recommendations concerning amendments to s61HE(8)(b)¹⁰ in tandem with a comprehensive cross-sector community education campaign.¹¹

Recommendations:

1. The proposed offence of ‘negligent sexual assault’ should be rejected.
2. If the proposed offence of negligent sexual assault becomes law, prosecutions for negligent sexual assault should be conducted by the DPP.
3. Section 61HE should be amended to make it clear that the existence of an intimate relationship does not in and of itself evidence consent.
4. Section 61HE should be amended to recognise the dynamics of domestic/family violence and the ways in which this can negate consent, even when there is no immediate threat or violence at the time of offence.

⁸ In their preliminary submissions, North Sydney Sexual Assault submitted “evidence of a prior relationship, or even a recent acquaintance is, ‘explored in Court and used to demonstrate implicit consent to a sexual act’ by the complainant”.

⁹ As discussed in the consultation paper at [2.92] – [2.103].

¹⁰ Recommendation 4 in CLCNSW’s submission.

¹¹ Recommendation 9 in CLCNSW’s submission.



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3. Structural and Systematic Issues

We endorse CLCNSW's recommendations [9] – [12] and submissions, and add:

3.1. Low reporting rates

3.1.1. Police

Women who experience domestic/family violence are likely to come in contact with the legal system and police at multiple points, including prior to, during and after separation.¹² There is an interplay between domestic/family violence and sexual assault. If victim-survivors of domestic/family violence have negative experiences with police, they are less likely to report sexual abuse.

It has been our experience that victim-survivors may not trust police, and may be hesitant to report sexual assault, because;

- (a) There is a history of discrimination against an individual or collective by police and other law enforcement institutions;
- (b) Police have previously misidentified a primary victim as the perpetrator, and have charged the primary victim or applied for an Apprehended Domestic Violence Order ('ADVO') for the protection of the primary perpetrator, even where there is an extensive history of domestic/family violence against the primary victim;
- (c) Police have refused to take statements or act in matters where significant violence is alleged; and
- (d) The perpetrator is part of a small RRR community and may have friends or relatives in the police force, or be part of the police force themselves.

In RRR communities victim-survivors may not want others to see them attend the police station, or for the community to see police attend their home. Police stations may be small and offer minimal privacy. Victim-survivors may not feel comfortable in a sterile police environment or speaking with the only male police officer on duty.

The barrier for reporting is even more pronounced for Aboriginal and Torres Strait Islander women due to a history of colonisation, institutionalised oppression, discrimination and resultant distrust. Speaking with male and/or non-Aboriginal Torres Strait Islander police (which is inevitable in RRR areas) about women's business, means systems of reporting are not culturally safe or appropriate.

As Aboriginal and Torres Strait Islander women are more likely to experience domestic/family violence, intergenerational trauma, and live in RRR areas, where police are not adequately trained in a trauma informed manner (and consequently respond inappropriately to domestic/family violence and sexual assault incidents), the likelihood of a negative police experience is even greater.

3.1.2. Community backlash

In RRR areas where perpetrators and victim-survivors are part of the same community, victim-survivors may experience backlash for reporting violence.

¹² However, recognising that a number of victim-survivors never report abuse.



Involving the community, through community based responses, education programs, or community involvement in the legal process, may be a way to reduce the backlash experienced by victim-survivors by promoting community ownership and understanding of the legal process.

Extensive consultation should occur with RRR and Aboriginal Torres Strait Islander communities in order to understand each community's unique needs, and barriers for reporting and engaging with the criminal justice system. Responses should be community led.

3.2. Engaging with the criminal justice system

3.2.1. Prevalence/continuation of rape myths/victim blaming

In our experience, women who have engaged with the criminal justice system have been made to feel as though they were, or would be, disbelieved due to intoxication at the time of the sexual assault, mental health issues or an inability to remember or misremembering of specific details. We submit this is inherently linked to entrenched rape and trauma myths which shift the focus from the offending to the victim-survivor's behaviour both at the time the offence, and in Court. This is especially pronounced in RRR areas where victim-survivors are often unable to access support services with any level of priority (e.g. rehabs, counselling, financial assistance)¹³ to address underlying vulnerabilities that may be used against them at trial.

As recommended by CLCNSW, a comprehensive, trauma informed, education campaign is necessary to address the above.

3.2.3. Re-engaging with the criminal justice system

It has been acknowledged in a number of submissions that the criminal justice system often re-victimises and re-traumatises, leaving victim-survivors feeling helpless and powerless. Feeling disbelieved or discredited prevents many victim-survivors from re-engaging with the criminal justice system. Women experiencing domestic/family violence will likely be the victim-survivor of a number of offences which are reportable to police or actionable through the Courts. When victim-survivors are disempowered by the legal system, they will be hesitant to utilise it again in the future.

We submit it is important that victim-survivors know that a finding of not-guilty or acquittal does not invalidate their experience or belittle their courage in accessing the criminal justice system. We submit it would be of value for the symbol of power and authority in the Court process, namely the judicial officer or their associate, to validate the victim-survivors experience/acknowledge their contribution to the process and ensure the victim-survivor does not feel as though the criminal justice system perceives them as a liar or devalued. The contents and timing of a direction to this effect is beyond the scope of our expertise.

3.3. Failure to provide adequate support to victim-survivors

As mentioned above, there is a lack of support for victim-survivors at the time of presentation at hospital, reporting and leading up to the criminal trial.

Women in RRR areas may have to attend hospitals where they are examined by male doctors following a sexual assault. It has been our experience that victim-survivors are often not connected with counselling at time of presentation despite the NSW health guidelines that require such a referral

¹³E.g. Dubbo and its service areas do not have a residential rehab facility.



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be made. Aboriginal and Torres Strait Islander victim-survivors are not provided with culturally appropriate and safe supports.

Women in RRR areas may not be linked in with victim focused legal services until their matter has concluded. The DPP does not act as the victim-survivors lawyer. Staff turnover in RRR areas is high and combined with Court delays, DPP solicitors and victim liaison officers, or Aboriginal support workers, may change regularly. If the DPP solicitor, victim liaison officer or Aboriginal support worker is based locally, they may be part of the small RRR community.

Victim-survivors in RRR areas have to travel to District Courts thus removing victim-survivors from the comfort of their home, family and community. This can also cause financial stressors, particularly if a victim-survivor has support persons they require at Court. If victim-survivors are not connected in with services to address the trauma at first instance, and are then isolated by physical distance from support networks at the time of trial, the stress of having to provide evidence in Court (which is already an isolating and disempowering experience for many victim survivors) is even greater. Where a victim-survivor is not supported, sharp defence practices can exploit a victim-survivors vulnerability and affect attrition rates, acquittals or findings of not guilty.

Victim Services claims can take up to two years to be decided and for money to be re-paid to a victim-survivor. Victim Services may not be able to provide face to face counselling for victim-survivors in RRR communities. As recognised in the consultation paper, findings of not guilty or acquittals are comparatively common in sexual abuse cases. Where communities are small and both the accused and victim-survivor reside there, the victim-survivors safety becomes a serious concern upon release of the accused. For victim-survivors experiencing financial disadvantage, installing security cameras or other safety measures following an acquittal or finding of not guilty, may not be feasible. Victim-survivors should receive victim-focused legal advice at the time of reporting to ensure that financial assistance is available at the time of acquittal or not guilty finding. Referrals to specialist legal and support services, at the time of reporting, would allow victim-survivors an opportunity to have the process explained to them and appropriate referrals made at an early stage so they can be better supported if the matter runs to trial.

Recommendations:

7. Extensive training should be provided to police about domestic/family violence and sexual assault.
8. Alternative and culturally appropriate/safe avenues of reporting should be explored and implemented.
9. Community based responses or alternatives should be explored as an addition to the criminal justice system. Consultations should occur with Aboriginal and Torres Strait Islander communities to identify issues and appropriate responses unique to each community. Community responses should be led by Aboriginal and Torres Strait Islander people.
10. The Criminal trial should include a direction informing the victim-survivor that, in the event of an acquittal or finding of not guilty, their experience was still valid, and they will not be treated as a liar or devalued should they need to access the legal system again.
11. Victim-survivors should be referred to victim focused legal and non-legal supports at the time of reporting or presenting at a hospital.



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4. Conclusion

Should you require any further information please contact Amy Schneider at amy.schneider@wnswclc.org.au

We thank you for considering our submissions.

Yours faithfully

Western NSW Community Legal Centre & Western Women's Legal Support

Per:



Amy Schneider
Solicitor



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