



# WIRINGA BAIYA

## ABORIGINAL WOMEN'S LEGAL CENTRE INC.

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

18 November 2019

By email: [nsw-lrc@justice.nsw.gov.au](mailto:nsw-lrc@justice.nsw.gov.au)

New South Wales  
Law Reform Commission

Dear Commissioners,

### **CONSENT IN RELATION TO SEXUAL OFFENCES: DRAFT PROPOSALS**

We refer to the above and to our previous submission dated 29 June 2018, and 15 February 2019.

#### **OUR CENTRE**

Wiringa Baiya Aboriginal Women's Legal Centre (Wiringa 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 five solicitors, most of whom are part-time.

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. We also deliver community legal education sessions across the state to Aboriginal communities about sexual assault and the law.

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.

#### **OUR SUBMISSION**

We do not seek to comment on all proposed amendments.

We support the submissions of Rape and Domestic Violence Services Australia, Women's Legal Services NSW, and Community Legal Centres NSW, and seek to make the following additional comments.

✉ 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.wiringabaiya.org.au](http://www.wiringabaiya.org.au) Email: [Wiringa\\_Baiya@clc.net.au](mailto:Wiringa_Baiya@clc.net.au)

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

ABN: 60 382 206 441

### New Interpretive Principles

We support and commend the draft interpretive principles. We agree that they will provide a useful foundation for community education initiatives. We also hope that these principles will be read to the jury in any opening statement from the prosecutor to set the framework for the trial. As we previously submitted, and has been well documented by numerous studies and academic analysis, jury members bring with them their own values, attitudes and prejudices about female sexuality which include rape myths and victim blaming.

### Clarifying the meaning of consent

We note that the Law Reform Commission has not recommended that the definition of consent be amended to incorporate a requirement that consent be communicated by words or conduct, as we, and many other agencies recommended previously in February 2019. However, we do note that the draft principle set out in section 61HF(c) states that “sexual activity should involve ongoing and mutual communication” and draft section 61HJ(1)(a) which states that a person does not consent “if the person does not do or say anything to communicate consent”.

We support proposal 5.1, 5.2, 5.3, 5.4, 5.5 and 5.6 and refer to RDVA submissions on these proposals.

### When a person does not consent

We support a single list of circumstances in which there is no consent.

We submit that proposed section 61HJ(1)(a) is a positive amendment towards a communicative model of consent. However, we suggest that the double negative of “ a person does not consent to a sexual activity if the person does not...” in draft proposals s61HJ (1)(a) to (c) is confusing and recommend that consideration should be given to re-wording section 61HJ to avoid this.

We support proposed section 61HJ(1) which negates consent where there is a context of domestic violence. We are pleased to see that the proposal recognizes that the force or threat need not be immediate, and that in the context of domestic violence fear may be a constant in the relationship. However, we recommend that subsection (i) should be amended to state “because of force or harm **of any type** to the person.....” to press that domestic violence has many forms and can include non- physical harm. As submitted previously domestic violence for Aboriginal women can include threats to remove children and/or malicious reports to child protection agencies. The loss of children is a significant reason why many Aboriginal women stay in a violent relationship.

We also recommend that the proposed draft section 61HJ include an additional sub-section that recognizes unequal power relations and states there is no consent in other circumstances where there is inequality for other reasons, such as economic, social, cultural and/or religious reasons. Such an additional sub-section was first recommended by

Professor Annie Cossins.<sup>1</sup> As Professor Cossins explains- meaningful and free consent is associated with “notions of free will, contractualism, free negotiation, formal equality, assertiveness, competitiveness and so on.”<sup>2</sup> However, given the inherent patriarchy of our culture men’s and women’s sexual autonomy cannot be viewed as the same. Fact finders (juries and judges) need to consider the complainant’s actual circumstances when considering whether there are reasonable grounds for consent. When commenting on this sub-section (61HA as it were then) Professor Cossins points out: “while [the subsections] state that the grounds on which it may be established that a person does not consent to sexual intercourse include ‘intimidatory or coercive conduct, or other threat’ and ‘the abuse of a position of authority or trust’ respectively these subsections do not take into account the range of unequal relationships in which a person may submit to sexual intercourse rather than freely and voluntarily agreeing.”<sup>3</sup>

As Professor Annie Cossins argues:

“If the law allows the subjective state of mind to be taken into account by fact-finders, it should also ask whether the defendant took into account the complainant’s subjective state of mind and the options available to her (rather than his assumptions about her state of mind) when fact finders are deciding consent and reasonable grounds for belief in consent.”<sup>4</sup>

### ***Recommendation 1***

That consideration should be given to re-wording proposed draft section 61HJ to avoid the double negative of “a person does not consent to a sexual activity if the person does not...” in draft proposals s61HJ (1)(a) to (c).

### ***Recommendation 2***

That proposed draft subsection section61HJ(1)(e) (i) should be amended to state “because of force or harm **of any type** to the person.....” to press that domestic violence has many forms and can include non- physical harm.

### ***Recommendation 3***

That proposed draft section 61HJ includes an additional sub-section that there is no consent in other circumstances where there is inequality for other reasons, such as economic, social, cultural and/or religious reasons.

### **Knowledge of consent**

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<sup>1</sup> Cossins, Annie “Why Her Behaviour is Still on Trial: The absence of Context in the Modernisation of the Substantive Law on Consent” [UNSW] UNSWLawJi 17 42(2) UNSW Law Journal 462 <http://classic.austlii.edu.au/au/journals/UNSWLawJl/2019/17.html>

<sup>2</sup> Ibid, page 5

<sup>3</sup> Ibid, page 22

<sup>4</sup> Ibid, page 20

We have no objection to the more simplified language of the proposed section 61HK and submit it is an improvement on the current language in section 61HE(3).

We hope that the proposed jury directions will go some way to address rape myths and encourage juries to sift them out when deciding if a defendant's belief that the complainant was consenting was reasonable in the circumstances. However, as discussed below, we submit that there must be a mechanism for ongoing review of any amendments to evaluate their effectiveness.

### Jury Directions on consent

In principle, we support the proposed new jury directions on specific misconceptions and agree that the jury directions be legislated. We support the flexibility of judges being able to give directions at any suitable time during the trial, both at the request of prosecution or defence, or without a request (when appropriate).

However, we have some comments about the wording of some of the proposed jury directions, as below:

- We do not understand why it is necessary to use the words "of itself" in draft direction 8(b): "the absence of injury or violence, or threat of violence or injury, does not **of itself**, mean that a person is not telling the truth about an alleged sexual offence." We submit these words be removed.
- We do not understand why draft direction 9(b) uses the words "of itself a reliable indicator" in the statement: "the presence or absence of emotion or distress is not, **of itself a reliable** indicator of whether or not a person is telling the truth". Once again we would recommend that those words be removed.
- We do not understand why draft jury direction 10 uses the words "of itself, a reliable" in the statement: "None of the following is, **of itself, a reliable** indicator that a person has consented to a sexual activity – (a) the person's clothing or appearance (b) the consumption by the person of alcohol or any other drug, (c) the person's presence in a particular location." The use of the words "of itself, a reliable indicator" is not making a firm statement about the irrelevance of these rape myths. We suggest the direction should simply state: "None of the following is an indicator that a person has consented to sexual activity..."
- Draft jury direction 11 should state "fear of harm **of any type** in circumstances of domestic and family violence" to explain to press to juries that domestic violence has many forms, and be consistent with our recommendation above.
- We recommend that a comprehensive definition and domestic and family violence be included to assist jurors understand the many forms of domestic and family violence.

### **Recommendation 4**

- Remove the words "of itself" in proposed draft jury direction 8(b): "the absence of injury or violence, or threat of violence or injury, does not **of itself**, mean that a person is not telling the truth about an alleged sexual offence."

- Remove the words “of itself a reliable indicator” in proposed draft jury direction 9(b).
- Remove the words “of itself, a reliable” from proposed draft jury direction 10.

### ***Recommendation 5***

Proposed draft jury direction 11 should be amended to:

- “fear of harm **of any type** in circumstances of domestic and family violence”.
- include a comprehensive definition of domestic and family violence to assist jurors understand the many forms of domestic and family violence.

### **Criminal justice system needs reform**

As stated previously, we recommend a comprehensive review of the criminal justice response to complaints of sexual assault. 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*.<sup>5</sup> This would assist in understanding more comprehensively what is occurring in sexual assault trials in all its aspects, not just the law that relates to consent.

We also recommend the establishment of an ongoing Sexual Assault Taskforce that comprises both relevant government agencies and peak non-government agencies working with people who have experienced sexual assault. This Taskforce would be responsible for the ongoing monitoring of the application of any legislative reforms and their effectiveness.

As we, and many other agencies have already submitted, 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. 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.

We recommend 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

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<sup>5</sup> *Heroines of Fortitude: The experiences of women in court as victims of sexual assault*, Department for Women (NSW), 1996

submit that services such as our Centre are well placed to provide this support, provided we are given additional resources to do so.

### ***Recommendation 6***

The Government should:

- introduce a comprehensive review of the criminal justice response to complaints of sexual assault;
- establish specialist sexual assault courts;
- establish an ongoing Sexual Assault Taskforce that comprises both relevant government agencies and peak non-government agencies working with people who have experienced sexual assault. This Taskforce would be responsible for the ongoing monitoring of the application of any reforms and their effectiveness.

### **Legislative Review**

#### ***Recommendation 7***

We recommend that there is a mechanism for statutory review to determine whether the policy objectives have been achieved by the amendments, such as a similar provision to that of section 119 of the *Victims Rights and Support Act 2013*. The ongoing monitoring of the Sexual Assault Taskforce, as suggested above, would clearly inform the legislative review.

### **Cultural change and prevention**

While efforts to improve legislation are to be applauded, changes to community views about sexual assault are essential. The Government must invest in a comprehensive and ongoing community education program about sexual assault law and challenges rape myths about female sexuality and patriarchal strictures of male sexuality.

The Law Reform Commission has previously referred to the Sexual Assault Strategy developed by the State Government. As stated in previous our submission, 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.

We reiterate that it is 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. It must cater to all levels of education, and to the spectrum of disabilities that impact a person's ability to communicate.

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, disabilities, 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.<sup>6</sup> 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.

#### ***Recommendation 8***

The Government must invest in a comprehensive and ongoing community education program about sexual assault law and challenges rape myths about female sexuality and patriarchal strictures of male sexuality. 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. It must cater to all levels of education, and to the spectrum of disabilities that impact a person's ability to communicate.

#### **Support services generally**

#### ***Recommendation 9***

We again recommend that the Government make significant investment in support services 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

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 [REDACTED] or [REDACTED]

Yours faithfully,  
Wirringa Baiya Aboriginal Women's Legal Centre

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<sup>6</sup> See the *International Convention to Eliminate all forms of Discrimination Against Women* which Australia has signed and ratified.