

28 June 2018

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## **Submission to the review of consent in relation to sexual assault**

Dear Panel Members,

Community Legal Centres NSW (CLCNSW) welcomes the opportunity to make this submission to the review of the laws surrounding consent in relation to sexual assault.

### **1. About Community Legal Centres NSW**

CLCNSW is the peak representative body for almost 40 community legal centres in NSW. Our team supports, represents and advocates for our members, and the legal assistance sector more broadly, with the aim of increasing access to justice for people in NSW.

Community legal centres (CLCs) are independent non-government organisations that provide free legal services to individuals and communities, at times when that help is needed most, and particularly to people facing economic hardship.

Community legal centres are community-embedded organisations highly attuned to the experiences, needs and perspectives of the communities they are based in. Our member centres' expertise comes from intimate connection with communities, and from exposure to the lived experience of victim-survivors.

The work of many community legal centres, and in particular Women's Legal Service NSW and Wirringa Baiya Aboriginal Women's Legal Centre, in the area of sexual assault includes advising women who have experienced sexual violence about reporting to police, evidence collection and legal processes; victims support entitlements; privacy and use of sensitive information; and complaints about service providers such as police. These centres also assist the services providing therapeutic support to women to respond to subpoenas and requests for records in court proceedings

CLCNSW represents the views of community legal centres to the government and broader community, advocates on key law reform and policy issues, and supports community legal centres to improve the efficiency and quality of services they deliver to the community.

## 2. General comments

Community Legal Centres NSW endorses the recommendations made by Rape and Domestic Violence Services Australia. We also endorse and reiterate the importance of the recommendations made in the final report from the Royal Commission into Institutional Responses to Child Sexual Abuse, and the relevance of much of that review to the issue of sexual assault more broadly.

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#### 4. Summary of recommendations

1. Section 61HA should be amended to include explicitly stated requirement for affirmative consent.
2. All primary and secondary schools should provide comprehensive, evidence-based education programs surrounding consent, communication, sexual assault, and the underlying cultural factors that lead to sexual violence.
3. Primary prevention programs of consent education in schools should be inclusive and culturally appropriate and formulated in consultation with communities including Aboriginal and Torres Strait Islander people, communities and organisations, people with disabilities, LGBTI communities, and culturally and linguistically diverse (CALD) communities.
4. Evidence-based secondary and tertiary prevention programs should be developed, implemented and expanded in consultation with experts.
5. Secondary and tertiary prevention programs should be inclusive and culturally appropriate and formulated in consultation with communities including Aboriginal and Torres Strait Islander people, communities and organisations, people with disabilities, LGBTI communities, and culturally and linguistically diverse (CALD) communities.
6. All police officers, prosecutors and judicial officers should be required to participate in comprehensive training relating to consent, sexual violence and trauma.
7. Training provided to police officers, prosecutors and judicial officers relating to consent, sexual violence and trauma should be culturally appropriate and designed in consultation with communities including Aboriginal and Torres Strait Islander people, communities and organisations, people with disabilities, LGBTI communities, and culturally and linguistically diverse (CALD) communities.
8. Sexual assault matters should be dealt with in courts with an appropriate physical set-up and specialist, trauma-informed staff and judicial officers.
9. Subsidies should be available to all victim-survivors in regional, rural and remote areas whenever such subsidies are necessary to facilitate these victim-survivors' access to appropriate courts.
10. Audio-visual link facilities should be provided such that victim-survivors in regional, rural and remote areas who are unable to travel to can access the most appropriate courts.
11. Court support dogs should be made available to victim-survivors throughout court proceedings in sexual violence cases.
12. Free, high-quality specialist counselling and other support services to victim-survivors of sexual violence should be granted secure, ongoing funding.

## 5. Amendments to Section 61HA

### 5.1 Application of Section 61HA definition of consent to other sexual offences

CLCNSW expresses gratitude and support for the changes regarding various sex crimes and consent implemented via the *Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018* on 20 June 2018. The previously stated position of CLCNSW member centre Women's Legal Service NSW has been that the Section 61HA definition of consent should be applied to other sexual offences in the *Crimes Act 1900* for which a lack of consent must be proved.<sup>[1]</sup> Prior to the passage of the *Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018*, sexual offence trials other than those for sexual assault, such as those for indecent assault, relied on the common law definition of consent.

In order to prosecute such cases, the following four things were required to be proved:

1. that [the accused] assaulted [the complainant],
2. that the assault was indecent,  
[if applicable or that immediately before or immediately after that assault [the accused] committed an act of indecency on/in the presence of [the complainant]]
3. that the assault was without the consent of [the complainant],
4. that [the accused] knew that [the complainant] was not consenting.

The jury in these cases was instructed that they could not find the accused guilty unless they believed that the Crown had proved all of the above beyond reasonable doubt.<sup>[2]</sup> Here, consent is not clearly outlined or defined, leaving room for ambiguity and assumptions.

In many cases, trials include sexual assault offences as well as other sexual offences for which a lack of consent must be proved. For instance, there may be a trial in which the defendant is being accused of a count of sexual assault and a count of indecent assault. In past this has created the confusing situation in which a judge was required to give the jury multiple directions at trial in relation to consent, for each of the offences.

It is the position of CLCNSW that the definition of consent as set out in Section 61HA is a stronger definition than that set out in common law, and that all crimes relating to sexual violence – most notably indecent assault – should make use of this definition rather than the common law definition.

We therefore commend the recent amendments contained in the *Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018* such that the newly created offences of 'sexual touching' and 'sex act' make use of the definition of consent as set out in the *Crimes Act 1900*, rather than the common law definition.

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<sup>1</sup> Women's Legal Service NSW. *Consent Provisions of the Crimes Act 1900*. 16 April 2014. <http://www.wlsnsw.org.au/wp-content/uploads/WLS-Submission-DAGJ-consent-a.pdf>

<sup>2</sup> Judicial Commission of New South Wales. 'Indecent assault: Crimes Act 1900 (NSW)' *Criminal Trial Courts Bench Book*. s 61L. Last updated 2018. Accessed online 5 June 2018. [https://www.judcom.nsw.gov.au/publications/benchbks/criminal/indecnt\\_assault.html#p5-670](https://www.judcom.nsw.gov.au/publications/benchbks/criminal/indecnt_assault.html#p5-670)

## 5.2 Active, affirmative consent

As it stands, Section 61HA does not stipulate a requirement for affirmative consent. Section 3c states that:

“A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:

- (a) The person knows that the other person does not consent to the sexual intercourse
- (b) The person is reckless as to whether the other person consents to the sexual intercourse, or
- (c) The person has no reasonable grounds for believing that the other person consents to the sexual intercourse”

While parts (b) and (c) imply some responsibility to ascertain whether or not there is consent, this wording still leaves space for a reading of the law that a lack of active resistance can constitute “reasonable grounds” to assume consent.

It is the position of CLCNSW that the law should explicitly state a requirement for affirmative consent.

In Tasmania, the law states:

“a person does not freely agree to an act if the person does not say or do anything to communicate consent...”<sup>[3]</sup>

In California a bill recently passed, which mandated that all sexual assault hearings on state-funded college campuses use a definition of consent that requires active, affirmative, ongoing consent.

"Lack of protest or resistance does not mean consent...nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time."

““Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity.”<sup>[4]</sup>

In most sexual assault cases, the matter being proven in court is not whether or not the sexual act took place – this is generally accepted in most cases – it is whether or not consent was present for the act. Non-consent is an exceedingly difficult thing to prove, particularly given the well-documented ‘tonic immobility’ – colloquially known as the ‘freeze response’ – that can arise during sexual violence.

“Overt signs of victim resistance during rape are critical issues in the handling of and recovery from rape/sexual assault. However, a substantial number of victims do not resist the attacker in any way. Tonic immobility (TI), a well-known

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<sup>3</sup> *Criminal Code Act 1924* (Tas).

<sup>4</sup> [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967)

involuntary, reflexive response to fear-inducing stimuli, may aid in explaining the paralysis and “freezing” of many rape victims. In the present study, rape survivors were classified as immobile, intermediate, or mobile, based on a self-report measure.”<sup>[5]</sup>

“Active resistance is considered to be the ‘normal’ reaction during rape. However, studies have indicated that similar to animals, humans exposed to extreme threat may react with a state of involuntary, temporary motor inhibition known as tonic immobility...Tonic immobility during rape is a common reaction associated with subsequent post-traumatic stress disorder and severe depression. Knowledge of this reaction in sexual assault victims is important in legal matters.”<sup>[6]</sup>

Given this common response to sexual assault, the law surrounding consent should leave no space for a reading that could assume that a lack of resistance during a sex act constitutes consent for that act.

Amanda Taub has outlined the dangerous gendered implications of a definition and understanding of consent that is anything other than affirmative:

“When our society treats consent as “everything other than sustained, active, uninterrupted resistance”, that misclassifies a whole range of behavior as sexually inviting. That, in turn, pressures women to avoid such behavior in order to protect themselves from assault.

As a result, certain opportunities are left unavailable to women, while still others are subject to expensive safety precautions, such as not traveling for professional networking unless you can afford your own hotel room. It amounts, essentially, to a tax that is levied exclusively on women.”<sup>[7]</sup>

The requirement for active, affirmative consent is one part of a necessary cultural shift around consent and sexual violence.

Nationally, 17.1% of women have experienced sexual assault since the age of 15; the Indigenous victimisation rate for sexual assault is significantly higher than the non-Indigenous rate.<sup>[8][9]</sup> However, less than 20% of those who experience sexual assault report

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<sup>5</sup> Grace Galliano, Linda M. Noble, Linda A. Travis and Carol Puechl. “Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Reponse and Its Correlates”. *Journal of Interpersonal Violence*. Vol. 8. No. 1. (1993): 109-114.

<sup>6</sup> Anna Möller, Hans Peter Söndergaard and Lotti Helström. “Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression.”

<sup>7</sup> Amanda Taub. ““Yes means yes” is about much more than rape”. *Vox*. Last updated 13 October 2014. Accessed online 20 June 2018. <https://www.vox.com/2014/10/10/6952227/rape-culture-is-a-tax-on-women-CA-yes-means-yes-dierks-katz>

<sup>8</sup> Women NSW. “NSW Sexual Assault Strategy: Progress Report.” *NSW Government, Health*. (2016): 3.

<sup>9</sup> *Ibid.* 3.

this assault to the police.<sup>[10]</sup> Of sexual offences that are reported to the police, less than 15% result in a charge being proven against the defendant.<sup>[11]</sup>

It is clear that this is an underreported and under-convicted crime.

An amendment to Section 61HA to require affirmative consent would slightly shift the burden of proof, to the significant benefit of victim-survivors of sexual offences.

### **Recommendations**

1. *We recommend that:*

Section 61HA should be amended to explicitly state that unless there is actively communicated consent, there cannot be an assumption of consent.

## **6. Practical application of Section 61HA**

### **6.1 Primary prevention: comprehensive education relating to consent and safe sexual relationships in schools**

While revisions to strengthen the law surrounding consent in relation to sexual assault are welcome, to fully tackle the problem of sexual violence in our society requires significant cultural change.

Some schools and universities are implementing education programs focusing on consent and sexual assault. Research has indicated the effectiveness of comprehensive, interactive consent education in reducing instances of, and improving responses to, sexual violence.<sup>[12][13]</sup>

Professor Moira Carmody's report *Conceptualising the prevention of sexual assault and the role of education* offers a comprehensive review of consent education initiatives, and recommendations as to the most and least effective models. She states:

“Prevention education is one crucial strategy in government and community responses to sexual violence. If we are to achieve the cultural shift in communities that promote non-violence and deplore the use of violence between intimate partners, we face many challenges. To respond to these

<sup>10</sup> Ibid. 5.

<sup>11</sup> J Fitzgerald. “The attrition of Sexual Offences from the New South Wales Criminal Justice System.” *Crime and Justice Bulletin*. Vol. 3.

<sup>12</sup> Australian Institute of Family Studies and Women NSW. “Current approaches to preventing and responding to sexual assault: A Rapid Evidence Assessment.” *Women NSW*. Strawberry Hills, NSW. (2017).

<sup>13</sup> Patricia M. Fabiano PhD, H. Wesley Perkins PhD, Alan Berkowitz PhD, Jeff Linkenbach EdD & Christopher Stark MS. “Engaging Men as Social Justice Allies in Ending Violence Against Women: Evidence for a Social Norms Approach”. *Journal of American College Health*. Vol. 52. No. 3. (2003): 105-112.

challenges we need to interrogate prevention education rigorously and to develop effective policy to guide its future implementation.”<sup>[14]</sup>

Primary and secondary schools provide education to children and young people relating to their bodies, sex, sexually transmitted infections and pregnancy, however this education at present does not necessarily include any discussion of healthy, safe relationships and good consent and communication. It is the position of CLCNSW that comprehensive education on ‘safe sex’ should necessarily involve discussion of consent. When education surrounding safe sex is provided at schools, there is often a discussion of the health risks including STIs, HIV/AIDS and unwanted pregnancy. The health impacts of psychological and physical trauma relating to sexual violence are significant, and should similarly be addressed in any safe sex education in schools.<sup>[15]</sup>

Education relating to consent, and emotional and physical safety during sexual interactions, has the capacity to:

- reduce rates of perpetrators committing sexual violence: this education makes them more aware of the reality of what constitutes sexual assault and the impact of this crime on survivors;
- reduce the capacity for perpetrators of sexual violence to be able to claim as a defence that they did not know or understand that a victim-survivor was not consenting;
- make more victim-survivors of sexual violence aware that what was done to them was sexual assault, and that they can seek support and/or justice;
- help to build a broader society that is less forgiving of sexual violence, that does not engage in victim-blaming, and is more attuned to reducing the activities that excuse sexual violence such as rape jokes; and
- help to build a broader society in which victims-survivors feel more comfortable reporting sexual crimes, in the knowledge that they will be taken seriously and the people they are reporting these crimes to will have a strong knowledge and understanding of consent and sexual violence.

It is vital that primary prevention education programs surrounding consent and sexual violence are evidence-based and culturally appropriate. A national survey on violence against women suggested that sexual violence against Aboriginal and Torres Strait Islander women was three times more common than against women who are not Aboriginal or Torres Strait Islander.<sup>[16]</sup> The prevalence of violence against Aboriginal and Torres Strait Islander women emanates from colonisation, and the dispossession and discrimination that

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<sup>14</sup> Moira Carmody. “Conceptualising the prevention of sexual assault and the role of education.” *Australian Centre for the Study of Sexual Assault*. No. 10. (2009).

<sup>15</sup> Cameron Boyd. “The impacts of sexual assault on women.” *Australian Institute of Family Studies*. Resource Sheet No. 2

<sup>16</sup> Natalie Taylor and Judy Putt. “Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia.” *Trends & Issues in crime and criminal justice*. Australian Institute of Criminology. Canberra, ACT. (2007): 2.



First Nations peoples have been subjected to for more than two centuries.<sup>[17]</sup> It is vital that primary prevention programs to combat sexual violence and increase understandings of consent are created in consultation with Aboriginal and Torres Strait Islander communities in recognition of the significantly higher rates of violence perpetrated against people in these communities.

People with disabilities, people from culturally and linguistically diverse backgrounds, people – particularly transgender people – and other marginalised groups also face disproportionately high rates of sexual violence. Education and training surrounding consent should also involve consultation with these communities most impacted by sexual violence.

### **Recommendations**

#### *2. We recommend that:*

All primary and secondary schools should provide comprehensive, evidence-based education programs surrounding consent, communication, sexual assault, and the underlying cultural factors that lead to sexual violence.

#### *3. We recommend that:*

Primary prevention programs of consent education in schools should be inclusive and culturally appropriate and formulated in consultation with communities including Aboriginal and Torres Strait Islander people, communities and organisations, people with disabilities, LGBTI communities, and culturally and linguistically diverse (CALD) communities.

## **6.2 Secondary and tertiary prevention of sexual violence**

CLCNSW supports the position of Rape and Domestic Violence Services Australia (RDVSA) that to prevent sexual violence requires a focus on changing the behaviours of those who perpetrate sexual violence. While primary prevention programs such as those outlined in section 6.1 of consent education in schools are an integral part of the cultural shift to address sexual violence, secondary and tertiary prevention should also play a role. Secondary prevention relates to early intervention programs for those who display the evidence of the potential that they may become perpetrators of sexual violence, and aims to stop specific behaviours from becoming entrenched. Tertiary prevention programs engage those who have perpetrated sexual violence and aim to prevent re-offending. As outlined by RDVSA:

“Research tells us that effective prevention work must be:

1. Comprehensive – embedded within the larger context of the community.
2. Underpinned by a theoretical framework –by a clear rationale for why the violence occurs, and how it can be changed.

<sup>17</sup> National Congress of Australia’s First Peoples. ‘Submission to United Nations Special Rapporteur on Violence Against Women’ (Submission, February 2017).

3. Effectively delivered – supported by environments that feature positive role modelling, social support, and pro-social activities.
4. Relevant and socially inclusive– contextually appropriate, inclusive, culturally sensitive, and involve consultation with representative participants.
5. Evaluated – measuring the impact of the program on behaviour.”<sup>[18]</sup>

Secondary and tertiary prevention programs should be developed, implemented and expanded based on the principles outlined above for effective prevention work.

<b>Recommendations</b>
<p><i>4. We recommend that:</i></p> <p>Evidence-based secondary and tertiary prevention programs should be developed, implemented and expanded in consultation with experts.</p> <p><i>5. We recommend that:</i></p> <p>Secondary and tertiary prevention programs should be inclusive and culturally appropriate and formulated in consultation with communities including Aboriginal and Torres Strait Islander people, communities and organisations, people with disabilities, LGBTI communities, and culturally and linguistically diverse (CALD) communities.</p>

### **6.3 Education relating to consent, sexual violence and trauma for police, prosecutors and judicial officers**

Alongside education in all schools surrounding consent and sexual assault, it is also vital that education is provided to all those who are lines of reporting for sexual assault – for instance, the police – and those who engage with sexual assault cases through the criminal justice system: prosecutors and judicial officers.

As outlined in section 5.2 above, reporting rates for sexual assault are very low, as are conviction rates. Aboriginal and Torres Strait Islander people are even less likely to report sexual violence to the police than people who are not Aboriginal or Torres Strait Islander.<sup>19</sup>

The Final Report from the Royal Commission into Institutional Responses to Child Sexual Abuse touches on the fact that many victim-survivors of sexual abuse may not report to the police due to the expectation of a negative or unhelpful response:

<sup>18</sup> Karen Willis. “Preventing sexual assault and domestic violence”. *Rape and Domestic Violence Services Australia*. Last updated 2018. Accessed online 25 June 2018. <http://www.rape-dvservices.org.au/Preventing-Violence/Preventing-Sexual-Domestic-Violence>

<sup>19</sup> Natalie Taylor and Judy Putt. “Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia.” *Trends & Issues in crime and criminal justice*. Australian Institute of Criminology. Canberra, ACT. (2007).

“An individual may have made a report in the past and received no response, or a slow or ineffective response. Alternatively, they may have received little or no support in making the report or felt overwhelmed or confused by the system.”<sup>[20]</sup>

A significant body of research has illustrated that police officers’ harmful beliefs and attitudes surrounding consent, rape myths and the credibility of victim-survivors harms victim-survivors and hampers just outcomes to these cases.<sup>[21][22][23][24]</sup>

Police forces should have comprehensive training on not just the laws surrounding consent and sexual violence, but also on the provision of a trauma-informed and culturally appropriate response to victim-survivors of these crimes. For instance, research has indicated the extent to which psychological trauma can significantly disrupt memory of victim-survivors of sexual assault, which can significantly impact police interviews upon reporting.<sup>[25][26]</sup> If police had a more nuanced knowledge and understanding of the influence of trauma, practices and approaches could shift accordingly and improve access to justice for victim-survivors of sexual violence.

Similarly, all judicial officers should be required to participate in comprehensive training relating to consent, sexual violence and trauma. In cases such as the one that sparked this review, the accused was initially found guilty by a jury and given a five year prison sentence. However, on appeal, a judge found the accused not guilty. This difference between findings was primarily based on differing understandings of consent between those making each finding. This case illustrates the immense importance of consent education for judicial officers.

Further, if the experience of following reporting of these crimes through the court process were more supportive and less retraumatising, more victim-survivors would be likely to pursue these cases through to conviction. With a trauma-informed court process, attrition rates for these crimes may reduce. Judges in sexual assault trials should be thoroughly familiar with not just consent law, but the reality of sexual violence, systemic sexism and the impacts of trauma on victim-survivors of sexual violence.

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<sup>20</sup> Royal Commission into Institutional Responses to Child Sexual Abuse. *Final Report: Volume 7 – Improving institutional responding and reporting*. (2017): 71.

<sup>21</sup> Jessica Shaw, Rebecca Campbell, Debi Cain & Hannah Feeney. “Beyond Surveys and Scales: How Rape Myths Manifest in Sexual Assault Police Records”. *Psychology of Violence*. Vol. 7. No. 4. (2017): 602-614.

<sup>22</sup> Eryn Nicole O’Neal. ““Victim is Not Credible”: The Influence of Rape Culture on Police Perceptions of Sexual Assault Complainants”. *Justice Quarterly*. (2017): 1-34.

<sup>23</sup> Melinda Tasca, Nancy Rodriguez & Cassia Spohn. “Police Decision Making in Sexual Assault Cases.” *Journal of Interpersonal Violence*. Vol. 28. No. 6. (2012): 1157-1177.

<sup>24</sup> Rachel M. Venema. “Police Officer Schema of Sexual Assault Reports.” *Journal of Interpersonal Violence*. Vol. 31. No. 5. (2014): 872-899.

<sup>25</sup> Amy Hardy. “Does trauma memory play a role in the experience of reporting sexual assault during police interviews? An exploratory study.” *Psychology Press*. Vol. 17. No. 8. (2009): 783-788.

<sup>26</sup> Sarah Halligan, Tanja Michael, David Clark & Anke Ehlers. “Posttraumatic Stress Disorder Following Assault: The Role of Cognitive Processing, Trauma Memory, and Appraisals.” *Journal of Consulting and Clinical Psychology*. Vol. 71. No. 3. (2003): 419-431.

### **Recommendations**

#### 6. We recommend that:

All police officers, prosecutors and judicial officers should be required to participate in comprehensive training relating to consent, sexual violence and trauma.

#### 7. We recommend that:

Training provided to police officers, prosecutors and judicial officers relating to consent, sexual violence and trauma should be culturally appropriate and designed in consultation with communities including Aboriginal and Torres Strait Islander people, communities and organisations, people with disabilities, LGBTI communities, and culturally and linguistically diverse (CALD) communities.

### **6.4 Specialist courts**

Community Legal Centres NSW recently made a submission in relation to the Family Law System, in which we recommended a greater number of specialist courts to deal with issues relating to family violence, Australia-wide. These courts should be physically set up such as to be maximally safe to those reporting family violence, and should include adequate safe rooms, separate entrances and exists for each party in a case, and make other considerations regarding physical space and safety. These courts should also have judicial staff and judicial officers specially trained in trauma-informed practice. The Australian Law Reform Commission and others have made similar recommendations, and have provided significant evidence of the value of such specialised courts.<sup>[27]</sup> In NSW, two family violence courts were piloted in Wagga Wagga and Campbelltown in 2005. An evaluation in 2008 indicated that these courts increased access to victim support, and these courts have been made permanent in those locations.<sup>[28]</sup>

A literature review on specialist prosecution units and courts, related to the Royal Commission into Institutional Responses to Child Sexual Abuse notes some benefits of specialist courts:

“specialist prosecution units and courts bring the generic benefits of specialisation, including efficiency gains from prosecutors and judges gaining expertise by concentrating on a particular subject matter. Specialists can usually work faster than generalists because they are more familiar with the tasks...Another generic advantage of specialisation is seen to be improved quality of decision-making. Experts are likely to make more knowledge-informed decisions than generalists, and are less likely to make significant errors of judgment. However, research does not support the claim that specialist judges are likely to be more free from what psychologists term

<sup>27</sup> Australian Law Reform Commission. “20: Specialisation”. *Family Violence – Improving Legal Frameworks*. Australian Law Reform Commission. April 2010.

<sup>28</sup> Australian Law Reform Commission. “32. Specialisation: Specialised family violence courts”. *Family Violence – A National Legal Response (ALRC Report 114)*. Australian Law Reform Commission. November 2010.

'cognitive illusions' than generalist judges. Other claimed advantages are greater uniformity in decision-making and better case management."<sup>29</sup>

In 2014, NSW Director of Public Prosecutions Lloyd Babb called for similarly specialised sexual assault courts.<sup>[30]</sup>

However, the Royal Commission also addressed the fact that specialist courts for child sex abuse cases may be impractical to implement. This impracticality would likely also apply to implementation of specialist courts for sexual assault cases more broadly.

"We remain of the view that specialist courts and prosecution units are likely to remain an impractical response to child sexual abuse prosecutions in Australia. However, some of the benefits of specialist responses can be obtained through appointing judges with additional expertise and training in child sexual abuse matters and adopting particular lists to case manage child sexual abuse matters."<sup>[31]</sup>

In August 2015, the NSW Government appointed two specialist judges to the District Court to hear child sexual assault cases in NSW. These judges were given extensive training for these roles, and will operate in Downing Centre District Court and the Newcastle District Court from 31 March 2016 until 31 March 2019.<sup>[32]</sup>

While it may be impractical to build new specialist courts to deal specifically with sexual assault matters, sexual assault cases should in every instance be carried out in an environment physically set up to ensure the safety of victim-survivors, and dealt with by judges with specialist training and expertise on sexual assault matters.

Victim-survivors should be entitled to request these protections regardless of their location. Many local courts in rural areas do not have the optimal set up to provide a physically safe environment, such as safe rooms and separate entrances and exists for the two parties in the case, and many also do not have specialist trauma-informed judicial staff. A move towards carrying out sexual assault cases with the provision of specialist location and staff could result in centralisation. As such, subsidies should be available upon request for victim-survivors in regional, rural and remote areas to travel to more appropriate courts should they wish. Audio-Visual Linkups should be available for sexual assault cases to ensure access to justice for victim-survivors physically unable to reach appropriate courts.

It is the position of CLCNSW that primacy should be given to creating a justice system in which every courtroom is physically safe for victim-survivors of sexual violence, and every judicial officer and prosecutor has a strong enough knowledge and sensitivity surrounding issues of consent, sexual assault and trauma that specialist courts and specialist provisions

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<sup>29</sup> Patrick Parkinson. "Specialist prosecution units and courts: a review of the literature". *Royal Commission into Institutional Responses to Child Sexual Abuse*, Sydney. (2016): iv.

<sup>30</sup> Rachel Browne. "Specialist courts needed for sexual assault cases, Lloyd Babb tells royal commission". *Sydney Morning Herald*. Last updated 15 July 2014. Accessed online 18 June 2018. <https://www.smh.com.au/national/nsw/specialist-courts-needed-for-sexual-assault-cases-lloyd-babb-tells-royal-commission-20140715-zt7kd.html>

<sup>31</sup> Royal Commission into Child Sexual Abuse. "Criminal Justice Report". *Commonwealth of Australia*. (2017): 241.

<sup>32</sup> *Ibid.* 221.

are not required. However, in the interim while more comprehensive improvements surrounding these issues are broadly implemented, specialist provisions for sexual assault cases in courts may make it easier for victim-survivors to engage with the justice system; this will increase access to justice.

### **Recommendations**

*8. We recommend that:*

Sexual assault matters should be dealt with in courts with an appropriate physical set-up and specialist, trauma-informed staff and judicial officers.

*9. We recommend that:*

Subsidies should be available to all victim-survivors in regional, rural and remote areas whenever such subsidies are necessary to facilitate these victim-survivors' access to appropriate courts.

*10. We recommend that:*

Audio-visual link facilities should be provided such that victim-survivors in regional, rural and remote areas who are unable to travel to can access the most appropriate courts.

### **6.5 Court support dogs**

Court support dogs have been used for many years in other countries such as the United States, and have very recently begun to be trialled in Australia. There is significant evidence suggesting the value of court support dogs in enabling witnesses – particularly those suffering from psychological trauma – to give comprehensive evidence that they otherwise may have been unable to give. The presence of a dog can help a witness to become more coherent and responsive, as it can help to ease stress. As a result, the presence of court support dogs can result in a more accurate and efficient testimony, and thus enhance the court process.<sup>[33]</sup>

February this year saw the end of an exceedingly successful nine-month trial of therapy dogs in Manly Local Court, and the announcement that this program will be expanded to a further nine courts in NSW.

NSW Attorney General Mark Speakman stated in February:

“these helpful hounds have assisted hundreds of victims of crime and witnesses who’ve enjoyed the benefits of the scientifically observed ‘pet effect’. It is exciting to see such a positive response to the program, not only from participants but also lawyers and court staff as well”<sup>[34]</sup>

<sup>33</sup> Casey Holder. “All dogs go to court: the impact of court facility dogs as comfort for child witnesses on a defendant’s right to a fair trial.” *Houston Law Review*. Vol. 50. No. 4. (2013): 1155-1187.

<sup>34</sup> Mark Speakman (Attorney General, NSW). *Every dog has its day (in court)*, media release. NSW Department of Justice. 12 February 2018.

He further stated in March:

“Therapy dogs have been a huge hit. Paws down, the Canine Court Companion pilot is one of the most popular programs ever trialled in a courthouse, which is why we are expanding the initiative... Hundreds of people took part in the trial and every one of them gave therapy dogs the tick of approval. Having a floppy ear to talk to and a friendly paw to hold helps victims and witnesses feel relaxed and more focused. The scientists call it ‘the pet effect’<sup>[35]</sup>

CLCNSW expresses support for the expansion of the initiative of therapy dogs in NSW courts, and sees the immense value in its further expansion, particularly in relation to sexual assault cases. As stated by Fair Agenda:

“Domestic violence and sexual assault are some of the most traumatic experiences imaginable -- and many survivors find the prospect of going to court extremely daunting. Every day, survivors – including children – are expected to re-live what can be the worst experiences of their lives. It's intimidating, re-traumatising, and isolating... In both Canada and the USA, courts now allow specially trained Labrador dogs to sit with, comfort, and soothe children and other vulnerable survivors as they give evidence. The program is having a wide range of benefits. Survivors report that through the relationship with their "courthouse dog", the judicial process is less traumatising and they are able to give clearer evidence. Survivors of domestic violence are also more likely to see their case through.”<sup>[36]</sup>

For most people, visiting the court is a stressful experience, but for victim-survivors giving evidence relating to sexual assault, this is particularly the case. The provision of court support dogs in all sexual violence cases when requested by victim-survivors would be a positive step for access to justice for victim-survivors of sexual assault.

### **Recommendations**

#### *11. We recommend that:*

Court support dogs should be made available to victim-survivors throughout court proceedings in sexual violence cases.

<https://www.justice.nsw.gov.au/Documents/Media%20Releases/2018/every-dog-has-its-day-in-court.pdf>

<sup>35</sup> Mark Speakman (Attorney General, NSW). A.G. Lets the dogs out to ten NSW courts, media release. NSW Department of Justice. 1 March 2018.

<https://www.justice.nsw.gov.au/Documents/Media%20Releases/2018/ag-lets-the-dogs-out-to-ten-nsw-courts.pdf>

<sup>36</sup> Fair Agenda. “Get comfort dogs into Australian courts.” *Fair Agenda*. (2016).

<https://www.fairagenda.org/comfortdogs>

## 6.6 Comprehensive, specialist, free counselling and other support services for victim-survivors of sexual violence

The provision of fully funded, comprehensive, specialist free counselling and other support services are an integral element of justice for victim-survivors of sexual violence.

Rape and Domestic Violence Services Australia (RDVSA) was in 2010 funded to establish 1800RESPECT, which is now Australia's specialist domestic violence and sexual assault counselling service. In early 2017 the future of this service became uncertain when the government announced plans to put the service out to tender, and to shift the rape crisis line to a call centre triage model; removing skilled and trained sexual violence counsellors from the front line. CLCNSW welcomed the Federal government's decision in the 2018-19 budget to allocate \$11.5 million to 1800RESPECT in response to significant community campaigns to maintain quality counselling services for victim-survivors of sexual violence. CLCNSW supports the further calls from RDVSA and the Australian Services Union (ASU) to increase resources to 1800RESPECT so as to ensure a stable future for this vital service.

Similarly, CLCNSW recommends additional funding for all community legal centres doing work in the area of sexual assault. The work of many community legal centres, and in particular Women's Legal Service NSW and Warringa Baiya Aboriginal Women's Legal Centre, in the area of sexual assault includes:

- advising women who have experienced sexual violence about reporting to police, evidence collection and legal processes;
- victims support entitlements;
- privacy and use of sensitive information; and
- complaints about service providers such as police.

These centres also assist the services providing therapeutic support to women to respond to subpoenas and requests for records in court proceedings.

It is integral to a fair justice system that all victim-survivors of sexual violence are able to access comprehensive, specialist, free counselling and other support services, such as those provided by RDVSA, Women's Legal Service NSW, Warringa Baiya Aboriginal Women's Legal Centre, and more.

### **Recommendations**

*12. We recommend that:*

Free, high-quality specialist counselling and other support services to victim-survivors of sexual violence should be granted secure, ongoing funding.



## 7. More information

Thank you for taking the time to consider our submission. If you have any questions or require further input, please contact us via [clcnsw@clcnsw.org.au](mailto:clcnsw@clcnsw.org.au) or (02) 9212 7333.

Regards,



Tim Leach,

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Community Legal Centres NSW

