elizabeth evatt community legal centre

22 February 2019

The Executive Director
NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001
By email: nsw-lrc@justice.nsw.gov.au

Submission to the NSW Law Reform Commission's inquiry into consent in relation to sexual offences

Dear Panel Members,

Thank you for the opportunity to make a submission to the NSW Law Reform Commission review of consent legislation in NSW.

About our service

Elizabeth Evatt Community Legal Centre (EECLC) is a non-government organisation that provides free legal advice and limited representation to disadvantaged members of the community living in the Blue Mountains, Greater Lithgow, Bathurst, Oberon and Orange regions of NSW. EECLC attends local court list days in Katoomba, Lithgow, Bathurst and Orange in matters involving applications for Apprehended Domestic Violence Orders and are a member of the Coalition Against Violence and Abuse in the Blue Mountains, Lithgow Cares, and Bathurst Family Violence Awareness Group which links us to other services and agencies providing frontline services to domestic violence and sexual assault survivors.

While our Centre is a generalist service, a recent review of our work found that over 70% of our direct client work involves woarking with victims of violence, many of whom are women.

In addition to histories of trauma, our clients are also vulnerable due to homelessness, lower literacy skills, lack of English, poverty, disability, mental ill health, social exclusion, substance abuse and the on-going experience of further acts of violence.

Due to our proximity to these issues and our casework for victims of violence, we are of the view that in addition to considerations of issues such as consent, we would welcome a review of other policing and prosecutorial practices and have some suggestions for reform

which we hope can be considered by this review considering the Terms of Reference invite expert evidence and research.

Observations and recommendations arising from the Terms of Reference

We would like to make the following observations on the Terms of Reference:

1. All relevant issues relating to the practical application of s 61HA, including the experiences of sexual assault survivors in the criminal justice system;

Research both domestically and internationally finds low reporting, recording, prosecution, and conviction rates for all forms of sexual abuse. EECLC acknowledges the many barriers that victims of violence face in reporting to Police and engaging with criminal justice processes, including:

- fear of retribution from the offender;
- fear of not being believed; or that the violence they have experienced is not 'serious' enough to warrant Police intervention;
- social stigma associated with being a victim of violence;
- previous poor experience with Police or the criminal justice system;
- fear that their children may be removed as a result of reporting the violence; and
- fear of re-traumatisation through engaging with the criminal justice system.

Case study 1:

Client A had been in a domestic relationship with the father of her young child for 3 years. During the relationship the Father perpetrated physical violence, verbal abuse and used controlling coercive behaviours, against the Mother, some of which she had reported to the police. At some point in the relationship, the couple had stopped having sexual intercourse as our client no longer wanted the relationship to continue and was trying to find a way to leave the home with her children. On two occasions, after the male had been consuming alcohol and drugs, he sexually assaulted her, once vaginally and once anally. After the anal penetration she decided to report the assaults to the Police.

After attending the Police station and attempting to report the assaults, the police advised her that they were not going to take any further action as she was still in a relationship with the offender and unless she was prepared to leave him, there wasn't much point in charging him with the offences. Our client instead used the Sexual Assault Reporting Option to report the sexual assaults.

The tragic aftermath of this story is that some years later, after she was able to leave the relationship, the Offender was convicted for sexually assaulting another woman. He is currently in custody for this assault and our client has now been contacted by detectives wishing to pursue charges against the offender for the earlier sexual assaults against our

client. This case study demonstrates many issues that are being discussed in this review – but perhaps most clearly demonstrates that despite years of reform and advocacy for clients of domestic violence and sexual assault, local Police still make fundamental mistakes in their responses to violence and these attitudes have dire consequences.

Despite decades of legal reform, legislative and policy reviews and reflection on accessing justice, research with victims of violence find that the Police and courts continue to fail victims.[1] These studies mirror the experiences of many of our clients and the daily trials of victims attempting to access justice through local and District court systems. Although some cases proceed to court, pleas are entered, and defendants are convicted at trial, only a minority (somewhere between 5 –30%)[2] of matters are ever reported to police. As the process and law stands at the moment in NSW and most jurisdictions - there are only two choices for sexual assault victims to report to Police or not. Existing law and procedure, coupled with social attitudes about gender and sexual violence, thwart just outcomes for victims which is why we make the following recommendations:

EECLC recommendation 1:
For the introduction of a restorative justice process for sexual assault

In Australia, as in many other jurisdictions, only a fraction of sexual assaults are ever reported to police (between 5-30%)[3], and sexual offences have the lowest conviction rate of any crime. This means that only a small proportion of victims-survivors ever have access to a 'justice process' through legal pathways focussed on traditional forms of punishment, namely incarceration.

To improve access to justice for people who have been sexually assaulted, alternative responses should be considered. One option is to introduce expanded restorative justice processes in NSW, similar to those legislated in other jurisdictions such as the Australian Capital Territory, New Zealand, Europe and North America. While Corrective Services NSW currently provides restorative justice, the process relies upon a successful conviction. This severely limits access to the process for sexual assault victims-survivors.

The United Nations (2002) defines restorative justice in the criminal setting to be *"any process in which the victim, the offender and/or any other individuals or community*

[1] Daly K and Curtis-Fawley, S "Justice for victims of sexual assault: court or conference?" published in Heiner K and Kruttschnitt C
(eds.) Gender and Crime: Patterns of Victimization and Offending (pp.230 - 65) New York: New York University Press, 2006.

[2] Kelly, Liz. "Routes to (In)justice: A research review on the reporting, investigation and prosecution of rape cases" London,
UK: Her Majesty Crown Prosecution Services Inspectorates (HMCPSI), 2001

[3] Kelly, Liz. "Routes to (In)justice: A research review on the reporting, investigation and prosecution of rape cases" London, UK: Her Majesty Crown Prosecution Services Inspectorates (HMCPSI), 2001.

members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party"[4].

In victim-focused restorative justice, emphasis is placed on the victim identifying all the components of harm (be they physical, social, emotional, material, symbolic or spiritual) before considering what restorative justice options could address all, some or none of these harms. Evidence indicates that the combination of these restorative justice processes, while not a complete solution to the recovery process, does provide victims with a counterpoint to the loss of power and control inherent in sexual assault.[5]

Despite best efforts, years of reform and ongoing advocacy to improve these systems, this loss of power is also common to many victims' experience of current police and court processes which is why exploration of restorative justice processes for survivors of sexual assault as an *alternative mechanism* for justice, merits attention.[6]

EECLC solicitors have heard from many women that they would like a process where they can express their experience and be heard. A process where the offender is held to account, not with the result being a prison sentence, but rather with an acknowledgement of the harm that the offender has caused the victim. This is particularly so in Aboriginal communities where the high rates of Indigenous incarceration are a barrier to reporting violence of any nature. Victims want to be able to make sense of what has happened, particularly in the context of sexual violence in intimate relationships. They want the offender to repair the harm to the extent possible and to be held meaningfully accountable. And perhaps most essentially, they don't want the person to hurt them or anyone else ever again

We would like to draw attention to the progress made in other Australian states and comparable international jurisdictions in reforming the criminal justice system and pursuing collective community responses to sexual assault.

Internationally there are, perhaps surprisingly, a high number of programs addressing sexual abuse including at least 15 programs that are formally affiliated with criminal justice systems and at least 29 others programs operating in the community.[7]

Within Australia, two states are currently involved in implementing restorative justice response to sexual assault – Victoria and the Australian Capital Territory. Of the 15

---

[4] United Nations 2002, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* Article 1 (3)

[5] Daly, K. (2015). *What is restorative justice? Fresh answers to a vexed question.* In Victims & Offenders, Vol. 11 (1), 1-21.

[6] Daly, K. (2015). *What is restorative justice? Fresh answers to a vexed question.* In Victims & Offenders, Vol. 11 (1), 1-21.

[7] Bolitho, J and Freeman, K. 2016, "The Use and Effectiveness of Restorative Justice in Criminal Justice Systems following Child Sexual Abuse or Comparable Harms" The Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney.

programs that have been evaluated a consistent finding is that, under specific conditions, participation improves victim wellbeing and is perceived by victim-survivors as satisfying, worthwhile and procedurally fair.[8]

Terms of reference, Point 3: Sexual assault research and expert opinion

The community legal sector works closely with victims of violence and fulfil a vital role in providing access to justice and legal remedies for survivors and victims of violence. Community Legal Centres (CLCs) fill a gap in service provision left by the NSW Legal Aid Commission and the NSW Aboriginal Legal Service as these services do not work with victim's rights issues - instead their core business focuses on criminal legal defence work. Given the role that CLCs hold in the legal service sector as experts in the provision of legal services to survivors of sexual assault and violence, it could be expected that we would have extensive knowledge and practice experience of trial processes, and practical examples of the impact of the *Crimes Act 1901* and the operation of s 61HA and s 61HE.

However, the reality for most survivors of sexual assault is that the Police have never charged the offender, nor have Police been able to complete a prosecution due to prosecutorial discretion, public policy considerations, general attrition and the low conviction rates. A small proportion of our clients have been able to access the traditional justice system, however the overwhelming reality for the vast majority of our clients and survivors more generally, is that the traditional justice mechanisms are out of reach.

CLCs are entitled to consider ourselves "experts" in the field of victim rights and we wish to make the following observations and recommendations, however we are hampered in providing comprehensive responses to this review based on practical experience in relation to s 61HA and s 61HE.

However, given this review invites submissions in response to the Terms of Reference it is our submission that the following reforms are necessary to address the systemic barriers in accessing just outcomes for survivors of sexual assault:

EECLC Recommendation 2:
Introduction of specialised courts for sexual assault and domestic violence

We have considered the campaign being put forward by the Women's Alliance entitled "Safe State" in anticipation of the NSW State election in March 2019 and support the reforms that the Women's Alliance are calling for especially in relation to enhanced services for Aboriginal and Torres Strait Islander women and the establishment of a specialised jurisdiction focussed on sexual assault and domestic violence.

Expert opinion elsewhere supports this recommendation, including most recently in evidence provided by Lloyd Babb SC, Director of Public Prosecutions in his evidence before the

Royal Commission into Institutional Responses to Child Sexual Abuse where he stated "that sexual assault matters should be dealt with by specialist prosecutors in dedicated courts."[8]

A report commissioned by the Royal Commission into Child Sexual Abuse into the use and effectiveness of specialised courts[9] in domestic and international jurisdictions presented the following benefits of specialisation including:

- Assisting the prosecution to present evidence most effectively
- Improving the quality of judicial decision making
- Reduction in case attrition
- Improve post-conviction dealing with offenders

That review identified the programs and courts such as the New York, Integrated Court Innovation Model, Family Violence Courts in Manitoba, Canada, South Africa and special jurisdictions in England and Wales as leaders in provision of best practice innovative legal responses to domestic violence and sexual assault.

In 2010 the Australian Law Reform Commission undertook a major review into family violence.[10] That review heard from services involved in the Domestic Violence Integrated Court Model in Wagga, which while now disbanded, did report to the ALRC Review that that process had *"continued success in terms of improved victim safety and access to victim support services."* It was noted by the ALRC that the structures and links of the DVICM had helped to foster relationships, understanding and confidence between individuals and organisations to the benefit of victims. A number of challenges were highlighted including: the need for more resources, training, high-level co-ordination and information sharing.

Case study 2

Client C is an Aboriginal woman living in a small rural community in NSW. She has a brain injury which affects her memory and has recently separated from her husband following an incident of physical violence. While seeking legal advice from the local community legal centre, she discloses additional sexual assaults perpetrated by her husband.

She states that she too embarrassed to describe what happened to the male police officers that attended her property as she felt like they were dismissive. She believes her husband has friendships with many of the local police and good reputation in the community and that she will not be taken seriously and she is reluctant to report as she wants to 'move on' with her life and doesn't want to get caught-up in prolonged legal proceedings. She does not report the sexual assault/s to police.

[8] https://www.smh.com.au/national/nsw/specialist-courts-needed-for-sexual-assault-cases-lloyd-babb-tells-royal-commission-20140715-zt7kd.html

[9] Parkinson, Patrick "Specialist prosecution units and courts: a review of the literature." Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2016.

[10] "Family Violence, A National Legal Response: Final Report" Australian Law Reform Commission, Canberra, 2010. https://www.alrc.gov.au/publications/32.%20Specialisation/existing-specialised-family-violence-courts-australia-0#_ftn65

This demonstrates that the fear instilled in victims by perpetrators of domestic violence can make them reluctant to come forward. The well-known low conviction rate reinforces their concerns about speaking-up and other approaches to handling these complex issues is warranted, especially as the overlap between family law, domestic violence and sexual assault overlap.

Lastly, while focussed on child sexual assault rather than adult sexual offenses, National Child Sexual Assault Reform Committee[11] recommended that a Child Sex Offences Court be established in each Australian jurisdiction that would involve specialised and highly trained personnel at all levels including court staff, judiciary and prosecutors, as well as comprehensive sex offender behaviour/treatment options and other measures supporting a trauma responsive framework.

EECLC recommendation 3: For sexual assault and domestic violence to be the responsibility of Department of Premier and Cabinet, and for the reformation of the Sexual Offences Taskforce

We note that the Sexual Offences Taskforce was a network of justice agencies, service providers, and other professionals working the criminal justice sphere around the issues of violence. This Taskforce had the role of making recommendations to policy reform, development and justice responses to best support survivors and offenders of violence, and was informed by services working closely with trauma and able to contribute knowledge to working with trauma-informed practice methods.

While other crimes rates have gone down or plateaued,[12] rates of sexual assault and domestic violence have continued to rise steadily – whether due to victims feeling more able to report and being supported to do so, or actual increases in the rates of violence – it is apparent that sexual assault and violence continue to interact with many policy frameworks and needs to be a priority area for the highest level of State and Federal Government. As such, we are calling for Sexual Assault and Domestic Violence to be elevated to the portfolio of Premier and Cabinet and for the Sexual Offences Taskforce to be reformed under this portfolio with the addition of placing equal attention on family and domestic violence.

Responses to review questions

3. The meaning of consent

[11] Cossins, A 2010. Alternative Models for Prosecuting Child Sex Offences in Australia. Report of the National Child Sexual Assault Reform Committee. Sydney: UNSW.

[12] https://www.smh.com.au/national/nsw/crime-in-nsw-has-been-dropping-for-more-than-a-decade-this-is-why-20181108-p50eq4.html

The law on consent is unclear and we support the submission made by CLCNSW which articulates the view of many legal centres in that an affirmative model of consent should be adopted. The following case study demonstrates some of the problems contained in the current model in that a typical "freeze" response to fear or threat could make a situation of sexual assault interpreted under the current definition ambiguous.

Case study 3

Client 3 is a South East Asian woman on a spousal visa, married to an Australian man. After arriving in Australia the relationship quickly deteriorated, although the husband was not physically violent toward her, Client 3 sought legal advice from our service about her rights. Client 3 discloses that her husband is restricting her finances, use of utilities in the house and is sleeping in another bedroom.

Client 3 also discloses that her husband comes into her room and has sex with her on a daily basis and she 'submits' to this because she is his wife and that she 'freezes and waits for 'it' to be over" and that she feels humiliated and depressed after sex.

After being provided information in her language about sexual assault, our client decides to report to the local police. An ADVO is taken out to protect our client, but no charges are laid against her husband.

As noted by the case study above, lack of protest, lack of resistance and/or silences does not mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. Overt signs of victim resistance are often seen as essential to prosecuting sexual assault, this is particularly problematic for victims in marital/intimate partner relationships that may not resist the attacker in any way, or may only consent to parts of sexual activity.

In addition, we support the observations made by Women's Legal Service NSW and Wirringa Baiya Aboriginal Women's Legal Centre, and note our own case studies that demonstrate that the current definition allows judges to be influenced by community values and rape myths in a sexual assault trial. Such values pertain to racism and promiscuity, and we note that the current definition does not adequately cover sexual violence that occurs in the context of relationships where there is domestic violence as highlighted above.

As noted, the definition of consent in s61HE of the *Crimes Act 1901 (NSW)* tends towards a communicative model. However, there remains ambiguity about whether consent must be communicated to be effective.[13]

EECLC supports Rape & Domestic Violence Services Australia's (R&DVSA) recommendation that the government legislate to clearly adopt an affirmative model of consent in s61HE by clarifying that consent must be actively communicated.

[13] Dougherty, Tom, 'Affirmative Consent and Due Diligence' (17/09/2018) https://www.tandfonline.com/doi/abs/10.1080/14680777.2018.1528467
West, Lindy https://www.nytimes.com/2018/01/17/opinion/aziz-ansari-metoo-sex.html?referer=http%253A%252F%252Fm.facebook.com%252F "Sexual assault shouldn't be a space in which people are supported to make mistakes and learn from them."

R&DVSA recommends a two-pronged approach for NSW to unambiguously adopt an affirmative model of consent:

- Amending the definition of consent in s61HE (2) to provide that 'a person consents to sexual activity if the person freely and voluntarily agrees to the sexual activity and communicates this agreement through words or actions.'
- Adding an additional circumstance to s61HE (factors negating consent), which provides that 'a person does not freely agree to an act if the person does not say or do anything to communicate consent.'[14]

By amending the substantive definition of consent in s61HE (2) as well, R&DVSA's proposal ensures NSW's legislation clearly adopts and is with consistent with an affirmative model. It also removes the ambiguity in the current section by making immediately clear that active communication is a core element of consent. The qualification that a person does not consent if they do not do or say something to communicate that consent inserted into s61HE makes clear to fact-finders that the positive definition of consent must be interpreted as requiring an act of communication rather than a state of mind.

We endorse CLCNSW and R&DVSA's detailed submissions on these points.

Question 4. Negation of consent 4.1 – 4.9

EECLC support the submission made by R&DVSA and welcomes the suggestion that the list of factors negating consent should be simplified.

EECLC welcomes the proposal that these factors should be reframed however as circumstances "in which consent is not present, rather than factors 'negating' consent. The expertise of R&DVSA should be recognised and we support their view that new consent-negating circumstances should be inserted into s 61HA(6) so that a person does not consent to sexual intercourse where they do not "say or do anything to indicate consent to the act".

Question 5: Knowledge, recklessness and the mental element 5.1 – 5.14

We strongly oppose any move towards the introduction of the concept of negligence in sexual assault legislation, as this would undo many years of advocacy and reforms that properly recognise the harm caused by sexual violence as well as the reforms in 2007. This would send the wrong message to the community and would result in fewer matters being proceeded against beyond charge.

We are strongly opposed to the NSW Bar Association's proposal on this point that recommended that the 'no reasonable grounds' test for an accused's knowledge about consent be abolished altogether. In the alternative, the Bar Association recommended a

[14] *Criminal Code Act 1924* (Tas) s 2A(2)(a)

lesser offence of 'negligent sexual assault' be created with a maximum penalty of five years' imprisonment which we strongly oppose on the basis that:

- the risk of serious harm resulting from sexual violence is so great that both advertent and inadvertent recklessness as to consent ought to be punished in the same way as actual knowledge the person did not consent
- creating a lesser offence of negligent sexual assault would undermine recent and proposed reforms to the law in NSW and send the wrong message to the community about the seriousness of sexual offences and
- resolution of such matters in the jurisdiction of the Local Court minimises the seriousness of sexual assault.

We are of the view that the views expressed by the Bar Association are out-dated and clearly underline the need for a comprehensive campaign to educate the community as well as the legal profession about the impacts of sexual violence. As is demonstrated throughout our submission, the impacts of sexual assault on individuals and the community are widespread and many people feel the impacts of their trauma throughout their life by suffering with ongoing mental health, employment substance use, housing and other social challenges and impacts.

As experts in their field working directly with survivors of violence, we see first-hand the influence of rape myths (including as noted, within domestic relationships), the role of sexism (in responses from Police and other services) and misogyny. We actively campaign to raise awareness of the prevalence of sexual assault and by making this submission, and our other advocacy work, see to dismantle misunderstanding about the factors around sexual assault, and the barriers and structures which have historically caused great discrimination and harm to women and survivors of sexual violence.

In relation to seeking and obtaining knowledge of consent, we are of the view that both partners should take active steps through words and actions to determine whether their partner consents to the sexual activity; and, that this responsibility occurs and recurs throughout the sexual encounter; and in addition, that consent can be withdrawn at any time. EECLC supports the preliminary submissions made by Rape & Domestic Violence Australia that there may be value in simplifying the three-tiered knowledge test and we are open to the proposal put forward that a single test be introduced, which would require the Prosecution to prove the defendant 'did not reasonably believe' the other person consented.

As in Victoria, the legislation should also make clear to fact-finders that in applying the test they 'must consider what the community would reasonably expect of the accused in the circumstances in forming a reasonable belief in consent.'[15]

A single mental element expressed in this way would require fact-finders to consider the defendant's actual belief about whether the complainant consented and then assess whether

[15] Jury Directions Act 2015 (Vic) s47(3)(d)

that belief accorded with reasonable community expectations about appropriate sexual behaviour.

Concluding comments

As noted, we welcome this review and would also welcome further scrutiny of sexual assault and domestic violence policy and practice. We would be pleased to be contacted about any aspect of this submission and wish to thank the NSW Law Reform Commission for considering our submission.

Yours faithfully,

Elizabeth Evatt Community Legal Centre

Thea Deakin Greenwood
Solicitor
thea@eeclc.org.au
(02) 47040208

Arlia Fleming
Managing Principal Solicitor
arlia@eeclc.org.au
(02) 47040203