WOMEN'S LEGAL SERVICE NSW

28 June 2018

Commissioner Carolyn Simpson
NSW Law Reform Commission
GPO Box 31,
SYDNEY NSW 2001

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

Dear Commissioner,

Consent in relation to sexual assault offences

1. Women's Legal Service NSW (WLS NSW) thanks the NSW Law Reform Commission for the opportunity to comment on the review into consent in relation to sexual assault offences.

2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

3. Our work 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. We also assist services providing therapeutic support to women to respond to subpoenas and requests for records in court proceedings.

4. WLS NSW welcomes this review and believes it would be beneficial for an Advisory Group or taskforce similar to that formed in 2004 – the Criminal Justice Sexual Offence Taskforce (Taskforce) - to be established to support the NSW Law Reform Commission in their important work on this review. WLS NSW was a member of the Taskforce in 2004-2005 and would welcome the opportunity to participate in a taskforce to assist this review.

5. The *Crimes Amendment (Consent – Sexual Assault Offences) Act 2007* amended the *Crimes Act 1900* to create a new s61HA, introducing a statutory definition of consent for sexual assault offences which commenced on 1 January 2008.

6. A statutory review of this provision took place in August 2012.

7. WLSNSW made a submission to the then NSW Department of Attorney General and Justice in response to the statutory review of the consent provisions in the *Crimes Act 1900*, dated 14 September 2012. In that submission, we spoke of the introduction of a statutory definition of consent as *"a very important part of modernising sexual assault laws in NSW"* and that *"we have no reason to believe that the terms of the amendment do not remain appropriate for securing [the policy] objectives [of the amendment]",* namely to give clear guidance as to what constitutes consent and to provide a more contemporary and appropriate definition of consent.

8. With the passing of time, it has become clear that the provision is not working as intended and clearer guidance is required through further statutory amendment in order to more clearly articulate an affirmative model of consent and to better capture sexual violence that occurs within the context of family or domestic violence.

9. We are also concerned by the continuing prevalence of rape myths in our society which focus on blaming the victim-survivor rather than holding the perpetrator to account. Such myths can influence the decision making by the fact finder in sexual assault trials to the detriment of a proper application of the law of consent. This is an issue that needs to be addressed in law and practice reform.

10. We also recommend broader terms of reference so the NSW Law Reform Commission can also consider the implementation of the Royal Commission into Child Sexual Abuse in Institutional Settings with respect to all sexual offences. For example, recommendation 1 in their Criminal Justice report recommends reforming the criminal justice system to ensure the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused, criminal justice responses

are available to victims-survivors and they are supported in seeking such responses. Recommendation 44 calls for reform to facilitate greater admissibility and cross-admissibility of tendency and coincidence evidence and joint trials. We attach our submission to the Royal Commission in response to the Criminal Justice Consultation Paper which outlines the importance of a trauma informed response to disclosures of sexual assault.

11. To ensure the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused it must be trauma-informed and limit further traumatisation of the victim-survivor.

12. Taskforce Recommendation 66 in *Responding to sexual assault the way forward* (2006) called for a number of changes including: specialised case management hearings; specialist judges; specialist prosecutors who remain on a case throughout the process; proactive case management to ensure matters are dealt with promptly; separate entrances to the court room for victims-survivors; access to CCTV; creation of a case management system within the Office of Director of Pubic Prosecution to ensure high standards and that complainants are kept informed of the progress of their matter through conferences and any issues impacting upon timely finalisation of their matter is resolved; data collection; *"the creation of a cross-agency monitoring body to assess and evaluate a dedicated and specialised court with alternate listing arrangements and the performance of all contributors to the project".*

13. There is a continued need for specialist courts which adopt trauma-informed practice, including specialist judges and specialist prosecutors. It is important that all who play a role in these specialist courts, including police, legal practitioners, judicial officers, interpreters, support services; and court staff have ongoing training in: trauma informed practice and understanding complex trauma; the dynamics and impacts of sexual violence, including sexual violence perpetrated within the context of domestic and family violence; cultural competency; and disability awareness.

14. Those who have experienced violence also need to be able to access the support they need when they need it – for example, wrap around services including intensive case management.

If you would like to discuss any aspect of this submission, please contact me or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

Women's Legal Service NSW

Janet Loughman
Principal Solicitor

Encl: Submission to the Royal Commission into Institutional Responses to Child Asexual Abuse in response to its Criminal Justice Consultation paper, 31 October 2016.

WOMEN'S LEGAL SERVICE NSW

31 October 2016

Royal Commission into Institutional Responses to Child Sexual Abuse
By email: criminaljustice@childabuseroyalcommission.gov.au

Dear Commissioners,

Criminal justice consultation paper

1. Women's Legal Service NSW (WLS NSW) thanks the Child Abuse Royal Commission for the opportunity to respond to the Criminal justice consultation paper. We have focussed on the key issues for survivors and advocacy and support groups, reflecting the nature of our work.

2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.

3. WLS NSW has provided legal advice and support to victims of child abuse over several decades. This has primarily been through helping victims to access victims support in NSW. Additionally, we acted on behalf of 13 survivors of child sexual assault, in civil litigation against the State of New South Wales that was the subject of the Royal Commission Case Study 19 into Bethcar Children's Home (Bethcar litigation).

4. We have drawn on our experience, recent developments in NSW such as the child witness intermediary pilot and on the policy submissions we made to the ALRC Family Violence Inquiry in 2012 and to the Child Abuse Royal Commission Issues Paper 10 Advocacy and Support and Therapeutic Services.

5. Through our work we are very aware that services working with victims of child sexual abuse must respond to a range of needs, provide support over the long-term and be accessible for everyone when and where they need it, including Aboriginal and Torres Strait Islanders, Culturally and Linguistically Diverse (CALD) communities, women with disabilities, LGBTIQ community, women living in regional, rural and remote areas, and women in prison.

This Centre is accredited by NACLC National Association of Community Legal Centres

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Approach to criminal justice reforms

6. We agree with the Royal Commission's proposed approach to criminal justice reforms, ie that any necessary reforms should be made to ensure that:

   a. criminal justice responses are available for victims and survivors who are able to seek them

   b. victims and survivors are supported in seeking criminal justice responses

   c. the criminal justice system operates in the interests of seeking justice for society, including the complainant and the accused.

Issues in police responses

7. Police, as all other professionals, should be trained to have a basic understanding of complex trauma. An understanding of complex trauma will be the foundation for an appropriate first response to someone who is reporting sexual assault. This will be crucial both to their recovery and to the decisions that they will make about reporting and following through with their complaint through the criminal justice process.

8. Some clients have reported to us that they have enduring high regard and appreciation for police officers who have provided respectful, believing, supportive responses to their complaints of child sexual assault and who have kept in touch with them through the process and provided the support they need to continue through the prosecution process.

9. Other clients have felt the police made incorrect assumptions about why they reported. Additionally, because the child sexual abuse was historical these clients have felt that police did not prioritise their case. In many instances we provided significant advocacy on the part of a client, including drafting a full statement to provide to the police before charges were laid. In another case it was more than 3 years after reporting to police that charges were laid. To have such significant delays even before the trial commences is very difficult for survivors of child sexual abuse, particularly when they have been living with the trauma of the abuse for such a long time.

Evidence of victims and survivors

Witness intermediaries

10. WLS NSW supports the proposal to make witness intermediaries available for children and other witnesses who have a disability that affects communication.

11. We agree with the comments of Professor Cooper that all people have a right to participate in the justice system, and that witness intermediaries can facilitate this participation for certain vulnerable witnesses.[1]

[1] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Consultation Paper* (2016), 381.

12. We submit that in child sexual abuse cases, the hearing of effective prosecution evidence, and the consequent likelihood of achieving convictions, should not be hindered by the very fact that the offences are perpetrated against children, who lack the capacity of most adults to effectively communicate in a court room.

13. The introduction of an intermediary scheme is also important to reduce the traumatic impact of giving evidence on survivors of child sexual abuse. This is consistent with the Royal Commission's commitment to reform that supports survivors to seek criminal justice responses. While intermediaries are impartial and are not to act as support people, their role should include informing the Court and legal practitioners about the witness' needs, informing the Court if the witness becomes distressed, and ensuring the witness understands what is happening. These functions are likely to make the process of giving evidence less distressing for survivors. We note that evaluation of the intermediary program in the United Kingdom found that intermediaries 'helped witnesses cope with the stress of giving evidence'.[2]

14. WLS NSW supports the use of intermediaries not just for child witnesses, but for adult witnesses whose ability to communicate is affected by a disability. There is no principled reason to not extend witness intermediaries to adult survivors with disabilities, especially noting the Royal Commission's findings that girls with a disability are 'significantly more likely to be victims of abuse'.[3] It is important that access to the criminal justice system is facilitated for these survivors who often do not report until they are adults.

Tendency and coincidence evidence and joint trials

15. WLS NSW supports the proposition that it should be easier to have joint trials so that all allegations against a particular accused can be heard and determined in one trial.

Should the law in relation to tendency and coincidence evidence and joint trials be reformed

16. WLS NSW supports reform to the law in relation to tendency and coincidence evidence and joint trials. Any reforms should facilitate the prosecution of sexual abuse perpetrators, and improve survivors' experience of the criminal justice system.

17. The existing law is unjustifiably weighted in favour of the interests of accused persons, without adequately responding to the interests of survivors. The practice of separating trials for separate counts to prevent the possibility of concoction and prejudice to the accused, and the exclusion of much tendency and coincidence evidence, means that juries do not get a full picture of the context and circumstances of the alleged offence.

[2] Joyce Plotnikoff and Richard Woolfson, *The 'Go-Between': Evaluation of Intermediary Pathfinder Projects'* (funded by Office for Criminal Justice Reform UK), 60-61.

[3] Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (2014), 112.

This is supported by the 1997 Judicial Commission NSW study which found that separating trials reduced the likelihood of a guilty verdict.[4]

18. WLS NSW clients have been the complainants in unsuccessful prosecutions where the same accused was convicted by a different court with respect to offences perpetrated against another family member. In these cases it is likely the accused would have been convicted for the offences against our client if the trials had been joined. In many cases, inconsistent outcomes between family members can cause more distress than no conviction at all. We have had clients express to us the trauma of not being believed, and particularly of not being believed when another victim was.

19. We have also spoken to clients who have not reported sexual assaults, but indicate they would if other victims were to come forward and they could support each other through the trial. This indicates that the severing of trials is likely to lead to attrition at the time when individuals are told the trial is to be severed.

Concerns in relation to unfair prejudice

20. The Jury Reasoning Research conducted by Professor Goodman-Delahunty for the Royal Commission and reported in the Issues Paper, demonstrates that concerns about unfair prejudice are unwarranted, and that legislative reform in this area is appropriate.

21. WLS NSW notes that decisions on the separation of trials, or exclusion of evidence are made on the basis of unfair prejudice to the accused or the 'interests of justice'. WLS NSW believes that the interests of justice must be more broadly construed to also include the 'injustice' to complainants in severed trials. A fair trial, in our view is one that does justice to all parties including the complainant.

Should issues of concoction, contamination or collusion be left to the jury?

22. WLS NSW supports leaving issues of concoction, contamination or collusion to the jury.

23. It is very common for an accused person to commit offences against more than one person, particularly in the case of child sexual abuse. Offender behavioural patterns suggest that offenders target sites of abuse that provide access to children and opportunities to assault. This often means an offender may assault a number of children from a group – a family, school, sporting team or religious community – who clearly know each other.

24. Simply knowing each other brings a reasonable possibility of 'concoction'. This means that highly probative and corroborative evidence may be excluded for an offence where it is notoriously difficult to find corroboration of a complainant's story.

25. The unique features of sexual assault offences and child sexual assault offences require, in our view, unique legislative solutions. These solutions must reflect the realities for

[4] P Gallagher and J Hickey, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales during 1994* (1997), prepared for the Judicial Commission of New South Wales

many sexual assault complaints: complainants, particularly children, often know each other and often have some form of connection or relationship. This connection is most often not indicative of concoction. Given this, it is not appropriate for the possibility of concoction to prevent relevant and probative evidence being admitted. Rather, it should be left to the jury to assess what weight to give to the evidence.

What other reforms should be made?

26. WLS NSW supports reform to tendency and coincidence law that would make it significantly easier to admit relevant evidence.

27. We note that under the *Uniform Evidence Law,* there remains a general discretion to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party.[5] Given this provision, the effect of excluding evidence and separating trials on the successful prosecution of child abuse perpetrators, the increased trauma suffered by complainants by existing law, and the outcomes of Professor Goodman-Delahunty's recent research that joint trials do not unfairly prejudice accused persons, there appears to be little justification for restrictive requirements on tendency and coincidence evidence. We submit that the current state of the *Uniform Evidence Law* in NSW does not go far enough, and reform that more closely follows the Western Australian or United Kingdom's models should be strongly considered. We submit that a simple test relating to relevance would be the best way forward.

Does specific provision need to be made in favour of joint trials, in addition to any reform in relation to tendency and coincidence evidence? If so, what provision should be made?

28. WLS NSW supports the establishment of a presumption that when multiple charges for sexual offences are joined in the same indictment, the charges are to be heard together. This presumption should not be rebutted merely because evidence on one charge is inadmissible on another charge. This was recommended by the Australian Law Reform Commission and NSW Law Reform Commission's comprehensive report *Family Violence – A National Legal Response,* and is already in place in Victoria under section 194 of the *Criminal Procedure Act 2009.*

29. The creation of a presumption for joint trials in sexual offence cases would still allow courts to order that trials be held separately when it was deemed to be necessary. However a presumption is necessary to increase the number of trials heard together given that the separation of trials decreases the likelihood of conviction, and increases survivors' distress.

30. We also note the ALRC and NSWLRC's statement that 'if separate trials are held, children involved may have to give evidence numerous times in their own trial, as well as in other trials, a process which can multiply the emotional stress experienced by child

[5] *Evidence Act 1995* (NSW) s 135(a).

complainants'.[6] This supports the argument for a presumption in addition to reform to tendency and coincidence rules.

Should any reforms apply specifically to child sexual abuse or should any reforms be of general application?

31. WLS NSW supports reforms that are of general application. WLS NSW supports reforms applying to all sexual offences, not just those where a child is the victim. Sexual offences perpetrated against adults are also difficult to prosecute and can occur in situations where tendency and coincidence evidence is relevant.

Aboriginal and Torres Strait Islander victims and survivors

32. We acknowledge the additional barriers that Aboriginal and Torres Strait Islander victims and survivors may face to reporting institutional child sexual abuse to police that are identified in the Issues Paper: mistrust of police and the criminal justice system; fear of children being removed; and legal issues such as having a criminal record themselves; kinship connections; pressure not to report; shame; remoteness; confidentiality; religion. We also note some Aboriginal victims/survivors have had positive experiences with Police, for example, as outlined in paragraph 8 above.

33. We refer to our submission to Issues Paper 10 Advocacy and Support and Therapeutic Treatment Services and reiterate the issues we raised in relation to Aboriginal and Torres Strait Islander women. These include the need for cultural competency training across all professionals in the justice system; trauma informed practice; increases in funding for community initiatives and services. Education of police, prosecutors, lawyers and judiciary regarding child sexual abuse, sexual assault and the impact of complex trauma is vital.

34. Additionally, it is important that services and particularly professionals in the justice system are familiar, for example, with local Aboriginal and Torres Strait Islander healing circles and other supports and that they get to know these services so they can refer people to these services where appropriate.

35. Options for more effective responses are canvassed in the Issues Paper, with a focus on a need for police and services to take steps to develop good relationships with Aboriginal and Torres Strait Islander communities to ensure less reluctance to report child sexual abuse. However, so much more is needed from the small to the large.

36. Appropriate and specific pathways could improve the likelihood of Aboriginal and Torres Strait Islander victims reporting sexual abuse and engaging with the criminal justice process. This could include an Indigenous pathway which is culturally safe and supportive. This could be done through Indigenous liaison and support officers located with Police and ensuring there are sufficient Indigenous Witness Assistance Officers with the DPP to assist Indigenous victims through the trial process.

[6] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response* (ALRC Report 114, 2010) 1224

37. We acknowledge the importance of programs such as *"Hey Sis, we've got your back"* which is a network of Aboriginal women from all parts of New South Wales, who are committed to working to prevent sexual assault in their communities. The network brought together Aboriginal women who were already talking about the impacts of sexual assault, who are educating and supporting people who have been impacted by sexual violence, and who are working to prevent sexual assault, so that they are supported, and able to stand even stronger against sexual violence. This program requires on-going, sustainable funding to support 'constructive yarning, professional development, networking and support for Aboriginal women who are working to reduce the rates of sexual assault against women and children'.[7]

38. Measures that move our whole community to acknowledge our First Nations People are also needed. As Muriel Bamblett has said [8]

> *If the rights of Aboriginal children and communities had been recognised and respected, it is likely our communities would have had greater forms of legal protection and redress in the face of the on-going process of colonisation and racial discrimination, and far better wellbeing and health outcomes.*
>
> *For me, the lack of recognition of the status and rights of the first peoples in the constitution and Australian polity has consequences for Aboriginal and Torres Strait Islander children, youth and families. You would think that in the 21st century we could have an inclusive constitution providing equality and acknowledging the history, status and inherent rights of Australia's first peoples rather than a constitution that excludes and denies Australia's true history.*

Survivors who are prisoners

39. We refer to our submission to Issues Paper 10 Advocacy and Support and Therapeutic Treatment Services and reiterate the issues we raised in relation to women in prison. Our submission is also informed by the prison outreach work we undertake at Silverwater and Emu Plains Women's Correctional Centres and for young women in juvenile detention at Juniperina Juvenile Justice Centre and more recently at Reiby Juvenile Justice Centre.

40. The ABS reports a 60% increase in the female prison population over the 10 years from 1999-2009.[9] In NSW, Aboriginal and Torres Strait Islander women represent 29.4% of women in prison.[10]

41. Courts are not generally well informed about the pathways to prison for women as a result of family violence, including sexual assault and child sexual abuse. A high proportion of

[7] Hey Sis, we've got your back accessed on 26 November 2015 at: http://www.heysis.com.au/Home.aspx

[8] Bamblett, M *It will take time and a resolute heart to exorcise the terra nullius demon.* http://www.theage.com.au/comment/it-will-take-time-and-a-resolute-heart-to-exorcise-the-terra-nullius-demon-20130525-2n3u9.html Accessed 27 October 2016

[9] ABS 2010 cited in Mary Stathopoulos, *Addressing women's victimisation histories in custodial settings*, ACSSA, No 13, 2012 at 3.

[10] Corrective Services NSW, *Facts and Figure Corrections research, Evaluation & Statistics, March 2013* at correctiveservices.justice.nsw.gov.au

women in prison have been victims of violent crime prior to coming into custody. The *2009 NSW Inmate Health Survey* found that: 66% of female inmates had been involved in at least one violent relationship and 29% of female inmates had been subjected to at least one form of sexual violence.[11]

42. Lawrie's 2003 study of Aboriginal women in NSW prisons found that over 75% of Aboriginal women had being sexually assaulted as a child, just under 50% had been sexually assaulted as adults and almost 80% were victims of family violence.[12]

43. Stathopoulos acknowledges that while there is little research regarding the prevalence of child sexual abuse amongst women in prison, where research has been done, prevalence is between 57% and 90%.[13]

44. In our submission to Issues Paper 10 we argued for improved access to counselling services available to women in prison, if they choose to engage in counselling or other therapy. Helping women address their trauma by offering treatment and support programs while they are in prison, along with information and alternative forms of reporting may encourage reporting of allegations of sexual assault.

If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Coordinator or Janet Loughman, Principal Solicitor on 02 8745 6900.

Yours faithfully,
Women's Legal Service NSW

Janet Loughman
Principal Solicitor

[11] Devon Idig, Libby Topp, Bronwen Ross, Hassan Mamoon, Belinda Border, Shalin Kumar and Martin McNamara, *2009 NSW Inmate Health Survey*, Justice Health, Sydney 2010 at 131
[12] Lawrie cited in Natalie Taylor & Judy Putt, 'Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia,' *Trends and Issues in crime and criminal justice,* Australian Institute of Criminology, September 2007 at 2.
[13] Ibid at 4.