



CARE LEAVERS AUSTRALASIA NETWORK

CLAN is a National, Independent, Peak Membership Body which supports, represents and advocates for people who were raised in Australian Orphanages, Children's Homes, Foster Care & Other Institutions.

January 2019

Submission to the New South Wales Law Reform Commission

A response to:

"Consent in relation to sexual offences".

CLAN - Care Leavers Australasia Network is the national, independent, peak membership body which represents and advocates for Care Leavers who were raised in Australia's and New Zealand's Orphanages, Children's Homes, Missions and Foster Care. CLAN's main objective is to assist and support Care Leavers and their families through the wide variety of work we do including, but not limited to, support and advocacy for the National Redress Scheme, support at the Royal Commission, the Senate Inquiry, searching for family and graves, counselling, casework, records, and publishing Care Leavers stories in the national newsletter.

CLAN thanks the NSW Law Reform Commission for the opportunity to respond to the review of section 61HA of the *Crimes Act 1900* (NSW) which deals with consent in relation to sexual offences.

Whilst CLAN's knowledge and expertise does not fall in the topics outlined in the paper, there are a few sections CLAN would like to comment on, to continue to improve the safety of future abuse survivors and ultimately the prosecution of sex offenders.

Alternatives to consent

CLAN strongly believes that the law in NSW should retain a definition of sexual assault based on an absence of consent. CLAN's experience with Care Leavers and their abuse histories informs us that children and those with disabilities often do not have a clear understanding of sexual assault and are vulnerable victims. Care Leavers were often in a position where their abusers would take complete advantage of them and were aware of their inability to provide consent. An absence of consent cannot be assumed as consensual sex, particularly in the case of those in 'Care', or those with disabilities where they may not have a sound enough understanding.

If the law was to define sexual assault differently, CLAN outlines the lack of ability for a child to consent. This in turn has life-long effects, where sexual assault against adult Care Leavers becomes more prominent. This is based on years in 'Care', where as vulnerable children, they were coerced in to sexual activity, or forcibly assaulted through threats, fear and misunderstanding.

CLAN is aware that a pattern of future abuse can occur for Care Leavers. Due to imprinted responses to abuse, many Care Leavers may say nothing or do nothing if they were attacked in adulthood. For many Care Leavers, this regression would be a normal reaction or even part of a PTSD response. Saying nothing does not constitute

consent. Therefore, CLAN stands strong in the opinion that a lack of verbal or physical resistance does not imply consent.

Meaning of Consent

CLAN believes there is great benefit in adopting an affirmative consent standard. By supporting the above points, an affirmative consent standard will allow for a shift in 'traditional views' and ultimately increase the likelihood and simplicity in charging offenders. By having a standard, clear definition of what consensual sex is, it will eliminate the need to rely on evidence of resistance, threats or force to adequately charge the accused.

As mentioned above, there needs to be a change in the way that consent is considered clear and adequate, as in the past Care Leavers and those with disabilities cannot rely on evidence of clear resistance as proof of non-consensual sex. By adopting an affirmative consent standard, it relies on the offender proving there was a form of consent rather than the survivor of the abuse proving there wasn't.

Negation of Consent

CLAN understands that currently 61HA outlines that a person does not consent to sexual intercourse if they do not have the capacity to consent, inclusive of age or cognitive incapacity. The 2007 reforms outline that if a person is abused by a person in a position of authority or trust, it MAY negate consent.

Firstly, CLAN would like to express our frustration on this point. Whilst we understand the abuse of a child is viewed in a different light, we would like to point out the life-long effects of being abused as a child in an instance where the person is in a position or authority or trust. Due to their complex upbringing of abuse and neglect, Care Leavers are susceptible abuse by people in positions of authority. They may consent on this basis for the need to feel close, loved or attached to an individual in this position. Overall it is due to Care Leavers experiences that they may be too emotionally immature to understand the impact on their ability to consent therefor increasing the likelihood of future abuse from people in authority.

Furthermore, by using the term "may" negate consent, it allows for loopholes in the justice system. CLAN questions why the ambiguity? It MUST be black and white.

In addition to adults, we have far too often seen an abuser have sexual intercourse with a child in 'Care' aged 16-18 years of age, where they are in a position of trust and/or authority.

We would like to point out the frequency of abuse occurring due to intimidating or coercive conduct and non-violent threats. CLAN is of the belief that these factors and abuse by those in authoritative positions MUST automatically negate consent.

61HA & 61HE

Comparatively, CLAN is pleased to see that 61HE will now be inclusive of sexual touching, aggravated sexual touching, sexual acts and aggravated sexual acts. We are also pleased to see that offences are considered 'aggravated' if the survivor of the abuse has a serious physical disability or cognitive impairment.

Conclusion

In conclusion, CLAN is pleased to see the New South Wales Law Reform Commission making amendments to section 61HA which focuses on consent in relation to sexual offences. CLAN is limited in feedback; however, we strongly believe that for many children who exited the 'Care' system with extensive sexual abuse histories, these amendments will allow for their future protection as vulnerable members of our society.

Ultimately, we would like to see the law outline a definition of sexual assault based on an absence of consent, as due to CLAN'S experience, a lack of verbal or physical resistance does not imply consent. As a result, CLAN believes there is great benefit in adopting an affirmative consent standard to allow for a simpler process in convicting sex offenders.

CLAN is adamant that changes must be made to what MAY negate consent, and feel that it is vital that those who abuse in a position of authority or trust MUST negate consent.

We thank the New South Wales Law Reform Commission for taking the time to read our submission.