



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.

Submission to the NSW Law Reform Commission: Consent in relation to sexual offences Draft Proposals

CLAN - Care Leavers Australasia Network is a national, independent, peak membership body which represents and advocates for those who were raised in Australia and New Zealand's Orphanages, Children's Homes, Missions and Foster Care. There were more than 500 000 children in Australia who grew up in 900 plus Orphanages, Children's Home, 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 advocacy, counselling, casework, records searching and publishing Care Leaver's stories.

CLAN would like to thank the NSW Law Reform Commission for giving us the opportunity to comment on your current draft proposals regarding consent in relation to sexual offences. Considering CLAN's role is primarily advocating for Care Leavers, CLAN feels that the majority of your draft proposals, while commendable are not within our area of expertise. We do however believe we have a role in using our knowledge of the child welfare system and how it has negatively impacted upon Care Leavers to inform and educate current public policy. Whilst CLAN are not legal experts, our point of view comes from our almost twenty years supporting and advocating for Care Leavers, and seeing the injustices of the legal system carried out upon them while they pursue justice for the crimes that were committed against them.

Therefore, we do feel obligated to comment on one particular aspect of your draft proposals, that being the section where a person 'does not consent' or consent is negated due to the circumstances. In particular, CLAN take issue with proposal 6.7: Abuse of authority or trust. Whilst CLAN is pleased to see the consideration of negating consent due to the abuse of authority or trust, we feel that the current and proposed legislation in NSW concerning this area is not strong enough and allows for the victimisation of the vulnerable.

The proposed legislation requires the person to be 'overborne' by the abuse of authority or trust to the degree where the complainant is unable to agree freely and voluntarily. Whilst this law may possibly be appropriate for those who are adults and are living freely and making their own decisions, this piece of legislation is highly inappropriate for 16 or 17 year olds who are living in the child welfare system and are being taken advantage of by adults whom they trust. Just because a child is old enough to give sexual consent it does not mean they are not still a child. This is especially true for children who are state wards and living in foster care, kinship care or in some sort of group home or other institution. Giving consent in these situations does not make a sexual relationship with a child in their care, acceptable in any form, and it definitely shouldn't be legal.

The Royal Commission in their Criminal Justice Report recommended:

State and territory governments should review any position of authority offences applying in circumstances where the victim is 16 or 17 years of age and the offender is in a position of authority (however described) in relation to the victim.

If offences require more than the existence of the relationship of authority (for example that it be abused or exercised), states and territories should introduce legislation to amend the offences so that the existence of the relationship is sufficient.

NSW legal bodies believe that it is not appropriate to criminalise sexual relationships when the parties are both over the age of consent even if there is a position of authority or responsibility as there may not be inequality between the parties. CLAN find the notion that there can be a position of authority, trust, or responsibility and there not be some element of inequality perplexing.

However, our main concern is with the child welfare system and ensuring that those in care today are not sexually abused or taken advantage of by those who are in a position of power or trust, especially by those who are entrusted and paid to care for their wellbeing.

It must also be remembered that children in care are particularly vulnerable and may have already been sexually, physically, or psychologically abused, and may also already be suffering from low self esteem and trust issues. All these factors can contribute to a child feeling more pressured to consent or wanting to please so they are not 'abandoned' again. The unique issues surrounding children in care and the abuse of those in a position of authority or trust are unique and must be treated as such.

Thus, it is CLAN's recommendation that if NSW intends to keep the legislation as it is for proposal 6.7 then a special subsection or new proposal be introduced specifically covering children in state care and consent being negated when there is a person of authority or responsibility concerned. This legislation NEEDS to be introduced to protect some of our most vulnerable children, and it is the states job to do this.

We urge the NSW Law Reform Commission to reconsider the Royal Commission's recommendations regarding abuse of a position of authority or trust. Specific legislation needs to be introduced to protect the children of NSW, who have already been removed from their biological families in order to be protected. Not using this opportunity when considering the law of consent is completely wasted if you do not implement legislation to protect children in care who are used and abused sexually everyday by the people who are meant to be protecting them. Those perpetrators who are savvy enough to use the child's psychological state against them to get consent need to be punished and need to be stopped. You have the perfect opportunity now to do this, please do not waste it.