



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 WA Department of Justice: Royal Commission Into Institutional Responses to Child Sexual Abuse: Strengthening the criminal law in response to child sexual abuse – Discussion Paper.

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 WA Department of Justice for giving us the opportunity to comment on your current discussion paper. The reforms suggested in your current paper will only serve to provide greater access and just outcomes for Care Leavers and other victims of child sexual abuse. 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.

Persistent child sexual abuse offence and course of conduct charges

CLAN are in agreeance with the Royal Commission regarding the term 'relationship' and its use in legislation when describing any type of child sexual abuse. It is however a tricky term to replace when trying to describe the ongoing nature of persistent child sexual abuse. CLAN are by no means legal experts however our suggestion would involve wording around 'maintaining unlawful contact/sexual contact' with a child. This terminology helps to encapsulate the ongoing nature of persistent child sexual abuse without the term relationship implying participation or reciprocity on a child victim's behalf.

With regard to the maximum penalty for persistent child sexual abuse CLAN are incredibly dumbfounded that this even needs to be asked. Of course the penalty should be increased to life imprisonment, and the WA Department of Justice should follow the lead of NSW and implement this penalty promptly. The current penalties under WA law do not reflect the seriousness or heinous nature of child sexual abuse. Any child who is sexually used has had their life changed forever. The trauma that is inflicted upon them by the atrocious actions of an adult will have lifetime consequences and leave scars that will never heal. This needs to be reflected in WA's sentencing laws. Whilst we acknowledge that every case is different, the current maximum sentence of 20 years is grossly inadequate, and raising the maximum to life imprisonment allows judicial discretion for all those offenders who are deserving of this penalty.

Furthermore, sentencing is not just about punishment, it is also about deterrence. These vile acts of adults against children need to be deterred. Currently, 20 years is not deterring anyone. In raising the maximum sentence to life imprisonment perhaps some perpetrators may rethink their decisions.

Concerning the course of conduct charges, CLAN is of the belief that it should be implemented but in addition to new persistent child sexual abuse offences. We are sure the WA Department of justice are well aware of the limitations in historical child sexual abuse matters, and even in many current child sexual abuse proceedings. Dealing with traumatised adult victims who are trying to recall details of abuse from decades ago as well as the challenges of current child victims and their families, fragile memories, and even incredibly young children who may not be able to verbalise properly, places enormous difficulty on the prosecution to meet the criteria of establishing 3 separate occasions. It is in these sorts of cases that the course of conduct charge would be beneficial

for both the prosecution and the victims. Of course there will be many other cases in which establishing at least 3 separate incidences will be attainable.

Grooming Offence

CLAN believe that proposal A is the right avenue to take with regard to grooming. Grooming offences around Australia are currently inconsistent and seem limited when considering what the actual meaning of grooming is. If the WA government are serious about strengthening criminal law in response to child sexual abuse, then a law encapsulating ALL aspects of grooming is essential. CLAN are of this opinion because we have heard first hand numerous accounts of Care Leavers and their families who have been groomed by perpetrators. Grooming can be a vital step for some predators who sexually use children. The introduction of a comprehensive grooming offence, if caught and prosecuted early enough could stop children from actually being sexually abused. Therefore, these laws aren't just in response to child sexual abuse, they are about preventing child sexual abuse.

Whilst there may be difficulties with proving grooming, and distinguishing innocent behaviours from actual grooming behaviours, CLAN believes that the benefits of having an offence such as this outweighs the negatives. At the end of the day it is the perpetrators state of mind and intent that can separate grooming behaviours from innocent ones, and whilst this may make establishing an offence harder to prove it is better to cast a wider net than let perpetrators free because there is no law to prosecute their actions.

Position of Authority Offences

CLAN are of the belief that if there was a list of categories to define who has 'care, supervision, or authority' in relation to a child aged 16 or 17 years, there would most likely be victims who fall through the cracks. Unfortunately, unless the list was completely exhaustive of every possible scenario (which seems highly improbable) it would allow perpetrators to go free.

It would be better to leave this open to judicial discretion, having a judge decide who is in a position of care, supervision, or authority'. CLAN recommends a list of categories of the most common positions to be drawn up that will serve as guidance for those in decision making. Furthermore, perhaps a comprehensive definition of what constitutes a person who has 'care, supervision or authority' over a child would be of assistance.

In terms of defences, CLAN's position would be that a blanket rule that those in a position of authority, regardless of age should be prosecuted for any sexual relationship with a child aged 16 or 17. A power imbalance can still occur because of their position of authority even though their ages may be similar. In reality, we would hope that there are not many situations in which young adults are entrusted with the care of older children. However, for any young adults who are in this position, we believe their role and responsibilities with regard to sexual relationships needs to be outlined before they commence any employment (either paid or voluntary) and understand the consequences of their actions. Perhaps it is something that can be considered as a mitigating factor in sentencing.

Retrospective removal of criminal limitation periods

CLAN wholeheartedly believes that criminal limitation periods for those sexual offences that were previously subject to a 3 month limitation period should be removed and made retrospective. Many other Australian jurisdictions have already done this and in order to achieve true justice for historical child sexual abuse victims these changes need to be implemented promptly.

Failure to report child sexual abuse/concealment offence

In order to provide maximum protection and assistance to children who have been sexually abused, CLAN believes that Proposal B which applies to ALL adults regardless of employment should be implemented. This would achieve consistency with Victoria and New South Wales, even though it goes beyond what the Royal Commission recommended. At present, child sexual abuse can be such a taboo topic, and many adults who are not mandatory reporters may decide that it is none of their business. We need to change the culture surrounding child sexual abuse, and this involves ALL adults, not just those involved in some form of institutional care. ALL adults need to stand up for those more vulnerable in our society, and while it's a shame that something like this needs to be placed in legislation to force adults to do the right thing, a law like this can begin to change societal attitudes around child sexual abuse and getting involved.

It is true that if this proposal was implemented there could well be an increase in reporting, and perhaps defensive reporting. However, as with most new laws, many may not be aware of it, and for others getting involved or challenging their cultural norms may not come easy, meaning there may not be a huge influx in reporting that one may expect. Whatever the outcome, it is advantageous and in the best interests of all children. Whomever the WA Department of Justice determines will be the receiver of these reports would need to have well trained employees capable of asking discerning questions to determine the legitimacy of the report.

The Western Australian Government will need to establish who should be the receiver of ALL reports, that is from mandatory reporters as well as the general public. If the system is too hard to navigate and reporting is made too complicated people will give up on doing it. It is overburdening the system and the individual making the report if they are required to report something more than once to different authorities. It is CLAN's belief that ANY adult who comes into contact with information regarding child sexual abuse should report this information to the Western Australian police. Of course different places of employment will have different chains of command where things will need to be spoken about, but in ALL cases if the person who comes into contact with the information is the one who needs to divulge this to the WA police there can be no passing the buck in the organisation.

Furthermore, once the Western Australian police are aware they will need to use their own channels as they normally would to inform the Department of Child Protection. It should not be the responsibility of the individual but should be part of departmental guidelines how reports are dealt with from there, in terms of child safety.

In terms of blind reporting, CLAN are of the opinion that if the reporter is aware of the child's identity then it should be disclosed. There may be some rare situations in which the identity may not be known in which case it cannot be reported. However, blind reporting in terms of this offence should not be best practice as it will make it difficult to charge and prosecute, not to mention the child will not be able to receive the help they will so desperately be needing.

Failure to protect a child from child sexual abuse

The implementation and prosecution of this offence may prove difficult due to the ambiguous nature of its wording. Western Australia should follow the lead of Victoria and word this offence 'by reason of a person's position'. Not everyone within an organisation will have the power to remove or reduce the risk due to the perpetrators position, or their own position within the institution. For these people, their responsibility is to report the perpetrator to the Western Australian police, but for others who have the power within the organisation to do so, the perpetrator should not only be reported to the WA police but removed from their position immediately. If it's not within someone's power to remove the perpetrator from their position then perhaps taking actions to remove children from the perpetrators contact. This seems like a something any decent person would do, however, history has taught us otherwise, thus the need to legislate and punish this sort of inaction to protect our most vulnerable from being sexually used.

Sentencing Reform in cases of child sexual abuse

CLAN strongly supports introducing a new provision into the Sentencing Act explicitly disallowing that good character be taken into account as a mitigating factor. Child victims have had this so called 'good character' used against them and it should never be used to give them a lesser sentence.

CLAN supports amending the sentencing Act to have regard to current sentencing standards and not those of previous times where child sexual abuse was not seen as the heinous crime we now know it to be. If this is not amended there is no justice for victims and there is no deterrence value for other would be perpetrators who think they will just receive a slap on the wrist. The Western Australian government needs to send a strong message to the community that violating a child will bring about the harshest punishments that we have. The seriousness of these crimes needs to be reflected in the sentencing.

Expanding Interlocutory appeal rights

CLAN have no specific legal expertise, however when considering the proposal put forward, it seems only fair and just and for the greater good that the DPP has the right to bring interlocutory appeals.

It is our opinion that the purpose of any of these changes needs to be what will give the DPP the greatest chance of catching and successfully prosecuting perpetrators of these horrible crimes against children. The advantages far outweigh any negatives associated with bringing interlocutory appeals, and as evidenced from Victoria, although there was an initial spike this eventually turned into a decline, negating any argument that the appeals court will forever be inundated with interlocutory appeals.

Making removal of presumption that males under 14 years are incapable of having sexual intercourse retrospective

CLAN are in full agreement with the proposal presented for issue 13. Males under 14 years are completely capable of sexually abusing another child and many have in the past. These crimes should be acknowledged retrospectively and should allow for prosecution to give ALL child victims justice and a chance to face their perpetrator.

Again, CLAN are not legal experts but we do not believe that NSW's reasoning for not implementing a retrospective application of this law is sufficient. Surely provisions can be made for sentencing child perpetrators (or those that were children at the time of the offence) so that they are not subject to the same lengthy sentencing times as adults. It doesn't mean their crimes should not be charged, prosecuted and sentenced if found guilty, to allow for justice for their child victims also. Of course their age and mental status should be considered as a mitigating factor when they are sentenced but we should not give them a free pass on their crimes against children. It would be neglectful for the WA government to follow NSW's lead with regard to this issue.

Conclusion

Before concluding, CLAN would also like to make one additional point, that a convicted paedophile should not be allowed to change their name under any circumstance. It is of the utmost importance for the safety of ALL children that child sex offenders cannot change their identity.

In conclusion, CLAN would like to thank you once again for considering the reforms that the Royal Commission has suggested regarding the criminal law in response to child sexual abuse. You as the WA government have been entrusted with the utmost responsibility of ensuring the safety of our most vulnerable members – children. Please do everything in your power to keep the children of today and the future safe, as well as to obtain justice for the children of the past. **Do not forget, the WA Government and its Department of Community Development and Department of Communities, Child and Family Support, was and is the legal parent/guardian of Care Leavers and children currently in care today.** It is your responsibility to look after these children, to deter perpetrators and prevent organisations facilitating abuse, and most importantly to ensure that when the system does fail these children/adults that their perpetrators are charged for the crimes they have committed and are convicted and sentenced to the fullest extent of the law.