Submission No 1

INQUIRY INTO ADEQUACY AND SCOPE OF SPECIAL CARE OFFENCES

Organisation: NSW Bar Association

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NEW SOUTH WALES
BAR ASSOCIATION

Our Ref: 17/709

20 March 2018

The Hon. Natalie Ward MLC
Committee Chair
NSW Legislative Council
Standing Committee on Law and Justice

By Email: law@parliament.nsw.gov.au

Dear ~~Ms Ward~~ Natalie

Inquiry into the adequacy and scope of special care offences

The New South Wales Bar Association (Association) provides the following response to the Standing Committee on Law and Justice's inquiry into and report on the adequacy and scope of the special care relationships recognised in the special care offence under section 73 of the *Crimes Act 1900.*

We note that the Department of Justice has previously consulted with the Association on the scope of the special care offence contained in section 73.

At the outset, the Association wishes to make it clear that it fully suppors laws which protect children in order to ensure that they are not the subject of abuse of power or authority from adults. The Association's position in relation to these matters has been to ensure that laws are enacted which can be properly understood and not result in confusion or arbitrary outcomes.

Students and school workers

The general position in NSW is that the NSW Parliament has determined that a person who is 16 years old is old enough to have the capacity to give real consent to sexual intercourse.

The purpose of s 73 is to protect a person aged 16-17 from adults who are in a position of power or authority with respect to him or her. It is the existence of position of power or authority that gives rise to the capacity to take advantage of the influence which arises from the position and requires the person aged 16-17 to be protected from the capacity for exploitation.

An initial proposal was made to expand s 73(3)(b) to "adults who work at a school". The Bar Association opposed that proposal because it might include contractors (eg 16 year old apprentice

landscapers) whilst performing work on school premises, who are not engaged as teachers and have no contact or association with a pupil.

The Association suggested that it would be appropriate to amend s 73(3)(b) to read "the offender is a school teacher and the victim is a pupil at the school where the offender teaches", since requiring the victim to actually be a pupil of the teacher is too narrow. All teachers at the school would have authority over the pupil. Alternatively, it was suggested that s 73(3)(b) might be amended to read "the offender works at a school where the victim is a pupil and is in a position of power or authority with respect to the victim".

Section 73(3)(b) has now beem amended to insert "the offender is a member of the teaching staff of the school at which thevictim is a student, or". Further, s 73(6) has been amended to define "member of the teaching staff" as follows:

> (a) a teacher at the school, or
> (b) the principal or a deputy principal at the school, or
> (c) any other person employed at the school who has students at the school under his or her care or authority.

These amendments are consistent with the suggestions made by the Association to the Department of Justice.

Youth workers and workers in youth residential care settings

Youth workers and workers in youth residential care settings, including but not limited to homelessness services, should in appropriate circumstances be recognised as having special care of any 16 or 17 year old young people to whom they provide services.

Section 73(3) should be amended to add the following paragraph:

> the offender is a youth worker employed to provide services to young persons under his care or authority

Existing special care relationship at the time of the sexual intercourse

The Association considers that s73 should not be expanded to include special care relationships which do not exist at the time of sexual intercourse but did exist during some time in the past.

The occurrence of grooming is already an offence in itself and would be the subject of prosecution quite independently of what occurred at a later date when the pupil has the capacity to give real consent. Further, if a prosecutor can satisfy a court that free consent was not possible in such circumstances, then

there is no need to rely on s 73 – a prosecution may be brought under the general sexual intercourse "without consent" provisions, where "consent" is defined to mean "freely and voluntarily agrees to the sexual intercourse" (s 61HA(2)).

A suggested "safeguard" that DPP consent will be required for prosecutions where there is no temporal connection between the relationship and the sexual intercourse" demonstrates the problematic nature of the second proposal. If a proposed substantive offence is too broad in scope, it should not be enacted. In the present case, if the relationship was not in existence at the time of the sexual intercourse, then there should not be a prosecution for this offence. Reliance on the discretion of a prosecutor is not consistent with the principle that there should be certainty in the criminal law so that the public is aware of which actions constitute criminal offences.

If you have any questions please contact the Association's Executive Director, Mr Greg Tolhurst on or by email at .

Yours sincerely,

Arthur Moses SC
President