

**INQUIRY INTO ADEQUACY AND SCOPE OF SPECIAL
CARE OFFENCES**

Name: The Hon. Paul Brereton

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SUBMISSION
TO
THE NSW LEGISLATIVE COUNCIL'S STANDING COMMITTEE ON LAW AND
JUSTICE
INQUIRY INTO THE ADEQUACY AND SCOPE OF SPECIAL CARE OFFENCES

Introduction

1. The NSW Legislative Council's Standing Committee on Law and Justice is currently conducting an inquiry into the adequacy and scope of special care offences. Following a request by the Attorney General, the terms of reference for the inquiry have been broadened to include examination of adoptive relationships. The updated terms of reference include that the Committee inquire into and report on various aspects of the adequacy and scope of the special care relationships recognised in the special care offence under section 73 of the Crimes Act 1900. .

2. This submission is confined to two aspects of the terms of reference, namely (a) whether the offences under s 73 should be expanded to recognise adoptive parents and adopted children as a special care relationship, and (b) whether the incest offence in section 78A of the Crimes Act 1900 should be expanded to include adoptive relationships. It recommends the amendment of s 73 (Sexual intercourse with child between 16 and 18 under special care), to extend the scope of special care relationships to the relationship of adoptive parent (and spouse or de facto partner of adoptive parent) and adopted child. It does not support the extension of s 78A (Incest) to relationships arising from adoption.

The current position

3. Section 73 creates offences (punishable by imprisonment for 8 and 4 years respectively), where a person has sexual intercourse with another person who is under his or her special care, and (a) is of or above the age of 16 years and under the age of 17 years, or (b) is of or above the age of 17 years and under the age of 18 years. For this purpose, a person (*the victim*) is under the special care of another (*the offender*) if, relevantly, the offender is the step-parent, guardian or foster parent of the victim or the de facto partner of a parent, guardian or foster parent of the victim, or the offender is a member of the teaching staff of the school at which the victim is a student, or the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, or the offender is a custodial officer of an institution of which the victim is an inmate, or the offender is a health professional and the victim is a patient of the health professional. Consent is not a defence.

4. The effect of section 73 is to extend the age of consent to 18 in the context of "special care" relationships, which are essentially relationships of power and/or trust. While the special care relationships as defined include quasi-parental relationships (step-parent,

guardian or foster parent of the victim or the de facto partner of a parent, guardian or foster parent of the victim), they do not include the relationships of parent and child, or adoptive parent and adopted child.

5. The former was no doubt excluded because the circumstances were considered to be covered by s 78A, which creates an offence (punishable by imprisonment for 8 years) where a person has sexual intercourse with a close family member who is of or above the age of 16 years, “close family member” being defined as a parent, son, daughter, sibling (including a half-brother or half-sister), grandparent or grandchild, *being such a family member from birth*. The qualifying words “being such a family member from birth” apparently exclude relationships arising from adoption.

6. Section 95 of the Adoption Act 2000 (General effect of adoption orders) provides that for the purposes of the law of New South Wales, if an adoption order is made, the adopted child is regarded in law as the child of the adoptive parent or adoptive parents and the adoptive parent or adoptive parents are regarded in law as the parents of the adopted child, and the adopted child ceases to be regarded in law as the child of the birth parents and the birth parents cease to be regarded in law as the parents of the adopted child. However, by s 95(4), for the purposes of any law of New South Wales relating to a sexual offence (being a law for which the relationship between persons is relevant), any relationship that would have existed if an adoption order or discharge order had not been made continues to exist for the purposes of that law in addition to any relationship that exists under this section by virtue of the order. While this clearly means that adoption has no effect on the criminal liability of a birth parent (or sibling) for incest, it is at best ambiguous as to the position of adoptive parents. Given the express qualifying words in s 78A, it is likely that s 78A would be construed as not imposing criminal liability in respect of relationships arising from adoption.

7. Section 99 of the Adoption Act (Relationship of adopted child to other children of the adopter) provides that an adopted child is taken to be related to another person, being the child or adopted child of his or her adoptive parent or parents (a) if he or she was adopted by 2 persons who are the spouses of each other jointly, and that other person is the child or adopted child of both of them, as brother or sister of the whole blood, and (b) in any other case, as brother or sister of the half blood, but only for the purposes of the application of the *Succession Act 2006* to the devolution of any property in relation to which a person dies intestate, and the construction of any disposition of any property. Thus a sibling by adoption is not criminally liable for incest.

The issue

8. Adoptees aged over 16 are therefore unprotected by either s 73 or s 78A. As adopted children are at least as vulnerable to abuse of trust and power as foster children, and the considerations that informed the “special care” relationships for the purposes of s 73 are equally applicable to them, that position is anomalous and unacceptable. Adopted children should enjoy at least the same protections from abuse of trust and power as foster children.

9. The more difficult question is whether this should be addressed by extension of the special care relationship under s 73 to the relationship of adoptive parent and child, or by treating an adopted child as equivalent to a natural child for the purposes of the law of incest under 78A.

Discussion

10. Significant differences between section 73 and section 78A include:

- section 73 protects only young persons aged 16 and 17, while section 78A protects close family members from age 16 for the duration of their lives;
- under section 73 the offender is the dominant party in the relationship of trust/power, while under section 78A all participants are offenders, and the offence is not limited to a relationship of trust/power but includes, for example, intercourse between siblings and half-siblings;
- the special public policy issues that arise under section 78A are reflected by the requirement for Attorney-General's consent to a prosecution, while no such constraint applies to section 73.

11. These differences reflect the differing main purposes of the two provisions: essentially, while s 73 is directed to the protection of young persons from abuses of trust and power, s 78A is directed to the protection of the public from the consequences of sexual intercourse between persons within the prohibited degrees of consanguinity. This purpose of section 78A is also reflected in the preservation of the birth family relationship for the purposes of the law of incest, under section 95(4) of the Adoption Act.

12. Those considerations suggest that the protection of adoptees aged 16 and 17 fits better in the context of section 73 than of section 78A. One reason for this is that in an adoptive relationship there is no question of consanguinity. Another is that inclusion of an adoptee within the meaning of a child in s 78A would go beyond protecting the child from abuses of power or trust by an adoptive parent, and extend to other close family members such as adopted siblings.

13. The main consideration in the opposite direction is that adoption is intended to have the effect that, so far as practicable, the position of an adopted child is the same as that of a natural child of the adopter. However, it does not completely do so, and the ongoing place and role of the birth family is increasingly recognised.

14. For those reasons, I favour an amendment to section 73 to include adoptive parents within the definition of "offender".

15. While the spouse of an adoptive parent is usually also either an adopter or a natural parent, that is not necessarily or invariably so – for example, where a sole adoptive parent marries after adoption. For that reason, and consistent with the recent amendment extending

liability to de facto spouses, the provision should also catch spouses and de facto spouses of adopters.

Conclusion

16. It is recommended that section 73(3)(a) be amended to read as follows:

- (a) the offender is the step-parent, *adoptive parent*, guardian or foster parent of the victim or *the spouse or de facto partner* of a parent, *adoptive parent*, guardian or foster parent of the victim.

The Honourable Justice P.L.G. Brereton, AM, RFD

30 May 2018