Submission No 3

INQUIRY INTO ADEQUACY AND SCOPE OF SPECIAL CARE OFFENCES

Organisation: Australian Lawyers Alliance

Date Received: 29 May 2018

29 May 2018

ATTN: Standing Committee on Law and Justice
Parliament House, Macquarie Street
Sydney, NSW, 2000, Australia

BY ONLINE SUBMISSION

Dear Sir/Madam,

INQUIRY INTO THE ADEQUACY AND SCOPE OF SPECIAL CARE OFFENCES UNDER THE *Crimes Act* 1900 (NSW)

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

We oppose oppression and discrimination and support democratic accountable systems of Government and an independent judiciary.

We value immensely the right of the individual to personal autonomy in their lives and to equal treatment under the law.

The ALA is grateful for being invited by the Standing Committee on Law & Justice (Standing Committee) to provide its response in relation to this inquiry.

The ALA is generally committed to the position that where the common law provides adequate protection, it is often the most appropriate means of ensuring the safety of children, because of its ability to take a broad case-by-case approach to matters as they arise.

At the outset, the ALA cautions the Standing Committee to attempt to limit the scope of Special Care Offences or alternatively to create a specific circumstance or law change that might hinder the development of the common law. The ALA is however generally supportive of making it unequivocally clear to potential perpetrators of abuse that this is wholly unacceptable, and in light of the findings of the recent Royal Commission into historical childhood abuse there will be no tolerance for those not complying with and/or failing to ensure the safety and best interests of all children.

The ALA responds to the Terms of Reference as follows:

(a) The adequacy of the scope of the Special Care Offences in ensuring the safety of school students, in relation to their application to teachers and other school workers

(b) Whether the offences should apply where a special care relationship existed but is no longer in effect

The ALA will respond to (a) and (b) with the following combined response:

The ALA believes that the Standing Committee should err on the side of caution when considering whether or not to specifically define and/or alter the existing Section 73 of the *Crimes Act* 1900. We note that the Standing Committee has sought a response in relation to specific situations:

(i) Whether the offences should apply where a school worker is a volunteer

Currently under the *Work Health and Safety Act* 2011 (NSW) a volunteer is considered to be a worker within the meaning of Section 7 of the *Work Health and Safety Act* 2011 (NSW). In order to capture the notion of a volunteer within the meaning of Section 73, consideration would need to be given to altering Section 73(3)(b) whereby the wording could be changed to 'The offender is a member of the teaching staff or a worker of the school at which the victim is a student'.

From the ALA's perspective the inclusion of a volunteer who is placed in a position of trust and/or opportunity and/or occasion to perpetrate abuse should be included within the scope of the Special Care Offences. Furthermore, this would fall in line with relatively recent comments by the High Court of Australia when commenting on the role of employees in a school environment in *Prince Alfred College Incorporated v ADC* [2016] HCA 37 whereby the Court clearly stated that:

> 'The relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed, vis-a-vis, the victim. In determining whether the parent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment….'

The ALA is of the view that the same should be said for criminal culpability of an individual irrespective of whether or not they are a teacher and that the test must be that if an individual is placed in a position that might give an occasion for a wrongful act, then they

must be considered, at least from a criminal perspective, to fall within the scope of the Special Care Offences.

By keeping the definition open, this would allow a Court to develop common law and expand on the circumstances in which the special provisions should or could apply in a school environment. This again falls in line with the general proposition put by the High Court in Prince Alfred College whereby they reiterate that:

> 'The "relevant approach" described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case-by-case.'

Whilst these notions quoted above are certainly quoted in a civil context as to whether or not a school would be vicariously liable for the actions of its employees, it nonetheless outlines the manner in which the High Court would approach the general nature of a person in a position of power and trust in a school environment, and their interactions with a student and from the ALA's perspective should be treated consistently both in a civil and criminal arena.

(ii) Whether the offences should apply where the school worker is a recent ex-student of the school

The ALA again asks the Standing Committee to exercise caution in allowing for this specific type of circumstance to be considered a Special Care Offence within the meaning of the *Crimes Act*, whereby from a practical perspective the ALA would think that innocent and natural relationships would form between individuals with close proximity in age that would be entirely innocent in nature and unlikely to give rise to criminal culpability. However, to err on the side of caution and in the interests of protecting children in a school environment, the changes to Section 73 of the *Crimes Act* as suggested above would necessarily extend to workers involved in a school whereby an inappropriate relationship could be formed by virtue of the abuse of an authority, power, trust, control and/or the ability to achieve intimacy with the victim. Again, the Standing Committee is reminded that

the common law would be able to approach this more practically than any piece of legislation to ensure that innocent relationships formed in a schooling environment between students do not fall into the realms of unnecessary and unfair criminal consequences. This is particularly relevant where those relationships were not formed as a result of the special position an ex-student may be placed in but may then have a particular position of power and/or trust as a school worker at a later point in time. It would be necessarily important here to ensure that the any provision deal with the question of when a particular relationship arose and the circumstances in which that relationship were to arise, which would be a question for the courts and common law to develop.

(iii) Whether the offences should apply where the school worker no longer works at the student's school

From the ALA's perspective each case must be considered on its own facts. For example, it is entirely plausible that a perpetrator of abuse may begin a grooming type relationship during the course of being a student's teacher and/or a worker within the school that the student attended. In circumstances where the introduction between an alleged perpetrator and a student first occurs at a particular school and then goes on to be abusive in nature, there is no reason why the general proposition as outlined in Prince Alfred College and extracted above would not equally be applicable to that teacher/worker if the occasion for the wrongful act arose from the authority, power, trust, control and/or the ability to achieve intimacy was first introduced by the teacher-student relationship. Again, from the perspective of this particular scenario, the ALA would submit that Section 73(3)(c) would deal with this potential offence and bring it within the scope of Section 73, namely, that an established personal relationship with a victim occurred in connection with the provision of religious, sporting, musical or other instruction to the victim. Again, the ALA would urge caution by the Standing Committee to ensure that Courts are allowed to interpret individual circumstances of matters as they occur on a case-by-case basis. This submission would equally apply to the term of reference (b) specifically, that each case

should be allowed to be considered on its own facts within the scope of the existing Section 73 drafting.

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

The ALA has no reason to believe that youth workers and workers in youth residential care settings would not fall within the scope of the existing Section 73(3)(c) and/or (e). Again, this would be a question for consideration by a Court on a case-by-case basis but one would think that a youth worker and/or worker in a youth residential care setting providing services and/or instruction would fall within the definition of 'other instruction to the victim' in Section 73(3)(c). Such a circumstances might also be capable of being determined to be within the context of a health professional whereby the victim is a patient of the health professional if the services being provided within a youth residential care setting were provided for the purposes of health provisions. In these circumstances, the ALA does not believe that any specific change to Section 73 needs to occur to cover this scenario.

(d) Whether the offences should be expanded to recognise adoptive parents and adopted children as a special care relationship

Section 95 of the *Adoption Act* 2000 enforces that once an adoption order is made, for the purposes of the law, the adopted child has the same rights in relation to the adoptive parent, or parents as a child born to the adoptive parents. Thus, the adoptive parents have the same responsibilities, and in the eyes of the law the adopted child\adoptive parents are the same as a parent/child relationship. This very question has been considered by various Courts including in *R V WDR* (2005) 91 SASR 522 where it was submitted that the section creating the offence of incest applied only to a natural parent. The Judge in that case found that there are a number of difficulties with that type of argument and disposed

of it suggesting that the very premise is wrong and an adoptive father and daughter, as was the case in this decision, were clearly in a relationship of 'parent and child' for the purposes of Section 72 of the *Adoption Act* 2000.

Furthermore, *Chief Justice Burbery in R v Campbell* [1968] TAS SR 38 also concluded that an adopted daughter is a daughter for the purposes of the legislation as it applied in that case, commenting that incest is a grave offence against the family and:

> 'When a father as head of a family brings within the shelter of the family unit a child by adoption he stands in precisely the same legal relationship with that child as if the child had been born in lawful wedlock.'

The ALA believes therefore that on any reasonable view the law as it currently applies would already consider an adoptive parent to be analogous to a biological parent/child relationship. Given the current drafting of Section 73 omits this in clear terms the ALA recommends that Section 73(3)(a) be altered to include the following:

> 'The offender is the stepparent, guardian, adoptive parent or foster parent of the victim or the de facto partner of a parent, guardian, adoptive parent or foster parent of the victim.'

(e) Whether any additional safeguards, including but not limited to Director of Public Prosecutions Section of Prosecutions, are required in any of the circumstances in paragraph (a) – (d) above

The ALA believes that any change to Section 73 be kept intentionally broad to allow a case-by-case interpretation dealing with the individual facts of a particular case in line with any special type of relationship or special role that arises in the specific circumstances of a particular case.

(f) Whether the incest offence in section 78A of the Crimes Act 1900 should be expanded to include adoptive relationships

For the reasons already provided under subsection (d) of this submission, the ALA is of the view that it would remain consistent with findings in Courts of other Australian states to include an 'adoptive parent' within the meaning of a close family member, as set out in Section 78A of the *Crimes Act* 1900. This would create general consistency and acknowledgement of the special relationship that occurs within an adoption scenario. From the ALA's perspective, it is absolutely paramount that children are protected in unequivocal terms from a criminal perspective in recognition of varied and changing definitions of the parenting relationship, particularly where that relationship is analogous to the same legal relationship that a child has with its biological parent.

The ALA is prepared to provide further submissions where required and to assist the Standing Committee in any way it requires in relation to this enquiry. The ALA again thanks the Standing Committee on Law and Justice in providing it with the opportunity to respond to this enquiry.

Yours faithfully,

Andrew Stone SC

NSW President
Australian Lawyers Alliance