Submission No 4

INQUIRY INTO ADEQUACY AND SCOPE OF SPECIAL CARE OFFENCES

Organisation: Law Society of NSW

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THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: DHrg1489946

28 May 2018

Ms Natalie Ward MLC
Committee Chair
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

By email: lawandjustice@parliament.nsw.gov.au

Dear Ms Ward,

Inquiry into the adequacy and scope of special care offences

Thank you for the opportunity to make a submission to the Inquiry into the adequacy and scope of special care offences (the Inquiry).

Section 73(1) of the *Crimes Act 1900* provides that any person who has sexual intercourse with another person who is under his or her special care, and is of or above the age of 16 years and under the age of 17 years, is liable to imprisonment for 8 years. Section 73(2) provides that any person who has sexual intercourse with another person who is under his or her special care, and is of or above the age of 17 years and under the age of 18 years, is liable to imprisonment for 4 years.

The purpose of a special care offence is to impose restraint upon a person who is in a position of power arising from a special care relationship. The offence under section 73 of the *Crimes Act 1900* provides an exception to the age of consent. We consider that, while it may be professionally unethical for people in a position of care to engage in sexual activity with a person under their care, it is a much bigger step for that conduct to be made criminal where there is no abuse of their position.

We note that on 7 March 2018, the NSW Parliament passed the Justice Legislation Amendment Bill 2018, which amended section 73 of the *Crimes Act 1900* to include principals, other teachers at the school and any employed school worker who has students under their care or authority. The new provisions commenced on 21 March 2018. In its concluding remarks on the Bill, the Legislation Review Committee commented that:

> The broad wording of the amended provision may make it insufficiently clear who could be found guilty of an offence under the section. Noting that the age of consent is 16, the current provision may unintentionally expose people such as debating and sports coaches (who may be young adults and ex-students) to criminal liability.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

> Although there may be good reasons for this aspect of the expanded definition, the Committee draws this matter to the attention of Parliament.[1]

We understand that the Inquiry will investigate whether the scope of special care offences should be further broadened, e.g. by including volunteers at schools, school workers who were recently ex-students, school workers who no longer work at the school and youth workers and workers in residential care settings (paragraphs (a) and (c) of the Terms of Reference). In addition, the Inquiry will consider whether offences should apply where a special care relationship is no longer in effect (paragraph (b) of the Terms of Reference).

We do not support the inclusion of theses suggested additional categories of special care relationships under section 73(3). These categories may or may not involve a power imbalance and would increase the risk of unintentionally criminalising ordinary human behaviour (a concern raised by the Legislation Review Committee).

Nor do we support the expansion of the offence to where the special care relationship does not exist at the time of the sexual intercourse. If an expanded definition is adopted, it should require a personal relationship between the alleged victim and accused at some point in the past. Otherwise the essence of the offence (the abuse of that personal relationship where there is deemed to be a power imbalance) will have been lost.

Any expanded definition should also require that, where the personal relationship in the school or foster parent context no longer exists, the prosecution must show that there was a continuing power imbalance arising from the previous special care relationship, thus justifying the removal of the requirement to prove consent.

We consider that categorisation may not be the most effective way to address the behaviour sought to be criminalised. It may be preferable to amend the section to create a broader offence that addresses the gravamen of the offence, i.e. the existence of a power imbalance that has been abused.

The Law Society supports the inclusion additional safeguards, including requiring the Director of Public Prosecutions sanction prosecutions.

Extended terms of reference – adoptive relationships

Under extended Terms of Reference, the Inquiry will also consider whether the offences should be expanded to recognise adoptive parents and adopted children as a special care relationship, and whether adoptive relationships should fall under the incest offence in section 78A of the *Crimes Act 1900*.

We consider that adoptive parents would fall under the definition of 'guardian' in section 73(3)(a) 'guardian'. However, we have no objection to adoptive parents being specified under this sub-section.

We do not consider it appropriate for the incest offence in section 78A of the *Crimes Act 1900* to be expanded to include adoptive relationships.

That offence requires the Attorney General's sanction (section 78F), in part because it is entirely possible to think of circumstances which, whilst morally questionable, should not be subject to the same criminal sanction as actual incest.

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[1] Legislation Review Committee, Legislation Review Digest, No. 49/56 13 February 2018, para [20], p11.

The underlying basis for regulation of incest is that, despite all the participants to a sexual relationship being consenting adults, there are genetic risks if a child is conceived from the relationship.

We trust these comments will assist the Inquiry.

Yours sincerely,

Doug Humphreys OAM
President