Submission No 7

INQUIRY INTO ADEQUACY AND SCOPE OF SPECIAL CARE OFFENCES

Organisation: NSW Government

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NSW Government Submission

NSW Legislative Council Standing Committee on Law and Justice Inquiry into the adequacy and scope of the special care offences

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1. Introduction

The NSW Government welcomes the opportunity to make a submission to the Legislative Council Standing Committee on Law and Justice in relation to its inquiry into the adequacy and scope of the special care offences.

This submission provides background information on the existing special care offences, information about the NSW Government's recent commitments to law reform in this area, and specific issues raised in the inquiry's terms of reference.

2. The special care offence

Introduction of the special care offence in 2003

The special care offence was introduced broadly in its current form by the *Crimes Amendment (Sexual Offences) Act 2003*, as part of a reform package that provided for the equal treatment of sexual offences irrespective of the victim's or perpetrator's gender or sexual orientation.

The special care offence replaced an offence of carnal knowledge by a male teacher, parent or step-parent with a female victim aged 16. The recasting of the offence involved:

- addressing the discriminatory aspects of the offence by ensuring that the offence applied to both male and female perpetrators and victims,
- expanding the remit of the offence by including additional relationships with a similar power imbalance (those between custodial officers and inmates, people providing religious, sporting, musical or other instruction and their pupils, and the relationship between a health professional and a patient),
- including a defence of marriage,
- including victims aged 17 but under 18, and
- removing the category of parent/child, as it was adequately dealt with by a revised incest offence introduced by the same reform package. The revised incest offence covered sexual intercourse with a close family member of or above the age of 16 years.

The inclusion of additional special care relationship categories and a defence of marriage had been suggested in the Final Report of the Royal Commission into the New South Wales Police Service (at 14.43 of Vol V: The Paedophile Inquiry, August 1997).

The offence has remained in broadly the same form since it was introduced in 2003, although it has been expanded in two ways:

- 2012: following a decision by the NSW Court of Criminal Appeal in which the court held that the offence extended to de facto partners, the offence was amended to expressly include de facto partners of step-parents, guardians or foster parents of the victim in a prescribed special care relationship category, and
- 2018: following a decision by the NSW Court of Criminal Appeal which highlighted a loophole in the way 'teacher' was defined in the provision, the offence was amended to expand the prescribed special care relationship category of student/teacher (see later at p.6).

Current offence of sexual intercourse with child aged 16 or 17 under special care

The current offence of sexual intercourse with a child aged 16 or 17 years under special care is contained in section 73 of the *Crimes Act 1900*.

To establish the offence has been committed, the prosecution must prove:

- a person had sexual intercourse
- with a child under his or her special care (meaning a prescribed special care relationship existed)
- who is aged 16 or 17.

Where the victim is 16 years the maximum penalty is 8 years imprisonment and where the victim is 17 years the maximum penalty is 4 years imprisonment. The difference in the maximum penalties available where a victim is 16 years and where a victim is 17 years reflects the idea that vulnerability decreases as the age of a child increases. The same approach is also taken (decreasing the maximum penalty as the age of the child increases) in other child sexual offences in NSW.

The offence is based on the presumption that a child aged 16 or 17 years cannot freely consent to sexual intercourse where a special care relationship exists. The general age of consent to sexual conduct in NSW is 16 years of age, and children below the age of 16 are presumed to be unable to consent to sexual activity. A person aged 16 or over is generally presumed to be able to engage in sexual intercourse freely and voluntarily. However, an exception exists where a child is aged 16 or 17 years old and there is a relationship of special care between the child and the other person.

The special care offence effectively increases the age of consent to 18 years in circumstances where one person is in a position of dominance or authority over another and may exploit their position. This means that the prosecution does not have to prove that the victim did not consent to the sexual activity. The purpose of the offence is to protect children aged 16 and 17 against such misuse of authority in particular relationships where there is a power imbalance between the parties. The offence does not require proof that the person in fact abused their authority. Instead, the existence of the special care relationship is sufficient. This is because there is a presumption that the vulnerabilities of children could be exploited by those in a position of authority over them. In such circumstances any consent may not be freely and voluntarily given.

The following exhaustive list of special care relationships is currently contained in section 73:

- the offender is the step-parent, guardian or foster parent of the victim or the de facto partner living with a parent, guardian or foster parent of the victim;
- the offender is a member of the teaching staff of the school at which the victim is a student;
- 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 (this would include persons who provide instruction to a victim through alternative education providers such as TAFE and private tutors);
- the offender is a custodial officer of an institution where the victim is an inmate; and
- the offender is a health professional and the victim is a patient of the health professional.

The category of ‘member of teaching staff/student’ includes all teachers at a school, and all other adults employed at a school who have responsibility for students or have students under their care at the school. It does not include volunteers at a school or teachers who are no longer employed at the student’s school.

The offence does not apply unless the special care relationship existed at the time the sexual intercourse occurred. Additionally, a person will not commit an offence if, at the time the offence was alleged to have been committed, the accused and the victim were married.

The offence does not cover other forms of sexual activity that do not amount to sexual intercourse. Under section 61H of the *Crimes Act 1900*, sexual intercourse is defined to mean:

- sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by any part of another person's body, or any object manipulated by another person,
- sexual connection occasioned by the introduction of any part of a person's penis into another person's mouth,
- cunnilingus, or
- the continuation of any of the above.

Recent convictions for special care offence

The special care offence was charged 137 times over the period January 2008 to December 2017, including instances in which multiple charges were brought against one person. An outcome of guilty was recorded in respect of 73 of those charges, an outcome of not guilty was recorded in respect of 39 charges, and the matter was withdrawn by the prosecution, dismissed due to mental illness and otherwise disposed of in respect of 25 charges.

15 people were convicted in respect of the 73 charges with an outcome of guilty. In these matters, the following sentences were imposed:

- 1 good behaviour bond
- 4 suspended sentences
- 10 sentences of imprisonment (average non-parole period of 19 months for offences under section 73(1) and 7 months for offences under section 73(2)).

Other legislative mechanisms to protect children from sexual exploitation by those in positions of authority

In NSW there are a number of legislative mechanisms which provide independent oversight if an allegation of a sexual offence or sexual misconduct is made against an employee in certain employment settings. This means there is a regulatory response available when a person is suspected of having a sexual relationship with a child under their care, regardless of the outcome of a criminal law response.

For example, the reportable conduct scheme under Part 3A of the *Ombudsman Act 1974* requires certain organisations to notify the Ombudsman of reportable allegations and convictions against employees (defined to include any employee of the agency, and any person hired to provide services to children including in the capacity of a volunteer) that arise in the course of an employee's work. Many of the special care relationships outlined in section 73 of the *Crimes Act 1900* are covered by the reportable conduct scheme, such as foster carers, teaching staff, custodial officers and health professionals.

After the notification is received, the employer and NSW Ombudsman work together in relation to the allegation, and the employer is usually required to carry out an investigation and make findings about the allegation. While a decision maker should exercise care when reaching a sustained finding in a matter involving a criminal allegation in the absence of a criminal conviction, it is not necessary that reportable conduct be sustained to the criminal standard (ie. beyond reasonable doubt).

If a sustained finding is made at the conclusion of an investigation, a notification must be made to the Office of the Children's Guardian (**OCG**). The OCG may conduct an assessment of a Working With Children Check (**WWCC**) clearance holder if the person has been the subject of a finding by a reporting body that the person engaging in sexual misconduct committed against, with or in the presence of a child, including grooming of a child. The OCG place a WWCC clearance holder on an interim bar from engaging in child-related work while the OCG conducts an assessment. The

OCG may also cancel the WWCC clearance if satisfied that the person poses a risk to the safety of children.

Where a person is charged with the special care offence, they become a disqualified person for the purposes of the *Child Protection (Working with Children) Act 2012,* pending the outcome of the proceedings. The OCG must cancel a WWCC clearance if they become aware that a person is a disqualified person.

Agencies that provide Out-Of-Home-Care (**OOHC**) services are also required to forward allegations of sexual misconduct to the OCG and Family and Community Services (**FACS**), which allows for the allegation to be dealt with through accreditation (OCG) and contracting (FACS) processes if appropriate. Service providers may also have their own codes of conduct which apply. There are also mechanisms available to protect children once a person has been convicted of a special care offence or other child sex offences. For example, the NSW Carers Register is a centralised database of persons who are authorised, or who apply for authorisations, to provide statutory or supported OOHC in NSW. It is managed by the OCG and acts as a common resource that all designated agencies must use to share information about carers and prospective carers. If an authorised carer was convicted of a special care offence or other child sex offence, that information could be used to de-authorise a carer and the de-authorisation would be entered into the NSW Carers Register. A carer who has been de-authorised by one organisation will not be able to present at another organisation without the two organisations discussing the person's suitability to be a carer.

Additionally, a court may order that a person be entered on the Child Protection Register if the person is convicted of a special care offence. An order that a person be entered on the Child Protect Register requires the registrable person to provide police with certain personal information, travel plans, and any changes to that information. The Child Protect Register helps to protect children from serious harm by providing a deterrent from re-offending, providing victims and their families with an increased sense of security, assisting police in monitoring registrable persons, and assisting in the early detection of offences by recidivist child sex offenders. The minimum period of registration for an adult offender is eight years.

3. NSW Government 2018 criminal law reforms

A Court of Criminal Appeal (**CCA**) case in December 2017 highlighted the narrow application of the special care offence and the way that it could fail to protect students from inappropriate conduct by school workers (see *R v PJ* [2017] NSWCCA 290, 1 December 2017). In response to concerns that the offence did not provide adequate protection to school students, the NSW Government committed to expanding the definition of this relationship.

In addition, the NSW Government has announced further amendments in a legislative package to strengthen child sexual abuse laws announced on 3 April 2018. The new laws will be introduced in Parliament before the end of the year.

Recent amendment to expand the teacher/student relationship

On 7 February 2018, the NSW Government introduced the Justice Legislation Amendment Bill 2018 (**the Bill**). The Bill passed Parliament on 7 March 2018, and commenced on assent on 21 March 2018.

The Bill expanded the definition of 'teacher' to close the loophole highlighted by the CCA case. 'Teacher' now covers:

(a) all teachers at a school, and
(b) all other adults employed at a school, and who have responsibility for students or have students under their care at the school

who have sexual intercourse with a 16 or 17 year old who is a student at the school. The amendment ensured that the offence applies whether or not the teacher is the student's direct classroom teacher at the time of the sexual intercourse.

The factual circumstances of the CCA case had highlighted the problem of the narrow application of the offence in schools. In that case, the prosecution of a PE teacher who had sexual intercourse with a Year 12 student was unsuccessful because the student was not a direct student of the teacher at the time, even though the teacher had taught the student in Years 8, 9 and 10 and still worked at the same school. This meant that if a teacher had previously taught a student and then began a sexual relationship with the student once they were 16 years old and not in the teacher's class, the conduct was not covered by the special care offence. It was also not clear whether the offence would apply if a person was not a classroom teacher but nevertheless has responsibility for students or has students under their care (for example, a principal).

The amendment made in March 2018 makes clear that all teachers and other adults employed at a school who have responsibility for students, or students under their care, cannot engage in sexual intercourse with students, and that the criminal law can respond when this occurs.

The amendment serves to emphasise that teachers have a special responsibility with respect to *all* students at the school at which they teach. Students are required to follow the directions and instruction of school workers, not only those of their classroom teachers. School workers are seen to be in a position of trust and authority which can be misused to manipulate students. The power imbalance can make students vulnerable to undue influence or pressure from school workers who seek to engage in an inappropriate sexual relationship. In such situations, any consent by the student may not be given freely and a student's inclination to follow the directions of school workers may be exploited.

The term 'care or authority' is not defined under the Act. However, the second reading speech to the 2018 amendments notes that the words are not intended to have any narrow, technical meaning; rather they are intended to capture all situations where the ordinary meaning of either word is applicable. The second reading speech also confirms that it will also not be necessary for the person to have students both under their care and under their authority. For example, a school worker who provides learning support and other services to students with disability has students under their care, although they may not be considered to supervise those students. The amendment does not cover adults employed by a school who do not have responsibility for students or have students under their care (for example, a groundskeeper). The amendment also does not affect alternative providers of education for 16 and 17 year old students (such as TAFE and private tutors), who are caught by a different category of relationship (established personal relationship in connection with instruction).

Future amendments to further strengthen the special care offence

The Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) released its Criminal Justice Report in August 2017. The report made 85 recommendations to improve the criminal justice response for victims of child sexual abuse.

On 3 April 2018, the NSW Government announced a comprehensive package of legislative reforms to child sexual abuse laws and a response to the Royal Commission's recommendations. The package takes up recommendations made by the Royal Commission and also includes reforms which arose in the context of a Child Sexual Offences Review undertaken by the Department of Justice in 2017, which was undertaken in response to the Joint Standing Committee report on the Sentencing of Child Sexual Assault Offenders (tabled 14 October 2014).

While the Royal Commission supported the existing NSW special care offence, which is fully aligned with the recommendations it made about such offences (see Appendix A), the NSW Government has committed to making it even stronger.

The package includes the introduction of a new special care offence and two additional amendments to strengthen aspects of the special care offence identified in the Child Sexual Offences Review:

- New criminal offence of sexual touching of a child aged 16 or 17 who is under special care
- Updating terminology by replacing the term 'foster parent' with 'authorised carer' in the special care offences

New offence of sexual touching within a special care relationship

The current special care offence applies where a person has sexual intercourse with a child aged 16 or 17 who is under special care. It does not cover non-penetrative sexual touching. The new offence will address this gap by criminalising any sexual touching in a special care relationship that is not sexual intercourse.

The new offence recognises that inappropriate conduct may occur in special care relationships that falls short of sexual intercourse but should nevertheless be criminalised.

The maximum penalty will be four years imprisonment where the victim is 16 years old and two years imprisonment where the victim is 17 years old.

Updating terminology to 'authorised carer'

In addition, the term 'foster parent' in the offence will be replaced with 'authorised carer' to achieve consistency with the language used in the *Children and Young Persons (Care and Protection) Act 1988.*

'Authorised carers' include:

- short-term and long-term carers
- respite and crisis emergency carers
- relative and kinship carers where the Minister holds parental responsibility or where the parent receives Family and Community Services' (**FACS**) support, and
- principal officers of agencies that provide OOHC.

Based on the CCA's broad interpretation of the term 'foster parent' (see *JAD v R* [2012] NSWCCA 73), the term 'authorised carer' is no broader than the existing terminology of 'foster parent'.

4. Specific issues raised in terms of reference

The terms of reference for the inquiry direct the Committee's attention to some specific aspects of the scope of the special care offence. The NSW Government provides the information below to assist the inquiry determining whether to make recommendations in relation to these matters.

Volunteers at schools

The special care offence does not currently cover a relationship between a student and a volunteer at their school. However, in some circumstances, volunteers in schools have contact with students and this may result in the volunteer having a relationship of authority over the student. For example:

- Volunteers providing personal care services to students with disabilities involving intimate contact with a student, including assisting a student with toileting, bathing or dressing;
- Volunteers providing mentoring services to students as a part of a formal mentoring program (although volunteers who provide mentoring services may be covered by the special care offence if they have established a personal relationship with the victim and the mentoring results in the volunteers providing instruction to the victim); and
- Volunteer scripture and religious educators (although volunteers may be covered by the special care offence if they have established a personal relationship with the victim and they are providing religious instruction to the victim).

Currently, all volunteers who have contact with students in NSW public schools are subject to workplace procedures for investigation, which are overseen by the NSW Ombudsman.

The Department of Education's *Working With Children Check Policy* defines volunteers in two ways:

- **Specified volunteers**, which includes those that provide personal care to children with disabilities (for example, toileting) - including parents; those providing mentoring services as part of a formal government or non-government agency program – including parents; and those working at the school who are not parents or close relatives of a child at the school
- **Volunteers**, which includes those doing unpaid volunteer work directly for the department; teacher education students (and similar) and those employed or engaged by a third party or the P&C at no cost to the department, including Special Religious Education Providers and providers of ethics classes.

School principals are required to apply WWCC requirements to both types of volunteer. Only after a person's WWCC has been verified, can that person commence volunteering work.

Parents and close relatives volunteering in their child's school are exempt from needing to provide a WWCC clearance, but are still required to provide 100 points of identification and complete a declaration which provides, among other things, that the person has not been refused a WWCC clearance or had a WWCC clearance cancelled, and that they have not been convicted of various offences, including sexual offences.

Youth workers and workers in youth residential care settings

Staff who work or volunteer with children in residential care settings, including youth refuges and homelessness services, are in a position of trust and authority over the children in such settings and services. These staff members are not authorised carers, health professionals or custodial officers, and are therefore not currently covered by the special care offence.

Children and young people who are under the power and authority of caseworkers or youth workers in residential care settings are particularly vulnerable to the power, authority and influence of those workers due to a number of factors, including psychological trauma sustained as a result of childhood abuse and neglect. Children and young people in these settings are more likely to have experienced a history of trauma, may have experienced placement disruption if they have been in OOHC (leading to a reduced social support network), and are highly unlikely to have the protection of a parent to mitigate against the heightened risk of manipulation and exploitation which may be experienced in those settings.

Children aged 16 and 17 may also reside in residential health care facilities, such as supported housing options provided by the Housing and Accommodation Support Initiative to children over the age of 16 with mental health problems, and residential care facilities provided by Alcohol and Other Drug services. Although the level of control and influence over tenants in these facilities is arguably more limited that in other youth residential care settings, young people may still be vulnerable to manipulation and pressure in these tenancies.

There are several regulatory frameworks in place to protect children in residential care settings. Caseworkers, youth workers, volunteers and contractors must hold a WWCC clearance, and caseworkers and youth workers subject to the requirements of the NSW Ombudsman's Reportable Conduct Scheme. Residential care providers are required to report allegations of sexual misconduct to OCG. A review of the allegations register since commencement indicates that the OCG has received at least two allegations that would appear to meet the criteria for the special care offence, if such relationships were covered.

Amendments to the incest offence or new category of adoptive parent/adopted child in special care offences

The special care offence does not currently include a relationship category of adoptive parent/adopted child. The offence covers step-parents, guardians and foster parents, and the de facto partners of parents, guardians and foster carers, but does not include biological parents or adoptive parents.

It is unclear whether or not the existing incest offence in section 78A of the *Crimes Act 1900* would apply to adoptive parents/adopted children, and there is no existing NSW case law to clarify the point. The offence in section 78A covers sexual intercourse between close family members where the child is aged 16 or over. 'Close family member' is defined in section 78A(2) as 'a parent, son, daughter, sibling (including half-brother or half-sister), grandparent or grandchild, being such a family member from birth'. Section 95 of the *Adoption Act 2000* provides that an 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. Further, 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, except for the purposes of any NSW law relating to a sexual offence for which the relationship between persons is relevant. Despite this, there is a question as to whether the stipulation that the person must be a close family member 'from birth' means the offence does not cover adoptive parents.

To ensure adopted children are protected in the same way as other children, and that there is a criminal law response where an adoptive parent takes advantage of an adopted child and has sexual intercourse with the child, the following two options are available:

1. amend the incest offence to explicitly cover adoptive relationships, or
2. amend the special care offence to include a relationship category of adoptive parent/adopted child.

Any amendment would not capture other adoptive relationships, such as those between adoptive siblings.

Amending the incest offence

If the incest offence were amended, sexual intercourse between an adoptive parent and adopted child would be criminalised regardless of the age of the child (that is, the offence would continue to apply once the adopted child turned 18) and the conduct of both parties would be criminalised. The maximum penalty under the incest offence is 8 years imprisonment.

The advantage of amending the incest offence is that it would reinforce the message that adoptive relationships are equal to biological relationships. Adoption can be distinguished from other non-biological guardian relationships like a guardian or authorised carer as, unlike other relationships, adoption is a permanent legal relationship that continues after a child turns 18. Adoptive parents are the legal parents of an adopted child, and are named on the child's birth certificate as the child's parents.

However, amending the incest offence would involve broadening the existing policy purpose of the offence, namely preventing reproduction between close blood relatives, to include preventing conduct that threatens the security and stability of the family unit and safeguarding children and

vulnerable young people. This change could criminalise the conduct of young people. An adopted child aged 16 or 17, who may be vulnerable to coercion or abuse of power, would be guilty of the offence as well as their adoptive parent and could be subject to a significant penalty. Also, where a child in OOHC is adopted by their carer, the incest offence would apply (and the child would be criminally liable) whereas the special care offence would have applied if the adoption had not taken place (and the child would not be criminally liable).

The Attorney General's sanction is also required before prosecution of an incest offence can commence. This may provide an additional level of protection against the commencement of prosecution of an incest offence against a child aged 16 or 17 years. There may also be other ways to mitigate the risk under this option of the child being criminalised. For example, the incest offence could be modified so that a child aged 16 to 17 will not be liable for an offence under that section, or by creating separate incest offences that apply to different types of conduct. In Victoria, for example, there is a specific offence of sexual penetration of a child or lineal descendant which only applies to the conduct of a parent.[1] However, amending the existing offence in this way may have the unintended consequences, including de-criminalising certain incest behaviour, for example sexual relationships between siblings.

Amending the special care offence

The advantage of amending the special care offence is that the conduct of the person under authority (the adopted child) would not be criminalised. The special care offence recognises that children aged 16 and 17 cannot freely consent to sexual intercourse with persons who have authority over them. This policy rationale may also apply to adoptive parents in the same way as to other non-biological relationships, and it may be preferable for the treatment of adoptive parents to be consistent with other categories of non-biological guardians that are already covered by the special care offence.

Taking this approach would preserve the traditional policy purpose of the incest offence. However, it would mean that adoptive relationships are not recognised in the criminal law as exact equivalents of biological parent-child relationships, and it would mean that it was not an offence for an adoptive parent to have sexual intercourse with their child once their child turns 18. The special care offences are punishable by up to 8 years imprisonment in relation to children aged between 16 and 17 years, and 4 years imprisonment for children aged between 17 and 18 years.

The new offence of sexual touching within a special care relationship (to be introduced in 2018) will criminalise sexual touching of a child aged 16 or 17 who is under the offender's special care. This offence will supplement the existing special care offence, and ensure that sexual touching (as well as sexual intercourse) with a vulnerable 16 or 17 year old is criminalised. There is currently no equivalent offence to supplement the incest offence, to criminalise sexual touching between close family members. Depending on the approach taken to including adoptive relationships in the special care offence for the purposes of sexual intercourse, these relationships (and the biological relationships of parent/child and grandparent/grandchild) could also be recognised in the new offence of sexual touching within a special care relationship.

Application of the offence where the special care relationship is no longer in effect

The CCA has recently confirmed that conduct is only covered by the special care offence where the special care relationship exists at the time of the sexual intercourse (*R v PJ* [2017] NSWCCA 290).

The existing special care offence and new offence do not cover circumstances where a relationship of special care previously existed but ceased prior to the sexual activity. For example, the offences currently do not apply in the following scenarios:

[1] *Crimes Act 1958* (Vic), s 50C.

- a teacher begins a sexual relationship with a student who has moved to a different school who was previously taught directly by the teacher at their school;
- a foster parent has sexual intercourse with a 16 or 17 year old child for whom they were previously a foster carer;
- the de facto partner of a child's parent may end their relationship with the parent, and subsequently initiate a sexual relationship with the child; or
- a general practitioner refers a 16 or 17 year old patient to another doctor, and then initiates a sexual relationship with the child.

Additionally, if the special care offence were extended to youth workers or workers in residential care settings, the special care offence would not extend to a scenario where a worker inappropriately maintains contact with young people outside of the work setting and subsequently establishes a sexual relationship with the young person when either the young person or the worker exited the service.

Once a special care relationship is established, a child may remain vulnerable to the undue influence of the person who has been in a position of authority over them, even after the relationship is extinguished. It is possible that significant grooming may occur while the relationship is in place that may influence the child at a later time, and a significant power imbalance may remain due to the nature of the previous relationship. It is not difficult to envisage how this may occur in the scenarios described above.

The *Child Protection (Working with Children) Act 2012,* provides that the OCG may conduct a risk assessment of a holder of a WWCC clearance if they are charged with a special care offence, or have been the subject of a finding by a reporting body that the person engaging in sexual misconduct committed against, with or in the presence of a child, including grooming of a child. Where the OCG commences an assessment of a WWCC clearance holder, the OCG may place an interim bar on the holder from engaging in child-related work. The OCG must cancel the WWCC clearance if satisfied that the person poses a risk to the safety of children. This means that the a WWCC clearance may be cancelled, or a person may be placed on an interim bar which prevents them from engaging in child-related work, even if the subject child no longer has a relationship with the holder of the WWCC clearance.

If the offence were extended to apply to situations in which a sexual relationship commences after the special care relationship ceases, consideration would need to be given to making the offence time limited. To avoid confusion, the time limit imposed would need to take into consideration the current practices within certain industries in relation to the prohibition on relationships between employees and young people who have exited their service.

Due to the breadth of the special care relationships, it is possible that removing the requirement for a temporal connection between the special care relationship and the sexual activity may increase the risk of the offence criminalising innocent and/or peer appropriate relationships. This is a particular risk in the category of established personal relationship in connection with the provision of instruction, and where the similar age defence does not apply but the victim and accused are nevertheless close in age. For example, the offence would apply where a 20 year old sports coach begins a relationship with a 17 year old team member after the sports season ends. It would also apply where a 19 year old and 16 year old who attend the same church begin a relationship several years after the 19 year old led a youth group or camp attended by the 16 year old. In these examples, it is unlikely that any power imbalance would remain as a result of the previous special care relationship.

Director of Public Prosecutions sanction of prosecutions under special care offence

Some offences require the approval of the Director of Public Prosecutions (**DPP**) before a prosecution is commenced. Examples include the intimate image offences where the accused in under 16 (*Crimes Act 1900* Division 15C) and the offence of persistent child sexual abuse of a child (*Crimes Act 1900* section 66EA). The DPP is able to delegate the power to Deputy Directors where appropriate.

Offences can also require the Attorney General's approval, although in practice this power is often delegated to the DPP. Examples include having sexual intercourse with a person who has a cognitive impairment where the accused is responsible for the care of that person (*Crimes Act 1900* section 66F), and concealing a serious indictable offence where the accused formed their knowledge or belief about the commission of the offence in a professional capacity (*Crimes Act 1900* section 316).

The effect of requiring the DPP's approval is that the NSW Police Force must apply to the DPP for consent to lay charges. This ensures the charges are thoroughly scrutinised and that charges are laid in accordance with the public interest where the offence type involves particular complexities. The NSW Police Force is required to prepare a full brief of evidence and submit this to the DPP. It can take up to six months for a decision to be made by the DPP, although on average the process takes three months and urgent applications can be determined in 28 days. While the process can be lengthy, it is important to note that a corresponding regulatory process will be underway if the accused works with children.

Appendix A: Recommendations made by Royal Commission into Institutional Responses to Child Sexual Abuse

In the August 2017 Criminal Justice Report, the Royal Commission supported the NSW special care offence as it does not require the prosecution to prove that the defendant exploited their position of authority.

The Royal Commission made three recommendations on 'position of authority' offences:

- **Recommendation 27:** State and territory governments should review any position of authority offences applying in circumstances where the victim is 16 or 17 years of age and the offender is in a position of authority (however described) in relation to the victim. If the offences require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), states and territories should introduce legislation to amend the offences so that the existence of the relationship is sufficient.
- **Recommendation 28:** State and territory governments should review any provisions allowing consent to be negatived in the event of sexual contact between a victim of 16 or 17 years of age and an offender who is in a position of authority (however described) in relation to the victim. If the provisions require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), state and territory governments should introduce legislation to amend the provisions so that the existence of the relationship is sufficient.
- **Recommendation 29:** If there is a concern that one or more categories of persons in a position of authority (however described) may be too broad and may catch sexual contact which should not be criminalised when it is engaged in by such persons with children above the age of consent, state and territory governments could consider introducing legislation to establish defences such as a similar-age consent defence.

The NSW Government will respond to the Final Report of the Royal Commission in June 2018. However, the three recommendations of the Royal Commission are already reflected in the NSW special care offence. The NSW special care offence does not require the prosecution to prove that the accused abused their authority and does not make consent a defence.

There was no concern in NSW that any category of relationship was too broad. The Royal Commission explicitly supported the special care relationship categories in the NSW offence.