Submission No 8

INQUIRY INTO ADEQUACY AND SCOPE OF SPECIAL CARE OFFENCES

Organisation: Federation of Parents and Citizens Association of New South Wales

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Inquiry into the Adequacy and Scope of Special Care Offences

Submission to the NSW Standing Committee on Law and Justice

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Introduction

Federation of Parents and Citizens Associations of New South Wales (P&C Federation) is thankful to the Standing Committee on Law and Justice for this opportunity to contribute feedback into this inquiry into the adequacy and scope of special care offences. P&C Federation supports the position of individual educational and developmental needs met by a range of differential services expressed through appropriate and well-planned curricula, programs and environments conducted by sensitive and well-trained personnel in conjunction with parents[1] and families.

The core belief of P&C Federation is that the education of our children and youth is the most fundamental means of ensuring individual and collective success and, as a result, our greatest national resource.

P&C Federation's response to this inquiry is guided by our support for prohibitions on people having sexual intercourse with people aged 16 and 17 who are under their special care. Although 16 and 17-year old young people are over the age of consent, the power imbalances between them and a person who has special care over them could compromise the capacity of a 16 or 17-year old to freely consent to sexual encounters,[2] and such sexual encounters could amount to a breach of trust or authority. Our response is mostly centred on the terms of reference relevant to students in public schools.

Terms of Reference

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, including:

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

P&C Federation believes some of section 73 of the *Crimes Act 1900 No 40* (the Act) could legitimately be extended in scope to include more volunteers in schools. This could be done similarly to a recent amendment of the Act which now prohibits teachers, School Principals/Deputy Principals and school employees who have students under their care or authority from having sexual intercourse with any 16 or 17-year old student at the school. It seems reasonable to infer that the amended section 73(6)(c) of the Act applies to all school employees, especially as the NSW Department of Education's *Code of Conduct* (section 22) implies that all school employees have a duty of care for students at the school. In contrast, the only part of the Act that may apply to school volunteers is section 73(3)(c), which to be punishable requires "*an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim*". We believe it is justifiable to instead apply such volunteers to the same standards as teaching staff (i.e. to prohibit volunteers providing instruction in schools from sexual acts upon 16-17-year old students at the school).

However, this would leave some legislative ambiguity over school volunteers who do not provide instruction in schools, such as volunteer school uniform shop or canteen workers. We would suggest any amendment to broaden the Act's scope to school volunteer workers should entail a more precise

[1] "Parent" refers to anyone with legal care of a child, such as a parent, carer or legal guardian

[2] Rationale outlined in Briefing Paper No. 21/1997 by Rachel Simpson: *The age of consent: an update*. October 1999

definition of “special care”, to remove the lack of clarity over whether or not “special care” applies to volunteers in schools only when they provide instruction to students.

To further protect young people, we also strongly recommend that the scope of special care offences be broadened to include non-penetrative sexual acts, as well as sexual intercourse (as outlined further below under “Any other related matter”).

whether the offences should apply where the school worker is a recent ex-student of the school

We see no reason to exempt recent ex-students who become school workers from the scope of the Act.

(ii) whether the offences should apply where the school worker no longer works at the student’s school

This submission is guided by our belief that the power imbalances between a person aged 16 or 17 and a person with care or authority over them are such that sexual encounters between them lack meaningful consent. It can be reasonably argued that power imbalances exist between any worker in the school sector and any 16 or 17-year old school student, regardless of whether the worker and student attend the same school. We therefore recommend that the concept of special care under section 73(3) of the Act be extended to situations where the offender is a school worker (including volunteers) and the victim is a 16 or 17-year old school student, regardless of whether the offender and victim attend the same school. As stated above and outlined further below, such special care offences should apply to both penetrative and non-penetrative sexual acts.

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

In situations where a special care relationship is no longer in effect, it is difficult to see that a power imbalance exists. However, this leaves open the possibility that while a special care relationship existed, the person with special care used their position to procure a future sexual relationship, such as through engaging in sexually explicit communication, or showing the person under their special care sexually explicit material. We therefore urge the Committee consider applying the grooming offences under section 66EB of the Act to special care situations.

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

The NSW Department of Justice has noted that there is some legislative ambiguity when it comes to adoptive parents engaging in sexual relations with their adoptive children: while it does not come under the scope of special care, it is also not explicitly covered by the incest offence (section 78A of the Act).[3] We strongly urge that the Act be amended to remove this ambiguity, by bringing such sexual relations under the definition of either incest or special care.

[3] NSW Department of Justice. 2017. *Discussion Paper: Child Sexual Offences Review*.

Any other related matter

Section 73 of the Act applies only to sexual intercourse, defined essentially as penetrative sexual acts. In contrast, special care offences in other States/Territories apply also to non-penetrative sexual acts, such as fondling and other indecent acts.[4] This legislative gap in New South Wales creates the troubling possibility that young people in special care relationships will not be protected from some abuses of trust or authority. We strongly recommend extending the scope of the Act to include non-penetrative sexual acts, such as sexual touching, or compelling or encouraging sexual touching. We also recommend following Western Australia's *Criminal Code Act Compilation Act 1913* (section 322(6)) in prohibiting indecent recordings of a 16 or 17-year old by a person who has special care over them.

[4] See *Crimes Act 1958* (VIC) section 49E; *Criminal Code Act Compilation Act 1913* (WA) section 322; *Criminal Code Act 1983* (NT) section 128; *Crimes Act 1900* (ACT) section 61A