Submission
No 15

INQUIRY INTO ADEQUACY AND SCOPE OF SPECIAL CARE OFFENCES

Organisation: Office of the Director of Public Prosecutions NSW

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OUR REFERENCE

DIRECTOR'S CHAMBERS

ODPP
New South Wales

YOUR REFERENCE

DATE
6 June, 2018

Janelle Moore
Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

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

Dear Ms Moore

Inquiry into the adequacy and scope of special care offences

Thank you for the opportunity to contribute to the NSW Legislative Council's Standing Committee on Law and Justice's special care offences enquiry.

My comments, addressing the Terms of Reference, are 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, including:

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

Volunteers who provide religious, sporting, musical or other instruction to their victim within the confines of a school (or outside) and have an established personal relationship with the victim in connection with the instruction they provide are already captured by sub-section 3(c) of section 73.

The list of instruction types in sub-section (3)(c) is non-exhaustive due to the reference to "other instruction". Therefore, volunteers who provide, for example, regular assistance with schoolwork, would also be covered if they have exploited an established personal relationship connected to the instruction they provide.

Volunteers who do not instruct children, such as those who volunteer for canteen duty will not be caught by the section. These volunteers do not exercise the requisite authority or control over children and therefore lack the resulting capacity to exploit the power that comes with such authority or control.

Given the wide variety of school volunteers and the fact that those who are in positions of power are already captured, there is no necessity for volunteers to be specifically referred to in section 73.

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

A recent ex-student who is a teacher at the school or has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction could commit an offence pursuant to sub-section 3(b) or (c) of section 73.

Where a recent ex-student returns to a school, whether as a paid employee or as a volunteer, and forms a sexual relationship with a 16 or 17 year old student there may be no exploitation borne of authority or control. In these circumstances, it may not be appropriate for a charge to be laid pursuant to section 73. This might particularly be so where there is a personal relationship that pre-dated the provision of that instruction,

The question of whether charges are appropriate will depend on the circumstances of the particular case. Sanction by me before charges are laid is appropriate in any case where there is a real concern that there is a consensual relationship, between a young adult (including an ex-student) who are close in age.

The parameters of such sanction would need to be carefully considered.

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

If a consensual sexual relationship occurs between a 16 or 17-year-old student and a person who previously worked at their school section 73 does not have a role to play. The student is no longer under the person's special care and there is no corresponding misuse of authority, or exertion of undue influence as envisaged by the section.

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

As it is currently framed, section 73 requires the present existence of a defined relationship at the time of the prohibited sexual intercourse. Sub-sections (3)(a), (b), (d) and (e) express this by the use of the word "is". The Court of Criminal Appeal in *R v PJ [2017] NSWCCA 290* held that this present existence requirement extended to sub-section (c) also.

The amendment to the section made in March of this year, as a result of the decision in *R v PJ,* removed the requirement that the victim be a pupil of the offender and also expanded the definition of "teacher".

The right balance has now been struck and there is no need for further extension of the section's reach. The section criminalises otherwise consensual sexual intercourse. Extension to situations where there is no longer a special care relationship and therefore no authority to be exploited or abused, would be a significant and unwarranted departure from the policy underlying the section.

(c) Whether youth workers 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

Section 73 should be extended to youth workers in residential care settings. Such workers have care of some of the most vulnerable, disadvantaged, needy and traumatised 16 and 17 year old children. The youth workers occupy positions of trust, influence, authority and power over these children.

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

Section 73 should be extended to adoptive parents and their children, because adoptive parents occupy a position of trust, authority and power in relation to their children.

(e) Whether any additional safeguards, including but not limited to Director of Public Prosecutions sanction of prosecutions, are required in any of the circumstances in paragraphs (a) – (c) above

Yes, see the answer to (a)(ii) above.

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

Including adoptive relationships in section 78A would be a move away from its present sole focus on biological connections. There are arguments for including adoptive parents because they have the same legal rights in relation to their children as biological parents, many adoptions occur when the child is very young, and the breach of trust committed by adoptive parents is no less damaging for a child than if the biological connection was present.

Some other jurisdictions, such a Victoria, include limited non-blood relationships in their incest laws.

It is not presently appropriate to include adoptive relationships in section 78A. If section 78A is to be amended, it requires a complete review to consider whether the scope of relationships included in the definition of "close family member" should be expanded.

Yours faithfully

Lloyd Babb SC
<u>Director of Public Prosecutions</u>