REPORT ON PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO THE ADEQUACY AND SCOPE OF SPECIAL CARE OFFENCES

CORRECTED

At Jubilee Room, Parliament House, Sydney, on Wednesday 27 June 2018

The Committee met at 9.00 a.m.

PRESENT

Ms Natalie Ward (Chair)

The Hon. David Clarke
The Hon. Trevor Khan
The Hon. Daniel Mookhey
The Hon. Lynda Voltz

CORRECTED

The CHAIR: Welcome to the first hearing of the Standing Committee on Law and Justice inquiry into the adequacy and scope of special care offences. The inquiry is examining whether the special care relationships covered under the Crimes Act 1900 should be further broadened to include other types of school workers not already covered under the Act, youth workers and adoptive parents. The inquiry is also considering whether any additional safeguards are required in the application of the special care offence and whether the incest offence under the Act should be expanded to include adoptive relationships.

Before I commence I acknowledge the Gadigal people, who are the traditional custodians of this land, and I pay respect on behalf of the Committee and those present to elders past and present of the Eora nation and expand that respect to other Aboriginals present today. Today we will hear from representatives of the NSW Department of Justice, the Office of the Director of Public Prosecutions and the Office of the Advocate for Children and Young People. We will also hear from organisations from the legal and education sectors.

Today's hearing is open to the public and is being broadcast live via the Parliament's website. A transcript of today's hearing will be placed on the Committee's website when it becomes available. In accordance with the broadcasting guidelines, while members of the media may film or record Committee members and witnesses, people in the public gallery should not be the primary focus of filming or photography. I would also remind media representatives—and I do not think there are any present—that they must take responsibility for what they publish about the Committee's proceedings.

It is important to remember that parliamentary privilege does not apply to what witnesses may say outside of their evidence at the hearing, so I urge witnesses to be careful about any comments they may make to the media or to others after they complete their evidence, as such comments would not be protected by parliamentary privilege if another person decided to take an action for defamation. The guidelines for the broadcast of proceedings are available from the secretariat staff. There may be some questions that a witness could only answer if they had more time or with certain documents to hand. In these circumstances witnesses are advised that they can take a question on notice and provide an answer within 21 days.

Witnesses are advised that any messages should be delivered to Committee members through the Committee staff. To aid the audibility of this hearing, I remind Committee members and witnesses to speak into the microphones. In addition, several seats have been reserved near the loudspeakers for persons in the public gallery who have hearing difficulties. Finally, I remind everybody to turn their mobile phones to silent for the duration of the hearing.

KATE CONNORS, Acting Executive Director, Policy and Reform, Department of Justice, affirmed and examined

MARK FOLLETT, Director, Crime Policy, Policy and Reform, Department of Justice, affirmed and examined

The CHAIR: Would you like to commence by making a short statement?

Ms CONNORS: We will not be making a short statement except to say that we are going to be speaking today to the New South Wales Government submission, which does have some mainly Justice-related material but it also has material from Family and Community Services [FACS] and Education. We can speak to what is in the submission, but if there are more in-depth questions for FACS and Education then we will have to direct them to them.

The CHAIR: Understandably.

The Hon. TREVOR KHAN: You do not want to say anything?

Ms CONNORS: No, we probably do not need to make an opening statement. Our submission was factual about the existing special care offences and then some of the recent commitments that we have done to law reform and the issues in your terms of reference, so we are very happy to start by taking questions, unless there is anything that you want us to lead with.

The CHAIR: Thank you.

The Hon. LYNDA VOLTZ: I will start with section 73. Was there any debate originally around why adoptive parents were not included in that Act when it was introduced?

Ms CONNORS: No. We did look for that in the second reading speech but we could not find any.

The Hon. LYNDA VOLTZ: Do you suspect it was possibly just an oversight?

Ms CONNORS: Yes.

Mr FOLLETT: Possibly.

Ms CONNORS: Possibly.

The Hon. LYNDA VOLTZ: Because given the list there seems no logical reason not to include adoptive parents—given that foster parents are in there and the Government's shift from foster parent to adoptive is part of the process.

Ms CONNORS: Yes. We could not find some of that original reasoning. It may be that it was included in the incest offence or it may have been an omission.

The Hon. LYNDA VOLTZ: But section 78A of course goes directly to the birth relationship. The reality is that that is why foster parents would not be included and probably the reason adoptive parents would not be included.

Mr FOLLETT: There is no settled case law on that, but yes, that is probably right. Justice Brereton's submission, which the Committee has, sets out the legal position really articulately as well so I think that is the likely conclusion but it is by no means certain.

The Hon. LYNDA VOLTZ: You would perceive that that piece of legislation will present a problem, given the diversity of communities and families now?

Mr FOLLETT: The incest?

The Hon. LYNDA VOLTZ: Yes?

Mr FOLLETT: Do you mean if it was to be—

The Hon. LYNDA VOLTZ: If it was to be amended to move away from the birth relationship?

Mr FOLLETT: One of the complexities around the incest offence, if it was to capture adoptive parents, is that it criminalises both parties whereas if the conduct you are trying to criminalise is in relation to the power imbalance, which special care goes to, the incest offence would really criminalise both parties in that adoptive relationship so it would create some complexities.

The Hon. LYNDA VOLTZ: Indeed section 73 really covers that power imbalance?

Ms CONNORS: That is right.

The Hon. LYNDA VOLTZ: Incest is a part of the law for a different reason.

Ms CONNORS: That is right. They go to different issues really at the heart of why those offences exist. There is a gap at the moment with adoptive children in special care and the two go to different purposes.

The Hon. LYNDA VOLTZ: Yes, completely different. Within your submission you included volunteer supervised personal care services particularly to children with disabilities. I would have thought they would have been captured by section 73 in terms of having children under their care as opposed to, say, a bricklayer who was working at a school.

Mr FOLLETT: I will double-check. Do you mean the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction? That is kind of a catch-all in section 73.

The Hon. LYNDA VOLTZ: I would have thought that those people would be captured by section 73 anyway because section 73 states that the offender has established a personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim. So would they be captured in there because I would have thought they have an established relationship with the victim?

The Hon. TREVOR KHAN: Well, it might be an established relationship but you have to read the second part in connection with the provision of religious, sporting, musical or other instruction. Care arrangement is not an instructional relationship.

The Hon. LYNDA VOLTZ: What I am trying to get to is: If you start to narrow it down, how do you differentiate between someone who is at a school providing a service? I am just surprised that a child who has a disability who has someone who has a care relationship is not already somehow captured by section 73?

Ms CONNORS: I suppose that is right—correct me if I am wrong—but there is no case law about what other instruction or what that might mean. The submission of the Director of Public Prosecutions suggests that does not need to be expanded.

The Hon. LYNDA VOLTZ: Is it captured by another Act such as the Health Act? Obviously in a hospital setting or some other setting with medical services, aged care facilities, disability homes or that kind of thing there would be relationships that cover these. Is it possible that it is captured by another Act or should be captured by another Act?

Mr FOLLETT: There are a number of other regulatory regimes that are relevant in this conversation and codes of conduct in employment relationships and those types of relationships that you might be referring to in terms of the health and care relationships. There are certainly guidelines and regulatory regimes around those relationships.

The Hon. TREVOR KHAN: That do not carry eight or more years.

Ms CONNORS: Yes.

Mr FOLLETT: There is no criminalisation of them.

The CHAIR: I was going to point to page 8 of your submission, which covers that and deals with volunteers at the school. It says they are covered by the Working With Children Check and the Ombudsman's regime but rightly they are not; they are exempt.

The Hon. LYNDA VOLTZ: I know they are exempt from this Act but, for example, health workers in a health situation, and the difference between patient transport and the transfer of children with disabilities. I would assume there would be protocols around that?

Ms CONNORS: Yes, there would be regulatory coverage of all of those kinds of things but not a criminal offence.

The CHAIR: That is the Ombudsman relationship, with the specified volunteers, including unpaid or those providing services, including personal care to children with disabilities.

Mr FOLLETT: It is a broad one.

The Hon. LYNDA VOLTZ: That is the bit I was looking at.

Mr FOLLETT: It could be very circumstantial in terms of the relationship so the section 73 provision of instruction in relation to sporting, et cetera, is rather circumstantial in terms of its relationship in that context and whether you are providing instruction.

The Hon. LYNDA VOLTZ: As a coach of an under-13 girls team you do not often get to provide instruction because they do not listen, but that is another issue. That has always been problematic because the Working With Children Check as well does not necessarily cover everybody. If you actually have a relationship with anybody in the team, cousin or grandfather, at the moment it does not require you to have a Working With Children Check. I know Football NSW now requires it of everybody who plays, but that certainly would not be replicated in other sports. I am not sure whether there is a protocol with schools. I assume schools would have anybody who is on the school site to have a Working With Children Check, regardless of whether the children were playing.

Ms CONNORS: Yes, I think that is right.

The Hon. TREVOR KHAN: If you go to page 5 of the submission, you identify 15 people have been convicted. Are you able to give us some details as to the nature of the relationship of those 15 with the victim?

Mr FOLLETT: Unfortunately, no. We inquired into that, to try and see whether those statistics in terms of the relationship are recorded. We are unable to determine that. We can determine the amount of charges, but not the particular—

Ms CONNORS: It is not recorded on the justice—

The Hon. TREVOR KHAN: I suppose that is right. They are just recorded by way of sentence category.

Mr FOLLETT: That is right.

Ms CONNORS: That is right.

The Hon. TREVOR KHAN: The next question is the definition of "foster parent". What is a foster parent?

Mr FOLLETT: The new bill that has just gone through—

The Hon. TREVOR KHAN: Which I should have read, I suppose!

The Hon. DANIEL MOOKHEY: It is not required when you support the law.

The Hon. TREVOR KHAN: Sometimes it is. Supporting and agreeing are two different things.

Mr FOLLETT: The new terminology is "authorised carer".

The Hon. TREVOR KHAN: So it covers more than—

Ms CONNORS: It covers short-term and long-term carers, respite, emergency, crisis, relative and kinship carers, and principal officers of agencies that supply that.

The Hon. TREVOR KHAN: Right. So it is quite a wide definition.

Ms CONNORS: Yes.

The Hon. TREVOR KHAN: I just have one further question at this stage. If we are going to recommend the widening of the categories, the question is: why? There has to be, in a sense, a balance between a moral distaste for a course of conduct and the necessity of criminalising behaviour. That seems to me to be the test on so much. If you get involved in an inquiry like this the automatic reaction is to say, "Yes, bung in another law to criminalise something else." It runs contrary to some other activities—for instance, the lowering of the age of consent. We have not, for instance, criminalised sexual contact between, say, a 16-year-old and an employer, however one might think, in the current circumstance, that the conduct might be outside the moral standard. How do we differentiate between moral opprobrium and what is necessary to criminalise? In a sense, that goes back to: what problem are we trying to solve? Do you know? Do we have a problem that we are trying to solve?

Mr FOLLETT: At its core it is the power imbalance. The age of consent in New South Wales is 16, so the law considers that you are freely able to give consent at 16 and above, but there are particular relationships where that consent is not considered to be free from the power imbalance. In terms of your question about the problem that we are trying to solve, I think it is in identifying those relationships that are so inherently flawed in terms of a power imbalance that consent could not possibly be free. In my view that is a difficult thing to determine. One of the royal commission recommendations was that you should not have to establish the power imbalance to prove the offence. It is almost—it is not this but it is almost—a strict liability offence in terms of the relationship exists, the sexual intercourse occurred and the offence is therefore proven. I think the task is to identify the relationships that exist in society where someone is exercising such a powerful influence over a 16- or 17-year-old that they could not freely consent.

The Hon. TREVOR KHAN: Let us go to a particular circumstance. We have a 16- or 17-year-old and a teacher who used to teach the student and now does not. I am not expressing a concluded view, I am just trying to work it through. Where is the power imbalance if there is not a direct teacher-student relationship at the point of time of the intercourse?

The CHAIR: That is the temporal question.

Ms CONNORS: Yes, that is right.

The Hon. TREVOR KHAN: Yes.

Ms CONNORS: I think you can see in the submissions that some of the submitters have said that that exists because there was a power imbalance. Therefore, at some later point that is always maintained. I suppose the idea is that respect for a teacher is maintained even though they are no longer the teacher at your school, or something like that. Others have said that it has to have that temporal relationship; otherwise we are impinging on people's freedom to have relationships. The authority is a temporal issue.

The Hon. TREVOR KHAN: I must say that I find it creepy, but creepy is different from—

Ms CONNORS: That is exactly the issue, isn't it? Whether it is a relationship people think is a good thing to have is different from whether it is something that should be criminalised.

The Hon. TREVOR KHAN: You do not have an answer in that sense.

Ms CONNORS: I think we will be very much looking forward to the Committee's recommendation.

The CHAIR: Did that not arise from the question of grooming at the time of the relationship?

The Hon. TREVOR KHAN: But that is an offence.

The CHAIR: Correct. But could that give rise to the circumstance in which later on there is that proclivity—having arisen from the grooming originally, however long ago—to the relationship, which could then extend into abuse: a criminal act?

Mr FOLLETT: That is right. The predatory behaviour that is sought to be criminalised—the grooming offence—is very relevant in that context, albeit the grooming offence applies to victims under 16. It is entirely possible that grooming occurs prior to a victim reaching the age of 16.

The CHAIR: That was very often the case in sexual abuse matters, but it is a different category.

The Hon. DANIEL MOOKHEY: I would like to ask a question following the Hon. Trevor Khan's line of questioning. In any of the case law is there any concluded view as to how the court will decide when a special care relationship has ended?

Mr FOLLETT: Has ended?

The Hon. DANIEL MOOKHEY: Yes. The design of the offence is predicated on a special care relationship, which obviously means that the point of commencement and the point of termination where you have escaped, therefore, the criminal law, at least in the way the offence is designed. When we are looking at the whole question of temporality there are two dimensions—when it starts and when it ends. Is there any guidance in respect of the existing categories of relationship that we can shed light on? I feel that the ex-student aspect of this would be the hardest part to design for. I understand the argument about the teacher, but there is the whole idea of, "I was an 18-year-old and I was in the athletics team, I graduated and came back the year after. I was in a relationship with a person before." How does that work? Incidentally, when that ends, what exactly is my liability or prohibition?

Mr FOLLETT: To answer the case law question, I am not sure. I am not sure that that is the court's task at the moment. I think the nexus has to be between the sexual intercourse and establishing that there was a special care relationship at the time of sexual intercourse currently. I do not think the prosecution would need to establish when the special care relationship ended in the current framing of the provisions.

The Hon. DANIEL MOOKHEY: But a defence team would.

Mr FOLLETT: They could—absolutely—but if the sexual intercourse occurred—

The Hon. DANIEL MOOKHEY: Yes, I understand that.

The Hon. TREVOR KHAN: Again we go on to the power relationship—not in this context but when the amendments were being put through, the question became: should the members of staff of a school, for

example the groundsman or groundswoman, or the cook, if it was a boarding school or the like, be included within the terms?

Mr FOLLETT: I think our submission—I cannot remember exactly where—goes to that point. It talks about a gardener at the school. I do not think the intent is to capture someone who works at the school and so is around children but not exercising that direct influence that would impair their judgement.

The Hon. TREVOR KHAN: Perish the thought. But if you are a teacher at the school, but had no teaching connection with the student, where is the power imbalance there? Obviously, the Parliament has decided that they should be included. I understand, in terms of the case law or factual circumstances, why we did that, but the power imbalance in a sense may not be there.

Mr FOLLETT: Yes. My recollection is that the power imbalance is the existence of a teacher and a student in the same school.

Ms CONNORS: The inherent hierarchy of the school means that that power imbalance is there, which means that if you are looking at other members of the school community, such as one who is a volunteer in the canteen or a groundsperson or something like that, that is when you start to think about whether there is an inherent power relationship. But the idea was, I suppose, that all teachers have an inherent power relationship in the school by nature of the school hierarchy.

The CHAIR: But is not the requirement to have students under their care? We have widened the scope to include all employees, but limited it with the provision that you must have students under their care or authority, which is our amendment.

The Hon. TREVOR KHAN: It is section 73 (3) (b), " … the offender is a member of the teaching staff of the school at which the victim is a student … "

The CHAIR: But our Justice Legislation Amendment Act 2018 included provision for all other adults employed at the school, or who have students under their care or control. The nexus is the teaching relationship or having students under your care and control. Does the cook in the kitchen have students under their care and control?

The Hon. LYNDA VOLTZ: Does that not get back to the argument I raised earlier? That is what I was trying to raise. Does that provision not capture the person looking after the disabled child, or does it?

Ms CONNORS: Not if they are a volunteer. If they are an employee—the issue is about expansion to volunteer. It would cover them if they were employed by the school to do that, but if they were a volunteer carer, it would not.

The CHAIR: In which case they would be covered by the Ombudsman and the Working With Children Check, but it is not a criminal offence.

Ms CONNORS: Yes, they would be covered by regulatory provisions.

The Hon. LYNDA VOLTZ: There are no offences under the Working With Children Check.

Ms CONNORS: That is right.

The Hon. LYNDA VOLTZ: It allows you into the school to undertake the activity.

Mr FOLLETT: Yes.

The CHAIR: Yes, there is a gap there.

The Hon. LYNDA VOLTZ: Yes, but it is a gap that could end up being problematic because it comes down to whether you have the care and control of children under your care. You are right: The cook does not have care and control of the child.

The Hon. TREVOR KHAN: No.

The Hon. LYNDA VOLTZ: Nor does the bricklayer or the gardener.

The CHAIR: That is the exact question: Should they be included?

Ms CONNORS: Yes.

The Hon. LYNDA VOLTZ: Why do we only do it for teachers? Why do we not for sporting coaches?

The Hon. TREVOR KHAN: Well, you can under that provision.

The Hon. LYNDA VOLTZ: Or away from the schools environment?

Mr FOLLETT: I think it probably would be captured because sporting coaches potentially—

The Hon. TREVOR KHAN: Under section 73 (3) (c).

Mr FOLLETT: Yes. It is about the instruction of sporting, religious—

The CHAIR: Yes, it is any other instruction.

The Hon. TREVOR KHAN: Religious, sporting, musical or other instruction.

Mr FOLLETT: That is right. Potentially, that is captured.

The CHAIR: And we have widened it to all teachers at the school so that we do not have that nexus of having to directly teach that pupil.

Mr FOLLETT: Yes.

Ms CONNORS: That is right.

The CHAIR: The position of being a teacher at the school implies a position of authority or care.

Mr FOLLETT: Yes. That is right—members of the teaching staff.

The CHAIR: If the student is not directly in your classroom, including principals.

The Hon. TREVOR KHAN: So (c) would capture, would it, parents who organise a maths coach, a year 12 student at school teaching a year 10 student who is bad at maths? That would be caught under section 73 (3) (c), would it?

Mr FOLLETT: Potentially. The recent bill that has gone through, which has not yet commenced, contains a similar age defence. Potentially the answer is yes, they would be captured, but the similar age defence kicks in if the relationship is no more than two years—year 10, year 12.

The Hon. TREVOR KHAN: But a university student would be in a bit of bother.

The CHAIR: Once you are over 18.

Mr FOLLETT: Yes.

The CHAIR: Is that right?

Mr FOLLETT: Yes. If the victim is 16 or 17 and the alleged offender is 18. It is the two-year nexus.

The CHAIR: Yes. It is not an offence if you are less than two years older.

Mr FOLLETT: Yes.

The Hon. DANIEL MOOKHEY: The design of the offence would effectively say that a 19-year-old university student has the same authority as a 40-plus-year-old teacher. If we were to follow the whole power imbalance test argument through to its conclusion, then that is essentially what we are saying. Is that fair?

The Hon. TREVOR KHAN: The answer to that is that it is a policy question.

Mr FOLLETT: Potentially, but the design of the similar age provision is because the similar age defence works as a defence; if the power imbalance is established and then the offence is alleged to occur. The idea behind the defence, as I understand it, is to essentially enable those innocent relationships where it is a young couple to have a defence for what is innocent behaviour. I do not think the policy intent is to capture those types of relationships.

The Hon. DANIEL MOOKHEY: Various schools will have various levels of reliance on volunteer labour, depending on the circumstance or largely the socio-economic status of the school as well. There are schools which are far more dependent on volunteer labour because they have not got the ability to pay for things like debating coaches and maths coaches. I used to participate and do a lot of it myself when I was much younger. Granted, I never had a special care relationship or anything resembling it. There will be an argument advanced that this will be disproportionately burdensome on schools which are reliant on volunteer labour, particularly among the 18- and 19-year-olds who often are ex-students who are coming back to the school. Do you have a view that there should be more than simply the power imbalance test that we use to guide the design of any subsection? Is there anything else that is available to us?

Ms CONNORS: The other proposal is that you would have to have the approval of the Director of Public Prosecutions [DPP].

The Hon. DANIEL MOOKHEY: For a prosecution?

Ms CONNORS: Yes, before a prosecution is commenced. That is what has been proposed as another safeguard, which would allow the DPP, I suppose, to look at that.

The Hon. TREVOR KHAN: Why is that a safeguard?

Ms CONNORS: The other point is then saying that would just create uncertainty in the criminal law. If there was a person, they would not know their status under the law if it was dependent upon the DPP reviewing the case. I think the Bar Association's submission goes to that point.

The Hon. TREVOR KHAN: Yes. I have to say that my limited experience of the traffic court was that on sexual offences there was a period of time where we were told that the standard rule that was being applied in respect of all sexual assault cases was that they would run. There was not any point in putting in a no bill: they would run. That reflected the policy position that the DPP adopted at that point in time. Obviously, it was some years ago, but if it then becomes just a matter of policy win—that is perhaps a bad way of putting it—but a policy decision by a particular DPP—or deputy director, I think it was at that stage, who was making those decisions—then it is pointless, is it not? There is no effective scythe at all on those sorts of prosecutions.

Mr FOLLETT: My review of the statute book where there is that DPP sanction of prosecution is that there is an additional consideration—the complexity of the prosecution as well. That goes to the evidentiary complexity where clear defences exist. That might be right, but the sanction of the DPP is in addition. As I understand it, it is kind of a broad public interest safeguard as well as considering if this prosecution is actually going to proceed. Is it worth pursuing this, or is it so complex, due to the different factors that need to be proved and the defences that are available, that it is not worth commencing?

The Hon. TREVOR KHAN: Those criteria do not apply to these sorts of offences, do they? This is not that hard. It is not a question about whether evidence will be admissible or whether judges will exercise a discretion to exclude material. There is none of those sorts of things. It is a sort of an up-and-down exercise: either you can prove a relationship or you cannot; you can prove age or you cannot, and the factual scenario is no different from any other what I might call sexual intercourse offence. This is stock-standard stuff. Does it require great insight by a learned senior counsel to come to a view?

Mr FOLLETT: I think that is a fair point. This is one of the challenges with this offence around the standard; there is clearly the potential to capture innocent relationships.

The CHAIR: The intended consequences.

Mr FOLLETT: The unintended consequences.

The Hon. TREVOR KHAN: It is innocent relationships of sexual intercourse that in a general sense we say are lawful.

Mr FOLLETT: That is right because—

The Hon. TREVOR KHAN: Because we have decided that 16-year-olds can engage in consensual intercourse.

Mr FOLLETT: That is right. And consent is not an issue here.

The Hon. TREVOR KHAN: That is right.

Mr FOLLETT: It is consensual relations. I should say the bill relating to the royal commission and criminal responsibility that has recently gone through expands it to sexual touching as well. So in addition to sexual intercourse it is now also sexual touching.

The Hon. LYNDA VOLTZ: The nature of schools is changing significantly. Colyton Public School has a safe area for women with social workers in it because the women will hang around anywhere. We now have a number of schools that actually have private gyms within them—the school uses the gymnasium during the day and during the night they are being rented out and operating as private spaces. It is creating a complexity because you may have gym instructors in a gym that are not teaching children. The nature of that kind of work in itself becomes problematic. How are we going to build in this changing dynamic of schools? In fact, a lot of them now have private sporting facilities run on them; they are more embedded in our communities. How can we do that without capturing people that should not be captured?

Ms CONNORS: We would need to have a very clear definition of authority and control because that is what is getting to those relationships. That power imbalance exists because of the authority and control aspect. I agree there are some interactions between volunteers and students where it is complex. Instructing someone on using gym equipment, for example, is a requisite level of authority and control that it would have an impact on the ability to freely consent to a relationship. I think there is a lot of complexity.

The CHAIR: Does that constitute other instruction?

Ms CONNORS: Yes, that is right. Because the aim we are getting at is where the dynamics between the two parties is such that consent is not freely given and, I suppose, thinking about what that kind of level of instruction or control would be where that presumption should arise.

The Hon. LYNDA VOLTZ: For example, my daughter is the manager of my soccer team simply because no one else would do it. You could have the situation where you have quite a young person in a sporting role on these places because of the changing nature. It could be someone's son or daughter of the coach. Where do they fit into that scheme if they are in a relationship with someone? They may be 20 or 21 and the other person may be 17.

Mr FOLLETT: Yes, that is one of the complexities. Also that relationship can commence outside—

The Hon. LYNDA VOLTZ: Completely outside, yes.

Mr FOLLETT: Before you move into the special care territory.

The Hon. TREVOR KHAN: If we take the example of a sporting team, we have got, let us say a 21-year-old, and a 17-year-old that is playing on a soccer team and they have entered into a relationship and then the elder person is then the coach and they get swept up in the legislation.

Ms CONNORS: Yes, they would.

The CHAIR: If they are 19 they are okay because they are under the two years.

Ms CONNORS: Yes.

The Hon. TREVOR KHAN: That is why I said a 21-year-old.

The CHAIR: That is right. I am clarifying that.

The Hon. LYNDA VOLTZ: My daughter was 17 and had a 21-year-old boyfriend. If he suddenly became the coach of her soccer team that would a problem.

The CHAIR: In terms of balance, the other side to that is the learnings from the royal commission. Very often those relationships arose from circumstances of—for example, I ran a case that involved cadets and an ex-student. As I say, some schools rely on volunteers. In other schools, it is quite a prestigious thing for former students to come back and be leaders. But the case evolved. An ex-student returned as a cadet leader but was a volunteer. That person was not captured, it was not perpetrated ongoing sexual abuse, which falls under that category. One of the defences was that it was a volunteer relationship and the student consented and "liked to come over to my house after cadets". In a policy sense, I would have thought that we must err on the side of the assumption that a younger person is whether directly under instructions or understanding the relationship with the person who came back to the school as a volunteer or otherwise who was instructing them was inclined to defer to that teacher or somehow be subject to the authority and control of that teacher, volunteer, coach, instructor, cadet instructor.

The Hon. TREVOR KHAN: The example that the Hon. Lynda Voltz was examining and that I followed up on was one in which there was a pre-existing relationship, an already existing relationship, and the elder of the person then enters into a volunteer relationship.

The CHAIR: Indeed, where perhaps the student was an older student in the school and then left the school and came back as the cadet instructor. So they had a relationship during their time at the school and then came back and were not captured.

The Hon. LYNDA VOLTZ: They would not have been captured because it was cadets. In my instance they would be captured because it is sport. The example with my daughter—of course, she will love me talking about her on the record—was they had actually met at the United Nations Youth Assembly where he had been a team leader and she had been one of the students, which would not captured. It had nothing to do with school. I know quite frankly it was an imbalance but that is an example of where you could be captured if they had met in a different environment and he then chose to come over and be a sporting—

Mr FOLLETT: Yes, that is spot on. There is the grooming offence to consider. I think we are talking about an innocent situation there but for the predatory behaviour that the Chair might be referring to, the grooming offence might capture that type of behaviour.

The CHAIR: Right.

The Hon. LYNDA VOLTZ: Was the example you cited an example of grooming? Did he get charged?

The CHAIR: No, he did not.

The Hon. LYNDA VOLTZ: His would not have been, but ours would automatically be.

Mr FOLLETT: Yes.

The CHAIR: Yes, and you are saying that is going too far.

The Hon. TREVOR KHAN: Yes.

Ms CONNORS: Yes.

The CHAIR: It depends on your perspective of whether it is voluntary.

The Hon. TREVOR KHAN: No. You start from the position that over the age of 16—we had all these fights in the Parliament about the age of consent—

The Hon. LYNDA VOLTZ: A long time ago.

The Hon. TREVOR KHAN: A long time ago.

The Hon. LYNDA VOLTZ: Paul O'Grady.

The Hon. TREVOR KHAN: We are now moving back. If you are going to move back from the position that Parliament established that the age of consent is 16 years of age then you have to show not a precautionary approach, with respect, but that you are dealing with a particular evil. I absolutely understand it is easy to do with teachers and foster parents but once you start widening the net then you are actually potentially capturing a whole range of people and relationships that are actually innocent, maybe not particularly tasteful but innocent. You are talking about criminalising; sending people to jail.

The Hon. LYNDA VOLTZ: Who would be completely unaware of the legislation.

The Hon. TREVOR KHAN: Yes, that is right. I think that is a significant step.

The CHAIR: Yes, but you also may be potentially capturing paedophiles.

The Hon. LYNDA VOLTZ: Maybe we should have this debate somewhere else.

The CHAIR: Yes.

The Hon. TREVOR KHAN: That is not what we are talking about.

The Hon. DANIEL MOOKHEY: I want to return to your suggestion that these requirements for DPP approvals is an additional safeguard. I want to work from a particularly ignorant position and assume that section 73 currently is not requiring DPP sanction. Is that correct?

Ms CONNORS: No.

The Hon. TREVOR KHAN: DPP in a sense does sanction all these offences when it takes over.

Ms CONNORS: That is right when it takes over, of course, the DPP always makes the decision whether to prosecute based on the public interest, the evidence and all those things.

The Hon. TREVOR KHAN: It has to hang up its certificate.

Ms CONNORS: Yes, but the safeguard is an earlier process with the police.

The Hon. DANIEL MOOKHEY: This does not fall into the category of requiring people to be sanctioned, or before in the earlier cases?

Ms CONNORS: Not at the moment, no.

The Hon. DANIEL MOOKHEY: You have led evidence on page 5 of your submission that says:

> The special care offence was charged 137 times over the period January 2008 to December 2017
>
> …
>
> 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

In respect to the 39 that were found not guilty—for want of a better term, how many of them do you think you could attribute to inability to prove elements of the offence because the elements of the offence are technical and difficult to prove in their nature, as in, you could not satisfy the care and instruction test or aspects of that? What are the evidentiary hurdles that we would be colliding with under the existing section if we were to broaden that our? Do you have any views? Again, forgive me if you have not read all 39 of the not guilty judgements.

Mr FOLLETT: We do not have that information, unfortunately. I am not sure whether we could get it, whether the judgements were reported and so whether that information is available or not.

The Hon. DANIEL MOOKHEY: Have you heard back from any of the prosecutors? Is there any of the information that you would ordinarily obtain?

Ms CONNORS: None of the submissions have suggested that the evidentiary issues are part of it. That has not been raised with us.

The Hon. TREVOR KHAN: There would be some where you have got proof of some offences and the jury has not been convinced beyond reasonable doubt on others.

The Hon. DANIEL MOOKHEY: Of course. There are obviously fact-based scenarios per the 39 charges, which I accept. I wonder whether or not this area of law has been scrutinised sufficiently for us to figure out whether or not care and control in these types of tests have any theoretical or design faults that we should be mindful of if we are to expand the relationships.

The Hon. TREVOR KHAN: One of them which led to one of the amendments was where the teacher was not actually the teacher of the student at the time. That led to a failure.

Mr FOLLETT: That is right.

Ms CONNORS: That is right. The original wording of the provision was a direct teacher-student relationship. There was a case where the teacher did not teach the student directly and the amendments followed that.

The Hon. DANIEL MOOKHEY: That is what the Attorney General wrote to us about.

The Hon. TREVOR KHAN: Yes, fairly quickly.

The Hon. DANIEL MOOKHEY: The existing approach is to essentially prescribe a series of relationships. One proposal is to expand the series of relationships. Should we be putting a general test?

Mr FOLLETT: Do you mean a power and control type of test?

The Hon. DANIEL MOOKHEY: In addition to it, and changing the design of it.

Mr FOLLETT: The royal commission, in its recommendations, recommended against that. They looked at the relationships of authority offences across the jurisdictions in Australia and said that New South Wales has the balance right in not requiring the proving of that power imbalance, so essentially having the prescription of the types of relationships rather than the task of the prosecution to prove that power relationship.

The Hon. TREVOR KHAN: Indeed, it could make cross-examination of the victim interesting.

The Hon. DANIEL MOOKHEY: Very difficult.

Ms CONNORS: Yes. That could be where that evidentiary issue might arise I suppose in some types of relationships where that power arises. I suppose interrogating someone about where they are giving soccer instruction could be a kind of difficult evidentiary thing.

The Hon. DANIEL MOOKHEY: I ask because, in general, there is a view that says that the moment you prescribe a series of relationships you tend to freeze them in time and 20 years hence we will be back here looking at them. Perhaps it would be wise to give the court and prosecutors a bit of discretion that does not require Parliament statute. You make a compelling point—it might not be appropriate for this case.

The CHAIR: Thank you very much. We appreciate your time today.

(The witnesses withdrew)

KARA SHEAD, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, affirmed and examined

MARIANNE CAREY, Legal and Policy Adviser, Office of the Director of Public Prosecutions, affirmed and examined

The CHAIR: Thank you for coming along today. Do you have an opening statement to begin with?

Ms SHEAD: No, we do not.

The Hon. LYNDA VOLTZ: Maybe I can follow up on Mr Khan's question from before in regard to the prosecutions that have occurred.

Ms SHEAD: Sorry—following from which question?

The Hon. LYNDA VOLTZ: Sorry, it was in the previous part of the hearing. You were not here.

Ms SHEAD: No, I was not—my apologies.

The Hon. LYNDA VOLTZ: Just ignore any lead in I have given on this.

The CHAIR: If I can fill in, we have had some questions with earlier witnesses about the number of prosecutions that have been taken through to prosecution—not from charges—so we are following up on that number. I do not know if you had the opportunity to read the Government submissions about how many charges have been laid leading through to prosecutions.

Ms SHEAD: Yes.

The Hon. LYNDA VOLTZ: And the nature of those that were prosecuted, the relationship in particular.

Ms SHEAD: Under the heading "Recent convictions for special care offences"?

The Hon. LYNDA VOLTZ: Correct. We have the number but we do not have the nature of those prosecutions. When we are looking at who is being prosecuted, is there a particular group within which there is a higher number of prosecutions? It covers a number of scenarios. Do you have any data around those prosecutions?

Ms SHEAD: We would have that data. To give a full answer I will have to take that question on notice. In the main, many prosecutions that might cover an age period where a child begins before the age of 16 and then covers later, offending will be prosecuted pursuant to different offences. I would anticipate that the relationships would be many and varied, reflecting the different types of relationships within which that offending and abuse occurs. If I may, we can return with some data on that. I suspect it would be a manual search of our systems, if you are interested in the factual relationship between the victims and those who are convicted or those who are charged. Can I ask the scope of the answer that you are seeking?

The Hon. TREVOR KHAN: The answer is both but it is probably more likely those who are charged. The Committee accepts that there will be a variety of reasons why prosecutions fail. If we are talking about the relationship, it is unlikely that is the element that is going to fail. It is going to be something else that will bring it undone.

The Hon. LYNDA VOLTZ: Although, as we saw in the case we were talking about earlier, it was actually the nature of the relationship that meant they were not convicted, because the person argued that the relationship—

The Hon. TREVOR KHAN: The teacher.

The Hon. LYNDA VOLTZ: Yes. It would be interesting for us to know how many had failed because, even though there had been a view to prosecute, they had made arguments. That is around that test case as well, where the Attorney General had written to us regarding a teacher who did not have care and control.

The Hon. DANIEL MOOKHEY: I would be very interested in the data as to why prosecutions fail, to the extent to which you have any—whether it is fact-based descriptions or other hurdles the Director of Public Prosecutions [DPP] would be able to shed light on, particularly around the design and the effects. I understand it is a very difficult thing to do, but to the extent to which you can shed any light on it I would certainly welcome it.

Ms SHEAD: There is a difficulty surrounding that because if the result is a jury verdict of not guilty—

The Hon. DANIEL MOOKHEY: You have no idea why. Yes.

Ms SHEAD: —there is no publishing of the reasons for that verdict.

The Hon. TREVOR KHAN: Apart from scratching one's head and working out why the heck that is.

Ms SHEAD: Yes, sometimes we are scratching our heads. Sometimes it is obvious or we think it is obvious. But it would be a bit of an exercise in analysis based on the evidence that may not be the reason. We could give you advice about what we think the likely reasons might be but they may not have been the jury's reasons. For example, in cases like PJ we can understand what occurred because we have the Court of Criminal Appeal [CCA] judgement. And sometimes legal argument that occurs tends to flesh out what the principal issue for the jury is in a trial. If that is the case then we might be able to distil something that is helpful for the Committee.

The Hon. DANIEL MOOKHEY: Now you mention it, how many of these have been subject to appeal, either by the DPP or by the defence?

Ms SHEAD: The section 73 offences?

The Hon. DANIEL MOOKHEY: Yes.

Ms SHEAD: I am aware of PJ and JAD. I am sure the Committee is aware of both of those. Would you like me to indicate what the citations are for them?

The Hon. DANIEL MOOKHEY: Yes, please.

Ms SHEAD: JAD is [2012] NSWCCA 73—it is a medium neutral citation. And PJ is [2017] NSWCCA 290—that is also a medium neutral citation.

The CHAIR: I think those are both cited in the Government submission.

Ms SHEAD: Yes.

The Hon. DANIEL MOOKHEY: Are they the only appeals that you would direct us to as perhaps being the more interesting of the judgements?

Ms SHEAD: Yes. That is right. But if you require assistance in relation to that, we are well placed to interrogate the various databases to see, if it is just New South Wales you are interested in, whether there have been other appeals and what the issues in those appeals were, relevant to this inquiry, if that would assist.

The Hon. DANIEL MOOKHEY: I for one think it would.

The CHAIR: Yes.

Ms SHEAD: I will take that on notice also.

The Hon. LYNDA VOLTZ: How many prosecutions have there been under section 78, for a start? Do you have that data?

Ms SHEAD: Section 78A prosecutions? No, I do not have that data to hand. That of course requires a sanction, so that data would be readily available and can be provided. I will also take that on notice.

The Hon. DANIEL MOOKHEY: How would the effect of the DPP having been required to sanction prosecutions meaningfully alter the existing status quo?

Ms SHEAD: The sanction of the DPP brings an extra safeguard to—are we referring here to the current sanction in relation to incest proceedings or proposed safeguards in relation to other section 73 issues?

The Hon. TREVOR KHAN: You can deal with it in the context of section 73, or potentially in the context of section 73.

Ms SHEAD: For example, where you are looking at section 73 offences, there can be, on occasion, a correlation between the age of the victim and the age of the person who is being investigated or has been charged. Sanctions occur in two ways. First, police may seek advice from our office in relation to whether or not there is sufficient evidence to charge, and a sanction is considered at that time. Things that inform whether or not an offence is sanctioned around an offence of this nature might be, for example, whether or not there would be any abusive or power imbalance in the relationship or whether it was a consensual relationship between two individuals of a similar age with no relationship where there was the capacity to become intimate or encourage sexual activity because of a power imbalance between the person who is under investigation. Those sorts of things could be considered by the director in terms of the overriding public interest, which is our predominate concern in relation to whether or not matters proceed to prosecution. It would safeguard it if there were technical offences but where the criminality involved did not bespeak a public interest in pursuing such prosecution.

The Hon. TREVOR KHAN: What is a technical offence involving intercourse? How does it become technical?

Ms SHEAD: Say, for example, there was a situation where a sexual situation occurred—I am speaking about forecasting into the future in relation to section 73.

The Hon. TREVOR KHAN: Sure.

Ms SHEAD: Say for example there was no similar age defence and somebody returned to the school immediately upon leaving the school and was coaching a team in debating, for example, or something of that nature, and had been in a relationship, perhaps an intimate relationship, with the student the year below them, that relationship had developed in the normal way, one might say, following the age of 16 where the sexual relationship was legal and then if that person returned to the school there might be at least a concern that prosecution for that person having sexual intercourse with the student, if they were employed either on a paid basis or a volunteer basis to do some coaching or sport coaching, whether or not there was the necessary power imbalance that gave either rise to the intimacy in the first place or saw its continuation beyond that person being in the school environment, leaving school and returning to volunteer or work.

The Hon. TREVOR KHAN: It is very close to the example that was given.

The Hon. DANIEL MOOKHEY: I do accept that is a scenario that is reasonably foreseeable to be prescribed in criminal law. What I am getting at is: What is the additional benefit in having the DPP exercising that judgement as opposed to a court, the police or anybody else in the chain? Secondly, to what extent do you have that discretion now?

Ms SHEAD: I will answer those seriatim, if I may. The difference can be if there is a similar age defence in the legislation, then there may not be a need for a sanction. That is one answer because then it would not be charged; one would expect. Certainly police do exercise their discretion widely and properly, I think, in the main. A sanction may be directed to those cases where, for whatever reason, there is an over-enthusiasm, shall I say, in relation to charging and it is an extra check and balance from the director at that point in time. The second way the sanction operates can be if there is a raft of charges and somebody is charged with various things. To be frank, I am struggling to think of an example that would give rise to that situation.

Sometimes a single section 73 charge may be attached to other charges, for example, where offending begins prior to 16 and continues after that age where there is some issue with whether or not the section 73 charge should proceed. As I said, I cannot readily bring an example to mind where the sanction would necessarily come into play there. It is more to me the discrete relationships where there is the similarity of age. The way the sanction works now is to ensure that there is a proper basis for the prosecution, given that errors do occur.

The Hon. DANIEL MOOKHEY: Do you currently have that? It is not like the DPP is powerless in this respect. You do have existing discretion.

Ms SHEAD: We do have existing discretion, correct, in relation to the tests we apply to criminal prosecutions, so we have to be satisfied that it cannot be said there is no reasonable prosecution and consider that in terms of a whole range of public interest issues but there are a raft of offences where sanctions are already in place. For example, presently the offence of persistent sexual abuse of a child requires the Director's sanction and it is exercised depending on the circumstances of the particular case, so there is some complexity in relation to that type of charge. I can take the Committee through some of the other sanctions.

The Hon. TREVOR KHAN: I would be interested in that.

Ms SHEAD: There are sanctions for section 66EA; a sanction is required for dealing with property that subsequently becomes an instrument of crime; criminal defamation; sexual intercourse with a person with a cognitive impairment and related offences pursuant to section 66F; the incest offences pursuant to sections 78A, 78B, 78F; homosexual intercourse where the accused was under 18 at the relevant time—that is schedule 11, clause 55 (2); fraudulent disposal of property, corrupt benefit of trustees, section 249E; concealing a serious indictable offence in circumstances where the knowledge or belief arose in the course of practising or following a profession, calling or vocation prescribed by the regulations, being legal practitioners, medical practitioners—

The Hon. TREVOR KHAN: We had a bit of a debate about that last week.

Ms SHEAD: Yes. Fraudulent concealment of deeds pursuant to section 193 of the Conveyancing Act; offences under the Surveillance Devices Act; serious racial, homosexual, HIV/AIDS, vilification; offences against the Real Property Act; and swear a false affidavit pursuant to the Oaths Act. There is quite a wide array of sanctions that either vest in the director or that have been delegated by the Attorney General to the director.

The Hon. TREVOR KHAN: That is a mishmash of offences. I am not being pejorative in those comments, but a number of those are actually Attorney General sanctions, is that right?

Ms SHEAD: Correct.

The Hon. TREVOR KHAN: That have been referred to you?

Ms SHEAD: That is correct.

The Hon. TREVOR KHAN: You do not have to do this now but of that list are you able to identify the ones that relate to the DPP sanctions as opposed to the Attorney General?

Ms SHEAD: Yes. The first three that I enumerated—the persistent sexual abuse of a child, dealing with property that subsequently becomes an instrument of crime and criminal defamation are strictly Director of Public Prosecutions sanctions and the remainder the Attorney General has delegated to the director.

The Hon. TREVOR KHAN: And now the new section 316, whatever it was, that was passed last week?

Ms SHEAD: Yes.

The Hon. DANIEL MOOKHEY: In respect of the existing section 73 offences, the way in which our terms of reference have been designed would imply that you would have sanction in respect to the additional categories that we would list, which would be "school worker is a volunteer", "school worker is a recent ex-student", "youth workers and workers in youth residential care settings", et cetera. Should you have sanctions over the existing categories of relationships as well—namely, we are not going to create two tiers of section 73 in that you would have sanction over some and not others? Is it your preferred view that you should have it over all categories that we put in section 73?

Ms SHEAD: Are you referring to subsection (6) "member of the teaching staff", for example, where it is a teacher, principal, deputy or other person employed and whether or not the sanction is necessary there?

The Hon. TREVOR KHAN: Other person employed could be that debating coach who is getting 20 bucks a week for turning up. That could be taken as employed, could it not?

Ms SHEAD: Yes, I would have thought so.

The Hon. DANIEL MOOKHEY: I am referring to that but I am also referring to the other relationships currently contained in section 73.

Ms SHEAD: So the step-parent, guardian, foster parent, those categories?

The Hon. DANIEL MOOKHEY: Yes, those ones as well.

Ms SHEAD: I understand.

The Hon. DANIEL MOOKHEY: Do you have a view that you should have the same sanctions? It is more a technical question, to be honest with you. It strikes me that our terms of reference suggest that perhaps we should have categories of relationships in our terms of reference but do you need them for the other ones as well?

Ms SHEAD: I do not think we do because there is nothing controversial about offenders who are step-parents, guardians, foster parents, a traditional member of the teaching staff. There is no need to bring to bear the types of considerations, like looking at the nature of the relationship that would have some role for the sanction to play. I take the point that having two tiers within a section where one requires a sanction and one does not—

The Hon. DANIEL MOOKHEY: Does not strike me as elegant.

Ms SHEAD: That is very nicely framed, I agree; it has an inelegance about it, yes.

The Hon. TREVOR KHAN: What about the circumstance—and I am not pointing the finger—you raise of the debating coach? The only difference is one gets 20 bucks a week, the other does it completely gratis.

Ms SHEAD: Yes.

The Hon. TREVOR KHAN: You would have a sanction required for the gratis and none for the person who gets 20 bucks. Is that logically consistent or inconsistent?

Ms SHEAD: It can be logically consistent if that is an element of the offence that is payment for that role.

The Hon. TREVOR KHAN: I understand that. But in an overall justice sense, is it consistent?

Ms SHEAD: Our approach to the real criminality of this offence relates to the nature of the relationship.

The Hon. TREVOR KHAN: Exactly. That is not dependent upon whether you get 20 bucks a week.

Ms SHEAD: Entirely.

The Hon. DANIEL MOOKHEY: The existing relationship requires more discretion being attached to it—the offender has established a personal relationship in connection with the provision of religious, sporting, musical or other instruction to the victim—than, perhaps, a step-parent. Is that the type of existing category that you think also should be required for it to be effective? That is probably the only one of the existing ones in which there is a similar argument for you having the sanctions power.

Ms SHEAD: Subsection 3 (c) is, of course, the recent amendment seeking to deal with the Court of Criminal Appeal case I referred to earlier. The established personal relationship in connection with the provision of religious, sporting, musical or other instruction to the victim can give rise to legal argument about whether or not that applies. That does have an element of uncertainty that it may bring in terms of the jury's ultimate task or indeed if legal argument were mounted as it was in the case of PJ—that there is insufficient evidence from a victim about that relationship. If your question relates more to whether there would be sufficiency of evidence issues such that the sanction would be required, then I think—

The Hon. DANIEL MOOKHEY: There is that one, but then there is the other basis that you have just described as being reasons why you should have the sanction power in respect of the other offences, which were equally applicable—as in, it is not in the public interest to bring a prosecution.

Ms SHEAD: I think the sanction in relation to more amorphous relationships can be useful if there is charging where there is not that element of power or control. If somebody is providing religious instruction, sporting instruction or musical instruction then the argument would be that there is a power imbalance—other than where, for example, somebody leaves the school and there is a relationship and then they return. In those circumstances you may wish to have that extra safeguard.

The Hon. TREVOR KHAN: But "other instruction" in a sporting context could be the 20-year-old assistant sporting coach on the hockey team, who turns up every Saturday and happens to end up in a relationship with a 17-year-old on the team. Frankly, I struggle to see the significant power imbalance that captures that person anyway, but I am obviously on the wrong side of the team there. If you are talking about the need for a sanction, I would have thought that that is precisely the circumstance where you would look at some sort of sieving of the potential prosecution.

Ms SHEAD: I think that that approach has to be right in that each case needs to be assessed on its own merits, and the particular relationship assessed in terms of when it began and what age the child was when the relationship began, because although somebody—

The Hon. TREVOR KHAN: I was careful in terms of nominating 17.

Ms SHEAD: Indeed. One may argue that the relationship is consensual much later, but if it began at an age where consent was not freely and voluntarily given, the fact that it continues beyond the age of consent matters not.

The Hon. TREVOR KHAN: Absolutely.

Ms SHEAD: But if it begins after the age of consent and there is no power issue with that relationship—such that the person's sporting instructor says, "You have to do something with me otherwise you are not going to be on the soccer team next year," that may be in play with a 20-year-old and may need to be considered. Even if there is some argument that there is a consensual aspect to such sexual interchanges, there may well be—

The Hon. TREVOR KHAN: If it is non-consensual we are not dealing with this section.

Ms SHEAD: That is right. I mean that if there is no element of that kind of coercion or power imbalance—I think it can exist in both types of relationships; that is what is required to be interrogated—and where it is just a natural relationship that has sprung up, albeit in that kind of setting, sometimes it cannot have the criminality attached to it such that there is a public interest in prosecuting it.

The Hon. TREVOR KHAN: But under what you propose subsection (3) would not be caught by your sieve. Am I right? That was the question you were asking, is it not?

The Hon. DANIEL MOOKHEY: Yes. If we were to provide a sanction in respect of the new categories of relationships that we have put in law, we still probably have to answer the question in respect of the existing categories. You were very clear in saying that the sanction would have no practical effects for step-parents, guardians or foster parents or a member of a teaching staff of a school, which are the more obvious circumstances. The third category—where the offender has a personal relationship with the victim in connection to religious, sporting, musical or other instruction—does not prescribe a relationship by trying to describe the parties to it, but rather the power imbalance. It would strike me that that would be the only one there which would qualify as being

of a similar nature that would require the sanction, should we decide to have it. I am just wondering what your views are. I am not sure whether I have made that any clearer.

The Hon. TREVOR KHAN: I must admit I am unattracted by there being civil and religious—but that reflects people's view of me and religion.

The Hon. DANIEL MOOKHEY: I am still struggling to understand the substantial effect of giving you this sanction as opposed to your existing powers. Is it the case that, should we give you this sanction, you would have the opportunity to exercise your discretion earlier in the charge cycle?

The Hon. TREVOR KHAN: That is right. You would stop it before it started.

Ms SHEAD: Well, no; it is the level of decision-making that occurs. The sanction can only be exercised by the director or the deputy directors. As we move to a charge certification model, where decisions in the prosecution process are made early by our lawyers, the director and deputies do not have any involvement in that process. This escalates such a question to the highest levels within our organisation.

The Hon. DANIEL MOOKHEY: Why can you not change that by way of policy practice adopted by the DPP office? Why do you need Parliament?

The Hon. TREVOR KHAN: Could I just stop you there. If you have the sanction, then essentially the copper who interviews the 21-year-old assistant hockey coach takes the statements of the victim and the assistant coach and then he or she has to refer the file to the DPP for approval before laying the charge. That is the implication of the sanction.

Ms SHEAD: If that is the only charge, yes. Sometimes it occurs that charges are laid where there is no sanction. That occurs from time to time, and then it comes to us in those circumstances. But, yes, if everything proceeds as it should then that is the process.

The Hon. TREVOR KHAN: That is what differentiates it from what you currently have. In terms of the early involvement of the DPP and what we are attempting to do now, that is one process. But by having the sanction you can potentially cut it off before any charge is laid.

Ms SHEAD: Correct.

The Hon. TREVOR KHAN: Before the first appearance at court and the like.

Ms SHEAD: Yes.

The Hon. TREVOR KHAN: That is what we are talking about.

Ms SHEAD: Correct. There is another way the sanction works, perhaps I should indicate, when it occurs. Our lawyers will look to settle charges as early as they can. Often police will be requested to lay extra charges—section 73 may well be one such charge—where you are looking at a raft of offending that extends beyond 16 and police have only laid charges before 16. The director is asked to consider the sanction within the context of charges already laid. That can be a little later in the process, after the police have laid the charges. Whether or not it is necessary, in the public interest, to pursue charges after someone is 16, if there are charges before, is a matter that is looked at by the director or the deputies.

The Hon. DANIEL MOOKHEY: I accept—I think I made reference to it—the earlier arrival of the DPP's eye in the charge cycle. Is that the only substantive difference that you would recognise? You have just described it going higher in the chain of the DPP's office. It is true that that would be the effect but it tempts me to ask whether you can just change that by way of policy design inside the DPP. Do you need Parliament to tell you that in order for you to alter the practice?

Ms SHEAD: We certainly do have standard operating procedures and policies. We have prosecution guidelines that are very fulsome in terms of guiding our staff in relation to when matters should be prosecuted and describing what the public interest is. Those measures are already in place, but there may be a policy reason for wishing that the people most experienced in exercising their judgement around what is in the public interest and achieving consistency around that—reasonable minds can differ on these sorts of prosecutions; it is a question of degree on a case-by-case basis. In my experience, elevating things to the director or the deputy directors ensures that there is an utterly consistent approach by the people most experienced in exercising that judgement. I mean no criticism of any of our staff in giving that evidence; it is just simply that often questions are questions of degree when one is assessing relationships, particularly those here where there is the concern that you do not want to criminalise behaviour that should not be criminalised.

The Hon. TREVOR KHAN: If that is the concern then really the primary obligation of the Legislature is to not roll out legislation that is too wide in its application. Is that the first hurdle we should be looking at?

Ms SHEAD: That is certainly an issue. The difficulty with narrow legislation can be that, for example, where there are unusual factual scenarios they can fall outside traditional ways relationships are described and not be amenable to prosecution. For example, if you have got a child who is left with somebody much older than them when they are young and then they move into what they might perceive to be a consensual relationship with that person, so then there is a delay in complaint as well. That often occurs with these types of matters where there is that power imbalance. The best way to assess those types of relationships is on a case-by-case basis. If they are too narrowly constrained you may not catch all of the situations involving children who are vulnerable at the ages of 16 and 17 because of a pre-existing relationship. That is my concern in a restricted type of approach. I think our office and courts would be well placed to have the sieve, as you have described it, to not pursue those matters that in the public interest should not be prosecuted.

The Hon. TREVOR KHAN: I congratulate you on your elevation in the DPP. You may have an approach with regards to your assessment of what is the public interest, but how can I be satisfied that after you have gone and retired that the next director who comes along applies the same test because consistency is not only over the period that you are there but it is also over an extended period of time.

Ms SHEAD: I can answer that to say experience has shown that there have been three successive directors. I can say I have worked with two of them, and shortly after the first there has been a consistency of approach and that is achieved by the provision of standard operating procedures, the guidelines. In my normal day-to-day work as a deputy director I refer to those guidelines all the time. They absolutely govern the way that I work and the judgements that I make. It is not only experience but that experience is overlaid with many constraints for prosecutorial decisions.

Whilst the guidelines can be a living document and can be amended to keep up with the times there is a consistency in terms of the public interest that runs through everything that would stay consistent even if you get a change within personnel because there is such a secure machinery and culture around prosecutorial decisions. Often by the time somebody is the director they have got very considerable experience in the criminal law, such that they are inured in that culture and that experience does ensure consistency.

The Hon. TREVOR KHAN: You will read in the transcript that I was a traffic court lawyer. My experience going back many years was that there was a period of time where there was just no point putting in no bills on sexual assault matters because the word was coming back "Don't bother. They're all going to trial." If that message was true then that would suggest that there was a narrowing of the holes in the sieve that were being applied by a director general or a Deputy Director of Public Prosecutions at the time when that message was coming back. Is it unfair that there are policy positions adopted within the office from time to time that are different?

Ms SHEAD: No, I do not agree with that. I reject any notion that policy decisions are taken that are antithetical to our guidelines in any way. The obligation on a director or a deputy director when they make directions about whether a matter has sufficient prospects of proceeding are to apply those guidelines. Anecdotal responses like that can arise for many reasons.

The Hon. TREVOR KHAN: The Crowns who gave me that message were just shutting it down?

Ms SHEAD: I cannot answer on an individual case. Certainly I think there is a reflection in the way matters are prosecuted that there is a greater understanding these days of the reasons why complaints are delayed; that children remember traumatic events in a way that is more challenging to the way that perhaps 20 years ago I can recall it was like in matters that we prosecuted. I think we may be more robust in terms of our view now sometimes because we understand the science around the way delay works on the mind of a child, the way things can be described—lacking in detail, for example. Much of the research of the royal commission is reflective of that in my experience.

The Hon. TREVOR KHAN: I have not practised for more than 12 years so we are talking about an earlier time than what, in a sense, we are now learning and accepting. I accept all of that. But you are asking essentially for a discretion to be exercised not by the judiciary but by the DPP to sieve through a series of cases because the Legislature should feel free to be satisfied that you will make the right decision?

Ms SHEAD: Yes, I hope the Legislature would feel free to think that we would make the right decision. But that said, there are other measures. The royal commission looked at a similar age defence in relation to this model and that is another option.

The Hon. TREVOR KHAN: We have done that—late at night, I think.

Ms SHEAD: Yes. In terms of the sanction it is our position that it can be a useful safeguard.

The Hon. DANIEL MOOKHEY: What is a safeguard? It is it your excessively enthusiastic attitude of the police towards the use of section 73? Is that what we are asking you to safeguard against?

Ms SHEAD: It could be. To my mind if somebody is charged with a criminal offence that can be a terribly difficult and traumatic series of events, particularly if there is a great delay between the laying of that charge and the direction for no further proceeding. For example, police charge somebody with a section 73 offence believing earnestly that there is a public interest in that charge and then that proceeds. For some months you have got a victim who has been put through the process of having to gather that evidence and then the stress of waiting for that prosecution and then it is not looked at for months or perhaps even longer and then a decision is taken not to proceed with the process. That decision is taken by the director or the deputy director, for example.

I think that intervening period and the difficulty that brings both to the person charged—an accused—and the victim whilst they have got the stress of waiting for the matter to come on, and the process to be worked through, could be avoided if that issue was looked at early on if there was a real concern about whether a charge should be laid. I think those sorts of issues are probably in the minority but they do come up from time to time. How that is dealt with, as I said, can be in a number of ways. There can be circumstances, and I have seen them, where charges are laid where they are not sanctioned later by the director. It does occur.

The Hon. DANIEL MOOKHEY: I was going to suggest the other scenario which you potentially would be safeguarding against which would effectively be a form of excessive charges to put a person in a bargaining position with the defence team.

The Hon. TREVOR KHAN: I perish the thought.

The Hon. DANIEL MOOKHEY: I know. Is it your view that section 73 offences get prosecuted standalones or is it usually a part of a series of offending for which multiple charges are brought?

Ms SHEAD: I think it is both. I cannot tell you I am sorry whether it is usually more than one or the other. When we review our data perhaps I can shed some more light on that question.

The Hon. DANIEL MOOKHEY: The cynic in me would be that often that species of behaviour that you see of excessive charges being brought as part of a bargaining process is actually done by the DPP. It is the DPP that suggests that further charges be laid. If section 73 falls within that category then effectively the position would be that we need sanction to safeguard ourselves against our own office and the practises of our lawyers, which is less persuasive to me than before. It just strikes me that the scenario that you were describing about the need to elevate this to the deputy or the DPP level, I still cannot see why that is not possible by you just changing your standing operating procedures.

Ms SHEAD: Well, no. I do not accept that we are trying to suggest that we need to do something about our staff overcharging. In fact, as we move into the process of early appropriate guilty pleas with our lawyers having greater legal delegation to negotiate effectively when matters are in the Local Court—

The Hon. DANIEL MOOKHEY: I am being provocative here.

Ms SHEAD: I understand. Our lawyers will have greater decision-making power for all the new appropriate early guilty plea matters. Our policy documents will say that overcharging for charge bargaining is not something that is principled and should occur. Our staff will not be doing that. If overcharging occurs before it gets to our office—

The Hon. DANIEL MOOKHEY: This is a perfect example.

Ms SHEAD: —then we need to act.

The Hon. DANIEL MOOKHEY: Exactly. That is a valid argument for why you should have the sanction.

Ms SHEAD: Yes. But my point earlier was not that people are suggesting additional charges because they are trying to do something unprincipled, but that they just bring a different mindset or through lack of experience. People can just make errors for trying to do the right thing and sometimes there needs to be a safeguard against that; but I think the vast majority of our lawyers would interrogate the type of relationship and understand what this section is getting at in terms of what relationships are to be criminalised and those that are not.

The Hon. LYNDA VOLTZ: Can I ask a question from the perspective of the other view? Does that not leave you open to coercion? Certain cases can take on a life of their own. They can enter the domain of the talkback radio host. The DPP would be very susceptible to directions to prosecute. It might be the other case—that it is actually not a safeguard. It actually becomes that the DPP cannot be the safeguard because the Attorney General could direct, or there will be this public campaign.

Ms SHEAD: The office of the DPP is completely independent from the Attorney General. We guard our independence fiercely. We do not prosecute matters for any reason other than a principled application of our prosecution guidelines. The idea that media would influence whether we prosecute or not I would reject entirely. Many of our cases have significant media scrutiny and we do not look at calls for prosecution by external sources and have those types of comments influence our prosecution decisions.

The Hon. LYNDA VOLTZ: Yet I have heard an Attorney General say on numerous occasions, "I have asked the DPP to review."

Ms SHEAD: Yes, and the Attorney General does have the power to ask for a review of certain processes that occur, and reports are made: But strict independence is maintained between our office and the Attorney General.

The Hon. LYNDA VOLTZ: Are you sure about that? I can recall cases and the review of Speedy-Duroux's case is one, for example, where that is exactly the process that was followed, was it not?

Ms SHEAD: I do not want to comment on any individual cases but the Attorney General does have the power to request our office to do certain things, and they are clearly set out in the Director of Public Prosecutions Act. When a review is undertaken and information is provided, that is done in a principled way. Any suggestion that there is undue influence or extraneous concerns taken on board by our office in that review, I reject that because much can be gained by an independent review of something, if that is sought. There can be good reasons why that is necessary from time to time, but we do not act under instructions from anybody. We are an independent agency.

The Hon. LYNDA VOLTZ: No, I am not saying that you act from instructions. What I am saying is that yours is a safeguard against overuse or reckless use of the Act. The other side of that coin is the ability then for you to become the whipping boy for talkback hosts and broadsheet media when there is a case that takes on a life of its own.

The CHAIR: Very often, though, it is the case in reverse. The media has picked up a case that has not been prosecuted, that you have declined to prosecute, and that has then gathered momentum. The media, for all its good intent, seeks to influence that decision and seeks to have a review undertaken in the hope that you might prosecute.

The Hon. LYNDA VOLTZ: Which is exactly the point.

The CHAIR: Which might equally be the same.

The Hon. TREVOR KHAN: Can I just go back to a point that I did not think we had landed at the end of the day.

The Hon. DANIEL MOOKHEY: Particularly if you want to cover yourself.

The Hon. TREVOR KHAN: Just let me finish. If there is to be a DPP sanction, have we reached a conclusion as to whether it applies only to new offences, or whether it is the (3) (c) offences?

The Hon. DANIEL MOOKHEY: I think we have not, but I also think that we perhaps should engage with that later.

The Hon. LYNDA VOLTZ: We can go back to it from here.

The Hon. TREVOR KHAN: Right.

The Hon. LYNDA VOLTZ: Because this was full-on.

The Hon. DANIEL MOOKHEY: Yes, that militant Radio National host.

The Hon. TREVOR KHAN: Right. We will steer clear of that.

The Hon. LYNDA VOLTZ: The problem is that you cannot. If you are the safeguard against the use of it, you are also the whipping boy that comes in where there is a case.

The Hon. DANIEL MOOKHEY: If you have a discretion.

The CHAIR: I think that has been answered by the witness, unless you have anything further to add?

The Hon. LYNDA VOLTZ: No.

The CHAIR: I am conscious of the time.

The Hon. LYNDA VOLTZ: We can go back to the point made by the Hon. Trevor Khan.

The Hon. TREVOR KHAN: I am concerned about where we got to before; that is, if we say we only apply it if we have a broadened range of categories, how will we deal with those exceptional circumstances that arise under (3) (c) where on all that you have said it would seem to me you would be of the view that potentially they should be the subject of a sanction?

Ms SHEAD: We have indicated that we support a sanction in relation to additional safeguards. I do not know that we have been directed to whether or not there should be a sanction for (3) (c) that has arisen during the evidence.

The Hon. TREVOR KHAN: That is right. We have broad latitude here.

Ms SHEAD: Yes.

The CHAIR: I think your submission goes directly to an ex-school worker, specifically, in terms of the sanction.

Ms SHEAD: Yes.

The Hon. TREVOR KHAN: Just let her answer.

The CHAIR: I am entitled to make a contribution, Mr Khan.

The Hon. TREVOR KHAN: I am asking the question at this stage.

The CHAIR: I am clarifying that was the submission. The question is as to the wider application of a sanction, which you have not addressed in your submission.

The Hon. DANIEL MOOKHEY: In respect to the ex-school worker, though, that is one of the broader categories.

The Hon. TREVOR KHAN: Yes.

The Hon. LYNDA VOLTZ: How about we just get down to the evidence.

The Hon. DANIEL MOOKHEY: I presume that your position is that, yes, because it is in the broader category, it is the ambiguous matter of (3) (c). Frankly, the argument that you have made for why you should have any respect to the additional categories sounds like they should apply to (3) (c).

The Hon. TREVOR KHAN: In brackets, "apart from religious".

The Hon. DANIEL MOOKHEY: Apart from religious, that is true.

Ms SHEAD: I do not think we have addressed that in our written submission squarely.

The Hon. DANIEL MOOKHEY: No, you have not.

The Hon. TREVOR KHAN: And that is not critical.

Ms SHEAD: If the Committee would like some further consideration of that, perhaps I should take that question on notice and provide something in writing.

The CHAIR: It is very clear that we do.

The Hon. TREVOR KHAN: Yes.

The Hon. DANIEL MOOKHEY: My question goes to the category of things that we would like you to take on notice. In respect to the 137 times over the period from January 2008 to December 2017 that these offences were charged, it would be very helpful to know how many of them were actually prosecuted by the DPP and how many were the police.

The Hon. TREVOR KHAN: All.

The Hon. LYNDA VOLTZ: They would have to be all by the DPP.

The CHAIR: Your submission states that volunteers are already captured by (3) (c) in relation to an established personal relationship. It is non-exhaustive, due to the other instruction category, and where they have an established personal relationship captured. In your view, what does "established personal relationship" mean? This is the first time the debating coach or the tutor comes in to tutor them. Where do you see the line there? Is that something you think would fall within that category, or is there a difficulty there? One of the big questions is about volunteers. If it is the first time, it is not an established personal relationship and, therefore, I would have thought had to be excluded.

Ms SHEAD: It depends what you mean by the first time because with established personal relationship there is often a lot of grooming behaviour that goes on before the first time.

The Hon. TREVOR KHAN: And then they would be captured.

Ms SHEAD: And then they would be captured because there is a relationship. If somebody came in and just did something out of the blue, for example, and they are doing that in connection with the provision of religious or other instruction captured in that section, whether or not there is an established personal relationship, there may well be a question over that, given the term "established" does give it a flavour of some sort of continuing relationship.

The CHAIR: The struggle with that is, "If you want to be on the team next week, let's pop outside."

Ms SHEAD: That is right.

The Hon. TREVOR KHAN: Could I ask you a related question that might arise from the Chair's question? The term "other instruction"—let me paint this scenario—at a pony camp, you would have two categories, either people would be on the staff or be volunteers. One is those who teach people how to ride, and the others are camp fathers and mothers. They are not involved at all in teaching the kids what to do, only in making sure that they go to bed on time.

Ms SHEAD: But making sure somebody goes to bed on time might well be "other instruction" about doing that.

The Hon. TREVOR KHAN: Do you think the term is wide enough to cover that?

Ms SHEAD: It could be, if they have got power to direct the behaviour of the children, such that there is a power imbalance there, then that could well be captured.

The Hon. LYNDA VOLTZ: But what if, for example, it was the manager of a soccer team as opposed to the coach?

The Hon. TREVOR KHAN: That is the sort of circumstance.

Ms SHEAD: I think it depends on the relationship between that individual and the child. Perhaps a manager, even if they do not have much to do with the child, the child might know that the manager has got a great deal of influence and control and power in relation to what it is the child wants to achieve and what they might do to please that person.

The Hon. LYNDA VOLTZ: Would that meet the established personal relationship bar, though?

The Hon. TREVOR KHAN: No, it might establish that one, but the question is—and I might be wrong—let us assume that it meets that threshold of a personal relationship with the victim, but is it in connection with the provision of "other instruction"?

Ms SHEAD: It depends. I know that is an unsatisfactory answer, but sometimes much would depend on the specifics of what had taken place in terms of the way that manager behaved towards that child, and whether or not the power imbalance that existed played a role in relation to the offending behaviour.

The Hon. LYNDA VOLTZ: This is where you get the difficulties with this piece of legislation, because you can have the 20-year-old manager. I gave the example of my 21-year-old daughter who is the manager of my soccer team of under-13 girls that I coach. You have the 20-year-old manager who would not think that this legislation covers them having a relationship with a 17-year-old, but actually they may be captured.

Ms SHEAD: Yes, they may be, if there was some aspect of the personal relationship where they were instructing and there was some sort of power imbalance.

The Hon. TREVOR KHAN: But there is nothing in the section that deals with power imbalance.

Ms SHEAD: Correct, yes.

The Hon. TREVOR KHAN: But that may be the rationale for the legislation.

Ms SHEAD: I understand.

The Hon. LYNDA VOLTZ: But they are certainly not giving instruction on soccer training. They are not coaching, they are not instructing.

The CHAIR: It is sporting, though.

The Hon. LYNDA VOLTZ: But it says instruction. It is implicit.

The CHAIR: If there are further questions, we can pose them to you. I know there are a couple of questions on notice that you have kindly agreed to take. You will have 21 days to provide those answers. We appreciate your time today. Is there anything further you would like to add?

Ms CAREY: No.

Ms SHEAD: Some of the data that you have requested—for example, whether or not the DPP laid the charge—might entail us getting records physically out of archives and looking at documents. We will do our very best.

The CHAIR: If you need an extension, let us know. We will deal with that through the Committee. Thank you very much.

(The witnesses withdrew)

(Short adjournment)

RICHARD WILSON, Barrister, Criminal Law Committee, NSW Bar Association, sworn and examined

SHARYN HALL, Barrister, Criminal Law Committee, NSW Bar Association, affirmed and examined

DOUG HUMPHREYS, President, Law Society of New South Wales, sworn and examined

PENNY MUSGRAVE, Member, Criminal Law Committee, Law Society of New South Wales, affirmed and examined

ANDREW MORRISON, RFD, SC, Spokesperson, Australian Lawyers Alliance, affirmed and examined

THOMAS SPOHR, Solicitor, Indictable Matters, Legal Aid NSW, affirmed and examined

AARON TANG, Acting Solicitor in Charge, Children's Legal Services, Legal Aid NSW, sworn and examined

The CHAIR: Welcome to each of our witnesses. Thank you for your time and your written submissions so far. Does any witness have anything to add as to their position and the capacity in which they appear today?

Mr WILSON: I am a deputy senior public defender but I am here in my capacity as a member of the Bar Association.

Ms MUSGRAVE: I am a solicitor and I am here as a member of the Criminal Law Committee of the Law Society of New South Wales.

The CHAIR: Do any of you have opening statements to begin with?

Ms HALL: We do.

The CHAIR: Please proceed.

Mr WILSON: Firstly, the Bar Association would like to thank the Committee for the opportunity to address it on these very important issues. At the outset, the Bar Association wishes to make it clear that it fully supports laws which protect children from the abuse of power or authority by adults. The association's general position in relation to special care offences is that laws should do two things: one, be readily understandable by everyone; and, two, criminalise only such conduct as is necessary for the protection of children from the abuse of power or authority by adults.

The starting point is that New South Wales Parliament has determined that a person who is 16 years old is old enough to have the capacity to give real consent to sexual intercourse. The purpose of section 73 is to protect children aged 16 to 17 from adults who are in a position of power or authority over them. It is the position of power or authority that gives rise to the capacity to take advantage of the influence which comes from that position. Children aged 16 or 17 should be protected from the possible exploitation due to that influence. Thus the Bar Association supports the general gist of the current legislation but says that some amendments are appropriate.

Ms HALL: The Bar Association submits that the legislation and any amendments to it should be consistent with two basic principles: It should capture conduct where there is power or authority operative over a child but not capture conduct where there is no such power or authority operative over a child. We support amendments to the existing legislation which give effect to those two principles.

Dr MORRISON: The Australian Lawyers Alliance is also grateful for the opportunity to appear. In common with everyone else here, the protection of children is a primary concern. We are particularly concerned, though, that any changes which are made should not criminalise relationships that occur in the natural course of events after the relationship of power and authority has expired. We simply draw attention in that context to the existing relationship between the French President and his wife. Absent any evidence that there was a sexual relationship prior to the expiry of the special relationship when she was his teacher, that should not trouble anyone. We need to be very careful in protecting children that we do not go to the extent of criminalising behaviour which is very natural and normal between adults.

Mr HUMPHREYS: To be brief and taking account of time, I say I simply support the comments made by the Bar Association in relation to the matter.

Mr SPOHR: I do not know that Legal Aid has a separate opening statement. There is broad agreement from most of the parties in respect of those opening issues and we join with them.

The CHAIR: Thank you all for your thoughtful and considered submissions which the Committee is very grateful to have received. There are a number of questions we have asked previous witnesses which we may go over again and get your thoughts on. I apologise if you have not been here for that part of it but we will not reiterate that.

The Hon. LYNDA VOLTZ: I am at the point now where I am starting to have problems with section 73 (c) as to who is and is not captured. Some of you may have been here for the example of a sporting team where a coach would be captured and a manager may or may not be captured. We have teaching staff being captured but I assume administrators may not necessarily be captured. Another example that occurs to me is an up-and-coming 17-year-old tennis player and their press officer. Would the press officer in that organisation be captured? I am starting to see problems and I am conscious of the fact that the Director of Public Prosecutions [DPP] has discretion with these offences. As the shadow Minister for Sport and a coach, I am unclear about who is captured by the Act and I have concerns about who may or may not be prosecuted. Are those concerns reflected in the legal profession? I am happy to hear your views.

Ms HALL: I start by saying that the uncertainty that you have just identified is something that we are very concerned about and that is why we have concentrated on the issue of power or authority. We are concerned that the relationship that is identified is one where there is an exercise of power or authority and there are numerous examples in the Crimes Act already in relation to sexual offences where that concept of being under authority is one that is regularly used; it is one that is understood and is defined in the legislation. That encapsulates not just the issue of giving instruction.

One of the issues with section 73 (3) (c) is the provision of instruction would not necessarily capture someone like an administrator but that is still someone who is in a position of power of authority over, for example, a player in a sports team because that person knows that if they do not comply with a direction there may be some sanction, so they might not be playing or they might not be picked for a team. Again, it is a similar situation with the tennis player. The press officer obviously has a position where they have the power to influence the success or otherwise of that person by manipulating the media.

That is why the Bar Association is concerned that what is really addressed is the authority concept, that power of authority, because that is really what this legislation is aimed at, given it is dealing with children who are recognised by the law to have the capacity to give consent but recognising that there are circumstances where that ability to consent is undermined by the very position of authority that the other person is in. Again, that is why the Bar Association considers that this legislation must be directed at adults because it does have the capacity—it may seem unusual—to capture someone who may well be younger than the complainant or victim in the matter. The issue of power of authority and directing it at adults is something that the Bar Association is concerned with.

The Hon. LYNDA VOLTZ: The flipside of that is that people who may not and probably should not be captured—and the DPP just gave an explanation that a manager may be captured—are being captured simply because the term "instruction" is such a loose one.

Ms HALL: If the situation was directed rather less than at "instruction" and rather at a position of authority, then the issue may well be clearer, although I do concede that the case law is clear that it does not need to be a situation where that power or authority is actually being exercised—that is, it does not have to be evidence of, "If you don't come outside with me now and do what I want you to do, you're not going to play", that does not have to be stated for that authority to have existed. I appreciate there can be some difficulties with it, but it is considered by the Bar Association that concentrating on that issue really is the gravamen of what the offence is trying to capture.

Mr WILSON: In (3) (a), (b), (d) and (e) are specific examples of the types of relationships where there is incontrovertibly a relationship of power and authority. The problem that we have is expanding to a kind of a catch-all category rather than a specific list. There is no difficulty really in having a list of specific incontrovertibles like (a), (b), (d) and (e) but if there is a catch-all, we suggest that there would need to be an extra element of under authority.

The Hon. LYNDA VOLTZ: Because that is where you are going to get the unsuspecting person—the bricklayer or gardener of the school and the young manager of the soccer team who has a 17-year-old girlfriend in the team or maybe in another team. It does not have to be in that team.

Mr WILSON: Yes, or the person who comes in to after-school care at the school and teaches the kids in after-school care how to play soccer but has nothing to do with any of the other students in the older age groups. We suggest that the definition under section 73 (6) (c) "has students at the school under his or her care or authority" extends to including the victim.

The Hon. LYNDA VOLTZ: Yes. There is another problem with the expansion into schools of private gyms. The organisation may be paying for the gym. The school has it during the day and then they can run it as a private enterprise at night. That becomes even more complex, I suspect.

Mr SPOHR: It is not hard to find examples that are difficult in the drafting, if I can say that respectfully to whomever it was that originally came up with it. 73 (3) (c) is not a sterling example of drafting. The use of the words "in connection with instruction" is not a terribly helpful or definitive phrase, but as the Bar Association correctly says, the real thing we are trying to get at here is an abuse of power relationship. If the legislation is directed to that rather than to some different concepts, then the examples you raised earlier—for example the manager of a sports team who may have some authority in the particularly—

The Hon. LYNDA VOLTZ: But they are unlikely to.

Mr SPOHR: It would be comparatively obvious in those circumstances. That is something that can be—if I can say so—relatively easily remedied by drawing the drafting down to that core problem: is there a relationship of authority that has been abused by the person who is in the position of authority? You raised, also, the question of the DPP's sanction. Legal Aid's position is that it is preferable to have certainty in the legislation rather than leaving it to the director's sanction. That has nothing to do with a distrust of the director or any of the director's successors. It is a question about a person who enters into a sexual relationship with another person having at least some degree of certainty, at the time they enter into that relationship, as to whether or not they are about to commit an offence.

The Hon. LYNDA VOLTZ: Yes. Under this legislation some people may not be aware that they are committing an offence.

Mr SPOHR: The director's sanction is not an element of the offence.

The Hon. LYNDA VOLTZ: No, but it allows whether the prosecution goes forward or it does not.

Mr SPOHR: That exists either way, with respect. The director always has a discretion not to proceed and to choose what charges. The director's sanction is really, in this circumstance, directed to getting over the ambiguity about whether there was a power relationship. The director makes that decision.

The CHAIR: One of the arguments in favour of that is that decision might be made earlier on in the process rather than the charges being laid, a time delay for both the accused and the accuser, and then the decision being made, some weeks or months later, by the sanction power to not proceed. What do you say to that?

Mr SPOHR: I confess I have not turned my mind to the timing question. In a practical sense, as I sit here, I would be surprised if it made a terribly large difference in terms of the timing. That is to say, whether the police have to get the director's sanction before commencing, or whether they commence first and then the director ultimately needs to make a decision about whether those charges to continue—that is, whether or not they remain on foot—certainly there is more stress once they have been charged, but I do not know that timing wise that makes a big difference. Potentially you might avoid that period where a person has been charged and then the director makes a decision. But, if I can say so, if that is a concern here it is a concern in every charge where there is a grey area about whether charges should proceed. We do not require the director's sanction in every set of charges.

The Hon. DANIEL MOOKHEY: Does the panel consider there to be any substantive value in the DPP having a sanction as an additional safeguard?

Mr HUMPHREYS: Absolutely. The director's position is unique. The are a number of offences that require the Attorney General's sanction or the DPP's sanction. My view is that they are able to see all of the evidence. Regrettably, police investigating these matters may be very close to either the victims or the victims' families, and may be under a considerable degree of pressure to proceed with the matter. Indeed, it is easier for the police to charge and then have the matter withdrawn. That may do irreparable harm to a person, simply by being charged and having a court appearance—their name publicly reported—and then the director may withdraw the charges because they are not satisfied that there is a reasonable prospect of success. My view is that it is far better to have a circumstance whereby the director is required to sign off prior to a person being dragged through the courts.

Dr MORRISON: I support that. Let us take a practical example. Supposing you have a male soccer player who coaches a female soccer team. That male might be 17 years of age and might be in an existing relationship with a girl on that team, also 17 years of age. Both are legally able to consent to sexual intercourse. The relationship may have predated the coaching of the team, but nonetheless, as 73 (3) (c) is drafted, there would appear to be an established personal relationship with the victim in connection with the provision of religious, sporting, music or other instruction. They would be caught and there would be a criminal sanction unless there is a discretion not to prosecute. For the reasons very ably advanced, it is better that that discretion be exercised prior to prosecution, not after an enormous amount of harm has been done by the prosecution being commenced.

Ms MUSGRAVE: I find it interesting that we are talking about the sanction in the context of it being an opportunity for the director to consider whether or not a person is under care and authority and whether or not

it is appropriate to proceed for those reasons. In that scenario with the 17-year-olds, if it is an abuse of authority the person should be prosecuted. If it is not an abuse of authority you would not expect them to be prosecuted. If we see the director considering whether or not it is an abuse of authority then that should be a constituent element of the offence, so people know what the offending behaviour is. It should not sit behind the offence and be left entirely to the director's discretion as to whether or not in his view the facts support that.

The Hon. DANIEL MOOKHEY: Is it not also a question which a jury or a court should be answering?

Ms MUSGRAVE: That is right. So it should be a constituent element of the offence.

The Hon. LYNDA VOLTZ: Your argument would be that it is not transparent to a 17-year-old coach reading the Act or looking at the legislation.

Ms HALL: That is the position the Bar Association takes. We agree with what Ms Musgrave said that there should be certainty in the criminal law—for people like Joe Bloggs the soccer coach to know the limits on his relationships with the girls in his team. If it is simply a discretion in the hands of the director then no-one has that knowledge.

The Hon. LYNDA VOLTZ: My greater concern is not with coaches—I see that you can clearly define coaches—but that it just says "instruction in sporting organisations". That could really mean anybody.

Mr WILSON: It could also mean someone who is pretty good at the task teaching someone else who is not that good at the task for a little bit of pocket money. That is not really a position of authority at all. They have no say over whether they go on to be a star or do whatever, or play next week. But that would be covered. The problem that we have got is the DPP having sanction is a useful tool in early prevention of inappropriate charges but the more important question is two things, and we have just identified it, to make sure that people know what the law is but also in terms of fairness to people charged with offences.

I had the benefit of hearing Ms Shead. She said that within her organisation reasonable minds may differ about whether it is appropriate to prosecute a particular person. If you think about what that means, it means that if I am charged, someone in the DPP thinks that it is not worth prosecuting me. But I am a guitar teacher; I am instructing someone. I fit into this definition. Someone in the DPP thinks that there is a relationship of authority and someone does not; they decide. There is no appeal, no jury ever gets to decide it and reasonable minds may differ. So they might be wrong and I am guilty. I turn up and I have to say, "I am sorry. Yes, I am guitar teacher. I did have sexual intercourse with this person". I have got no defence.

The Hon. LYNDA VOLTZ: That raises another question relating to guitar teachers and high school students. If you are a music tutor or—

Mr WILSON: Any tutor.

The Hon. LYNDA VOLTZ: A tutor who is in religious studies be captured, but not any tutor would be captured.

The CHAIR: That would be captured in "other instruction".

Mr WILSON: It is the provision of religious instruction, sporting instruction, musical instruction or other instruction.

The CHAIR: It is anyone who is instructing.

Dr MORRISON: And it does not require that they be an employee of the institution.

The Hon. LYNDA VOLTZ: They will not be.

Mr WILSON: Or that there is any relationship of authority.

The Hon. LYNDA VOLTZ: The child who has left school in the past year who is a first year university student and teaches a child up the road who is doing their Higher School Certificate will be captured?

Ms HALL: Assuming they are doing a bit of maths tutoring after school it is captured.

Mr HUMPHREYS: That is where it goes back to the gravamen of the offences actually not stated in the section, that being the abuse of a power relationship.

Ms HALL: The under authority aspect which really the legislation is trying to address but capturing so much.

The Hon. LYNDA VOLTZ: Off the top of my head I can think of three people who would be captured by this piece of legislation at the moment to my knowledge.

Ms MUSGRAVE: I think we could get into double digits.

Mr WILSON: But if they are charged they literally have no defence because if it is true that they were in that relationship, "Yes, I am tutoring this person for their HSC", they literally have no defence.

The CHAIR: Except for the similar age defence.

Mr WILSON: Except if they are 19 and one month and 17 and no months.

The CHAIR: Yes, but it is not correct to say that there is no defence, there is a similar age defence.

Mr WILSON: Sorry, that is the only possible defence.

Ms HALL: It is very limited.

Mr TANG: On the similar age defence, the position of Legal Aid is that it should be different from the recently introduced section 80A (c) because that only allows for a two-year difference. We say that if that has encapsulated more children, whereas this particular provision relates to older children, 16-year-olds, 17-year-olds who are ostensibly consenting—because they are above the age of consent—therefore it is appropriate that the age difference should be greater than two years—at least three or five. Some of the other jurisdictions have five, so that it can capture the 19-year-old or the 20-year-old.

The CHAIR: The 21-year-old?

The Hon. LYNDA VOLTZ: Which is not rare.

Mr TANG: It is not a rare occurrence. Also, just adding to the point raised earlier about having an element of the defence to have a position of authority, the position of Legal Aid is to go even a step further to clarify that that should not only be a position of authority but there should be an element of a power imbalance, which is the principle behind this particular offence. In relation the DPP discretion we were talking about earlier, that happening before being charged, and the stress that it causes a defendant, if they have to go through proceedings, aside from that stress there is a very long-term effect that would arise from a defendant being charged. The Working With Children Check would be triggered for the rest of their life simply on the fact that they got charged. There is a real need for certainty to apply in the actual offence and that is the certainty not only for the defendant but also for the complainant and a certainty for the general community.

Mr SPOHR: Legal Aid also explicitly in its written submission said that a provision should not apply to children, that is, the offence should not apply to children or at least that should be subject to sanction by the director although it has stressed, as I have inarticulately said before, that we would prefer for the provision to be clear on its face rather than deferring that aspect of it simply to the director's discretion. In other words in the context of children—

The Hon. LYNDA VOLTZ: That is an example of, say, a 15-year-old student and a 17-year-old instructor or tutor which would not be captured under the—

Mr SPOHR: I do not mean to interrupt you but a 15-year-old child does not fall within these provisions.

The Hon. LYNDA VOLTZ: No, I am thinking of the 17-year-old that would.

Mr SPOHR: But the 15-year-old child who has sex is a separate offence.

The Hon. LYNDA VOLTZ: That is right it is a separate offence and there are provisions—I understand they are of like age, yes.

The CHAIR: They are of a similar age.

The Hon. LYNDA VOLTZ: Similar ages but there is a second offence if you are a 17-year-old or 18-year-old tutor.

Mr SPOHR: Section 73 only applies where the victim is 16 years old or 17 years old.

The Hon. LYNDA VOLTZ: Yes, of course.

Mr SPOHR: I am sorry to have interrupted you.

The Hon. LYNDA VOLTZ: No, you are right. I had in my mind that it might be a double-barrelled way to capture them.

Mr WILSON: With musical instructions sometimes you can have someone who is younger who is instructing someone who is older.

The Hon. DANIEL MOOKHEY: Is the suggestion that is being advanced that the Committee should pursue the suggestion of altering the elements of the offence to effectively establish some power, control or authority test?

Dr MORRISON: Can I come in on that just to try to pull together what has been said. It seems to me that the definition of "special care" should involve the elements of abuse of power or authority? It has got to be abusive. There has got to be power and authority as well as the age-related elements which are there as well. If there is, in the examples of tutoring we have looked at, that lack of authority, or if it is not properly to be defined as abusive because it is wholly consensual between those over 16 who freely consent to the relationship, then that really should not be a matter which calls this section into play. It comes back to the definition of "special care" and those elements ought to be inserted in it and should be a prerequisite for a prosecution and there should still be a discretion because there may be fairly delicate matters of opinion about whether those elements are made out.

The CHAIR: Dr Morrison, do you agree with the submission of the Bar Association that there should be an amendment to include the words "in a position of power or authority" with respect to the victim?

Dr MORRISON: I would say "abuse of power or authority" because I think that is critical as well. The mere fact that someone has some degree of ability to give instruction as a soccer coach might, such as take a player off the field, otherwise it might be seen as bringing the section into play, but if, for example, it was a pre-existing relationship or a relationship which was manifest, was not truly outside the realm of the soccer field, then it is not abusive and why should the section suggest it is?

The Hon. LYNDA VOLTZ: Effectively this legislation will also pick up any student doing work experience?

Dr MORRISON: Yes.

The Hon. LYNDA VOLTZ: That is good news for Parliament.

The Hon. DANIEL MOOKHEY: I presume, therefore, that you would prefer the explicit element of the offence to also apply to the existing categories of relationships that are currently contained in section 73?

Mr WILSON: Not from the perspective of the Bar Association. Section 73 (3) (a) would be subject to the definition that speaks of teacher and principal or deputy principal, that is fine. Perhaps to the more extended definition it should apply, which is "any other person employed", which is a catch-all definition of a member of staff. We think it should apply to the catch-all definition of people employed at the school and we think it should apply to section 73 (3) (c) but in terms of step-parents, teachers, custodial officers, health professionals—

Ms HALL: They are established relationships.

Mr WILSON: Yes, that is right.

The Hon. DANIEL MOOKHEY: That is why I asked the question.

The CHAIR: You said that earlier. They are absolutely clear.

Ms HALL: Yes.

The Hon. DANIEL MOOKHEY: Have you had an opportunity to look at the recommendations of the royal commission into institutional child sexual abuse with respect to special care offences?

Ms HALL: In what respect?

The Hon. DANIEL MOOKHEY: They seem to have a view that perhaps that is not an approach we should pursue of locating that in an offence because effectively it will open up victims to cross-examination on that point about whether or not authority existed or did not exist and whether or not it was abuse or not abuse in so far as there needs to be authority. I am not an expert on the royal commission's findings, but certainly the view that was advanced by the New South Wales Government this morning was that the royal commission would not prefer that approach being located in our laws.

Ms HALL: In terms of the use of "under authority" we already have under the "Crimes Act", the case law requires there to be a relationship of authority. Off the top of my head, that is defined as "under the care, supervision or authority" of the accused in the matter. There is a definition. However, the case law does not require that that position of authority is actually being exercised. The example used before was, "Come out here and do what I say or otherwise you will not play next week."

If you were to leave out that element of the abuse aspect, which was suggested before, then in my submission the legislation would be doing both. It would be addressing the concerns that have been raised by the

profession but also would be taking into account what the royal commission has said; that is, you would not need to be putting the complainant in the position, necessarily, that they are going to be cross-examined about that issue of the abuse of authority. I would think on a practical level that is probably going to happen anyway. It might well happen whether or not it is in there.

The Hon. DANIEL MOOKHEY: But the issue is that the royal commission did not take an ambiguous attitude towards this question.

Ms HALL: No.

The Hon. DANIEL MOOKHEY: They are clear that any reference to an abusive relationship should not be located in the offence and it should be simply sufficient for our criminal law to prove that the relationship existed, and that should be enough. Their preferred approach to dealing with the complexity that has been described is, effectively, rather than located in the elements of the offence, it would establish defences.

Ms HALL: That leaves everyone open to the uncertainty we identified earlier.

The Hon. DANIEL MOOKHEY: Sure.

Ms HALL: The Committee has expressed its concern about the types of relationships that will be captured if we just have these extraordinarily broad categories and a complete lack of certainty, which means in a sense everyone will be charged.

The Hon. DANIEL MOOKHEY: I accept that. What is your preferred design around the safeguard? Is it to locate it as an element of the offence or are you better off having the relationships with a set of defences which are available to people?

Mr HUMPHREYS: We would say that that then creates the evil I was talking about earlier—that people will then have to prove their innocence, and they will be charged.

The Hon. DANIEL MOOKHEY: I agree, that that is the correct view, but the royal commission says that that is what we should be talking about.

Mr HUMPHREYS: With respect, my view is that before you charge people and put them through the extraordinary process of criminal law procedures, you need to be very sure that there is evidence that satisfies every element of the offence. By providing a defence like that, in fact what you are doing is putting people on the back foot from the very beginning.

The Hon. DANIEL MOOKHEY: Yes.

Ms MUSGRAVE: Perhaps I could answer the question by going back to what Mr Wilson was saying. What the royal commission was concerned about was that if you do have certain categories, you should not be required to establish an abuse of authority because, by definition, a current teacher of a pupil has a position of authority and the court should not be put to the burden of having to hear evidence about it and have it established. This debate, though, is arising when you are seeking to extend the categories. In New South Wales we have time and time again fallen foul of trying to categorise everything that we think should be captured by an offence or a provision: The Bail Act is a perfect example.

If I could just seek clarification from Mr Wilson, I think what he was suggesting was that there were categories where you would not have to also establish that they were in a position of authority. Some of the categories that are not there, which are the historical categories that did not generate this debate, you would not have a need to establish the authority independently of them simply fulfilling that function. A teacher is just a teacher. When you come to widening out the categories, though, and you come into the grey area, the way of addressing the grey area is by saying, "We are including these categories because we think they are examples where there may be a position of authority." If there is a position of authority which needs to be proved, you add that in as an element and then it is an offence. Is that what the Bar Association was suggesting, if I can ask the question?

Mr WILSON: Effectively. From what I understand, the royal commission said it preferred the New South Wales model because it listed specific categories and you did not have to prove anything else. We totally agree with that in relation to (a), (b), (d) and (e). There are certain types of relationships. Perhaps in terms of certainty, one way forward would be to simply specify particular types of relationships and leave it at that. But if you are going to have a catch-all, which is not a specific definition—

Ms MUSGRAVE: If you extend it, you need a safeguard.

The Hon. LYNDA VOLTZ: Is there a definition of special care?

Mr WILSON: Yes, there is.

Ms MUSGRAVE: In a sense.

Mr WILSON: They are under special care if, and only if, the relationship fits in (a), (b) and (d).

The Hon. LYNDA VOLTZ: That is an element that is concerning me as well because of "special care". if you look down to instruction, why is a 16-year-old or 17-year-old who is getting instruction in the workplace getting instruction? Special care would imply to me that it means you are in some sort of guardianship role.

Ms MUSGRAVE: Yes.

Mr WILSON: Yes.

The Hon. LYNDA VOLTZ: But because I cannot find a definition for it, I cannot under subsection (3) narrow down who is covered.

Mr WILSON: I am quite surprised, I must say, that under the existing legislation it does not include an employee—someone who could be sacked.

Ms HALL: That is right.

The Hon. LYNDA VOLTZ: My reading of it is that if instruction means instruction—I used the example of work experience before and I thought, "Well, why would work experience be the only example for a 16-year-old or 17-year-old getting instruction?" An apprentice is a person getting instruction from a person in a position of power.

Ms HALL: Exactly.

Mr WILSON: But what if they know how to do the job; if they are actually working at McDonald's and they have been told by somebody else that they can be sacked?

The Hon. LYNDA VOLTZ: McDonald's was exactly the other one that was springing to my mind. That is why I went back to special care, but I could not find a definition for special care.

Mr WILSON: The definition is that it is only special care if it fits into one of these categories. It is an absolutely exclusive definition.

Ms MUSGRAVE: It is defined by the category.

The Hon. LYNDA VOLTZ: Do you remember we went back to the tutors and I said that a sporting tutor and a music tutor would be covered, but the others would not. You said no, because instruction is instruction.

Mr WILSON: Because of (c).

The Hon. LYNDA VOLTZ: Yes. But if instruction is instruction in the tutoring business, why is instruction of a 16-year-old or a 17-year-old in the workplace not instruction?

Mr WILSON: It would be. I think that would be covered. I think that the trainee at McDonald's would be a problem, but once they had passed their traineeship and they are being supervised by someone who is not teaching them anything, arguably they would not be.

The CHAIR: That is also an employment relationship, though.

Ms HALL: You have a perverse situation where they are able to consent because they are over 16. If they are an employee, because of the abuse of authority, the authority does not fall within section 73 (3) (c). It is only instruction.

The Hon. LYNDA VOLTZ: Yes, but it is instruction if they are trainees in the workplace and if they are apprentices in the workplace.

Ms HALL: Yes, but if they are not?

Mr WILSON: That is right, not if they are just juniors.

Ms HALL: But if the instruction is, "Can you clean out the oil vat?", I do not know whether that would fall within that.

The Hon. LYNDA VOLTZ: I am thinking of government subsidies that have been paid to train some of these people in some of these places of employment.

The Hon. DANIEL MOOKHEY: For example, the natural thing would be the TAFE in schools program and the schools in TAFE program, which has quite a high interface and movement of people between

schools and TAFE campuses. Incidentally, they move on to employment locations in which they are carrying out instruction. It is not clear whether or not they are covered when their workplace instructor may also be acting in an educational capacity. That is the scenario.

Mr HUMPHREYS: The evil with what we are dealing with is that it is so broad and so open to interpretation. That is why we are saying about the point of clarity is that we need to turn that around and actually get back to something that is actually understandable by not just me or you, but by people who are at work and they know, "No, we cannot do this ever", or you have a circumstance whereby we look at whether or not—as I said, it is the abuse of power that is the gravamen of the offence. That is what we need to look at.

The Hon. LYNDA VOLTZ: That may be where the definition of special care needs to be defined.

Ms HALL: Yes.

Mr HUMPHREYS: Indeed.

Dr MORRISON: I take on board what the Bar Association has said. Perhaps the compromise position is that in respect of certain offences, you do not require to establish abuse but in others, you do. Because the definition under section 73 (3) of "special care" could reasonably make an offence by a member of the teaching staff which meets the other provisions a crime but it is very different if there is a voluntary relationship under section 73 (3) (c)—the tutoring, the coaching. That relationship may have elements of power and authority but it may not be abusive. Without adding that additional requirement, it seems to me that there is a problem. There is one other problem in the section, of course. That is the fact that the offence relates to sexual intercourse. There could be a sexual relationship which falls short of sexual intercourse and which is not picked up by the section.

Mr TANG: It is now section 73A which covers those scenarios. It reflects essentially the same wording as section 73 at the moment. I do not know whether you would consider it falling within your terms of reference, but presumably when one looks at any amendments to section 73 they should be imported into, or a consideration should be taken for them being imported into, 73A. However, because 73A deals with the lesser sexual offences that do not involve sexual intercourse—for example, sexual touching and sexual acts—because they are less serious, perhaps one needs to not just necessarily import whatever changes we make to section 73 to 73A. There might need to be look at those ones and further consideration of those as well.

The Hon. DANIEL MOOKHEY: The broad summary of your position is that rather than having the DPP's sanction as the safeguard, you would prefer the safeguard effectively being the elements of the offence, or both?

Mr HUMPHREYS: I think there needs to be both.

Ms MUSGRAVE: They are not mutually exclusive.

The Hon. DANIEL MOOKHEY: Of course. I was not suggesting that.

Mr WILSON: It is not a safeguard. It is only a safeguard against procedurally someone being charged. It is not a safeguard against people being criminalised who are not criminals. It is because, as Ms Shead said, reasonable minds may differ about the appropriateness. You can see the scenario that the DPP makes a decision based on the information that they have been given. At that point, it may be that they have only got one side of the story and make a decision which may be perfectly correct on the information that they have got, but if it were litigated in court the jury might come to a completely different view about whether there was a relationship of authority or not. It is really giving the DPP the power to decide whether someone is guilty or not with no appeal, no review mechanism. No matter whether they do their job in good faith and consistency, as Ms Shead said, reasonable minds within their organisation differ about cases. Somebody decides you are guilty and you go to jail; somebody decides you are not. Rather than the courts deciding, somebody in the DPP office is deciding. They should be deciding whether to prosecute, but they should not be deciding whether someone is guilty or not.

Mr TANG: This is not an academic question. In our practice, dealing with children in Legal Aid, we have a number of cases where there has been prosecution of consensual underage sex. I have got one at the moment where essentially it was an irate father of the girl who said she was just a few weeks shy of 16 who chased the client. The client, because of that fear, ended up going to the police station. Instead of proceeding against the father, they prosecuted the boy. That has far-ranging impacts on his life in terms of the Child Protection Register, Working With Children Check and an unspent conviction that stays with him for the rest of his life and will affect him when he is a grandad and wants to coach his grandkid's soccer team.

The Hon. LYNDA VOLTZ: We have had those examples at the spent conviction inquiry that Trevor was on with me.

Mr TANG: Exactly. It is just not an academic exercise to say that there needs to be this certainty within the legislation and arguments about the differing minds of the DPP. It is happening right now in the existing legislation that we have in relation to children.

The Hon. LYNDA VOLTZ: I guess the other point is that the cases that go to prosecution—although it is always better, if you can, not to drag people through it—that is where the rulings of the law actually sit. That is the standard that you actually come to. If you get this uneven set of cases going through for prosecution—not that we would hope there would be many—there is a possibility that you do not get the rulings that set the standard on what gets prosecuted and what does not.

Ms MUSGRAVE: Except in the absence of it being an element, you will not get any ruling on what care and authority is because they do not need to think about it. All they need to do is decide that that person was a teacher or was not instructing. We are missing out on that.

The Hon. TREVOR KHAN: In terms of the DPP's sanction, I am not an enthusiast I have to say. It seems to me that it is an easy way for politicians to avoid having to make a hard decision to say, "Oh well, everyone will be nice and make intelligent decisions.".

Ms MUSGRAVE: I think the point we got to was the sanction was good and should be there, but that the responsibility of deciding whether or not proceedings should commence—that is, the DPP turning their mind to whether or not the person is under the care and authority—should not lie solely with the DPP. The care and authority provision should be an element in the offence, so you would have both.

The Hon. TREVOR KHAN: I picked that up. I was just positing what differentiates these offences from so many others that appear in the Crimes Act where no sanction applies?

Ms HALL: The Bar Association takes a slightly different view to what was just said on behalf of the Law Society. The Bar Association's position is there should be certainty in the legislation itself. It should not be necessarily up to the director to make those decisions.

The Hon. TREVOR KHAN: To fix those problems.

Ms HALL: That is what Mr Wilson was just talking about.

Ms MUSGRAVE: No, we are also saying that we need to see a change.

Mr HUMPHREYS: I think we agree with that.

Ms HALL: I understand that, but I am just saying that in our submissions the Bar Association does take a slightly—

The Hon. TREVOR KHAN: I read it. Again, I am not attracted by it because I think it allows us to avoid the problem. That is my view.

Mr HUMPHREYS: Our view is that it is better in these matters because of the matters that we have been positing. This is dreadful stuff in terms of judgements or whatever. You are better off to have a road hump, at least having the DPP, before you start a prosecution and having a situation whereby it is the coppers who are laying the charges and you then end up in court. From my point of view, it is far better to have a road hump prior to that before you charge somebody and the damage that is done simply as a result of being charged.

The Hon. TREVOR KHAN: I understand that. What differentiates an offence under section 73 from so many others in the Crimes Act?

Mr TANG: The difference is that these are offences relating to children who can consent and so they are committing—but for this section—consensual sex.

Ms MUSGRAVE: It is otherwise lawful behaviour.

The Hon. TREVOR KHAN: Do you think that is sufficient differentiation from others?

Mr TANG: To have the DPP involved, yes.

Mr SPOHR: Incest is in discussion here in your terms of reference in a separate context. But it is the reason why there is a sanction in respect of incest as well. Because where you are dealing with two people who, absent these specific provisions, are entitled to consent to the conduct that they are engaging in, what you are dealing with is an unusual judgement call about whether, in the particular circumstances of that case, notwithstanding that everybody is allowed to do what they have done, it should be criminalised. That does usually differentiate it. That is, as I say, why the sanction which nominally goes to the Attorney General in respect of incest but in fact is delegated to the director—why incest contains the same sanctions.

The Hon. TREVOR KHAN: It may have been answered already. Should the sanction simply apply to the new offences or should it apply to all under 73: (a), (b), (c) and (d)?

Mr HUMPHREYS: No.

Mr WILSON: We would say there is no point it applying to (a), (b) and (c).

Mr HUMPHREYS: Yes. I think that is probably the better view.

Mr WILSON: Sorry, (a), (b), (d) or (e); (c) is different. But (a), (b), (d) and (e) are very clear and certain.

The Hon. LYNDA VOLTZ: Clearly defined.

The Hon. DANIEL MOOKHEY: I am relying on the data that has been provided by the New South Wales Government. They say 137 charges were laid between January 2008 and December 2017, which works out at a rough average of 13 a year. That does not strike me as being a particularly zealous police force that is out there charging people or charging people regularly.

The Hon. TREVOR KHAN: Maybe because the offences are not that common.

The Hon. DANIEL MOOKHEY: That is the other reason. As an adjunct to the Hon. Trevor Khan's questions about why this qualifies and whether or not it is common, we are not getting an evidence base here that this is an out-of-control problem that requires—

Mr HUMPHREYS: My answer to that is the grievous harm that is done to a person when they are charged and that may well be withdrawn.

The Hon. TREVOR KHAN: You could look at a hell of a lot of sexual offences where that applies.

Mr HUMPHREYS: We do.

Mr WILSON: Any child sex offence.

The Hon. TREVOR KHAN: Yes.

The Hon. DANIEL MOOKHEY: We are told that 25 of those 137 were withdrawn. We have asked the DPP and other sources to provide us with more details about what it is. A lot of the arguments make sense to me, but I am comparing that to the evidence base we have been given about the management of the problem we are dealing with here, and I am not seeing evidence that this is a huge issue.

Ms MUSGRAVE: But we are talking about an extension though.

The Hon. LYNDA VOLTZ: That is under the current Act, not the extended Act.

Ms MUSGRAVE: Yes, and I think it is the extension into a grey area that highlights the potential problem.

Mr TANG: Also the extension in the March 2018 amendments was a substantial extension and that has only recently come into play. It may be that we have not seen the impacts of that borne through yet.

The Hon. TREVOR KHAN: You will have to excuse my ignorance as to what we passed, but is that—

Mr HUMPHREYS: I am not going there.

Mr TANG: That is an amendment in relation to the schools, the teachers. With respect to the Bar Association, our position is a little bit different. They say (a), (b), (d) and (e) are quite incontrovertible. We say that there are some difficulties in relation to the teaching staff because the definition also includes any other person employed at the school and students at the school under his care or authority. That encompasses the possibility of the soccer coach, the out-of-home care kid[1] who is minding the kindy kids and has a relationship with the year 12 student because there is no nexus that is made between the alleged offender and the actual victim, which was their position.

Mr WILSON: Should I clarify? That was our position. It is the same as Legal Aid. When I say (a), (b), (d) and (e), remember I said "teachers and principals", not the extended definition of staff members. So it is (b) but only in relation to 6 (a) and (b), which is teachers, principals, deputy principals.

---

[1] See correspondence received from Mr Aaron Tang on 18 July 2018 regarding clarification on evidence

The Hon. TREVOR KHAN: So the sanction should not apply to—

Mr SPOHR: To non-recognised categories I think is the easiest way to describe it.

Mr WILSON: To the catch-all categories rather than—

Mr SPOHR: The ordinary categories. To come back to a point that was raised earlier, the royal commission formed the view and explicitly said—we have quoted it in the Legal Aid submission—that they considered there are no circumstances in which a 16-year-old or 17-year-old could appropriately consent to sex with a teacher. The royal commission went on to say that if they wanted to then the teacher-student relationship should end or the person should turn 18. But when we are talking about what lawyers would describe as categories that are not well accepted—people other than teachers, doctors, guardians and carers—and when we are talking about tutors, other students who may have care relationships, it is a different proposition. The areas are so grey and so difficult that it might be a problem.

The Hon. TREVOR KHAN: You were not here earlier but in fact we ventilated that with the DPP.

Mr SPOHR: I was here for part of that. I come back to the question raised about whether it strikes as being the police that are charging this a lot and the scale of the problem. The related issue is, as Mr Tang has raised, that in addition to changing the categories, we now have 73A which relates to sexual touching and things that fall short of actual sexual intercourse. It remains to be seen what effect that will have, but non-sexual intercourse acts may also start falling into that category and that is why, with respect, Mr Tang's position was made earlier, which is that we need to think about those as well while we are thinking about this.

The Hon. DANIEL MOOKHEY: I accept that and of course I am being slightly provocative in the questioning here. But 73 guilty convictions were reported against 15 people. Should we change the law, I accept that more people will be prosecuted under it. If you widen the definition of what a special offence is and if you widen the categories of people who are subject to the provisions then by definition you are widening the ambit of who can be prosecuted. What I am trying to get to is the quality of the DPP sanction as a safeguard.

Mr HUMPHREYS: It is a road hump—that is all. It is not certain.

The Hon. DANIEL MOOKHEY: I asked this question of the DPP: To the extent to which the DPP maintains current discretion, what is the substantial effect? For the reasons you mentioned, Mr Humphreys, it is a substantial effect to bring the charges up earlier in the piece. You could avoid a lot of harm for a person who is otherwise not going to be found guilty if they are not charged at all, and that is a substantive benefit. But to the extent to which the discretion already exists, how much of that problem is already covered? The DPP says to us that if we get that safe, we are given the sanction power, they will effectively apply a public interest test without actually telling us what they would find to be the public interest. They say that effectively their standard operating procedures lay that out. I do not know the extent to which those standard operating procedures are known to you. I do not know the extent to which they are known to defence lawyers or to victims.

Ms MUSGRAVE: They are on their website.

Mr SPOHR: Their guidelines are on the website.

The Hon. DANIEL MOOKHEY: I guess the question is whether they are meaningful or not.

Mr SPOHR: This is what I was raising earlier in response to a different question. That is true of any number of offences, such as manslaughter, where community standard tests are applied. The director has to make a decision on behalf of the community whether it is appropriate, and the ultimate decision rests with the jury. With respect, that question on its own is not the right question because it is not about whether we can know how they are going to apply a test. The real question is: Is the offence, as it is drafted, clear? Because then it does not matter, in a way, what the director does. The director's sanction may also still be appropriate. If the provision is sufficiently clear then you do not have to worry about how the director's sanction is going to be applied as much because you know what the offence means.

The Hon. LYNDA VOLTZ: You made the point earlier that if the DPP does not want to prosecute, it does not prosecute anyway.

Mr SPOHR: We have spoken separately about that. I was responding to a question about timing. Timing is different to the consequences that mere charging has. Mere charging has potentially major consequences, almost invariably major consequences.

Mr WILSON: And there is a difference between the decision-making process of the director. They have prosecution guidelines on their website, which everyone can look up, but they are a series of factors that are then all taken into account in a discretionary decision. That is a very different type of decision-making from interpreting

legislation and working out whether someone is actually guilty of an offence and the elements that are made out. They do that as part of that. They see whether there are reasonable prospects of successfully prosecuting. They also take into account some other factors of the public interest and all sorts of multifarious factors.

At the end of the day it is a discretion and we cannot pick what they are going to do because it is a discretion taking into account various factors—like sentencing—pulling in different directions. We know how they do it and we know what they take into account but we have no idea what they are actually going to decide on any individual case. And no-one off the street could possibly know what they are going to decide. Whereas someone off the street should be able to read: "Oh, I am not allowed to do this because it is a crime."

The CHAIR: Parking the sanction issue for a moment, you say that the answer to provide that clarity is the insertion of the amendment with the position of power or authority and the abuse element. That does not deal with the sanction issue, but it provides clarity.

The Hon. TREVOR KHAN: But not with respect to all categories.

The CHAIR: But category (c).

Mr WILSON: Or alternatively just to list very specific categories only of relationships rather than throw in catch-alls.

The CHAIR: The guitar teacher, the debating coach.

Ms HALL: Yes.

Dr MORRISON: It might be very difficult, however, to envisage every conceivable relationship. Whilst I accept that that would be desirable, I am not sure that it is practicable.

The Hon. TREVOR KHAN: Would you have nominated categories such as priests, teachers, doctors and then a catch-all provision thereafter?

The Hon. LYNDA VOLTZ: About power and abuse?

Ms HALL: That includes the element that it is a relationship, yes.

The CHAIR: We have that catch-all in (c).

Dr MORRISON: And from our perspective we would say it has to be not merely power and authority, it has to be abusive as well because otherwise there is no evidence that that power and authority is being misused.

The Hon. DANIEL MOOKHEY: As Madam Chair said, we do have a catch-all in (3) (c) and also in (6) (c). There is a kind of catch-all of people at schools and a kind of catch-all of people to do with instruction but they do not have the overriding power and authority issue.

Mr SPOHR: And abuse.

The CHAIR: The existence of the power and authority and the abuse of that power and authority.

The Hon. LYNDA VOLTZ: In which area is that power and authority occurring? I still have problems with the workplace instruction. I do not mind that it is captured but you have to be clear about what you are doing.

Mr TANG: Our position, which might be slightly different, is that you would have the threshold question, which is the existence of a relationship of position of authority and a power imbalance and if you like to add to that abuse of that, that is not a general provision. That is a provision in which you would have under that those categories and only those categories.

The Hon. TREVOR KHAN: That would run completely against what the royal commission has said.

The Hon. LYNDA VOLTZ: If you start defining where the abuse of power pops up, where you have the one-on-one instruction and the isolated incidents, the biggest problem where you find it is particularly in sports.

The Hon. TREVOR KHAN: The difficulty with your proposal, elegant as it is, is the direction to the jury would become hellishly complicated. You are asking them to decide an additional factor. If it is simply what I think is the most common one—the teacher—then why complicate it? A teacher should know they do not interfere with their students. From my perception of complicated jury directions, you do not need: prove teacher, prove student, prove age—bang, you are gone. Those ones are simple. I think it is the more subtle ones you are talking about.

Ms HALL: Yes.

The Hon. TREVOR KHAN: For instance, when I was outside holding a meeting.. They are the ones that need to be the subject of a control test.

Mr WILSON: Sure. The point I am trying to make is that the problematic ones we are looking at need to be varied.

The Hon. TREVOR KHAN: Yes.

Mr WILSON: The other point I am trying to make is that we would caution against extension of categories so that you get this broad category where there is uncertainty as to everything else.

The Hon. LYNDA VOLTZ: Yes, so you want clarity over whether or not the 19-year-old or 20-year-old sports manager is captured or the bloke who works for the apprentice to show him how to use a certain tool; you actually want the instructor to be captured. It is that kind of clarity.

Mr WILSON: I think the Committee needs to think about whether those people need to be covered.

The Hon. LYNDA VOLTZ: That is right. At the moment it looks like they are not covered.

Mr WILSON: They are covered at the moment. Some of this is perhaps unethical institutional conduct where the sports club should be saying, "No relationships between coaches and people."

The Hon. TREVOR KHAN: But that is a different question from whether it should be criminal?

Mr SPOHR: Indeed.

Ms HALL: Yes.

Mr WILSON: Exactly and criminalisation is a big step and historically this section started out about step-parents, stepfathers realistically, and I suspect for a lot of the charges, once you get the figures from the DPP—the only time I have seen them in my personal practice is as an extension of the stepfather or a de facto of a parent who is sexually abusing, usually a girl. She turns 16 and then we have got these charges and other charges before she turns 16.

The Hon. LYNDA VOLTZ: Unless you get the powerful father or the person who wants to pursue the issue. That was my example with the DPP and the talkback host?

Mr WILSON: That has been amended over the years to include de facto partner of parents rather than strictly people who are married and that sort of stuff. That is the historical underpinning of what this has been trying to criminalise and I think extending that to teachers, custodial officers and health professionals is very logical but we have to be careful how far we take it because some of it is bad behaviour and unethical behaviour, borderline—

The Hon. TREVOR KHAN: Creepy?

Mr WILSON: Creepy but should people be facing eight years jail?

Ms HALL: It is the crossover between moral judgement and criminal judgement. That is where it needs to be clear. You might not approve of a certain relationship but it might, in terms of the criminal law, be something that is not contrary to it.

Mr WILSON: Or sackable. You may be sacked from your position as a coach.

The Hon. DANIEL MOOKHEY: Effectively, Dr Morrison's suggestion is that we would create two tiers. First, it is dead certain that we all think this is inappropriate and should be criminal. The second suggestion is that we establish a second tier of people who we think are in the grey zone. Is that an appropriate summary of your position?

Dr MORRISON: That is what I was suggesting, particularly in regard to (3) (c), that there should be an additional requirement that the relationship be abusive. It is one thing that custodial officers and teachers be caught without establishing that. Mind you, teachers from the same school are also a part of it. The fact that someone is a teacher does not mean that they cannot have a relationship with a 17-year-old from another school but if they are from the same school, then they are squarely caught by this provision, but (c) is really the heart of our problem.

The Hon. LYNDA VOLTZ: Because a 20-year-old with a 17-year-old girlfriend in a soccer team is probably not an abusive relationship?

Dr MORRISON: In all probability.

The Hon. TREVOR KHAN: You keep talking about (3) (c) and we talk about the end. What about religious instruction? I am not attracted to putting them in a fuzzy category, quite frankly.

Mr WILSON: It could be a youth group. When I was a kid we had youth groups and we elected our leader and they took lessons of Bible studies, and that person was the same age as everybody else.

The Hon. TREVOR KHAN: I grudgingly concede that.

Dr MORRISON: I am afraid I have seen an awful lot of those examples in my practice and sadly that is far too common so that is appropriately picked up by (3) (c).

The Hon. DANIEL MOOKHEY: Dr Morrison, if we were to follow the logic of creating two categories, one of dead certainty and one of ambiguity, and how we treat the two, in so far as we are invited by our terms of reference to extend the categories to school workers such as where a school worker is a volunteer, school workers who are recent ex-students of the school and school workers who no longer work at the student's school, where do you think those types of relationships fit?

Dr MORRISON: That is where it starts to get very difficult.

The Hon. DANIEL MOOKHEY: Indeed, that is why I am asking you the question.

The Hon. TREVOR KHAN: It was flicked to us because it was too hard.

The Hon. DANIEL MOOKHEY: And we are flicking it to you because you are the experts.

Dr MORRISON: I am not saying it is ultimately too hard to deal with but it is a challenge because the civil law has been developing in picking up those for vicarious liability on the part of institutions of people in employment-like relationships. The Supreme Court in the United Kingdom, in particular, has been speaking loudly and clearly at least since the various claimants case. The Supreme Court followed the success of the House of Lords and, in a number of cases, Marga, and elsewhere—I think it was in Marga that it was the priest who was at a youth group but because he was wearing his clerical collar that was enough to cause the church to be an appropriate defendant and the church there does not of course take the Ellis point in relation to it not existing and its trustees not being capable of being sued. That is the way the law has been developing there.

If you are dealing with those who are volunteers at a school who read to children or who are on the school premises for a whole variety of other reasons relating to the school's activities, they may be in a different relationship in respect of pupils whom they are not in charge of than an employed teacher. I wonder whether, in extending to persons who are in an employment-like relationship, that should not also be subject to the protection that we have been talking about with (3) (c)—that the relationship has to be abusive as well. They are not in the same category as custodial officers, health professionals and teachers, per se.

The Hon. DANIEL MOOKHEY: Your basic position is that there is sufficient ambiguity in respect of all those categories in the Committee's terms of reference that we ought not declare with absolute certainty that they are like a teacher.

Mr SPOHR: The fact that you are asking the question surely answers that question.

The Hon. DANIEL MOOKHEY: True, but I was also asking because we need it on the record. I know my opinion but I would like to have yours, and have it reported.

Ms HALL: That is why the Bar Association says that the definition in (6) (c) should be amended. That could reflect a person who is, rather than employed, someone who is working at the school in a paid or unpaid capacity who has students at the school, including the victim, under his or her care or authority. That captures a broader range obviously—those who are there in a volunteer capacity, provided they are in a relationship where there is care or authority over the person who is the victim.

Dr MORRISON: I would fully agree with that.

The CHAIR: Can I ask the panel's views on the volunteer position. The DPP, in its submission has said that there is no necessity for volunteers to be specifically referred to in the section. But we do have to consider that question. I think in your submissions you referred to the Prince Alfred College case. Whilst that is a case about vicarious liability, it involves a discussion about the nature of being in a position of power and trust in a school environment. Can I ask you each to comment on your view about that, and whether that should be specifically covered, or is that covered by the inclusion of the abuse provision that we have spoken about earlier?

Dr MORRISON: I think the Bar Association's submission gives one solution to that problem. Otherwise the school janitor, who has never seen a classroom in his life, but who happens to be 18 years of age, is picked up by this if that person develops a relationship with an 18-year-old pupil. They could even have met outside the

school environment. We just need that additional safeguard, and the Bar Association's proposition is one way of dealing with that. The alternative is, as with (3) (c), to include that there be not merely power and authority but that it be abusive. I agree that in respect of teachers, per se, there should not be that additional requirement, because it is perfectly proper to require that teachers, medical practitioners and others have special ethical requirements which should be sanctioned in law.

Mr TANG: Legal Aid's position is the same as the DPP's—that there is no need to extend it to volunteers, because it is already covered. I think the DPP's submission noted also that there would be insufficient authority from volunteers such as the janitor and the canteen duty parent, et cetera.

Mr SPOHR: In other words, the mother who occasionally goes to the canteen and volunteers does not have appropriate authority over the students in those circumstances. It would not necessarily need to be picked up. The current wording of 73 (3) (c) covers it.

Mr HUMPHREYS: The debate that we are having here just indicates how murky and difficult this area is. I suggest to you that the current provisions are not good.

The CHAIR: So I hear.

Mr HUMPHREYS: That raises the question of how we try to fix them and get an appropriate balance. At the end of the day it is all about an appropriate balance, clarity of what is criminal behaviour and what is not, and, where there are grey areas, putting in appropriate checks and balances to ensure that behaviour is not prosecuted where there is not an imbalance of power and where that power has not been abused.

Mr TANG: Can I just add something in relation to certainty. One of the things that Legal Aid does is a program of community legal education. We go out to youth groups, youth workers, students and parents—primarily students in schools. One of the main workshops that we give is on sex, consent and sexting. We get a lot of questions from kids about the state of the law. Unfortunately, even putting aside this piece of legislation, the state of the law in terms of what kids can do and not do, in terms of sex and sexting, is quite murky, uncertain and inconsistent. This piece of legislation would add to that exponentially. From a very practical, on-the-ground perspective, we have already heard that there is a degree of uncertainty around the law concerning what kids can do and not do in terms of sex.

The Hon. TREVOR KHAN: This is not really a question about what kids can do or not do; it is actually what adults can do and not do, I would have thought.

Mr TANG: It is both, because 16- and 17-year-olds may be entering into a sexual relationship with another child. But 16- and 17-year-olds might be entering into a relationship with their 30-year-old teacher and asking themselves, "Can I do this or not? If I do this, is it going to make it a crime for him or her?"

Mr SPOHR: Bear in mind that by definition, we are only in this offence if the child has consented. So in that situation it does matter because if they have not consented we are in a whole other series of offences—60 (1) (j) and other offences.

The Hon. TREVOR KHAN: I get that. The principal obligation lies upon the older person.

Mr WILSON: But then there is the child protection issue of making children aware of their own rights and danger areas.

The Hon. TREVOR KHAN: I do not know that that is a matter for this criminal law.

Mr HUMPHREYS: I understand that, but what I am saying is that even within this area it is not beyond the realms of possibility that it is the 16- or 17-year-old that is the initiator. For them to know that they cannot do that is important.

The CHAIR: Are there any further things that you would like to address?

Mr WILSON: The only thing we have not addressed is the question about whether the offences should apply where there was a special care relationship and it no longer exists. Our position is no, that should not be penalised.

The CHAIR: You have addressed that in your written submission.

Dr MORRISON: The ALA takes exactly the position.

Mr HUMPHREYS: We concur. Once it is over, it is over.

The Hon. DANIEL MOOKHEY: How do we know it is over, though?

The CHAIR: You are over 18 or you are not a teacher anymore.

Ms HALL: The relationships that are obvious are going to be obvious if they are over.

The Hon. DANIEL MOOKHEY: Sure, but for the less obvious relationships, someone has to quit the soccer team—

Ms HALL: Possibly not. You are not on the soccer team or you do not go to that school anymore, or you have left school or your mum broke up with that particular bloke so he is not your stepfather anymore.

Mr TANG: The other thing we have not addressed is the extension to youth workers. Our position is that it should only extend to youth workers in a residential setting. It is appropriate for a residential setting because the children in those settings are particularly vulnerable. There is quite a wide category of youth workers. As I said, we work hand in hand with a lot of youth workers in community legal education and otherwise. So you could get, foreseeably, a youth worker who does not have a casework function, who could be quite young. They might play basketball with a group of kids. It would not be appropriate, in my submission, for these to be caught by 73.

The CHAIR: No-one has taken any questions on notice but Mr Shoebridge, who has not been able to attend today, may like have a chance to pose further questions to you. They may follow. The Committee has resolved that any questions taken on notice will be returned within 21 days. The secretariat can assist with that. I thank you all very much for attending the hearing. Thank you for your time and for your submissions. They are clearly very well considered.

(The witnesses withdrew)

(Luncheon adjournment)

ANDREW JOHNSON, Advocate for Children and Young People, Office of the Advocate for Children and Young People affirmed and examined

KELLY TALLON, Senior Policy Advisor, Office of the Advocate for Children and Young people, affirmed and examined

The CHAIR: Do you wish to make an opening statement?

Mr JOHNSON: Yes. First, I thank the Committee for the invitation to appear before this important inquiry. I acknowledge the traditional owners of the land, the Gadigal people of the Eora nation, and pay my respect to elders past, present and emerging. The Advocate for Children and Young People [ACYP] is an independent statutory appointment overseen by the Committee on Children and Young People. Our mandate is to advocate for and promote the safety, welfare and wellbeing and voice of all children and young people in New South Wales with the focus on the needs of those who are vulnerable or disadvantaged.

In my role as advocate I have been privileged to receive direct feedback from nearly 17,000 children and young people across the State, this includes children and young people in schools, residential and out-of-home care services and specialist homeless services, to name a few locations. I need to point out to the Committee that we have not done consultations specifically on the issue before the Committee today. We have heard back from them about what is working and what is not working; what makes them feel safe, welcome and included; and what makes the biggest difference for children and young people when they need help.

Children and young people have consistently told us that the thing that makes the real difference to them was having a trusted adult in their lives whether that be a teacher, sports coach or caseworker; someone who could connect with them, listen to what they were saying and work with them to overcome any issues that they might be facing. Whilst most children and young people report that they feel safe within these relationships, it is important to identify the gaps in the system that may allow children and young people to be harmed by abuse of authority or trust.

Therefore, in line with other stakeholders we have made submissions to this inquiry that we support extending the special care offences to any adult who works or volunteers at school or has authority over students, youth workers in residential care and specialist homeless services and any adult who employs or manages a young person aged 16 or 17 in a workplace. Extending the offences in a workplace brings New South Wales, as the Committee would well know, in line with other jurisdictions, including Victoria, South Australia and the Northern Territory. It also aligns with what we have heard from children and young people in relation to the workplace. Children and young people have told us in polling that they would like to learn more about their rights in a variety of contexts, and work was one of the key areas where children and young people were unclear about rights more generally or what would constitute authority in a workplace.

Other submissions have pointed out there are risks that an expanded offence may capture age-appropriate and genuinely mutual consensual relationships, and we agree with that. We suggest that section 73 of the Crimes Act should clarify that an offender under each of the special care offences is someone over the age of 18; that a similar age defence should be introduced where the victim and accused are close in age and the relationship is consensual; and that the Director of Public Prosecutions should be required to sanction certain prosecutions, including young people of similar age, and given our mandate, that could extend up to 25, and those who are in special care relationships which are no longer in place.

In relation to special care in families we are of the view that the incest offences are a more appropriate vehicle for addressing adoptive relationships. We highlight the need to consider how any reforms to the special care offences will link to other forthcoming reforms and we also emphasise the importance of community awareness and education in improving child and youth safety. In any law reform process it is incredibly important, particularly for us, that we have robust educational programs so that children and young people are aware of the laws that are there to protect them or, in fact, they could fall under. Thank you very much for this opportunity.

The Hon. LYNDA VOLTZ: Representatives of the law profession appeared earlier. I do not know if you heard their evidence.

Mr JOHNSON: A little, yes.

The Hon. LYNDA VOLTZ: Section 73C seems to be very loosely defined and broad. A good example is in workplaces. One could argue that in terms of instruction, under that legislation trainees and apprentices may

be captured by the Act as it stands, which has passed both Houses of Parliament. Their view was that really the problem was abuse of power which does not appear to be defined so broadly in the Act. What is your view?

Mr JOHNSON: I think we agree with the sentiment that what we are about is abuse of power in certain situations. I think it is important, coming from the young person's perspective that young people are often unclear about that. For us, or for lawyers, it may be clear that there is no technical legal authority over the children and young people but they may assume that is the case. Whether it is in a workplace and a shift manager says, "You can get more shifts" or "You will get the position you want in the team", I think we often need to do a better job of articulating to young people what are their rights and responsibilities in any situation, but particularly in the workplace.

Having heard and read a lot of the evidence from the royal commission, one of the central things that the royal commission is looking at is that we should assume that if a young person assumes that there is abuse of power then we have to accept that that is the case because while legally there may not be a technical oversight, that young person may feel that they are bound by an authority figure with adults. We need to do better at explaining to children and young people their rights in any given situation. It was certainly found by the royal commission that we need to do better in that for all young children, whatever institution or organisation they are connecting with.

The Hon. LYNDA VOLTZ: The way the Act is written, abuse of power is not the evidential proof required. There could be a 20-year-old coach or manager of a soccer team with a 17-year-old girlfriend who is automatically captured by the Act. There could be a 19-year-old worker with a 16-year-old apprentice in the workplace. They could be showing them how to use the tools and they could be captured by the Act. They may not be the specific examples you have given and the power dynamic may not exist but they are simply captured by the Act by the nature of what they are doing.

Mr JOHNSON: I think that is why we are suggesting a similar age defence and that there be discretion for the Director of Public Prosecutions [DPP] to look at those particular cases on a case-by-case basis. If young people are of a similar age, I think it is important to focus on—

The Hon. TREVOR KHAN: What is a similar age?

Mr JOHNSON: We are agnostic as to a particular age. To make the law consistent in other areas or other law reforms we have suggested that the starting point would be two years, but we are also looking at the fact that within the DPP having discretion, you may look up to 24. We say that because in our legislation, but in many legislations, the New South Wales jurisdiction defines a young person who is 12 to 24. You could see, in the circumstances you are talking about, similar age defence where young people could get caught up in a situation. Although, for us, it really is about focusing back on: Did the young person feel like that person has an authority over them? Sometimes as adults we say no whereas in fact we think that the systematising of children's voices has to go further in many parts of law reform in jurisdictions in New South Wales. This would be one of them where we would say it would be very important in the guidelines that the young person is asked what was their experience of the abuse.

The CHAIR: We have heard a lot from the legal panel about certainty in the legislation, but one of the concerns is that a child may not differentiate between a volunteer and a teacher, and so they will not understand the employment relationship. They just know there is an adult at the school. What do you say to that and to the volunteer provision?

Mr JOHNSON: Given we are going to come from protecting the child or young person first, that is our point around the fact that children and young people are not necessarily going to perceive if someone is a volunteer or paid person. That is why we and other organisations are saying that maybe should be included in the extension of special care offences. It is our role, I guess, in the system to only think through problems from their perspective. Having listened to a lot of young people, I think it is very unclear. Back to my point: We are not very good at explaining parameters of power in the institutions in which they live. I think there are circumstances in which volunteers in certain circumstances would be perceived as a person of power.

The Hon. TREVOR KHAN: What if they do not perceive the power at all? Let us suppose it is a teacher and that the 17-year-old young person, not a child, perceives no imbalance of power at all? Are you saying that if there is no perception of power imbalance, they are not guilty of an offence?

Mr JOHNSON: No. I think that is what we are saying when you are looking at it from the view of the child. Often the assumption is that if there is no imbalance of power in a legal sense, you assume that it does not exist. What we are saying is when we are looking at that specific issue of power imbalance, you need to look at it from their perspective.

The Hon. TREVOR KHAN: That is what I am putting to you. What if the child, when questioned, says, "No, there was no power imbalance. He or she was entirely under my spell."

Mr JOHNSON: I think that as the offence is laid out we are saying that, in your case, the teacher would be captured in the provision and we would agree with that.

The Hon. TREVOR KHAN: So would I, but it is not dependent upon the power imbalance; it is dependent upon the relationship.

The Hon. LYNDA VOLTZ: Legislation.

Mr JOHNSON: Agreed. We agree with that position. All we are saying is that when there have been discussions about power imbalance, when we are just looking at that slither of a wider issue, our job is to come to you and say, "You know what? It is not as certain for children as we think." Therefore we are saying that we should be clearer about areas and name them. You could go the Queensland route, which is about having a very broad and open provision. We see there is merit in listing particular kinds of professions and situations where a child is more likely to be subject to coercion or being a victim of an offence.

The Hon. LYNDA VOLTZ: But at the moment it is not clear—well, to my mind it is not clear—over who is being captured. The soccer coach might be captured. The soccer manager might not be captured.

Mr JOHNSON: Specifically relating to (3)?

The Hon. LYNDA VOLTZ: To (c).

The CHAIR: The coach has the direct personal relationship in relation to sporting.

The Hon. TREVOR KHAN: Do not worry about the personal relationship—is not involved in instruction.

The CHAIR: Well, the coach has the sport. The other instruction is the issue. Who is captured?

The Hon. LYNDA VOLTZ: Who is captured?

Mr JOHNSON: I think you are lawyers, but as a non-lawyer you would assume on a plain reading of this that, as sporting has been mentioned, I think that is about where guidelines need to be clearer about when you are looking at these provisions: What do we actually mean by that? I think that comes from the child's or young person's perspective. Where we may not see a relationship where somebody has power, that may not be clear to them. I think we agree with you that to bring more certainty it would be good to get clarity around and direction around when we are talking about sporting, what do we mean? For us I think listing those areas is important. We agree with you, that maybe we can go further and get clarity around those areas.

The Hon. LYNDA VOLTZ: One of the examples that Legal Aid raised was where it was actually a father who wanted to pursue a prosecution as opposed to the daughter who was a month off being 16 and the father insisted on prosecution. I know what you are saying: It is from a young person's point of view, but the reality is that the law sits as it is for the whole community. A parent will perceive that this is where the prosecution should happen.

Mr JOHNSON: I think in certain circumstances part of this, particularly in a post royal commission environment, is about the community standing up and saying out loud that there are some situations where we think young people are put at a disadvantage given that they are not understanding relationships and not understanding to the fullest extent of the power of the adult in their circumstance. In fact, in our consultations with children and young people, one of their biggest and clearest recommendations to us was about when we were hearing back from them about violence. By violence, they meant physical, sexual or emotional. They said that they need more adults to stand up and say out loud that it is just plain wrong. This goes some way, in some areas, to say there that are certain circumstances in our society where we say, "The onus is that that young person should be protected."

The Committee has looked at this and when we looked at it ourselves, we thought, well, if you extend it we need to think where are the other vulnerable circumstances and what is not specifically listed. The Ombudsman turned to specialist homelessness services. In terms of residential care, there are other examples where you would want to ensure that the protection of the young person is the primary concern in that moment. If people are coming to you, which is not an invalid approach, to say that we must ensure that we need to protect those people who are being accused, our role in this process is to say, "We need to be very clear that the protection of children and young people is at the heart of this."

Having this discussion is very important for us to live more of the true recommendations of the royal commission, as well as for the community to have the conversation about where are the elements that we think

that children and young people may be unsafe. This provision is establishing an important spotlight for our community to say: Here are the rules that we want to have in place as a collective, that in these special circumstances we need to take extra precaution, and set it out in law that in these circumstances it is not on.

The Hon. LYNDA VOLTZ: That is fine and that is what everybody wants to do. The problem is that we are seeing people who will be automatically picked up by definition of (3) (c). The young worker in a workplace with an apprentice or a trainee, whether that is McDonald's or somewhere else; or the guitar teacher who is paid 30 bucks a week to give a guitar lesson to a 17-year-old who becomes the girlfriend. They will automatically be picked up. These are situations where they may not even be aware that the legislation applies to them. There is no power imbalance, but by definition that legislation is picking them up as opposed to the manager who says, "I can get you extra shifts", or the coach of the soccer team who says, "Go out with me because I can get you in a representative team."

Mr JOHNSON: Which is why we are saying that there should be similar age defences that the Director of Public Prosecutions should have discretion in. Some of the cases that you are talking about would be picked up by our suggestions, particularly in similar age.

The Hon. LYNDA VOLTZ: At the moment there is an age defence of two years. If you are a 20-year-old and a 17-year-old, you fall outside that defence. The difference could be two years and one month. Do you think that should be extended?

Mr JOHNSON: That is something for the Committee to look at. When we were looking at it, in terms of consistency at law, you would say it is two years. From our point of view, it is worthwhile looking at extending that so that in terms of similar age, the Director of Public Prosecutions can say the starting point is two years but on a case-by-case basis they could go up to the age of 24.

The CHAIR: Are you saying that those two should go hand in hand? The defence of similar age should be subject to the DPP review as opposed to standing as a distinct offence?

Mr JOHNSON: Yes, that is right.

The Hon. TREVOR KHAN: Does that mean it will not be available if the DPP says no?

Mr JOHNSON: You would have the circumstance that it is a consensual relationship.

The Hon. TREVOR KHAN: That has got to be the starting point of this.

Mr JOHNSON: Yes.

The Hon. LYNDA VOLTZ: Otherwise it is a different offence.

Mr JOHNSON: Maybe a sliding scale that if it is two years it is not at the discretion, but two years up to the age of 24, maybe that is at the discretion of the Director of Public Prosecutions.

The Hon. DANIEL MOOKHEY: The DPP already has discretion in terms of its ability to bring a reasonable prosecution. Your suggestion is to amend the similar age defence to broaden it to change the defence?

Mr JOHNSON: What has been raised with the Committee is the concern about the law looking at certain circumstances when there are consensual relationships between young people of similar age. We must be very clear in the law so that people know that if it is a consensual relationship between young people of a similar age that they know very clearly that that is part of the defence. If you are educating young people or young managers, everyone should be told that this should not be—when we looked at certain businesses and the sector, they are already talking as if the law exists. It is good to know, but I think making the age defence clearer so that people can say, "Well, that is there". Then we will not be having a conversation about "What happens if". We can say, "There is a similar age defence." Better minds than ours can determine whether it is two or three years. We would ask the Committee to think about extending it to the age of 24. We think that should be explicit, and it should be explicit for certainty but also for the protection of children and young people.

The Hon. TREVOR KHAN: What Acts would identify a 24-year-old as a young person? I am expressing my ignorance entirely at this stage.

Mr JOHNSON: The easy way to answer that is that the Advocate for Children and Young People Act defines "young person" as a person up to the age of 24.

The Hon. DANIEL MOOKHEY: This is also arising from some of the developments in the child protection law. A strong view is emerging that there should be planning on the 18 to 24 cycle, not 21, which is what happens now.

The Hon. TREVOR KHAN: Is there any other legislation that enshrines the age of 24?

Mr JOHNSON: There would be. I can take that on notice and we can provide it to you. We are so used to having an easy answer, which is our Act. I do not know if it exists at other places.

The Hon. TREVOR KHAN: I am not being critical, but if there is more that is good.

The Hon. DANIEL MOOKHEY: You will find it most commonly used in insurance law. A lot of risk assessment is about the age upon which the brain reaches adult conclusion. It is the scientific view.

The Hon. LYNDA VOLTZ: You will recall that from some other legislation that you have done, Mr Khan.

The CHAIR: Mr Johnson, with section 73 (3) (c), one of the suggestions proposed is that there be an amendment to include the requirement that there be a position of power or authority. Do you support that? Secondly, that there be an addition of an abuse of that power or authority. Earlier you alluded to the section of authority. Would you supportive of enshrining that in the legislation to specifically set out that there must be a position of power or authority and there must be the abuse of it?

The Hon. TREVOR KHAN: That was with regard to the (3) (c).

The Hon. DANIEL MOOKHEY: Section 73 (3) (c) and the additional, not the teacher.

The CHAIR: The submission refers to the teacher, but the section does not. My reference is to the position of power or authority.

The Hon. LYNDA VOLTZ: In (3) (c).

Mr JOHNSON: There are two parts to that. I am thinking on my feet, given that I am able to say that I am not thinking through all of the unintended consequences. Making the abuse of power clear, having already talked about it with the Committee, goes back to whose definition of abuse of power do we mean? There were two parts. The second part, you are more likely to be able to say yes. The first part, the unintended consequences is the adult. The royal commission says that the onus should not be on the victim to determine the position of power. The royal commission is very clear that the onus is not on the victim to prove that that was the case.

For clarity, it is important to have a position of authority, but the questions we have are how do we define that and who defines that? If there was another inquiry into that, we would have to think that through in a legal reform way to ensure that the onus is not back on the young person where you are getting the young person in front of the system, explaining as to why they thought they were in power. Often you are getting people who are forgetting what it was like to be a young person. We concur with the royal commission that it should never be on the onus of the young person to prove that onus of authority.

The CHAIR: Do you have anything further to add?

Ms TALLON: No.

Mr JOHNSON: No. Thank you for the opportunity.

The CHAIR: Thank you for your submissions and your time today. We are very appreciative of it. With that question on notice, the Committee has resolved to request responses within 21 days. If you could direct that through the secretariat, we would be grateful.

Mr JOHNSON: I seek clarification from the Chair. The age of our children and young people bumps around a lot. We may extend beyond your initial question which was those who say 24 and maybe give you an indication of where some of the law says 16, some of it says 17 and some of it says 24.

The CHAIR: The Committee would welcome that. Mr David Shoebridge has been unable to attend today but he may direct some questions in writing also. I am not aware of any at this stage, but there might be some.

Mr JOHNSON: Sure.

The CHAIR: Thank you.

(The witnesses withdrew)

(Short adjournment)

PATRICK DOUMANI, Member Support Officer, Federation of Parents and Citizens Association of New South Wales, sworn and examined

MARIA KAIVANANGA, Councillor for Sydney Electorate, Federation of Parents and Citizens Association of New South Wales, sworn and examined

The CHAIR: The Committee appreciates you coming along today and your written submissions which the Committee has received. Would either of you like to make an opening statement?

Ms KAIVANANGA: Yes. We would like to thank the Committee for this opportunity to contribute to the inquiry into the adequacy and scope of special care offences. Our response to this inquiry is mostly centred on the terms of reference relevant to government schools and our main opinions are as follows. Section 73 of the Crimes Act should be extended in scope to apply to volunteer school workers as well as to teaching staff. However, this should be accompanied by better clarity on whether this includes workers who do not have students under their direct supervision.

We also recommend that the concept of special care be extended to situations where the offender is a school worker, including volunteers, and the victim is a 16-year-old or 17-year-old school student, regardless of whether the offender and victim attend the same school. We also recommend that the Committee look into applying the grooming under the Crimes Act explicitly to special care situations to mitigate against the possibility of someone abusing their position of authority to procure a future sexual relationship with someone under their special care. We recommend that special care offences apply not only to sexual intercourse but also to sexual touching, compelling or encouraging sexual touching, and making indecent recordings.

The Hon. LYNDA VOLTZ: Could you please repeat the item in which you said "regardless of whether they attended the same school"? I missed what the reference was to.

The Hon. TREVOR KHAN: It was point two.

Mr DOUMANI: We recommend that the concept of special care be extended to situations where the offender is a school worker, including volunteers, and the victim is a 16-year-old or 17-year-old school student, regardless of whether the offender and victim attend the same school.

The Hon. LYNDA VOLTZ: I do not understand what you mean by that.

Mr DOUMANI: At the moment the Act applies to situations where the teacher or the school worker and the student attend the same school, not if there is sexual intercourse between a school worker and a school student at a different school. This point is saying that that should be amended to apply to situations where they do not attend the same school, particularly if it is a school worker and a school student in the government school sector.

The Hon. LYNDA VOLTZ: Is that with your broadened definition of school worker?

Mr DOUMANI: The definition of school worker includes what is in the Act at the moment, which is any employee with students under their care. We argue that should be extended to volunteer school workers as well.

The Hon. LYNDA VOLTZ: If they are not at the same school, they are not under their care.

Mr DOUMANI: This was something that had come up when we were putting this submission together. At first we considered that perhaps that would be too broad and that even though sexual relations between a school worker and a student at different schools may be inappropriate it was something that might be best covered by the code of conduct of the Department of Education.

The Hon. LYNDA VOLTZ: Say, for example, you had a gardener at one school who was 20 years of age with a 17-year-old girlfriend at another school.

Mr DOUMANI: Then there is the other point that relates back to the first point in which we mentioned there should be some more clarity around exactly what a school worker is, whether it applies to people who have students under their direct supervision or whether it applies to all school employees. At the moment from our reading of it that is not particularly clear.

The Hon. LYNDA VOLTZ: I am perhaps confused because if they are not at the same school, by definition they are not going to be under their care and supervision anyway.

Mr DOUMANI: Our thinking was that, by reason of being an employee of the Department of Education or a school worker, that already puts them in a position where they may put undue pressure on a student.

The Hon. LYNDA VOLTZ: Say they were a guitar teacher who comes in and gives a one-hour lesson to a couple of students at one school, would that cover them as being an employee to someone in another school?

Mr DOUMANI: If they are employed by the school then yes it would.

The Hon. DANIEL MOOKHEY: If I am, say, a debate coach at school A and my girlfriend goes to school B, and I never have contact with school B, never go to school B and have never performed my volunteer labour at school B, should I be captured?

Mr DOUMANI: That is another area where there is a bit of a lack of clarity about what a school worker is.

The Hon. DANIEL MOOKHEY: Under your proposal, if I am a volunteer, it is a voluntary relationship.

The Hon. LYNDA VOLTZ: Under point two.

Mr DOUMANI: Yes.

The Hon. DANIEL MOOKHEY: Is that something you think should be covered?

Mr DOUMANI: Originally we considered maybe that is something best covered by the department's code of conduct, saying that employees of the department should not engage in any sexual relationship with a student in the government sector.

The Hon. TREVOR KHAN: You would probably have universal agreement on that.

Mr DOUMANI: Yes. But then—

The Hon. TREVOR KHAN: You have gone the next step from the code of conduct and the employment related code of conduct to criminalising behaviour which is in a sense another step.

Mr DOUMANI: The reasoning behind that was that if it is left up to the education department it would be at the discretion of people who may or may not consider it important, whereas if it is legislation then it is automatically covered and there is no ambiguity anymore about that.

The Hon. DANIEL MOOKHEY: That would be true. I am defining what you would like to be covered by the legislation because should a volunteer person who performs labour at a school who then has a relationship with someone from a different school which involves intercourse—the first person having no connection or nexus with the school which that student is a part of—be covered?

Mr DOUMANI: When you say "labour", do you mean someone like a gardener?

The Hon. DANIEL MOOKHEY: I will just go back to the scenario I presented to you before. I coach debating on a voluntary basis at school A, my girlfriend is at school B, I never go to school B or have anything to do with school B; never been a debating coach at school B. Do you think that should be covered, because when you described your proposal it sounded like you did?

Mr DOUMANI: At the moment that is one of those grey areas which might need clarifying. That is why we say there should be a more specified definition of what exactly is a school worker and whether it applies to debating coaches or not.

The Hon. LYNDA VOLTZ: Representatives of the law profession have expressed the view that putting these groups down or trying to define a person is problematic in itself; it is actually the abuse of power that needs a definition within the Act. That is a better way of defining where an offence is occurring. You do not want to capture the 19-year-old bloke with his girlfriend when they are coaching the soccer team. You want to capture the abuse of power. That is problematic within the Act because it is not defined.

Mr DOUMANI: Okay. That key point is where someone is actually in a position where they can apply undue pressure on someone by reason of their position.

The Hon. LYNDA VOLTZ: So you have care and control of children?

Mr DOUMANI: Yes.

The Hon. LYNDA VOLTZ: And you are abusing your power to start a sexual relationship with a 16- or 17-year-old who is in your care and control.

The Hon. TREVOR KHAN: I think we all agree that if it is a teacher, we get it. That is easy; it just should not happen. The problem is once you start broadening beyond those clearly identifiable and definable categories.

Mr DOUMANI: While it is in the same school, yes, that should still apply to all volunteers and employees. The code of conduct of the Department of Education does seem to say that all employees may have some duty of care over their students so that is why it may well apply to all employees.

The Hon. TREVOR KHAN: Let us go back to the Mookhey exercise again. We have a fellow who is 19 or 20. He is in a relationship with a 16- or 17-year-old at the school. Then at the behest of somebody at school, he is invited to become a debating coach for a small compensation. Under the current law that debating coach is then covered by this section; the relationship has already been in existence and yet by the act of taking up the employed position of debating coach that person is liable to be prosecuted for a special care offence. Do you think that is appropriate in a criminal sense? I am not dealing with the morality of it.

Mr DOUMANI: In situations where a relationship started before a special care relationship came into existence, yes, it may well be a valid defence then because the relationship was not a result of an abuse of power. Where someone becomes a debating coach and then starts a relationship with a student at the same school, that would be a different matter then, but we do think that it would be a valid defence if the relationship started before a special care relationship came into existence. It still would not be appropriate for someone to continue the relationship perhaps if that student was still under their direct authority under the new position.

Ms KAIVANANGA: I suppose we are just addressing the power imbalance?

The Hon. TREVOR KHAN: Yes.

Ms KAIVANANGA: Mostly sitting on that reasoning and whether there was a lack of meaningful consent so that position could also be used to make the youth do something other than what they are used to doing within that relationship so there is an abuse of power there as well.

The Hon. LYNDA VOLTZ: Yes, and that is what concerns the law profession. It is that dynamic around the abuse of power.

Ms KAIVANANGA: That is right. That is what we sit on and we believe that the special care offences should apply to those situations and both penetrated as well as non-penetrated circumstances.

The Hon. TREVOR KHAN: I think you have sold us on that.

The Hon. LYNDA VOLTZ: With the volunteers the only concern I have is that schools are a changing and shifting dynamic now. Schools like Colyton Public School have safe women areas with volunteers who go to help because often that is the safest place for some women to be. Other schools run community cafes and some schools have now invested in gyms, where the school has the gym during the day and it becomes a private enterprise essentially at night. Do you have a view on how these will work into the dynamics of this kind of legislation? With the volunteers where you will narrow it to? Will it be the direct employee of the school itself or is it anyone on school property?

Mr DOUMANI: It would be anyone on school property who actually has a supervisory role over students.

The Hon. LYNDA VOLTZ: Take the example of the gym that is run by the school during the day but by private enterprise at night.

Mr DOUMANI: In those situations there would be a special care relationship if there are 16- or 17-year-olds under the direct supervision of those people.

Ms KAIVANANGA: Not primarily the students but there are community groups that do come in and utilise school premises.

The Hon. LYNDA VOLTZ: Dance groups are a good example.

Ms KAIVANANGA: That is right.

The Hon. DANIEL MOOKHEY: Community languages.

Ms KAIVANANGA: Exactly, taekwondo.

The Hon. LYNDA VOLTZ: Choirs.

Ms KAIVANANGA: Choirs, yes, absolutely, so it is in light of those groups that do come in.

The Hon. LYNDA VOLTZ: So you can see where you are going to start getting a different dynamic with those groups being in the school; quite often there will be relationships within those groups. A member of the choir giving instructions to some of the other students and who may be only two or three years older than them could be captured by this if their relationship is with a 16- or 17-year-old. They are probably rare cases but the

fact that those people could get captured I suspect is part of the concern. Where do you draw the line on what is a volunteer person with care and control of a 16- or 17-year-old?

Mr DOUMANI: There would always be situations where there are grey cases like that but, for the sake of maximising the safety of students, it would be best to apply it as broadly as possible. Possibly in some cases that may be a reason to apply an age-difference defence, although the problem with that is that it is not necessarily the age difference that is the problem. If there is a two-year age difference but someone is in a position of power—

The Hon. LYNDA VOLTZ: I think that is a problem that people perceive with the Act now. The power imbalance is not defined—only the role of the person—whereas everyone's problem is with the power imbalance. It is not that alone, but the power imbalance leads to the abuse.

The CHAIR: Do you agree with the proposal to specifically include those words: not only to clarify the role but to insert those words—the position of power and authority—to make it clear that that is the requirement?

Mr DOUMANI: Yes.

The Hon. TREVOR KHAN: I am just looking again at (3) (c), because Lynda raised the issue of people coming onto the site to use the gym facilities. If you look at the wording of (3) (c) would it not apply to a personal trainer in any circumstance?

The Hon. LYNDA VOLTZ: Yes.

The Hon. TREVOR KHAN: It would not have to be on the school premises.

The Hon. LYNDA VOLTZ: No, absolutely. It could be in any gym in New South Wales.

The CHAIR: Under "sporting" and "instruction".

The Hon. TREVOR KHAN: Yes.

The CHAIR: Do you have anything further you would like to add?

Mr DOUMANI: Only that, from our perspective, that should remain the case. It should still apply to that sort of scenario.

The Hon. LYNDA VOLTZ: There are a lot of arguments around sporting coaches. As we know there have long been issues in regard to that, but when they say "sport" they do not define who it is in sport. It could be the manager; it could be anybody.

The Hon. DANIEL MOOKHEY: You recognise that 16- and 17-year-olds otherwise have the right to enter into sexual intercourse.

Ms KAIVANANGA: Yes.

The Hon. DANIEL MOOKHEY: If a 16- or 17-year-old voluntarily enters into sexual intercourse with a gym instructor at Fitness First—which has absolutely nothing to do with the educational instruction received at school—is it your view that that should be covered?

Mr DOUMANI: At the moment under (3) (c) of the Act that would be covered—at least by my reading of it.

The Hon. TREVOR KHAN: Yes, that is right.

The Hon. LYNDA VOLTZ: It is.

Mr DOUMANI: We would agree that that should be kept, just for the maximisation of the safety of 16-year-olds and 17-year-olds, and to ensure—

The Hon. DANIEL MOOKHEY: But that gets to the nub of the issue, which is that the law has already concluded that 16- and 17-year-olds have the capacity to make decisions for themselves in most circumstances. Insofar as this special care protection exists in law, it is because Parliament has qualified that right. Some people would argue that prohibiting a gym instructor from entering into a sexual relationship with a 17-year-old would be an unintended consequence of this law. It was never designed to, because effectively the power imbalance aspect is not there. Trying to teach someone how to use a piece of gym equipment is not the same as you giving them maths instruction.

The Hon. TREVOR KHAN: Day in, day out, over a 12-month period of time. It is the subtlety of the relationship.

Mr DOUMANI: It is. That sort of scenario is not something that is within our purview. It is not something that we would take a strong position on, one way or another. We are mostly centred on situations in a school setting.

The Hon. TREVOR KHAN: It is so structured in a school setting. The lines of authority are quite clear in the school setting. There is a pretty recognisable hierarchy within a school environment which actually does not translate as effectively out in the broader community.

Mr DOUMANI: We would agree.

The Hon. TREVOR KHAN: If you define legislation so that it fits within the school environment—I think a lot of these amendments were designed to do that—their application outside may have outcomes that nobody every anticipated.

Mr DOUMANI: Yes.

The Hon. DANIEL MOOKHEY: My point is simply that the P and C would not oppose any attempts to better define (3) (c) to avoid such circumstances as—

Mr DOUMANI: To avoid circumstances like those which apply to areas outside of an educational or school setting. That is not something that we would comment on.

The CHAIR: Thank you very much for attending today, for your evidence and for your submission. There are no questions that have been taken on notice. There may be some written questions from Mr Shoebridge, who has not been able to attend today. They will be directed to you through the secretariat.

(The witnesses withdrew)

(The Committee adjourned 2.35 p.m.)