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Mark Speakman
Attorney General



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Parliament House
Macquarie Street
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Dear Mr Blunt

Please find enclosed a copy of the NSW Government's response to Report 66 of the Standing Committee on Law and Justice – *Inquiry into the adequacy and scope of special care offences* – November 2018.

Yours sincerely

Mark Speakman

Received at 1:00pm
Thursday 1 August 2019

Government Response

NSW Legislative Council Standing Committee on
Law and Justice Report 66 –

Adequacy and scope of the special care offences

July 2019

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1. Introduction

The Attorney General, the Hon Mark Speakman SC MP, referred terms of reference for the Inquiry into the Adequacy and Scope of Special Care Offence ('the Inquiry') to the Legislative Council Standing Committee on Law and Justice on 13 February 2018. Expanded terms of reference were referred on 18 April 2018. Those final terms of reference (at **Appendix C**) were adopted by the Committee on 1 May 2018.

In summary, the terms of reference tasked the Committee with inquiring into and reporting on the adequacy and scope of the special care relationships recognised in the special care offence under section 73 of the *Crimes Act 1900* (NSW) (the **Crimes Act**). In particular, the Committee was to consider whether:

- the offence's scope ensures the safety of school students by covering all relevant relationships with school staff and volunteers;
- the offence should apply where a special care offence has existed, but is no longer in effect;
- the offence should apply to youth workers and workers in youth residential care settings;
- the offence should be expanded to recognise adoptive relationships;
- the incest offence under section 78A of the Crimes Act should be expanded to include adoptive relationships; and
- any additional safeguards are required.

The Committee received 17 submissions, including one from the NSW Government, and held one public hearing, at which witnesses included representatives from the NSW Department of Justice.

The Committee delivered its Report 66, 'Adequacy and scope of special care offences' (the **Report**), on 22 November 2018. The Report concluded that there is value in amending the special care offence to provide greater clarity and certainty about which relationships are captured as criminal conduct, and made five recommendations to Government to achieve that result.

The NSW Government thanks the Committee for its thoughtful consideration of this complex issue, and its careful balancing of divergent views on the question of reform. The Government's response to the Report's findings and recommendations is set out below.

2. The special care offence

The special care offence is set out under section 73 of the Crimes Act, reproduced at **Appendix A**. The NSW Government Submission to the Inquiry at **Appendix E** provides background on its introduction and development, however, a short summary is provided below for context.

Introduction of the special care offence in 2003

The special care offence was introduced into the Crimes Act in 2003 as part of a reform package that provided for the equal treatment of sexual offences irrespective of the victim's or perpetrator's gender or sexual orientation captured in the *Crimes Amendment (Sexual Offences) Act 2003*. The special care offence repealed and replaced a more limited offence of 'carnal knowledge' by a (male) teacher, father or step-father with his pupil, daughter or step-daughter who is over 16, but under 17, years of age.

Unlike the carnal knowledge offence, the special care offence introduced in 2003:

- applied to both sexual intercourse¹ between an adult of either sex and a young person of either sex aged 16 or 17 years [referred to as 'young people' for the remainder of this response];
- applied to various relationships involving a power imbalance, including between:
 - step-parents, guardians or foster parents and young people under their care;
 - school teachers and pupils;
 - custodial officers and inmates;
 - adults who have established personal relationships with a young person in connection with the provision of religious, sporting, musical or other instruction; and
 - health professionals and their patients;
- included a defence of marriage; and
- removed the parent/child relationship from the definition of a 'special care' relationship (with sexual relationships between parents and children, and between other close family members, instead criminalised under the incest offence in section 78A of the Crimes Act, also revised under the *Crimes Amendment (Sexual Offences) Act 2003*).

While the general age of consent to sexual conduct in NSW is 16 years of age, the special care offence is founded on the presumption that a young person aged 16 or 17 years cannot freely consent to sexual intercourse with a person with whom they have a 'special care' relationship. More specifically, the offence recognises that special care relationships involve some imbalance of power, which affects the capacity of the young person under the authority of the older person in that relationship to give free and voluntary consent.

Current form of special care offence

Since its enactment in 2003, the special care offence has remained largely unchanged, however, it has been subject to the following three amendments:

¹'Sexual intercourse' is defined under section 61HA of the Crimes Act to mean:

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

- In 2012, following a decision by the NSW Court of Criminal Appeal² in which the Court held that the offence extended to the de facto partners of a young person's parent, guardian or foster parent, section 73 was amended to expressly include relationships between de facto partners of victim's parents, guardians and foster parents as 'special care' relationships for the purposes of the offence;
- In March 2017, following a decision by the NSW Court of Criminal Appeal³ that highlighted a loophole in the way 'teacher' was defined for the purposes of section 73, the offence was amended to capture relationships between students and 'member[s] of the teaching staff of the school' (defined to include teachers, principals and deputy principals, and 'any other person employed at the school who has students at the school under his or her care or authority'); and
- In December 2018, the offence was amended to replace the reference to 'foster carer' with 'authorised carer', to align with current terminology and to ensure that the relationships covered by the offence include those between young people and short-term and long-term carers; respite and crisis emergency carers; relative and kinship carers where the Minister holds parental responsibility, or where the parent receives Family and Community Services' (FACS) support; and principal officers of agencies that provide out of home care (OOHC).

In addition, in December 2018, the special care offence was supplemented with an additional offence criminalising sexual touching of a young person under special care, under section 73A of the Crimes Act (reproduced at **Appendix B**). That offence covers a wider range of sexual conduct, and applies to a slightly wider range of relationships, including relationships between a young person and his or her parent or grandparent, or the de facto partner of his or parent or grandparent (see section 73A(3)(a)).

The Committee's Report was completed after the special care sexual touching offence was passed, but prior to its commencement.

² *JAD v R* [2012] NSWCCA 73.

³ *R v PJ* [2017] NSWCCA 290.

3. Committee recommendations

The Committee made five recommendations with respect to reform to the special care offence. The Government's response to each recommendation is set out in the table below.

Committee Recommendation	NSW Government Response
<p>Recommendation 1:</p> <p>That the NSW Government amend section 73 of the <i>Crimes Act 1900</i> to clarify that the offender is in a position of authority in the relationship.</p>	<p>Support.</p> <p>As set out in the NSW Government Submission to the Inquiry, the policy objective behind the special care offence (as well as the recently enacted special care (sexual touching) offence under section 73A) is to protect 16 and 17 year olds from exploitation by adults who are in a position of authority over them, whether or not that authority is abused. This ensures that innocent, consensual relationships between young people over the age of consent and people over the age of majority are not inadvertently criminalised. This is also reflected in the characterisation of such offences as 'position of authority' offences by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission).</p> <p>Most of the relationships defined as 'special care' relationships under section 73(3) inherently involve the adult party's authority over the young person (i.e.: section 73(3)(a), involving parents/carers and their children/children under their care; section 73(3)(b), involving school staff members and students; section 73(3)(d), involving custodial officers and inmates; and section 73(3)(e), involving medical practitioners and patients). However, as the Inquiry Report notes, in the remaining relationship type, under section 73(3)(c) (involving an adult who provide religious, sporting, musical or other instruction to a young person), the adult party may not always be in a position of authority, and the current wording of the provision, which does not expressly or impliedly require that the adult be in a position of authority relative to the young person, may mean that adults in consensual, innocent relationships with young people over whom they have no actual or de facto authority might be found guilty of an offence. . For example, under its current construction, a 19 year old who volunteers as a debating coach at his or her former high school in the year after graduation and forms an innocent, consensual relationship with a 17 year old member of the debating team, over whom the 19 year old has no actual or de facto authority, might be providing 'other instruction' for the purposes of section 73(3)(c) and be liable to criminal prosecution.</p> <p>Accordingly, the Government will give effect to this Recommendation by amendment to section 73(3)(c), and to specify that a position of authority is also required for a relationship of the type referred to in Rec 4 (see below) in order for it to constitute a relationship of 'special care'.</p>

	<p>The NSW Government supports the Recommendation, and agrees that section 73's overall objective would be better achieved if section 73(3)(c) is amended to provide greater clarity and certainty as to the requirement that the adult be in a position of authority relative to the young person in order for an offence to be committed.</p> <p>The NSW Government supports a corresponding clarification with respect to section 73A(3)(c).</p>
<p>Recommendation 2:</p> <p>That the NSW Government amend section 73(3)(c)⁴ of the <i>Crimes Act 1900</i> to:</p> <ul style="list-style-type: none"> - clarify that the offender is in a position of care or authority - ensure that the reference to 'any other person employed at the school' [under section 72B for the purposes of both section 73(3)(b) and section 73A(3)(b)] includes unpaid workers, such as volunteers. 	<p>Support.</p> <p>As above, the NSW Government accepts the Inquiry's finding that section 73 generally, and section 73(3)(c) in particular, would benefit from greater clarity and certainty. The NSW Government supports an amendment to section 73(3)(c) to make clear that, for the purposes of section 73, a relationship between an adult and a young person to whom the adult provides religious, sporting, musical or other instruction only constitutes a relationship of 'special care' if the adult is in a position of authority relative to the young person.</p> <p>The NSW Government agrees that an amendment to this effect will make clear that the power imbalance due to the adult's position of authority relative to the young person, which is inherent in the other categories of special care relationships under section 73(3), is also required for the purposes of section 73(3)(c). It will also avoid criminalising innocent, consensual relationships formed between young people and adults in connection with extra-curricular activities that do not involve any power imbalance.</p> <p>The NSW Government supports corresponding clarifications for the purposes of section 73A(3)(c).</p> <p>The NSW Government further agrees that the section 72B definition of 'member of the teaching staff' of a school, which currently includes, for the purposes of section 73(3)(b) (and section 73A(3)(b)), 'any other person employed at the school' may create an unintended ambiguity. While the use of the term 'employed' was not intended to limit section 73(3)(b)'s application to paid staff only, the NSW Government recognises that this phrasing may cause some confusion and ambiguity as to the offence's scope and application.</p> <p>The NSW Government supports the Recommendation that the section 72B definition be amended to place beyond doubt that section 73(3)(b) (and section 73A(3)(b)) applies to staff in both paid and unpaid, and formal, informal or voluntary, positions.</p>
<p>Recommendation 3:</p> <p>That the NSW Government give consideration to</p>	<p>Support.</p>

⁴ NB: This is incorrectly referred to as section 73(6)(c) in the Report.

amending the *Crimes Act 1900* to include employment relationships as an additional category under section 73(3).

As the Committee makes clear in its Report, the question of whether relationships between young people and their colleagues in an employment context should be defined as 'special care' relationships under section 73(3) is a complex one.

As the Report and various stakeholder submissions have indicated, many young people have jobs and work alongside colleagues of the same or similar ages. Some colleagues may have been friends or partners before they began working together; others may make strong friendships or develop intimate relationships with their colleagues after meeting at work. In some cases, a young person or their friend/partner may even have assisted the other to gain employment in the organisation, without any expectation that that could then place them at risk of prosecution (for example, by notifying friends or members of their network that there is a vacancy in the organisation).

Any amendment to the special care offence to deem all employment relationships to be special care relationships for the purposes of section 73(3) may criminalise innocent, consensual relationships formed between such colleagues, and potentially restrict young people's autonomy, deter young people or their partners from taking or remaining in certain roles, or place young people's partners at risk of prosecution.

The risk of prosecution of consensual, innocent relationships between colleagues may be reduced by clearly requiring that, to be a relationship of 'special care', an employment relationship must involve the adult being in a position of authority with respect to the young person. However, that may not be enough to avoid criminalisation of innocent, consensual relationships, or to ensure that all potentially exploitative employment relationships are criminalised.

Determining when an employment relationship involves 'authority' may not always be simple. A purely hierarchal assessment may not be sufficient; in an organisation with multiple areas a 'manager' might have no managerial authority over a young person who is not in his or her team. Alternatively, a person at the same level as a young person, but who has greater experience, may be able to exercise de facto authority. How those variables might be captured would require careful consideration to avoid unintended consequences.

The NSW Government will continue to monitor developments in this area.

Support.

The NSW Government agrees that section 73(3) would benefit from amendment to recognise relationships between young people and adults engaged in youth residential care and homelessness services, where the adult party is in a position of authority relative to the young person, within the scope of special care relationships.

Young people who live or stay in residential care facilities on a short or long term basis, or who access homelessness services, can be particularly vulnerable to exploitation. Staff who work or volunteer with young people in such settings may be in a position of trust and authority with respect to the young people they engage

Recommendation 4:

That the NSW Government amend the *Crimes Act 1900* to include relationships in youth residential care settings and homelessness services as additional

<p>categories under section 73(3).</p>	<p>with. However, they may not be authorised carers, health professionals or custodial officers, and therefore may not be covered by the special care offence.</p> <p>The NSW Government agrees that amending section 73(3) to categorise these relationships as 'special care' relationships, where the adult party is in a position of authority relative to the young person, aligns with the policy objectives of the special care offence, and would promote protection of vulnerable young people.</p> <p>The NSW Government supports a corresponding amendment for the purposes of section 73A(3).</p>
<p>Recommendation 5:</p> <p>That the NSW Government amend the <i>Crimes Act 1900</i> to include adoptive parents and de facto partners of adoptive parents in section 73(3)(a).</p>	<p>Support:</p> <p>The special care offence applies to relationships between young people and their step parents, guardians, and authorised carers, and those individuals' partners, but does not apply to sexual relationships between young people and their parents. Instead, sexual relationships between children and their biological parents (and between other 'close family members') are instead criminalised under the incest offence, under section 78A of the Crimes Act. 'Close family member' is defined under section 78A(2) as a parent, son, daughter, sibling, half-sibling, grandparent, or grandchild 'from birth'.</p> <p>However, as the NSW Government's Submission to the Inquiry acknowledged, it is not clear whether a sexual relationship between an adopted person and a close member of his or her adoptive family would constitute an act of incest for the purposes of section 78A. Arguably, the incest offence may not apply, noting that:</p> <ul style="list-style-type: none"> - the individuals involved would not have been close family members 'from birth'; and - the policy intent behind the incest offence has historically been principally directed at preventing reproduction between close blood relatives and conduct that threatens the security and stability of the family unit. <p>The NSW Government agrees that the current phrasing of the special care and incest offences may have inadvertently created a situation in which there is no offence to criminalise a person entering into a sexual relationship with a young person who is a close member of his or her family by way of adoption.</p> <p>The NSW Government accepts the Committee's conclusion that this situation would best be remedied by amending section 73. Amending the special care offence to include relationships between adopted young people and their adoptive parents (and the de facto partners of their adoptive parents) will preserve the policy intent behind the incest provision, but also make clear that, in sexual relationships between adults with authority over young people, it is the conduct of the adult that is criminalised only.</p> <p>The NSW Government also proposes to amend section 73 to include relationships between adopted young people and their adoptive grandparents and the de facto partners of their adoptive grandparents, as well as the de facto</p>

partners of their (biological) grandparents. This reflects, and will be consistent with, the inclusion of both parents and grandparents, and the de facto partners of parents and grandparents, in section 73A.

The NSW Government supports a corresponding amendment to include relationships between adopted young people and their adoptive parents and adoptive grandparents, and the de facto partners of their adoptive parents, adoptive grandparents and biological grandparents, for the purposes of section 73A.

Additional reform

Building on Recommendation 5, the NSW Government considers that one additional amendment to the Crimes Act is appropriate. It is proposed to:

- amend the incest offence under s78A of the *Crimes Act 1900* (NSW) to provide that, in cases involving sexual intercourse between a 16 or 17 year old and his/her parent or grandparent, the young person is immune from prosecution (recognising that a similar dynamic as reflected in the special care offences will be present).

As set out above, the special care offence is designed to protect young people who are over the age of consent but under the age of majority from exploitation by adults who are in a position of authority over them (whether or not that authority is abused). The new section 73A special care (sexual touching) offence classifies relationships between young people and their parents and grandparents, and the de facto partners of their parents and grandparents, as 'special care' relationships in recognition that parents, grandparents and their partners are generally in a position of authority over the young person. This is also reflected in Recommendation 5, which recognises that relationships between adopted young people and their adoptive parents and their de facto partners (to be extended to include adoptive grandparents and their de facto partners, as above) also generally involve the adult party in a position of authority.

At present, section 73, unlike section 73A, does not classify relationships between young people and their biological parents and grandparents (or the de facto partners of their biological grandparents) as special care relationships; sexual intercourse between young people and their biological parents and grandparents is already criminalised under section 78A. However, as the NSW Government Submission to the Inquiry and the Committee's Report both note, section 78A applies with the effect that any person over the age of 16 who has a sexual relationship with a close family member is liable to prosecution. This is inconsistent with the policy intent behind the special care offences, which is to protect young people from sexual exploitation by adults with authority over them.

This additional proposed amendment to section 78A will address this inconsistency and promote the protection of young people from exploitation.

Appendix A: Special care offence (sexual intercourse)

73 Sexual intercourse—young person between 16 and 18 under special care

- (1) Any person who has sexual intercourse with a young person who:
 - a. is under his or her special care, and
 - b. is of or above the age of 16 years and under the age of 17 years,is liable to imprisonment for 8 years.
- (2) Any person who has sexual intercourse with a young person who:
 - a. is under his or her special care, and
 - b. is of or above the age of 17 years and under the age of 18 years,is liable to imprisonment for 4 years.
- (3) For the purposes of this section, a young person (*the victim*) is under the special care of another person (*the offender*) if, and only if:
 - a. the offender is the step-parent, guardian or authorised carer of the victim or the de facto partner of a parent, guardian or authorised carer of the victim, or
 - b. the offender is a member of the teaching staff of the school at which the victim is a student, or
 - c. the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, or
 - d. the offender is a custodial officer of an institution of which the victim is an inmate, or
 - e. the offender is a health professional and the victim is a patient of the health professional.
- (4) (Repealed)
- (5) A person does not commit an offence under this section if the person and the young person to whom the charge relates were, at the time the offence is alleged to have been committed, married to each other.
- (6) (Repealed)

Appendix B: Special care offence (sexual touching)

73A Sexual touching—young person between 16 and 18 under special care

(1) Any person who intentionally:

- a. sexually touches a young person under the person's special care, or
 - b. incites a young person under the person's special care to sexually touch the person, or
 - c. incites a young person under the person's special care to sexually touch another person,
or
 - d. incites another person to sexually touch a young person under the first person's special care,
- is guilty of an offence.

Maximum penalty:

- a. in the case of a young person who is of or above the age of 16 years and under the age of 17 years—imprisonment for 4 years, or
- b. in the case of a young person who is of or above the age of 17 years and under the age of 18 years—imprisonment for 2 years.

(2) A person does not commit an offence under this section if the person and the young person to whom the charge relates were, at the time the offence is alleged to have been committed, married to each other.

(3) For the purposes of this section, a young person (the victim) is under the special care of another person (the offender) if, and only if:

- a. the offender is the parent, grandparent, step-parent, guardian or authorised carer of the victim or the de facto partner of a parent, guardian or authorised carer of the victim, or
- b. the offender is a member of the teaching staff of the school at which the victim is a student, or
- c. the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, or
- d. the offender is a custodial officer of an institution of which the victim is an inmate, or
- e. the offender is a health professional and the victim is a patient of the health professional.

Appendix C: Inquiry Term of Reference

Inquiry into the adequacy and scope of special care offences

That the Standing Committee on Law and Justice inquire into and report on the following aspects of the adequacy and scope of the special care relationships recognised in the special care offence under section 73 of the *Crimes Act 1900*:

- (a) the adequacy of the scope of the special care offences in ensuring the safety of school students, in relation to their application to teachers and other school workers, including:
 - i. whether the offences should apply where a school worker is a volunteer,
 - ii. whether the offences should apply where the school worker is a recent ex-student of the school,
 - iii. (iii) whether the offences should apply where the school worker no longer works at the student's school,
- (b) whether the offences should apply where a special care relationship existed but is no longer in effect,
- (c) whether youth workers and workers in youth residential care settings, including but not limited to homelessness services, should be recognised as having special care of any 16 or 17 year old young people to whom they provide services,
- (d) whether the offences should be expanded to recognise adoptive parents and adopted children as a special care relationship
- (e) whether any additional safeguards, including but not limited to Director of Public Prosecutions sanction of prosecutions, are required in any of the circumstances in paragraphs (a) - (d) above,
- (f) whether the incest offence in section 78A of the Crimes Act 1900 should be expanded to include adoptive relationships, and
- (g) any other related matter.

Committee membership

The Hon Natalie Ward MLC (*Chair*)

The Hon Lynda Voltz MLC (*Deputy Chair*)

The Hon David Clarke MLC

The Hon Trevor Khan MLC

The Hon Daniel Mookhey MLC

Mr David Shoebridge MLC

Liberal Party

Australian Labor Party

Liberal Party

The Nationals

Australian Labor Party

The Greens

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

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

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

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

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

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