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STANDING COMMITTEE ON LAW AND JUSTICE

Adequacy and scope of special care offences



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Adequacy and scope of special care offences

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Terms of reference

1. 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) 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 - (b) whether the offences should apply where a special care relationship existed but is no longer in effect,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.

The terms of reference were referred to the committee by the Hon Mark Speakman MP, Attorney General on 13 February 2018.¹ The committee adopted these terms of reference on 15 February 2018.

Additional terms of reference ((d) and (f)) were referred to the committee by the Hon Mark Speakman MP, Attorney General on 18 April 2018. These terms of reference were subsequently adopted by the committee on 1 May 2018.

¹ *Minutes*, NSW Legislative Council, 6 March 2018, p 2310.

Committee details

Committee members

The Hon Natalie Ward MLC	Liberal Party	<i>Chair</i>
The Hon Lynda Voltz MLC	Australian Labor Party	<i>Deputy Chair</i>
The Hon David Clarke MLC	Liberal Party	
The Hon Trevor Khan MLC	The Nationals	
The Hon Daniel Mookhey MLC	Australian Labor Party	
Mr David Shoebridge MLC	The Greens	

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Chair's foreword

The special care offence aims to protect young people from being abused by someone in a position of authority. In recent years, the offence has been amended to ensure that this protection extends to capture a wide array of special care relationships, particularly in a school setting.

On this basis, the committee was tasked with examining the adequacy and scope of the special care offence as it is currently framed, and to consider the circumstances under which, if any, the offence should be expanded. A wide array of views and concerns were presented by stakeholders in written and oral submissions. Given the wide range of opinion, it presented the committee with a challenging exercise, and members grappled with the implications of the offence in many different situations and contexts.

However, one consistent concern expressed by stakeholders was that the current wording of the offence is broad, such that it has the potential to capture innocent relationships that were not intended to be deemed as criminal conduct. The committee examined these issues closely and carefully, whilst also considering the overarching intent of the legislation.

The committee believes there is value in amending the special care offence to provide greater clarity and certainty about which relationships are captured as criminal conduct. Members formed the view, based on the evidence presented, that it is necessary for the wording of the offence to be amended to ensure that the offender is in a position of authority over the victim. The committee also recommends that the offence explicitly include unpaid workers in schools, and that it be expanded to include relationships in youth residential care settings and homelessness services, as well as adoptive relationships.

The committee is mindful that our recommendations should not introduce the need for proof of the exercise or abuse of authority. We note the Royal Commission into Institutional Responses to Child Sexual Abuse recommended that no further evidence be required beyond the existence of the relationship of authority in order for the offence to apply.

This was a complex inquiry, for which the committee is grateful to have received the expertise of the many stakeholders who participated. On behalf of committee members, I sincerely thank inquiry participants for drawing out the complexities of the offence for our thorough consideration.

I thank the Attorney General for this referral. I thank my fellow committee members for their participation and considered engagement throughout the inquiry. In particular, I am most appreciative of the hard work and professional support of the committee secretariat staff, Rhia Victorino, Madeleine Foley, Tina Higgins, Janina Moaga and Helen Hong, at a particularly busy and challenging time in the parliamentary schedule.



The Hon Natalie Ward MLC
Committee Chair

Summary of key issues

In examining the adequacy and scope of the special care offence under section 73 of the *Crimes Act 1900*, the committee was tasked with considering the following key issues, as outlined in the inquiry's terms of reference:

Special care relationships in schools

Inquiry participants discussed whether the special care offence should apply to certain types of school workers, namely volunteers, recent ex-students and former workers (term of reference (a)). In terms of volunteers, the NSW Government was of the view that the special care offence does not currently cover a relationship between a student and a volunteer at their school, despite the possibility of volunteers having, in some circumstances, a relationship of authority over their students. However, other stakeholders had a different view, believing that the offence captures these individuals. Given the difference in opinions, stakeholders agreed there would be merit in amending the offence to explicitly refer to unpaid workers.

In relation to ex-students, the committee received evidence to suggest that the offence already captures these individuals, provided they fall within one of the special care categories prescribed in the Act. In the case of former school workers, stakeholders generally did not support extending the offence to school workers who no longer work at the student's school.

Special care relationships no longer in effect

Stakeholders considered whether a temporal condition should be included in the special care offence to account for special care relationships that once existed but are no longer in effect (term of reference (b)). While some inquiry participants recognised the influence a person in a position of authority may continue to have over a young person, even after the special care relationship has ended, numerous others did not support the offence applying to these relationships when they cease to exist.

Special care relationships in youth residential care settings

In response to whether youth residential care settings should be included within the scope of the special care offence (term of reference (c)), stakeholders consistently called for the offence to extend to youth workers and workers in these settings. The committee received evidence highlighting the inherent vulnerabilities of children and young people within youth residential care settings, who are at particular risk of sexual exploitation and influence.

Adoptive relationships

The committee was asked to consider whether the special care offence should be expanded to include adoptive parents and adopted children as a special care relationship (term of reference (d)), and separately in relation to the incest offence in section 78A of the *Crimes Act* (term of reference (f)).

The committee received evidence indicating that an expansion of the special care offence to include adoptive relationships, rather than the incest offence, would be the most appropriate legislative response given that the purpose of the offence is to protect young people and to criminalise those who would abuse their authority over them.

The sanction of prosecutions by the Director of Public Prosecutions

Stakeholders considered the value of the Director of Public Prosecutions (DPP) sanctioning prosecutions under the special care offence (term of reference (e)) as a safeguard to prevent the risk of criminalising what may be regarded as appropriate consensual conduct. Inquiry participants grappled with, on the one hand, the sanction providing assurance that prosecutions would only be pursued as necessary, and, on the other, the power granted to the DPP to pursue, or not pursue prosecutions, in its discretion. In light of this, numerous stakeholders argued for greater certainty and clarity in the law, such that a DPP sanction as a safeguard may only be needed under limited circumstances, if at all.

Amending the offence to provide greater clarity and protection to young people in special care relationships

A consistent concern expressed by inquiry participants was that the offence, as it is currently worded, is broad, such that it has the potential to capture innocent relationships that were not intended to be deemed as criminal conduct. One problem area, in particular, is section 73(3)(c), where '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'. The latter part of this provision – 'other instruction to the victim' gave rise to disagreement among stakeholders as to which relationships would be covered under this provision.

Inquiry participants expressed a wide range of views, leaving no clear consensus on how best to amend the offence. Some stakeholders argued that it is the absence of an explicit reference to 'authority' within the wording of the special care offence that is the underlying problem. The committee received evidence suggesting there is value in amending the special care offence to make it clear that the victim is the person under the authority or care of the offender, thereby aligning the application of the offence with the intention of the legislation – to protect young people against the abuse of authority in special care relationships.

There was also evidence from some stakeholders about the need to include employment relationships as a category within in the special care offence, given that while there is regulation around sexual misconduct in employment settings, there is no criminalisation of this conduct.

Recommendations

- Recommendation 1** **37**
That the NSW Government amend section 73 of the *Crimes Act 1900* to clarify that the offender is in a position of authority in the relationship.
- Recommendation 2** **37**
That the NSW Government amend section 73(6)(c) of the *Crimes Act 1900* to:
- clarify that the offender is in a position of care or authority
 - ensure the reference to 'any other person employed at the school' includes unpaid workers, such as volunteers.
- Recommendation 3** **38**
That the NSW Government give consideration to amending the *Crimes Act 1900* to include employment relationships as an additional category under section 73(3).
- Recommendation 4** **38**
That the NSW Government amend the *Crimes Act 1900* to include relationships in youth residential care settings and homelessness services as additional categories under section 73(3).
- Recommendation 5** **39**
That the NSW Government amend the *Crimes Act 1900* to include adoptive parents and de facto partners of adoptive parents in section 73(3)(a).

Conduct of inquiry

The terms of reference were referred to the committee by the Hon Mark Speakman MP, Attorney General on 13 February 2018.² The committee adopted these terms of reference on 15 February 2018.

Additional terms of reference ((d) and (f)) were referred to the committee by the Hon Mark Speakman MP, Attorney General on 18 April 2018. These terms of reference were subsequently adopted by the committee on 1 May 2018.

The committee received 17 submissions.

The committee held one public hearing at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.

² *Minutes*, NSW Legislative Council, 6 March 2018, p 2310.

Chapter 1 Background

This chapter provides an overview of the special care offence, including its rationale and purpose. It also outlines how the offence has developed over time and the role of common law in recent amendments. The chapter also briefly considers the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse as they relate to the inquiry.

The special care offence

- 1.1 In New South Wales, the age of consent for sexual intercourse is 16 years of age.³ Under section 73 of the *Crimes Act 1900*, however, it is an offence to have sexual intercourse with a person aged 16 or 17 years under special care. Known as the 'special care offence', the offence requires that:
- a person had sexual intercourse
 - with a person under his or her 'special care' (that is, a prescribed special care relationship existed)
 - where the victim is aged 16 or 17 years.⁴
- 1.2 The offence is based on the presumption that a child aged 16 or 17 years cannot freely consent to sexual intercourse where a special care relationship exists. The general age of consent to sexual conduct in NSW is 16 years of age, and children below the age of 16 are presumed to be unable to consent to sexual activity. A person aged 16 or over is generally presumed to be able to engage in sexual intercourse freely and voluntarily. However, an exception exists where a child is aged 16 or 17 years old and there is a relationship of special care between the child and the other person.⁵
- 1.3 The special care offence effectively increases the age of consent to 18 years in circumstances where one person is in a position of dominance or authority over another and may exploit their position. This means that the prosecution does not have to prove that the victim did not consent to the sexual activity. The purpose of the offence is to protect children aged 16 and 17 against such misuse of authority in particular relationships where there is a power imbalance between the parties. The offence does not require proof that the person in fact abused their authority. Instead, the existence of the special care relationship is sufficient. This is because there is a presumption that the vulnerabilities of children could be exploited by those in a position of authority over them. In such circumstances any consent may not be freely and voluntarily given.⁶

³ *Crimes Act 1900*, s 66C.

⁴ *Crimes Act 1900*, s 73. Please note that the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*, which was passed in June 2018 but is currently not in force, also introduced a new special care offence of sexual touching (see paragraph 1.26).

⁵ Submission 7, NSW Government, p 4.

⁶ Submission 7, NSW Government, p 4.

- 1.4 Under section 73 (3) of the *Crimes Act*, a special care relationship is exclusively defined as one where:
- the offender is the step-parent, guardian or foster parent of the victim or the de facto partner living with a parent, guardian or foster parent of the victim, or
 - the offender is a member of the teaching staff of the school at which the victim is a student, or
 - 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
 - the offender is a custodial officer of an institution where the victim is an inmate, or
 - the offender is a health professional and the victim is a patient of the health professional.⁷
- 1.5 The offence does not apply if, at the time the offence was alleged to have been committed, the person and the other person to whom the charges relate were married to each other.⁸
- 1.6 The maximum penalty for the offence is:
- 8 years imprisonment, where the victim is 16 years⁹
 - 4 years imprisonment, where the victim is 17 years.¹⁰
- 1.7 According to the NSW Government, the difference in the maximum penalties 'reflects the idea that vulnerability decreases as the age of a child increases' and is consistent with the approach taken in other child sexual offences in New South Wales.¹¹
- 1.8 Since 2003, there have been 67 cases prosecuted under the special care offence: 31 cases relating to the teacher category of relationships, 27 relating to the step-parent, guardian or foster parent category of relationships, and 9 relating to the category of relationships established in connection with religious, sporting, musical or other instruction.¹²

Rationale and purpose of the special care offence

- 1.9 While it is generally accepted that a young person aged 16 years or over is able to engage in sexual intercourse freely and voluntarily, the special care offence is based on the presumption that a young person aged 16 or 17 years cannot freely and voluntarily consent to sexual intercourse where a special care relationship exists.¹³ It is inherent that in these relationships there is a power imbalance that holds one person in a position of authority over another. The offence presumes that those in a position of authority may exploit the vulnerabilities of young people, therefore any consent may not be freely and voluntarily given.¹⁴

⁷ *Crimes Act 1900*, s 73 (3).

⁸ *Crimes Act 1900*, s 73 (5).

⁹ *Crimes Act 1900*, s 73 (1).

¹⁰ *Crimes Act 1900*, s 73 (2).

¹¹ Submission 7, NSW Government, p 4.

¹² Answers to questions on notice, Ms Johanna Pheils, Deputy Solicitor for Public Prosecutions (Legal), Solicitor's Executive, Office of the Director of Public Prosecutions, 27 July 2018, p 1.

¹³ Submission 7, NSW Government, p 4.

¹⁴ Submission 7, NSW Government, p 4.

- 1.10** The purpose of the special care offence is thus to protect people aged 16 or 17 years against the abuse of authority in special care relationships. It does so by requiring nothing more than the existence of a special care relationship at the time of sexual intercourse in order for the offence to be committed.¹⁵
- 1.11** Throughout the inquiry, stakeholders acknowledged and supported the intention of the special care offence.¹⁶ Accordingly, they maintained that the offence should only criminalise what Mr Richard Wilson, Barrister, Criminal Law Committee, New South Wales Bar Association, described as 'such conduct as is necessary for the protection of children from the abuse of power or authority by adults'.¹⁷

Development of the special care offence

- 1.12** The special care offence was introduced largely in its current form by the *Crimes Amendment (Sexual Offences) Act 2003*, as part of a reform package providing for the equal treatment of sexual offences irrespective of the victim's or offender's gender or sexual orientation.¹⁸
- 1.13** The special care offence replaced an offence of carnal knowledge by a male teacher, parent or step-parent with a female victim aged 16.¹⁹
- 1.14** While the special care offence has remained broadly in the same form since it was introduced in 2003, a number of significant amendments relating to the offence have been made in recent years. These amendments are briefly outlined below.

Extension of the special care offence to de facto partners

- 1.15** In 2012, the *Crimes Legislation Amendment Act 2012* amended the special care offence to expressly include de facto partners of parents, guardians or foster parents of a victim in the prescribed special care relationship category.²⁰
- 1.16** The amendment was made following a case in the NSW Court of Criminal Appeal (CCA) which involved a sexual offence perpetrated by a de facto partner on his partner's daughter.²¹ The case drew attention to the ambiguity of the term 'foster parent' within the prescribed special care relationship category, and considered whether or not the term applies to de facto partners of parents.

¹⁵ Submission 7, NSW Government, p 4.

¹⁶ For example, Evidence, Mr Richard Wilson, Barrister, Criminal Law Committee, New South Wales Bar Association, 27 June 2018, p 24; Evidence, Dr Andrew Morrison RFD SC, Spokesperson, Australian Lawyers Alliance, 27 June 2018, p 24; Submission 2, Independent Education Union of Australia, p 1.

¹⁷ Evidence, Mr Wilson, 27 June 2018, p 24.

¹⁸ Submission 7, NSW Government, p 3.

¹⁹ Submission 7, NSW Government, p 3.

²⁰ Submission 7, NSW Government, p 3.

²¹ *JAD v R* (2012) NSWCCA 73.

- 1.17 Based on a broad interpretation of the term 'foster parent' deeming the term 'capable of including a de facto of a natural parent', the CCA concluded that the special care offence did extend to de facto partners 'where the de facto can be shown to play a role in the upbringing of the child'.²²

Expansion of the teacher/student relationship

- 1.18 In March 2018, the *Justice Legislation Amendment Act 2018* amended the special care offence by expanding the prescribed special care relationship category of teacher and student.
- 1.19 Previously the provision made it an offence for a person to have sexual intercourse with a another person if the offender was the victim's school teacher. However, a further CCA case highlighted a loophole in the way 'teacher' was defined in the provision, thereby rendering a narrow interpretation of the special care offence in schools.²³
- 1.20 In that case, the prosecution of a teacher who had sexual intercourse with a student was unsuccessful because the student was not a direct student of the teacher at the time, even though the teacher still worked at the same school and had taught the student in previous years.²⁴
- 1.21 As it stood, the original provision meant that if a teacher had previously taught a student and then began a sexual relationship with that student once they were 16 years old and not in the teacher's class, the conduct was not covered by the special care offence.²⁵
- 1.22 The amendment was therefore introduced to expand the definition of 'teacher' to 'a member of the teaching staff' of the school at which the victim is a student. The 'member of teaching staff' category now includes all teachers at a school, the principal or deputy principal, and 'any other person employed at the school who has students at the school under his or her care or authority'.²⁶
- 1.23 The amendment ensures that the offence applies whether or not the teacher is the student's direct classroom teacher at the time of the sexual intercourse.²⁷

Further changes under the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*

- 1.24 Passed in June 2018, the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* makes a number of other changes to the special care offence, although these are not yet in force.²⁸

²² *JAD v R* (2012) NSWCCA 73 at 166.

²³ *R v PJ* (2017) NSWCCA 290.

²⁴ *R v PJ* (2017) NSWCCA 290.

²⁵ Submission 7, NSW Government, pp 6-7.

²⁶ *Crimes Act 1900*, s 73 (6).

²⁷ Submission 7, NSW Government, pp 6-7.

²⁸ The *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* received assent on 27 June 2018 but the provisions will commence on proclamation.

- 1.25 One of the key changes is to replace the term ‘foster parent’ with ‘authorised carer’.²⁹ Under the amendment, an ‘authorised carer’ is defined as a:
- short-term and long-term carer
 - respite and crisis emergency carer
 - relative and kinship carer where the Minister holds parental responsibility or where the parent receives Family and Community Services’ support, and
 - principal officer of an agency that provides out of home care.³⁰
- 1.26 The Act also introduces a new special care offence of sexual touching under the *Crimes Act*. Prior to the amendment, the special care offence applied only where a person had sexual intercourse with a child aged 16 or 17 under special care. It did not cover non-penetrative sexual touching.³¹
- 1.27 The new offence is being introduced to bridge this gap, recognising that inappropriate conduct may occur in special care relationships that falls short of sexual intercourse but should nevertheless be criminalised.³²
- 1.28 The maximum penalty for the offence of sexual touching is 4 years imprisonment where the victim is 16 years, and 2 years where the victim is 17 years.³³
- 1.29 In addition to amending the special care offence, the Act will also establish a similar age defence for a number of sexual offences including the special care offence. The changes allow a defence to be raised if the age difference between the alleged victim and the accused is no more than two years.³⁴
- 1.30 In his second reading speech for the Bill, the Attorney-General, the Hon Mark Speakman MP, explained that the defence ‘aims to ensure that older children are not prosecuted for voluntary sexual conduct with their peers’. He added: ‘However undesirable we might consider such behaviour, it should not be a criminal offence’.³⁵

Royal Commission into Institutional Responses to Child Sexual Abuse

- 1.31 In August 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) released its Criminal Justice Report, which contained a number of recommendations to improve the criminal justice response for victims of child sexual abuse.³⁶

²⁹ Under the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*, the term ‘authorised carer’ is to have the same meaning as in the *Children and Young Persons (Care and Protection) Act 1998*.

³⁰ Submission 7, NSW Government, p 8.

³¹ Submission 7, NSW Government, p 8.

³² Submission 7, NSW Government, p 8.

³³ *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*, Schedule 1, cl [27].

³⁴ *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*, Schedule 1, cl [46].

³⁵ *Hansard*, NSW Legislative Assembly, 6 June 2018, p 8 (Mark Speakman).

³⁶ Submission 7, NSW Government, p 7.

Table 1 'Point of authority' offences across Australian jurisdictions³⁷

	Offence	Definitions provided
New South Wales	Sexual contact between an adult and a child of 16 or 17 years of age who is under 'special care'	'Special care' is defined to arise if the offender is the victim's step-parent, guardian or foster parent; teaching staff; custodial officer; or health professional; it also arises if 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
Victoria	Sexual contact between a child over the age of consent (children 16 or 17 years of age) and a person in a position of 'care, supervision or authority'	A 'position of care, supervision or authority' is defined to include teachers; foster parents; legal guardians; ministers of religion; employers; youth workers; sports coaches; counsellors; health professionals; police; and employees of remand and similar centres
Western Australia	Sexual acts between 16 or 17 year old children and persons who have the 'care, supervision or authority' of the child	A relationship involving 'care, supervision or authority' is not defined
South Australia	Sexual contact between children under 18 years of age and persons in a position of authority	Persons in a 'positions of authority' include teachers; foster parents; step-parents or guardians; religious officials or spiritual leaders; medical practitioners, psychologists or social workers; persons employed or providing services in a correctional institution or a training centre; and employers
Australian Capital Territory	Sexual contact or acts of indecency with a young person who is 16 or 17 years of age and under 'special care'	'Special care' is defined to include relationships such as those with teachers; step-parents, foster carers or legal guardians; people providing religious instruction to the young person; employers; sport coaches; counsellors; health professionals; and custodial officers
Northern Territory	Sexual intercourse or gross indecency involving a child of 16 or 17 years of age under 'special care'	'Special care' is defined to arise if the offender is the victim's step-parent, guardian or foster parent; teacher officer at a correctional institution; or health professional; it also arises if the offender has established a personal relationship with the victim in connection with 'care, instruction or supervision', such as supervision in the course of employment or training
Queensland	No specific provisions extending offences in relation to positions of authority or trust; aggravated provisions exist for some offences so that offenders are liable to longer imprisonment if they are a 'person who has care of a child'; definition of 'consent' includes that it may be vitiated in circumstances where it was obtained by exercising authority	
Tasmania	No offences in relation to persons in positions of authority or trust; definition of 'consent' includes a series of circumstances where it may be vitiated, including where the victim is 'overborne by the nature or position of another person', which may be interpreted to include persons in a position of authority, care or trust	

³⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI* (2017), pp 100-101.

- 1.32** Among the issues discussed was the 'position of authority' offences. The report acknowledged that institutional child sexual abuse 'often involves perpetrators who are in a position of authority in relation to their victims'.³⁸
- 1.33** Table 1, extracted from information contained in the Royal Commission's Criminal Justice Report, compares the 'position of authority' offences across the Australian jurisdictions, as well as the approach taken by states without a comparable offence.
- 1.34** In its report, the Royal Commission considered whether it was preferable for all jurisdictions to adopt position of authority offences that did not require proof that an offender exploited their position of authority, rather than allowing the relationship of authority to vitiate consent to sexual activity.³⁹
- 1.35** The Royal Commission concluded that no further evidence should be required beyond the existence of a relationship of authority in order for the offence to have been committed.⁴⁰ In light of this, the Royal Commission made three recommendations relating to position of authority offences directing state and territory governments to:
- review and amend any position of authority offences so that the existence of a relationship of authority is sufficient
 - review and amend any provisions allowing consent to be negated where sexual contact has been made between a young person and person in a position of authority so that the existence of a relationship of authority is sufficient
 - consider introducing legislation establishing defences, such as a similar age consent defence, where there is concern that prescribed position of authority categories are too broad and may capture sexual contact that should not be criminalised.⁴¹
- 1.36** The existing New South Wales special care offence was supported by the Royal Commission, as it does not require proof that an offender exploited their position of authority.⁴² In particular, the Royal Commission explicitly supported the special care relationship categories in the offence, stating that it did not consider that the broadest category relating to the provision of instruction should be narrowed or removed.⁴³

³⁸ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI* (2017), p 98.

³⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI* (2017), p 98.

⁴⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI* (2017), p 118.

⁴¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI* (2017), p 120.

⁴² Submission 7, NSW Government, p 7.

⁴³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI* (2017), p 119.

Chapter 2 Concerns about the adequacy and scope of the special care offence

This chapter examines concerns raised by inquiry participants about the adequacy and scope of the special care offence as it is currently framed. Key among these concerns is that innocent relationships may be unintentionally captured, an issue many attributed to the absence of an explicit reference to 'authority' within the wording of the offence.

The chapter also considers those special care categories which stakeholders found particularly problematic, namely the category established by section 73(3)(c) 'in connection with the provision of religious, sporting, musical or other instruction', and certain relationships found within the school context under section 73(6)(c) 'any other person employed at the school who has students at the school under his or her care or authority'. Inquiry participants discussed, in particular, the potential application of the special care offence to volunteers, recent ex-students and former workers, as stipulated in the inquiry's terms of reference (a)(i)-(iii).

Scope of the special care offence (section 73(3))

- 2.1** Under in section 73(3) of the *Crimes Act 1900*, the 'victim' is considered under the special care of the 'offender' if the relationship between the two fall into one of the categories of relationships listed in the offence itself, for example, the offender is a step-parent of the victim or a member of the teaching staff at the school in which the victim is a student.
- 2.2** Essentially, there are five categories of relationships prescribed within the offence, as outlined at paragraph 1.4, although the more problematic category identified by stakeholders was the one listed in section 73(3)(c) which captures relationships established 'in connection with the provision of religious, sporting, musical or other instruction'.
- 2.3** Based on the wording of these different categories of relationships, inquiry participants argued that the parameters of the offence are wide, such that the offence may capture a host of innocent relationships that were not intended to be deemed as criminal conduct.⁴⁴ As Mr Doug Humphreys, President, Law Society of New South Wales, asserted:

The evil with what we are dealing with is that [the offence] is so broad and so open to interpretation ... [T]he point of clarity is that we need to turn that around and actually get back to something that is actually understandable ...⁴⁵

- 2.4** Stakeholders feared that young people engaged in such relationships, where there may be no power imbalance or authority, would be caught unnecessarily by the legislation and suffer particularly significant long-term consequences as a result.⁴⁶ These relationships may involve parties for whom a similar age defence cannot be raised, and where the relationship does not

⁴⁴ For example, Evidence, Mr Thomas Spohr, Solicitor, Indictable Matters, Legal Aid NSW, 27 June 2018, p 35; Evidence, Mr Richard Wilson, Barrister, Criminal Law Committee, New South Wales Bar Association, 27 June 2018, p 36; Evidence, Dr Andrew Morrison RFD SC, Spokesperson, Australian Lawyers Alliance, 27 June 2018, p 39; Submission 14, Legal Aid, p 6.

⁴⁵ Evidence, Mr Doug Humphreys, President, Law Society of New South Wales, 27 June 2018, p 32.

⁴⁶ For example, Submission, 11, Office of the Advocate for Children and Young People, p 1.

fall explicitly within the prescribed categories of the offence. These individuals may then be subject to the stress and trauma of being charged with the offence and called before the courts, only for the charges to be later withdrawn.⁴⁷

2.5 Legal Aid NSW argued that the progressive expansion of the special care offence has 'increased the risk of criminalising consensual sexual conduct where there is no power imbalance'.⁴⁸ It said that concerns were raised during the parliamentary debate when the offence was first introduced in 2003 about the need to 'carefully set the boundaries of the offence because of the risk of including relationships that did not involve a power imbalance, such as peer relationships between people who are close in age'.⁴⁹

2.6 Troubled by the potential scope of the special care offence as it is currently framed, several inquiry participants drew attention to the need to distinguish between what may be considered as criminal conduct versus unethical behaviour.

2.7 Stakeholders commented on the weight of this distinction, arguing that to deem sexual behaviour in certain care relationships as 'creepy', distasteful or immoral is profoundly different from criminalising it.⁵⁰ As the Law Society of New South Wales stated:

We consider that, while it may be professionally unethical for people in a position of care to engage in sexual activity with a person under their care, it is a much bigger step for that conduct to be made criminal where there is no abuse of their position.⁵¹

2.8 Similarly, Ms Sharyn Hall, Barrister, Criminal Law Committee, New South Wales Bar Association, reflected on the line between moral and criminal judgment as she called for greater clarity in identifying it:

It is the crossover between moral judgment and criminal judgment. 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.⁵²

2.9 According to Dr Andrew Morrison RFD SC, Spokesperson, Australian Lawyers Alliance, determining this difference is critical: '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'.⁵³

2.10 While some deemed the wording of the special care offence to be too broad, it is important to note that the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal

⁴⁷ For example, Evidence, Mr Humphreys, 27 June 2018, p 26; Evidence, Mr Aaron Tang, Acting Solicitor in Charge, Children's Legal Services, Legal Aid NSW, 27 June 2018, p 28.

⁴⁸ Submission 14, Legal Aid NSW, p 11.

⁴⁹ Submission 14, Legal Aid NSW, p 5.

⁵⁰ For example, Evidence, Mr Wilson, 27 June 2018, p 36; Evidence, Mr Spohr, 27 June 2018, p 35.

⁵¹ Submission 4, Law Society of New South Wales, p 1.

⁵² Evidence, Ms Sharyn Hall, Barrister, Criminal Law Committee, New South Wales Bar Association, 27 June 2018, p 37.

⁵³ Evidence, Dr Morrison, 27 June 2018, p 24.

Commission) had 'no concern in NSW that any category of relationship was too broad' and therefore 'explicitly supported the special care relationship categories in the NSW offence'.⁵⁴

- 2.11** The Royal Commission acknowledged, however, that if there were concerns that these offences are too broad, and capturing relationships that should not be criminalised, jurisdictions should consider introducing a similar age defence.⁵⁵ It cautioned, however, that the appropriateness of this defence should be carefully considered in light of the fact that in some special care relationships where the 'victim' and 'offender' are of 'similar age', there may still be an element of exploitation:

... [T]he appropriateness of such a defence would need to be considered carefully. A 'victim' who did not come to see the relationship as exploitative would be unlikely to complain or give evidence as a complainant. Further, while the 'victim' and 'offender' being of the same age might reduce the likelihood of inequality and exploitation, it does not necessarily eliminate them.⁵⁶

- 2.12** In the most recent amendments to the *Crimes Act*, passed in June 2018, New South Wales established a similar age defence which states:

It is a defence to a prosecution for an offence under ...section 73 [special care offence]... if the alleged victim is or above the age of 14 years and the age difference between the alleged victim and the accused person is no more than 2 years.⁵⁷

- 2.13** Although several stakeholders suggested that the similar age defence should be expanded by increasing the age difference,⁵⁸ the principle and usefulness of the defence was widely acknowledged, particularly in terms of its capacity to exclude innocent relationships that may be unintentionally captured under section 73. For example, Mr Mark Follett, Director, Crime Policy, Policy and Reform, Department of Justice, advised that the defence will 'essentially enable those innocent relationships where it is a young couple to have a defence for what is innocent behaviour'.⁵⁹

Lack of reference to 'authority'

- 2.14** For a number of inquiry participants, the lack of clarity and certainty in the law comes down to the presence of 'authority' in special care relationships and the way this authority is represented in the drafting of the special care offence. Some stakeholders argued that, after all, the

⁵⁴ Submission 7, NSW Government, Appendix A, p 14.

⁵⁵ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI* (2017), p 120.

⁵⁶ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI* (2017), p 119.

⁵⁷ *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*, Schedule 1, cl [46]. Please note these amendments are not yet in force.

⁵⁸ Submission 14, Legal Aid NSW, p 11; Evidence, Mr Tang, 27 June 2018, p 28; Submission 11, Office of the Advocate for Children and Young People, p 1; Evidence, Mr Andrew Johnson, Advocate for Children and Young People, Office of the Advocate for Children and Young People, 27 June 2018, p 44.

⁵⁹ Evidence, Mr Mark Follett, Director, Crime Policy, Policy and Reform, Department of Justice, 27 June 2018, p 7.

exploitation of this authority is what the offence is in essence about.⁶⁰ As Mr Humphreys contended: '... it is the abuse of power that is the gravamen of the offence'.⁶¹

- 2.15** This view was shared by Ms Hall who highlighted the 'authority' concept as the point of difference between relationships of voluntary consent and relationships of care where that consent is 'undermined':

... that power of authority ... 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.⁶²

- 2.16** These inquiry participants asserted that it is the absence of an explicit reference to 'authority' within the wording of the special care offence that is the underlying problem. Ms Hall contended that it is 'the under authority aspect which really the legislation is trying to address but capturing so much'.⁶³ Likewise, Mr Humphreys argued: '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'.⁶⁴

- 2.17** The written submission from Legal Aid New South Wales also pointed to the significance of 'authority' in determining the scope of the special care offence. Without a clear requirement for authority in a special care relationship, Legal Aid asserted that the offence is open to capturing a range of relationships that may not in fact involve a power imbalance that could be exploited. Legal Aid made this observation in comparison with other jurisdictions, stating:

Unlike other jurisdictions, the offence in New South Wales is not limited, or framed, by any requirement for an actual relationship of authority to exist between the parties. As a result, there is a risk that the offence can apply to a relationship that may, or may not, involve any element of authority or power imbalance that is likely to have an impact on a young person's capacity to consent to sexual conduct.⁶⁵

- 2.18** Several inquiry participants suggested that the special care offence might perhaps be recast to criminalise behaviour based on the operation of power or authority over a victim.⁶⁶ As Ms Hall argued:

... 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.⁶⁷

⁶⁰ For example, Mr Follett, 27 June 2018, p 4; Evidence, Mr Johnson, 27 June 2018, p 42.

⁶¹ Evidence, Mr Humphreys 27 June 2018, p 32.

⁶² Evidence, Ms Hall, 27 June 2018, p 25.

⁶³ Evidence, Ms Hall, 27 June 2018, p 27.

⁶⁴ Evidence, Mr Humphreys, 27 June 2018, p 27.

⁶⁵ Submission 14, Legal Aid NSW, p 3.

⁶⁶ For example, Evidence, Mr Patrick Doumani, Member Support Officer, Federation of Parents and Citizens Association of New South Wales, 27 June 2018, p 49; Evidence, Mr Humphreys, 27 June 2018, p 27; Evidence, Ms Hall, 27 June 2018, p 27.

⁶⁷ Evidence, Ms Hall, Barrister, 27 June 2018, p 25.

2.19 How this principle might be established in the offence is discussed in the next chapter.

Concerns about section 73(3)(c) – special care relationships based on 'other instruction to the victim'

2.20 For many inquiry participants, one of the key areas of concern in the current legislation is section 73(3)(c) of the *Crimes Act*, which prescribes the special care category where:

... 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 ...⁶⁸

2.21 A number of stakeholders found it difficult to determine what a relationship 'in connection with the provision of ... other instruction' means and what kinds of relationships would be covered by this provision.⁶⁹ As Mr Thomas Spohr, Solicitor, Indictable Matters, Legal Aid NSW, argued: 'The use of the words "in connection with [the provision of ... other] instruction" is not a terribly helpful or definitive phrase ...'.⁷⁰ Moreover, Ms Kate Connors, Acting Executive Director, Policy and Reform, Department of Justice, added that 'there is no case law about what other instruction ... might mean'.⁷¹

2.22 The committee discussed several scenarios with inquiry participants where it was not clear if the offence would apply because of the lack of clarity around whether the offender was providing 'other instruction' to the victim.

2.23 For instance, stakeholders considered whether an offence may occur in circumstances where a private gym employee enters into a sexual relationship with a student, where the employee is 'instructing' the student on how to use gym equipment. Ms Connors identified possible complexities around this scenario, stating that for such circumstances:

... the aim we are getting at is where the dynamics between the two parties is such that consent is not freely given and ... thinking about what that kind of level of instruction or control would be where that presumption should arise.⁷²

2.24 In this situation, Ms Connors believed that '[i]nstructing someone on using gym equipment ... is a requisite level of authority and control that it would have an impact on the ability to freely consent to a relationship'.⁷³

2.25 Similarly, the example of a horse riding camp was raised where there may be parent volunteers who are not involved with teaching children how to ride, but may, for example, 'instruct' children to go to bed. Ms Kara Shead, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, considered that this situation could fall within the category of

⁶⁸ *Crimes Act 1900*, s 73(3)(c).

⁶⁹ For example, Submission 16, Catholic Schools NSW, p 4.

⁷⁰ Evidence, Mr Spohr, 27 June 2018, p 26.

⁷¹ Evidence, Ms Kate Connors, Acting Executive Director, Policy and Reform, Department of Justice, 27 June 2018, p 3.

⁷² Evidence, Ms Connors, 27 June 2018, p 9.

⁷³ Evidence, Ms Connors, 27 June 2018, p 3.

'other instruction', stating: '... [I]f 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'.⁷⁴

2.26 Some inquiry stakeholders commented on those relationships they believed would be captured under this category of the offence, despite the apparent absence of power or authority in those relationships.

2.27 For example, Ms Hall and Mr Richard Wilson, Barrister, Criminal Justice Committee, New South Wales Bar Association, argued that the legislation would cover any type of tutoring relationship – academic, musical, sporting, religious or otherwise – including where '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'.⁷⁵ According to Mr Wilson, in such relationships there 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 ... But that would be covered'.⁷⁶

2.28 When considering the hypothetical example of a sexual relationship between a 17 year old and a 21 year old, both members of a sporting team, whose circumstances change by virtue of the 21 year old becoming the coach of that team, Mr Follett stated: 'I do not think the policy intent is to capture those types of relationships'. Mr Follett recognised the challenge the offence presents with the way that particular special care category is currently framed.⁷⁷

2.29 Others discussed those relationships that may not be captured, despite the offender being in a position of authority within the same 'musical, sporting, religious or other' settings as those instruction-based relationships.

2.30 For example, Ms Hall, asserted that the 'instruction' category may not cover sports administrators or agents, even though these are positions of authority or power over players. She explained:

... the provision of instruction would not necessarily capture someone like an administrator but that is still someone who is in a 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 Again, it is a similar situation with ... [the] press officer [who] obviously has a position where they have the power to influence the success or otherwise of that person by manipulating the media.⁷⁸

2.31 Despite these concerns, the Royal Commission did not consider any category under the offence as 'too broad', including a category such as that listed under section 73(3)(c).⁷⁹ In particular, it argued against the narrowing or removal of this category in recognition of the access offenders have to children through these types of relationships:

⁷⁴ Evidence, Ms Kara Shead, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 27 June 2018, p 22.

⁷⁵ Evidence, Mr Wilson, 27 June 2018, p 27.; Evidence, Ms Hall, 27 June 2018, p 27.

⁷⁶ Evidence, Mr Wilson, 27 June 2018, p 27.

⁷⁷ Evidence, Mr Follett, 27 June 2018, pp 7-8.

⁷⁸ Evidence, Ms Hall, 27 June 2018, p 25.

⁷⁹ Submission 7, NSW Government, Appendix A, p 14.

... [I]t is clearly the case that relationships formed through these types of instruction can provide opportunities for the instructor to gain access to children and to abuse them. ... We do not consider that this category of relationships of 'special care' should be narrowed or removed.⁸⁰

Concerns about section 73(6)(c) – definition of 'member of teaching staff'

- 2.32** Concerns were raised in relation to section 73(3)(b) which states that a person is under the special care of another person if the 'offender is a member of the teaching staff of the school at which the victim is a student'.
- 2.33** Section 73(6) defines 'member of the teaching staff' and while the definition clearly includes a teacher, principal or deputy principal at the school, 73(6)(c) was identified as being problematic, stating that it also includes 'any other person employed at the school who has students at the school under his or her care or authority'.⁸¹
- 2.34** The NSW Government advised that the phrase 'care or authority' is not defined under the Act, but that the words are 'not intended to have any narrow, technical meaning; rather they are intended to capture all situations where the ordinary meaning of either word is applicable'.⁸²
- 2.35** Notwithstanding this, the NSW Government acknowledged that the amendment 'does not cover adults employed by a school who do not have responsibility for students or have students under their care (for example, a groundskeeper)'.⁸³
- 2.36** While inquiry participants generally supported the recent amendments to this provision which extended the meaning of 'member of teaching staff' to include teachers, principals and deputy principals within a school, a number of stakeholders questioned the parameters of section 73(6)(c) and regarded this provision as ambiguous and problematic.⁸⁴ Some likened this particular provision to a 'catch all' category where it is not certain which school workers would be captured by the offence.⁸⁵
- 2.37** For example, stakeholders identified specific examples of 'other persons employed at the school', such as the school gardener or cook, where it is unclear if the offence applies to them because they do not have students under their direct care or authority.⁸⁶
- 2.38** Ms Connors, Department of Justice, explained the challenge around these types of workers:

⁸⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI* (2017), p 118.

⁸¹ *Crimes Act 1900*, s 73(3)(c).

⁸² Submission 7, NSW Government, p 7.

⁸³ Submission 7, NSW Government, p 7.

⁸⁴ For example, Evidence, Mr Tang, 27 June 2018, p 34; Evidence, Dr Morrison, 27 June 2018, p 32.

⁸⁵ For example, Evidence, Mr Wilson, 27 June 2018, p 25; Evidence, Mr Spohr, 27 June 2018, p 34.

⁸⁶ For example, Evidence, Mr Follett, 27 June 2018, p 6; Evidence, Ms Connors, 27 June 2018, p 6; Evidence, Ms Maria Kaivananga, P&C Federation Councilor for Sydney Electorate. Federation of Parents and Citizens Association of New South Wales, 27 June 2018, p 46.

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 grounds person or something like that, that is when you start to think about whether there is an inherent power relationship.⁸⁷

2.39 In the case of the school gardener, for example, Mr Follett, Department of Justice, argued: '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 judgment'.⁸⁸

2.40 Similarly, Mr Aaron Tang, Acting Solicitor in Charge, Children's Legal Services, Legal Aid New South Wales, argued that there would 'insufficient authority' from certain school workers such as janitors and canteen duty parents to be covered by the offence.⁸⁹

2.41 Both the Law Society of New South Wales and Legal Aid New South Wales noted the comments of the NSW Parliament's Legislation Review Committee, which considered the amendments expanding the teaching staff category and which acknowledged its lack of clarity:

The broad wording of the amended provision may make it insufficiently clear who could be found guilty of an offence under the section. Noting that the age of consent is 16, the current provision may unintentionally expose people such as debating and sports coaches (who may be young adults and ex-students) to criminal liability. Although there may be good reasons for this aspect of the expanded definition, the Committee draws this matter to the attention of Parliament.⁹⁰

2.42 Stakeholders discussed how, under this provision, the offence may also apply to a host of relationships within the school environment that involve 'other persons employed at the school' but are not intended to be captured by the offence. These relationships may involve a student and a (non-teaching) school employee who do not have a relationship of authority but are caught by the offence nonetheless by virtue of the employee having 'students under his or her care or authority'.

2.43 Examples identified by inquiry participants included a young teacher's aide who engages in sexual activity with a student that attends the same school,⁹¹ and a carer at an out-of-school service who has a relationship with an older student.⁹²

2.44 In addition to concerns raised about section 73(6)(c), inquiry participants also questioned whether volunteers, recent ex-students and workers no longer at the school would be captured by the special care offence, in response to the inquiry's terms of reference (a)(i)-(iii).

⁸⁷ Evidence, Ms Connors, 27 June 2018, p 5.

⁸⁸ For example, Mr Follett, 27 June 2018, p 5.

⁸⁹ Evidence, Mr Tang, 27 June 2018, p 38.

⁹⁰ NSW Parliament Legislation Review Committee, Legislation Review Digest, No. 49/56 13 February 2018, para [20], p11, as cited in Submission 4, Law Society of New South Wales, p 1 and Submission 14, Legal Aid New South Wales, p 6.

⁹¹ Submission 14, Legal Aid New South Wales, p 6.

⁹² Evidence, Mr Wilson, 27 June 2018, p 25.

Volunteers

- 2.45** The inquiry specifically considered whether the special care offence should apply 'where a school worker is a volunteer', as required by terms of reference (a)(i).
- 2.46** According to the NSW Government, the special care offence does not currently cover a relationship between a student and a volunteer at their school, despite the possibility of volunteers having, in some circumstances, a relationship of authority over their students.⁹³ Such circumstances may include when a volunteer provides personal care services to students with disabilities, mentoring services, or is a scripture or religious educator.⁹⁴
- 2.47** However some inquiry participants argued that the special care offence in fact already captures certain volunteers within its scope.⁹⁵ For example, the Office of the Director of Public Prosecutions (ODPP) maintained that volunteers who provide religious, sporting, musical or other instruction to their victim, and have an established personal relationship in connection with that instruction, are covered by section 73(3)(c).⁹⁶
- 2.48** Moreover, the ODPP argued that volunteers that do not instruct children, such as canteen duty volunteers, are not captured by the offence because these volunteers 'do not exercise the requisite authority or control over children and therefore lack the resulting capacity to exploit the power that comes with such authority or control'.⁹⁷ As such, they asserted that there is no need for volunteers to be specifically referred to in the offence.
- 2.49** Legal Aid New South Wales shared this position, agreeing that section 73(3)(c) already applies to volunteers who provide instruction and is not necessary for those who do not.⁹⁸
- 2.50** Others, however, asserted that the legislation does not adequately account for volunteers and thus supported the inclusion of this particular type of school worker within the scope of section 73(6)(c).⁹⁹ The Australian Lawyers Alliance, for example, argued that the offence should apply to volunteers who are 'placed in a position of trust and/or opportunity and/or occasion to perpetrate abuse'.¹⁰⁰

⁹³ Submission 7, NSW Government, p 8.

⁹⁴ Submission 7, NSW Government, p 8.

⁹⁵ For example, Submission 14, Legal Aid, p 9.

⁹⁶ Submission 15, Office of the Director of Public Prosecutions, p 1.

⁹⁷ Submission 15, Office of the Director of Public Prosecutions, p 1.

⁹⁸ Submission 14, Legal Aid New South Wales, p 9.

⁹⁹ For example, Submission 11, Office of the Advocate for Children and Young People, p 1; Submission 8, Federation of Parents and Citizens Associations of New South Wales, p 2; Submission 2, Independent Education Union of Australia, p 3; Submission 11, Office of the Advocate for Children and Young People, p 1.

¹⁰⁰ Submission 3, Australian Lawyers Alliance, p 3.

Recent ex-students

- 2.51** During the inquiry some questions were also raised about the position of ex-students who work at the school they have since left, where the former student enters into a relationship with a current student of the school. This addressed terms of reference (a)(ii), whether the special care offence should apply 'where the school worker is a recent ex-student of the school'.
- 2.52** Some inquiry participants expressed support for these types of relationships to be captured under the offence, given the authority over the 'victim' in these relationships.¹⁰¹ For example, the Independent Education Union of Australia were in favour of extending the offence to 'ex-students (recent or otherwise) of the school at which the victim is a student and who is now working in that school, as he/she would have care of, authority over, or provide instruction to students at that school'.¹⁰²
- 2.53** Other stakeholders argued that the offence already captures recent ex-students in varying capacities within different special care relationships, which was suggested to be contrary to the intent of the legislation. Legal Aid New South Wales asserted:
- A school worker who is a recent ex-student of the school is already covered by the offence if the ex-student is a member of the teaching staff (as defined in section 73(6)), or the ex-student has an established personal relationship with a student in connection with the provision of instruction (73(3(c))).
- Legal Aid NSW is concerned that including recent ex-students in the offence is not consistent with the purpose of the offence, as they are likely to be close in age to 16 and 17 year old students at the school, and to have established peer relationships with students at the school that do not entail a power imbalance.¹⁰³
- 2.54** Similarly, the ODPP asserted that recent ex-students are already covered by the offence providing the recent ex-student falls within one of the other special care categories.¹⁰⁴
- 2.55** The ODPP did acknowledge that, as a recent ex-student, there may be 'no exploitation borne of authority or control' over a 16 or 17 year old student, and therefore a charge under this offence may not be appropriate. The ODPP suggested a sanction by the Director may be applicable 'where there is a real concern that there is a consensual relationship, between a young adult (including an ex-student) who are close in age'.¹⁰⁵ The sanction of prosecutions by the ODPP as a safeguard is considered more closely in the next chapter.

¹⁰¹ For example, Submission 8, Federation of Parents and Citizens Associations of New South Wales, p 3;

¹⁰² Submission 2, Independent Education Union of Australia, p 3.

¹⁰³ Submission 14, Legal Aid New South Wales, p 9.

¹⁰⁴ Submission 15, Office of the Director of Public Prosecutions, p 3.

¹⁰⁵ Submission 15, Office of the Director of Public Prosecutions, p 3.

Former school workers

- 2.56** The inquiry's term of reference (a)(iii) also calls for consideration of whether the special care offence should apply 'where the school worker no longer works at the student's school'.
- 2.57** A number of inquiry participants did not support the special care offence extending to school workers who no longer work at the student's school.¹⁰⁶ The ODPP argued that section 73 'does not have a role to play' at all as the student is 'no longer under the person's special care and there is no corresponding misuse of authority, or exertion of undue influence as envisaged by the section'.¹⁰⁷
- 2.58** The Australian Lawyers Alliance (ALA) did, however, suggest that 'each case must be considered on its own facts' given that, as an example, an offender may begin a grooming relationship with a student while they are a teacher or worker at the school but may not engage in sexual activity whilst working at the school.¹⁰⁸ The ALA urged caution in amending the legislation for this purpose, as they believed the courts should be given opportunity to interpret individual circumstances of matters on a case-by-case basis.¹⁰⁹

Step-grandparents

- 2.59** While most inquiry participants submitted that the special care offence may be worded too broadly to capture some potentially innocent relationships, one anomaly that arose was in relation to step-grandparents.
- 2.60** Currently, under section 73(3)(a) a special care offence is deemed to have occurred if sexual intercourse (or sexual touching) occurs and the offender is the step-parent, guardian or foster parent of the victim or the de facto partner of a parent, guardian or foster parent of the victim.
- 2.61** As outlined in chapter 1, many of the cases prosecuted by the ODPP typically fell into a range of categories of relationships, including teacher, step-parent and relationships that fall into the category of section 73(3)(c), that is relationships 'in connection with the provision of religious, sporting, musical or other instruction'.¹¹⁰
- 2.62** However, the ODPP reported one case in which the prosecution of a step-grandfather under the offence could not proceed because a 'step-grandfather' is not currently covered by the offence.¹¹¹

¹⁰⁶ For example, Submission 14, Legal Aid New South Wales, p 9; Submission 2, Independent Education Union of Australia, p 4.

¹⁰⁷ Submission 15, Office of the Director of Public Prosecutions, p 3.

¹⁰⁸ Submission 3, Australian Lawyers Alliance, p 5.

¹⁰⁹ Submission 3, Australian Lawyers Alliance, p 5.

¹¹⁰ Answers to questions on notice, Ms Johanna Pheils, Deputy Solicitor for Public Prosecutions (Legal), Solicitor's Executive, Office of the Director of Public Prosecutions, 27 July 2018, p 1.

¹¹¹ Answers to questions on notice, Ms Johanna Pheils, Deputy Solicitor for Public Prosecutions (Legal), Solicitor's Executive, Office of the Director of Public Prosecutions, 27 July 2018 – Attachment (confidential, cited with permission).

Committee comment

- 2.63** The committee acknowledges the range of concerns raised by inquiry participants about the adequacy and scope of the special care offence as it is currently framed. In particular, the committee notes the arguments suggesting that the offence is too broad and ambiguous in its parameters, such that it may potentially capture innocent relationships that were not intended to be deemed as criminal conduct.
- 2.64** The committee believes that the overarching intent of the legislation – to protect young people from being abused by someone in a position of authority in relationships of special care – is not adequately captured in the offence as it is currently worded. This is problematic, as it is important for the offence to provide certainty, particularly to those who have special care relationships with young people.
- 2.65** The challenge is in identifying the parameters of the offence in different contexts. Is the 19 year old after school music tutor captured by the offence if he has a sexual relationship with a 16 year old girl he tutors? Does the offence apply to a 20 year old soccer manager who has a sexual relationship with a 17 year old player on the team? And what if their relationship predated the manager's appointment to the position?
- 2.66** These scenarios are but two examples that highlight the confusion and uncertainty stakeholders have identified. Many attribute this lack of clarity to the absence of an explicit reference to 'authority' within the wording of the offence. In this regard, we note that other jurisdictions refer to the offence as a 'position of authority' offence, rather than a 'special care offence', including the Royal Commission in its recent Criminal Justice Report.
- 2.67** In the next chapter the committee will consider how best to amend the offence to ensure it captures only those relationships where a position of authority exists between an offender and victim.

Chapter 3 Amending the special care offence

This chapter focuses on how the special care offence can be amended to address the concerns raised about its adequacy and scope in chapter 2. In particular, it will discuss how to enhance clarity and certainty in terms of what relationships are captured by the offence, and specifically whether there should be a requirement that the victim is under the 'authority' of the offender.

The chapter will also examine amending the offence to expand its scope in certain contexts, for example, to youth residential care settings, as raised in the inquiry's term of reference (c), and in employment relationships. It also considers whether a temporal condition should be placed on the offence, in response to term of reference (b), and whether there is value in having a requirement that the Director of Public Prosecutions sanction prosecutions, in response to term of reference (e). Finally, the chapter discusses what the most appropriate legislative mechanism should be for protecting young people in adoptive relationships, as canvassed in the inquiry's terms of reference (d) and (f).

Improving clarity and certainty

- 3.1** A number of stakeholders considered it may be appropriate to amend the current legislation to provide greater confidence that the special care offence would only capture criminal conduct.¹¹² These inquiry participants discussed a number of ways to amend the provision to ensure that the offence more accurately and explicitly reflects the intention of the legislation.
- 3.2** Mr Doug Humphreys, President, Law Society of New South Wales, described the task at hand as one of achieving balance between clarity in the law and appropriate safeguards to ensure that consensual behaviour is not criminalised:
- ... 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.¹¹³
- 3.3** Ultimately, whatever amendments are made to the law to ensure it captures criminal behaviour and reflects the intentions of the special care offence, inquiry participants insisted that there must be a clear understanding of what the legislation expects of people in relationships of special care.¹¹⁴ As Mr Humphreys remarked, the special care offence 'has to be understandable by not just me or you, but by people ...'.¹¹⁵
- 3.4** Similarly, the Office of the Advocate for Children and Young People argued that any amendments to the law requires education at the community level to ensure that 'lawful, ethical

¹¹² For example, Evidence, Mr Richard Wilson, Barrister, Criminal Law Committee, New South Wales Bar Association, 27 June 2018, p 24; Evidence, Mr Doug Humphreys, President, Law Society of New South Wales, 27 June 2018, p 39.

¹¹³ Evidence, Mr Humphreys, 27 June 2018, p 39.

¹¹⁴ For example, Evidence, Mr Aaron Tang, Acting Solicitor in Charge, Children's Legal Services, Legal Aid NSW, 27 June 2018, p 39.

¹¹⁵ Evidence, Mr Humphreys, 27 June 2018, p 32.

and safe relationships' are promoted by those who work by, with and on behalf of children and young people.¹¹⁶

Requiring the victim to be 'under authority'

3.5 Short of listing all potential special care relationship categories in the special care offence, which several stakeholders acknowledged would be problematic,¹¹⁷ there was wide consensus that the offence could be significantly strengthened and clarified by requiring the victim to be under the 'authority' of the offender. Indeed, as outlined in chapter 2, many inquiry participants considered the abuse of this 'authority' to be at the heart of the offence.

3.6 Advocating this position, Legal Aid asserted that having this 'authority' requirement would more closely reflect the purpose of the legislation:

The offence should be amended to more closely target its fundamental objective of protecting young people from sexual exploitation by those who are in positions of authority. We consider the offence should include an additional requirement ... for the existence of a relationship of authority involving a power imbalance between the parties.¹¹⁸

3.7 Ms Sharyn Hall, Barrister, Criminal Law Committee, New South Wales Bar Association, also supported the need for an overarching reference for the 'victim' to be 'under authority' of the offender. She argued that this notion of 'under authority' is already a well-established concept under the *Crimes Act 1900*:

... 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.¹¹⁹

3.8 Requiring the victim to be under the 'authority' of the offender is already the case in some other jurisdictions. As outlined in chapter 1,¹²⁰ the Criminal Justice Report of the Royal Commission into Institutional Responses to Child Sexual Abuse reported that in Victoria, Western Australia and South Australia, the comparable offences criminalise sexual activity between a young person and a person in a 'position of authority'.¹²¹ In Victoria and South Australia, a 'position of authority' is defined by a number of categories, while in Western Australia, persons who have the 'care, supervision or authority' is not defined.¹²²

¹¹⁶ Submission 11, Office of the Advocate for Children and Young People, p 2.

¹¹⁷ Evidence, Dr Andrew Morrison RFD SC, Spokesperson, Australian Lawyers Alliance, 27 June 2018, p 32; Evidence, Ms Penny Musgrave, Member, Criminal Law Committee, Law Society of New South Wales, 27 June 2018, p 30; Evidence, Ms Kara Shead, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, 27 June 2018, p 18.

¹¹⁸ Submission 14, Legal Aid NSW, p 5.

¹¹⁹ Evidence, Ms Sharyn Hall, Barrister, Criminal Law Committee, New South Wales Bar Association, 27 June 2018, p 25.

¹²⁰ See Table 1 – 'Point of authority' offences across Australian jurisdictions.

¹²¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI*, pp 100-101.

¹²² Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI*, p 101.

3.9 In contrast, the Australian Capital Territory and Northern Territory, together with New South Wales, criminalise sexual activity between a person and a young person in 'special care'. In all three states, 'special care' is defined by a number of categories.¹²³ Queensland and Tasmania take a different approach altogether where offences specifically relating to a position of authority do not exist, rather the relationship of authority is a factor that can vitiate consent.¹²⁴

3.10 In addition to the requirement of 'authority' within the special care offence, stakeholders also proposed different ways in which this should appear in the legislation. For example, Mr Aaron Tang, Acting Solicitor in Charge, Children's Legal Services, Legal Aid NSW, argued for the offence to include a relationship of authority involving a *power imbalance*. He stated:

... the position of Legal Aid is to go even a step further to clarify that [there] 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.¹²⁵

3.11 Meanwhile, Dr Andrew Morrison RFD SC, Spokesperson, Australian Lawyers Alliance, insisted that there should be an additional element of '*abuse*' in the offence, as the definition of 'special care' 'should involve elements of abuse of power or authority'.¹²⁶ He argued:

... [F]rom 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.¹²⁷

3.12 In response to including the 'abuse' of authority within the offence, Ms Hall contended that the case law under the *Crimes Act* does not require that a position of authority be abused or exercised if a victim is deemed 'under authority'. She asserted that the basic 'authority' element on its own – there being a relationship of authority without any requirement for proof – meets the needs of the offence. Ms Hall explained:

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 ...

If you were to leave out that element of the abuse aspect ... [the legislation] 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.¹²⁸

¹²³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI*, pp 100-101.

¹²⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI*, p 101.

¹²⁵ Evidence, Mr Tang, 27 June 2018, p 28.

¹²⁶ Evidence, Dr Morrison, 27 June 2018, p 24.

¹²⁷ Evidence, Dr Morrison, 27 June 2018, p 36.

¹²⁸ Evidence, Ms Hall, 27 June 2018, p 25.

- 3.13** Other inquiry participants also drew attention to the findings of the Royal Commission with respect to proving the 'abuse' or 'exercise' of authority, as opposed to merely requiring its existence, in order for the offence to be committed.¹²⁹ The Royal Commission stated: 'We do not see what evidence of 'abuse' – in the sense of misuse – or 'exercise' of authority should be needed beyond the existence of the relationship of authority'.¹³⁰ Accordingly, the Commission concluded that '... the existence of the relationship of authority is sufficient', and recommended that legislation across jurisdictions be amended to reflect this.¹³¹
- 3.14** As part of the discussion around including 'authority' in the special care offence, some inquiry participants considered whether the requirement should only apply to the 'catch all' category under section 73(3)(c), namely, those relationships established 'in connection with the provision of religious, sporting, musical or other instruction to the victim', or to all categories of relationships under the offence.
- 3.15** For example, Mr Richard Wilson, Barrister, Criminal Law Committee, New South Wales Bar Association, argued in favour of requiring the victim to be under the 'authority' of the offender only for the category of relationships that he asserted lack clarity, that is those relationships established 'in connection with instruction' under section 73(3)(c).¹³² He explained:
- 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.¹³³
- 3.16** Legal Aid agreed with introducing 'authority' into section 73(3)(c) at the very least, arguing that without this element, the 'instruction' category is too broad and may capture relationships where there is no power imbalance:

This category is not limited to contexts where a young person is actually under the authority of the person who is providing the instruction, and ... could potentially apply to relationships where there is no power imbalance, for example, a 17 or 18 year old sports mentor or team captain who has consensual sex with a member of the team. An amendment introducing a requirement for a relationship of authority involving a power imbalance would ... address our concerns with this category of special care relationships.¹³⁴

¹²⁹ For example, Evidence, Mr Mark Follett, Director, Crime Policy, Policy and Reform, Department of Justice, p 7; Evidence, Ms Kate Connors, Acting Executive Director, Policy and Reform, Department of Justice, 27 June 2018, p 7.

¹³⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI*, p 118.

¹³¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III to VI*, p 120.

¹³² Evidence, Mr Wilson, 27 June 2018, p 29.

¹³³ Evidence, Mr Wilson, 27 June 2018, p 25.

¹³⁴ Submission 14, Legal Aid NSW, p 6.

- 3.17** However, Legal Aid ultimately recommended that the authority requirement apply to 'all of the categories described in section 73', and not just section 73(3)(c).¹³⁵
- 3.18** In the end, Ms Hall, New South Wales Bar Association, suggested that reframing the offence to highlight authority instead of instruction may be preferable: 'If the situation was directed rather less than at "instruction" and rather at a position of authority, then the issue may well be clearer ...'.¹³⁶
- 3.19** The Australian Lawyers Alliance (ALA) expressed some reservations about amending the offence as it is currently framed, emphasising the role of common law in determining its scope:
- ... [W]here the common law provides adequate protection, it is often the most appropriate means of ensuring the safety of children, because of its ability to take a broad case-by-case approach to matters as they arise.
- ... [T]he ALA cautions the Standing Committee to attempt to limit the scope of Special Care Offences or alternatively to create a specific circumstance or law change that might hinder the development of the common law.¹³⁷
- 3.20** As noted in chapter 2, the Royal Commission also supported the current provisions of the special care offence in New South Wales. It had no concerns that any category of relationship was too broad, and expressed that no further evidence should be required beyond the existence of a relationship of special care in order for the offence to have been committed.¹³⁸

Prescribing no categories of special care relationships

- 3.21** In addition to clarifying the wording of the offence, others suggested removing the categories of special care relationships outlined from 73(3)(a) to 73(3)(e) altogether. These inquiry participants suggested that such an option may better reflect the objectives of the offence and highlight authority as the requisite element that categorises the nature of these relationships.
- 3.22** Legal Aid suggested this as an alternative approach, pointing to Western Australia as an example of where this kind of offence has been successfully applied to a range of relationships within various contexts.¹³⁹ Legal Aid argued that the offence could be framed in such a way that it still includes a requirement for 'a relationship of authority involving a power imbalance' but does not define what those relationships are. According to Legal Aid, the benefits are two-fold:

Framing the offence in this way, rather than by reference to a fixed list of categories of relationships makes clear that:

'... the question is one of fact, not morality. Differences in age and social position are two factors, amongst doubtless many more, that give rise to inequality and imbalance in relationships'.¹⁴⁰

¹³⁵ Submission 14, Legal Aid NSW, p 8.

¹³⁶ Evidence, Ms Hall, 27 June 2018, p 25.

¹³⁷ Submission 3, Australian Lawyers Alliance, p 2.

¹³⁸ Submission 7, NSW Government, Appendix A, p 14.

¹³⁹ Submission 14, Legal Aid NSW, p 7.

¹⁴⁰ *R v Howes* [2001] VSCA 159 per Brooking JA, as cited in Submission 14, Legal Aid NSW, p 7.

Such an approach may also avoid the need for ad hoc legislative amendment in response to particular cases where the consent of a young person has been vitiated by the abuse of a relationship involving power imbalance, yet where the relationship is not of a prescribed category.¹⁴¹

- 3.23** Likewise, the Law Society of New South argued that 'categorisation may not be the most effective way to address the behaviour sought to be criminalised', and made a similar proposition to Legal Aid: 'It may be preferable to amend the section to create a broader offence that addressed the gravamen of the offence, i.e. the existence of a power imbalance that has been abused'.¹⁴²
- 3.24** Mr Andrew Johnson, Advocate for Children and Young People, Office of the Advocate for Children and Young People, acknowledged that children and young people are unlikely to differentiate between different categories of special care relationships and adults within those relationships. Mr Johnson stated that, for example, 'children and young people are not necessarily going to perceive if someone is a volunteer or paid person ... I think there are circumstances in which volunteers in certain circumstances would be perceived as a person of power'.¹⁴³
- 3.25** In this case, however, Mr Johnson presented the inability to distinguish between adults in positions of authority as an argument for further expanding the categories listed within the offence. He explained: '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'.¹⁴⁴

Addressing concerns about the definition of 'member of teaching staff'

- 3.26** As outlined in chapter 2 and relevant to the inquiry's term of reference (a), stakeholders raised concerns about the breadth of section 73(6)(c), as it relates to section 73(3)(b), in that the definition could capture relationships unintended by the offence involving parties that are not connected by any relationship of authority, that is, the student is not under the authority of the (non-teaching) school employee.
- 3.27** To address this concern, Mr Wilson, New South Wales Bar Association, suggested amending the definition of 'students at the school under his or her care or authority' to explicitly include the victim.¹⁴⁵
- 3.28** In addition to amending the offence to clarify the scope of section 73(6)(c), stakeholders discussed expanding the offence to ensure it explicitly captures volunteers.
- 3.29** For example, the Australian Lawyers Alliance (ALA) recommended amending section 73(3)(b) so that the offender is 'a member of the teaching staff *or a worker* of the school at which the

¹⁴¹ Submission 14, Legal Aid NSW, p 7.

¹⁴² Submission 4, Law Society of New South Wales, p 2.

¹⁴³ Evidence, Mr Andrew Johnson, Advocate for Children and Young People, Office of the Advocate for Children and Young People, 27 June 2018, p 42.

¹⁴⁴ Evidence, Mr Johnson, 27 June 2018, p 43.

¹⁴⁵ Evidence, Mr Wilson, 27 June 2018, p 25.

victim is a student'.¹⁴⁶ The ALA asserted that by keeping the definition open, it would allow the courts to 'develop common law and expand on the circumstances in which the special provisions should or could apply in a school environment'.¹⁴⁷

- 3.30** Alternatively, Ms Hall, New South Wales Bar Association suggested that section 73(6)(c) could be amended to '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'.¹⁴⁸ She argued that this would ensure the coverage of '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'.¹⁴⁹

Extending the offence to youth residential care settings

- 3.31** Stakeholders also considered special care relationships in youth residential care settings, and whether youth and other workers in these settings should be recognised as having special care of the young people to whom they provide services, as outlined in the inquiry's term of reference (c).
- 3.32** The NSW Government advised that staff who work or volunteer with children and young people in residential care settings, including youth refuges and homelessness services, are in a position of trust and authority over the children in these settings. However, these staff members are not covered by the special care offence as they are not authorised carers, health professionals or custodial officers.¹⁵⁰
- 3.33** All inquiry participants who considered this category supported extending the special care offence to youth workers and workers in residential care settings.¹⁵¹ A number of these stakeholders highlighted the inherent vulnerabilities of children and young people within these settings, often stemming from psychological trauma sustained from childhood disadvantage, abuse and neglect.¹⁵²
- 3.34** The NSW Ombudsman, in particular, argued strongly in favour of including workers in residential care settings within the scope of the offence, given their experience in relation to special care relationships. The NSW Ombudsman reported that almost half of the reportable conduct notifications received in 2016-2017 were from the government and non-government out-of-home-care (OOHC) sector, with sexual allegations being the most common type of notification received.¹⁵³

¹⁴⁶ Submission 3, Australian Lawyers Alliance, p 3.

¹⁴⁷ Submission 3, Australian Lawyers Alliance, p 3.

¹⁴⁸ Evidence, Ms Hall, 27 June 2018, p 38.

¹⁴⁹ Evidence, Ms Hall, 27 June 2018, p 38.

¹⁵⁰ Submission 7, NSW Government, p 9.

¹⁵¹ For example, Submission 14, Legal Aid New South Wales, p 10; Submission 10, Gymnastics Australia, p 2; Submission 11, Office of the Advocate of Children and Young People, p 1.

¹⁵² For example, Submission 15, Office of the Director of Public Prosecutions, p 3; Submission 14, Legal Aid New South Wales, p 10; Submission 7, NSW Government, p 9.

¹⁵³ Submission 17, NSW Ombudsman, pp 3-5.

- 3.35** The NSW Ombudsman maintained there is strong evidence that two cohorts of young people – those who are in residential care and those who are accessing homelessness services – are at particular risk of sexual exploitation and influence given their heightened vulnerability and the inherent power imbalance in their relationships with adults in these settings. They concluded that relationships with these young people should be prescribed within the special care offence, asserting that such an approach would be 'consistent with community expectations of adults engaged to support highly vulnerable young people'.¹⁵⁴
- 3.36** To reflect this extension of the special care offence to residential care settings, inquiry participants suggested amending section 73(3) by inserting an additional category for this setting that, like the other categories, is 'broad in range' so as to capture people beyond those in a direct relationship with the victim.¹⁵⁵
- 3.37** The Australian Lawyers Alliance had a contrasting view in this regard, asserting that youth and other workers in these settings are in fact already covered by the offence. It stated: 'The ALA has no reason to believe that youth workers and workers in youth residential care settings would not fall within the scope of the existing Section 73(3)(c) and/or (e)'.¹⁵⁶

Extending the special care offence to employment relationships

- 3.38** During the inquiry some stakeholders discussed including employment relationships as a category within in the special care offence, given that while there is regulation around sexual misconduct in employment settings, there is no criminalisation of this conduct.¹⁵⁷ Indeed, Mr Mark Follett, Director, Crime Policy, Policy and Reform, Department of Justice, acknowledged this gap and expressed surprise that such relationships are not already covered under existing legislation.¹⁵⁸
- 3.39** The NSW Government advised that, separate to the special care offence, there is a regulatory response which provides for independent oversight if allegations of sexual misconduct are made against an employee in certain employment settings.¹⁵⁹
- 3.40** This response includes the reportable conduct scheme under Part 3A of the *Ombudsman Act 1974*, which requires certain agencies to notify the NSW Ombudsman of reportable allegations and convictions against employees that arise in the course of an employee's work, for investigation.¹⁶⁰ These agencies include designated government agencies, public authorities and non-government agencies, such as schools and agencies providing substitute residential care.¹⁶¹

¹⁵⁴ Submission 17, NSW Ombudsman, p 4.

¹⁵⁵ For example, Submission 17, NSW Ombudsman, pp 3-5. Submission 1, Bar Association of New South Wales, p 2.

¹⁵⁶ Submission 3, Australian Lawyers Alliance, p 6.

¹⁵⁷ Evidence, Mr Follett, 27 June 2018, p 3.

¹⁵⁸ Evidence, Mr Follett, 27 June 2018, p 3.

¹⁵⁹ Submission 7, NSW Government, p 5.

¹⁶⁰ Submission 7, NSW Government, p 6.

¹⁶¹ Submission 15, NSW Ombudsman, p 1.

- 3.41** The NSW Government advised that many of the special care relationships under the special care offence are covered by the reportable conduct scheme, including foster carers, teaching staff, custodial officers and health professionals.¹⁶²
- 3.42** Under the scheme, if a sustained finding is made against an employee, notification must be made to the Office of the Children's Guardian (OCG) who may conduct an assessment of the employee's Working With Children Check (WWCC). The OCG may place an interim bar on the employee from engaging in child-related work, and can cancel the WWCC clearance if the employee is deemed a risk to the safety of children. If charged with the special care offence, the employee becomes a 'disqualified person' under the *Child Protection (Working with Children) Act 2012*, which affects their ability to work with children.¹⁶³
- 3.43** Several stakeholders supported the inclusion of employment relationships in the special care offence. For example, Mr Andrew Johnson, Advocate for Children and Young People, advised that to do so would be consistent with other jurisdictions, including Victoria, South Australia and the Northern Territory, and would meet the needs of young people who are unclear about their rights in the workplace.¹⁶⁴
- 3.44** Some inquiry participants drew attention to the example of a fast food trainee to demonstrate the difficulty with excluding employment relationships from the offence. For instance, Mr Wilson argued that the trainee would be captured under the 'other instruction' category of the offence (section 73(3)(c)) during their traineeship but not necessarily once that traineeship ends. He asserted: '... once [the trainee] had passed their traineeship and they are being supervised by someone who is not teaching them anything, arguably they would not be [covered by the offence]'.¹⁶⁵
- 3.45** Ms Hall shared this view, asserting that while an employee may be under authority, this is not currently captured in the offence, so what is left is a requirement for 'instruction'. Ms Hall was less definitive about whether the 'instruction' requirement did or did not apply to employees, however, given the ambiguity referred to earlier around what instruction means. She remarked: '... [I]f the instruction is, "Can you clean out the oil vat?", I do not know whether that would fall within that [category of 'instruction']'.¹⁶⁶

Should a temporal condition be placed on the special care offence?

- 3.46** Amending the legislation to account for special care relationships that once existed but are no longer in effect was also discussed by stakeholders during the inquiry, in response to the inquiry's term of reference (b). Consideration was given to whether the offence should include a temporal condition in recognition of the influence a person in a position of authority may continue to have over a young person even after the special care relationship has ended.

¹⁶² Submission 7, NSW Government, pp 5-6.

¹⁶³ Submission7, NSW Government, pp 5-6.

¹⁶⁴ Evidence, Mr Johnson, 27 June 2018, p 41.

¹⁶⁵ Evidence, Mr Wilson, 27 June 2018, p 27.

¹⁶⁶ Evidence, Ms Hall, 27 June 2018, p 32.

- 3.47** The NSW Government drew attention to the NSW Court of Criminal Appeal case which considered the 'teacher' definition loophole that previously existed in the special care offence (referred to in chapter 1).¹⁶⁷ The NSW Government submitted that the case confirmed that the offence only covers conduct 'where the special care relationship exists at the time of the sexual intercourse', and consequently does not cover circumstances where a relationship of special care previously existed but ceased prior to the sexual activity.¹⁶⁸ They cited various examples of where the offence would not apply under this principle, including a relationship between a teacher and a student previously in the same school but no longer, a foster parent and a 16 or 17 year old child for whom they were previously a foster carer, and a doctor who previously treated a young patient who now has a different treating doctor.¹⁶⁹
- 3.48** The NSW Government suggested that the influence of someone in a position of authority within a special care relationship may continue to have an impact on a young person well after that relationship has ended:
- Once a special care relationship is established, a child may remain vulnerable to the undue influence of the person who has been in a position of authority over them, even after the relationship is extinguished. It is possible that significant grooming may occur while the relationship is in place that may influence the child at a later time, and a significant power imbalance may remain due to the nature of the previous relationship.¹⁷⁰
- 3.49** The NSW Government therefore raised the question of whether the special care offence should be time limited to acknowledge the continuing influence of a previous authority relationship while allowing for innocent or peer appropriate relationships to develop at a later time.¹⁷¹
- 3.50** One inquiry participant suggested that placing a temporal condition on the offence may be warranted, in recognition that 'the potential for exploitation from the previous relationship might linger'.¹⁷² The stakeholder suggested a 12 month period for the offence to apply once the special care relationship has ended, however, only suggests this within the context of a school relationship:

... the offence should apply for an appropriate period in circumstances where a school worker no longer works at the student's school. The intended purpose of the legislation seeks to protect students from exploitation where there is a relative power imbalance brought about by a relationship of care or authority. Even if a school worker leaves a school, the potential for exploitation from the previous relationship might linger.

Furthermore, it is possible that an unscrupulous person wishing to avoid liability, might leave a school and immediately thereafter exploit the relationship. To avoid such exploitation, a temporal condition might be prudent. For example, Parliament might

¹⁶⁷ *R v PJ* (2017) NSWCCA 290.

¹⁶⁸ Submission 7, NSW Government, p 11.

¹⁶⁹ Submission 7, NSW Government, p 12.

¹⁷⁰ Submission 7, NSW Government, p 12.

¹⁷¹ Submission 7, NSW Government, p 12.

¹⁷² Submission 6, Confidential, p 5 (quoted with permission).

consider that liability ought to arise if the sexual intercourse occurs within 12 months of the school worker leaving the student's school.¹⁷³

3.51 Numerous other inquiry participants who considered this issue did not support the offence applying to special care relationships no longer in effect, citing various reasons for their opposition.¹⁷⁴

3.52 For example, the Law Society of New South Wales argued that if the offence were to be expanded in this way, it would require a relationship at some point in the past and proof of a continuing power imbalance, which is at odds with the offence as it is currently framed.¹⁷⁵ It also conflicts with the recommendations of the Royal Commission, as outlined in paragraph 1.35. The Office of the Director of Public Prosecutions shared this view, stating:

The right balance has now been struck and there is no need for further extension of the section's reach. The section criminalises otherwise consensual sexual intercourse. Extension to situations where there is no longer a special care relationship and therefore no authority to be exploited or abused, would be a significant and unwarranted departure from the policy underlying the section.¹⁷⁶

3.53 Meanwhile, the New South Wales Bar Association recognised that grooming may be a relevant concern but asserted that it is already an offence in itself and 'would be the subject of prosecution quite independently of what occurred at a later date when the pupil has the capacity to give real consent'.¹⁷⁷

Should the Director of Public Prosecutions be required to sanction prosecutions under the special care offence?

3.54 In seeking to provide the greatest protection to young people in special care relationships, inquiry participants considered the value of the Director of Public Prosecutions (DPP) sanctioning prosecutions under the special care offence, as raised in the inquiry's term of reference (e). Stakeholders discussed how this could operate as a safeguard to prevent the risk of criminalising what may be regarded as appropriate consensual conduct.

3.55 Requiring DPP sanction of prosecutions for an offence means that the NSW Police Force must apply to the DPP for consent to lay charges. This involves a process whereby the police must prepare a full brief of evidence and submit it to the DPP for their consideration and decision. It can take up to six months for a decision to be made, however, according to the NSW Government, the sanction 'ensures the charges are thoroughly scrutinised and that charges are laid in accordance with the public interest where the offence type involves particular complexities'.¹⁷⁸

¹⁷³ Submission 6, Confidential, p 5 (quoted with permission).

¹⁷⁴ For example, Submission 2, Independent Education Union of Australia, p 1; Submission 4, Law Society of New South Wales, p 2; Submission 14, Legal Aid New South Wales, p 6; Submission 15, Office of the Director of Public Prosecutions, p 1.

¹⁷⁵ Submission 4, Law Society of New South Wales, p 2.

¹⁷⁶ Submission 15, Office of the Director of Public Prosecutions, p 2.

¹⁷⁷ Submission 1, New South Wales Bar Association, pp 2-3.

¹⁷⁸ Submission 7, NSW Government p, 13.

- 3.56** Ms Kara Shead, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions, advised that this type of safeguard already operates in relation to a number of other offences, for example, the persistent sexual abuse of a child, dealing with property that subsequently becomes an instrument of crime, and criminal defamation.¹⁷⁹ Ms Shead noted that the Attorney General is also required to sanction certain offences, including the fraudulent disposal of property, corrupt benefit of trustees, and serious racial, homosexual, HIV/AIDS, vilification.¹⁸⁰
- 3.57** Some inquiry participants unequivocally supported the sanction of prosecutions under the special care offence by the DPP.¹⁸¹ They acknowledged its advantages by offering a 'broad public interest safeguard' as well as the examination of legal and evidentiary complexities on a case-by-case basis by the highest levels within the DPP to pursue only those prosecutions as necessary.¹⁸²
- 3.58** Indeed, Ms Shead explained that sanctioning allows the DPP to consider different types of relationships individually, assessing each on its own merits and acting as a 'sieve': '... our office and courts would be well placed to have the sieve ... to not pursue those matters that in the public interest should not be prosecuted'.¹⁸³
- 3.59** Some inquiry participants drew particular attention to the positive impact a DPP sanction would have on the charging cycle, with stakeholders such as Mr Humphreys, Law Society of New South Wales, and Dr Morrison, Australian Lawyers Alliance, arguing that a sanction may avoid the 'irreparable harm' caused by charges being laid and then later withdrawn. As Dr Morrison explained: '... 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'.¹⁸⁴
- 3.60** However, several stakeholders questioned the power that would be granted to the DPP to proceed or not proceed with prosecutions at its discretion, if it was required to sanction the offence. Mr Wilson, New South Wales Bar Association, even asserted that 'it is only a safeguard against procedurally someone being charged'.¹⁸⁵ He drew a distinction between the DPP sanction and a court's role in deciding whether or not someone is guilty of an offence:

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 ... 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.¹⁸⁶

¹⁷⁹ Evidence, Ms Shead, 27 June 2018, p 15.

¹⁸⁰ Evidence, Ms Shead, 27 June 2018, p 14.

¹⁸¹ For example, Submission 9, NSW Society of Labor Lawyers, p 1; Submission 10, Gymnastics Australia, p 2; Submission 4, Law Society of New South Wales, p 2.

¹⁸² For example, Mr Follett, 27 June 2018, p 8; Evidence, Mr Humphreys, 27 June 2018, p 26.

¹⁸³ Evidence, Ms Shead, 27 June 2018, p 18.

¹⁸⁴ Evidence, Dr Morrison, 27 June 2018, p 26.

¹⁸⁵ Evidence, Mr Wilson, 27 June 2018, p 26.

¹⁸⁶ Evidence, Mr Wilson, 27 June 2018, p 26.

3.61 Mr Wilson contended that a discretionary decision is a 'very different type of decision-making from interpreting legislation'.¹⁸⁷ Indeed, it is this regard for the law that several stakeholders were most concerned about in discussing this safeguard.

3.62 Numerous inquiry participants argued that rather than the DPP sanction prosecutions under the offence, there should be certainty in the legislation.¹⁸⁸ As Mr Thomas Spohr, Solicitor, Indictable Matters, Legal Aid NSW, asserted:

... [I]t 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.¹⁸⁹

3.63 Likewise, Ms Hall, New South Wales Bar Association, shared this view, stating 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.¹⁹⁰

3.64 The New South Wales Bar Association in its written submission was also of this opinion, stating that 'reliance on the discretion of a prosecutor is not consistent with the principle that there should be certainty in the criminal law so that the public is aware of which actions constitute criminal offences'.¹⁹¹

3.65 Ultimately, Mr Spohr identified the issue as one of whether the legislation is clear enough for the DPP to make their decision, rather than whether the DPP can be trusted with that decision making:

... it is not about whether we can know how [the DPP] 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.¹⁹²

3.66 Notwithstanding the need for certainty in the legislation, inquiry participants indicated their support for a DPP sanction of prosecutions, but only under certain conditions or for certain categories of special care relationships.

¹⁸⁷ Evidence, Mr Wilson, 27 June 2018, p 26.

¹⁸⁸ Evidence, Mr Tang, 27 June 2018, p 26.

¹⁸⁹ Evidence, Mr Thomas Spohr, Solicitor, Indictable Matters, Legal Aid NSW, 27 June 2018, p 26.

¹⁹⁰ Evidence, Ms Hall, 27 June 2018, p 27

¹⁹¹ Submission 1, New South Wales Bar Association, p 4.

¹⁹² Evidence, Mr Spohr, 27 June 2018, p 35.

- 3.67** For example, the NSW Ombudsman argued that DPP approval to prosecute should not be required for the familial relationships under section 73(3)(a),¹⁹³ while the Office of the Advocate for Children and Young People asserted that DPP sanction should only apply to special care relationships that involve young people of similar age, and special care relationships that once existed but are no longer in effect.¹⁹⁴
- 3.68** Others, such as Mr Wilson and Mr Humphreys, suggested that the sanction apply only to the 'catch all' categories of relationships prescribed within the offence, namely those that fall under section 73(3)(c) and potentially those where it was unclear whether the 'offender' would be a member of a teaching staff due to the problems with the definition in section 73(6)(c). These inquiry participants argued that the other categories in section 73(3) – familial, custodial and health – are 'incontrovertible' and as such do not require a sanction.¹⁹⁵
- 3.69** Ms Shead acknowledged that a 'sanction in relation to more amorphous relationships can be useful if there is charging where there is not that element of power or control',¹⁹⁶ such as peer-relationships of similar-aged parties.¹⁹⁷ She also recognised that the DPP sanction may not be necessary for all categories of relationships under the legislation:

...[T]here 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...¹⁹⁸

- 3.70** However, the DPP's overall view on this issue was that 'the sanction should apply to each of the categories under section 73(3)'.¹⁹⁹ They pointed to the legal and evidentiary complexities around sexual abuse offences such as the special care offence, and explained that other offences require the DPP's sanction for these same reasons:

Cases involving ongoing sexual abuse, particularly where there has been a delay in making a complaint, are often complex in legal and evidentiary senses. For instance there is often more than one victim, the offences routinely commence prior to the 16th birthday and grooming behaviour may need to be charged. Other offences such as section 66EA and incest already require the Directors sanction for these reasons.²⁰⁰

- 3.71** Inquiry participants generally agreed that as a 'safeguard', having both certainty and clarity in the law and a DPP sanction of the offence is necessary.²⁰¹ As Ms Penny Musgrave, Member, Criminal Law Committee, Law Society of New South Wales, argued:

¹⁹³ Submission 17, NSW Ombudsman, p 4.

¹⁹⁴ Submission 11, Office of the Advocate for Children and Young People, p 2.

¹⁹⁵ Evidence, Mr Wilson, 27 June 2018, p 34; Evidence, Mr Humphreys, 27 June 2018, p 34.

¹⁹⁶ Evidence, Ms Shead, 27 June 2018, p 18.

¹⁹⁷ Evidence, Ms Shead, 27 June 2018, p 18.

¹⁹⁸ Evidence, Ms Shead, 27 June 2018, p 18.

¹⁹⁹ Answers to questions on notice, Ms Johanna Pheils, Deputy Solicitor for Public Prosecutions (Legal), Solicitor's Executive, Office of the Director of Public Prosecutions, 27 July 2018, p 2.

²⁰⁰ Answers to questions on notice, Ms Pheils, p 2.

²⁰¹ For example, Evidence, Mr Humphreys, 27 June 2018, p 32; Evidence, Ms Musgrave, 27 June 2018, p 32.

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.²⁰²

Adoptive relationships

- 3.72** During the inquiry, stakeholders also examined adoptive relationships, including whether the special care offence should be expanded to recognise adoptive parents and adopted children as a special care relationship (inquiry term of reference (d)) or whether the incest offence in section 78A of the *Crimes Act 1900* should be expanded to include adopted relationships (inquiry term of reference (f)).
- 3.73** The NSW Government acknowledged a gap in the legislation with respect to protecting adopted children in the same way as other children, and considered what the most appropriate mechanism would be to provide a criminal response where an adoptive parent takes sexual advantage of an adopted child.²⁰³
- 3.74** The NSW Government submitted that on the one hand, amending the incest offence would 'reinforce the message that adoptive relationships are equal to biological relationships', although it acknowledged that it would also broaden the policy purpose of the offence beyond preventing reproduction between close blood relatives. It also would potentially criminalise young people given both parties are chargeable under the offence.²⁰⁴ On the other hand, amending the special care offence would preserve the objectives of the incest offence, however, adoptive relationships would not be considered equal to biological parent-child relationships in the criminal law, and sexual activity within an adoptive relationship would not be an offence once the child turns 18 years old.²⁰⁵
- 3.75** Some inquiry participants, such as the Advocate for Children and Young People and Catholic Schools NSW, supported the expansion of the incest offence, rather than the special care offence, to include adoptive relationships.²⁰⁶
- 3.76** However, most other stakeholders supported the expansion of the special care offence instead, suggesting that section 73(3)(a) be amended to include adoptive parents in that category of relationships.²⁰⁷
- 3.77** In particular, the Honourable Justice Paul Brereton AM RFD examined this issue closely and argued in favour of extending the scope of special care relationships to include adoptive relationships. Justice Brereton outlined a number of significant differences between the special care offence and the incest offence, including the special care offence only protecting young

²⁰² Evidence, Ms Musgrave, 27 June 2018, p 32.

²⁰³ Submission 7, NSW Government, pp 10-11.

²⁰⁴ Submission 7, NSW Government, pp 10-11.

²⁰⁵ Submission 7, NSW Government, pp 10-11.

²⁰⁶ Evidence, Mr Johnson, 27 June 2018, p 41; Submission 16, Catholic Schools NSW, p 5.

²⁰⁷ For example, Submission 14, Legal Aid, p 3; Submission 4, Law Society of New South Wales, p 2; Submission 10, Gymnastics Australia, p 2; Submission 14, Legal Aid New South Wales, p 11.

people while the incest offence protects close family members for life. Justice Brereton also noted that the special care offence identifies the offender as the dominant party in a relationship of trust and power, while the incest offence identifies all parties as offenders and is not limited to a relationship of trust and power.²⁰⁸

3.78 Justice Brereton argued that these differences reflect the fundamental distinction between the purposes of these two offences, and explained this distinction:

... [E]ssentially, while s 73 is directed to the protection of young persons from abuses of trust and power, s 78A is directed to the protection of the public from the consequences of sexual intercourse between persons within the prohibited degrees of consanguinity. This purpose of section 78A is also reflected in the preservation of the birth family relationship for the purposes of the law of incest, under section 95(4) of the Adoption Act.²⁰⁹

3.79 Justice Brereton concluded: "Those considerations suggest that the protection of adoptees aged 16 and 17 fits better in the context of section 73 than the incest provision in section 78A".²¹⁰

Committee comment

3.80 In light of the issues raised in relation to the scope of the special care offence, the committee believes it is necessary to amend the provision to provide greater clarity and certainty. There appears to be an apparent disconnect between the intention of the legislation and its application in certain contexts.

3.81 Disparity between inquiry participants about which relationships are captured by the legislation and which ones are not, indicate some ambiguity exists.

3.82 The Royal Commission in its Criminal Justice Report refers to these offences broadly as 'position of authority' offences, rather than 'special care offences', and there are differences in how the offence is worded across jurisdictions. Clearly, this type of offence, however it is described, exists so as to capture those cases where people have abused their position or relationship with a young person.

3.83 In this regard the committee recognises there may be value in having a reference to 'authority' in the offence as perhaps this would help to ensure that only those relationships where a power imbalance exist are captured.

3.84 While many of the categories under section 73(3) are straightforward, section 73(3)(c) as it is currently worded is problematic. The words 'in connection with' and 'other instruction' are not defined in the provision, and could be interpreted broadly. The inclusion of reference to 'authority' may provide more guidance as to what relationships would be captured.

3.85 This, however, should not introduce the need for proof of the exercise or abuse of authority. Indeed, we note the Royal Commission has recommended that no further evidence be required

²⁰⁸ Submission 5, Hon. Justice Paul Brereton AM RFD, p 3.

²⁰⁹ Submission 5, Hon. Justice Paul Brereton AM RFD, p 3.

²¹⁰ Submission 5, Hon. Justice Paul Brereton AM RFD, p 3.

beyond the existence of a relationship of authority in order for the offence to have been committed.

- 3.86 Accordingly, the committee recommends that the special care offence be amended to make it clear that the offender is in a position of authority, but not so as to include a reference or requirement for abuse of the position of authority.

Recommendation 1

That the NSW Government amend section 73 of the *Crimes Act 1900* to clarify that the offender is in a position of authority in the relationship.

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- 3.87 The committee also acknowledges the concerns raised in the previous chapter in relation to the definition of 'member of teaching staff', as it relates to section 73(3)(b). The definition in section 73(6) states that a member of teaching staff includes teachers, principals, deputy principals and 'any other person employed at the school who has students at the school under his or her care or authority'.
- 3.88 The committee agrees that by including an explicit reference to the victim being under the school employee's care or authority in section 73(6)(c), the offence would no longer unnecessarily capture every possible relationship between any school employee and any student.
- 3.89 In addition, in response to the inquiry's term of reference (a)(i) relating to the application of the offence to school workers who are volunteers, the committee believes a further amendment should be made to section 73(6)(c) to ensure it captures volunteers. Use of the phrase 'employed' has cast doubt as to whether the offence is limited only to paid workers in schools. While the committee acknowledges that some stakeholders suggest the special care offence already applies to volunteers in an instructional capacity (under section 73(3)(c)), the committee believes that it would be appropriate to amend section 73(6)(c) to refer to both paid and unpaid workers.
- 3.90 The committee therefore recommends amending section 73(6)(c), to both ensure the offender is in a position of care or authority, and capture volunteers.

Recommendation 2

That the NSW Government amend section 73(6)(c) of the *Crimes Act 1900* to:

- clarify that the offender is in a position of care or authority
- ensure the reference to 'any other person employed at the school' includes unpaid workers, such as volunteers.

-
- 3.91 With regard to the inquiry's terms of reference (a)(ii) and (a)(iii) which relate to the application of the special care offence to school workers who are recent ex-students and former school workers, the committee acknowledges the range of views shared by stakeholders in chapter 2 (paragraphs 2.51 – 2.58).
- 3.92 In the case of recent ex-students, the committee acknowledges the evidence of stakeholders that the special care offence already applies if the recent ex-student falls within one of the prescribed

special care categories, including as a member of the teaching staff. The committee also notes that 'recent ex-student' suggests that the person is likely to be similar in age to a 16 or 17 year old, such that the similar age defence may apply. In the case of former school workers, the committee agrees with inquiry participants that the special care offence does not have a role to play if a student is no longer under the special care of that worker. The committee therefore believes that no specific amendment to the special care offence is required in relation to recent ex-students and former school workers.

- 3.93** The committee acknowledges existing regulations around sexual misconduct in the workplace, including the reportable conduct scheme. However, the committee is conscious that this regulatory response ultimately does not equate to a criminal one.
- 3.94** It was noted by some participants that those already in the workplace who receive instruction or training may already be covered by this legislation. In particular, the fast food industry, where a large number of young people work, may lead to those already in a personal relationship being captured in an employment relationship. The committee urges the Attorney General to give special consideration to this provision in any review arising from the recommendations of this committee.
- 3.95** The committee is of the view that, like all other relationships of care prescribed in the special care offence, there is an inherent power imbalance in employment relationships. It is therefore within reason to consider that the consent of a 16 or 17 year old employee may be compromised where the relationship involves an employer or someone in a position of authority in the workplace. The committee therefore recommends that consideration be given to amending the special care offence to include employment relationships as an additional category under section 73(3).
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Recommendation 3

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

- 3.96** The committee also acknowledges the arguments for extending the special care offence to youth and other workers in youth residential care settings, as raised in the inquiry's term of reference (c), given the heightened vulnerabilities of young people in these settings. The committee finds the evidence of the NSW Ombudsman compelling, noting that almost half of the reportable conduct notifications it received in one year came from the substitute residential care sector, relating predominantly to sexual allegations. On this basis, the committee recommends amending the special care offence to include relationships in youth residential care settings and homelessness services.
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Recommendation 4

That the NSW Government amend the *Crimes Act 1900* to include relationships in youth residential care settings and homelessness services as additional categories under section 73(3).

- 3.97** Two other matters concerning how the special care offence should be amended were also considered during the inquiry. The first relates to the inquiry's term of reference (b) which considers whether a temporal condition should be placed on the offence, in recognition of the fact that once a special care relationship has ended, the person in the position of authority may continue to exert influence over the young person. Given most stakeholders did not support the offence applying to relationships no longer in effect, the committee makes no recommendations in this regard.
- 3.98** The second issue relates to whether there is value in requiring the Director of Public Prosecutions to sanction prosecutions under this offence, as raised in the inquiry's term of reference (e). While the committee acknowledges that the Director of Public Prosecutions already has a discretion as to which cases it pursues, the committee accepts that this requirement may help to alleviate some of the complexities faced in these matters.
- 3.99** The committee believes greater clarity and certainty in the legislation may be achieved by its recommendations, such that this 'safeguard' may not be necessary. There may be merit in requiring the Director of Public Prosecutions to sanction prosecutions under this offence, for cases falling within the category under section 73(3)(c) which relates to relationships established 'in connection with ... other instruction'.
- 3.100** The committee also acknowledges there is a gap in the Act in relation to adopted children and their adoptive parents, and notes that this gap may be addressed by expansion of the special care offence.
- 3.101** The committee considers that an expansion of the special care offence to include adoptive relationships is an appropriate legislative response given that the purpose of the offence is to protect young people.
- 3.102** This runs in direct contrast with the intent of the incest offence, which is to prevent reproduction between close blood relatives, and has medical and health implications. The incest offence, if amended to include adoptive relationships, would criminalise all parties, including the exploited young person. The committee was persuaded by the arguments put forward by the Honourable Justice Paul Brereton AM RFD on this distinction.
- 3.103** The committee therefore recommends amending section 73(3)(a) to include adoptive parents and the de facto partners of adoptive parents.

Recommendation 5

That the NSW Government amend the *Crimes Act 1900* to include adoptive parents and de facto partners of adoptive parents in section 73(3)(a).

Appendix 1 Submissions

No.	Author
1	NSW Bar Association
2	Independent Education Union of Australia NSW/ACT Branch
3	Australian Lawyers Alliance
4	Law Society of NSW
5	The Hon. Paul Brereton
6	Confidential
7	NSW Government
8	Federation of Parents and Citizens Association of New South Wales
9	NSW Society of Labor Lawyers
10	Gymnastics NSW
11	Office of the Advocate for Children and Young People
12	Ms Robin Turner
13	Ms Gabrielle McGuire
14	Legal Aid NSW
15	Office of the Director of Public Prosecutions NSW
16	Catholic Schools NSW
17	NSW Ombudsman

Appendix 2 Witnesses at hearing

Date	Name	Position and Organisation
Wednesday 27 June 2018, Jubilee Room, Parliament House	Ms Kate Connors	Acting Executive Director, Policy and Reform, Department of Justice
	Mr Mark Follett	Director, Crime Policy, Policy and Reform, Department of Justice
	Ms Kara Shead	Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions
	Ms Marianne Carey	Legal and Policy Advisor, Office of the Director of Public Prosecutions
	Mr Richard Wilson	Barrister, Criminal Law Committee, NSW Bar Association
	Ms Sharyn Hall	Barrister, Criminal Law Committee, NSW Bar Association
	Mr Doug Humphreys	President, Law Society of New South Wales
	Ms Penny Musgrave	Member, Criminal Law Committee, Law Society of New South Wales
	Dr Andrew Morrison RFD SC	Spokesperson, Australian Lawyers Alliance
	Mr Thomas Spohr	Solicitor, Indictable Matters, Legal Aid NSW
	Mr Aaron Tang	Acting Solicitor in Charge, Children's Legal Services, Legal Aid NSW
	Mr Andrew Johnson	Advocate for Children and Young People, Office of the Advocate for Children and Young People
	Mr Patrick Doumani	Member Support Officer, Federation of Parents and Citizens Association of New South Wales
	Ms Maria Kaivananga	P&C Federation Councillor for Sydney Electorate, Federation of Parents and Citizens Association of New South Wales

Appendix 3 Minutes

Minutes no. 24

Thursday 15 February 2018

Standing Committee on Law and Justice

Members' Lounge, Parliament House, Sydney, 4.34 pm

1. Members present

Ms Ward, *Chair*

Ms Voltz, *Deputy Chair*

Mr MacDonald (substituting for Mr Clarke)

Mr Khan

Mr Mookhey

Mr Shoebridge

2. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 23 be confirmed.

3. Correspondence

The committee noted the following item of correspondence:

Received:

- 19 December 2017 – Letter from Timothy Nicholls, Senior Lawyer, Dowson Turco Lawyers to Chair, requesting the Committee recommend changes to the *Relationships Register Act 2010* and the *Relationships Register Regulation 2010* to recognise de facto same-sex relationships registered overseas.

Resolved, on the motion of Mr Khan: That the correspondence from Dowson Turco Lawyers be forwarded to the Hon Mark Speakman MP, Attorney General for a response.

4. Consideration of ministerial terms of reference

The Chair tabled the following terms of reference received from the Hon Mark Speakman MP, Attorney General on 13 February 2018:

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) 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, and
- (d) whether any additional safeguards, including but not limited to Director of Public Prosecutions sanction of prosecutions, are required in any of the circumstances in paragraphs (a) - (c) above.

Resolved, on the motion of Mr Shoebridge: That the terms of reference be amended by inserting at the end:

‘(e) any other related matter.’

Resolved, on the motion of Mr Shoebridge: That the committee adopt the terms of reference, as amended.

5. Inquiry into the adequacy and scope of special care offences

5.1 Proposed timeline

Resolved, on the motion of Mr Khan: That the committee adopt the following timeline for the administration of the inquiry:

- Closing date for submissions: Wednesday 30 May 2018
- Hearings: June 2018
- Reporting date: August 2018.

5.2 Stakeholder list

Resolved, on the motion of Mr Khan: That the secretariat circulate to members the Chairs’ proposed list of stakeholders to provide them with the opportunity to amend the list or nominate additional stakeholders, and that the committee agree to the stakeholder list by email, unless a meeting of the committee is required to resolve any disagreement.

5.3 Advertising

All inquiries are advertised via twitter, stakeholder letters and a media release distributed to all media outlets in New South Wales.

6. Selection of Bills Committee

The Clerk Assistant - Committees briefed the committee on its new role in examining bills referred by the House following a recommendation by the Selection of Bills Committee.

7. Adjournment

The committee adjourned at 4.42 pm, *sine die*.

Jenelle Moore
Clerk to the Committee

Minutes no. 25

Tuesday 1 May 2018

Standing Committee on Law and Justice

Members’ Lounge, Parliament House, Sydney, 2.02 pm

1. Members present

Ms Ward, *Chair*
Ms Voltz, *Deputy Chair*
Mr Clarke
Mr Khan
Mr Mookhey
Mr Shoebridge

2. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 24 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 23 March 2018 – Letter from Dr Arthur Chesterfield-Evans to Chair, regarding the statutory review of the *State Insurance and Care Governance Act 2015*
- 18 April 2018 – Letter from the Hon Mark Speakman SC MP, Attorney General, to Chair, requesting that the committee inquire into and report on additional matters relating to adoptive relationships as part of the inquiry into special care offences.

Sent:

- 19 February 2018 – Letter from Chair to the Hon Mark Speakman SC MP, Attorney General, forwarding correspondence from Mr Timothy Nicholls, Senior Lawyer, Dowson Turco Lawyers to Chair, regarding changes to the *Relationships Register Act 2010* and the *Relationships Register Regulation 2010* to recognise de facto same-sex relationships registered overseas.

4. Inquiry into the adequacy and scope of special care offences**4.1 Amendment to terms of reference**

Resolved, on the motion of Mr Shoebridge: That, as previously agreed via email, the committee adopt the amendment to the terms of reference to include examination of:

- whether the special care offence in section 73 of the Crimes Act 1900 should be expanded to include adoptive parents and adopted children as a special care relationship
- whether the incest offence in section 78A of the Crimes Act 1900 should be expanded to include adoptive relationships.

5. Timeline for next round of scheme reviews

Resolved, on the motion of Ms Voltz: That the committee adopt the following timetable for the next round of scheme reviews:

- workers compensation and Compulsory Third Party insurance schemes:
 - call for submissions 1 May 2018
 - report November 2018
- Dust Diseases and Lifetime Care and Support schemes:
 - call for submissions October 2018
 - report February 2019.

6. 2018 review of the workers compensation scheme**6.1 Approach to the review**

Resolved, on the motion of Mr Clarke: That the 2018 review of the workers compensation scheme focus on:

- the feasibility of a consolidated personal injury tribunal for Compulsory Third Party and workers compensation dispute resolution, as per recommendation 16 of the committee's first review of the workers compensation scheme, including where such a tribunal should be located and what legislative changes are required
- recommending a preferred model to the NSW Government.

6.2 Call for submissions and closing date

Resolved, on the motion of Mr Shoebridge: That the call for submissions be made on 1 May 2018 via twitter, stakeholder letters and a media release distributed to all media outlets in New South Wales, with a closing date of 17 June 2018.

6.3 Stakeholder list

Resolved, on the motion of Mr Shoebridge: That members have until 5.00 pm on Thursday 3 May 2018 to nominate additional stakeholders to the stakeholder list.

6.4 Hearing dates

Resolved, on the motion of Mr Shoebridge: That the committee set aside one hearing day in July/August, with the date to be determined by the Chair after consultation with members regarding their availability.

7. 2018 review of the Compulsory Third Party insurance scheme

7.1 Approach to the review

Resolved, on the motion of Ms Voltz: That the 2018 review of the Compulsory Third Party insurance scheme focus on the following aspects of the new scheme:

- whether it is achieving the NSW Government's stated objectives of:
 - increasing the proportion of benefits provided to the most seriously injured road users
 - reducing the time it takes to resolve a claim
 - reducing opportunities for claims fraud and exaggeration
 - reducing the cost of green slip premiums
- whether there has been a reduction in claims frequency since 1 December 2017 and if so, the projected impact on premiums
- the impact of the new profit normalisation and risk equalisation mechanisms in controlling insurer profits
- the effectiveness of the new CTP Assist and Dispute Resolution Services for statutory benefits claims
- the impact of the new minor injury definition, including on reducing fraudulent and exaggerated claims
- the impact of the changes on minor physical and psychological injuries
- the return to work and recovery outcomes of the new statutory benefits scheme
- the impact of the new reporting obligations on insurers which require them to report all new claims in real time to SIRA.

7.2 Call for submissions and closing date

Resolved, on the motion of Ms Voltz: That the call for submissions be made on 1 May 2018 via twitter, stakeholder letters and a media release distributed to all media outlets in New South Wales, with a closing date of 17 June 2018.

7.3 Stakeholder list

Resolved, on the motion of Mr Clarke: That members have until 5.00 pm on Thursday 3 May 2018 to nominate additional stakeholders to the stakeholder list.

7.4 Hearing dates

Resolved, on the motion of Mr Khan: That the committee set aside one to two hearing dates in July/August, with the dates to be determined by the Chair after consultation with members regarding their availability.

8. Adjournment

The committee adjourned at 2.17 pm, until Wednesday 27 June 2018, Jubilee Room, Parliament House (public hearing for inquiry into the adequacy and scope of special care offences).

Sharon Ohnesorge
Clerk to the Committee

Minutes no. 26

Wednesday 27 June 2018
Standing Committee on Law and Justice
Jubilee Room, Parliament House, Sydney, 8.50 am

1. Members present

Ms Ward, *Chair*
Ms Voltz, *Deputy Chair*
Mr Clarke (from 11.00 am)
Mr Khan
Mr Mookhey

2. Apologies

Mr Shoebridge

3. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 25 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 19 June 2018 – Email from Mr Russell Schokman, Policy Advisor, Independent Education Union of Australia, NSW/ACT Branch, to the secretariat, declining the invitation to appear at the public hearing on 27 June 2018
- 20 June 2018 – Email from Ms Julianna Demetrius, Assistant Ombudsman, Strategic Projects, NSW Ombudsman, to the secretariat, advising that she and the Deputy Ombudsman are not available to appear at the public hearing on 27 June 2018
- 22 June 2018 – Email from Mr Peter Grace, State Co-ordinator – Mission and Student Wellbeing, Catholic Schools NSW, to the secretariat, advising that Catholic Schools NSW are not available to appear at the public hearing on 27 June 2018.

Sent:

- 14 May 2018 – Letter from the Chair to the Hon Mark Speakman SC MP, Attorney General, confirming that the terms of reference for the inquiry into the adequacy and scope of special care offences has been extended to include examination of adoptive relationships, as requested.

5. Inquiry into the adequacy and scope of special care offences**5.1 Public submissions**

The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1-5 and 7-17.

5.2 Confidential submissions

Resolved, on the motion of Ms Voltz: That the committee keep submission no. 6 confidential, as per the request of the author.

5.3 Public hearing

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Ms Kate Connors, Acting Executive Director, Policy and Reform, Department of Justice
- Mr Mark Follett, Director, Crime Policy, Policy and Reform, Department of Justice.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Kara Shead, Acting Director of Public Prosecutions, Office of the Director of Public Prosecutions
- Ms Marianne Carey, Legal and Policy Advisor, Office of the Director of Public Prosecutions.

The evidence concluded and the witnesses withdrew.

Mr Khan left the meeting.

Mr Clarke joined the meeting.

The following witnesses were sworn and examined:

- Mr Richard Wilson, Barrister, Criminal Law Committee, NSW Bar Association
- Ms Sharyn Hall, Barrister, Criminal Law Committee, NSW Bar Association
- Mr Doug Humphreys, President, Law Society of New South Wales
- Ms Penny Musgrave, Member, Criminal Law Committee, Law Society of New South Wales
- Dr Andrew Morrison RFD SC, Spokesperson, Australian Lawyers Alliance
- Mr Thomas Spohr, Solicitor, Indictable Matters, Legal Aid NSW
- Mr Aaron Tang, Acting Solicitor in Charge, Children's Legal Services, Legal Aid NSW.

Mr Khan re-joined the meeting.

Mr Clarke left the meeting.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Andrew Johnson, Advocate for Children and Young People, Office of the Advocate for Children and Young People
- Ms Kelly Tallon, Senior Policy Advisor, Office of the Advocate for Children and Young People.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Patrick Doumani, Members Support Officer, Federation of Parents and Citizens Association of New South Wales
- Ms Maria Kaivananga, P&C Federation Councillor for Sydney Electorate, Federation of Parents and Citizens Association of New South Wales.

The evidence concluded and the witnesses withdrew.

The hearing concluded at 2.34 pm.

6. 2018 reviews of Compulsory Third Party insurance scheme and workers compensation scheme

Resolved, on the motion of Mr Khan: That:

- hearings be held on 24 and 25 July for the Workers Compensation review
- hearings be held in August/September for the CTP review, on dates to be confirmed after the secretariat canvasses member availability.

7. Adjournment

The committee adjourned at 2.34 pm, until Tuesday 24 July 2018, Jubilee Room, Parliament House (public hearing for 2018 review of the workers compensation scheme).

Rhia Victorino

Clerk to the Committee

Draft minutes no. 37

Monday 19 November 2018

Standing Committee on Law and Justice

Room 1136, Parliament House, Sydney at 1.05 pm

1. Members present

Mrs Ward, *Chair*
 Ms Voltz, *Deputy Chair*
 Mr Clarke
 Mr Graham (substituting for Mr Mookhey) (from 1.09 pm)
 Mr Khan
 Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mr Shoebridge: That minutes no. 36 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- 9 July 2018 – Letter from Mr Aaron Tang, Acting Solicitor in Charge, Children's Legal Service, Legal Aid NSW, to the Chair, advising of a transcript correction to evidence given at the public hearing on 27 June 2018.
- 9 August 2018 – Email from the author of submission no. 6 to the secretariat, advising that the author agrees to the publication of an excerpt from submission no. 6 for use in the committee's final report.
- 9 August 2018 – Email from Ms Johanna Pheils, Deputy Solicitor for Public Prosecutions (Legal), Solicitor's Executive, Office of the Director of Public Prosecutions NSW (ODPP), to the secretariat, advising that the ODPP agree to the publication of a reference to confidential material provided in their answers to questions on notice for use in the committee's final report.
- 10 September 2018 – Email from Ms Anne Whitehead, Acting Deputy Solicitor Legal, Office of the Director of Public Prosecutions NSW (ODPP), to the secretariat, requesting that the attachment to their answers to questions on notice remain confidential and providing a summary of additional information for publication.
- 18 September 2018 – Email from Ms Anne Whitehead, Acting Deputy Solicitor Legal, Office of the Director of Public Prosecutions NSW (ODPP), to the secretariat, regarding the confidentiality of their attachment to questions on notice.

4. Inquiry into the adequacy and scope of special care offences**4.1 Publication of excerpt from submission no. 6**

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of the above excerpt from submission no. 6 for use in the committee's final report.

Resolved, on the motion of Mr Shoebridge: That the committee keep confidential the correspondence from author of submission no. 6, dated 9 August 2018, regarding the publication of an excerpt from submission no. 6.

4.2 Answers to questions on notice – Office of the Director of Public Prosecutions

Resolved, on the motion of Mr Shoebridge: That the committee keep confidential the attachment to the Office of the Director of Public Prosecutions answers to their answers to questions on notice.

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of a reference to the attachment to the answers to questions on notice from the Office of the Director of Public Prosecutions for use in the committee's final report, as agreed to by the author.

4.3 Transcript clarification

Resolved, on the motion of Mr Shoebridge: That the committee include a footnote in the transcript of 27 June 2018 noting the clarification received on 9 July 2018 from Mr Aaron Tang, Acting Solicitor in Charge, Children's Legal Service, Legal Aid NSW.

4.4 Reference to material from the Royal Commission Criminal Justice Report

The committee noted that excerpts from the *Criminal Justice Report: Parts III to VI* of the Royal Commission into Institutional Responses to Child Sexual Abuse are referred to in the Chair's draft report.

4.5 Consideration of Chair's report

The Chair tabled her draft report entitled draft report, entitled *Adequacy and scope of special care offences*, which, having been previously circulated, was taken as being read.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.64 be amended by omitting 'abuses of' and inserting instead 'being abused by someone in a position of'.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.65 be amended by:

- omitting '21 year old' and inserting instead '19 year old'
- omitting '22 year old' and inserting instead '20 year old'.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.67 be amended by omitting 'power imbalance' and inserting instead 'position of authority'.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.86 be amended by inserting ', but not so as to include a reference or requirement for abuse of the position of authority' after 'authority of the offender'.

Resolved, on the motion of Mr Khan: That Recommendation 1 be amended by omitting 'give consideration to amending' and inserting instead 'amend'.

Resolved, on the motion of Mr Shoebridge: That Recommendation 1 be amended by omitting 'victim is under the authority of the offender' and inserting instead 'offender is in a position of authority'.

Resolved, on the motion of Mr Khan: That paragraph 3.87 be omitted:

'The committee recognises the concerns raised by some stakeholders about the offence extending to any person, including any person under the age of 18 years. Concerns around this issue are adequately addressed by the recent introduction of the similar age defence, as passed in June 2018 under the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*. The committee also notes that the Director of Public Prosecutions has a discretion about which cases it pursues, and in light of the similar age defence, may be unlikely to pursue prosecution of 'offenders' under 18 years.'

Resolved, on the motion of Mr Khan: That Recommendation 2 be amended by omitting 'give consideration to amending' and inserting instead 'amend'.

Resolved, on the motion of Mr Shoebridge: That Recommendation 2 be amended by omitting 'victim is the person under the offender's care or authority' and inserting instead 'offender is in a position of care or authority'.

Resolved, on the motion of Ms Voltz: That the following new paragraph be inserted after paragraph 3.94:

'It was noted by some participants that those already in the workplace who receive instruction or training may already be covered by this legislation. In particular, the fast food industry, where a large number of young people work, may lead to those already in a personal relationship being captured in an employment relationship. The committee urges the Attorney General to give special consideration to this provision in any review arising from the recommendations of this committee.'

Resolved, on the motion of Mr Shoebridge: That:

- Recommendation 3 be amended by omitting 'and relationships in youth residential care settings and homelessness services as additional categories under section 73(3)' and inserting instead 'as an additional category under section 73(3).'
- the following new recommendation be inserted after Recommendation 3:

'Recommendation x

That the NSW Government amend the *Crimes Act 1900* to include relationships in youth residential care settings and homelessness services as additional categories under section 73(3).'

Resolved, on the motion of Mr Khan: That paragraph 3.102 be amended by inserting at the end: 'The committee was persuaded by the arguments put forward by the Honourable Justice Paul Brereton AM RFD on this distinction.'

Resolved, on the motion of Mr Khan: That Recommendation 4 be amended by omitting 'give consideration to amending' and inserting instead 'amend'.

Resolved, on the motion of Ms Voltz: That:

- the draft report as amended be the report of the committee and that the committee present the report to the House
- the transcripts of evidence, submissions, answers to questions on notice, and correspondence relating to the inquiry be tabled in the House with the report
- upon tabling, all unpublished attachments to submissions be kept confidential by the committee
- upon tabling, all unpublished transcripts of evidence, submissions, answers to questions on notice, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee
- the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling
- the committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee
- dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting
- that the report be tabled on Thursday 22 November 2018.

5. Adjournment

The committee adjourned at 1.32 pm until *sine die*.

Rhia Victorino
Clerk to the Committee

