

## Inquiry into the adequacy and scope of special care offences

Legal Aid NSW submission to the NSW Standing Committee on Law and Justice

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323 CASTLEREAGH ST

HAYMARKET NSW 2000 / DX 5 SYDNEY

**Legal Aid**   
NEW SOUTH WALES

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## About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of

Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority, Drug Court and the Youth Drug and Alcohol Court.

The Criminal Indictable section provides representation in trials, sentences and short matters listed at the Downing Centre District Court, complex committals in Local Courts throughout NSW, Supreme Court trials and sentence proceedings throughout NSW, fitness and special hearings in the District and Supreme Courts, and high risk offender matters in the Supreme Court.

The Children's Legal Service advises and represents children and young people under 18 involved in criminal cases and Apprehended Violence Order applications in the Children's Courts.

Legal Aid NSW welcomes the opportunity to make a submission to the Legislative Council's Standing Committee on Law and Justice. Should you require any further information, please contact:

Kate Halliday, Senior Law Reform Officer

Policy, Planning and Programs

Phone: (02) 9219 6399

[Kate.halliday@legalaid.nsw.gov.au](mailto:Kate.halliday@legalaid.nsw.gov.au)

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## Introduction

Legal Aid NSW welcomes the opportunity to make a submission to the Inquiry into the adequacy and scope of special care offences in the *Crimes Act 1900* (NSW) (**Crimes Act**).

The special care offences in section 73 of the Crimes Act protect young people aged 16 or 17 years from sexual exploitation by others who are in a position of authority over them. The law recognises that where there is a power imbalance between such people, young people are unlikely to be able to freely consent to sexual conduct. Where there is no relationship involving a power imbalance, additional legal protection beyond the general law of sexual assault is not required.<sup>1</sup>

Section 73 of the Crimes Act contains an exhaustive list of relationships that, in effect, deem when a person (the victim) is under the special care of another (the offender). Special care offences need to be carefully framed because they alter the general rule that young people aged 16 and 17 have sufficient maturity to consent to sexual acts.

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. This may lead to arbitrary and unfair results.

While Legal Aid NSW supports the retention of a separate "special care" offence in NSW, we suggest that to address the above risk, section 73 should be amended to introduce an additional element requiring proof of the *existence of a relationship of authority* involving a *power imbalance* between the parties. Alternatively, the offence could be framed without reference to fixed categories, to enable the fact finder to determine, in the particular circumstances of the case, whether an existing power imbalance has vitiated the young person's consent.<sup>2</sup>

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<sup>1</sup> The abuse of a position of authority or trust is a ground on which consent is may be vitiated for the purpose of a prosecution for sexual assault *Crimes Act 1900* (NSW) section 61HA(6)(c). Further, section 21A (2)(k) of the *Crimes (Sentencing Procedure) Act 1986* (NSW) provides for the aggravation of offences if there is abuse of authority or if the victim was under the authority of the offender.

<sup>2</sup> The Western Australian special care offence would provide a starting point for this approach. It criminalises sexual conduct by a person, with a child aged 16 or 17 years, who is under his or her care, supervision or authority, with no reference to any specific categories of relationships: *Criminal Code Act Compilation Act 1913* (WA) section 322.

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Should the categorisation approach under the current offence be retained in NSW, Legal Aid NSW supports expansion of the categories of prescribed relationships to include:

- the relationship between workers in youth residential settings and a young person under their care, and
- the relationship between adoptive parents and their children.

In any event, we suggest that appropriate safeguards be introduced to prevent the risk of criminalisation of consensual conduct.

Our detailed submission follows.

## Purpose and history of special care offences

Section 73 of the Crimes Act was introduced in NSW in 2003. It replaced the former offence of carnal knowledge of a girl aged 16 years, and under 17 years, by a schoolmaster or teacher, father or step-father where the girl was his pupil, daughter or step-daughter.

In introducing the amendment in 2003 the Hon Tony Burke stated:

*[The amendment] introduces a number of relationships other than teacher (sic) where there is a similar power relationship and power imbalance...these relationships include those between custodial officers and inmates, people providing religious, sporting, musical or other instruction and their pupils, and the relationship between a health professional and a patient.<sup>3</sup>*

The Hon Carmel Tebbut said:

*This new section aims to protect young people from sexual exploitation from persons in positions of authority.<sup>4</sup>*

During Parliamentary debate at that time, concerns were raised about the need to carefully set the boundaries of the offences because of the risk of including relationships that did

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<sup>3</sup> Hon Tony Burke MLC, Legislative Council Hansard, 27 May 2003.

<sup>4</sup> Hon Carmel Tebbut MLC, Legislative Council Hansard, 27 May 2003.

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not involve a power imbalance, such as peer relationships between people who are close in age.<sup>5</sup>

Section 73 was amended in March 2018 to expand the category of special care relationship of teacher to members of the teaching staff at a school.<sup>6</sup> A “member of the teaching staff” is defined as:

- a teacher at the school
- the principal or deputy principal at the school, or
- any other person employed at the school who has students at the school under his or her care or authority.<sup>7</sup>

This last category covers school employees who have responsibility for the care of students, such as tutors or sporting coaches. It is not limited by any requirement for an established personal relationship where there is a power imbalance between the employee and the student, or a requirement for the student be under the authority of the employee. By contrast, the category of special care relationships in section 73(3)(c) requires an established personal relationship between a person, in connection with the provision of instruction, and the young person.

## TOR 1 Adequacy and scope of the special care offences

Legal Aid NSW believes that the scope of special care offences is too broad. 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, applying to all of the categories described in section 73, for the existence of a relationship of authority involving a power imbalance between the parties.

In its discussion of the March 2018 amendments, the NSW Legislative Review Committee stated:

*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*

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<sup>5</sup> Hon Carmel Tebbutt MLC and Hon Dr Peter Wong MLC, Legislative Council Hansard, 27 May 2003.

<sup>6</sup> *Justice Legislation Amendment Act 2018* (NSW). The amendment will commence on 2 July 2018.

<sup>7</sup> *Crimes Act 1900* (NSW) section 73(6).

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*good reasons for this aspect of the expanded definition, the Committee draws this matter to the attention of Parliament.*<sup>8</sup>

Legal Aid NSW agrees with the remarks of the Legislative Review Committee. As presently drafted, the new offence would criminalise consensual sexual activity between:

- A 17 year old student and 19 year old teacher's aide who have a one night stand when they meet at a party and are unaware that the other is associated with the same school.
- A 19 year old who commenced a relationship with a year 12 student at the school when he was himself a student there and who is later employed as a teacher's aide in a primary class at the school. We note that, unlike teachers (who are usually 22 years old at a minimum), teacher's aides can often be quite young, have had a prior association with the school (such as being a former student) and could have been in a relationship with a student of the school before they begin their employment.
- A carer at an out of school hours service who has a relationship with a 17 year old, Year 12 student.
- A casual soccer coach in a relationship with a Year 12 student who does not play soccer.

Legal Aid NSW is also concerned about the potential breadth of section 73(3)(c): where a person has an established personal relationship with the young person *in connection with* the provision of religious, sporting, musical or other instruction to the young person. 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 again, 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 also address our concerns with this category of special care relationship.

An alternative approach would be to reframe the offence in a manner where no specific relationship categories are prescribed. Section 322 of the *Criminal Code Act Compilation Act 1913 (WA)*, for example, criminalises conduct where the offender sexually penetrates

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<sup>8</sup> Legislation Review Committee, Legislation Review Digest No 49/56 13 February 2018, at [20], pp10-11.

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a child who is under his or her care, supervision or authority.<sup>9</sup> The Western Australian offence could be used as a starting point for an alternative approach in NSW. The WA offence has been applied in a range of contexts where these types of relationships are likely to develop, including educational, residential care, sporting, health, law enforcement, religious and spiritual contexts.<sup>10</sup> Before its amendment in 2006, the equivalent Victorian offence was also interpreted broadly, including to cover the situation where the sexual conduct took place off school premises and outside of school hours.<sup>11</sup>

This approach would be consistent with the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse on special care offences.<sup>12</sup> Under this approach, a crucial question in a prosecution for the offence is whether, at the time of the sexual conduct, the young person was in fact under the care, supervision or authority of the accused.

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.*<sup>13</sup>

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.

Consistent with Legal Aid NSW's primary position, this model of a special care offence would preferably contain an additional requirement for a *relationship of authority* involving a power imbalance between the parties.

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<sup>9</sup> The provision also applies to a person who procures, incites or encourages a child to engage in sexual behaviour, who indecently deals with a child, who procures, incites or encourages a child to do an indecent act or who indecently records a child.

<sup>10</sup> The WA offence has been applied in respect of the following relationships: A PE school teacher and his students; *D v The State of Western Australia* [2009] WASCA 155; A school soccer team coach and members of the soccer team: *D v The State of Western Australia* [2009] WASCA 155; An informal foster carer and his foster child: *RST v The State of Western Australia* [2016] WASCA 59; A formalised foster care relationship: *JDF v The State of Western Australia* [2016] WASCA 221.

<sup>11</sup> Victorian Law Reform Commission *Sexual Offences—Law and Procedure: Discussion Paper*, [6.78]

<sup>12</sup> Royal Commission into Institutional Responses to Child Sexual Abuse Criminal Justice Report (**Royal Commission Report**) Part III – VI, Recommendation 27.

<sup>13</sup> *R v Howes* [2001] VSCA 159 per Brooking JA

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## Whether the offences should apply to school workers who are volunteers

Subject to our comments below concerning workers in residential care and adoptive relationships, Legal Aid NSW does not support expansion of the offence to school workers who are volunteers. A volunteer at a school who has an established personal relationship with a student in connection with the provision of instruction (of any kind) is already covered by section 73(3)(c). There is no requirement for a person to be employed to fall within this category.

Should a more flexible model of the offence be supported, the nature of an offender's association with a school would not be limited by whether they were an employee, contractor or volunteer.

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

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. For this reason, we support the introduction of a similar age defence to the offence in section 73 (see below).

## Whether the offences should apply where the school worker no longer works at the student's school

Legal Aid NSW does not support expansion of the offence to school workers who no longer work at the student's school.

The expansion of the NSW offence in March 2018 means that it is no longer necessary for a school worker to have an actual teacher – pupil relationship with a young person for the offence to apply. Expanding the offence further (to school workers who no longer work at the school) would criminalise consensual sexual activity between an ex-school worker and a student aged 16 or 17 years who were not acquainted with each other when the school worker was employed at the school. They may not even have met during the school worker's tenure at the school.

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If the offence were framed by reference to a relationship of authority involving a power imbalance (and not the mere existence of a position of authority), the nature of an offender's association with a school would not be limited by whether the worker remains at the school. It would be a matter of fact and degree in a particular case as to whether the position of care, supervision or authority involving a power imbalance has persisted after the school worker has left the school.

## TOR 2 Where special care relationship existed but is no longer in effect

Legal Aid NSW does not support the expansion of the offence to circumstances where a special care relationship existed, but is no longer in effect. Extending the offence in this manner would be inconsistent with the underlying objective of the offence, and could result in criminalising entirely consensual sexual conduct.

Our comments in relation to whether the offence should apply to a school worker no longer working at the school (see above) also apply in relation to this aspect of the TOR.

This approach was not supported by the Royal Commission into Institutional Responses to Child Sexual Abuse:

*We have no hesitation in saying that a schoolteacher should not engage in any sexual conduct with his or her 16- or 17-year old students. There are no circumstances in which we would say that a student should be accepted to have consented freely to that conduct without being affected by the unequal position between the schoolteacher and student. There are no circumstances in which we would accept that such a 'relationship' was not exploitative. If the schoolteacher and student really want to be together, **they can cease the relationship of schoolteacher and student or wait until the student leaves school or turns 18.***<sup>14</sup> [our emphasis].

## TOR 3 Youth workers and workers in youth residential care settings

Legal Aid NSW considers that the offence should include workers in residential care settings and young people who are resident and under their care. Young people in residential care settings are inherently vulnerable because of their personal circumstances and experiences, and are likely to have experienced trauma or abuse. Combined with the private nature of residential care, those circumstances are likely to give rise to a power imbalance between a youth worker working in such a setting and young people who are under their care. This approach would be also consistent with that taken in section 49 (13) of the *Crimes Act 1958* (Vic).

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<sup>14</sup> Royal Commission Report, page 118.

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While we support the expansion of the offence to cover a worker in a youth residential care setting where the young person is a resident and under the care of that worker, we would not support the inclusion of youth workers beyond those working in residential care.

## TOR 4 Expansion of the offence to recognise adoptive parents and children as a special care relationship

Legal Aid NSW supports the expansion of the offence to recognise the relationship between adoptive parents and their children, consistent with the existing position in respect of guardians and foster parents. Adoptive relationships are not covered by the incest offence in section 78 of the *Crimes Act* because that offence only applies to relationships that have existed between the two people since birth.

## TOR 5 Safeguards

Legal Aid NSW suggests that a number of safeguards should be introduced to the offences, as currently framed, to prevent criminalisation of young persons and the potentially unjust application of the offence.

The offence currently imposes criminal liability on anyone, including a person under the age of 18 years, who falls within one of the special care categories and who engages in consensual sex with a person aged 16 or 17 years. It is possible that a 17 year old, who is employed at a school, or who is a voluntary sport coach outside of a school, could be caught by the offence if he or she has a consensual (and otherwise lawful) sexual relationship with a student or a member of the sporting team.

A conviction, or even a charge, for an offence under section 73 that was committed as a child can have particularly harsh and lifelong consequences.

A person who is sentenced for the offence *as a child*:

- is a registrable person under the *Child Protection (Offenders Registration) Act 2004* (NSW) and must report as a sex offender for 7 and a half years<sup>15</sup> and
- has a criminal conviction that is not capable of being spent.<sup>16</sup>

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<sup>15</sup> *Child Protection (Offenders Registration) Act 2004* (NSW), section 3A. A person who committed the offence as a child is not registrable if the court makes an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) or section 33(1) (a) of the *Children (Sentencing Procedure) Act 1987* (NSW)

<sup>16</sup> *Criminal Records Act 1991* (NSW), section 7

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A charge for the offence *as a child* is also sufficient to trigger an assessment requirement for a working with children clearance.<sup>17</sup>

We therefore recommend the following safeguards.

### Exemption of children

Children should not be liable to prosecution for the offence, or in the alternative, prosecutions against children should require the sanction of the Director of Public Prosecutions. Generally however, we do not support reliance on prosecutorial discretion to address problems created by overly broad drafting. Criminal statutes should be drafted to create certainty regarding what behaviour is encompassed by a particular offence.

### Similar age defence

We suggest that a similar age defence should be available where there is no more than a three year difference between the young person and the other person in a special care relationship. The introduction of a similar age defence would recognise that the nature of a relationship between a student and a worker at a school, or a sport music instructor or who is no more than three years older than the student, is not one that is likely to involve a power imbalance. Legal Aid NSW believes that the amendments made to the offence in March 2018 have increased the risk of criminalising consensual sexual conduct where there is no power imbalance, and the need for such a defence.

The Model Criminal Code provides for a similar age defence for all sexual acts committed against children involving a 2 year age difference.<sup>18</sup> We consider a greater age difference is justified in respect of the special care offence, as this offence involves young people of greater maturity, and who are generally more likely to be in a position to consent.

We do not consider that reliance on police or prosecution discretion in those cases where there is no actual power imbalance is a satisfactory approach. The exercise of this discretion is not subject to oversight or review. In the experience of our criminal lawyers, police charging decisions in respect of consensual underage sex are not consistent, and may be affected by pressure of family members of complainants.

Victoria has a similar age defence that applies where the ‘offender’ and child were in a domestic partnership, the ‘offender’ was not more than five years older than the child, and

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<sup>17</sup> *Child Protection (Working with Children Act 2012 (NSW) sections 14 and 16, Schedule 1(1) and Schedule 2(1)(h).*

<sup>18</sup> Clause 5.2.17.

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the domestic partnership commenced before the child came under the ‘offender’s’ care, supervision or authority.<sup>19</sup>

The Royal Commission into Institutional Responses to Child Sexual Abuse also recommended consideration of the introduction of defences such as a similar age defence to address concerns that the categories of persons in a special care relationship may be too broad and risk catching consensual sexual conduct that should not be criminalised.<sup>20</sup>

### Defence of honest and reasonable belief

We suggest that a further defence be introduced of honest and reasonable belief that the accused did not have a special care relationship with the young person.<sup>21</sup> This would address the situation where a person, who, for example, is employed at a school, commits the offence if he or she has sex with a young person not knowing that he or she is a student at that school. This scenario is foreseeable in light of the pending amendment to the definition of “member of teaching staff” which will not require any actual relationship of authority between the two people. The Royal Commission into Institutional Responses to Child Sexual Abuse suggested that such a defence could be considered.<sup>22</sup>

## TOR 6 Whether the incest offence in section 78A of the Crimes Act 1900 should be expanded to include adoptive relationships

Legal Aid NSW considers adoptive relationships should be included as a further category in the special care offence in section 73 if the offence is to be amended by way of addition of further categories. Amendment of section 78A of the Crimes Act would then be unnecessary.

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<sup>19</sup> *Crimes Act 1958* (Vic) sections 49Y(1)(b) 49Y(2)(b). A domestic partnership is a registered domestic partnership, or a relationship where the two people live as a couple on a genuine domestic basis (section 35).

<sup>20</sup> Royal Commission Report, Recommendation 29

<sup>21</sup> For example, *Crimes Act 1958* (Vic) section 49Z

<sup>22</sup> Royal Commission Report, page 120.