Reforming Australian Criminal Laws against Persistent Child Sexual Abuse

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Abstract

Criminal offences enabling prosecution of repeated instances of child sexual abuse exist in all Australian states and territories. These laws were developed to overcome the inherent difficulties presented by the requirement for particulars of individual crimes when prosecuting repeated or persistent sexual offending against children. In 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse reviewed these provisions, resulting in a series of recommendations for criminal law reform and a model law that defined the offence as maintaining an unlawful relationship with a child. This article critically analyses the implementation of reforms across Australian states and territories, drawing on public advocacy against this framing of the offence, and provides further suggestions for reform.

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I Introduction

The Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') made 85 recommendations for reform of the criminal justice system to ensure justice for victims of child sexual abuse.[1] This article provides a critical analysis of the implementation of the Royal Commission's proposed reforms to criminal laws that prohibit persistent child sexual abuse ('persistent CSA'). These laws exist in all Australian states and territories,[2] but have been widely regarded as ineffectual in achieving their underlying policy objective.[3] We explain the key features of the proposed reforms, identify to what extent those features have been implemented in each state or territory, and evaluate whether reforms have achieved the underlying policy objective of the laws. Based on this analysis, we draw conclusions about future reforms required to achieve an optimal legislative model.

To situate this analysis, in Part II we outline the features of child sexual abuse that create challenges for criminal prosecution in general, and we then identify additional defects in the law that persistent CSA laws are intended to address. We explain the 'perverse paradox' that arises when legal principles directed towards ensuring a fair trial hamper an effective criminal justice response, most acutely in cases of extensive and persistent sexual offending against children. In Part III, we discuss the Royal Commission's approach, their analysis of the legislative response to this issue, and their recommendations for reform. In Part IV, we identify and critically analyse six relevant aspects of the Royal Commission's proposed legislative model:

(A) reform to the actus reus of the offence;

(B) reducing the number of unlawful sexual acts involved in an offence;

(C) including sexual offences against young people in a relationship of care or authority with the accused;

(D) removing the requirement for jury unanimity regarding individual acts or occasions of abuse;

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1 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Report, August 2017).

2 *Crimes Act 1900* (ACT) s 56; *Crimes Act 1900* (NSW) s 66EA; *Criminal Code Act 1983* (NT) sch 1 ('*Criminal Code* (NT)') s 131A; *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 229B; *Criminal Law Consolidation Act 1935* (SA) s 50; *Criminal Code Act 1924* (Tas) sch 1 ('*Criminal Code* (Tas)') s 125A; *Crimes Act 1958* (Vic) s 49J; *Criminal Code Act Compilation Act 1913* (WA) app B ('*Criminal Code* (WA)') s 321A.

3 See, eg, Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response (Volume 1)* (Report No 114, October 2010) 1143 [25.56]; Liesl Chapman, *Review of South Australian Rape and Sexual Assault Law: Discussion Paper* (2006) 35 [52]; ACT Law Reform Commission, *Report on the Laws relating to Sexual Assault* (Report No 18, April 2001) 48–51; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children (Part 1)* (Report No 55, June 2000) 74. See also Alannah Brown, 'A Comparative Study on the Offence of "Maintaining a Sexual Relationship with a Child" in the Northern Territory and Queensland' (2015) 39(3) *Criminal Law Journal* 148; Martine Powell, Kim Roberts and Belinda Guadagno, 'Particularisation of Child Abuse Offences: Common Problems When Questioning Child Witnesses' (2007) 19(1) *Current Issues in Criminal Justice* 64.

(E) introducing retrospective application of persistent CSA offences; and

(F) removing the requirement for consent or approval by the Director of Public Prosecutions before the laying of a persistent CSA charge.

Our analysis of the implementation of each of these reform elements in the Australian states and territories (current to April 2022) demonstrates substantial inconsistency, including a failure to implement many of the recommendations, and enactment of reforms that have a different legal effect despite being a formal implementation of the model laws. In particular, reforms in several jurisdictions to make the actus reus of the offence an 'unlawful sexual relationship' have departed significantly from how that concept was understood at the time of the Royal Commission's analysis. Given the inherent legal and normative problems of conceptualising persistent CSA in terms of a 'sexual relationship', we argue that further reforms should abandon this nomenclature. Our argument is informed by and strongly supports the advocacy undertaken by campaigners and survivors with lived experience, including #LetHerSpeak founder Nina Funnell and 2021 Australian of the Year Grace Tame. Their efforts have influenced specific legislative reforms, especially in Tasmania, concerning the capacity of survivors to identify themselves in the public domain, but also to amend the name of the maintaining offence, and their ongoing work has transformed national discourse about child sexual abuse.[4]

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[4] As a result of sustained campaigning by Nina Funnell, Grace Tame, Tameka Ridgeway, and others, including through the #LetHerSpeak media campaign, the *Evidence Act 2001* (Tas) s 194K was amended to allow publication of a survivor's name if they were over the age of 18, had freely provided consent in writing and if there were no ongoing proceedings. The relevant provisions in the *Evidence Amendment Act 2020* (Tas) commenced on 6 April 2020. Previously, s 194K prohibited the publication of identifying particulars, including a complainant's name, in relation to court proceedings. The intention of the provision was to protect the individual's privacy, but it had the effect of preventing publication of a complainant's name. For many survivors, this silencing was contrary to their own preference and desire to be able to tell their story. Before reform, the only way to be able to be fully heard on their terms in the public domain was to gain a court order, which was costly, time-consuming, added further trauma, and had an uncertain outcome. Created and managed by journalist and sexual assault survivor advocate Nina Funnell, in partnership with Marque Lawyers, News Corp, and End Rape on Campus Australia, the #LetHerSpeak campaign aimed to abolish laws preventing sexual assault survivors from speaking about their experience and identifying themselves as survivors. Grace Tame's legal case was a catalyst for the #LetHerSpeak Tasmania campaign, and other arms of the campaign were then established in the Northern Territory, and Victoria: see *#LetHerSpeak* (Website) <https://www.letusspeak.com.au/>. See also generally for accounts of these reforms: Nina Funnell, 'Let Her Speak Campaign Aims to Ensure All Victims Can Take Back Their Voices' *ABC* (online, 13 August 2019) <https://www.abc.net.au/news/2019-08-13/let-her-speak-campaign-tasmania-nt/11405050>; Lorna Knowles, 'Finally, She Can Speak', *ABC* (online, 12 August 2019) <https://www.abc.net.au/news/2019-08-12/grace-tame-speaks-about-abuse-from-schoolteacher/11393044>.

At the same time as these reforms, Tasmanian criminal law was amended by the *Criminal Code Amendment (Sexual Abuse Terminology) Act 2020* (Tas) s 5. These reforms, which also commenced on 6 April 2020, renamed some sexual offences to better reflect the seriousness of the crime, and the true nature of the conduct. The offence of 'maintaining a sexual relationship with a person under the age of 17' in s 125A was renamed 'persistent sexual abuse of a child'. However, problematically, despite this change in the name of the offence and the charge, the offence provision itself still refers to 'maintains a sexual relationship with a young person' as the act constituting the crime: *Criminal Code* (Tas) (n 2) s 125A(2). Grace Tame emphasised the importance of the change in nomenclature in her 2021 address to the National Press Club, which also provided an unforgettably powerful and insightful call for structural and social reform that should stand as an eternal reminder for the nation:

Given the outstanding need for further reforms, in Part V we outline a path for future reform of Australian persistent CSA laws that achieves the underlying policy objectives of the provisions through a legislative model that defines the offence as 'persistent sexual abuse'.

II Child Sexual Abuse: Natural Challenges for Prosecution and the 'Perverse Paradox' of Persistent Abuse

A *Natural Features of Child Sexual Abuse and Challenges in Criminal Prosecution*

Criminal justice responses to all forms of child sexual abuse are hindered by low rates of reporting, charging, and prosecution, high attrition, fewer guilty pleas and fewer convictions.[5] Several natural features of the phenomenon of child sexual abuse contribute to these poor outcomes, and some of these are particularly salient in foregrounding the analysis in this article. First, as established by a substantial body of evidence, delayed disclosure of child sexual abuse is common in all contexts of sexual abuse.[6] A comprehensive review found that 60–70% of adult survivors did not disclose during childhood.[7] Significantly, studies have consistently found that the tendency towards delayed disclosure is even stronger in cases where the perpetrator is a family member, a close family acquaintance, or an authority figure such as a person occupying a religious or institutional role.[8]

Grace Tame, 'Share Your Truth, It Is Your Power', *The Guardian* (online, 4 March 2021) <https://www.theguardian.com/commentisfree/2021/mar/04/share-your-truth-it-is-your-power-grace-tames-address-to-the-national-press-club>. This advocacy has led to proposed amendments in the Australian Capital Territory that would change the heading of the offence from 'sexual relationship with child or young person under special care' to 'persistent sexual abuse of child or young person under special care': Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 10 February 2022, 218 (Shane Rattenbury, Attorney-General); Family Violence Legislation Amendment Bill 2022 (ACT) cl 36.

5 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report — Executive Summary and Parts I–II* (Report, 2017) 164–5 ('*Criminal Justice Report Executive Summary and Parts I– II*'); Judith Cashmore, Alan Taylor and Patrick Parkinson, 'Fourteen-Year Trends in the Criminal Justice Response to Child Sexual Abuse Reports in New South Wales' (2020) 25(1) *Child Maltreatment* 85.

6 See, eg, Kamala London, Maggie Bruck, Stephen J Ceci and Daniel W Shuman 'Disclosure of Child Sexual Abuse: A Review of the Contemporary Empirical Literature' in Margaret-Ellen Pipe, Michael E Lamb, Yael Orbach and Ann-Christin Cederborg (eds), *Child Sexual Abuse: Disclosure, Delay, and Denial* (Routledge, 2007) 11; Scott D Easton, 'Disclosure of Child Sexual Abuse among Adult Male Survivors' (2013) 41(4) *Clinical Social Work Journal* 344.

7 London et al (n 6) 18–19.

8 See, eg, Ramona Alaggia, Delphine Collin-Vézina and Rusan Lateef, 'Facilitators and Barriers to Child Sexual Abuse (CSA) Disclosures: A Research Update (2000–2016)' (2019) 20(2) *Trauma, Violence, and Abuse* 260; Charlotte Lemaigre, Emily P Taylor and Claire Gittoes, 'Barriers and Facilitators to Disclosing Sexual Abuse in Childhood and Adolescence: A Systematic Review' (2017) 70 *Child Abuse & Neglect* 39; Patrick Parkinson, Kim Oates and Amanda Jayakody, 'Breaking the Long Silence: Reports of Child Sexual Abuse in the Anglican Church of Australia' (2010) 6(2) *Ecclesiology* 183; Daniel Smith, Elizabeth J Letourneau, Benjamin E Saunders, Dean G Kilpatrick, Heidi S Resnick, Connie L Best, 'Delay in Disclosure of Childhood Rape: Results from a National Survey' (2000) 24(2) *Child Abuse & Neglect* 273.

Second, the reasons for delayed disclosure are related to the dynamics of sexual abuse, which are particularly heightened in cases of persistent victimisation by a known offender. Familial offenders and other offenders who have a close personal relationship with the child, or with whom the child is in a relationship of dependence, exploit this emotional and psychological bond to deter disclosure and keep the abuse secret. In these cases, which are common and represent the archetypical situation of persistent CSA, the child is often systematically groomed[9] at a deep psychological level and may be made to feel special and loved, and given privileges. Offenders often instil in survivors a sense of blame or shared responsibility for the acts, and warn of the child's guilt should any adverse outcome befall the offender as a result of disclosure. Non-disclosure and delays in disclosure are frequently a product of direct threats from the offender, causing the child to fear reprisals either to themselves or to others they care for, such as siblings. Where the offender is a family member, the survivor can fear breakdown of the family. In institutional cases, the survivor will often fear the consequences of disclosing for themselves, such as reprisals, exclusion or the denial of opportunities, and will legitimately fear not being believed because of the offender's status and the institution's culture. In all such cases, the power dynamic between offender and victim exerts a pervasive silencing effect, which magnifies other factors at both the individual level[10] and the societal level,[11] which also tend towards non-disclosure and delayed disclosure. Even where disclosure does occur, it is infrequently to law enforcement agencies.[12] This delay in disclosure creates a natural impediment to the commencement of a criminal prosecution, and the likelihood of a successful prosecution even if commenced.[13]

Third, the potential impact of traumatic events on memory can be significant for criminal prosecution prospects. This arises because of the features of the criminal trial process, including the rigours of cross-examination in an adversarial system, and the high standard of proof where the elements of the offence must be proved beyond reasonable doubt and accepted as such by the jury. Scientific evidence indicates the effects of trauma on memory are not straightforward: some individuals with a trauma history demonstrate deficits in memory performance, but others have superior memory, and in general, survivors of such trauma do not have such

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9 For a detailed model and explanation of the grooming process, see Georgia M Winters, Elizabeth L Jeglic and Leah E Kaylor, 'Validation of the Sexual Grooming Model of Child Sexual Abusers' (2020) 29(7) *Journal of Child Sexual Abuse* 855.

10 Although they are never, in reality, to blame for their experience, survivors are often made to feel responsible for the abuse by the offender: see, eg, Lucy Berliner and Jon R Conte, 'The Process of Victimization: The Victims' Perspective' (1990) 14(1) *Child Abuse & Neglect* 29. In addition, survivors may often feel an unwarranted sense of responsibility for the abuse as a way of coping with the experience and maintaining an image of the offender as a good person and the world as a safe place: see, eg, Judith L Herman, *Trauma and Recovery: The Aftermath of Violence — From Domestic Abuse to Political Terror* (Basic Books, 1997) 103–5.

11 Delphine Collin-Vézina, Mireille De La Sablonnière-Griffin, Andrea M Palmer and Lise Milne, 'A Preliminary Mapping of Individual, Relational and Social Factors that Impede Disclosure of Childhood Sexual Abuse' (2015) 43 *Child Abuse & Neglect* 123.

12 See, eg, Smith et al (n 8); David Finkelhor, Janis Wolak and Lucy Berliner, 'Police Reporting and Professional Help Seeking for Child Crime Victims: A Review' (2001) 6(1) *Child Maltreatment* 17.

13 Defence counsel, for example, will seek to cast doubt on the complainant's testimony and credibility, by questioning why the complainant did not tell anyone immediately or earlier than they did, and why they did not take other protective action.

impaired memories to contraindicate involvement in legal processes.[14] Importantly, lapse of time alone has minimal impact on the reliability of memories of significant long-past events, including traumatic events.[15] There is also substantial evidence regarding the validity of memory evidence about events that may have been lost or forgotten.[16] The overall accuracy of such memories means the application of legal processes to such cases remains entirely legitimate, and this applies also to the memory of traumatic events.

Yet, in some circumstances, the recollection of some details of traumatic events can be made more difficult. Some survivors may adopt mechanisms of coping with the traumatic event and the memory of it, which involve avoiding or forgetting memories of specific events and details. That is, while having sound generalised memory of the traumatic events, survivors of childhood trauma may experience difficulty in memory specificity, such that they cannot clearly recall some specific details of a specific episode. These coping mechanisms have been interpreted and referred to in different ways in the scientific literature, including through concepts such as 'distancing coping',[17] 'functional avoidance',[18] and 'motivated forgetting'.[19] Studies have indicated that as a natural defence mechanism, individuals are more likely to forget some details of abuse or to have periods of forgetting when they are abused by parents or caregivers.[20] Yet, at the same time, memories are thought to have even greater accuracy where they involve greater traumatic impact.[21]

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14 Gail S Goodman, Deborah Goldfarb, Jodi A Quas, Rachel K Narr, Helen Milojevich and Ingrid M Cordon, 'Memory Development, Emotion Regulation, and Trauma-Related Psychopathology' in Dante Cicchetti (ed), *Developmental Psychopathology (Volume 3): Maladaptation and Psychopathology* (John Wiley, 3rd ed, 2016) 555 ('Memory Development'); Gail S Goodman, Jodi A Quas, Deborah Goldfarb, Lauren Gonzalves, Alejandra Gonzalez, 'Trauma and Long-Term Memory for Childhood Events: Impact Matters' (2019) 13(1) *Child Development Perspectives* 3 ('Trauma and Long-Term Memory').

15 Goodman et al, 'Memory Development' (n 14) 577; Goodman et al, 'Trauma and Long-Term Memory' (n 14) 4.

16 See, eg, Deborah Goldfarb, Gail S Goodman, Rakel P Larson, Mitchell L Eisen, Jianjian Qin, 'Long-Term Memory in Adults Exposed to Childhood Violence: Remembering Genital Contact Nearly 20 Years Later' (2019) 7(2) *Clinical Psychological Science* 381; Christin M Ogle, Stephanie D Block, Latonya S Harris, Gail S Goodman, Annarheen Pineda, Susan Timmer, Anthony Urquiza, Karen J Saywitz, 'Autobiographical Memory Specificity in Child Sexual Abuse Victims' (2013) 25(2) *Development and Psychopathology* 321; Simona Ghetti, Robin S Edelstein, Gail S Goodman, Ingrid M Cordòn, Jodi A Quas, Kristen Weede Alexander, Allison D Redlich and David PH Jones, 'What can Subjective Forgetting Tell Us About Memory for Childhood Trauma?' (2006) 34(5) *Memory & Cognition* 1011; Kristen Weede Alexander, Jodi A Quas, Gail S Goodman, Simona Ghetti, Robin S Edelstein, Allison D Redlich, Ingrid M Cordon, David PH Jones, 'Traumatic Impact Predicts Long-Term Memory for Documented Child Sexual Abuse' (2005) 16(1) *Psychological Science* 33.

17 Latonya S Harris, Stephanie D Block, Christin M Ogle, Gail S Goodman, Else-Marie Augusti, Rakel P Larson, Michelle A Culver, Annarheen R Pineda, Susan G Timmer and Anthony Urquiza, 'Coping Style and Memory Specificity in Adolescents and Adults with Histories of Child Sexual Abuse' (2016) 24(8) *Memory* 1078, 1079–80.

18 J Mark G Williams, Thorsten Barnhofer, Catherine Crane, Dirk Hermans, Filip Raes, Ed Watkins and Tim Dalgleish, 'Autobiographical Memory Specificity and Emotional Disorder' (2007) 133(1) *Psychological Bulletin* 122, 134–5.

19 Michael C Anderson and Simon Hanslmayr, 'Neural Mechanisms of Motivated Forgetting' (2014) 18(6) *Trends in Cognitive Sciences* 279.

20 Jennifer J Freyd, Anne P Deprince and Eileen L Zurbriggen, 'Self-Reported Memory for Abuse Depends upon Victim-Perpetrator Relationship' (2001) 2(3) *Journal of Trauma and Dissociation* 5.

21 Goodman et al, 'Trauma and Long-Term Memory' (n 14) 4.

Overall, while individuals' memories of events including traumatic events vary, what is clear is that some survivors of child sexual abuse may, as a result of the lapse of time, protective psychological processes and neuropsychiatric mechanisms, not have comprehensive and consistent memories of specific details of specific abusive events, even where they have strong memories of the general context and other specific details.

B *A Perverse Paradox: Challenges in Prosecuting Persistent Offending*

The challenge for criminal prosecution posed by these natural features of child sexual offending has been acknowledged since at least the late 1980s by both the judiciary and governments.[22] In the context of persistent CSA, the requirement to provide particulars — the specific details of an alleged crime, sufficient to ensure the accused has fair opportunity to defend the charges — presents significant difficulties for complainants and prosecutors.[23] The result is what Sulan and Stanley JJ of the Supreme Court of South Australia have called 'the perverse paradox that the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence'.[24] *S v The Queen*, a decision by the High Court of Australia in 1989, exemplifies the operation of the criminal justice system in the absence of persistent CSA laws.[25] The appellant had been convicted of three charges of unlawful carnal knowledge on the basis of his daughter's evidence of repeated sexual assaults occurring every couple of months over a number of years. On appeal to the Western Australia Court of Criminal Appeal, Brinsden J had summarised the difficulty confronting the Court:

> In a nutshell the problem is this. The appellant having been convicted of three counts of unlawful carnal knowledge (incest), one in each year, and there having been, on the daughter's evidence, at least in every year three acts of intercourse, in respect of what act of intercourse in each year was the appellant convicted?[26]

The majority of the Court of Criminal Appeal dismissed that first appeal. However, the High Court disagreed, holding that the trial amounted to a miscarriage of justice, since the state of the particulars had deprived the defendant of an opportunity to raise a defence, the complainant's evidence did not have a clear relationship with the charged acts, and that evidence was not sufficient to assure the Court that the jurors had unanimously agreed on the same three acts.[27] The High Court quashed the convictions and sent the matter for retrial.

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22 See, eg, DG Sturgess, *An Inquiry into Sexual Offences involving Children and Related Matters* (Office of the Director of Prosecutions (Qld), 1986); Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children (Part 1)* (Report No 55, June 2000) ch 4; and below (n 26) and accompanying text.

23 See Powell, Roberts and Guadagno (n 3) 64; Brown (n 3) 150–1; Dayna M Woiwod and Deborah A Connolly, 'Continuous Child Sexual Abuse: Balancing Defendants' Rights and Victims' Capabilities to Particularize Individual Acts of Repeated Abuse' (2017) 42(2) *Criminal Justice Review* 206, 207.

24 *R v Johnson* [2015] SASCFC 170, [2].

25 *S v The Queen* (1989) 168 CLR 266.

26 *S* (1988) 39 A Crim R 288, 297.

27 *S v The Queen* (n 25) 274–6 (Dawson J), 279–81 (Toohey J), 287 (Gaudron and McHugh JJ).

The tendency of this application of the law to produce unjust outcomes in cases of persistent CSA was acknowledged almost immediately in subsequent decisions. In *Podirsky v The Queen*, the Western Australia Court of Criminal Appeal acknowledged that an effect of *S v The Queen* was that 'notwithstanding clear and cogent evidence of a course of conduct involving repeated acts of sexual intercourse'[28] the requirement of particularisation had not been met, since:

> the Crown have found it impossible to identify any particular act with sufficient precision to enable any one offence to be charged. This means that unless the law is changed there is a possibility that the more acts of intercourse or other acts of sexual abuse and the greater the length of time over which they occur, the more difficult it may be to establish that any one of a series of multiple offences has been committed. Some reform would seem desirable to cover cases where there is evidence of such a course of conduct.[29]

Subsequently, between 1989 and 1998 all Australian states and territories enacted offences enabling multiple alleged acts to be particularised as a single persistent CSA offence.[30] Despite subsequent reviews and reforms, those offences have generally not been successful in achieving this objective.[31] Most recently, the Royal Commission examined this issue, and made recommendations for law reform to establish a nationally consistent, effective legislative regime to enable the prosecution of persistent CSA.

III The Royal Commission into Institutional Responses to Child Sexual Abuse

On 12 November 2012, the then Prime Minister, Julia Gillard, announced the establishment of a royal commission to address mounting public concern about the endemic failings of Australian institutions to respond to allegations and incidents of child sexual abuse.[32] The Royal Commission became the largest in Australia's history, and its size and scope provided an unprecedented opportunity for examination of the topic.[33] The Commission's three-volume *Criminal Justice Report*

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28 *Podirsky v The Queen* (1990) 3 WAR 128, 136 (Malcolm CJ, Wallace and Walsh JJ).

29 Ibid 135 (Malcolm CJ, Wallace and Walsh JJ).

30 *Crimes (Amendment) Act (No 3) 1991* (ACT) s 3; *Crimes Legislation Amendment (Child Sexual Offences) Act 1998* (NSW) sch 1 [2]; *Criminal Code Amendment Act (No 3) 1994* (NT) s 7; *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 23; *Criminal Law Consolidation (Child Sexual Abuse) Amendment Act 1994* (SA) s 3; *Criminal Code Amendment (Sexual Offences) Act 1994* (Tas) s 4; *Crimes (Sexual Offences) Act 1991* (Vic) s 3; *Acts Amendment (Sexual Offences) Act 1992* (WA) s 6.

31 See above n 3.

32 Phillip Coorey and Josephine Tovey, 'Gillard Acts on Sex Abuse Claims: Nationwide Royal Commission: No Organisation Will Escape Investigation', *The Sydney Morning Herald* (Sydney, 13 November 2012) 1; Department of the Prime Minister and Cabinet (Cth), 'Establishment of Royal Commission into Child Sexual Abuse' (Media Release, 12 November 2012) <https://pmtranscripts.pmc.gov.au/release/transcript-18905>.

33 For further discussion of the significance and legacy of the Royal Commission, see Katie Wright, Shurlee Swain and Kathleen McPhillips, 'The Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2017) 74 *Child Abuse & Neglect* 1; Katie Wright and Shurlee Swain, 'Speaking the Unspeakable, Naming the Unnameable: The Royal Commission into

focused on 'ensuring justice for victims through … processes for referral for investigation and prosecution',[34] in accordance with paragraph (d) of the Royal Commission's Letters Patent. In keeping with the scope of its remit, the Royal Commission reviewed the operation of persistent CSA laws in the context of institutional child sexual abuse.[35] However, it expected implementation of its recommendations 'to improve the response to all forms of child sexual abuse in all contexts'.[36]

The Royal Commission heard evidence demonstrating scant progress in resolving the legal difficulties of prosecuting persistent CSA over a number of decades, even while knowledge of the dynamics of this type of offending has improved. The Commission considered a 2016 trial on charges of child sexual offences alleged to have occurred in the 1980s, which resulted in an acquittal.[37] Conducting the trial by judge alone, Frearson DCJ displayed sympathetic awareness of the difficulties faced by complainants providing evidence of persistent CSA, saying that although the complainant's evidence was 'replete with confusion and inconsistency … confusion and inconsistency is probably what one would expect had he been sexually abused as he says.'[38] His Honour concluded that he was 'well satisfied that the accused did sexually abuse the complainant at school and I reject his blanket denial as a reasonable possibility.'[39] However, for the purposes of the criminal trial, Frearson DCJ was required to ask not whether the abuse occurred, but whether he was satisfied beyond reasonable doubt 'of the particular instances that are said to found the particular charges'.[40] The Royal Commission concluded that the resulting acquittal:

> raises the issue of whether a criminal justice response can be said to be reasonably available to condemn and punish child sexual abuse if an accused is acquitted in circumstances where the judge was 'well satisfied' that the accused sexually abused the complainant.[41]

The Royal Commission's legal analysis was complemented by a review of empirical research on the effects of CSA on memory and the ability of complainants to draw on memory to provide evidence in criminal proceedings.[42] Reflecting the findings of research discussed above, the review of empirical research concluded that the

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Institutional Responses to Child Sexual Abuse' (2018) 42(2) *Journal of Australian Studies* 139; Michael Mintrom, Deirdre O'Neill and Ruby O'Connor, 'Royal Commissions and Policy Influence' (2021) 80(1) *Australian Journal of Public Administration* 80; Michael Salter, 'The Transitional Space of Public Inquiries: The Case of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2020) 53(2) *Australian & New Zealand Journal of Criminology* 213.

34 *Criminal Justice Report Executive Summary and Parts I–II* (n 5) 7.

35 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report — Parts III–VI* (Report, 2017) ch 11 ('*Criminal Justice Report Parts III–VI*').

36 *Criminal Justice Report Executive Summary and Parts I–II* (n 5) 7.

37 *R v Rafferty* (New South Wales District Court, Frearson DCJ, 25 August 2016) ('*Rafferty*'), discussed in *Criminal Justice Report Parts III–VI* (n 35) 12–16.

38 *Rafferty* (n 37) 8.

39 Ibid 16.

40 Ibid.

41 *Criminal Justice Report Parts III–VI* (n 35) 65.

42 Jane Goodman-Delahunty, Mark A Nolan and Evianne L Van Gijn-Grosvenor, *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence* (Royal Commission into Institutional Responses to Child Sexual Abuse, July 2017).

requirement for particulars distinguishing distinct events in the context of repeated, ongoing abuse, places unjustifiable and unrealistic expectations on complainants.[43]

The Royal Commission concluded that specific criminal offences were necessary in each state and territory to achieve the policy objective of enabling prosecution and conviction, where warranted by the evidence, in cases of persistent CSA. Those offences would be ones that:

> do not require particularisation in a manner inconsistent with the ways in which complainants remember the child sexual abuse they suffered
>
> allow for the effective charging and successful prosecution of repeated but largely indistinguishable occasions of child sexual abuse.[44]

A *The Royal Commission's Law Reform Recommendations*

Based on this legal and social science analysis, the Royal Commission proposed a legislative model intended to implement a nationally consistent and effective approach to the prosecution of persistent CSA.[45] Its model was the Queensland offence,[46] 'maintaining an unlawful sexual relationship with a child'.[47] At the time of the Royal Commission, Queensland was the leading jurisdiction measured by use of the charge.[48] The Royal Commission identified several features of the Queensland offence that, in its view, provided effective framing of a persistent CSA offence. First, the Queensland provision defines the actus reus as the maintenance of an unlawful sexual relationship. What the jury must agree on is the existence of that unlawful sexual relationship, rather than specific acts or occasions of sexual offending.[49] Second, the Queensland law expressly provides that particulars of any unlawful sexual acts are not required to be alleged or proven.[50] Finally, since the 2003 reforms, the Queensland provision has specified that the jury need not unanimously agree that the same unlawful sexual acts occurred.[51] Together, these

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43 Ibid 144–5.

44 *Criminal Justice Report Parts III–VI* (n 35) 66.

45 *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report — Parts VII–X and Appendices* (Report, 2017) Appendix H ('*Criminal Justice Report Parts VII–X and Appendices*').

46 *Criminal Justice Report Parts III–VI* (n 35) 71.

47 *Criminal Code* (Qld) (n 2) s 229B.

48 *Criminal Justice Report Parts III–VI* (n 35) 30–4. Based on publicly available data, this remains the case, with consent to prosecute given in 104 matters in 2019–20: Office of the Director of Public Prosecutions (Qld), *Annual Report 2019–20*, 17. By comparison, the Northern Territory reported no indictments in that year: Director of Public Prosecutions (NT), *Annual Report 2019–2020*, 18. Further direct comparison is difficult, with Victoria and Tasmania publishing information on the number of people sentenced, rather than charged. Victoria reported that nine people were sentenced for the charge in 2019–20: Sentencing Advisory Council (Vic), *Persistent Sexual Abuse of a Child under 16: Sentencing Trends in the Higher Courts of Victoria 2015–16 to 2019–20* (Sentencing Snapshot 257, August 2021). Tasmania reports more frequent use, averaging 14 sentences per year for the period 2001–14: see Sentencing Advisory Council (Tas), 'Supreme Court Sentencing Statistics' <https://www.sentencingcouncil.tas.gov.au/statistics/supremecourt>. No more recent information appears to be available. The ACT, NSW, SA, and WA do not appear to publish information on the use of their persistent CSA charge.

49 *Criminal Code* (Qld) (n 2) s 229B(3).

50 Ibid s 229B(4).

51 Ibid s 229B(4)(c).

elements allow for evidence of multiple unparticularised acts to prove an offence, consistent with the type of evidence complainants were able to provide.[52]

The Royal Commission compared the Queensland offence to the South Australian offence in effect at the time (persistent sexual exploitation of a child),[53] which had proven effective in the prosecution of persistent CSA, but had recently been read down effectively to exclude cases where the jury was unable to delineate specific acts of sexual exploitation.[54] The Queensland offence was also preferable to the Victorian course of conduct charge, since that provision only captures repetitive offending of the same type.[55] In the view of the Royal Commission, the main legal defect with the Queensland offence was the absence of retrospective effect.[56] Accordingly, the Royal Commission recommended that each state and territory government should amend its persistent CSA offence to adopt a legislative model,[57] based on the Queensland offence, where:

> a. the actus reus is the maintaining of an unlawful sexual relationship
> b. an unlawful sexual relationship is established by more than one unlawful sexual act
> c. the trier of fact must be satisfied beyond reasonable doubt that the unlawful sexual relationship existed but, where the trier of fact is a jury, jurors need not be satisfied of the same unlawful sexual acts
> d. the offence applies retrospectively but only to sexual acts that were unlawful at the time they were committed
> e. on sentencing, regard is to be had to relevant lower statutory maximum penalties if the offence is charged with retrospective application.[58]

B *The 'Sexual Relationship' Problem*

Despite endorsing the Queensland model, the Royal Commission had clear reservations about the use of the term 'sexual relationship', with its positive connotations of mutuality and romance, to denote persistent sexual offending against children.[59] Nevertheless, the Royal Commission preferred that the term be adopted in all states and territories because there was substantial precedent from the Queensland courts regarding its effective interpretation, and the operation of the offence in Queensland satisfactorily dealt with concerns that modifying the requirement for particulars created an inherent risk of unfairness to the accused.[60]

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52 *Criminal Justice Report Parts III–VI* (n 35) 39.
53 *Criminal Law Consolidation Act 1935* (SA) s 50, as at 23 November 2008.
54 *Criminal Justice Report Parts III–VI* (n 35) 68, referring to *R v Johnson* (n 24).
55 *Criminal Justice Report Parts III–VI* (n 35) 70, referring to *Criminal Procedure Act 2009* (Vic) sch 1, cl 4A.
56 *Criminal Justice Report Parts III–VI* (n 35) 68.
57 *Criminal Justice Report Parts VII–X and Appendices* (n 45) Appendix H.
58 *Criminal Justice Report Parts III–VI* (n 35) 74 (Recommendation 21).
59 Ibid 71.
60 Ibid 24, 71, 73. The Royal Commission noted that the High Court of Australia had twice declined to grant special leave to appeal to applicants arguing that the Queensland provision inherently results

We maintain there is a compelling case for not using the term 'sexual relationship' in either the title of the provisions or their content, and that reform of this nomenclature would achieve congruence with social science understandings of child sexual abuse and secure subsequent benefits in jurisprudential logic and consistency. As we have argued elsewhere, these reservations are firmly grounded in theory, including recognition that the concept of a 'sexual relationship' embeds harmful myths about child sexual abuse into the law.[61] As will be seen in the analysis below, particularly in Pt IV(A) regarding reform to the actus reus, the use of the term has resulted in legislative inefficiency and lack of clarity, and has required contorted judicial reasoning to overcome its inherent problems. The departure of other state and territory courts from the Queensland Court of Appeal's interpretation of the term undermines the Royal Commission's reasoning in favour of its adoption. Moreover, abandoning use of this term has high social policy value and restores public confidence in the criminal justice system, as shown by the justifiably trenchant opposition to the use of 'relationship' terminology in these provisions. These considerations underpin our proposal for a legislative model that achieves the policy objectives identified by the Royal Commission without perpetuating the use of the term 'sexual relationship' to describe persistent sexual offending against children. The creation of such an offence will require comprehensive reform not just of the parts of the provisions that describe the offence, but to each of the remaining elements considered below.

IV Implementing Reform to Persistent Child Sexual Abuse Laws

Table 1 summarises key features of the laws in each Australian state and territory compared to the Royal Commission's recommended legislative model. This shows that four of the eight Australian states and territories now have persistent CSA laws where the actus reus is a 'relationship', in line with the Royal Commission's recommendations. However, critical analysis of those reforms demonstrates the ongoing challenge of drafting an effective persistent CSA law conceptualised as an 'unlawful sexual relationship', as the recent tranche of legislative amendments has resulted in offences that operate substantially differently to the Queensland offence that formed the basis of the recommendation. As a result, new issues arise, such as the distinction between *acts* and *occasions* of abuse.

in unfairness to the accused: at 24, see *MAW v The Queen* [2008] HCATrans 335; *CAZ v The Queen* [2012] HCATrans 244.

61 See Elizabeth Dallaston and Ben Mathews, '"Unlawful Sexual Relationships": A Comparative Analysis of Criminal Laws against Persistent Child Sexual Abuse in Queensland and South Australia' (2021) 42(1) *Adelaide Law Review* 1, 19–20.

Table 1: Implementation of key Royal Commission recommendations (as at April 2022)

Jurisdiction*	Actus reus	Number of acts/ occasions	Age of young person in a relationship of authority or special care	Removal of extended jury unanimity	Retrospectivity	DPP approval
Model Provisions	**Relationship**	**2**	**<18**	**Yes**	**Yes**	**No**
ACT	✓	✓	✓	✓	✓	✗
NSW	✓	✓	✗	✓	✓	✗
NT	✗	✗	✗	✗	✗	✗
Qld	✓	✓	✗	✓	✓	✗
SA	✓	✓	✓	✓	✓	✓
Tas	✗	✗	✗	✓	✓	✗
Vic	✗	✗	✗	✗	✗	✗
WA	✗	✗	✗	✗	✗	✗

* Australian Capital Territory ('ACT'); New South Wales ('NSW'); Northern Territory ('NT'); Queensland ('Qld'); South Australia ('SA'); Tasmania ('Tas'); Victoria ('Vic'); Western Australia ('WA').

Meanwhile, multiple recommended reforms remain overdue. Failure to implement reforms in a cohesive manner has resulted in offences in several jurisdictions that use the terminology of an 'unlawful sexual relationship', but do not operate as 'relationship' offences. Substantive inequalities persist between states and territories, such as a higher number of instances of sexual offending required to constitute the offence, and the absence of retrospective effect that would enable the prosecution of historic crimes. Even where substantial reform has been implemented, the recommendation that a higher age should apply for complainants where there is a relationship of authority between the complainant and the accused has not been widely adopted, for reasons that are unclear. Other features of earlier persistent CSA laws that did not feature in the Royal Commission's recommendations, such as the requirement for prosecutorial consent, have persisted. Our critical analysis in Part IV examines these problems and informs our recommendations for reform in Part V.

A *Reforming the Actus Reus: 'Maintaining an Unlawful Sexual Relationship'*

Australian persistent CSA offences may broadly be categorised depending on whether the actus reus is an unlawful sexual relationship, or multiple occasions of sexual offending. Queensland's offence, 'maintaining an unlawful sexual relationship', is an example of the former category.[62] In contrast, the Victorian offence 'persistent sexual abuse of a child' is committed if an adult 'sexually abuses' a child under 16 'on at least 3 occasions during a particular period'.[63] Reform to the actus reus was a fundamental feature of the Royal Commission's recommendations. Significant legislative reforms to implement this recommendation have occurred in South Australia, the Australian Capital Territory, and New South Wales.[64] The result of these reforms has been the creation of 'relationship' offences that operate substantially differently to Queensland's, while four states and territories have retained offences comprising multiple occasions of offending. A comparison of the actus reus of each current offence is provided in Table 2. It is not immediately clear from the wording alone how the actus reus in each jurisdiction is defined, and further explanation is provided in the following three sections.

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62 *Criminal Code* (Qld) (n 2) s 229B.

63 *Crimes Act 1958* (Vic) s 49J(1).

64 *Crimes Legislation Amendment Act 2018* (ACT) s 4; *Royal Commission Criminal Justice Legislation Amendment Act 2020* (ACT) s 6; *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 cl 20; *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) s 6.

Table 2: Actus reus of Australian persistent child sexual abuse offences (as at April 2022)

Actus reus	**Jurisdiction**	**Offence provision**	**Definitions**
An unlawful sexual relationship (maintained by continuity or habituality of sexual contact) involving more than one unlawful sexual act	Qld	Any adult who maintains an unlawful sexual relationship with a child under the age of 16 years commits a crime.	An unlawful sexual relationship is a relationship that involves more than 1 unlawful sexual act over any period.
A relationship involving more than one unlawful sexual act	ACT	A person commits an offence if the person— (a) is an adult; and (b) engages in a relationship with a child, or a young person under the special care of the adult, that involves more than 1 sexual act.	A relationship includes repeated contact, interaction, engagement or association, of a sexual nature or otherwise…
	NSW	An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.	An unlawful sexual relationship is a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period.
	SA	An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.	An unlawful sexual relationship is a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period.

Actus reus	**Jurisdiction**	**Offence provision**	**Definitions**
Unlawful sexual acts committed on three or more occasions	NT	Any adult who maintains a relationship of a sexual nature with a child under the age of 16 years is guilty of an offence…	A person shall not be convicted of an offence against this section unless it is shown that the offender… has … done an act defined to constitute an offence of a sexual nature in relation to the child on 3 or more occasions…
	Tas	A person who maintains a sexual relationship with a young person who is under the age of 17 years… is guilty of a crime.	An accused person is guilty … if, during a particular period … the accused committed an unlawful sexual act in relation to the young person on at least 3 occasions
	Vic	A person (A) commits an offence if…	(a) A sexually abuses another person (B) on at least 3 occasions during a particular period; and (b) B is a child under the age of 16 years during the whole of that period.
	WA	A person who persistently engages in sexual conduct with a child under the age of 16 years is guilty of a crime…	[A] person persistently engages in sexual conduct with a child if that person does a sexual act in relation to the child on 3 or more occasions each of which is on a different day.

1 *The Queensland Offence: An 'Unlawful Sexual Relationship'*

The original Queensland provision was intended to make it an offence to maintain an unlawful sexual relationship with a child, but a historical analysis demonstrates that the offence must be precisely drafted to have this effect. As the High Court of Australia concluded in the 1997 decision *KBT v The Queen*, it is not sufficient to provide that it is an offence to maintain an unlawful sexual relationship if the fact of that relationship is proven by multiple occasions of abuse.[65] At that time, the *Criminal Code Act 1899* (Qld) ('*Criminal Code* (Qld)') relevantly provided that:

> (1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years.
>
> (1A) A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the offender … has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child … on 3 or more occasions ...[66]

In the view of the High Court, the terms of s 229B(1A) required that what must be proven were acts on three or more occasions. This, and not the maintenance of an unlawful sexual relationship, formed the actus reus of the offence. The evidence must therefore permit a jury to unanimously agree which occasions have been proven.[67] This requirement undermined the fundamental purpose of persistent CSA laws, to make conviction possible even when the evidence provided by a complainant does not enable discrete offences to be particularised.[68] Although *KBT* concerned the Queensland law, the legislation in all other states and territories was substantially similar and was construed accordingly.[69]

The Queensland offence was redrafted in 2003 to restore the original legislative intention.[70] The law expressly provides that a jury must be satisfied beyond reasonable doubt that the 'unlawful sexual relationship' existed,[71] but need not agree on which alleged unlawful sexual acts were done by the accused during the period of the relationship,[72] removing the need for what has been called 'extended'[73] jury unanimity. Crucially, however, judicial decisions have established that the prosecution must also demonstrate the accused maintained the relationship

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65 *KBT v The Queen* (1997) 191 CLR 417, 423 (Brennan CJ and Toohey, Gaudron and Gummow JJ), 431 (Kirby J) ('*KBT*').

66 *Criminal Code* (Qld) (n 2) s 229B, as at 26 March 1994.

67 *KBT* (n 65) 422–3 (Brennan CJ and Toohey, Gaudron and Gummow JJ).

68 Brown (n 3) 155; *Criminal Justice Report Parts III–VI* (n 35) 18–20.

69 Brown (n 3) 155; *Criminal Justice Report Parts III–VI* (n 35) 18–20. The operation of offences in other states and territories after the decision in *KBT* is discussed in the following sections.

70 Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 13–14. See also Table 2 in this article.

71 *Criminal Code* (Qld) (n 2) s 229B(3).

72 Ibid s 229B(4).

73 *R v Little* (2015) 123 SASR 414, 417 [12].

by sexual contact that is *continuous* and *habitual*.[74] This limits the scope of the provision and, most problematically, appears to draw from characteristics of (consensual) sexual relationships between adults to delineate a course of criminal sexual offending against children.[75]

2 *Reformed 'Relationship' Offences*

South Australia, the Australian Capital Territory, and New South Wales now have persistent CSA offences framed as a 'relationship'. The experience in the Australian Capital Territory, where initial reforms encountered a similar difficulty to that identified in *KBT*, demonstrate the ongoing challenges of effectively drafting an offence of this type. A notable outcome in each of these jurisdictions is a departure from the Queensland approach. The key difference is that there is no requirement to prove that the relationship has been maintained through continuous and habitual sexual contact.

(a) *South Australia*

South Australia reformulated its persistent CSA provision in 2017, with an express intention to effect the recommendations of the Royal Commission.[76] Initially, the offence was applied in a manner reflecting the Queensland position, where proof was required of a relationship in which the adult engaged in unlawful sexual acts, and that the relationship was maintained by the accused through continuity or habituality of sexual contact.[77] However, in two significant decisions of the South Australian Court of Criminal Appeal, this construction was categorically rejected.[78] Instead, the relationship that must be proved, and which the jury must unanimously agree existed, may be *any* relationship falling within a wide and open category including familial, domestic, working, recreational, and professional relationships between adults and children.[79] Maintenance of a relevant relationship is proven by the accused's knowledge of the circumstances that constituted the relationship, which includes all interactions between the accused and the complainant and any positions of authority held by the accused in relation to the complainant.[80] This provides the South Australian offence with a much wider scope compared to the Queensland offence.

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74 See, eg, *R v Kemp (No 2)* [1998] 2 Qd R 510, 511–12 (Macrossan CJ), 518 (Mackenzie J); *R v S* [1999] 2 Qd R 89, 94; *R v DAT* [2009] QCA 181, [12]–[13] (Holmes JA, Muir JA agreeing at [20]), [22] (McMurdo J); *R v CAZ* [2012] 1 Qd R 440, 457 [46] (Fraser JA, Chesterman and White JJA agreeing at 460 [57]–58]); *R v SCE* [2014] QCA 48, [5] (McMurdo P).

75 The problems with this are fully articulated in Dallaston and Mathews (n 61).

76 *Criminal Law Consolidation Act 1935* (SA) s 50, as at 24 October 2017, substituted by the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) s 6; South Australia, *Parliamentary Debates*, Legislative Council, 19 October 2017, 8021 (Kyam Maher).

77 See, eg, *R v Hamra* [2018] SADC 33, 2 [2]; *R v Keyte* [2018] SADC 22, 2 [10]; *R v F, KV* [2019] SADC 53, 22 [78].

78 *R v M, DV* (2019) 133 SASR 470; *R v Mann* (2020) 135 SASR 457.

79 *R v Mann* (n 78) 465–6 [26]–[28], [32] (Kourakis CJ, Kelly J agreeing at 468 [36], Peek J agreeing at 468 [37]).

80 Ibid 464 [20] (Kourakis CJ).

(b) *Australian Capital Territory*

The Australian Capital Territory has twice enacted reforms intended to implement the Royal Commission's recommendations, after a first attempt proved ineffective.[81] In *KN v The Queen*, the Australian Capital Territory Court of Appeal was required to interpret the new offence.[82] The provision before the Court made it an offence for an adult to 'maintain a sexual relationship with a young person or a person under special care', and specified that 'the trier of fact must be satisfied beyond reasonable doubt that a sexual relationship existed', but also 'baldly'[83] stated that an adult maintains such a relationship 'if on two or more occasions … the adult engages in a sexual act'.[84] The clarity of this latter expression, reminiscent of the Queensland version of the offence considered in *KBT*, did not allow the Court to construct the actus reus as anything other than those two or more occasions of sexual offending.[85] Murrell CJ and Rangiah J acknowledged the failure of this construction to give effect to the express intention to implement a 'relationship' offence as recommended by the Royal Commission.[86]

Subsequently, a revised provision was enacted to ensure a relationship formed the actus reus of the offence.[87] The new offence appears to embed the South Australian approach, defining a 'relationship' as including 'repeated contact, interaction, engagement or association, of a sexual nature or otherwise'.[88] This definition is intended to 'to refer to the way in which the perpetrator and complainant are connected, rather than to connote any particular class or kind of relationship'.[89] In a further departure from the Queensland approach, the revised provision removes the word 'maintaining', requiring that the relationship has simply been engaged in, rather than maintained.[90] References to an 'unlawful sexual relationship' or a 'sexual relationship' have been replaced by the unqualified term 'relationship'.[91] This appears to exclude the imposition of a requirement that the relationship must be one that involves habitual sexual contact. A Bill presented on 10 February 2022 would

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81 Regarding the first reforms, see *Crimes Act 1900 (ACT)* s 56, as at 2 March 2018, substituted by *Crimes Legislation Amendment Act 2018* (ACT) s 4; Explanatory Memorandum, Crimes Legislation Amendment Bill (No 2) 2017 (ACT).

82 *KN v The Queen* (2019) 14 ACTLR 289 ('*KN*').

83 Ibid 294 [22] (Murrell CJ and Rangiah J).

84 *Crimes Act 1900* (ACT) s 56, as at 2 March 2018.

85 *KN* (n 82) 302 [63] (Murrell CJ and Rangiah J); 307 [90] (Mossop J).

86 Ibid 303 [70] (Murrell CJ and Rangiah J). Mossop J attributed this result to an 'unexplained' (at 307 [90]) drafting decision to incorporate wording from the earlier provision rather than adopting the language of either the model provisions or the Queensland offence on which they were based: ibid 306–7 [89]–[90].

87 *Crimes Act 1900* (ACT) s 56, as at 1 September 2020; Explanatory Statement, Royal Commission Criminal Justice Legislation Amendment Bill 2020 (ACT) 31 ('ACT Explanatory Statement').

88 *Crimes Act 1900* (ACT) s 56(2)(a).

89 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 2 July 2020, 1473 (Gordon Ramsay, Attorney-General).

90 ACT Explanatory Statement (n 87) 32.

91 Ibid 33, referring to the new s 56(8), which replaced s 56(9). For example, while the previous provision specified that there was no requirement for 'members of the jury to agree on which sexual acts constitute the sexual relationship', the current provision specifies there is no need for 'members of the jury to agree on the same sexual acts involved in the relationship': *Crimes Act 1900* (ACT) s 56(5)(c), as at 2 March 2018; *Crimes Act 1900* (ACT) s 56(4)(c).

remove the remaining reference to an 'unlawful sexual relationship' in the heading to the section.[92]

(c) *New South Wales*

New South Wales introduced its original offence, persistent sexual abuse of a child, in 1998.[93] No reform was made to overcome the result of *KBT* until 2018, when the offence was substituted to implement the Royal Commission's recommendations.[94] The new offence adopts the wording of the Royal Commission's model provisions to define the actus reus as 'maintaining an unlawful sexual relationship with a child'.[95]

These reforms have not yet been the subject of extensive judicial consideration, and it is unclear whether the offence will operate in a similar manner to South Australia's counterpart offence. The provision is expressed in similar terms to the South Australian offence, and in a recent criminal trial, the New South Wales District Court held that:

> 'A relationship' is a way of describing the nature of the connection between two or more people. Here, it is whether there was a relationship between the accused and the complainant …
>
> In determining whether the relationship was an unlawful sexual relationship, the Court must also be satisfied beyond reasonable doubt that the accused committed two or more unlawful sexual acts with or toward the complainant during the period identified …
>
> 'Maintained' has its ordinary everyday meaning. That is, carried on, kept up or continued.[96]

This expression of the offence echoes the South Australian approach, and contains no reference to the kinds of considerations regarding habituality or continuity of sexual contact that apply in Queensland. However, Mahony SC DCJ also directed himself that there must be 'an ongoing relationship of a sexual nature between [the accused] and [each complainant]' and proof of 'some continuity or habituality of sexual conduct'.[97] In the only available appellate decision, the Court of Criminal Appeal accepted that 'maintaining an unlawful sexual relationship' was a distinct element of the offence, but did not address its interpretation.[98] The construction of this provision therefore remains unclear.

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92 Family Violence Legislation Amendment Bill 2022 (ACT) cl 36.

93 *Crimes Act 1900* (NSW) s 66EA, as at 15 January 1999, inserted by the *Crimes Legislation Amendment (Child Sexual Offences) Act 1998* (NSW) sch 1 [2].

94 *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 cl 20; New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 June 2018, 5 (Mark Speakman, Attorney-General).

95 *Crimes Act 1900* (NSW) ss 66EA(1)–(2).

96 *R v O'Toole* [2020] NSWDC 431, [5]. See also *R v CEM* [2020] NSWDC 537, [76]–[79].

97 *R v O'Toole* (n 96) [362].

98 *Xerri v R* [2021] NSWCCA 268, [93]–[97] (Price J; Bell P agreeing at [1]).

3 *'Multiple Occasions' Offences*

The Northern Territory, Tasmania, Victoria, and Western Australia have retained their offences largely as they existed before the Royal Commission. Although the provisions are diverse, and have followed different reform pathways, in each case the actus reus is multiple occasions of sexual offending. A notable feature is that three of these states — Tasmania, Victoria, and Western Australia — have amended their legislation to avoid labelling the crime an 'unlawful sexual relationship'.

(a) *'Relationship' Offences in Name Only: The Northern Territory and Tasmania*

The Northern Territory's persistent CSA provision closely follows the wording of the original Queensland provision and is in substantially the same form as first enacted in 1994.[99] Citing *KBT*, the Northern Territory's Court of Criminal Appeal has held the actus reus to be the commission of unlawful sexual acts on three or more occasions.[100] A draft Bill that would have implemented the current Queensland approach in the Northern Territory was released for consultation in 2014, but does not appear to have progressed further.[101]

A similar situation exists in Tasmania, where the offence is expressed as maintaining an unlawful relationship with a young person,[102] but has been treated as requiring proof only of multiple occasions of abuse.[103] Reforms in 2020 renamed the charge from 'maintaining a sexual relationship with a young person' to 'persistent sexual abuse of a child or young person' to better reflect the nature of the crime.[104] This reform took place after a review of the language used generally in the *Criminal Code Act 1924* (Tas) sch 1 ('*Criminal Code* (Tas)') to describe sexual offences and complainants,[105] but did not include amendment to the wording of the provision.

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[99] *Criminal Code* (NT) (n 2) s 131A. Minor amendments were made by the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT) s 8.

[100] *Kelly v The Queen* (2010) 27 NTLR 181, 183 [3]; *PDW v The Queen* (2009) 25 NTLR 72, 79 [9]–[10]. See also *PW v The Queen* [2020] NTCCA 1, [3]; Brown (n 3) 156–7.

[101] Criminal Code Amendment (Sexual Offences) Bill 2014 (NT) cl 11.

[102] *Criminal Code* (Tas) (n 2) s 125A(2).

[103] See, eg, the statement of Blow CJ that 'the crime of maintaining a sexual relationship with a young person under the age of 17 years is committed when an offender commits an unlawful sexual act in relation to a particular young person on at least three occasions': *DJT v Tasmania* (2018) 28 Tas R 109, 112 [6]. See also *Director of Public Prosecutions (Tas) v Harington*, in which Pearce J said that 'the crime of maintaining a sexual relationship with a young person … requires proof of at least three unlawful sexual acts against a young person',[103] and did not identify any further requirement to prove the maintenance of a relationship: *DPP (Tas) v Harington* (2017) 27 Tas R 128, 141 [42]. It is also an element of the offence that the young person is not married to the accused: *Criminal Code* (Tas) (n 2) s 125A(3)(b).

[104] *Criminal Code Amendment (Sexual Abuse Terminology) Act 2020* (Tas) s 5; Tasmania, Legislative Assembly, *Parliamentary Debates*, 18 March 2020, 39 (Elise Archer, Minister for Justice).

[105] Department of Justice (Tasmania), *Renaming Sexual Offences: Removing Outdated Language in Chapter XIV of the Criminal Code Act 1924* (Proposal Paper, December 2019) 8–9 <https://www.justice.tas.gov.au/__data/assets/pdf_file/0008/554840/Proposal-Paper-for-Renaming-of-Chapter-XIV-Sexual-Offences-FINAL.pdf>.

(b) *'Persistent Sexual Abuse of a Child': Victoria and Western Australia*

Reforms in both Victoria and Western Australia have replaced their original 'relationship' offences with offences framed as 'persistent sexual abuse of a child', but which continue to require proof of multiple occasions of sexual offending. As a result, these provisions do not achieve the substantive goal of the actus reus recommended by the Royal Commission. However, along with the Tasmanian law, they avoid the problematic use of 'relationship' terminology.

Victoria's original persistent CSA offence made it an offence to maintain a sexual relationship with a child under the age of 16.[106] This offence initially differed in several respects from the original Queensland offence, but most of those differences were removed from 1998.[107] As in other states and territories, the actus reus of the crime was held to be the commission of acts on three or more occasions.[108] In 2006, the offence was amended to remove 'relationship' terminology, becoming 'persistent sexual abuse of a child under the age of 16',[109] in recognition that the offence was 'actually sexual abuse not a "sexual relationship"'.[110] Subsequent reforms have retained the name 'persistent sexual abuse of a child', and largely retained the elements of the earlier offence.[111]

Western Australia's original persistent CSA offence made it a crime to have a sexual relationship with a child under the age of 16, defined as doing an act that would constitute a prescribed offence in relation to the child on three or more occasions, each of which is on a different day.[112] The offence was reformed in 2008 with the aim of overcoming the effect of *KBT*.[113] The reformed provision prohibits persistent sexual conduct with a child under 16 years of age,[114] which is defined similarly to the previous offence (that is, the doing of a sexual act on three or more occasions, each on a different day).[115] It also amended the title to remove the term

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106 *Crimes Act 1958* (Vic) s 47A, as at 5 August 1991, inserted by *Crimes (Sexual Offences) Act 1991* (Vic) s 3.

107 Unlike Queensland, this offence was proven by three or more occasions of the *same kind* of sexual act: *Crimes Act 1958* (Vic) s 47A(2)(a) (at 5 August 1991). Subsequent amendments removed the requirement that the child had been under the care, supervision, or authority of the accused, that the sexual offences be of the same kind, and that the accused and the complainant were not married: *Crimes (Amendment) Act 1997* (Vic) s 5, effective 1 January 1998; *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) s 5, effective 22 October 2014.

108 *KRM v The Queen* (2001) 206 CLR 221, 236 [41] (McHugh J), 245 [67] (Gummow and Callinan JJ), 256 [102] (Kirby J), 265 [137] (Hayne J).

109 *Crimes (Sexual Offences) Act 2006* (Vic) s 11.

110 Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2185 (Rob Hulls, Attorney-General).

111 *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 16, commencing 1 July 2017; Explanatory Memorandum, Crimes Amendment (Sexual Offences) Bill 2016 (Vic) 30. This reform included the renumbering of the offence provision, which is now *Crimes Act 1958* (Vic) s 49J.

112 *Criminal Code* (WA) (n 2) s 321A, as at 1 August 1992, inserted by *Acts Amendment (Sexual Offences) Act 1992* (WA) s 6.

113 *Criminal Law and Evidence Amendment Act 2008* (WA) s 10; Western Australia, *Parliamentary Debates*, Legislative Assembly (22 June 2006) 4212 (James (Jim) McGinty, Attorney-General).

114 *Criminal Code* (WA) (n 2) s 321A.

115 Ibid s 321A(2).

'relationship with' from the title of the offence, which, it was said, implied 'an element of mutuality or consent and [is] considered inappropriate'.[116]

4 *Further Reforms to the Actus Reus*

Further reform to the actus reus is required in the Northern Territory, Tasmania, Victoria, and Western Australia to achieve the legislative model recommended by the Royal Commission. However, we would argue that a return to the language of an 'unlawful sexual relationship' in Tasmania, Victoria, and Western Australia would be a retrograde step and is not necessary. Instead, we argue that the intended purpose of reform may be achieved by an offence that defines the actus reus as 'persistent sexual abuse'.[117]

B *Reducing the Number of Unlawful Acts*

The Royal Commission recommended that 'an unlawful sexual relationship is established by more than one unlawful sexual act'.[118] In the model laws, this was expressed through the definition of an unlawful sexual relationship as 'a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period.'[119] A historical analysis of the provisions demonstrates a trend towards a lower number of unlawful acts as jurisdictions undertake reform. This occurred in Queensland in 2003, South Australia in 2008, and in New South Wales and the Australian Capital Territory in reforms following the Royal Commission.[120] Meanwhile, offending conduct on at least three occasions is still required under the unreformed provisions of the Northern Territory, Tasmania, Victoria, and Western Australia.[121] The imposition of a higher number of instances of CSA in some jurisdictions represents a substantive legal inequality, and its continuance is difficult to justify.

'Acts' or 'Occasions'

Notably, the Royal Commission's recommendations elided the distinction between 'acts' and 'occasions' of offending conduct. While the purpose of the reforms was to enable a criminal justice response to 'repeated but largely indistinguishable *occasions* of child sexual abuse',[122] the resulting recommendations specified more than one *act*, and this approach has been adopted in the reforms of the Australian Capital Territory, New South Wales, and South Australia. The distinction is not

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116 Explanatory Memorandum, Criminal Law and Evidence Amendment Bill 2006 (WA) 3.

117 See below Part V(A).

118 *Criminal Justice Report Parts III–VI* (n 35) 74 (Recommendation 21(b)).

119 *Criminal Justice Report Parts VII–X and Appendices* (n 45) 552 (Appendix H, cl 3(2)).

120 *Crimes Legislation Amendment Act 2018* (ACT) s 4; *Royal Commission Criminal Justice Legislation Amendment Act 2020* (ACT) s 6; *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 cl 20; *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 18; *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) s 7.

121 *Criminal Code* (NT) (n 2) s 131A(3); *Criminal Code* (Tas) (n 2) s 125A(3)(a); *Crimes Act 1958* (Vic) s 49J(1)(a); *Criminal Code* (WA) (n 2) s 321A(2).

122 *Criminal Justice Report Parts III–VI* (n 35) 66 (emphasis added).

often in issue, and the terms may be used interchangeably even where legislation expressly requires evidence that unlawful sexual acts occurred on multiple occasions.[123] This distinction no longer exists under the Queensland law and, arguably, is unnecessary because proof of the maintenance of a relationship requires evidence of sexual conduct that is habitual and continuous.[124]

The significance of this distinction may be illustrated by considering that some cases of child sexual abuse involve multiple 'acts' occurring once only, at one particular time; for example, in the same event, the offender may expose themselves, touch the child, and force the child to touch them. These various acts involve several offences, but do not constitute the type of persistent sexual abuse occurring at different times to which these offence provisions are directed.

The distinction between acts and occasions has renewed significance in jurisdictions with reformed 'relationship' offences where the construction of a 'relationship' has departed from the Queensland example. In those jurisdictions, it appears possible that multiple unlawful sexual acts occurring on a single occasion, where there is a relationship (which need not be sexual) between the accused and the complainant, would theoretically satisfy the elements of the offence.

In the remaining jurisdictions where there is a requirement for multiple occasions of offending,[125] this is understood as requiring 'a clear separation in time or circumstance between the acts'[126] or acts that are not 'proximate in time and circumstance'.[127] Thus, in the Northern Territory case *Kelly v The Queen,* the Court of Criminal Appeal allowed an appeal on the basis that only two occasions of offending, involving four unlawful sexual acts, had been proven.[128]

The prospect of an offence that operates without any requirement for abuse persisting over time — and not within a single event — is not justified by, or congruent with, the policy rationale of the offences. The current laws in South Australia, the Australian Capital Territory, and New South Wales, theoretically enable this inappropriate outcome. Accordingly, we would recommend that further reforms provide that unlawful sexual acts must occur *on two or more occasions*.

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123 See, eg, Pearce J's summary of the Tasmanian offence as comprising multiple constituent acts that met the legislative definition of an unlawful sexual act, and reference to the restricted particularisation requirement regarding 'the dates on which any of the unlawful sexual *acts* were committed or the exact circumstances in which any of the unlawful sexual *acts* were committed': *DPP (Tas) v Harington* (n 103) 141–2 [42]–[43] (emphasis added).

124 See above Part IV(A)(1).

125 The current provisions of the Northern Territory and Tasmania continue to require evidence of unlawful sexual acts on at least three occasions: *Criminal Code* (NT) (n 2) s 131A(3); *Criminal Code* (Tas) (n 2) s 125A(3)(a). The Victorian offence (persistent sexual abuse of a child) requires evidence of sexual abuse on at least three occasions (*Crimes Act 1958* (Vic) s 49J(1)(a)). In Western Australia (persistent sexual conduct with a child), the sexual acts must be done on three or more occasions, and it is simply stated that each must be on a different day: *Criminal Code* (WA) (n 2) s 321A(2).

126 *Tognolini v The Queen* (2011) 32 VR 104, 106.

127 *Kelly v The Queen* (n 100) 186 [20].

128 Ibid 186–7 [16]–[21] (Riley J, Martin CJ agreeing at 182 [1], Kelly J agreeing at 187 [22]).

C *The Age of 'a Child' or Young Person under Care or Authority*

It is clearly an element of all persistent CSA offences that the complainant is a child at the time of the offending conduct. The model provisions extend the definition of a child to include all children under the age of 16, as well as those under the age of 18 where the accused is an adult in a special relationship of trust or authority with the child.[129] This is phrased in the model provisions as applicable where the complainant, during the period of the alleged offence, is 'under the special care of' the accused.[130] In the model provisions, a person (the child) will be under the special care of an adult if:

> (a) the adult is the parent, step-parent, guardian or foster parent of the child or the de facto partner of a parent, step-parent, guardian or foster parent of the child, or
>
> (b) the adult is a school teacher and the child is a pupil of the school teacher, or
>
> (c) the adult has an established personal relationship with the child in connection with the provision of religious, sporting, musical or other instruction to the child, or
>
> (d) the adult is a custodial officer of an institution of which the child is an inmate, or
>
> (e) the adult is a health professional and the child is a patient of the health professional, or
>
> (f) the adult is responsible for the care of the child and the child has a cognitive impairment.[131]

The maximum age of a complainant at the time of the alleged offence varies between jurisdictions in line with the general age of consent to sexual intercourse.[132] The relevant age is 16 in the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, Victoria, and Western Australia,[133] and 17 in South Ausralia and Tasmania.[134] Only the Australian Capital Territory and South Australia have increased the relevant age of the complainant to 18 in the context of a relationship of special care or authority.[135]

This cannot be explained by differences in the general criminal law regarding the age of consent, since the majority of states and territories have a higher age of consent where there is a relationship of care or authority between the accused and

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129 *Criminal Justice Report Parts VII–X and Appendices* (n 45) 552 (Appendix H, Jurisdictional note).
130 Ibid 551 (Appendix H, cl 2(1)(b) (definition of 'child')).
131 Ibid 551 (Appendix H, cl 2(2)).
132 *Crimes Act 1900* (ACT) s 55(2); *Crimes Act 1900* (NSW) s 66C; *Criminal Code* (NT) (n 2) s 127; *Criminal Code* (Qld) (n 2) s 215; *Criminal Law Consolidation Act 1935* (SA) s 49; *Criminal Code* (Tas) (n 2) s 124; *Crimes Act 1958* (Vic) s 49B; *Criminal Code* (WA) (n 2) s 321.
133 *Crimes Act 1900* (ACT) s 55; *Crimes Act 1900* (NSW) s 66C; *Criminal Code* (NT) (n 2) s 127; *Criminal Code* (Qld) (n 2) s 215; *Crimes Act 1958* (Vic) s 49B; *Criminal Code* (WA) (n 2) s 321.
134 *Criminal Law Consolidation Act 1935* (SA) s 49; *Criminal Code* (Tas) (n 2) s 124.
135 *Crimes Act 1900* (ACT) ss 56(1)(b), 56(12) (definition of 'young person'); *Criminal Law Consolidation Act 1935* (SA) ss 50(12), (13).

the complainant.[136] This is the case in every jurisdiction except Queensland and Tasmania, and even in those states the exercise of authority over another may vitiate consent.[137] The result is that New South Wales, the Northern Territory, Victoria, and Western Australia have a higher age of consent to sexual intercourse in the context of a relationship of care or authority, but the persistent CSA offence only applies to conduct before the complainant reaches the age of 16.

It is not clear why this aspect of the reforms has not been widely implemented, given the widespread adoption and apparent acceptance of the policy rationale for position of authority offences. While some differences between jurisdictions is to be expected, as for the general age of consent, discrepancies within jurisdictions are more difficult to reconcile. This element of the model provisions should be implemented, most clearly in those states and territories where a higher age of consent already applies within relationships of authority or care.

D *Removing the Requirement for 'Extended Jury Unanimity'*

The Royal Commission's view was that persistent CSA offences must 'not require particularisation in a manner inconsistent with the ways in which complainants remember the child sexual abuse they suffered'.[138] All persistent CSA laws in Australia expressly provide for a modification of the common law requirement for particulars of any alleged unlawful sexual acts, which is intended to achieve this objective.[139] However, this modification alone has been demonstrably inadequate when all members of a jury are required to reach unanimous agreement that the same occasions of sexual offending occurred.[140] Consequently, the Royal Commission's recommendation was that the law in each jurisdiction should also specify that 'jurors need not be satisfied of the same unlawful sexual acts'.[141] At the time, this had only been effected in Queensland.[142]

Since the Royal Commission published its recommendations, the High Court has indicated a greater willingness to accept a deductive process of reasoning in cases of persistent, undifferentiated offending of the same type. This arose in *Hamra v The Queen*, which concerned the South Australian law immediately preceding the 2017 reforms.[143] The High Court affirmed the position of the South Australian Court of Criminal Appeal that, while a jury must be able to delineate two or more acts in order to reach agreement, those acts need not be differentiated by reference to the

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136 *Crimes Act 1900* (ACT) s 55A; *Crimes Act 1900* (NSW) s 73; *Criminal Code* (NT) (n 2) s 128; *Criminal Law Consolidation Act 1935* (SA) s 49(5) (a person in a position of authority in relation to the person under 18); *Crimes Act 1958* (Vic) s 49C ('under care, supervision or authority'); *Criminal Code* (WA) (n 2) s 322.

137 See *Criminal Justice Report Parts III–VI* (n 35) 99–101.

138 Ibid 66.

139 *Crimes Act 1900* (ACT) s 56(5); *Crimes Act 1900* (NSW) ss 66EA(4), (5)(b); *Criminal Code* (NT) (n 2) s 131A(3); *Criminal Code* (Qld) (n 2) ss 229B(4)(a)–(b); *Criminal Law Consolidation Act 1935* (SA) s 50(4)(a), (b); *Criminal Code* (Tas) (n 2) s 125A(4)(a); *Crimes Act 1958* (Vic) s 49J(4); *Criminal Code* (WA) (n 2) s 321A(5)(b).

140 Or a statutory majority: eg, *Juries Act 1927* (SA) s 57(1).

141 *Criminal Justice Report Parts III–VI* (n 35) 74 (Recommendation 21).

142 Ibid 25.

143 *Hamra v The Queen* (2017) 260 CLR 479.

circumstances of each occasion.[144] The opinion of the High Court was that nothing in 'the common law nor s 50 … precludes a judge or jury from deducing a conclusion by simple and obvious logic'.[145] Therefore, in the case before the Court:

> It was open to conclude that there were two or more acts of sexual exploitation committed if, for instance, the judge concluded beyond reasonable doubt that the appellant committed the [same type of] acts of sexual exploitation every time he stayed over, which was nearly every weekend for months, and possibly years, from when B was thirteen or possibly fourteen.[146]

Shortly after this decision, the South Australian law was replaced with the current offence. It remains unclear whether unreformed persistent CSA offences in other states or territories could now accommodate conviction by a judge or jury on the basis of evidence of undifferentiated offending in some instances.[147] Implementation of the Royal Commission's recommendation in those jurisdictions would resolve this uncertainty.

In most jurisdictions, removing the requirement for extended jury unanimity operates in concert with the establishment of an alternative element which becomes the actus reus of the offence. In Queensland, jury unanimity rests on the existence of a relationship that must be maintained by the accused through continuity or habituality of sexual contact.[148] The reformed 'relationship' offences created after the Royal Commission have operated similarly, although the requirements of proof of that relationship are different.[149]

The removal of extended jury unanimity may take on a different complexion in jurisdictions where the actus reus remains multiple occasions of sexual offending. In the Australian Capital Territory, Murrell CJ and Rangiah J were disquieted by the result of the first attempted reforms that no jury unanimity was required on the conduct comprising the offence, especially given the severity of punishment of up to 25 years' imprisonment.[150] In South Australia, only Blue J was prepared to countenance a construction of the reformed offence as a multiple occasions offence without extended jury unanimity.[151] Kourakis CJ described that result as a 'radical

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144 Ibid 497–8, citing *R v Hamra* (2016) 126 SASR 374, 389 [47] (Kourakis CJ, Kelly J agreeing at 393 [67], Nicholson J agreeing at 413 [135], Lovell J agreeing at 414 [137]).

145 *Hamra v The Queen* (n 143) 493 [28].

146 Ibid 494 [33].

147 See, eg, the *Victorian Criminal Charge Book*, which cautions that the conclusion in *Hamra v The Queen* (n 143) was at odds with the Victorian position but that, since the High Court's decision concerned the South Australian offence, 'it is not known whether [*Crimes Act 1958* (Vic)] s 49J is relevantly similar to s 50 of the *Criminal Law Consolidation Act 1935* (SA) such that previous Victorian decisions on s 47A and s 49J have been qualified or overruled': Judicial College of Victoria, *Victorian Criminal Charge Book* (online at 17 February 2021) [7.3.22] <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#64929.htm>.

148 See cases cited above n 74.

149 See above Part IV(A)(2). In Western Australia, jury unanimity is not required only if there is evidence of sexual acts on four or more occasions and as long as 'the jury is satisfied that the accused person persistently engaged in sexual conduct in the period specified': *Criminal Code* (WA) (n 2) s 321A(11).

150 *KN* (n 82) 294 [22], 302 [63] (Murrell CJ and Rangiah J).

151 *R v M, DV* (n 78) 488 [62].

departure'[152] from the 'cardinal principle'[153] of criminal law that there be a conduct element proved beyond reasonable doubt to the satisfaction of the jury. The current Tasmanian provision is therefore an anomaly, since the requirement for extended jury unanimity regarding occasions of abuse was removed without further amendment to the actus reus, which remains the commission of unlawful sexual acts against a young person on three or more occasions.[154]

Therefore, while the Royal Commission's recommendations in this area should be implemented in the Northern Territory, Victoria, and Western Australia to provide certainty and equitable access to an effective means of prosecuting persistent CSA, this reform should not be implemented without attention to the appropriate definition of the actus reus.

E *Introducing Retrospectivity*

Evidence heard by the Royal Commission in case studies and in testimony from prosecutors indicated that modern persistent CSA provisions could, if made retrospective, enable prosecutions of historic child sexual offences that would otherwise not have a reasonable prospect of success.[155] The Royal Commission therefore recommended that persistent CSA provisions should be made retrospective, subject to caveats described below.

The recommendation is significant, since it is an entrenched principle of Australian law that criminal liability should not be imposed retrospectively.[156] While Australian legislatures are constitutionally empowered to impose such liability,[157] the courts regard this exercise of legislative power as exceptional and require unambiguous expression that this is the legislative intention.[158] This principle reflects values of fairness and justice,[159] and protection from retrospective criminal liability may be regarded as a human right.[160] Retrospectivity is less offensive when

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152 Ibid 476 [15].

153 Ibid 475 [14], quoting *R v McCarthy* (2015) 124 SASR 190, 197 [5].

154 See above n 103 and accompanying text.

155 *Criminal Justice Report Parts III–VI* (n 35) 30; Royal Commission, Transcript of Public Hearing Case Study 11 (Day WA18): Examination of B Fiannaca (Deputy Director of Public Prosecutions (WA)) (5 May 2014) WA2023; Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 33: The Response of The Salvation Army (Southern Territory) to Allegations of Child Sexual Abuse at Children's Homes That It Operated* (July 2016) 136; Royal Commission, Transcript of Public Hearing Case Study 33 (Day C112): Examination of A Kimber (Director of Public Prosecutions (SA)) (14 October 2015) T11758:20–T11759:9.

156 See, eg, William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1st ed, 1765) vol 1, 46; *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 534 (Mason CJ) ('*Polyukhovich*').

157 *R v Kidman* (1915) 20 CLR 425, 451 (Higgins J).

158 *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, 478 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See generally D Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019) 357 [10.1].

159 Dan Meagher, 'Two Reflections on Retrospectivity in Statutory Interpretation' (2018) 29(3) *Public Law Review* 224, 229.

160 See, eg, *Human Rights Act 2019* (Qld) s 35(1); *Charter of Human Rights and Responsibilities* (Vic) s 27(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 15(1).

the wrongfulness of the conduct, regardless of its legality, ought to have been apparent at the time.[161]

Appropriately, the Royal Commission's recommendation was that retrospective application should only apply to sexual acts that were unlawful at the time they were committed.[162] Given concerns about the imposition of modern penalties to historic offences,[163] the Royal Commission also recommended that crimes committed before the introduction of the relevant original persistent CSA offence should be sentenced according to the lower maximum penalties applicable to those earlier offences.[164]

At the time of the Royal Commission, only South Australia and Tasmania had laws that operated retrospectively.[165] Subsequently, reforms giving retrospective effect to the provisions have been implemented in the Australian Capital Territory, New South Wales, and Queensland.[166] The effect of retrospectivity for persistent CSA offences is not to criminalise previously permissible conduct, nor is it to impose modern sentencing standards on earlier times. Rather, it makes it possible to provide a criminal justice response to historic crimes, reflecting a better understanding of the dynamics of such offending.[167] This reform is clearly justified and should be implemented in the Northern Territory, Victoria, and Western Australia.

F *The Requirement for Director of Public Prosecutions Approval*

In most states and territories, the approval of the Director of Public Prosecutions ('DPP') or Attorney-General is legislatively required before a persistent CSA offence may be charged.[168] The only exception is South Australia, where it was required under the original formulation of the offence, but was omitted in the reforms of 2008 and 2017.[169] The Royal Commission made no specific recommendation on this issue, but, notably, its model provisions do not require such approval. Evidence suggests the additional requirement impedes appropriate prosecution of offences, and there is no compelling evidence to date that absence of the requirement leads to unjust or inefficient outcomes.

Generally, the requirement for DPP consent for prosecution is an exceptional requirement, imposed to avoid the inappropriate laying of charges. This is justified, for example, for crimes involving sensitive or controversial events, or where

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161 See *R v Snow* (1915) 20 CLR 315, 335 (Isaacs J); *Polyukhovich* (n 156) 643 (Dawson J).

162 *Criminal Justice Report Parts III–VI* (n 35) 74 (Recommendation 21(d)).

163 See, eg, testimony from Legal Aid NSW quoted in ibid 59. See also ibid 69.

164 *Criminal Justice Report Parts III–VI* (n 35) 69–70, 74 (Recommendation 21(e)).

165 Ibid 21; *Criminal Law Consolidation Act 1935* (SA) s 50(6), as at 23 November 2008, and in the current form of the offence; *Criminal Code* (Tas) (n 2) s 125A(1).

166 *Crimes Act 1900* (ACT) s 56(2)(b); *Crimes Act 1900* (NSW) s 66EA(7); *Criminal Code* (Qld) (n 2) ss 746–8.

167 *Criminal Justice Report Parts III–VI* (n 35) 69. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 June 2018, 5 (Mark Speakman, Attorney-General).

168 *Crimes Act 1900* (ACT) s 56(10); *Crimes Act 1900* (NSW) s 66EA(14); *Criminal Code* (NT) (n 2) s 131A(9); *Criminal Code* (Qld) (n 2) s 229B(6); *Criminal Code* (Tas) (n 2) s 125A(7); *Crimes Act 1958* (Vic) s 49J(9); *Criminal Code* (WA) (n 2) s 321A(7).

169 See *Criminal Law Consolidation Act 1935* (SA) s 74(10), as at 28 July 1994.

prosecution raises significant public policy considerations.[170] In the case of persistent CSA laws, this requirement is theoretically underpinned by a recognition that these laws must navigate a tension between preserving a defendant's right to a fair trial while enabling an effective criminal justice response.[171] For example, when the requirement was first imposed in South Australia, it was explained that requiring that the decision to prosecute be made solely by the DPP in accordance with best charging practices was the least complicated and most effective way of answering criticism that the laws eroded the rights of the accused and created the potential for abuse.[172]

However, all prosecutorial decisions are made under guidelines where the paramount criterion is the public interest, including whether the admissible evidence is capable of establishing the offence, whether there is a reasonable prospect of conviction, and whether other discretionary factors indicate prosecution should not proceed.[173] The other discretionary factors include consideration of whether the proceedings would be unduly harsh or oppressive. It is not clear that these comprehensive guidelines are insufficient to protect against inappropriate prosecution decisions.[174] Moreover, while the practical effect of the requirement for DPP approval is not entirely clear, there is concern it impedes use of the provision,[175] and it plainly presents another step that must be taken to facilitate prosecution and may implicitly deter its use. It has been argued that the requirement treats complainants in persistent CSA matters with unjustified suspicion and hostility.[176]

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170 See, eg, Director of Public Prosecutions (ACT), *The Prosecution Policy of the Australian Capital Territory* (1 April 2021) 14 [3.10]; Commonwealth Department of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (19 July 2021) 8 [2.24].

171 For example, the Tasmanian policy suggests that if the particulars are sufficient, it is preferable to charge the alleged unlawful sexual acts as individual crimes: Director of Public Prosecutions (Tas), *Prosecution Policy and Guidelines* (16 December 2021) 25.

172 South Australia, *Parliamentary Debates*, Legislative Council, 20 April 1994, 541 (Trevor Griffin, Attorney-General).

173 Director of Public Prosecutions (ACT) (n 170); Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines* (March 2021); Office of the Director of Public Prosecutions (NT), *Guidelines of the Director of Public Prosecutions* (2016); Department of Justice and Attorney-General (Qld), *Director's Guidelines* (30 June 2016); Director of Public Prosecutions (SA), *Statement of Prosecution Policy & Guidelines* (October 2014); Director of Public Prosecutions (Tas) (n 171); Director of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (24 January 2022); Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (1 September 2018). See also Natalie Hodgson, Judy Cashmore, Nicholas Cowdery, Jane Goodman-Delahunty, Natalie Martschuk, Patrick Parkinson, Martine B Powell and Rita Shackel, 'The Decision to Prosecute: A Comparative Analysis of Australian Prosecutorial Guidelines' (2020) 44(3) *Criminal Law Journal* 155, 158–9.

174 Similarly, other checks are built into the criminal justice system to protect the defendant's right to a fair trial. For example, judicial officers presiding over criminal trials have the power to stay proceedings if they determine the state of particulars available will result in unfairness to the accused: *Walton v Gardiner* (1993) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ).

175 For example, the Office of the Director of Public Prosecutions (NSW) informed the earlier Family Violence inquiry that the novelty of the provisions had originally justified this requirement, but in the light of experience it was no longer needed: Australian Law Reform Commission and New South Wales Law Reform Commission (n 3) 1144 [25.61].

176 For example, the then Shadow Attorney-General of South Australia Chris Sumner stated in relation to the original provision in that State:

As suggested by its omission from the Royal Commission's model law, there seems no compelling justification for the requirement of DPP approval to continue in future reforms.

V Future Reforms to Australian Persistent Child Sexual Abuse Laws

Two overarching themes emerge from this account of the current state of persistent CSA law in Australian jurisdictions. First, many necessary reforms have not been undertaken. The consequence is that in several states and territories, it is doubtful whether, in the words of the Royal Commission, 'a criminal justice response can be said to be reasonably available to condemn and punish child sexual abuse'.[177] Second, it is now clear that persistent CSA reforms in Australia cannot be regarded as a national implementation of the Queensland approach. As a result, much of the Royal Commission's reasoning for basing its recommendations on the Queensland offence no longer apply. In the eyes of the Royal Commission, it was a strength of the Queensland offence that it had been the subject of substantial judicial interpretation. This factor was significant enough that the Royal Commission was prepared to set aside the inappropriate connotations of the term 'relationship' to conceptualise persistent CSA. The newly reformed provisions in South Australia, the Australian Capital Territory, and New South Wales do not have that advantage.

The operation of the reformed 'relationship' offences highlights the limited value of this terminology. The interpretation of the offence in those jurisdictions results from the sound application of principles of legislative interpretation and avoids the interpolation of concepts more appropriate to consensual sexual relationship between adults into the criminal law of persistent CSA. There is no clear advantage to labelling the actus reus of a persistent CSA charge a 'relationship', since the existence of a relationship will rarely be in issue, and does not represent the essence of the offending conduct. As a result, there is little justification for the continued use of this terminology in future reforms.

Achieving an Optimal Legislative Model

Based on this analysis, we propose that an optimal legislative model is one where:

1. The actus reus is persistent sexual abuse of a child.

The most significant element of the Royal Commission's recommendations, that the actus reus of each persistent CSA offence should be maintaining an unlawful sexual relationship, remains outstanding in the Northern Territory, Tasmania, Victoria, and

> given the philosophical concerns about the sidelining of victims in the criminal justice process, and given that in some other jurisdictions victims can go along in tandem with the prosecutor (with the State), it would be a retrograde step in our system to take away a right that a victim currently has of bringing a person before a court during a committal hearing. That is why I oppose it.
>
> South Australia, *Parliamentary Debates*, Legislative Council, 20 April 1994, 541.

[177] *Criminal Justice Report Parts III–VI* (n 35) 65.

Western Australia. However, we argue that the Royal Commission's conclusion that this is the better formulation of the offence can no longer be supported. A preferable definition of the actus reus that achieves the policy objective of the laws without the significant legal and normative shortcomings of 'relationship' terminology is 'persistent sexual abuse of a child'.

2. Persistent sexual abuse is established by sexual abuse committed against a child on more than one occasion.

Reform to require only two instances of abuse has been implemented in all states with 'relationship' offences, but remains outstanding in the Northern Territory, Tasmania, Victoria, and Western Australia. However, where reforms have eliminated the need for more than one *occasion* of abuse, this element should be restored. This could be expressed in the legislation by describing the relevant conduct as an accused engaging in sexual abuse of a child on 'two or more occasions'.

3. Sexual abuse is any act that constitutes, or would constitute (if sufficiently particularised), a sexual offence against a child or young person.

While it is appropriate that the maximum age of 'a child' for the purposes of a persistent CSA offence varies in line with the statutory age of consent in different states and territories, all jurisdictions other than Queensland and Tasmania now recognise that relationships of care and authority over a young person create a power imbalance that negates their consent to sexual activity. Most jurisdictions do not recognise this type of offending as an unlawful sexual act for the purposes of their persistent CSA provision. This creates a legal anomaly that should be addressed in further reforms.

4. The trier of fact must be satisfied beyond reasonable doubt that the accused engaged in persistent sexual abuse of a child but, where the trier of fact is a jury, jurors need not be satisfied of the same occasions of abuse.

The requirement for extended jury unanimity regarding individual occasions of abuse must be removed to enable the intended operation of these laws, bearing in mind that this reform must be accompanied by the definition of an alternative actus reus.

5. The offence applies retrospectively, encompassing sexual acts that were unlawful at the time.

The argument for retrospective application of persistent CSA laws is clear, and this recommendation of the Royal Commission should be implemented in all jurisdictions. Reservations about the fairness and legality of retrospective application are addressed by the courts' existing powers to ensure a fair trial, the limitation of retrospective application to behaviour that was criminal at the time, and consideration of changing sentencing standards.

6. There is no requirement to obtain prosecutorial consent before laying a charge of persistent sexual abuse.

The continued imposition of this requirement is not justified on policy grounds and has been identified as a barrier to the use of the provisions. It has persisted in all states and territories except South Australia, and should be removed in further reforms.

VI Conclusion

The prosecution of persistent CSA has long posed a challenge to the criminal justice system. The analysis of the Royal Commission into Institutional Responses to Child Sexual Abuse revealed substantial differences in the scope and operation of persistent CSA offences between the Australian states and territories. Over the preceding decades, some Australian states had undertaken substantial reform to ensure their laws achieved the intended objective, while others had not made any substantial amendments since the first creation of the offence. The Royal Commission proposed a nationally consistent approach to provide access to an effective criminal justice response to all Australians. Our analysis current to April 2022 shows that the implementation of the Royal Commission's recommendations has continued the history of uneven reform in this area, and identifies key elements of those reforms that remain overdue. We have identified problematic aspects entrenched in the continued use of the terminology of an 'unlawful sexual relationship' to conceptualise persistent sexual abuse. This forms the basis of our proposed legislative model that accurately defines the offence as persistent sexual abuse of a child, and provides greater scope for victims of this type of offending to obtain justice through the criminal law.