

Prosecutorial Discretion in Cases of Persistent Child Sexual Abuse

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Abstract

In this article we examine the operation of laws in New South Wales ('NSW'), Queensland and South Australia that make it an offence to maintain an 'unlawful sexual relationship' with a child or young person. Our article draws on interviews with prosecutors and analysis of a sample of case files in each jurisdiction, as well as data on convictions. We identify three different approaches to prosecutorial discretion. The first is that the charge should only be used where


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
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
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Content warning: This article contains descriptions of sexual acts involving children that may be disturbing to some readers.

the victim cannot give sufficient particulars to charge individual offences. The second is that the charge should be used in circumstances where charging individual incidents of abuse does not properly capture the level of criminality involved in the conduct of the accused in sexually abusing the complainant. The third is that the charge may be used whenever it provides an appropriate description of the nature of the accused's offending behaviour towards the child. These different approaches help explain the widely different levels of usage of the charge between NSW and the other two States.

I Introduction

The prosecution of cases involving the sexual abuse of children has long been seen as an important strategy in child protection, supported now by laws making it a criminal offence not to report child sexual abuse offences to the police.¹ However, comparatively few cases in which a person of interest is identified lead to charges being laid.

In New South Wales ('NSW'), over a 14-year period from 2003 to 2016, a suspect was identified in 63.6% of cases reported when the complainant was still a child, and in 84.7% of cases where the offence was reported by the complainant only after reaching adulthood.² The police commenced criminal proceedings in only 29% of child-reported incidents and in 43.7% of adult-reported incidents in which a suspect was identified.³ Overall, only one in six (16.6%) child reports of sexual assault incidents and one in five (20.8%) indecent assault incidents over the 14-year period resulted in criminal proceedings.⁴ In South Australia ('SA'), over a 20-year period from 1992 to 2012, a higher percentage of reports led to charges being laid.⁵ However, charges were also more likely than in NSW to be withdrawn and less likely to result in guilty pleas.⁶

Various reforms have been made to the law in jurisdictions across Australia over the last 30 years in response to recommendations by commissions of inquiry and law reform bodies to better support child witnesses to give their best evidence and to improve the prospects of a successful prosecution.⁷ Even with these reforms, the complainant still needs to provide a sufficiently detailed account of the abuse to justify a conviction. One of the many challenges in prosecuting cases of child sexual abuse is that if children were abused on many occasions, they may not have a sufficiently detailed memory of individual acts of abuse.⁸ That is the case not only

¹ See, eg, *Crimes Act 1900* (NSW) s 316A.

² 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, 88–9 <<https://doi.org/10.1177/1077559519853042>>.

³ *Ibid* 89.

⁴ *Ibid*.

⁵ Judith Cashmore, Patrick Parkinson and Alan Taylor, 'Trends in Prosecutions for Child Sexual Abuse in South Australia 1992–2012' (2018) 39(1) *Adelaide Law Review* 99, 110–11.

⁶ *Ibid* 120–1.

⁷ See, eg, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (August 2017) ('*Criminal Justice Report*').

⁸ Dayna M Woiwod and Deborah A Connolly, 'Continuous Child Sexual Abuse: Balancing Defendants' Rights and Victims' Capabilities to Particularize Individual Acts of Repeated Abuse'

for many child witnesses, but also for adults giving evidence of their abuse when they were children. These victims may have a memory of what typically occurred at times when the perpetrator violated their bodies, but not enough detail about any one single event to distinguish it from other incidents of abuse.⁹ Further, while details specific to individual incidents or events may be remembered, the source of those details is not stored with the detail in memory. This results in confusion of those details across incidents, for both children and adult complainants. But, because of children's underdeveloped cognitive skills, they are especially prone to these confusions.

Because the criminal law has generally required that the trier of fact be satisfied beyond reasonable doubt of a specific occasion on which an unlawful act has been committed, this necessitates providing details that meet the description of each offence charged and that are reasonably sufficient for the accused to make a proper defence.¹⁰ For this reason, it has been difficult for at least some child witnesses to provide enough details to support a conviction. As two judges stated in a South Australian appeal, the operation of the provision 'can produce the perverse paradox that the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence'.¹¹

One way in which Australian jurisdictions have sought to address this problem has been by allowing a single charge to be proven where there is sufficient evidence of a number of incidents of abuse.¹² This is a provision specific to child sexual abuse offences. Originally, three or more individual incidents were typically required to substantiate the offence. That remains the case in three States (Tasmania, Victoria and Western Australia); but now the majority of Australian jurisdictions provide that the charge can be proven with at least two incidents of unlawful sexual acts (the Australian Capital Territory, NSW, the Northern Territory, Queensland and SA).

The offence has various names in different Australian jurisdictions. The most common one is 'persistent sexual abuse of a child'. South Australia previously used

(2017) 42(2) *Criminal Justice Review* 206 <<https://doi.org/10.1177/0734016817704700>>; Jane Goodman-Delahunty, Judith Cashmore and Natali Dilevski, 'Prosecutorial Decision-Making in Cases of Child Sexual Abuse: Lessons from Australia', in Monica K Miller, Logan A Yelderman, Matthew T Huss and Jason A Cantone (eds), *The Cambridge Handbook of Psychology and Legal Decision-Making* (Cambridge University Press, 2024) 240 <<https://doi.org/10.1017/9781009119375>>.

⁹ 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* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, July 2017) 97–109. On interviewing techniques to address this problem, see Sonja J Brubacher, Martine B Powell and Kim P Roberts, 'Recommendations for Interviewing Children about Repeated Experiences' (2014) 20(3) *Psychology, Public Policy, and Law* 325 <<https://doi.org/10.1037/law0000011>>.

¹⁰ *Johnson v Miller* (1937) 59 CLR 467; *S v The Queen* (1989) 168 CLR 266; *Macri v The Queen* (2022) 110 NSWLR 1, 40–1.

¹¹ *R v Johnson* [2015] SASFC 170, [2] (Sulan and Stanley JJ).

¹² *Crimes Act 1900* (ACT) s 56; *Crimes Act 1900* (NSW) (n 1) s 66EA; *Criminal Code Act 1983* (NT) sch 1 ('*Criminal Code* (NT)') s 208JI; *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(5)(b).

that name, but now refers to the offence simply as ‘sexual abuse of a child’.¹³ In Western Australia, the offence is called ‘persistent sexual conduct’;¹⁴ in Queensland, ‘repeated sexual conduct with a child’;¹⁵ and in the Northern Territory, ‘repeated sexual abuse’.¹⁶ In shorthand, the charge goes by different names in different jurisdictions. Queensland prosecutors usually call it a ‘maintaining’ charge since the offence is defined as that an adult ‘maintains an unlawful sexual relationship with a child’.¹⁷ Other terms in use are ‘ongoing child sexual abuse’, ‘persistent child sexual abuse’ or ‘persistent sexual exploitation’. For the purposes of this article, the offence will be called ‘the persistent sexual abuse offence’.

The Royal Commission into Institutional Responses to Child Sexual Abuse (‘Royal Commission’) recommended that the law in every jurisdiction be amended along the lines of the Queensland offence.¹⁸ Both SA and NSW made changes to the law in 2017¹⁹ and 2018²⁰ respectively to give effect to that recommendation.

In this article we examine how the persistent sexual abuse offence has been used in Queensland, NSW and SA, when it is seen to be useful and how the different States might differ in terms of charging practices. We start by considering the elements of the offence in the three jurisdictions and the reforms that have occurred over time (Part II). We then explain the method for this empirical study (Part III), before presenting the results (Parts IV and V). In Part IV we draw on interviews with prosecutors and an analysis of a sample of case files in each of the three jurisdictions to identify how the persistent sexual abuse offence is utilised in practice. In Part V we provide some statistics concerning rates of charging and conviction in two States (NSW and Queensland). Our discussion includes an evaluation of the differences in approach between the three jurisdictions and the reasons for them (Part VI), before we consider whether further law reform is needed (Part VII).

II Elements of the Persistent Sexual Abuse Offence

NSW, Queensland and SA define the offence in terms of ‘maintaining an unlawful sexual relationship with the child’, evidenced by the requisite number of unlawful sexual acts.²¹ That is, the prosecution must show beyond reasonable doubt that there was an ‘unlawful sexual relationship’. It is not necessary for the jury to agree on the same specific acts of offending. Other jurisdictions identify the offence in terms of persistence of the abuse, rather than the existence of a relationship. There has been

¹³ *Criminal Law Consolidation Act 1935* (SA) (n 12) s 50.

¹⁴ *Criminal Code* (WA) (n 12) s 321A.

¹⁵ *Criminal Code* (Qld) (n 12) s 229B.

¹⁶ *Criminal Code* (NT) (n 12) s 208JL.

¹⁷ *Criminal Code* (Qld) (n 12) s 229B(1).

¹⁸ See Recommendation 21 in *Criminal Justice Report* (n 7) pts III–VI, 71–4.

¹⁹ *Statutes Amendment (Attorney General’s Portfolio) (No 2) Act 2017* (SA) s 6.

²⁰ *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW).

²¹ The ACT also uses the language of ‘relationship’. The offence is committed if an adult ‘engages in a relationship’ with a child or a young person, although the offence in this jurisdiction is confined to children or young people under the ‘special care’ of the adult. Special care is defined in s 55A(2). A ‘relationship’ is defined as including ‘repeated contact, interaction, engagement, or association, of a sexual nature or otherwise’: *Crimes Act 1900* (ACT) (n 12) s 56(2)(a).

opposition to the language of ‘relationship’,²² not least from abuse survivors, because it carries implications of mutuality and consent,²³ and this has been the catalyst for the language of relationship to be deleted from the law in Tasmania, Victoria and Western Australia.²⁴

The legislative provisions in the different Australian jurisdictions have required amendment over time to address the impacts of certain High Court of Australia decisions that limited the utility of the provision.²⁵ In this section we outline the main provisions and differences between the relevant law in the three Australian jurisdictions (NSW, Queensland and SA) that are the focus of this article.

A *The Royal Commission Recommendations*

Recommendations of the Royal Commission provided a particular stimulus for legislative reform. In its 2017 *Criminal Justice Report*, the Royal Commission recommended substantial changes to the drafting of the offence, largely using Queensland’s version as a model.²⁶ It explained its rationale as follows:

We consider that the Queensland offence, in making the actus reus the relationship rather than the individual occasions of abuse, provides the best opportunity to charge repeated or ongoing child sexual abuse in a manner that is more consistent with the sort of evidence a complainant is more likely to be able to give.

... Many children may have composite memories of repeated occasions of abuse and may recall events and give evidence in that form.²⁷

B *Crimes Act 1900 (NSW) s 66EA*

NSW made substantial amendments to its persistent sexual abuse offence in 2018, based on the Royal Commission recommendations.²⁸ One important element of the reform is that only two incidents of unlawful sexual conduct need to be proven, not three. Section 66EA(1) of the *Crimes Act 1900* (NSW) now provides: ‘An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.’ A child is defined in s 66EA(15) as being under the age of 16 years.

To address the problem of specificity, the legislation provides that the prosecution is not required to allege the particulars of any unlawful sexual act that

²² While the Royal Commission indicated that ‘[t]he language of “relationship” does not sit easily with the exploitation involved in child sexual abuse offending’, it was seen as helpful in emphasising ‘that the actus reus of the Queensland offence — and what the jury needs to be satisfied of — is the existence of the relationship and not particular underlying acts’: *Criminal Justice Report* (n 7) pts III–VI, 71.

²³ Elizabeth Dallaston and Ben Mathews, ‘Reforming Australian Criminal Laws against Persistent Child Sexual Abuse’ (2022) 44(1) *Sydney Law Review* 77, 79, 87–8.

²⁴ *Justice Miscellaneous (Commission of Inquiry) Act 2024* (Tas) s 18; *Crimes (Sexual Offences) Act 2006* (Vic) s 11; *Criminal Law and Evidence Amendment Act 2008* (WA) s 10.

²⁵ See generally, Dallaston and Mathews (n 23), who examine in detail the law in the different Australian jurisdictions as at 2022.

²⁶ *Criminal Justice Report* (n 7) pts III–VI, 18–74.

²⁷ *Ibid* pts III–VI, 68.

²⁸ *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) (n 20). This law came into effect on 1 December 2018. In *Xerri v The King*, the High Court considered the differences between s 66EA as amended, and the previous provision: *Xerri v The King* (2024) 278 CLR 276, 282–3 (Gageler CJ and Jagot J), 294–5 (Gordon, Steward, and Gleeson JJ).

would be necessary if the act were charged as a separate offence. It is only necessary that the prosecution alleges the particulars of the period of time over which the unlawful sexual relationship is said to have existed. The members of the jury are also not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship (ss 66EA(4), (5)(c)). The persistent sexual abuse offence can be proven on the basis of incidents that occurred in the course of the relationship in more than one state or even in another country, as long as at least one of the unlawful sexual acts occurred in NSW (s 66EA(3)). This avoids the complainant having to give evidence in two different trials for no other reason than the geography of the offending.

In *Xerri v The King*,²⁹ the High Court made clear that the actus reus of the offence in NSW is the relationship involving sexual acts, not the specific offences by which that relationship is demonstrated to have existed. As Gordon, Steward and Gleeson JJ explained:

This reflects the work and recommendations of the Royal Commission. That Royal Commission did not suggest a mere reformulation of existing State and Territory offences but a major reform whereby all States and Territories would follow the Queensland model and the focus would not be on the proof of a particular number of individual sexual offences, but on proving a particular kind of relationship.³⁰

C Differences between NSW, Queensland and SA

In their current forms, the laws in Queensland and SA are quite similar to NSW, notwithstanding differences of nomenclature. In all three States, the offence can only be committed by an adult who ‘maintains an unlawful sexual relationship with a child’,³¹ although definitions of ‘a child’ vary.³² The offence has retrospective effect, as long as the acts engaged in by the accused were unlawful sexual acts during the period in which the relationship existed.

The maximum penalty in NSW, Queensland and SA is imprisonment for life.³³ This is a higher maximum sentence than in Tasmania, Victoria and Western Australia.³⁴ When sentencing for the offence, the judge must determine the culpability of the defendant based on all the evidence available concerning the extent and seriousness of the offending, including estimates provided by the complainant/s

²⁹ *Xerri v The King* (n 28). See also *RA v The King* [2024] NSWCCA 149; *R v Lamey* [2025] NSWCCA 17. *Xerri v The King* (n 28) 298 [65], citing *Criminal Justice Report* (n 7) pts III–VI, 66, 68.

³⁰ *Crimes Act 1900* (NSW) (n 1) s 66EA(1); *Criminal Code* (Qld) (n 12) s 229B(1); *Criminal Law Consolidation Act 1935* (SA) (n 12) s 50(1).

³¹ While Queensland, like NSW, defines a child as being under 16 (*Crimes Act 1900* (NSW) (n 1) s 66EA(15); *Criminal Code* (Qld) (n 12) s 229B(1)), in SA, a child is defined for the purposes of this section as under 17 years of age; or under 18 years if, during the period of the relationship the adult was in a position of authority in relation to that person: *Criminal Law Consolidation Act 1935* (SA) (n 12) s 50(12).

³² *Crimes Act 1900* (NSW) (n 1) s 66EA(1); *Criminal Code* (Qld) (n 12) s 229B(1); *Criminal Law Consolidation Act 1935* (SA) (n 12) s 50(1). This is also the maximum sentence in the Northern Territory: *Criminal Code* (NT) (n 12) s 208JI(7).

³³ In Tasmania, the maximum penalty for all offences except otherwise specified in legislation is 21 years (*Criminal Code* (Tas) (n 12) s 389(3)). In Victoria and the ACT, the maximum sentence is 25 years (*Crimes Act 1958* (Vic) (n 12) s 49J(2); *Crimes Act 1900* (ACT) (n 12) s 56(1)), while in Western Australia it is 20 years (*Criminal Code* (WA) (n 12) s 321A(4)).

about the frequency of the unlawful sexual acts to which they were subjected. The nature and frequency of the sexual acts are relevant to the assessment of the objective seriousness of the offence. It falls to the judge, on sentencing, to make the findings of fact proven beyond reasonable doubt and that form the basis of the sentence,³⁵ provided that these are not inconsistent with the verdicts of the jury.³⁶

The SA law is clearest in spelling out that in order to convict of an unlawful sexual relationship, the trier of fact needs only to be satisfied ‘as to the general nature or character of those acts’.³⁷ In *Hamra v The Queen*,³⁸ interpreting an earlier version of the SA provision, the High Court held that the requisite proof of two or more acts for the purposes of the persistent sexual abuse offence can be deduced from acceptance of the complainant’s evidence about undifferentiated offending of a particular kind that occurred on a regular basis.³⁹ So, for example, if the complainant gave evidence that the defendant committed an act of sexual exploitation every day over a two-week period, the trier of fact could reasonably deduce that two or more acts must have occurred over a period of ‘not less than 3 days’, as required by the statute.⁴⁰

D *The Nature of the Relationship*

The need, in all three States, to prove the existence of an unlawful sexual relationship, as opposed to the occurrence of more than one unlawful sexual act, has caused some difficulties of interpretation.⁴¹ The Queensland Court of Appeal has held that there needs to be a relationship that was maintained for some period of time, as opposed to the various offences of a sexual nature being ‘a discontinuous succession of sporadic and isolated incidents’.⁴² In other words, there has to be some continuity or ‘habituality’ of sexual contact.⁴³

In contrast, Kourakis CJ in the Supreme Court of South Australia interpreted the provision as requiring proof beyond reasonable doubt of ‘the existence of a relationship which whilst it subsisted was corrupted, and constituted an unlawful sexual relationship, by the defendant engaging in two or more unlawful sexual acts’.⁴⁴ His Honour has also indicated that the category of relationships falling within the section is not closed, but includes familial, residential, professional, sporting and recreational relationships.⁴⁵

³⁵ This is made explicit in SA: see *Criminal Law Consolidation Act 1935* (SA) (n 12) s 50(11).

³⁶ *MK v The King* [2024] NSWCCA 127. See also *Burr v The Queen* (2020) 285 A Crim R 504.

³⁷ *Criminal Law Consolidation Act 1935* (SA) (n 12) s 50(4)(b).

³⁸ *Hamra v The Queen* (2017) 260 CLR 479.

³⁹ While the offending must consist of unlawful sexual acts, they do not have to be the same kind of unlawful sexual acts: *Criminal Law Consolidation Act 1935* (SA) (n 12) s 50(2).

⁴⁰ *Hamra v The Queen* (n 38) 493 [28].

⁴¹ For an analysis of the law in two states, 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.

⁴² *R v S* [1999] 2 Qd R 89, 94.

⁴³ *R v DAT* [2009] QCA 181, [2] (Holmes JA), quoting *R v Kemp (No 2)* [1998] 2 Qd R 510, 518 (Mackenzie J). See also *R v CAZ* [2012] 1 Qd R 440, 457–8 [46] (Fraser JA).

⁴⁴ *R v M, DV* (2019) 133 SASR 470, 476 [16].

⁴⁵ *R v Mann* (2020) 135 SASR 457, 465 [26].

In *MK v The King*,⁴⁶ a five-member bench of the NSW Court of Criminal Appeal considered the proper interpretation of the word ‘relationship’ in the context of s 66EA of the *Crimes Act 1900* (NSW). Beech-Jones CJ at CL, with whom the other four members of the Court agreed, considered that s 66EA was materially different from the Queensland provision, but in any event viewed the interpretation given to it by the Queensland Court of Appeal as inconsistent with decisions of the High Court.⁴⁷ His Honour preferred the interpretation given by Kourakis CJ in the SA cases and Basten AJA in a dissenting judgment in *RW v The King*.⁴⁸ He wrote that a relationship, for the purposes of the offence, may be an established one, such as parent and child, teacher and student or coach and player; or it may be one that arises from the facts and circumstances of the unlawful sexual acts themselves and what connects those acts.⁴⁹

In the following section, we outline the research methods we used to investigate prosecutorial decisions about the use of the persistent abuse charge in NSW, Queensland and SA.

III Method

This article is based on an analysis of three sets of data from three Australian jurisdictions (NSW, Queensland and SA): interviews with prosecutors, a sample of Office of the Director of Public Prosecutions (‘ODPP’) case files, and data on convictions.

Approval for the research was granted by University of Sydney Human Research Ethics Committee (2019/388), with letters of support for the research by the Director of Public Prosecutions (‘DPP’) in each State.

A Interviews with Prosecutors

We conducted interviews with a purposive sample of 38 prosecutors from three States (16 from NSW, 10 from Queensland, and 12 from SA) who routinely make decisions about child sexual assault cases proceeding or not in each jurisdiction.⁵⁰ They were mostly experienced prosecutors with an average of 12.8 years working in the ODPP (ranging from 3 to 21 years) in different roles. To avoid identification, they will all be termed ‘prosecutors’ without further detail as to their position.⁵¹

⁴⁶ *MK v The King* (2023) 112 NSWLR 96.

⁴⁷ *Ibid* 105, 107–8, citing *KBT v The Queen* (1997) 191 CLR 417; *BBH v The Queen* (2012) 245 CLR 499. Special leave to appeal *MK v The King* (n 46) to the High Court was refused: *MK v The King* [2024] HCASL 62 (5 December 2024).

⁴⁸ *RW v The King* [2023] NSWCCA 2.

⁴⁹ *MK v The King* (n 46) 121 [95].

⁵⁰ Office of the Director of Public Prosecutions (‘ODPP’) prosecutors with a range of responsibilities were invited to participate in the study through internal circular/channels with the approval of the Director of Public Prosecutions in the three States. All were provided with information about the study, provided informed consent and informed that they would not be identified, could stop the interview at any time, and offered the opportunity to receive the transcript, in accordance with University of Sydney ethics approval.

⁵¹ The prosecutors had different titles within and between States that came with different levels of responsibility for prosecutorial decision-making (eg Solicitor Advocates, Managing Solicitors, Crown Prosecutors, Senior Legal Officer, Senior Crown, and Senior Prosecutor).

Semi-structured interviews, conducted by one of four interviewers (authors Cashmore, Shackel, Goodman-Delahunty and Martschuk),⁵² were recorded with the consent of the participants, transcribed verbatim, and de-identified for thematic coding and analysis using NVivo 14.⁵³ Prosecutors were asked a range of questions about the processes and considerations in making decisions whether to proceed in recent finalised cases of sexual assault that did and did not proceed, as well as the consultation process with police and their communication with the complainant/s and their family. The transcripts were coded by two authors and two research assistants with reliability checks to establish consistency/agreement. Quotes have been edited to remove potentially identifying details and improve clarity and readability (for example, to correct grammatical errors).

B Case File Analysis

A purposive sample of 112 ODPP case files in finalised child sexual assault matters was obtained from the three States (47 NSW case files involving 60 complainants; 34 Queensland case files involving 43 complainants; and 31 SA case files involving 49 complainants). The case files were selected by ODPP staff in consultation with the researchers from available matters (mostly finalised in 2018–2021) to provide a range of cases based on the following criteria:

- a mixture of cases in which the decision was made to proceed or conversely not to proceed;
- historical and contemporary matters; and
- matters involving complainants of different ages at the time the alleged incidents occurred.

Charges concerning the ‘persistent abuse of a child’ were considered in 28 cases (25% overall). The accused persons were most commonly fathers or the mother’s partner (see Table 1 below). The complainants (29.6% of complainants in the overall child sexual assault sample) were aged from 3 to 18 years across the duration of the offending and most were female (see Table 2 below). In most cases, the offending progressed from non-penetrative sexualised touching to penetrative offending.

⁵² The interviews were conducted either as individual face-to-face interviews, online by Teams or telephone to fit in with prosecutor schedules and preferences, and to accommodate the prohibition on attending ODPP offices during 2020 and 2021 because of COVID-19 pandemic restrictions. The average interview length was 69 minutes (range: 46 to 115 minutes). The conduct and coding of the interviews accord with COREQ criteria (Consolidated Criteria for Reporting Qualitative Research): see Allison Tong, Peter Sainsbury and Jonathan Craig, ‘Consolidated Criteria for Reporting Qualitative Research (COREQ): A 32-Item Checklist for Interviews and Focus Groups’ (2007) 19(6) *International Journal for Quality in Health Care* 349 <<https://doi.org/10.1093/intqhc/mzm042>>.

⁵³ Four participants did not consent to the audio-recording of their interviews, so the interviewer took notes that were subsequently transcribed.

Table 1: Identity of the accused in the sample ‘persistent abuse of a child’ cases

Identity of the accused	Number
Fathers (biological, adoptive, and stepfathers) or the mother’s partner	16
Grandfathers	4
Family friends	4
Persons in authority (teacher or church leader)	2
Unrelated persons	2
Total	28

Table 2: Gender of the complainants in the sample ‘persistent abuse of a child’ cases

Gender of the complainants	Number
Female (aged 3 to 18 years)	33
Male (aged 5 to 14 years)	12
Total	45

The information extracted from the case files included:

- characteristics of the offence, the complainant, and alleged offender;
- evidentiary factors (presence of corroborating evidence, corroborating witnesses, quality of interview with the complainant);
- case outcome (not proceeded with, plea, acquittal, conviction on at least one charge); and
- reasons to change the indictment or not to proceed, where applicable.

Case file data were de-identified and coded to preserve anonymity and confidentiality.⁵⁴ The cases included matters in which ODPP interviewees were involved, but the analysis did not attempt to match the interviewees with information from the case files.

IV Thematic Analysis of Interviews with Prosecutors and Case Files Analysis

The focus of the analysis was on the interviews in which prosecutors made comments concerning aspects of prosecuting the persistent sexual abuse offence and the case files in each jurisdiction where a persistent sexual abuse offence was charged or considered.

⁵⁴ Thorough and time-consuming extraction of data from the case files was conducted by a team of trained research assistants in each State and entered into comprehensive Excel spreadsheets that contained summary notes and narrative. Access to case files was approved by the Director of Public Prosecutions in each State and all data extraction was conducted in ODPP offices — no case files or copies were removed from ODPP offices. ODPP staff provided guidance as to the structure of the files and interpretation of nomenclature and abbreviations.

The interviews and examples from case files indicated significant differences in NSW's approach to the persistent sexual abuse offence compared with that in Queensland and SA, notwithstanding the substantial amendments to the law made by the NSW Parliament in 2018 with the goal of making it easier to gain a conviction on the basis of this charge.

A *The Requirement for Approval by the Director of Public Prosecutions*

In NSW and Queensland, the charge requires the approval of the Director of Public Prosecutions.⁵⁵ One prosecutor in Queensland thought the reason for needing the Director's approval was because of 'the seriousness of the charges' (Prosecutor 24 (Qld)). South Australian law has no such requirement, although it had this when first enacted.⁵⁶ The Royal Commission's model provision did not include a requirement for the Director's approval.

Prosecutors in both NSW and Queensland indicated that gaining the Director's approval was not, in itself, a problem:

I don't think anyone's concerned about sending that up the line, and that goes for police or DPP people. Because sometimes police will indicate that they would like that charge considered, and other times, it's something that comes more internally from the Office.

(Prosecutor 11 (NSW))

The process is that the case for the persistent sexual abuse offence would be set out in a Memorandum that would make its way to a senior prosecutor and then to the Director:

Obviously with child sex offending kind of matters, in Queensland we have like an overarching charge of 'maintaining', which is like an ongoing relationship. That decision is ultimately one for the Director of our office. So, if I have a matter and it looks like there's a habitual ongoing relationship, like, for example, often we hear stuff like the child will say 'It happened every time'. 'Every time they came over, he would do this'... If we see that and we think that a charge of 'maintaining' should be pursued, then I draft a memorandum identifying all the relevant evidence to support such a charge, then that goes up to my superior officer ... And then if they agree that a 'maintaining' charge should be pursued, it then goes up to our Director and the Director makes the ultimate decision as to whether or not that charge should be there.

(Prosecutor 24 (Qld))

Only one prosecutor (in NSW) reported that approval was declined. That was, as it happens, the only time she had put up that charge for approval.

Because charging the offence requires the approval of the Director, it is not a charge that can be laid by the police. In the DPP's office, multiple specific charges may be wrapped up in a 'persistent sexual abuse' charge or the charge is added when

⁵⁵ *Crimes Act 1900* (NSW) (n 1) s 66EA(14). In Queensland, the legislation refers to the need for approval of a Crown Law Officer: *Criminal Code* (Qld) (n 12) s 229B(6).

⁵⁶ Dallaston and Mathews (n 23) 105.

it becomes clear to the prosecutor on reviewing the video of the police interview with the complainant, that the charged incidents are part of a larger pattern of sexual abuse:

... because sometimes it can even be things like the charges are three counts of rape and some charges of indecent treatment. And we watch the video recording of the child and some of the language they use and some of the references they make give rise to us thinking that maybe it's better done as a 'maintaining', which is 'maintaining a sexual relationship with a child', which is another charge. So often, we have to consider that, because sometimes kids will say in their interview something like, 'It would always be in my bedroom,' or something. And we go, 'Well, what do you mean by always? Does that mean on the three occasions on an isolated charge, or is it something that's happening regularly?'

(Prosecutor 21 (Qld))

However, one of the issues about requiring the Director's approval is that this means the police do not lay the charge, and they may not have elicited the evidence from the complainant with this charge in contemplation:

And I would have thought it's a pretty basic thing for me if it's an ongoing sexual abuse case, start at the beginning, what's the first time you can remember? When was the next time? They just don't seem to go through that, they jump all over the place ... then they forget to go back and get that specific of what happened on that first occasion. It's training, I think.

(Prosecutor 01 (NSW))

One consequence of that is that the complainant may have to be re-interviewed. One prosecutor in Queensland estimated that re-interview was necessary in about one in every ten cases she dealt with, and one reason was because she was considering a 'maintaining' charge:

It's not all the time, maybe one in every — yeah, maybe one in every 10 and again, sometimes it's clarification of something. Sometimes it's ... I am of the view that this matter might be a 'maintaining' charge, so we need to specifically address with the child how often these things are happening and where and when and all that sort of stuff.

(Prosecutor 21 (Qld))

Another prosecutor found variations in the quality of police interviews in different parts of Queensland where she worked:

The police officers I dealt with in [xxx] ... were really good at getting out the detail of the regularity to support a charge like that. So, they were good at thinking ahead about what they would charge, while they were talking to the child, and asking questions to work around that. Here, I've found that it varies depending on the police officer. And sometimes you do have to go back and ask for another interview to be done, to get better information out.

(Prosecutor 20 (Qld))

B *The Utility of the Charge*

A limitation on the utility of this charge has been that the notion of ‘maintaining an unlawful sexual relationship’ implies some degree of continuity in the offending between time A and time B (the alleged duration of the relationship). A long interval between incidents of sexual abuse may make it difficult to prove the maintenance of a sexual relationship. Two prosecutors explained:

I can think of a matter recently where the solicitor with carriage raised a question of whether we should [charge the persistent sexual abuse offence]. In that particular case, he raised the question because the complainant, on her own evidence she said, ‘He offended against me in this way on a couple of occasions’. Then there was a gap in time of some years where nothing happened. Then he started offending against me again in a different way ... But when I looked at the test if you like for proving that offence or proceeding with that offence as opposed to identifying particular offences, it seemed to me that we couldn’t prove ... the maintenance of the relationship.

(Prosecutor 12 (NSW))

It’s just a matter of confirming whether or not the charges are the best ones and ensuring that we’ve got someone who’s been regularly and consistently offending against a child for a period of time. So, we want to make sure that we are charging them with a ‘maintaining’ as opposed to isolated event because that’s the most appropriate charge for offending of that nature.

(Prosecutor 21 (Qld))

Case 27 (NSW) illustrates how a lack of continuity in the offending may affect the decision to lay the persistent sexual abuse charge. In this case, a father admitted to offending against his two daughters. Some of this offending had occurred in another country, prior to the family moving to Australia. Three charges of indecent assault on a person under 16 were brought by police, two of them involving the complainant and the other involving another child. The charge concerning the second child was dropped. The accused said he was intoxicated at the time and could not offer much of a recollection, and the child was unable to provide details sufficient to sustain the charge.

The prosecution considered a s 66EA charge in relation to the first complainant, and this was the subject of memoranda going up to the Director’s office. An advantage of laying this charge was that the most serious offence had occurred in the other country. This could not, on its own, be the basis of a charge in NSW; but it could be included under s 66EA(3) as a sexual act that supported the charge of having an unlawful sexual relationship. The prosecutor who recommended a s 66EA charge also considered that the charges that could be particularised in NSW were ‘not capable of adequately reflecting the accused’s criminality’. The recommendation to charge under s 66EA was supported by two more senior members of the ODPP. However, a senior legal adviser did not support the charge. Her view was that the conduct could ‘equally, if not more appropriately be described as opportunistic, inappropriate behaviour in circumstances where the accused clearly had the opportunity to offend against the complainant more frequently and more explicitly but did not’. The relationship created the offending opportunity, but the father did not exploit that opportunity on a regular basis. The senior legal adviser

also had concerns about laying the more serious charge given that the mother and child victim were not supporting the prosecution. The Deputy Director declined to support the charge, citing the Queensland authorities concerning the need for the sexual relationship to be ‘maintained’ for a period of time and to be habitual. It followed that the offending did not satisfy the element of persistence contained in the name of the charge.

There are nonetheless various reasons why, in many cases, a persistent sexual abuse charge was preferred either on its own, or as an alternative to specific charges.

1 *Allowing for Less Specificity in the Complainant’s Account*

Prosecutors across the three States had a similar understanding of the utility of the offence to address situations where it is very difficult for the complainant to identify particular offences. A complainant might say something like ‘he would do this over and over again’, without being able to differentiate clearly one episode of abuse from another. However, prosecutors did stress that there was a need for some specificity in relation to two or more incidents:

Notwithstanding that there is that exception that allows for some degree of non-specificity, the prosecution is still required to identify with some precision the specific occasions or specific types of acts that are being alleged by a child.

(Prosecutor 34 (SA))

I think the biggest challenge with those matters [with survivors] is explaining to them that we need — when someone’s been sexually assaulted over and over again, the way they tell — the way they talk about that is it would’ve happened — you know, it would’ve happened in the bedroom. It always happens like this. And we need people to be concrete about particular events in a way that I think the mind struggles with. Because if, you know, you’re five and six, and something’s happening all the time, there’s nothing to pick out to say, ‘Well, this was the day that I was wearing this or I was doing this.’ And we have to be quite clinical about it, and say ‘I can’t — we have difficulty prosecuting cases where someone just says, ‘That happened all the time’.

(Prosecutor 09 (NSW))

Prosecutor 09 (NSW) recognised that the 2018 changes to the law in NSW had made prosecution in these circumstances easier, but ‘we still need people to talk about individual events rather than the things that would’ve happened all the time’. The problem of lack of particularisation is illustrated by Case 7 (SA), which was a case of abuse of two sisters. The older girl alleged being regularly abused from the age of 11 years, and the younger one from 8 or 9 years. Initially the accused, their stepfather, was charged with two counts of indecent assault. The complainants could not specify the exact incidents when they were abused, but rather outlined that they could recall the offending occurring almost every night; so the charge was changed to two counts of persistent sexual abuse.⁵⁷

Case 4 (SA) illustrates how individual charges may need to be abandoned in favour of pursuing just the persistent sexual abuse offence. The complainant was

⁵⁷ Both children were reluctant to give evidence, and the jury eventually acquitted the accused.

sexually abused by her natural father (with whom she did not live) on contact visits. The offences occurred when she was aged between 10 and 12 years. Initially, the accused was charged with four counts of aggravated indecent assault with a person under the age of 14 years, six counts of unlawful sexual intercourse with a person under the age of 14 and one count of aggravated assault of a person under the age of 12. A number of these charges were subsequently dropped, as the complainant could not provide adequate detail. Shortly before trial, the prosecutor decided to change the sexual offence charges to just one count of persistent sexual abuse. The reason was that the complainant was conflating incidents. The charges were initially laid on the basis that the complainant would be able to articulate the charges separately, however, her account was of ongoing similar offending.⁵⁸

2 *Lack of Specificity about the Time Period*

The persistent sexual abuse offence is particularly useful when the child cannot provide sufficient information about dates even in quite broad terms (such as, a calendar year or what age s/he was when the event occurred).⁵⁹ In Case 23 (SA), a father sexually abused his daughter continuously between the ages of 4 and 17 years. The trial judge concluded that the abuse had occurred on approximately a weekly basis while the parents were living together. It occurred less often when the parents had separated and she was seeing her father only one weekend per fortnight. While the prosecution could identify ten specific occurrences to prove the persistent sexual abuse charge, it laid only this one charge since the complainant could not be sufficiently specific about the dates of these specific occurrences of abuse.

Case 17 (Qld) illustrates how a persistent sexual abuse charge may be the only realistic one, given the limited capacity of a child to give evidence about individual incidents of abuse. In this case, the child was aged between 2 and 4 years at the time of the offending, and she disclosed to her mother when she was 4. She was aged 6 years at the time of trial. The accused was her father, with whom she stayed once per month. The allegations were that when the complainant would stay with the defendant, he would either have a bath with her or bathe her and then take her to his bedroom. He would then pat her dry with a towel and proceed to conduct unlawful sexual acts on her. Originally, the police laid nine charges concerning individual incidents of abuse. However, after consideration, the ODPP charged only one offence — the persistent sexual abuse offence. This was because, while the complainant particularised the nature of the alleged offending quite well, she was unable to provide specificity in terms of the approximate timeframe of the offences. In the end, the accused was acquitted by the jury on the persistent sexual abuse charge.

⁵⁸ The outcome of the case is not known as the trial had not been held at the time of the file review.

⁵⁹ Identifying the time period within which the offences occurred is a significant challenge for children. Details about the year or one's age are not sensory inputs that form episodic event memories, so those details are inaccessible from an episodic event memory trace, and have to be imputed from socially acquired knowledge. That cultural knowledge may not be gained until later when a child learns the calendar, and how to tell time. These memory inferences are vulnerable to error so the presence of dating errors should not be used to discredit accounts of what happened: Thanujeni Pathman, Lina Dekker, Christine Coughlin and Simona Ghetti, 'Examining Temporal Memory and Flexible Retrieval of Conventional Time Knowledge across Middle to Late Childhood' (2022) 23(4) *Journal of Cognition and Development* 571 <<https://doi.org/10.1080/15248372.2022.2072846>>.

It is important for the prosecutors to identify with particularity and accuracy the overall time period within which the abuse occurred, since this is a necessary element of the charge of persistent sexual abuse. Prosecutor 19 (Qld) referred to having prosecuted a case where the jury could not agree whether the accused was guilty or not. During cross-examination, the complainant had said at one point that she was 7 years old when certain events happened, and later that she was 9 years old.⁶⁰ The prosecution had charged in relation to her being aged 8, and consequently the judge, in summing up, instructed the jury that they might be satisfied that the abuse occurred at some time, but considered it might have been outside the relevant date range; that is, when she was 8.

3 *Avoiding the Burden of Giving Evidence on a Multiplicity of Charges*

Another use given by prosecutors for the persistent sexual abuse charge was to avoid the complainant having to give evidence about a large number of incidents, even if he or she could remember many with sufficient detail for the police to lay individual charges. This could help to lessen trauma for complainants. Two Queensland prosecutors observed:

There is definitely great advantage of using that offence because sometimes we'll have cases come in, you know, they'll be 20, 30, 100 charges of particular things laid by the police. Thinking about how that plays out as a trial, that can be quite difficult for a victim to be able to go through each and every incident, but if you've got this sort of catch-all approach it's definitely much easier for them in my experience. It's easier for us to present the case. It's easier for the jury to decide the case pending and in Queensland it's more likely to attract a more significant sentence I think too.

(Prosecutor 19 (Qld))

I think they're easier, only because you're not proving each individual charge and each individual day, and things like that. You've got — I mean they're definitely, they're more complex in terms of how much information they have, but in comparison, if you've charged 20 or 30 different counts, depending on different dates, then you've got a lot that your child has to come up to proof on.

(Prosecutor 20 (Qld))

4 *Plea Negotiation*

Another way in which the offence may be useful — although it is not a reason to lay this charge — is that it may result in an acceptable plea agreement, which has the benefit that the complainant is not required to testify. The offence carries a maximum life sentence, and so lawyers for the defence may offer a guilty plea to individual charges that carry lower maximum sentences:

⁶⁰ This is a quite common 'telescoping' temporal error made by children. They may think they were older at the time of remembered events than they actually were: see Carole Peterson, Qi Wang, Darcy Hallett, Sophie Bartlett, Amanda YF Ma, Melissa M MacKay, Emma J Pretty, Luciana Viscarra and Elaine Y Wang, 'Dating Early Memories: When Did Events *Really* Happen?' (2024) 71 *Cognitive Development* 101489, 1–10 <<https://doi.org/10.1016/j.cogdev.2024.101489>>.

They'll say, 'Look you're charged with maintaining a sexual relationship with a child — we will plead to two counts of unlawful sexual intercourse'. So if we get an offer of that nature that we think is reasonable, then that's when we would let the police know that we have that offer and the Witness Assistance Officer — we'll let them know as well that we have that offer, and then we'll consult with the complainant about that.

(Prosecutor 29 (SA))

That may, however, just be a negotiating tactic:

There are also people who will absolutely try it on and try and get you to agree to taking three counts of gross indecency instead of three counts of persistent sexual exploitation. ... Always consistent is that we get the views of our police officers and our complainants at a time when we feel like there's properly something on the table.

(Prosecutor 32 (SA))

Another SA prosecutor, however, commented that they rarely get pleas in child sex cases because there is the likelihood of a jail term, and it may be better for the defendant to take 'a commercial decision to roll the dice' (Prosecutor 31 (SA)). Even in an ongoing sexual abuse case, 'a plea will reduce the period of time in jail, but you're still looking at big, big numbers' (Prosecutor 31 (SA)).

Notwithstanding these doubts about defendants' willingness to engage in plea negotiations, the sample of case files provides numerous illustrations of successful negotiations. Where prosecutors offered or accepted a plea, there were cogent reasons for doing so, not least that they had doubts about the complainants' capacity to manage giving evidence.

In Case 30 (NSW), a s 66EA charge was supported by the Director, but eventually dropped as part of a plea agreement. In this case, the complainant reported that her stepfather had sexually abused her about twice per week over the period when she was aged between 8 and 10 years. This abuse included penile-oral and penile-vaginal intercourse. For the most part, the complainant was unable to provide details of the assaults involving sexual intercourse. There were also certain other difficulties with her evidence, not least that at one stage she had told a counsellor that a written note disclosing abuse by 'dad' was referring to her natural father, a claim she subsequently retracted. She had, in fact, been abused previously by her natural father when she was younger, which led to her removal from his care. The senior legal adviser supported the s 66EA charge:

Chambers has consistently taken the view that this maintenance [of the relationship] is also a discrete element of the new NSW offence. I agree that sexual intercourse with a child once or twice a week over the course of two years is sufficient to establish that a sexual relationship was maintained, despite the fact that there is (at present) no other evidence about what sort of relationship the accused and the complainant had or any other conduct by him towards her during that time... .

Despite the fact that this complainant can particularise some offending, she cannot do so in relation to the vast majority of the offending conduct. In my view, that falls within the scope of prosecutions that were considered when the section was enacted.

The accused was charged with individual incidents of abuse in the alternative — s 66A (sexual intercourse with a person under 10) and s 61M(2) (aggravated indecent assault). After a brief negotiation, the accused offered to plead guilty to two counts under s 66A and one count under s 61M(2) with one further count under s 66A and one further count under s 61M(2) placed on a Form 1.⁶¹ The guilty plea was made in exchange for the prosecution dropping the charge under s 66EA(1), but with the condition that the agreed facts reflect the ongoing nature of the sexual abuse. The plea proposal was approved by the Director. The defendant was subsequently sentenced to imprisonment for 11 years.

Plea negotiation also occurred in Case 34 (NSW). In this case, the alleged abuse had occurred at a school run by a religious order, of which the accused was, at the time, a member. The complainant was aged between 10 and 13 years at the time of the incidents, which were of frequent and ongoing indecent assaults. The accused had been convicted previously of indecent assaults against other boys. The complainant had difficulty in particularising individual incidents. For this reason, the Director approved a s 66EA charge on advice from a senior legal adviser that while this charge is used only where the victim cannot give sufficient particulars to charge individual offences, the level of generality in the complainant's account was such that the individual offences may not be able to be proven.

The accused, who was representing himself, initially rejected the prosecution's offer in relation to two individual counts before the trial but pleaded guilty to these two lesser charges on the second day of the trial.

Case 14 (SA) provides another example. The father was originally accused of maintaining an unlawful sexual relationship over a 6-year period. He masturbated in his son's presence, and on various occasions incited or procured the son to masturbate. He also placed his erect penis against the son's back, and caused the child to watch pornography. He tried to get his daughter to engage in masturbation as well. The trial prosecutor proposed amending the charges to one charge of gross indecency in relation to the son and one count of attempt to procure an indecent act in relation to the daughter. The prosecutor was prepared to proceed on this basis after forming the view that the complainants' needs were better met by acknowledgments and taking responsibility, rather than imprisonment. He outlined that it would be significant to the complainants if the accused was prepared to admit the conduct, that it was wrong and caused harm, and thus give the complainants the chance to have their say about the impact through the sentencing process. The accused pleaded guilty to these charges and was put on the maximum three-year good behaviour bond.⁶²

⁶¹ In proceedings for a principal offence, a prosecutor may file in court a list of further offences in an approved form (Form 1) for which the offender has been charged but not convicted and which the offender wants taken into account on sentence for the principal offence: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 32(1); *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 4. The inclusion of offences in Form 1 can be useful in plea negotiations both for the prosecution and the defence.

⁶² This approach reflects tenets of a successful NSW victim-centred treatment program for offending fathers where the focus is on their acceptance of responsibility, facing up to the child victim, and eventual restoration of relationships: Dale Tolliday, Jo Spangaro and Lesley Laing, *Therapy with Harming Fathers, Victimized Children and their Mothers after Parental Sexual Assault: Forging Enduring Safety* (Routledge, 2018); Jane Goodman-Delahunty, *The NSW Pre-Trial Diversion of*

C *Options to Charge the General Offence and Specific Incidents*

There is not necessarily a choice to be made between the ‘umbrella charge’, as one prosecutor called it, and specific charges — both may be utilised:

No, I think it comes down to — for me when I’m preparing them, I often consider ‘maintaining’ like an umbrella charge, which is probably a really bad way to describe it, but it’s one of those things that cover everything. So you might have actual specific incidents in the indictment, so we’ll have ‘maintaining’ as always count one, and then you’ll have several counts of actual incidents where they remember. Like, ‘Oh, the time Mum went to the shops’, or ‘When we were watching a Cinderella movie’. And so you’ll have those because you can actually particularise them, and there’s other evidence that you might be able to get to corroborate.

(Prosecutor 24 (Qld))

The law in NSW, Queensland and SA differs, in certain respects, in how to deal with the potential overlap between the offence of maintaining a sexual relationship and specific offences that might be proven to have occurred during the period of time in which that sexual relationship is said to have occurred. In Queensland, it is possible to be convicted both of the sexual relationship offence and one or more unlawful sexual acts, but the court imposing a sentence of imprisonment may not order that the sentence for the sexual relationship offence be served cumulatively with the sentence applicable to the unlawful sexual act. For example, in Case 30 (Qld), an 8-year-old female complainant disclosed to her mother that the paternal grandfather had rubbed his fingers on her vagina on multiple occasions over the previous 15 months. The accused had a criminal history of attempted rape in 1984 for which he was convicted. He was charged with four charges of indecent treatment. The DPP added one further charge of maintaining an unlawful sexual relationship with a child. The accused pleaded guilty and was sentenced to four years’ imprisonment.

In NSW, a person cannot be convicted of both a sexual relationship offence and an unlawful sexual act in relation to the same child if it is one of the unlawful sexual acts that allegedly constituted the unlawful sexual relationship.⁶³ However, NSW provides specifically for alternative verdicts so that even if the defendant is acquitted of the sexual relationship charge, they may be convicted of one or more identified unlawful sexual acts.⁶⁴

In SA, a person may be convicted both on the sexual relationship offence and a specific sexual offence occurring in the same time period, as long as they are charged in the same indictment.⁶⁵ The offences may also be charged in the alternative. For example, in Case 3 (SA), the complainant alleged sexual abuse by her father from the ages of 8 to 18 years, at which time she became pregnant by him. There was a period of a couple of years in that time when the father did not sexually assault her as he was in an online relationship. However, the abuse recommenced

Offenders (Child Sexual Assault) Program: An Evaluation of Treatment Outcomes (Evaluation Report for Sydney West Area Health Services, Charles Sturt University, 2009).

⁶³ *Crimes Act 1900* (NSW) (n 1) s 66EA(9).

⁶⁴ *Ibid* s 66EA(13).

⁶⁵ *Criminal Law Consolidation Act 1935* (SA) (n 12) ss 50(7)–(9).

when she was 16, the father having sexual intercourse with her regularly on school nights and sometimes on weekends. The prosecution eventually decided to charge one count of maintaining an unlawful sexual relationship with a child and, in the alternative, four counts of unlawful sexual intercourse by a person in a position of authority with a person under 18 years, all of which were referable to specific occurrences when she was 16 years or older. The reason for having the alternative charges was that the prosecution was not confident that it would be accepted that the unlawful sexual relationship had been continuous, given the break in offending. The accused eventually pleaded guilty to the unlawful sexual relationship charge, with the consequence that the alternative charges were dismissed.

The SA case files indicate different views about charging the persistent sexual abuse offence and laying specific event charges in the alternative. Some prosecutors did lay charges in the alternative. Others considered laying charges in the alternative was unnecessary if there was sufficient evidence to support several individual event charges. Case 9 (SA) is illustrative of the value of having a persistent sexual abuse charge. In this case, the accused allegedly abused two children (who were unrelated to one another) at different points in time. The prosecution laid four specific incident charges in relation to the first child as she was able to give sufficient details. A persistent sexual abuse offence was charged in relation to the second child as she could not provide sufficient detail of specific events. The accused was acquitted on the charges of abuse of the first child but convicted of the persistent sexual abuse offence in relation to the second child. The accused had a prior criminal record of such offending.

D *Choosing the Most Appropriate Charge*

The predominant view in Queensland and SA would appear to be that prosecutors should choose the persistent sexual abuse charge whenever that is the most appropriate description of the criminal behaviour, and particularly in circumstances where the abuse was so frequent that the complainant could not recall many specific events:

[I]f the facts of the case tend to support the relationship offence, as opposed to individual counts, then we would charge the relationship offence. And then also, though, if the police might have initially charged maybe one or two specific incidences, we would look at the interview — if there were more specific incidences, we could allege them as other specific counts, or we might allege the relationship offence and allege all of the conduct under the relationship offence.
(Prosecutor 37 (SA))

I've had a matter recently where we didn't pursue 'maintaining' because she was able to just identify several distinct offences, whereas in charges of 'maintaining' you might have a few actual incidents they can remember, but because it was happening so frequently it's more of a 'Oh, this happened every time, or every month, or every week'. So that charge is to try and encapsulate that kind of offending. ... I don't think we shy away from the 'maintaining' charge because of any concerns of difficulties or anything like that. It's just whether or not the charge is appropriate, and if it reflects the type of offending that the complainant has alleged, and if it does meet that criteria then we will proceed upon it.
(Prosecutor 24 (Qld))

An illustration of this is Case 16 (SA). An adoptive father abused the child when she was aged between 3 and 12 years. She complained in mid-life as an adult. The DPP solicitor recommended that nine counts of indecent assault be charged due to the fact that the complainant could recall nine specific incidents of abuse with detail. The prosecutor decided, however, to charge the persistent sexual abuse offence because much of the offending had occurred in a similar way, all of which the complainant had attempted to block out. Further, many of the specific offences occurred when the complainant was aged between 3 and 6 years, which made the prosecutor sceptical of how reliable her memory would be. The accused pleaded guilty to the persistent sexual abuse charge.

E *A Preference for Particularised Charges*

Prosecutors in all three jurisdictions did, in some cases, choose to charge specific offences even when the persistent sexual abuse charge could have been utilised. Usually this was because the complainant could describe a few occasions in sufficient detail to support specific charges. Case 5 (Qld) is illustrative. A father sexually abused his daughter in a variety of ways when she was aged 15 or 16 years. The incidents occurred over a period of about a year. The prosecution charged him with a total of seven offences: rape; grooming; four incidents of indecent treatment of a child under 16; and a charge of supplying a dangerous drug to a minor. The accused pleaded guilty after plea negotiation in which the rape offence was reduced to a charge of indecent treatment. It is likely that the accused committed more offences than he was charged with, since the complainant indicated that she could not recall all incidents of his offending clearly. However, the persistent sexual abuse charge was not considered.⁶⁶

Another reason for not using the charge was that another offence could readily be proven that carried a similar maximum sentence. For example, in Case 13 (Qld), the accused was the mother's long-term male partner. He sexually abused one of her daughters, who fell pregnant to him at the age of 12 years and had the baby. She estimated that they had had sexual intercourse about 20 times. He was charged with four counts of incest.⁶⁷ An offence of an unlawful sexual relationship was not considered by the prosecution. The incest offence was clearly proven by genetic testing of the baby, and the maximum penalty for incest is, as with the persistent sexual abuse offence, life imprisonment. The accused pleaded guilty and was sentenced to imprisonment for 5 years and 6 months.

There was nonetheless a clear difference between the approach in NSW and that in the other two jurisdictions. In NSW, there seems to have been a strong preference for charging specific offences wherever possible.

Several NSW prosecutors recognised that the amendments to s 66EA had made it easier to prosecute on the basis of this charge:

⁶⁶ The charges in this case were settled in 2018–19, on the basis of the law as interpreted by the Queensland Court of Appeal in *R v S* (n 42).

⁶⁷ Under s 222 of Queensland's *Criminal Code*, a person can be guilty of incest by being a step-parent, and 'a reference to a step relationship includes a relationship corresponding to a step relationship arising because of cohabitation in a de facto relationship': *Criminal Code* (Qld) (n 12) s 222(6).

Well ... that actual section has changed recently. Before, the office, more often than not, took a view that if individual offences could be made out and properly particularised, then we would proceed with discrete charges. But this [s 66]EA is quite different to the old EA, and I am seeing it a little bit more than we used to. I think this new EA's got a lot of benefits, so I think we'll probably be using it a bit more.

(Prosecutor 04 (NSW))

... the newer section requires only two events rather than three, but in the past, they were quite rare in my experience, but now I see more of them.

(Prosecutor 11 (NSW))

Even so, in NSW, it was clear from the interviews that there was a strong preference for individual offence charges where those could be sufficiently particularised:

We always try to have a strong indictment with the greatest chance of success, and in some situations, you are going to have a clear cut, or a better case, for a particular charge and a decision is taken on that basis.

(Prosecutor 02 (NSW))

[If] they could particularise those offences on those occasions then that's the preferable course.

(Prosecutor 12 (NSW))

This appears to reflect a longstanding policy in the NSW ODP, and the intentions of NSW Parliament in enacting the 2018 reforms. In the Second Reading Speech for the Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018 (NSW), the Attorney-General said:

As is currently the case, prosecutions for this offence will require the approval of the Director of Public Prosecutions. This will ensure the offence is only used where the victim cannot give sufficient particulars to charge individual offences.⁶⁸

Another explanation for choosing the s 66EA charge, given by a NSW prosecutor, was to ensure the charges reflected the extent of the offending behaviour over a period of time (Prosecutor 11 (NSW)). She explained that if the particular offences sufficiently captured the level of criminality, then she would prefer to charge whatever number of offences that the complainant could particularise, but the persistent sexual abuse offence would be considered in cases where the charged offence has not 'sufficiently covered the criminality'.

The prosecutor went on to contrast two situations. The first is where a child reports abuse over a number of years but can remember only one or two events over that period. In that instance, she would see the persistent sexual abuse offence as appropriate. However, in a second scenario where the complainant reports abuse over the same number of years but might be able to remember say '15 particular occasions', then her preference would be to charge individually. In circumstances where the child was under the age of 10 years at the time of the abuse, then maximum

⁶⁸ New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 June 2018, 5 (Mark Speakman, Attorney-General) <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-102474>> ('Second Reading Speech').

penalties of 25 years' or life imprisonment would already be applicable, so nothing would be gained by charging s 66EA as representing a more serious matter.

Further insights into the differences in the use of the persistent sexual abuse offence can be gleaned from statistical data on the use of this charge.

V State Trend Data

It is clear that the reforms made to s 66EA in NSW, and which came into effect in December 2018, have been a catalyst for a much greater number of prosecutions under this section. For the calendar years 2008 to 2023 inclusive, 42 convictions were recorded under the old version of s 66EA (Figure 1). Under the new section, with charges from 1 December 2018 to the end of 2023, there were 87 convictions (Figure 1). However, the number of convictions for persistent child sexual abuse offences remains very few when compared with Queensland and despite Queensland's much smaller population.⁶⁹

Figure 1: Convictions on persistent sexual abuse charges, NSW and Qld 2016–2023⁷⁰



⁶⁹ Queensland had a population of nearly 5.6 million as at 30 June 2024 compared with nearly 8.5 million in NSW: Australian Bureau of Statistics, *National, State and Territory Population* (Catalogue No 3101.0, 12 December 2024) <<https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/jun-2024#states-and-territories>>.

⁷⁰ Data for Figure 1 provided by the Judicial Commission of New South Wales and the Queensland Office of Public Prosecutions.

VI Discussion

Our study shows that the persistent sexual abuse offence has been used in NSW, Queensland and SA for a number of different reasons. It has great utility in helping overcome the evidential difficulties created by the problem that some children have in particularising individual instances of sexual abuse. From that point of view, it has been a significant reform, making it more likely that a prosecution will succeed.⁷¹ However, the utility of the offence from the prosecution's point of view is not limited to those cases in which the complainant cannot provide sufficient detail of individual incidents or identify a particular time period within which the abuse occurred. It is useful also when some of the offending occurred in another jurisdiction,⁷² and to avoid witnesses having to give evidence on a multiplicity of charges.⁷³ It has also been a catalyst for successful plea negotiations, avoiding the need for the child to give evidence at trial.⁷⁴

Our study also shows that the views of prosecutors vary on when use of the charge is warranted, and there are particular differences between practices in NSW and the other two jurisdictions.⁷⁵ Notwithstanding the legislative changes in 2018, which resulted in NSW law being similar to that in Queensland and SA,⁷⁶ NSW remains conservative about the use of this charge in comparison with the other two jurisdictions.⁷⁷ This is borne out by the statistics in Part V above. Even if a s 66EA offence is charged, it might well be dropped if the defendant is prepared to plead to charges based on individual incidents. The persistent sexual abuse charge tends to be reserved for cases where the complainant may not be as likely to come up to proof if specific counts are charged.

In Queensland and SA, by way of contrast, the persistent sexual abuse charge is used much more readily. Specific charges will sometimes be laid even when it would be open to the prosecution to charge the persistent sexual abuse offence; but this is more likely to occur in circumstances where the specific charges carry heavy maximum penalties in any event, or where to do so adequately addresses the level of criminality.⁷⁸

A *Different Approaches to the Use of the Persistent Sexual Abuse Offence*

1 *A Concession to the Prosecution*

This continuing preference in NSW for charging individual incidents of abuse even when there was ongoing sexual abuse over a long period of time reflects a view, expressed also in the Attorney-General's Second Reading Speech introducing the changes to s 66EA, that the charge is to be used only 'where the victim cannot give

⁷¹ See above Part IV(B)(1)–(2).

⁷² See above Part IV(B), Case 27 (NSW).

⁷³ See above Part IV(B)(3).

⁷⁴ See above Part IV(B)(4).

⁷⁵ See above Part IV(E).

⁷⁶ See above Part II(C).

⁷⁷ See above Parts IV(E), V.

⁷⁸ See above Part IV(D)–(E).

sufficient particulars to charge individual offences'.⁷⁹ This was also the rationale given for requiring DPP approval for the charge being laid.

This approach to the use of the charge could be characterised as the 'evidential deficit' approach. That is, Parliament has permitted the use of this charge as a concession to the prosecution in cases where the complainant cannot sufficiently particularise the offences and differentiate one occasion from another, while recognising that to allow such a charge represents a diminution in the exacting standards otherwise required to convict an accused of serious criminal misconduct.

On this view, the persistent sexual abuse charge involves some sacrifice of fairness to the accused and so should be used only when necessary and when justified by the perceived gravity of the offending behaviour. The sacrifice of fairness to the accused arises from three factors.⁸⁰ First, the existence of an ongoing relationship can be proven by particularising only two unlawful sexual acts, and even where more sexual acts are particularised, there is no need for the jury to agree on which sexual acts form the basis of the proof. Second, those unlawful sexual acts do not need to be particularised with the same level of detail as would be necessary for the jury to be satisfied of guilt were the act charged as a separate offence. This makes it more difficult for the accused to cast reasonable doubt on whether the incident occurred due to lack of detail or inconsistencies in the complainant's account of that detail. Third, from two proven sexual acts it is inferred that the overall narrative of the complainant, which might involve an account of regular sexual abuse over a period of years, should be accepted for sentencing purposes. This is subject to two qualifications only: the narrative can only be accepted to the extent that this is consistent with the jury verdict, and the sentencing judge must disregard alleged incidents about which there is a reasonable doubt.

2 *Addressing the Accused's Level of Culpability*

A quite different rationale for the offence is what might be called the 'additional culpability' approach. That is, the charge should be used in circumstances where charging individual incidents of abuse does not properly capture the level of criminality involved in the overall conduct of the accused.⁸¹ Convictions for three or four individual sex offences will no doubt lead to a substantial sentence of imprisonment in almost all cases, but if the real level of offending, accepting the complainant's narrative, is of say 50 such unlawful sexual acts over a period of three years, then convictions on the three or four occasions that can be sufficiently particularised would not adequately convey to the sentencing judge how serious and persistent was the accused's offending.

In support of this approach, the maximum sentence in NSW, Queensland and SA is life imprisonment. While some individual offences, particularly those involving a child aged under 10 years, may carry very high maximum sentences, the charge could be used to encapsulate a large number of offences of indecent assault

⁷⁹ See above n 68 and accompanying text.

⁸⁰ See above Part II.

⁸¹ See, eg, Part IV(B), Prosecutor 21 (Qld).

or acts of indecency that on their own involve lower maximum penalties, resulting in a heavier sentence than would otherwise be the case.

On this view of the role of the persistent sexual abuse offence, if the accused is already being charged with offences that carry maximum sentences of 25 years or life imprisonment, nothing is to be gained, in sentencing terms, by using those incidents to prove the ongoing sex offending against the child.

3 *Recognising the Nature of the Accused's Offending Behaviour*

The third approach could be termed the 'descriptive accuracy approach'. On this view, just as an individual act of burglary is appropriately charged as an incident of criminality occurring at a particular moment in time and in an identifiable place, so, conversely, the ongoing sexual abuse of a child should be charged as an offence defined by the relationship which is the occasion for multiple unlawful sexual acts.⁸² This is not, of course, to suggest that the relationship involves either consent or mutuality, notwithstanding that some children are groomed into being participants in unlawful acts to which they do not have the maturity to give consent.⁸³ The accuracy of the description of this as an unlawful sexual relationship gives emphasis to the fact that the opportunity for the abuse arises because of the accused's relationship with that child, and this almost invariably involves exploitation of the trust of a parent or of a position of trust in an institutional setting.

Because the charge relates to the relationship rather than an incident of criminality occurring at a particular time or place, it is justifiable for the complainant's narrative of the offending behaviour to include incidents that occurred in another state or country, so long as the jurisdiction is established by one or more incidents occurring in the state in which charges are brought.⁸⁴

On this view, focusing on individual, particularised incidents of unlawful acts could be seen as a category error. Fairness to the accused of course requires that at least two, or in some Australian jurisdictions, three, such incidents are particularised, to allow the accused to mount a defence which could include an alibi or rebuttal of significant details. Beyond this, though, the incidents of unlawful acts do not appropriately describe the nature of the offending.

This seems to be the approach generally taken in Queensland and SA, and explains the much higher number of charges and convictions in Queensland compared with NSW. It may also be seen as an approach that is fairer to complainants than expecting them to remember in detail individual incidents of unlawful sexual acts when it is what would typically happen over and over again that they are most likely to remember. That said, there is a risk of overreach if the persistent sexual abuse charge, carrying a maximum sentence of life imprisonment,

⁸² See above Part IV(D).

⁸³ Samantha Craven, Sarah Brown and Elizabeth Gilchrist, 'Sexual Grooming of Children: Review of Literature and Theoretical Considerations' (2006) 12(3) *Journal of Sexual Aggression* 287 <<https://doi.org/10.1080/13552600601069414>>; Tolliday, Spangaro and Laing (n 62); Limor Ezioni, 'The Crime of Grooming' (2020) 8 *Child & Family Law Journal* 1.

⁸⁴ See above Part IV(B), Case 27 (NSW).

is used in circumstances where such a sentence is grossly disproportionate to the gravity of the offending behaviour alleged.

B *The Requirement for the Director's Approval*

The requirement for the Director's approval may be understood as necessary on the evidential deficit approach, for if the use of the persistent sexual abuse charge is seen as something of a concession to the prosecution, then it is appropriate that its use should be subject to approval at the highest level. On the other two approaches, it is difficult to see why extra procedural safeguards should be required beyond the professional judgment of the senior prosecutor. All states and territories already have detailed guidelines concerning prosecution⁸⁵ and it can be expected that experienced prosecutors will apply these sensibly, referring a matter to the Director's Chambers only in cases of significant doubt as to the best course of action.

There is no indication from either the interviews with prosecutors or from the files, that requiring the Director's approval imposes any particular burden or necessitates unwarranted delay. The NSW files indicate an orderly process in which the recommendation is passed up the managerial chain. If a persistent sexual abuse charge is recommended by the prosecutor, it is considered by a senior legal adviser, who prepares a memorandum of advice for the Director.⁸⁶

However, a consequence of this requirement is that when the police are conducting their investigations, they need to identify specific charges unless they seek pre-charging advice and approval from the DPP. This is because, without such approval, they cannot lay the persistent sexual abuse charge straightaway even when it is clearly the most appropriate option. If the prosecution is to succeed on those specific charges, then the complainant will need to provide more detailed particulars than is necessary to support the persistent sexual abuse charge. The case comes into the ODPP with specific charges having been laid. Given the requirement of particularisation, these may well represent the tip of the iceberg in terms of offending and therefore be quite unrepresentative of the level of criminality involved. It is only in the ODPP that appropriate charges can be laid and the justification for doing so may not be apparent at first from the police file. There may also be a need for further interviews of the complainant to clarify matters pertinent to the persistent sexual abuse charge. In practice, this might be avoided by police securing a narrative account of the abuse after individual episodes have been discussed, in the initial interview.

The strongest case, perhaps, for eliminating the requirement of the Director's approval is that it treats the persistent sexual abuse offence as one that ought to be charged by way of exception, with specific charges being the rule. Arguably, the reverse position ought to hold. Where a complainant credibly alleges abuse that occurred on a regular basis in the context of a relationship (such as with a father,

⁸⁵ 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. For an example of prosecutorial guidelines, see ODPP New South Wales, *Prosecution Guidelines* (Web Page) <<https://www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines>>.

⁸⁶ See above Part IV(A).

stepfather or leader within a youth organisation), the presumption ought to be that the persistent sexual abuse offence is charged, with specific offences being charged in the alternative. This is because only the persistent sexual abuse offence will properly describe the complainant's experience and appropriately respond to the degree of culpability of the accused. Charging specific incidents, such as the first or last occasion that the abuse occurred, is unlikely to properly reflect the complainant's allegations of continuing unlawful conduct over a period of time. On that view, the persistent sexual abuse offence ought to be charged even when other offences that could be the primary charge carry maximum sentences of an equivalent length. It is always possible to charge specific offences in the alternative.

The strongest argument against removing the requirement for the Director's approval is that it operates as a flag for caution in the use of a charge that carries a very severe maximum sentence and that arguably reduces the evidential burden for the prosecution. However, no evidence emerges from our study that the absence of a requirement for the Director's approval has resulted in an inappropriate use of this charge in SA.

C *NSW and the Problem of Statutory Interpretation*

One significant obstacle to the greater use of the persistent sexual abuse charge in NSW is that the Second Reading Speech introducing the 2018 amendments made it clear that the Government of the day saw this offence as being available on a somewhat exceptional basis, to be used only 'where the victim cannot give sufficient particulars to charge individual offences'.⁸⁷ That, taken literally, cannot represent sound policy. It must at least be read to mean that the charge should be laid only where the complainant cannot give sufficient particulars to charge individual offences *of the same gravity* as those alleged in her narrative. If a child can sufficiently particularise only a couple of instances of sexual touching that were accompanied by memorable details, but provides a narrative of regular oral sex or vaginal penetration, those charges relating only to sexual touching would be a grossly inadequate basis for a prosecution. The persistent sexual abuse charge is clearly the most appropriate one in these circumstances.

Whatever the NSW Attorney-General may have intended, the text of the statute itself imposes no limitations on the discretion of the Director to approve a persistent sexual abuse charge. Bennion has written that a statutory enactment 'takes on a life of its own' after it becomes law and 'what the original framers intended sinks gradually into history'.⁸⁸ The courts must give effect to the words of the statute, placed in context and with an understanding of the statute's purpose. The mischief to which the current version of s 66EA of the *Crimes Act 1900* (NSW) is directed is clear, not least from the Royal Commission's report and recommendations. To the extent that the Second Reading Speech expresses a narrower purpose or suggests a constraint on the Director's discretion, it is not a purpose or a constraint that Parliament has chosen to enact into law.

⁸⁷ 'Second Reading Speech' (n 68).

⁸⁸ Francis Bennion, *Statutory Interpretation: A Code* (Butterworths, 3rd ed, 1997) 687.

VII Is Further Law Reform Needed?

Apart from removing the requirement in Queensland and NSW for the Director's approval, other changes to the law could be considered. One concerns the language of the offence, which continues to cause controversy. Section 66EA of the *Crimes Act 1900* (NSW) is representative of the Australian jurisdictions that frame the offence in terms of an unlawful relationship: 'An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.' Much difficulty could be avoided if this were reframed to provide: 'An adult who, in the course of a relationship with a child, commits two or more unlawful sexual acts over any period, is guilty of an offence.' This conveys the meaning of ss 66EA(1)– (2) more concisely, without giving rise to an interpretation that Parliament sees any element of mutuality or consent on the child's part.

The reformulated provision is also consistent with the view adopted by the five-member bench of the NSW Court of Criminal Appeal in *MK v The King*, agreeing with a view expressed, among others, by Kourakis CJ in the Supreme Court of South Australia.⁸⁹ In *MK v The King*, Beech-Jones CJ at CL, summarised the three different views of the requirements for an unlawful sexual relationship:

[T]he question that arises in each application is whether proof of the commission of two or more unlawful sexual acts is sufficient to make out the offence (the first construction), or whether the prosecution must also prove the existence of a *relationship* 'in which' the unlawful sexual acts were committed (the second construction) or alternatively prove the existence of a *sexual relationship* between the accused and a child over and above the commission of the unlawful sexual acts (the third construction).⁹⁰

The NSW Court of Criminal Appeal adopted the second construction. The High Court, in *Xerri v The King*, also spoke in similar terms.⁹¹ There must be a relationship. That is the context in which it can be understood — that the complainant might be subject to abuse over a lengthy period without being able to recall, in great detail, many particular incidents.

There is also a need to clarify that the unlawful sexual acts need not occur on a continuing or habitual basis. The relationship needs to be a continuing one during the times between which it is said to have occurred, but the offending need not be continuous. The behaviour is not less criminal because, for a reason such as prolonged absence, illness, or a shift in sexual interests, the offending is characterised by bursts of criminality.

VIII Conclusion

Together, the interviews with prosecutors across three jurisdictions, and the case files from these jurisdictions, provide a rich picture of how the charge of persistent sexual abuse is used and why it has such utility. The ways in which it has proved useful go well beyond the settled rationale for having an offence of this kind. This is to allow the possibility of prosecution in cases where the child has a 'script' memory

⁸⁹ *R v M, DV* (n 44); *R v Mann* (n 45).

⁹⁰ *MK v The King* (n 46) 98 [3].

⁹¹ *Xerri v The King* (n 28).

of what would typically happen over and over again in the course of an abusive relationship, without being able necessarily to recount individual instances of sexual assault with sufficient detail. Charging this offence may also avoid the need for the child to give evidence about a multiplicity of individual instances of abuse. If it acts as a catalyst for plea negotiations that result in acceptable guilty pleas, then the child will be spared the stress of giving evidence at trial.

Amendments to the law since the conclusion of the Royal Commission have been helpful in resolving difficulties and uncertainties about the use of this charge. In particular, the 2018 changes to the law in NSW⁹² ought to facilitate the charging of this offence much more frequently than was the case prior to the amendments. There has been an increase in its use in NSW, but the approach taken remains generally a cautious one.

The requirement in NSW for the Director's approval to use the charge may add to the perception that the offence is to be charged only by way of exception. However, there does not seem to be the same perception in Queensland, where the Director's approval is also required. A disadvantage of that requirement, in both jurisdictions, is that it may necessitate reinterviewing the child since the police cannot lay the persistent sexual abuse charge themselves. However, some police may anticipate that this charge could be laid and cover the necessary ground in the original interview.

The persistent sexual abuse offence does involve some sacrifice in fairness to the accused since the complainant is not required to provide the same detail of individual incidents, and the jury need not agree that the same incidents operate as proof of the abusive relationship.⁹³ This makes it more difficult for the accused to cast reasonable doubt due to lack of detail or inconsistencies in relation to specific instances.

Of course, prosecutors have an obligation of fairness to the accused, which means that the offence should not be charged where it is not appropriate or, carrying a maximum life sentence, the charge would exceed the gravity of the behaviours alleged. The interviews and case files indicated that the charge is appropriately used, and could be used more often than it is. Research on the perceptions of defence lawyers may be valuable to get their views on whether, and to what extent, the charge is used appropriately.

⁹² See above Part II(B).

⁹³ See above Part VI(A)(1).