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'UNLAWFUL SEXUAL RELATIONSHIPS': A COMPARATIVE ANALYSIS OF CRIMINAL LAWS AGAINST PERSISTENT CHILD SEXUAL ABUSE IN QUEENSLAND AND SOUTH AUSTRALIA

Note: this article contains descriptions of sexual acts involving children which may be disturbing to some readers.

Abstract

Criminal laws in all Australian states and territories facilitate the prosecution of repeated or persistent child sexual abuse by allowing for a single charge that may be proved by evidence of multiple instances of abuse. One approach, pioneered in Queensland, is to create an offence where an adult 'maintains an unlawful sexual relationship with a child'. In this article, we compare the recent implementation of this approach in South Australia with the Queensland law to illuminate ongoing difficulties in the drafting, interpretation, and operation of these laws and provide recommendations for future reform.

I Introduction

Some instances of sexual offending against a child involve a single event or circumstance, and these cases are dealt with through the operation of discrete criminal offences. However, other cases involve persistent, repeated offending against a child, involving multiple acts at different times and places. Australian states and territories have introduced criminal offences to facilitate the prosecution of repeated or persistent sexual abuse of a child, recognising the gravity of this offending, and its distinct dynamics, presentation, and requirements of proof. These offences were created to accommodate the demonstrated difficulties of prosecuting such cases, especially the requirement to provide particulars of specific criminal charges within an environment of multiple events over extended periods of time.

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State and territory jurisdictions have adopted different approaches to drafting these laws. In some jurisdictions, the offence is constituted by the commission of a specified sexual act against a child on a minimum of two or three occasions. Another approach, adopted in both Queensland and South Australia, is to create an offence where an adult 'maintains an unlawful sexual relationship with a child'[1] involving more than one unlawful act 'over any period'.

The purpose of this article is to undertake a comparative doctrinal analysis, examining the nature and operation of these laws in Queensland and South Australia. Although the Queensland offence has been identified as the most effective means of framing the law, this analysis shows that the operation of the Queensland offence since 1989 has relied on notions of sexual relationships as they normally occur between consenting adults, with the result that persistent child sexual abuse ('persistent CSA') that does not follow a similar pattern may fall outside its scope. More recent developments in the South Australian law have demonstrated a different approach that does not unduly restrict the application of the offence, and which better reflects the purpose of the provisions and an accurate understanding of the nature of persistent CSA. However, our analysis of the South Australian law demonstrates continuing problems in the drafting, interpretation, and operation of these laws, and forms the basis for recommendations for further reform that retains critical elements to ensure the efficacy and fairness of these laws, while avoiding intractable conceptual and terminological problems.

First, in Part II, we explain the rationale for these offences, before outlining the general principles in the legislative provisions in Queensland and South Australia, with some additional observations about normative criticisms of the laws in Part III. We then provide a historical and doctrinal synthesis of the development of the law in Queensland in Part IV, demonstrating the significant role of judicial interpretation, before turning in Part V to the position in South Australia since reforms to implement a Queensland-style offence were completed in 2017. Following this, in Part VI, we undertake a critical analysis of the law in Queensland and South Australia current to July 2020. Our analysis reveals that while the legislative provisions in these two States are broadly similar in content and purpose, judicial consideration indicates important differences in statutory interpretation which illustrate further conceptual, operational and terminological problems. Finally, we provide two conclusions and a recommendation for legislative reform.

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1 For the purposes of these provisions, in Queensland, a 'child' is under the age of 16 years: *Criminal Code Act 1899* (Qld) s 229B(1). In South Australia, a 'child' is '(a) a person who is under 17 years of age; or (b) a person who is under 18 years of age if, during the period of the relationship that is the subject of the alleged unlawful sexual relationship offence, the adult in the relationship is in a position of authority in relation to the person who is under 18 years of age': *Criminal Law Consolidation Act 1935* (SA) s 50(12) ('*CLCA*'). This mirrors the age of consent in the respective states, which is 16 in Queensland, and 17, or 18 when the accused is in a position of authority, in South Australia: *Criminal Code Act 1899* (Qld) s 215; *CLCA* (n 1) ss 49(3), (5).

II Background: The Rationale for the Offence of Persistent Sexual Abuse of a Child

As a general principle of criminal law, particulars of an alleged offence must be provided to the accused with a sufficient degree of specificity to provide a fair opportunity to defend the charge.[2] In addition, for sentencing purposes, the nature, circumstances, and seriousness of the offending conduct must be identified.[3] In the case of persistent CSA, it has not always been clear how the procedures of criminal trials should be applied in a way that achieves both fairness to the accused and criminal justice on behalf of victims. As will be seen below, statutory reforms have attempted to address the difficulties of framing criminal charges arising from evidence provided by complainants of acts of persistent CSA, which cannot be sufficiently particularised as individual acts.

The 1989 High Court case *S v The Queen* illustrates the difficulties faced by the courts prior to the enactment of persistent CSA offence provisions.[4] At trial, the complainant gave evidence that she had been sexually abused by her father from the age of nine or ten until she was 17, including that from the age of approximately 14 until she left home at the age of 17, he had subjected her to sexual intercourse approximately every couple of months.[5] The accused was charged and convicted of three counts of unlawful carnal knowledge, each particularised as an act of sexual intercourse to have occurred on an unknown date in each of three periods, roughly equivalent to the calendar years 1980, 1981, and 1982. The trial judge had accepted the Crown's position that no better particulars regarding the date or location of the offences could be provided.[6] The majority of the Western Australian Court of Criminal Appeal dismissed an initial appeal against conviction, since the appellant was unable to identify a real opportunity for a defence that had been precluded by the lack of specificity.[7] However, Brinsden J, while ultimately rejecting the grounds of appeal, identified the difficulty raised by an indictment in such a form:

> In a nutshell the problem is this. The appellant having been convicted of three counts of unlawful carnal knowledge (incest), one in each year, and there having been, on the daughter's evidence, at least in every year three acts of intercourse, in respect of what act of intercourse in each year was the appellant convicted?[8]

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2 See, eg, *Johnson v Miller* (1937) 59 CLR 467, 497 (Evatt J); *Jago v District Court (NSW)* (1989) 168 CLR 23, 57 (Deane J); *S v The Queen* (1989) 168 CLR 266, 278 (Toohey J); *R v CAZ* [2012] 1 Qd R 440, 455 [40] (Fraser JA) ('*CAZ*').

3 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(a); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1); *Sentencing Act 1995* (NT) s 5(2)(b); *Penalties and Sentences Act 1992* (Qld) ss 9(2)(c), (4), (6); *Sentencing Act 2017* (SA) s 11(1)(a); *Sentencing Act 1997* (Tas) s 11A; *Sentencing Act 1991* (Vic) s 5(2)(c); *Sentencing Act 1995* (WA) ss 6(1)–(2).

4 *S v The Queen* (n 2).

5 *S* (1988) 39 A Crim R 288, 289 (Brinsden J).

6 *S v The Queen* (n 2) 278 (Toohey J).

7 *S* (n 5).

8 Ibid 297.

On appeal, the majority of the High Court held that the convictions should be quashed and sent for retrial.[9] The Court identified a range of issues that constituted a miscarriage of justice, including that:

- the lack of specificity impeded the defendant's capacity to raise an effective defence, for example, an alibi defence;[10]
- the complainant gave evidence of behaviour that could not be directly linked to a particularised charge, or that might have referred to one of a number of occasions, and it was uncertain how this evidence should be treated;[11] and
- it was unacceptable to allow conviction when individual jurors may not have identified the same occasions as constituting the relevant offences, since in that case the verdict would not be unanimous.[12]

In 1990, the Supreme Court of Western Australia applied the reasoning in *S v The Queen* to *Podirsky v The Queen*, quashing a rape conviction due to defects in particularisation of the offence.[13] The Court recognised the potential injustice to defendants in trials where evidence of repeated acts is provided but cannot be clearly linked to a specific charge.[14] However, the Court noted the quandary created for the criminal justice system by the effect of these principles on trials for persistent sexual offending:

> [O]ne effect of the decision in *S v The Queen* is that notwithstanding clear and cogent evidence of a course of conduct involving repeated acts of sexual intercourse … the Crown have found it impossible to identify any particular act with sufficient precision to enable any one offence to be charged. This means that unless the law is changed there is a possibility that the more acts of intercourse or other acts of sexual abuse and the greater the length of time over which they occur, the more difficult it may be to establish that any one of a series of multiple offences has been committed. Some reform would seem desirable to cover cases where there is evidence of such a course of conduct.[15]

In response to these challenges, all Australian states and territories have introduced criminal offences to facilitate the prosecution of persistent CSA. These offences were first introduced between 1989 and 1999, with Queensland being the first, and

9 *S v The Queen* (n 2) 266, 278 (Dawson J), 283 (Toohey J), 288 (Gaudron and McHugh JJ).

10 Ibid 274–5 (Dawson J), 281 (Toohey J).

11 Ibid 275 (Dawson J). For a discussion on propensity evidence, see at 279–80 (Toohey J). For a discussion on similar fact evidence, see at 287 (Gaudron and McHugh JJ).

12 Ibid 276 (Dawson J).

13 (1990) 3 WAR 128, 128 (Malcolm CJ, Wallace and Walsh JJ).

14 Ibid 136.

15 Ibid.

New South Wales the last.[16] However, despite these reforms, a satisfactory form of the offence has proved elusive.[17] The operation of these laws has been the subject of reviews in both family violence and institutional abuse contexts, which have concluded that the requirement to provide particulars of separately charged acts still presents a substantial impediment to the prosecution of persistent CSA in most Australian jurisdictions, and that further reform is necessary to achieve the objective of the provisions.[18]

The argument for further reform parallels a more general critique that an inadequate understanding and conceptualisation of child sexual abuse in the criminal justice system impairs the ability of the state to respond with appropriate sanctions.[19] Reform recommendations have used social science evidence to explain the high rates of attrition for child sexual abuse prosecutions, and to provide a guide for further reform of criminal laws and trial processes.[20] Social science evidence about the dynamics of persistent CSA and victims' recall of recurrent events confirms the insight of legislators and members of the judiciary that particularisation presents exceptional

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

17 Martine Powell, Kim Roberts and Belinda Guadagno, 'Particularisation of Child Abuse Offences: Common Problems when Questioning Child Witnesses' (2007) 19(1) *Current Issues in Criminal Justice* 64, 65; Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Final Report No 114, NSWLRC Final Report No 128, October 2010) vol 1, 1143; *Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report: Parts III to VI* (Report, August 2017) ch 11 ('*Criminal Justice Report*: *Parts III to VI*'). See also Liesl Chapman, 'Review of South Australian Rape and Sexual Assault Law' (Discussion Paper, Government of South Australia, 2006) 30–45 <https://web.archive.org/web/20120303041624/http://www.justice.sa.gov.au/publications/RapeLawReformDP.pdf>; Australian Capital Territory Law Reform Commission, *Report on the Laws Relating to Sexual Assault* (Report No 18, April 2001) ch 2 [16]–[36]; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children Part 2* (Report No 55, December 2000) ch 19.

18 *Family Violence: A National Legal Response* (n 17) 1142–5 [25.51]–[25.67]; *Criminal Justice Report: Parts III to VI* (n 17) ch 11.

19 Ben Mathews and Delphine Collin-Vézina, 'Child Sexual Abuse: Toward a Conceptual Model and Definition' (2019) 20(2) *Trauma, Violence, & Abuse* 131, 136.

20 Antonia Quadara, 'Prosecuting Child Sexual Abuse: The Role of Social Science Evidence' in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 261.

challenges in many cases of persistent CSA.[21] For example, research into memory reveals that children are often unable to provide specific details about recurring past events; instead, what is retained is a general memory of the shared features of many experiences, rather than memories of particular details of individual events.[22] This principle applies with particular force in the context of children's experiences of sexual abuse, due to both the general operation of memory and the added protective mechanisms that victims of such acts may adopt.[23] Given that sexual abuse typically occurs in clandestine circumstances with no witnesses, no physical evidence, and disclosure is commonly delayed, often the only direct evidence of an offence is the testimony of the complainant.[24] The result is that in many cases of repeated victi-

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21 See, eg, Queensland, *Parliamentary Debates*, Legislative Assembly, 24 November 1988, 3256 (Brian Austin), explaining that the original s 229B had been drafted

> in recognition of the limited recall which many children, particularly those of tender years, have in respect of specific details such as time and dates of the offences and other surrounding circumstances. Numerous cases have arisen where it is abundantly clear that a consistent course of sexual interference has been undertaken in respect of a particular child who, although unable to recall with the precision of an adult, all the surrounding circumstances of the events, nonetheless can give clear, cogent and compelling evidence as to the identity of the perpetrator and the acts that were committed upon him/her on many occasions.

See also South Australia, *Parliamentary Debates*, House of Assembly, 4 May 1994, 1005 (Stephen Baker). Similar comments were made by the South Australian Deputy Premier on the reasoning behind the enactment of the original South Australian offence, which was in response to the

> great difficulty in charging defendants where the allegations involve a long period of multiple offending. In some cases … the child — or the adult recalling events which took place when he or she was a child — cannot specify particular dates or occasions when the offence is alleged to have taken place. The result is that defendants are being acquitted even where juries clearly indicate that they accept the evidence that abuse took place at some time.

See also the judicial comments quoted above nn 8 and 15 and accompanying text.

22 *Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report: Executive Summary and Parts I to II* (Report, August 2017) 238, 242–3 ('*Criminal Justice Report: Parts I to II*'); 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' (Research Report, Royal Commission into Institutional Responses to Child Sexual Abuse, July 2017) ch 7; Kara Shead, 'Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions' (2014) 26(1) *Current Issues in Criminal Justice* 55, 60; Dayna M Woiwod and Deborah A Connolly, 'Continuous Child Sexual Abuse: Balancing Defendants' Rights and Victims' Capabilities to Particularize Individual Acts of Repeated Abuse' (2017) 42(2) *Criminal Justice Review* 206, 213–14.

23 Goodman-Delahunty, Nolan and Van Gijn-Grosvenor (n 22) ch 6.

24 *Criminal Justice Report: Parts I to II* (n 22) 169, 253. On non-disclosure and delayed disclosure, and the reasons for this frequently including fear induced by threats from the offender, see the summary in Ben Mathews, 'A Taxonomy of Duties to Report Child Sexual Abuse: Legal Developments Offer New Ways to Facilitate Disclosure' (2019) 88(1) *Child Abuse and Neglect* 337, 338–9.

misation, the complainant's evidence cannot support sufficient particularisation for criminal charges.

Most recently, the Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') questioned 'whether a criminal justice response can be said to be reasonably available to condemn and punish child sexual abuse' when a judge or jury may accept that the accused has repeatedly sexually abused a child, but conviction is impossible because the evidence is not sufficient to distinguish individual instances of abuse.[25] The Royal Commission identified the Queensland form of the offence, 'maintaining a sexual relationship with a child', as a model for reform in other states, since

> 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.[26]

This proposed reform has since been implemented in South Australia. In the sections that follow, we analyse the key features and criticisms of the Queensland-style persistent CSA offence and identify how recent developments in the South Australian law depart from the Queensland model.

III Persistent CSA Laws in Queensland and South Australia

Queensland was the first Australian jurisdiction to introduce a persistent CSA offence, with the original offence coming into effect on 3 July 1989.[27] It was drafted in response to the recommendations of the *Inquiry into Sexual Offences Involving Children and Related Matters* by the Queensland Director of Prosecutions, DG Sturgess.[28] Sturgess addressed the legal challenges identified in cases similar to *S v The Queen*, and recommended a new offence that would occur when an adult 'enters into and maintains a relationship with a child of such a nature he commits a series of offences of a sexual nature with that child'.[29]

Five years after Queensland first enacted its provision, South Australia created its first persistent CSA provision, effective from 28 July 1994.[30] This provision was also

25 *Criminal Justice Report: Parts III to VI* (n 17) 65.

26 Ibid 68.

27 *Criminal Code Act 1899* (Qld) s 229B, as at 3 July 1989, as inserted by *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 23.

28 DG Sturgess, Queensland Office of the Director of Prosecutions, *Inquiry into Sexual Offences Involving Children and Related Matters* (Interim Report, 1986) 69–72.

29 Ibid 71.

30 *CLCA* (n 1) s 74, as at 28 July 1994, as inserted by *Criminal Law Consolidation (Child Sexual Abuse) Amendment Act 1994* (SA) s 3.

an attempt to resolve the difficulties identified by the High Court in *S v The Queen*.[31] In his second reading speech, the South Australian Attorney-General, Chris Sumner, noted that under the current law, 'defendants are being acquitted even where juries clearly indicate that they accept the evidence that abuse took place at some time'.[32] Sumner explained that the new offence, 'persistent sexual abuse of a child', was modelled after legislation in other states and territories that had created an offence of 'having a sexual relationship with a child'.[33] However, the provision did not use the term 'relationship'. Instead, 'persistent sexual abuse of a child' consisted of 'a course of conduct involving the commission of a sexual offence against a child on at least three separate occasions'.[34]

Since 2017, the substance of the provision in South Australia has largely converged with that of Queensland. Both now provide that an adult who maintains an unlawful sexual relationship with a child is guilty of an offence,[35] and that conviction requires that the jury (or, in South Australia, the trier of fact) must be satisfied beyond reasonable doubt that an unlawful sexual relationship existed.[36] The two fundamental principles underpinning the laws are the modification of the general criminal law requirement to provide particulars of the offence, and the removal of the requirement for extended jury unanimity. As the following sections explain, both of these elements are necessary to ensure the actus reus is effectively identified as an unlawful sexual relationship.

A *Modification of Particularisation*

The key feature shared across all states and territories is the express modification of the requirement to provide particulars of individual unlawful sexual acts.[37] This is currently expressed in both the Queensland and South Australian provisions as 'the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence',[38] and that 'the jury

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31 South Australia, *Parliamentary Debates*, Legislative Council, 13 October 1993, 547 (Chris Sumner, Attorney-General). The original Bill lapsed and was passed by the subsequent Parliament. See the second reading explanation: South Australia, *Parliamentary Debates*, House of Assembly, 4 May 1994, 1005 (Stephen John Baker, Deputy Premier).

32 South Australia, *Parliamentary Debates*, Legislative Council, 13 October 1993, 547 (Chris Sumner, Attorney-General).

33 Ibid.

34 *CLCA* (n 1) s 74(2), as at 28 July 1994.

35 *Criminal Code Act 1899* (Qld) s 229B(1); *CLCA* (n 1) s 50(1).

36 *Criminal Code Act 1899* (Qld) s 229B(3); *CLCA* (n 1) s 50(3).

37 *Crimes Act 1900* (ACT) ss 56(5)(a)–(b); *Crimes Act 1900* (NSW) ss 66EA(4), (5)(b); *Criminal Code Act 1983* (NT) s 131A(3); *Criminal Code Act 1899* (Qld) ss 229B(4)(a), (b); *CLCA* (n 1) ss 50(4)(a), (b); *Criminal Code Act 1942* (Tas) s 125A(4)(a); *Crimes Act 1958* (Vic) s 49J(4); *Criminal Code Act Compilation Act 1913* (WA) s 321A(5)(b). See generally Woiwod and Connolly (n 22) 210.

38 *Criminal Code Act 1899* (Qld) s 229B(4)(a); *CLCA* (n 1) s 50(4)(a).

[or, in South Australia, trier of fact] is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence'.[39] This aspect of the provisions is intended to allow prosecution of persistent CSA offences despite what might otherwise be an inadequate degree of particularisation.

However, the effect of this aspect of the provisions was limited by the High Court of Australia in its 1997 decision *KBT v The Queen* ('*KBT*').[40] This decision concerned a conviction under the original Queensland provision, which at the time relevantly provided:

> **Maintaining a sexual relationship with a child under 16**
>
> **229B.(1)** Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years.
>
> **(1A)** A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the offender, as an adult, has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f), on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions.[41]

In the Court's view, since s 229B(1A) provided that conviction required proof of the doing of relevant acts on three or more occasions, this formed the actus reus of the offence, and it necessarily followed that a jury must be 'agreed as to the commission of the same three or more illegal acts'.[42] Consequently, the Court held that even though the dates and exact circumstances of each of the three acts done during the period of the alleged relationship did not need to be particularised, the evidence must be sufficient for the jury to distinguish three separate acts or occasions: 'evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour' would not be sufficient.[43] The practical effect of s 229B(1A) and *KBT*

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39 *Criminal Code Act 1899* (Qld) s 229B(4)(b); *CLCA* (n 1) s 50(4)(b).

40 (1997) 191 CLR 417 ('*KBT*').

41 *Criminal Code Act 1899* (Qld) s 229B, as at 26 March 1994. The provision at this date differs slightly from that originally enacted, reflecting editorial changes made in Reprint No 1 of the *Criminal Code Act 1899* (Qld), as authorised by the *Reprints Act 1992* (Qld) s 7, including the numbering of subsection (1A) and removal of words indicating gender: *Reprints Act 1992* (Qld) ss 24, 43.

42 *KBT* (n 40) 422 (Brennan CJ, Toohey, Gaudron and Gummow JJ).

43 Ibid 423.

was the imposition of much the same requirement for particularised acts that the provision was intended to avoid.[44]

Although *KBT* concerned the Queensland offence, equivalent provisions in the other states and territories were substantially similar and therefore faced the same difficulty.[45] Under the original South Australian provision, the need to particularise distinct offences was removed: the charge was required to particularise when the alleged course of conduct began and ended, and the general nature of the conduct and sexual offences, but not 'the dates on which the sexual offences were committed, the order in which the offences were committed, or differentiate the circumstances of commission of each offence'.[46] However, significantly, the jury was required to agree on the 'material facts' of at least three separate incidents, even if they did not agree 'about the dates of the incidents, or the order in which they occurred'.[47] Because of this, the reasoning of the High Court in *KBT* regarding the need to delineate three underlying acts on which the jury could agree applied.[48] As a result, the offence was rarely charged by prosecutors since the provision failed to overcome the difficulties posed by the need to provide sufficient particulars.[49]

B *Removal of the Requirement for 'Extended Jury Unanimity'*

Subsequently, several states and territories have expressly removed the requirement for 'extended jury unanimity'.[50] That is, the jury is not required to agree on which particular acts were committed in the course of the relationship. The Queensland provision was redrafted in 2002 to restore 'the original intention of the provision, that is, to focus on the unlawful relationship or course of conduct, rather than on the separate [specified] sexual acts comprising the relationship'.[51] The redrafted offence provides that 'all the members of the jury must be satisfied beyond reasonable doubt that … an unlawful sexual relationship with the child involving unlawful sexual acts existed',[52] but that in relation to those acts the prosecution is not required to allege,

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44 Alannah Brown, 'A Comparative Study on the Offence of "Maintaining a Sexual Relationship with a Child" in the Northern Territory and Queensland' (2015) 39(3) *Criminal Law Journal* 148, 155; *Criminal Justice Report: Parts III to VI* (n 17) 18–20.

45 Brown (n 44) 155; *Criminal Justice Report: Parts III to VI* (n 17) 18–20.

46 *CLCA* (n 1) s 74(4), as at 28 July 1994.

47 Ibid s 74(5)(b), as at 28 July 1994.

48 Chapman (n 17) 35.

49 South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1473 (Michael Atkinson, Attorney-General).

50 *Crimes Act 1900* (ACT) s 56(5)(c); *Crimes Act 1900* (NSW) s 66EA(5)(c); *Criminal Code Act 1899* (Qld) s 229B(4)(c); *CLCA* (n 1) s 50(4)(c); *Criminal Code Act 1924* (Tas) s 125A(4)(c); *Criminal Code Act Compilation Act 1913* (WA) s 321A(11).

51 Queensland, *Parliamentary Debates*, Legislative Assembly, 6 November 2002, 4443 (Rod Welford, Attorney-General); Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 4.

52 *Criminal Code Act 1899* (Qld) s 229B(3).

and the jury is not required to be satisfied of, particulars that would be necessary if an act was charged as a separate offence; and all members of the jury are not required to be satisfied about the same unlawful sexual acts:[53]

> **229B Maintaining a sexual relationship with a child**
>
> (1) Any adult who maintains an unlawful sexual relationship with a child under the age of 16 years commits a crime.
>
> Maximum penalty — life imprisonment.
>
> (2) An unlawful sexual relationship is a relationship that involves more than 1 unlawful sexual act over any period.
>
> (3) For an adult to be convicted of the offence of maintaining an unlawful sexual relationship with a child, all the members of the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed.
>
> (4) However, in relation to the unlawful sexual acts involved in an unlawful sexual relationship —
>
> (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and
>
> (b) the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence; and
>
> (c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts.[54]

The effect of these amendments is that the maintenance of an unlawful sexual relationship, and not the unlawful sexual acts, becomes the actus reus of the offence. All members of the jury must unanimously agree that an unlawful sexual relationship involving more than one unlawful sexual act existed, but they need not agree on *which* unlawful sexual acts had been proven.[55] This has permitted convictions to be upheld, for example, where a jury has accepted generalised evidence of multiple unlawful sexual acts and found the accused guilty of a relationship charge, but not of

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53 Ibid ss 229B(4)(a)–(c).

54 *Criminal Code Act 1899* (Qld) s 229B(1)–(4), as amended by *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 18.

55 *CAZ* (n 2) 452 [33].

other charges relating to specific acts.[56] This achieves the primary policy objective of the provision. This substantive version of s 229B has been effective since 1 May 2003,[57] and was the version considered by the Royal Commission. Amendments to give the offence retrospective effect were passed in September 2020.[58]

For similar reasons, South Australia's original offence, 'persistent sexual abuse of a child', was replaced in 2008 by a new offence named 'persistent sexual exploitation of a child'.[59] The new offence was intended to focus on 'acts of sexual exploitation that comprise a course of conduct (persistent sexual exploitation) rather than a series of separately particularised offences'.[60] This offence involved the commission of more than one act of sexual exploitation of a child over a period of at least three days, instead of the previous minimum of three occasions.[61] An act of sexual exploitation was defined as an act in relation to the child that could, if properly particularised, be charged as a sexual offence.[62] It was expressly stated that it was not necessary that each act be particularised.[63] However, the provision was silent regarding the matter of extended jury unanimity.

It was not clear that the redrafted offence overcame the shortcomings of the previous formulation.[64] South Australia's Director of Public Prosecutions, Adam Kimber, informed the Royal Commission that the new offence had enabled the prosecution of some matters that otherwise would not have been able to proceed due to the lack of particulars.[65] However, Kimber added that because the new offence retained the requirement for extended jury unanimity, this 'might, in theory, limit the utility of

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56 See, eg, *R v LAF* [2015] QCA 130; *R v WAB* [2008] QCA 107.

57 Minor amendments were made by the *Criminal Code and Other Acts Amendment Act 2008* (Qld) ss 43, 120; *Health and Other Legislation Amendment Act 2016* (Qld) s 9; *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) s 95.

58 *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020* (Qld) s 21, inserting *Criminal Code Act 1899* (Qld) s 746. This insertion gave retrospective effect to: *Criminal Code Act 1899* (Qld) s 229B, regarding acts committed before 3 July 1989; *Criminal Code Act 1899* (Qld) s 747, which provides similarly for the period 3 July 1989–30 April 2003; and *Criminal Code Act 1899* (Qld) s 748, which allows for proceedings to be started, and convictions and punishment to be imposed, 'as if section 229B had always applied': *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020* (Qld) s 21.

59 *CLCA* (n 1) s 50, as at 23 November 2008, as inserted by *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) s 7.

60 South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1474 (Michael Atkinson, Attorney-General).

61 *CLCA* (n 1) s 50(1), as at 23 November 2008.

62 Ibid s 50(2).

63 Ibid s 50(4).

64 See generally Marie Shaw and Ben Doyle, 'The "Age of Statutes" and Its Intersection with Fundamental Principles: An Illustration' (2019) 40(1) *Adelaide Law Review* 353, 357–9.

65 *Criminal Justice Report: Parts III to VI* (n 17) 32–3.

this provision'.[66] The South Australian Court of Criminal Appeal applied the position in *KBT* to the redrafted provision, with the result that the acts of sexual exploitation were not required to be particularised, but the jury was required to reach a unanimous decision regarding at least two acts.[67] In *R v Johnson*, the South Australian Court of Criminal Appeal overturned a conviction of persistent sexual exploitation, holding that the evidence must enable the jury to 'delineate' at least two offences in order to agree unanimously on the commission of those two offences.[68] Although this may require a relatively low degree of particularity, evidence of 'vaginal sexual intercourse … on many occasions over a period of two years' was not held sufficient in that case to enable a jury to delineate and agree upon the requisite two acts.[69] While agreeing that the appellant was entitled to an acquittal on the proper application of s 50, Sulan and Stanley JJ were moved to comment:

> Unlike the Queensland provision, which has overcome the problem identified in *KBT* and the South Australian cases, the provision, as it exists in South Australia, in our view, does not reflect the intention of the legislature, as indicated in the Second Reaching Speech … We consider that if it is the intention of the legislature to create an offence of persistent sexual exploitation involving the maintenance of a sexual relationship with a child, then consideration should be given to amending s 50 along similar lines to the Queensland provision.[70]

This suggestion was implemented in 2017 when South Australia's provision was again replaced by a new offence, now named 'persistent sexual abuse of a child'.[71] The legislation was passed with some urgency in order to address the consequences of the High Court decision *Chiro v The Queen*[72] ('*Chiro*') for convictions under s 50 that were awaiting sentencing.[73] In *Chiro*, the majority of the Court held that a judge who did not ascertain which acts of sexual exploitation the jury were unanimously

66 Ibid 33.

67 See, eg, *R v M, BJ* (2011) 110 SASR 1, 28–9 (Vanstone J, Sulan J agreeing at 6 [1], White J agreeing at 41 [138]); *R v Little* (2015) 123 SASR 414, 417; *R v Johnson* [2015] SASCFC 170; *Hamra v The Queen* (2017) 260 CLR 479; *DL v The Queen* (2018) 266 CLR 1. See generally Shaw and Doyle (n 64) 357–9.

68 [2015] SASCFC 170, [111] (Peek J, Sulan and Stanley JJ agreeing at [1]).

69 Ibid [114].

70 Ibid [11]–[12].

71 *CLCA* (n 1) s 50, as at 24 October 2017, as amended by *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) s 6.

72 (2017) 260 CLR 425 ('*Chiro*'). The accused was a high school teacher and the complainant a student, and the jury had heard evidence of acts ranging from kissing on the mouth to oral and vaginal penetration. The view of the facts most favourable to the appellant, on which the High Court held he should have been sentenced, were that the acts agreed by the jury to have occurred were kissing in circumstances of indecency. On resentencing, the original sentence of 10 years was reduced to 3.5 years: *R v Chiro* [2017] SASCFC 144.

73 South Australia, *Parliamentary Debates*, Legislative Council, 19 October 2017, 8019 (Andrew McLachlan), 8024 (Kyam Maher); *Chiro* (n 72).

agreed upon was obliged to sentence on the view of the facts most favourable to the accused, regardless of the judge's views of the evidence and circumstances of offending.[74] The government took advantage of this opportunity to adopt a version of the model persistent CSA provisions recommended by the Royal Commission.[75] This version of the offence came into effect on 24 October 2017:

> **50 — Persistent sexual abuse of child**
>
> (1) An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.
>
> Maximum penalty: Imprisonment for life.
>
> (2) An ***unlawful sexual relationship*** is a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period.
>
> (3) For an adult to be convicted of an unlawful sexual relationship offence, the trier of fact must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship existed.
>
> (4) However —
>
> (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and
>
> (b) the trier of fact is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence, but must be satisfied as to the general nature or character of those acts; and
>
> (c) if the trier of fact is a jury, the members of the jury are not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship.[76]

This formulation of the offence is substantially similar to the current Queensland offence. It effectively modifies the requirement to provide particulars of individual unlawful sexual acts, and for jury unanimity regarding which acts were perpetrated

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74 *Chiro* (n 72) 451 (Kiefel CJ, Keane and Nettle JJ).

75 South Australia, *Parliamentary Debates*, Legislative Council, 19 October 2017, 8021 (Kyam Maher). See also *Criminal Justice Report: Parts III to VI* (n 17) 74; *Royal Commission into Institutional Responses to Child Sexual Abuse*, *Criminal Justice Report: Parts VII to X and Appendices* (Report, August 2017) app H ('*Criminal Justice Report: Parts VII to X and Appendices*').

76 *CLCA* (n 1) ss 50(1)–(4), as at 24 October 2017 (emphasis in original).

by the accused. In line with the Royal Commission's recommendation, it introduces the concept of an 'unlawful sexual relationship' to form the actus reus of the offence into South Australian law.

C *'Maintaining an Unlawful Sexual Relationship'*

Since South Australia's reforms in 2017, the offences in both States provide that an adult who maintains an unlawful sexual relationship with a child is guilty of an offence,[77] and that conviction requires that the trier of fact must be satisfied beyond reasonable doubt that an unlawful sexual relationship existed.[78] There are slight differences in the wording used to define an unlawful sexual relationship, but it is not clear that these differences are significant. The Queensland provision stipulates that an unlawful sexual relationship is 'a relationship *that involves* more than 1 unlawful sexual act over any period',[79] while South Australia's definition is 'a relationship *in which* an adult *engages* in 2 or more unlawful sexual acts with or towards a child over any period'.[80] This requires the same number of acts (at least two). However, it is not immediately clear whether there is a meaningful difference between 'a relationship' that *involves* unlawful acts (Queensland) and one *in which* the adult engages in acts (South Australia). In *R v M, DV* ('*M, DV*') Kourakis CJ of the Supreme Court of South Australia suggested that they are equivalent.[81] Similarly, it is not clear that there is any substantive significance that the acts must be *with or towards* a child (South Australia).

Despite the convergence of the legislation in Queensland and South Australia, the nature and operation of these laws in each state has diverged. The differing operations of the law in each state do not appear to be founded in legislation, but in the construction of that legislation by the respective state supreme courts. The key concept that has been the subject of judicial consideration is a *relationship*, and what it means to *maintain* such a relationship. Analysis of the case law demonstrates significant differences in judicial interpretation and, consequently, the scope and operation of the laws in each state. In Queensland, conviction requires proof beyond reasonable doubt that the accused has maintained an unlawful sexual relationship, where a 'relationship' is a sexual relationship, and maintenance of that relationship is demonstrated by sexual contact that is *continuous and habitual*.[82] In contrast, the construction of the law in South Australia requires proof only of a relationship, including a wide range such as ordinary familial or other relationships, and there is no requirement that continuity of *sexual* interactions be demonstrated.[83] Maintenance of a relationship requires only

77 *Criminal Code Act 1899* (Qld) s 229B(1); *CLCA* (n 1) s 50(1).

78 *Criminal Code Act 1899* (Qld) s 229B(3); *CLCA* (n 1) s 50(3).

79 *Criminal Code Act 1899* (Qld) s 229B(2) (emphasis added).

80 *CLCA* (n 1) s 50(2) (emphasis added).

81 (2019) 133 SASR 470, 474 [10] (Kourakis CJ) ('*M, DV*').

82 See below Part IV.

83 See below Part V.

knowledge of all the circumstances that are said to constitute the relationship, which includes all non-sexual interactions and any positions of authority.[84]

A notable feature of the Queensland law is that, while it places the maintenance of such a relationship at the core of the offence, no version of the offence has provided a comprehensive definition of that concept. This was presented to the Parliament in 1988 as a deliberate drafting choice to use 'ordinary everyday language',[85] readily understandable by members of the public. However, this drafting approach has introduced legal uncertainty, requiring substantial interpretation by the courts. The 2003 reforms introduced a partial definition: 'An unlawful sexual relationship is a relationship that involves more than 1 unlawful sexual act over any period'.[86] While this appears to define an 'unlawful sexual relationship', the term 'relationship' remains undefined, and in no version of the offence is it specified what it means to 'maintain' such a relationship. As will be seen in Parts IV and V below, the courts of each state have sought to interpret the 'inherently broad and imprecise concept'[87] of a relationship to delineate what conduct by an adult amounts to maintaining a sexual relationship with a child and is therefore punishable under the provisions.

D *Normative Critiques*

Persistent CSA laws have been the subject of several normative critiques. These are discussed here, with particular emphasis on the laws of Queensland and South Australia, to evince the tensions at the heart of socio-legal policy in this domain which persistent CSA laws attempt to navigate. First, they have been claimed to compromise fairness to the accused, breaching fundamental tenets of the criminal justice system and the rule of law. Second, a contrasting claim has asserted that restrictive judicial interpretation of the provisions, together with a requirement for prosecutorial approval, has limited their intended use. Consequently, an effective form of the offence is yet to be established in most jurisdictions. Third, provisions that use the terminology of a 'relationship' have been criticised as inappropriate, offensive and damaging, with judicial officers, scholars and advocates arguing the use of the concept is inappropriate in the context of child sexual abuse. We would add to this critique that use of the term 'relationship' has influenced the interpretation and operation of these provisions in ways that are legally and conceptually inappropriate.

1 *Compromising Fairness to the Accused*

The creation of persistent CSA offences aims to balance fairness to the accused against the rights of complainants with 'the specific needs and characteristics of

84 Ibid.

85 Queensland, *Parliamentary Debates*, Legislative Assembly, 24 November 1988, 3256 (Brian Austin).

86 *Criminal Code Act 1899* (Qld) s 229B(2), as at 1 May 2003.

87 *R v Kemp* [1997] 1 Qd R 383, 396 (Fitzgerald P).

the victims which the law is intended to protect'.[88] Some have claimed that the relaxation of the requirement to provide sufficient particulars of charges is prejudicial to defendants' rights to a fair trial.[89] For example, the Queensland offence has been characterised as

> an offence carrying a maximum term of life imprisonment … on the strength of a range of unparticularisable allegations about which the jury can be satisfied in a non-specific way and on a mixed basis [ie, without extended jury unanimity] … [S]uch a provision might seem to many to be a long stride from the notion that an accused is entitled to know the substance of what is alleged with particularity and for guilt to require proof of that matter, and that matter alone, beyond reasonable doubt.[90]

These claims have not been endorsed by judicial authorities. In *R v CAZ* ('*CAZ*'), the appellant argued that the Queensland provision so compromised fairness to the accused that it was constitutionally invalid on the basis that it required a District Court judge, exercising federal judicial power, to act contrary to Ch III of the *Commonwealth Constitution*.[91] The appellant argued that the reduced particularisation requirement and removal of extended jury unanimity meant that the jury could 'effectively return a non-unanimous verdict contrary to the requirements for a trial by jury and a unanimous verdict under s 80 of the *Constitution*'; the return of such a verdict would be lacking the unanimity on 'each element of the offence' that is 'an essential feature of a jury trial'; and that a District Court judge presiding over a trial would be unable to 'ensure an accused's right to a fair trial where the practical effect of s 229B(4) means that there are no adequate protections or safeguards to protect the rights of the accused'.[92]

The Queensland Court of Appeal disagreed, noting that a trial judge has a duty to ensure a fair trial, and retains the power to direct the prosecution to provide particulars if they see fit, and to adjourn the trial for that purpose.[93] In the Court's view, notwithstanding the provisions of s 229B, those particulars would include 'the essential allegations of fact made by the prosecution in sufficient detail to enable the defendant to understand and to meet the charge'.[94] Jury unanimity would be required

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88 Brown (n 44) 161. See also Pierrette Mizzi, 'Balancing Prosecution with the Right to a Fair Trial: The Child Sexual Abuse Reforms in NSW' (2019) 31(2) *Judicial Officers Bulletin* 11, 18; Woiwod and Connolly (n 22) 217; *Criminal Justice Report: Parts III to VI* (n 17) 68.

89 See, eg, Christopher Boyce, 'Guilt by Disposition? S47A of the Crimes Act' (2000) 74(5) *Law Institute Journal (Victoria)* 58, 61; Andrew West, 'Maintaining Unlawful Sexual Relationships' (2013) 33(1) *Queensland Lawyer* 10, 11–14.

90 West (n 89) 11.

91 *CAZ* (n 2).

92 Ibid 452 [34] (Fraser JA).

93 Ibid 458 [47] (Fraser JA, Chesterman JA agreeing at 460 [57], White JA agreeing at 460 [58]).

94 Ibid 458 [48].

on 'the essential allegation that the defendant maintained a sexual relationship with a child that involved more than one unlawful sexual act', even if the jurors did not agree on which unlawful sexual acts had been proved.[95]

2 *Limited Effectiveness of Persistent CSA Provisions*

A second criticism has been that the laws have not resulted in sufficient substantive justice from victims' perspectives. In 2010, a consultation paper asked whether the existing offences had achieved their aims within the family violence context.[96] Many submissions revealed a view that the provisions were under-utilised and were not achieving their aim.[97] Submissions identified restrictive judicial interpretation of the offence provisions, notably in jurisdictions that had not implemented reforms since the decision in *KBT*, and the requirement in some states and territories to obtain approval from the Director of Public Prosecutions before laying a charge as barriers to their use.[98] The resulting report recommended further review of the 'utilisation and effectiveness of persistent sexual abuse type offences'.[99]

Similarly, in 2017, the Royal Commission reviewed the performance of persistent CSA laws in the context of institutional abuse.[100] The Royal Commission's *Criminal Justice Report* explained that the offences were infrequently charged, except in Queensland and Tasmania.[101] The main difficulty faced by the application of the offence in most states and territories was the failure to rectify the effect of *KBT* on extended jury unanimity. In the Royal Commission's view, the only jurisdiction that had successfully overcome this limitation was Queensland:

> 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.[102]

The Royal Commission noted that convictions under the Queensland offence have been upheld by the Court of Criminal Appeal even when the jury had not convicted the accused of any individual offences charged on the same indictment.[103] Therefore, the Queensland framing of the offence appears to effectively and safely enable

95 Ibid 459 [53].

96 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks* (ALRC Consultation Paper No 1, NSWLRC Consultation Paper No 9, April 2010) 735.

97 *Family Violence: A National Legal Response* (n 17) 1143–4.

98 Ibid 1143–5.

99 Ibid 1145–6.

100 *Criminal Justice Report: Parts III to VI* (n 17) ch 11.

101 Ibid 30.

102 Ibid 68.

103 Ibid 66, citing *R v LAF* [2015] QCA 130; *R v RAS* [2014] QCA 347; *R v WAB* [2008] QCA 107.

prosecution of persistent CSA offences that cannot be prosecuted as individual offences.[104] The Queensland approach was also preferred by many submissions.[105] The Royal Commission provided draft legislation, based on the Queensland law, which was intended to enact that position in the other states and territories.[106]

Although this analysis supports a view that the effectiveness of the Queensland provision depends on the actus reus being an unlawful sexual relationship, it is not clear, so long as there is an actus reus distinct from individual acts, that it must be a *relationship*. The key limitation in other jurisdictions is the failure to overcome the effect of *KBT*, rather than the precise question of how the offence is conceptualised. For example, the Royal Commission contrasted the Queensland offence with the South Australian offence in force at the time, 'persistent sexual exploitation of a child'.[107] As described above, this offence had enabled conviction to occur in some cases of persistent CSA that, in the view of the Director of Public Prosecutions, would not have been able to be effectively prosecuted as individual offences. The limitation of the offence was the need for members of the jury to delineate and agree the same two or more acts.[108]

The relevance to our analysis is that, while both States now have persistent CSA laws that are effective, the resulting South Australian offence substantially differs in scope and operation from that of Queensland. This provides an opportunity to more closely examine the following critique about the conceptualisation of persistent CSA as an unlawful sexual relationship.

3 *The Terminological Problem: Use of the Concept of a 'Relationship'*

A third criticism of these offences is the use of the terms 'relationship' and 'sexual relationship' to delineate the setting in which unlawful sexual acts against children have been perpetrated. Survivors, advocacy groups, and lawyers have argued that this terminology obscures the nature of the crime and causes additional harm to survivors of persistent CSA by mischaracterising the interactions between offenders and victims as mutual or having romantic connotations.[109] Justice Brett of the Supreme Court of Tasmania has described the Tasmanian offence as having a 'very poor name', noting the crime 'has nothing to do with a relationship'.[110] Some states,

104 *Criminal Justice Report: Parts III to VI* (n 17) 66–8.

105 Ibid 42, 44, 46, 49, 50, 51, 53, 54, 56.

106 *Criminal Justice Report: Parts VII to X and Appendices* (n 75) app H.

107 *CLCA* (n 1) s 50, as at 23 November 2008.

108 *Criminal Justice Report: Parts III to VI* (n 17) 68.

109 Nina Funnell, 'Nature of Language in Paedophile Charge Adds to Victim Trauma', *The Mercury* (Hobart, 19 August 2019) 8; Edith Bevin, 'Overhaul of Sex Abuse Laws Needed to Remedy Community Confusion, Advocates Say', *ABC News* (online, 15 August 2019) <https://www.abc.net.au/news/2019-08-15/call-for-sexual-assault-laws-overhaul-in-tasmania/11414982>; Amber Wilson, 'Not All for Sex Crime Rename', *The Mercury* (Hobart, 7 March 2020) 20.

110 Wilson (n 109).

such as Tasmania, Victoria, and Western Australia, have adopted 'persistent sexual abuse' nomenclature in recognition of the inappropriate implications of labelling the offence a 'relationship'.[111] Many jurisdictions in the United States have also developed persistent CSA offences[112] using terminology such as 'continuous sexual abuse of a child'[113] or 'engaging in repeated acts of sexual assault of the same child'.[114]

The use of 'relationship' terminology does not reflect an accurate understanding of the nature of child sexual abuse. Child sexual abuse occurs when any adult or child in a position of power over the victim inflicts contact or non-contact sexual acts, to seek or obtain physical or mental sexual gratification for themselves or another person and whether immediate or deferred in time and space, when the child either does not have capacity to provide consent, or has capacity but does not provide consent.[115] A 'sexual relationship', as a normative concept, involves consensual sexual activity, which by its nature must be premised on full, free, and voluntary consent to the acts.[116] On this basis, it is clearly inappropriate to conceive of non-consensual sexual acts inflicted on a child as involving a 'sexual relationship'. This definitive conclusion has clear implications for law reform, to which we return below.

Despite this criticism, the framing of the offence as an 'unlawful sexual relationship', and in particular the Queensland form of the offence, has been preferred as an effective approach to drafting a provision that does not rely on specific acts to form the actus reus of the offence. The Royal Commission explained that '[t]he language of "relationship" does not sit easily with the exploitation involved in child sexual

111 *Criminal Code Act 1924* (Tas) s 125A, as amended by *Criminal Code Amendment (Sexual Abuse Terminology) Act 2020* (Tas) s 5; *Crimes Act 1958* (Vic) s 47A, as amended by *Crimes (Sexual Offences) Act (No 2) 2006* (Vic) s 11; *Criminal Code Act Compilation Act 1913* (WA) s 321A, as amended by *Criminal Law and Evidence Amendment Act (No 2) 2008* (WA) s 10. See also Tasmania, *Parliamentary Debates*, House of Assembly, 18 March 2020, 38 (Elise Archer, Minister for Justice); Victoria, *Parliamentary Debates*, House of Assembly, 16 November 2005, 2185 (Rob Hulls, Attorney-General); Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 June 2006, 4212 (JA McGinty, Attorney General).

112 Woiwod and Connolly (n 22) 211.

113 See, eg, Cal Penal Code § 288.5 (Deering 2016).

114 Wis Stat § 948.025 (2019–20).

115 Mathews and Collin-Vézina (n 19).

116 Although terms such as 'sex' and 'a sexual relationship' may be qualified as 'non-consensual' or 'unlawful' to refer to sexual assault, the inherent normative assumptions of mutuality and voluntary participation in those terms has been identified by literature on the use of romantic and erotic language in sexual assault trials, and underscored by the misuse of such concepts by offenders to justify their sexual offending against children: see, eg, Janet Bavelas and Linda Coates, 'Is It Sex or Assault? Erotic Versus Violent Language in Sexual Assault Trial Judgments' (2001) 10(1) *Journal of Social Distress and the Homeless* 29, 31–2; Shruti Navathe, Tony Ward and Theresa Gannon, 'Cognitive Distortions in Child Sex Offenders: An Overview of Theory, Research & Practice' (2008) 4(3) *Journal of Forensic Nursing* 111.

abuse offending',[117] but nevertheless adopted this language in their model provisions on the view that it permitted 'the most effective form of offence'.[118] Accordingly, their model provisions are headed 'Persistent Sexual Abuse of Children Model Provisions', while the words within the provision refer to 'maintaining an unlawful sexual relationship with a child'.[119]

The recent emergence of an alternative approach in South Australia, occurring after the conclusion of the Royal Commission, provides a new perspective on the operation of the Queensland offence and an opportunity to re-evaluate persistent CSA laws in the light of the comparative observations and critiques above. As will be shown below, concepts of both a 'relationship' and a 'sexual relationship' have presented challenges for judicial interpretation, which have shaped the operation of the provisions in both Queensland and South Australia. While Queensland pioneered the persistent CSA offence in Australia, and has continued to implement reforms that improve the operation of the law, we argue that judicial interpretation of the provision has drawn on the concepts of a 'relationship' and a '*sexual* relationship' in ways that are legally and factually inappropriate in the context of persistent CSA. A review of the historical and doctrinal development of these offences in Queensland and South Australia, including judicial consideration of the current provisions, will demonstrate the attempt to navigate this tension, and will inform the final analysis.

IV Queensland: Maintaining an Unlawful Sexual Relationship

Since 1989, Queensland courts have developed a corpus of case law regarding the interpretation of s 229B, and in particular whether the accused has maintained an unlawful sexual relationship. Despite the reformulation of the offence in 2003, including the partial definition of an 'unlawful sexual relationship', the courts' interpretation of what constitutes the maintenance of an unlawful sexual relationship has remained consistent.[120] Namely, maintaining an unlawful sexual relationship with a child requires evidence of a *sexual relationship*, which is maintained through sexual contact that occurs with *continuity* and *habituality*.[121] In taking this approach, the offence as it operates in Queensland has been complicated by judicial references to the existence of 'a sexual relationship', and to questionable interpretations of the application of the concepts of continuity and habituality, with the result that some situations of repeated acts appear to have been excluded from the operation of the provision.

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117 *Criminal Justice Report: Parts III to IV* (n 17) 71.

118 Ibid.

119 *Criminal Justice Report: Parts VII to X and Appendices* (n 103) 550–3, especially cl 3 of the Model Provisions.

120 *CAZ* (n 2) 457 [46] (Fraser JA).

121 See, eg, *R v Kemp [No 2]* [1998] 2 Qd R 510, 511–2 (Macrossan CJ), 518 (Mackenzie J) (*'Kemp [No 2]'*); *R v S* [1999] 2 Qd R 89; *R v A* [2002] QCA 536; *R v DAT* [2009] QCA 181 ('*DAT*'); *CAZ* (n 2); *R v SCE* [2014] QCA 48, [5] (McMurdo P) ('*SCE*').

A *A 'Relationship of a Sexual Nature'*

As first expressed in *R v Kemp [No 2]* ('*Kemp [No 2]*') in 1998,[122] and affirmed 20 years later in *R v PBA* ('*PBA*'),[123] proving an offence under s 229B requires proof of 'an ongoing relationship of a sexual nature'.[124] In *Kemp [No 2]*, the Court was looking for evidence of a 'sexual relationship' *between both parties*, drawing on characteristics of an 'ordinary' sexual relationship:

> Use of the term 'relationship' implies *a continuity of contact in which both parties are involved*; *the sexual element will be the particular character of the relationship which will appear*. Evidence of conduct occurring between the two parties, if it pointed to the existence of *a sexual character in their relationship* during the specified period, would be direct evidence of an aspect of this offence.[125]

> Where what has to be proved is not just a single incident, or three incidents, but a s. 229B relationship — a situation subsisting over a period of time — acts of the accused tending to show a 'guilty passion' at relevant times are directly relevant; *in court as in ordinary life, one deduces that two people have a sexual relationship with one another, wholly or in part from evidence that they engage in acts characteristic of such a relationship*.[126]

In referring to the ways in which a sexual relationship may be deduced in 'ordinary life', the Court was presumably drawing on the characteristics of a sexual relationship between consenting adults. This approach could be seen as taking up the invitation offered by the Queensland Parliament, since the provision was said to 'use … ordinary everyday language which is able to be understood by ordinary people'.[127] However, framing child sexual abuse in terms of mutual involvement in sexual activity is clearly inappropriate and without factual basis. The adoption of prevailing myths and misrepresentations of child sexual abuse can be seen in the following passage in *Kemp [No 2]*, contrasting a s 229B relationship with a scenario where an adult and child meet unexpectedly on multiple occasions and 'decide' to have sexual intercourse:

> [I]f an adult and a child were proved by clear evidence to have arranged to meet for the purpose of having sexual intercourse on each occasion when she was allowed out on leave from boarding school, but their arrangement and evidence of their intention to continue with it was discovered after only three such occasions,

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122 *Kemp [No 2]* (n 121).

123 [2018] QCA 213 ('*PBA*').

124 Ibid [7] (Fraser JA). See also *Kemp [No 2]* (n 121) 522 (Mackenzie J): 'Section 229B is an unusual offence in that it requires proof of at least an habitual course of conduct of a sexual nature in respect of a person under 16'.

125 *Kemp [No 2]* (n 121) 511 (Macrossan CJ) (emphasis added).

126 Ibid 512 (Pincus JA) (emphasis added).

127 Queensland, *Parliamentary Debates*, Legislative Assembly, 24 November 1988, 3256 (BD Austin).

> such evidence may be sufficient to satisfy a jury beyond reasonable doubt that the adult was maintaining a sexual relationship with the child. On the other hand there is no reason to think that the section was intended to apply if what is proved are three random or opportunistic incidents such as a case where, over a period of time, an adult and a child meet unexpectedly and without arrangement at a place of entertainment and on each occasion decide to have sexual intercourse during the course of the evening.[128]

Although more recent judgments rarely describe complainants as active participants in a sexual relationship, the requirement that the relationship be of a sexual nature has persisted, even though the provision now provides that '[a]n unlawful sexual relationship is a *relationship* that involves more than 1 unlawful sexual act over any period'.[129] This is because it has been held that continuity or habituality of sexual contact is necessary to prove the relationship has been *maintained*. In *CAZ*, Fraser JA explained that, before 2003, the offence had required proof of 'sufficient continuity or habituality to justify the inference that the defendant maintained a sexual relationship with the child', and that there was 'no indication in the explanatory notes or in the text of the current section that this requirement has been discarded'.[130] In particular, s 229B(3), which requires that 'all the members of the jury must be satisfied beyond reasonable doubt that the evidence establishes that an unlawful sexual relationship with the child involving unlawful sexual acts existed', appeared to Fraser JA as consistent only with the view that there must be an 'ongoing relationship of a sexual nature' with 'continuity or habituality of sexual conduct'.[131] In *PBA*, the Queensland Court of Appeal affirmed that the issue of whether an unlawful sexual relationship *existed* required proof of 'a relationship that involved more than one unlawful sexual act during the charged period'.[132] This is in line with the partial definition provided in s 229B(2) after 2003. However, the existence of a relationship was distinguished from the issue of whether the accused had *maintained* the relationship, which 'required proof that there was an ongoing relationship of a sexual nature between the appellant and the complainant, and that required some continuity or habituality of sexual conduct rather than merely proof of isolated or unconnected incidents'.[133]

B *The Concepts and Measurement of Continuity and Habituality*

While all formulations of s 229B have required evidence of a minimum number of unlawful sexual acts within an alleged relationship, Queensland case law shows that they may not be sufficient to demonstrate the maintenance of an unlawful sexual

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128 *Kemp [No 2]* (n 121) 518 (Mackenzie J).

129 *Criminal Code Act 1899* (Qld) s 229B(2) as at 1 May 2003 (emphasis added).

130 *CAZ* (n 2) 457–8 [46] (Fraser JA).

131 Ibid.

132 *PBA* (n 123) [7] (Fraser JA).

133 Ibid.

relationship.[134] Therefore, even in cases where it is accepted that the accused has done multiple unlawful sexual acts towards a child, this may fall short of the requirement to prove that an unlawful sexual relationship has been maintained though continuity or habituality of sexual conduct. For example, in the Queensland Court of Appeal decision *R v DAT* ('*DAT*'), the complainant provided evidence of approximately seven incidents of 'touching' by her father over five years in the context of weekly access visits.[135] The relationship was alleged to have occurred between June 1996 and June 2001, and therefore the pre-2003 formulation of s 229B applied. The appellant had pleaded guilty to four counts of indecent treatment of a child under 16, being the complainant, and was also convicted of maintaining a sexual relationship with a child. On appeal, Holmes JA accepted as reasonable the appellant's submission that 'the indicia of maintaining a relationship include the duration of the alleged relationship, the number of acts and the nature of the acts engaged in'.[136] Her Honour compared the number of acts, approximately seven, to the number of opportunities for sexual contact, represented by approximately 250 access visits, concluding that this number tended to disprove regularity or habituality of conduct by the accused.[137] Moreover, the decision afforded legal significance to the specific nature of the acts done, based on whether penetration occurred: acts of touching were contrasted with acts of penile penetration, which 'would indicate a more deliberate and significant course of conduct'.[138] The Queensland Court of Appeal concluded that the incidents of touching were too fleeting to constitute a relationship, amounting instead to 'random spontaneous events':[139]

> Given the nature of the touching described, the limited number of events, the fact that they were spread over such a long period of time, and the absence of any evidence that there was any limitation of opportunity, I do not think it was open to his Honour to be satisfied that these were more than random spontaneous events. The evidence was not sufficient to prove beyond reasonable doubt that the appellant had maintained an unlawful relationship with his daughter.[140]

The reasoning in *DAT* was endorsed by the Queensland Court of Appeal in *R v SCE* ('*SCE*'), which also applied the pre-2003 version of the offence.[141] President McMurdo noted that the unlawful sexual acts on which the jury had agreed (touching the complainant's breasts, simulating sexual intercourse, and sexual intercourse) were 'much more serious and invasive than the acts in *R v DAT* which this Court

134 *DAT* (n 121) [12] (Holmes JA).

135 Ibid [14]–[15].

136 Ibid [13].

137 Ibid [15]–[16].

138 Ibid [13].

139 Ibid [17] (Holmes JA, Muir JA agreeing at [20]), [24] (McMurdo J).

140 Ibid [17] (Holmes JA).

141 *SCE* (n 121).

found did not establish habituality'.[142] Further, the order in which these acts occurred provided evidence of 'the continuing escalation of the relationship'.[143] In sum, evidence of 'three discrete acts over less than 18 months' was found by the majority to have 'demonstrated sufficient continuity to allow the drawing of an inference of a developing and continuous relationship' by the jury.[144] The difference between this case and *DAT* appears to be that the acts were more 'serious and invasive' than those in *DAT*, and could be characterised as an 'escalation of the relationship'.[145]

There are several difficulties with this approach. It creates a possibility that instances of repeated sexual offending against children will be excluded from the operation of the provision based on an unjustifiably restricted interpretation of what must exist to satisfy the condition of 'a relationship'. This interpretation is premised on the 'fleetingness' of the acts, or their 'isolated' or perceived 'random spontaneous' nature. In this sense, the approach to the concept of 'a relationship' is more reflective of the nature of a sexual relationship between adults, and directly contradicts the purpose of the provision. It also, without any justification in policy or legislation, downgrades the significance of unlawful non-penetrative sexual acts, which by their nature remain illegal and therefore within the ambit of the provision, and which may be just as harmful as penetrative acts.[146] Emphasis on fleeting or spontaneous events of sexual offending against children ignores the very nature of child sexual abuse. This often involves multiple acts over a period of time, and is by its nature often not continuous or habitual in contrast to a more regular pattern reflective of consensual relationships. Child sexual abuse is inherently dependent on spontaneity given the fact that offenders require the opportunity to inflict the acts in secret, and such circumstances are not always present or under their control.[147]

142 Ibid [10] (McMurdo P). For the purposes of clarity, please note the judgment quoted here is that of President Margaret McMurdo, whereas the judgment quoted above in *DAT* is that of Justice Philip McMurdo.

143 Ibid [11] (McMurdo P).

144 Ibid [11] (McMurdo P, Morrison JA agreeing at [78]). Justice of Appeal Gotterson did not consider it necessary to make a determination on that question: at [34].

145 Ibid [10].

146 See generally David M Fergusson, Geraldine FH McLeod and L John Horwood, 'Childhood Sexual Abuse and Adult Developmental Outcomes: Findings from a 30-Year Longitudinal Study in New Zealand' (2013) 37(9) *Child Abuse and Neglect* 664; Elizabeth Oddone Paolucci, Mark L Genuis and Claudio Violato, 'A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse' (2001) 135(1) *Journal of Psychology: Interdisciplinary and Applied* 17; Penelope K Trickett, Jennie G Noll and Frank W Putnam, 'The Impact of Sexual Abuse on Female Development: Lessons from a Multigenerational, Longitudinal Research Study' (2011) 23(2) *Development and Psychopathology* 453.

147 Ramona Alaggia, Delphine Collin-Vézina and Rusan Lateef, 'Facilitators and Barriers to Child Sexual Abuse (CSA) Disclosures: A Research Update (2000–2016)' (2019) 20(2) *Trauma, Violence and Abuse* 260; Stephen W Smallbone and Richard K Wortley, 'Child Sexual Abuse: Offender Characteristics and Modus Operandi' (Trends and Issues in Crime and Criminal Justice No 193, Australian Institute of Criminology, February 2001).

C *Developing an Interpretation More Consistent with Law and Social Science*

In some more recent cases, the Queensland Court of Appeal has continued to develop the concepts of continuity and habituality in ways that are more consistent with law and social science evidence on the nature of child sexual offending, without specifically overruling *DAT*. In *R v FAL* ('*FAL*'), the Court stated that continuity or habituality *does not* require physical contact of a minimum level of intimacy, duration, or invasiveness.[148] The Justices of Appeal rejected the argument, based on the *Macquarie Dictionary* definition of 'relationship', that an unlawful sexual relationship must entail intimacy and duration of contact sufficient to show the accused adult and the child having a 'connection'.[149] Similarly to *DAT*, the relevant unlawful sexual acts involved touching the complainant, on or about her genital area on the outside of her clothing, and on her breast or breasts inside her shirt.[150] The appellant argued that such 'fleeting low level contact' was insufficient, but the Court disagreed, concluding that it was for the jury to decide whether such contact amounted to sexual contact of sufficient continuity or habituality to amount to the maintenance of an unlawful sexual relationship.[151] In *R v Watson*,[152] the Court agreed with the conclusion in *FAL*, stating that even 'momentary' or 'marginal' touching on the outside of clothing, when of a sexual nature sufficient to constitute indecent dealing, was sufficient to establish the existence of an unlawful sexual relationship.[153] In both of these cases, there was no requirement that the contact be of a particular level of invasiveness or frequency, nor that it progress in a manner consistent with the development of a sexual relationship. These more recent cases display an approach that is more consistent both with the range of sexual offences against children encompassed by s 229B and social science evidence about the nature of sexual offending against children.

Nevertheless, the interpretation of s 229B by the Queensland courts means that it remains necessary to prove that a relationship of a sexual nature existed, which has been maintained by the accused through the habituality and continuity of sexual contact. The application of the concepts of habituality and continuity arise from the courts' reasoning about the qualities that identify a 'relationship', and in particular a 'sexual relationship', rather than the characteristics of persistent CSA. This restricts the application of the provision despite the purpose of the provision being to accommodate the evidentiary characteristics of persistent CSA. Although more recent decisions are less insistent about the nature and frequency of sexual contact, perhaps reflecting an increased societal and juridical understanding of the nature of child sexual abuse, the Queensland approach leaves open the possibility that the application of the provision is unjustifiably limited.

148 [2017] QCA 22, [32] ('*FAL*').

149 Ibid [28]–[32].

150 Ibid [5].

151 Ibid [21]–[33].

152 [2017] QCA 82.

153 Ibid [36]–[38] (Sofronoff P, Fraser JA and Applegarth J).

V South Australia: Persistent Sexual Abuse of a Child

Due to the recency of these reforms, South Australia has a relatively short history of judicial consideration of persistent CSA offences focused on a relationship. The first cases decided in the South Australian District Court under the reformed 2017 law adopted the Queensland approach.[154] For example, in the reasons provided by Judge Muscat in the District Court in the 2019 case of *R v F, KV*, the elements of the offence were enumerated and included both that the defendant had engaged in an unlawful sexual relationship with the complainant, namely 'a relationship in which an adult engages in two or more sexual acts with or towards a child', and that the unlawful sexual relationship had been *maintained*, which meant 'some continuity of sexual conduct and not merely isolated sexual acts'.[155] His Honour cited with approval the comments of McMurdo J in *DAT* regarding the necessity to prove continuity or habituality of the sexual contact to establish that a relevant relationship had been maintained.[156] Thus, initially at least, the South Australian provision was taken to require evidence of a sexual relationship.

A *A Different Approach to the Concept of 'a Relationship'*

However, in May 2019, the South Australian Court of Criminal Appeal delivered its decision in *M, DV*.[157] Each of the three judgments dealt extensively with the appropriate construction of the term 'unlawful sexual relationship' and the concept of 'a relationship', based on three alternative constructions which Blue J identified:

> 1 The relationship is constituted by the multiple unlawful sexual acts themselves.
>
> 2 There must be a relationship (not necessarily a sexual relationship) between the defendant and complainant and this is an element of the offence in addition to multiple unlawful sexual acts.
>
> 3 There must be a sexual relationship between the defendant and complainant and this is an element of the offence in addition to multiple unlawful sexual acts.[158]

Notably, all three judges rejected the third construction, which would require evidence of a *sexual* relationship, and is the construction most closely resembling the Queensland judicial interpretation of s 229B. Chief Justice Kourakis rejected this construction as inconsistent with the statutory definition of an unlawful sexual

154 See, eg, *R v Hamra* [2018] SADC 33, [4] (Judge Barrett); *R v Keyte* [2018] SADC 22, [10] (Judge Davison).

155 [2019] SADC 53, [78].

156 Ibid, citing *R v DAT* [2009] QCA 181, [22].

157 *M, DV* (n 81).

158 Ibid 484–5 [48].

relationship: if evidence of two or more acts is sufficient, to 'require more frequent and persistent acts would be inconsistent'.[159] Similarly, Blue J found no basis in the wording of the provision to support the contention that the relationship must be a sexual one:

> The word 'unlawful' in the definition is given meaning by the reference to *unlawful* sexual acts and the word 'sexual' in the definition is given meaning by the reference to unlawful *sexual* acts in the definition.[160]

Further, Blue J viewed it as improbable that the legislature intended to create an offence involving such 'complexity and uncertainty' as the concept of a 'sexual relationship'.[161]

The majority, Kourakis CJ and Lovell J, preferred the second construction.[162] The Chief Justice held that the phrase 'in which' contained in section 50(2) served to 'differentiate the relationship from the unlawful sexual acts', meaning that a relationship must be proved.[163] His Honour also acknowledged the Parliament's clear intention to adopt the recommendations of the Royal Commission, including that reforms should be made so that 'the actus reus is the maintaining of an unlawful sexual relationship'.[164] In agreement, Lovell J noted that while either the first or second interpretations were possible readings of the text of the provisions, the second interpretation was preferable since it 'accommodates the purpose of the section and the mischief it was designed to overcome'.[165]

In contrast, Blue J concluded that the first construction was the proper one, when the text, context, and purpose of the provision were taken into account.[166] In his Honour's view, the text of s 50(2) ('an unlawful sexual relationship is a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period') could be read consistently with either the first or the second construction.[167] For Kourakis CJ, this wording clearly differentiated the relationship from the unlawful sexual acts.[168] Therefore, Kourakis CJ rejected the first construction on the basis that having no requirement to prove a 'relationship' would remove the element on which the jury could unanimously or by majority agree beyond reasonable doubt.[169] In Blue J's view, the words 'in which' could equally be read as meaning the

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159 Ibid 478 [22].

160 Ibid 485 [49] (emphasis in original).

161 Ibid 485 [50].

162 Ibid 474 [9]–[10] (Kourakis CJ), 514 [174] (Lovell J).

163 Ibid 474 [10].

164 Ibid 478 [20], quoting *Criminal Justice Report: Parts III to VI* (n 17) 74.

165 Ibid 515–16 [178]–[183].

166 Ibid 488 [64].

167 Ibid 486 [52].

168 Ibid 474 [10].

169 Ibid 475–6 [14].

relationship was constituted by the acts.[170] Justice Blue drew further support for this construction from the context provided by s 50(4)(c), which provides that members of the jury need not agree on 'which unlawful sexual acts *constitute* the unlawful sexual relationship'.[171] Also, Blue J saw the first construction as most consistent with the purpose and rationale of the provision: to enable conviction where a jury agrees that an adult has committed multiple sexual offences against a child but is unable to identify or agree with certainty on particular acts: '[i]t should be sufficient … that the trier of fact is satisfied that multiple sexual offences have been committed'.[172] Finally, his Honour was unpersuaded that a 'relationship' element was required for the purposes of jury unanimity, given the deliberate legislative choice to depart from common law principles of unanimity, the availability of other elements (for example the complainant's age) on which unanimity could occur, and the rarity of cases where the existence of a 'relationship' within the South Australian interpretation would be in issue.[173] We return to these reasons below in Part VI(B).

The effect of *M, DV* and its requirement that there be a relationship, but not necessarily a sexual one, between the complainant and the accused can be seen in subsequent District Court decisions. A range of relationships have been accepted as satisfying this element. In *R v H, A*, Judge Tracey found that there was a relationship between each of the two complainants and the accused, since one was a cousin of the accused and the other was a family friend.[174] In *R v B, LM*, Judge Slattery acknowledged that the parties had 'a father and daughter relationship'.[175] Going considerably further, in *R v Korth*, Judge Davison held the requisite relationship was established by the fact the complainant was cared for by the accused's wife in a family day care setting.[176]

In *R v Mann* ('*Mann*'), the Court of Criminal Appeal expanded on the proper approach to the interpretation of the term 'relationship' in the context of s 50.[177] *Mann* originated in a South Australian District Court trial that resulted in an acquittal in part because it was found the necessary relationship had not been proven.[178] In that trial, Judge Chapman held that for a relationship to exist, the accused must have

> knowingly maintained a relationship with the complainant. There are three parts to this element. First, there was a relationship between the accused and the complainant. That is separate from/outside of the alleged unlawful sexual

170 Ibid 486 [52].

171 Ibid 486 [53], 488 [61] (emphasis added).

172 Ibid 486 [54].

173 Ibid 488 [62].

174 [2019] SADC 169, [17].

175 [2020] SADC 42, [12].

176 [2019] SADC 133, [16].

177 (2020) 135 SASR 457 ('*Mann*').

178 *R v Mann* [2020] SADC 47, [91] (Judge Chapman).

> acts. Second, the accused maintained that relationship. Third, the accused did so knowingly.[179]

Applying this to the facts of the case at trial, Judge Chapman regarded the previous de facto stepfather/stepdaughter relationship, predating the period of the alleged relationship, as relevant but not sufficient to prove beyond reasonable doubt that a relationship existed during the period of the alleged unlawful sexual relationship. During the period of the alleged relationship, contact between the complainant and the accused occurred between four and seven times during random and brief visits by the accused to the house the complainant lived in with her mother.[180] The contact consisted almost solely of the alleged unlawful sexual acts themselves, and Judge Chapman found there was not sufficient evidence of interaction outside the alleged unlawful sexual acts to prove the existence of a relevant relationship.[181] Even if a relevant relationship existed, Judge Chapman was not satisfied that the accused had maintained the relationship, since he had gone to the house on only a small number of occasions, arriving late at night, and there was no evidence of interaction other than the acts of abuse.[182] Although the complainant gave evidence that she had provided the accused with breakfast on three of those occasions, that was action taken by the complainant, and Judge Chapman did not view the complainant's 'action in remaining at the house in the morning long enough to have breakfast in bed [as] conduct sufficient to amount to "maintaining" a relationship'.[183]

This interpretation of the offence is difficult to reconcile with the majority's position in *M, DV*, that it was necessary to prove that a relationship existed but without the imposition of additional requirements about the character of that relationship. In this instance, Judge Chapman's interpretation resembled the Queensland approach, where requirements of proof attach to the character of the relationship, and whether that relationship has been maintained by the accused through consistent conduct, such that some instances of repeated sexual offending against a child may fall outside the scope of the offence.

Following the acquittal, Judge Chapman referred a series of questions regarding the interpretation of the offence to the Court of Criminal Appeal,[184] to which Kourakis CJ, with whom Kelly and Peek JJ agreed, responded, expanding on the Court's position in *M, DV*. First, Kourakis CJ disagreed with Judge Chapman's interpretation that a relationship separate from the unlawful sexual acts had to be proved. While it was clear from *M, DV* that a relationship must be proved as a separate element to the occurrence of two or more unlawful sexual acts, evidence of the unlawful sexual acts

179 Ibid [41].

180 Ibid [82].

181 Ibid [89].

182 Ibid [90].

183 Ibid.

184 *Mann* (n 177).

may also be evidence of the existence of a relationship.[185] The jury must unanimously (or by majority) agree on the existence of the unlawful sexual relationship, but may differ on which evidence they rely on to reach that conclusion. Excluding evidence of the accused's repeated sexual conduct from the jury's consideration on whether a relationship has been proved would undermine the purpose of the provision, which is to provide a relaxed requirement for particularisation.[186] Second, Kourakis CJ agreed with the trial judge that the relationship must be maintained, but whereas Judge Chapman expressed this as 'knowingly maintained', the Chief Justice explained that the state of mind required for this element was knowledge of the sexual acts and the surrounding circumstances that constituted the maintenance of a relationship.[187] It was not necessary that the accused saw themselves as being in a particular type of relationship with the complainant.[188]

In *M, DV*, the majority of the Court held that it was an element of the offence that a relationship existed, and that it need not be a sexual relationship. In *Mann*, Kourakis CJ expanded further on the correct interpretation of the term 'relationship' for the purposes of s 50:

> The category of relationships falling within s 50 of the *CLCA* can never be closed because relationships vary widely and the very concept evolves over time with societal changes. The wide range of social and interpersonal relationships falling within the term include:
>
> - familial, legal and de-facto, relationships;
> - residential relationships;
> - working relationships;
> - sporting and recreational relationships; and
> - professional relationships.[189]

Additionally, Kourakis CJ referred to the range of persons within the definition of persons in a position of authority in s 50(13) as 'an indication of the breadth of the concept of relationship for the purposes of s 50'.[190] The range of roles enumerated in s 50(13) includes: teachers in relation to all pupils at the school where the teacher works; parents and others in parental roles and any of their de facto or domestic partners; providers of religious, sporting, musical, or other instruction to a child;

185 Ibid 464 [15].

186 Ibid 464 [15]–[16].

187 Ibid 464–5 [20].

188 Ibid.

189 Ibid 465 [26].

190 Ibid 466–7 [32].

religious and spiritual leaders in a group attended by a child; health professionals or social workers providing personal services to a child; and employers and others with a similar authority over a child's employment. In Kourakis CJ's view, sexual acts by adults in a position of authority in relation to a child take place in the context of the 'social, hierarchical and legal relationships' created by that position of authority.[191] This reflects a conceptualisation of persistent CSA as a crime where sexual offences are perpetrated within a relationship that might otherwise be benign or ordinary, which is substantially different to the Queensland approach where a relevant 'relationship' must be maintained quite differently through continuous or habitual sexual contact.

Therefore, Kourakis CJ concluded that, in this case, there was strong evidence of a relationship: even though the prior, 'quasi-parental' relationship, had undergone change, it provided 'patterns of behaviour and attitudes towards each other,' some of which the complainant resumed during the period of the alleged unlawful sexual relationship.[192] The prior relationship provided the accused with access to the complainant's home, and authority, acceptance, and a power imbalance which provided context for the complainant's response.[193] Finally, Kourakis CJ made it clear that the existence of a relationship was a factual question for determination by the jury, and that '[n]o judicial gloss should be put on the statutory language'.[194] This is a substantial departure from the Queensland position, where the statutory language has been subject to extensive interpretation.

The result of these recent South Australian Court of Criminal Appeal cases is that the provision in South Australia requires evidence of a relationship between the complainant and the accused, but an emphatic rejection of the notion that this must be a *sexual* relationship, or that *maintaining* such a relationship requires evidence of continuity or habituality of sexual contact. Evidence of a relationship may be drawn not only from the existence of a recognised social or interpersonal relationship or a position of authority, but from the full context of the interactions between the complainant and accused. Maintenance requires only a mental state of knowledge of the alleged acts and the surrounding circumstances.

VI Critical Analysis of Differences in the Queensland and South Australian Provisions and Their Judicial Interpretation

This comparison of the law in Queensland and South Australia demonstrates that the South Australian approach is more consistent with the nature and purpose of the provisions. As it currently operates, the Queensland offence captures repeated unlawful sexual acts committed against a child only in the presence of a relationship that has the characteristics of a 'sexual relationship', which stands in contrast to the

191 Ibid.

192 Ibid 466 [30].

193 Ibid.

194 Ibid 465 [21].

stated rationale for the provision, which is to enable prosecution of sexual offences against children where the complainant is unable to identify an act with sufficient precision to link it to a single particularised charge. Recent South Australian decisions have dispensed with the need to prove the qualities of habituality and continuity that, in Queensland, serve to limit the circumstances in which the offence can be proved, and have given rise to successful appeals even when there is evidence or an admission of repeated unlawful sexual acts against a child.

The South Australian approach is also more consistent with a proper understanding of the nature of consent, relationships, and child sexual abuse. The South Australian judicial interpretation frames an unlawful sexual relationship with a child as involving an ordinary relationship between an adult and a child, in the context of which the adult sexually offends against the child: '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'.[195] This may be contrasted with the approach in Queensland, where an unlawful sexual relationship is inappropriately framed as a relationship of a sexual nature between an adult and a child, drawing on the indicia of sexual relationships between adults. By not requiring that the 'relationship' be a sexual one, the South Australian position more accurately reflects social science knowledge about the dynamics of child sexual offending.[196] As Kourakis CJ observes in *Mann*, 'sexual offending against children is generally committed by taking opportunistic advantage of a relationship with them'.[197] Although more recent Queensland decisions are arguably more consistent with the findings of social science about persistent CSA,[198] the requirement that there be evidence the relationship has been maintained through continuous and habitual sexual contact remains.

195 *M, DV* (n 81) 476 [16] (Kourakis CJ).

196 This is due to the fact that offenders are frequently family members or known acquaintances who have a different type of relationship with the child: David Finkelhor et al, 'Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors' (1990) 14(1) *Child Abuse and Neglect* 19, 22; David Finkelhor et al, 'The Lifetime Prevalence of Child Sexual Abuse and Sexual Assault Assessed in Late Adolescence' (2014) 55(3) *Journal of Adolescent Health* 329, 331. Familial relationships can include grandparent, stepparent, and uncle/aunt; non-familial known acquaintances can include schoolteacher, parish priest, and sports coach. In addition, evidence indicates that intrafamilial child sexual offending often involves the opportunistic commission of sexual acts, rather than a planned or purposive pattern of offending: Benoit Leclerc and Jean Proulx, 'An Opportunity View of Child Sexual Offending: Investigating Nonpersuasion and Circumstances of Offending through Criminological Lens' (2018) 30(7) *Sexual Abuse* 869, 877–8.

197 *Mann* (n 177) 466 [31].

198 See above Part IV(A).

A *Continuing Problems in Judicial Interpretation of an 'Unlawful Sexual Relationship'*

Although the South Australian construction more effectively responds to the legislative and public policy imperative, and is more consistent with conceptual models of child sexual abuse, there remains more to be said in favour of the construction preferred by Blue J in *M, DV*: that '[t]he relationship is constituted by the multiple unlawful sexual acts themselves.'[199] As an exercise in statutory interpretation, the South Australian construction arguably strains the bounds of the concept in the offence provision of maintaining 'an unlawful sexual relationship', even taking into account the proper contemporary approach to statutory interpretation.[200] This points to intractable problems in the continuing use of terminology of 'maintaining an unlawful sexual relationship'. These include the interpretation of the verb 'maintains', the interpretation of the term 'relationship', and the need to elide its adjectival qualifier of 'sexual'. Read together, the s 50(1) definition of an 'unlawful sexual relationship' and the s 50(2) offence provision of 'maintaining an unlawful sexual relationship' effectively state that '[a]n adult who maintains a relationship in which the adult engages in 2 or more unlawful sexual acts with or towards a child over any period is guilty of an offence'.[201] Demonstrating this ongoing textual ambiguity, in *M, DV*, both Lovell and Blue JJ considered it open on the text of the provision to read this either as requiring a relationship as an element of the offence in addition to unlawful sexual acts, or as *equating* the relationship with those acts.[202]

Yet, what is important is the persistence of the acts over time; the 'maintenance of a relationship' becomes redundant. While the 'relationship' may have provided the context within which the offender had access to the child, and could create the conditions which were conducive to offending, it is not the 'relationship' itself that is significant either jurisprudentially or contextually. In large part, this is because the offender in most cases will not have done anything to create or 'maintain' a 'relationship' when viewed in this way. An aunt or uncle neither creates nor maintains a relationship with their niece or nephew, nor does a grandparent with their grandchild, nor does a teacher with their student. These 'relationships' are created through other

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199 *M, DV* (n 81) 484–5 [48].

200 See *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ):

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

201 *M, DV* (n 81) 484 [47] (Blue J).

202 Ibid 486 [52] (Blue J), 515 [178]–[180] (Lovell J).

agencies or mere chance, and are 'maintained' of their own status without an active effort by the adult. They can be contrasted with 'sexual relationships', which are created by parties of substantively equal standing, capacity and agency, and actively maintained by a range of interactions including genuinely consensual sexual behaviour. This reasoning is similar to that set out by Blue J in *M, DV*: in cases where an adult has been charged with an offence against the South Australian provision, it is not the *existence* of such a relationship that is likely to be in issue, nor is it the relevant conduct giving rise to the charge; those factors do not make the maintenance of a relationship a suitable element on which jury unanimity should rest.[203]

B *Two Conclusions and Recommendations for Legislative Reform*

The analysis above informs two conclusions and recommendations for reform. The first is that the construction of the term 'relationship' in South Australia is clearly preferable to that in Queensland, both from the perspective of the proper application of orthodox principles of statutory interpretation, and from the perspective of the need to ensure the provision is not unduly restricted in its practical operation.

Second, to overcome the normative objection to the use of the term 'relationship' in both these legislative provisions, the legislation — including in South Australia — should be amended to remove the use of the term so that the conceptual, legal and factual focus is on the experience of unlawful sexual acts at multiple points in time. The choice of terminology is significant beyond the implications for survivors, since the concepts of 'persistent sexual abuse' and 'continuous sexual abuse' more accurately describe in factual terms persistent CSA offending. The concept of a 'relationship' has been justifiably denounced as an inappropriate concept in this context, and we would assert this argument applies with even greater force to the use of the concept of a '*sexual* relationship'. An interpretation of this terminological question must be informed by a proper understanding of a robust conceptual model of the nature of child sexual abuse, together with an understanding of the concepts of consent and sexual relationships.

The provisions in both Queensland and South Australia are effective in large part because they establish an actus reus separate from individual unlawful sexual acts, providing an element on which a jury may unanimously agree without the need to particularise or delineate any unlawful sexual acts. Despite the operational effect of South Australia's construction of the term 'relationship' being more appropriate, the continued use of this terminology is problematic. It is the pattern of repeated or persistent behaviour that is jurisprudentially and contextually meaningful, and the existence of this pattern of repeated or persistent behaviour does not require employment of the term 'relationship'. This, together with the unsatisfactory discrepancy between the existing legal terminology's reliance on the concepts of 'relationship' and 'sexual relationship', and the need for the law to reflect a proper understanding of the conceptual nature of child sexual abuse, leads to the conclusion

203 Ibid 488 [62].

that it is no longer either necessary or appropriate to use either of these relational concepts in this context.

Any proposed reform should address the normative critiques of persistent CSA offences, including that these offences compromise the rights of the accused to a fair trial. The modification of particularisation and removal of extended jury unanimity regarding individual acts are justified by a robust policy rationale, to enable the imposition of criminal sanctions for sexual offending against children, and recognition that the requirement to particularise individual acts may create exceptional difficulties especially in cases where sexual offending is repeated over a prolonged period. This criticism has less force given that the modification applies only to the unlawful sexual acts, and it remains necessary to provide particulars, and for the jury to unanimously agree on, the relationship element of the offence. Additionally, the courts have noted that these provisions do not interfere with the ordinary powers and obligations of a trial judge to ensure a fair trial.[204] Nevertheless, this criticism demonstrates that the identification of an actus reus separate from individual acts is necessary not only to give effect to the policy objective of the provisions but also to ensure fairness.

Reform that is both conceptually appropriate and operationally practicable can be achieved by referring in the substantive provisions to the concept of 'persistent sexual abuse', rather than 'maintaining a sexual relationship'. This would form the actus reus of the offence, and the element on which the jury must unanimously agree, avoiding the need to agree on the occurrence of specific acts. The core substantive provision could be expressed as: 'An adult who engages in persistent sexual abuse of a child is guilty of an offence.' The definitional provision could be expressed as: 'An adult engages in persistent sexual abuse of a child where they engage in two or more unlawful sexual acts with or towards a child over any period.' This approach would better reflect much of the substantive recommendation of the Royal Commission,[205] and would be preferable because it also overcomes the terminological problem. The relaxed particularisation requirements, and removal of extended jury unanimity, should continue to apply regarding the unlawful sexual acts.

VII Conclusion

Persistent CSA laws attempt to address the difficulties of prosecuting these offences against children. The comparative doctrinal analysis provided above shows that, while Queensland and South Australia have each enacted legislation that is broadly similar in drafting and purpose, the different approaches adopted by the courts in each state lead to substantial differences in the scope and operation of the law. The developments of the law in South Australia are relevant to other states with similar

204 *CAZ* (n 2) 458. See also Transcript of Proceedings, *CAZ v The Queen* [2012] HCATrans 244, [321]–[323] (Crennan J), [362]–[369] (French CJ); Transcript of Proceedings, *MAW v The Queen* [2008] HCATrans 335, [96]–[100] (Kirby J).

205 *Criminal Justice Report: Parts III to VI* (n 17) 74.

forms of persistent CSA offences, including Queensland, and other states that seek to implement reform. Future reforms of these laws in all states and territories should take account of the need to provide an effective means of imposing criminal sanctions on persistent CSA offending, and the need to preserve fairness to the accused in the context of the reduced requirements of particularity and extended jury unanimity enacted by persistent CSA provisions, as well as the imperative to construct laws that accurately reflect the nature of the crime and do not cause further distress and harm to victims.