GOVERNMENT OF WESTERN AUSTRALIA

Department of Justice

Discussion Paper

Royal Commission into Institutional Responses to Child Sexual Abuse:

Strengthening the criminal law in response to child sexual abuse

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Contents

1 Introduction

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) was established in 2013 pursuant to the *Royal Commissions Act 1902* (Cth) to inquire into and report upon responses by institutions to instances and allegations of child sexual abuse. The Royal Commission undertook five years of inquiry, taking evidence of survivors of child sexual abuse in multiple public hearings, private sessions, written submissions, as well as conducting significant public consultation and research.

The Royal Commission delivered four sets of recommendations, within the following reports:

- Working with Children Checks Report (released August 2015)
- Redress and Civil Litigation Report (released September 2015)
- Criminal Justice Report (released August 2017)
- Final Report - incorporating all recommendations from the three previous reports and introducing 189 new recommendations covering a broad range of areas (released December 2017).[1]

In total, the Royal Commission made 409 recommendations to the Australian Government, state and territory governments, and non-government organisations.

The Western Australian Government (the State Government) is committed to creating a 'Safer WA for Children'.[2] The State Government will take action to prevent child sexual abuse from happening; respond swiftly and effectively to abuse should it occur; and address abuse that happened in the past. In June 2018, the State Government released its initial response to the recommendations of the Royal Commission.[3] This response identified that 310 recommendations within the *Final Report* are applicable to the State Government. Most of these (289) were accepted, or accepted in principle, whilst 21 recommendations were identified as requiring further consideration.

In December 2018, the State Government published its first annual progress report on implementation of the Royal Commission's recommendations, pursuant to recommendation 17.2 of the *Final Report.* Sixteen of the 21 recommendations requiring further consideration were revised to an 'Accept in Principle' response.

The Western Australian Department of Justice (the Department) plays a significant role in responding to, and implementing, recommendations made within the Royal Commission's second, third and fourth reports: the *Redress and Civil Litigation Report*, the *Criminal Justice Report*, and the *Final Report*.

[1] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report*, (15 December 2017). https://www.childabuseroyalcommission.gov.au/final-report

[2] Government of Western Australia, *2018 Annual Report: Royal Commission into Institutional Responses to Child Sexual Abuse* (December 2018).

[3] Government of Western Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse - Response by Minister McGurk on behalf of the State Government of Western Australia* (June 2018) https://www.dpc.wa.gov.au/ProjectsandSpecialEvents/Royal-Commission/Pages/The-WA-Government-Response-to-Recommendations-(June-2018).aspx

Significant reforms in relation to redress for survivors of institutional child sexual abuse, as well as removing limitation periods for seeking civil damages, and identifying a proper defendant to sue in the case of unincorporated institutions, have already been delivered by the State Government in response to these Royal Commission reports.[4] A Discussion Paper released by the Department in December 2018 invited public discussion regarding further recommendations of the *Redress and Civil Litigation Report*, in relation to imposing a non-delegable duty of care and separate liability entailing a reverse onus of proof.[5] The consultation period has now closed.

[4] See *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA).

[5] Department of Justice, Government of Western Australia, *Duty of Institutions in relation to child sexual abuse: Royal Commission recommendations 89-93*.

2 Scope of this Discussion Paper

The *Criminal Justice Report* made 85 recommendations to the Australian Government, and state and territory governments. Of these, 83 are applicable to the State Government.

This Discussion Paper relates to the 18 criminal law recommendations within the Royal Commission's *Criminal Justice Report.*[6] The Department defines the 'criminal law' recommendations as those recommendations pertaining to criminal offences, sentencing legislation, and criminal appeals. These recommendations are *Criminal Justice Report* recommendations 21 – 30; 33 - 36; 74; 76; 79 and 83.

This Discussion Paper does not canvas the 21 recommendations within the *Criminal Justice Report* that relate to evidence law reform, as these recommendations are being progressed separately through new evidence legislation.

Non-legislative recommendations of the *Criminal Justice Report* are being progressed by the Department of Justice through specific projects. These include recommendations about implementing a witness intermediary scheme in courts, improving information and support to victims in court, improving court technology to allow victims to deliver evidence remotely, reducing delays in prosecutions, and training and development initiatives for the judiciary and legal officers.

The Department welcomes submissions in response to the specific questions in this Discussion Paper. Information regarding the process for lodging a submission is provided in section 4.

The diagram below illustrates the relationship of the recommendations informing this Discussion Paper: *Strengthening the criminal law in response to child sexual abuse*, to the other recommendations of the *Criminal Justice Report*, and the three other reports released by the Royal Commission. The segments of the diagram coloured **green** represent the groups of recommendations this Discussion Paper will canvas.

[6] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017. https://www.childabuseroyalcommission.gov.au/criminal-justice

18 criminal law recommendations

2.1 How this Discussion Paper is presented

Each of the 18 criminal law recommendations that fall within the scope of this Discussion Paper are discussed in the following chapters.

The 18 recommendations are grouped according to nine 'Issues'. For example, recommendations 21 – 24 all deal with reform to persistent child sexual abuse offences, therefore 'persistent child sexual abuse offences' is Issue 1.

Chapters 5 – 13 of the Discussion Paper present each Issue. Further details regarding case law, or information about other states' and territories' positions in regards to the recommendations, will be contained in Appendices.

In relation to each 'Issue', the Discussion Paper canvasses:

- the issues of concern identified by the Royal Commission
- the position in other relevant jurisdictions
- current law in Western Australia
- proposals for reform in Western Australia
- discussion questions relevant to reform in Western Australia.

The following table sets out the 18 individual criminal law recommendations in the scope of this Discussion Paper along with their Chapter and Issue.

Criminal Justice Report recommendations regarding criminal offences, sentencing laws, and appeals legislation		
Rec number	**Recommendation**	**Discussion Paper Chapter and 'Issue'**
21	Each state and territory government should introduce legislation to amend its persistent child sexual abuse offence so that: a. the actus reus is the maintaining of an unlawful sexual relationship b. an unlawful sexual relationship is established by more than one unlawful sexual act c. the trier of fact must be satisfied beyond reasonable doubt that the unlawful sexual relationship existed but, where the trier of fact is a jury, jurors need not be satisfied of the same unlawful sexual acts d. the offence applies retrospectively but only to sexual acts that were unlawful at the time they were committed e. on sentencing, regard is to be had to relevant lower statutory maximum penalties if the offence is charged with retrospective application.	**Chapter 5** Issue 1
22	The draft provision in Appendix H [of the *Criminal Justice Report*] provides for the recommended reform. Legislation to the effect of the draft provision should be introduced.	Issue 1
23	State and territory governments (other than Victoria) should consider introducing legislation to establish legislative authority	Issue 1

	for course of conduct charges in relation to child sexual abuse offences if legislative authority may assist in using course of conduct charges.	
24	State and territory governments should consider providing for any of the two or more unlawful sexual acts that are particularised for the maintaining an unlawful sexual relationship offence to be particularised as courses of conduct.	Issue 1
25	To the extent they do not already have a broad grooming offence, each state and territory government should introduce legislation to amend its criminal legislation to adopt a broad grooming offence that captures any communication or conduct with a child undertaken with the intention of grooming the child to be involved in a sexual offence.	**Chapter 6** Issue 2
26	Each state and territory government (other than Victoria) should introduce legislation to extend its broad grooming offence to the grooming of persons other than the child.	Issue 2
27	State and territory governments should review any position of authority offences applying in circumstances where the victim is 16 or 17 years of age and the offender is in a position of authority (however described) in relation to the victim. If the offences require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), states and territories should introduce legislation to amend the offences so that the existence of the relationship is sufficient.	**Chapter 7** Issue 3
28	State and territory governments should review any provisions allowing consent to be negatived in the event of sexual contact between a victim of 16 or 17 years of age and an offender who is in a position of authority (however described) in relation to the victim.	Issue 3
29	If there is a concern that one or more categories of persons in a position of authority (however described) may be too broad and may catch sexual contact which should not be criminalised when it is engaged in by such persons with children above the age of consent, state and territory governments could consider introducing legislation to establish defences such as a similar-age consent defence.	Issue 3
30	State and territory governments should introduce legislation to remove any remaining limitation periods, or any remaining immunities, that apply to child sexual abuse offences, including historical child sexual abuse offences, in a manner that does not revive any sexual offences that are no longer in keeping with community standards.	**Chapter 8** Issue 4
33	Each state and territory government should introduce legislation to create a criminal offence of failure to report targeted at child sexual abuse in an institutional context as follows: a. The failure to report offence should apply to any adult person who:	**Chapter 9** Issue 5

	i. is an owner, manager, staff member or volunteer of a relevant institution – this includes persons in religious ministry and other officers or personnel of religious institutions ii. otherwise requires a Working with Children Check clearance for the purposes of their role in the institution but it should not apply to individual foster carers or kinship carers. b. The failure to report offence should apply if the person fails to report to police in circumstances where they know, suspect, or should have suspected (on the basis that a reasonable person in their circumstances would have suspected and it was criminally negligent for the person not to suspect), that an adult associated with the institution was sexually abusing or had sexually abused a child. c. Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution. Foster and kinship care services should be included (but not individual foster carers or kinship carers). Facilities and services provided by religious institutions, and any services or functions performed by persons in religious ministry, should be included. d. If the knowledge is gained or the suspicion is or should have been formed after the failure to report offence commences, the failure to report offence should apply if any of the following circumstances apply: i. A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years). ii. The person who is known to have abused a child or is or should have been suspected of abusing a child is either: · still associated with the institution · known or believed to be associated with another relevant institution. iii. The knowledge gained or the suspicion that is or should have been formed relates to abuse that may have occurred within the previous 10 years. e. If the knowledge is gained or the suspicion is or should have been formed before the failure to report offence commences, the failure to report offence should apply if any of the following circumstances apply: i. A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years) and is still associated with the institution (that is, they are still in the care, supervision or control of the institution). ii. The person who is known to have abused a child or is or should have been suspected of abusing a child is either: · still associated with the institution	

	· known or believed to be associated with another relevant institution.	
34(b)	Include appropriate defences in the failure to report offence to avoid duplication of reporting under mandatory reporting and any reportable conduct schemes.	Issue 5
35	Each state and territory government should ensure that the legislation it introduces to create the criminal offence of failure to report recommended in recommendation 33 addresses religious confessions as follows: a. The criminal offence of failure to report should apply in relation to knowledge gained or suspicions that are or should have been formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession. b. The legislation should exclude any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective. c. Religious confession should be defined to include a confession about the conduct of a person associated with the institution made by a person to a second person who is in religious ministry in that second person's professional capacity according to the ritual of the church or religious denomination concerned.	Issue 5
36	State and territory governments should introduce legislation to create a criminal offence of failure to protect a child within a relevant institution from a substantial risk of sexual abuse by an adult associated with the institution as follows: a. The offence should apply where: i. an adult person knows that there is a substantial risk that another adult person associated with the institution will commit a sexual offence against: · a child under 16 · a child of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child ii. the person has the power or responsibility to reduce or remove the risk iii. the person negligently fails to reduce or remove the risk. b. The offence should not be able to be committed by individual foster carers or kinship carers. c. Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution. Foster care and kinship care services should be included, but individual foster carers and kinship carers should not be included. Facilities and services provided by religious institutions, and any service or functions performed by persons in religious ministry, should be included. d. State and territory governments should consider the Victorian offence in section 49C of the Crimes Act 1958	**Chapter 10** Issue 6

	(Vic) as a useful precedent, with an extension to include children of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child.	
74	All state and territory governments (other than NSW and South Australia) should introduce legislation to provide that good character be excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending, similar to that applying in NSW and South Australia.	**Chapter 11** Issue 7
76	State and territory governments should introduce legislation to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, but the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed.	Issue 7
79	State and territory governments should introduce legislation, where necessary, to expand the Director of Public Prosecution's right to bring an interlocutory appeal in prosecutions involving child sexual abuse offences so that the appeal right: a. applies to pre-trial judgments or orders and decisions or rulings on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case b. is not subject to a requirement for leave c. extends to 'no case' rulings at trial.	**Chapter 12** Issue 8
83	State and territory governments (other than the Northern Territory) should give further consideration to whether the abolition of the presumption that a male under the age of 14 years is incapable of having sexual intercourse should be given retrospective effect and whether any immunity which has arisen as a result of the operation of the presumption should be abolished. State and territory governments (other than the Northern Territory) should introduce any legislation they consider necessary as a result of this consideration.	**Chapter 13** Issue 9

3 Summary of discussion questions

The State Government has accepted in principle all of the 18 recommendations under consideration in this Discussion Paper.

'*Accept in Principle*' means that '*the State Government supports the intent or merit of the policy underlying the recommendation, but does not necessarily support the method for achieving the policy; and/or additional funding will be required to implement the recommendation*'.[7]

'Accept in Principle' indicates that the State Government has committed to implement the policy intent expressed in the recommendation, but will explore how best to implement it, and consider cost implications, for the benefit of the Western Australian community.

Submissions to the questions posed in this Discussion Paper will inform how recommendations with *Accept in Principle* responses will be implemented. The questions associated with each Issue are set out in table below.

Issue 1	**Persistent child sexual abuse offence and course of conduct charges**
1.1	The term 'relationship' when describing the sexual exploitation of a child victim was found to be inappropriate by the Royal Commission because it implies a degree of participation in the offence by the victim. Western Australia removed the term 'relationship' from this offence in 2008. What would a preferable term be, that describes the core element of the offence, which still reflects the ongoing nature of the contact, without meaning 'behaviour' or 'conduct' that must be particularised?
1.2	What should the maximum penalty be for persistent sexual abuse of a child? Should the penalty be increased to reflect the seriousness of sexually abusing a child repeatedly over time?
1.3	Do you support establishing legislative authority for a rule of criminal procedure allowing course of conduct charges to be laid in respect of child sexual abuse offences, as an alternative to the above proposal, or in addition to the proposal? Would course of conduct charging be more effective in prosecuting persistent sexual abuse of a child than implementing the proposed amended 'persistent sexual conduct with a child under 16' offence?

Issue 2	**Grooming offence**
2.1	Should a grooming offence that applies to in-person (face to face) grooming, specify certain behaviours attributed to the latter stages of grooming (along with the intention of facilitating a sexual offence), or apply to *any* words or conduct intended to facilitate a sexual offence against a child?
2.2	Is the key element that the accused 'intends that the behaviours will facilitate the commission of a sexual offence', and not what particular behaviours are associated with that intent?

[7] Government of Western Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse - Response by Minister McGurk on behalf of the State Government of Western Australia* (June 2018). 10.

Issue 3	Position of authority offences
3.1	Should persons having 'care, supervision or authority' in relation to a child aged 16 or 17 years be defined by reference to a list of categories of persons, or should the question of whether someone has a relationship of 'care, supervision or authority' in relation to a child be left to judicial discretion?
3.2	Are any additional defences required to be introduced for the offence of 'sexual offences against a child of or over 16, by a person of authority'?
3.3	Specifically, should a 'similar age' defence be introduced for this offence, whereby it is a defence to prove that the accused is not more than two or three years older than the 16 or 17 year old?

Issue 4	Retrospective removal of criminal limitation periods
4.1	Do you support the State Government's intention to remove limitation periods for those sexual offences that were previously subject to a 3 month limitation period for prosecution?

Issue 5	Failure to report child sexual abuse/concealment offence
5.1	Please comment on which policy rationale (A, B or C) is most compelling.
5.2	If you support Proposal A, should the obligation to report to police extend to all of the persons listed under recommendation 33(a), that is, to owners, managers, staff members and volunteers, and any person who requires a Working with Children Check clearance for purposes of their role in the institution? Or, would it be justified to restrict the obligation upon persons within the institution with the most authority, for example, owners and managers?
5.3	If you support Proposal B (a failure to report offence applying to all adults), how can the risk of over-reporting and defensive reporting be managed?
5.4	If you support Proposal C, introducing a concealment offence whereby there is an additional element that the person knew the information would assist police, (but did not report it to police), should the offence apply to all adults or only to persons within institutions, as referred to in question 1?
5.5	Do you have any comments about which defences and exceptions should be included in a new failure to report offence? See for reference: 'Table of excuses and exceptions legislated by other jurisdictions for 'failure to report' offence'.
5.6	Should a person mandated to report under other statutory obligations, such as mandatory reporting or reporting under a proposed reportable conduct scheme, be required to report to all possible authorities? For example, should a teacher be required to report the same case of abuse to police and the CEO, or should one report suffice? Are information-sharing processes between the relevant authorities effective enough to ensure that if a report is made to one authority, it will be on-reported to the other?
5.7	Should a reporter who is required to report sexual abuse under these laws have to report the full details of the victim's identity to discharge their obligations under the offence? That is, would a person be exempt from being charged with failing to report child sexual abuse if they had 'blind reported' to

	police (had reported details of the perpetrator and the offending, but not the victim's details)? Should the details of exactly what is required to be reported to police be provided in the offence provisions?

Issue 6	**Failure to protect a child from child sexual abuse offence**
6.1	The phrase 'power or responsibility to remove the risk', while clearly indicating that the offence applies to someone who has at least some authority within an organisation, may not be specific enough to enable persons within organisations/institutions to know if they are obligated under the offence. For example, in a sporting club, would the obligation apply to a coach, or is the obligation upon the club's governing board? In a school, does the obligation fall upon a teacher, or only on a school's principal? In a multi-tiered management structure within a larger organisation, who should have the obligation? · Should the provisions specify who exactly within the institution has the obligation to remove the risk to a child? · If so, should this be 'heads of institutions', or should it apply to other management roles within an institution? · Should it apply to anyone within the institution who is capable of taking action to remove the risk? · Should it state, as it is worded in Victoria's offence, that 'by reason of person's position, has the power or responsibility to reduce or remove that risk'?
6.2	Should there be any defences or exceptions to the offence of failing to protect a child from sexual abuse?

Issue 7	**Sentencing reform in cases of child sexual abuse**
7.1	Please provide any relevant feedback on Proposals part A and part B.

Issue 8	**Expanding interlocutory appeal rights**
8.1	Can you provide comment on the proposal to expand the right of the Director of Public Prosecutions to bring interlocutory appeals in cases of child sexual abuse?
8.2	Should the DPP's right to appeal, applying to pre-trial judgments or orders and decisions or rulings on the admissibility of evidence, be subject to a requirement for leave?

Issue 9	**Making removal of presumption that males under 14 years are incapable of having sexual intercourse retrospective**
9.1	Do you support the implementation of the proposal to introduce a provision into the Criminal Code to provide that the omission of section 29 in 1985 has retrospective effect dating back to 1913 when the Criminal Code was enacted?

10.1 Additional question
Is there anything else you would like to comment on in relation to the above issues, or in relation to child sexual abuse criminal laws in Western Australia?

4 How to make a submission

If you wish to respond to questions on matters contained in this paper, **you can make a written submission**. If you are unable to make a written submission but would like to provide your input, please contact the officer below on the email address provided to enquire about alternative means.

It is **not** required that you respond to every question asked, or respond to all of the nine issues canvassed in this Discussion Paper.

To be considered by the Department of Justice, submissions must be received **by close of business 4 October 2019**.

Submissions should be titled **Strengthening the criminal law – Discussion Paper** and preferably emailed to: LegPolicy@justice.wa.gov.au

Alternatively, hard copies can be sent to:
Senior Policy Officer
Legal Policy and Analysis
Strategic Reform Division
Department of Justice
GPO Box F317
PERTH WA 6841

Please direct enquiries to the Department of Justice via: LegPolicy@justice.wa.gov.au

If any parts of your submission contain **confidential** information – this must be clearly identified (on the cover page – and the relevant parts) in your submission. If confidentiality is sought please specify in reasonable detail the basis for the claim.

Please be aware of requirements regarding the *Freedom of Information Act 1992* (WA) and Department of Justice processes (please see http://www.justice.wa.gov.au).

Disclaimer about information contained within this Discussion Paper: Information relating to the status of legislation, case law and policy in other jurisdictions was current at the time of approval, and may have changed in the time between approval and publication.

5 Issue 1: Persistent child sexual abuse offence

5.1 The issues of concern identified by the Royal Commission

The Royal Commission's findings confirmed that survivors of child sexual abuse can face significant difficulties recalling details, such as date, time and place, of sexual abuse. This is impacted by factors such as the effect of time between incidents occurring and disclosure of the abuse, or not being able to clearly distinguish times and places due to very young age. Difficulties distinguishing specific details (particulars) of separate incidents of abuse are compounded in cases where sexual abuse is ongoing and repeated over time.

The Royal Commission carefully considered the need to be able to condemn ongoing, but often indistinguishable occurrences of child sexual abuse, without undermining a fair trial for the accused.[8] Between 1989 and 1999, all of the states and territories enacted persistent child sexual abuse offence provisions in attempts to achieve this, however, the Royal Commission found most of these to be ineffective.[9] Queensland, in 2003, amended the *actus reus* (the action or conduct constituting the offence) of its original persistent child sexual abuse offence, and Victoria has more recently introduced a new 'course of conduct' charge, in addition to its existing persistent child sexual abuse offence (see below).

5.1.1 Persistent child sexual abuse offences

Persistent child sexual abuse offences were introduced in the 1980s-90s with the aim of allowing the prosecution to proceed in circumstances where there is evidence that unlawful sexual conduct occurred over a period of time, but where the evidence lacks the detail required to prosecute separate charges for each of the acts.

In most jurisdictions, persistent child sexual abuse offences have required the prosecution to establish that conduct constituting a sexual offence occurred on three or more occasions, on separate days, however, the complainant need not specify dates, or in any other way particularise the circumstances of the sexual acts.

In 1997, the High Court case of *KBT v The Queen*,[10] considered the Queensland persistent child sexual abuse offence. The Court held that because the offence requires the jury to be satisfied beyond reasonable doubt that at least three acts occurred, sufficient particulars of the occasions are in fact required.[11]

In the subsequent 2001 High Court case of *KRM v The Queen*,[12] which considered the Victorian version of the offence, Justice Kirby described the *KBT* position as follows:

[8] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, 10. https://www.childabuseroyalcommission.gov.au/criminal-justice
[9] Ibid, 11.
[10] *KBT v The Queen* (1997) 191 CLR 417.
[11] *KBT v The Queen* (1997) 191 CLR 417, 422 (Brennan CJ, Toohey, Gaudron and Gummow JJ).
[12] *KRM v The Queen* [2001] HCA 11; (2001) 206 CLR 221.

[the offence] relieves the complainant of the need, or the prosecution of the requirement, to prove the 'dates or exact circumstances of the alleged occasions'. But 'occasions' there must still be.[13]

The issue identified in *KBT,* according to the Royal Commission*,* is the key reason that persistent child sexual abuse offence provisions are rarely used in Australian jurisdictions.

5.1.2 Queensland addressed the issue in KBT v The Queen in 2003

In 2003, in response to *KBT*, Queensland amended the *actus reus* of its offence by replacing the requirement to prove that three acts of a sexual nature occurred, with proving beyond reasonable doubt that an 'unlawful sexual relationship' existed.[14] An 'unlawful sexual relationship' is defined as a relationship that involves more than one unlawful sexual act over any period. An 'unlawful sexual act' is defined as an act that constitutes, or would constitute (if it were sufficiently particularised), an offence of a sexual nature.

Parliamentary debate of the Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld), described that 'the existing section will be replaced by a redrafted section that restores the original intention of the provision, that is, to focus on the unlawful relationship or course of conduct, rather than on the separate sexual acts comprising the relationship'.[15]

Under the Queensland 'maintaining a sexual relationship with a child' offence, 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 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. All the members of the jury are not required to be satisfied about the same unlawful sexual acts.

The Queensland offence has been regularly prosecuted. Between 2010 and 2016, 518 prosecutions were finalised. Guilty pleas were entered for 61 per cent of these, and 14 per cent of cases resulted in a verdict of guilty at trial. A not guilty verdict was entered by jury in 12 per cent of cases.[16]

The Royal Commission found the Queensland form of the offence to be the most effective, and to that extent, recommendations 21 – 24 are largely based on the Queensland legislation.

A summary of the Royal Commission's findings on the strengths of the Queensland offence is as follows:

- The core element, and *actus reus*, of the offence is the maintaining of an unlawful sexual relationship between the accused and the child.

[13] *KRM v The Queen* [2001] HCA 11 [92]; (2001) 206 CLR 221, 252.

[14] *Criminal Code Act* (Qld) s229B(1).

[15] Queensland, *Parliamentary Debates*, Legislative Assembly, 2 November 2002, 4443, (R J Welford, Attorney General).

[16] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, 32. https://www.childabuseroyalcommission.gov.au/criminal-justice

- The one or more unlawful sexual acts are not required to be particularised to the extent required if the acts were being prosecuted as a separate offence.
- Even though each juror must be satisfied that one or more individual unlawful sexual acts occurred, they need not all be satisfied that the same acts occurred.
- The offence best allows for the type of evidence that is likely to be given as a result of composite memories of repeated abuse.

The Royal Commission found that the Queensland offence could be improved, as follows:[17]

- It should operate retrospectively, that is, allowing it to apply to conduct that occurred before the commencement of the offence in legislation, provided the conduct was unlawful at the time. This is important because of the known delays in reporting child sexual abuse. The sentencing court, however, should have regard to the maximum penalties that applied to the individual acts of abuse at the time they were committed.
- The term 'relationship', used in the name of the offence, 'maintaining an unlawful sexual relationship', is problematic because it does not sit easily with the exploitation involved in sexual offending against a child. However, an alternative term has not been proposed that would demonstrate that the *actus reus* is about the maintenance of ongoing sexual contact with the child, rather than focusing on the individual sexual acts.

The above findings informed Recommendation 21 of the Royal Commission:

Criminal Justice Report, Recommendation 21

Each state and territory government should introduce legislation to amend its persistent child sexual abuse offence so that:

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

[17] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, 71. https://www.childabuseroyalcommission.gov.au/criminal-justice

Recommendation 22 refers to draft provisions for the persistent child sexual abuse offence as outlined in Recommendation 21. See **Appendix A** for the draft provision referred to.

Criminal Justice Report, Recommendation 22

The draft provision in Appendix H provides for the recommended reform. Legislation to the effect of the draft provision should be introduced.

5.1.3 Course of conduct charges

In July 2015, Victoria introduced a course of conduct charge in the *Criminal Procedure Act 2009* (Vic).[18] The charge was introduced to deal with repeated and systematic offending of 'relevant offences',[19] as a rule of criminal procedure rather than as a discrete offence. Victoria is the only Australian jurisdiction to introduce this. The course of conduct charge is modelled on similar charges in the United Kingdom,[20] and in New Zealand.[21]

The Second Reading Speech of the Crimes Amendment (Sexual Offences and Other Matters) Bill 2014 (Vic), introducing the new charge, explains the deficiencies of the existing persistent sexual abuse of a child offence, as follows:

> This offence…called 'persistent sexual abuse of child under the age of 16'…allows less specific evidence by a complainant to be sufficient to identify and prove a charge. However, the applicability of the offence remains limited. Under section 47A, it is not sufficient for a complainant to give evidence about what the accused would typically or routinely do. Instead, section 47A requires proof of three separate offences. This means that the complainant must remember details to distinguish between different acts of abuse. This requirement is difficult to satisfy where sexual abuse is ongoing, as complainants commonly find it difficult to remember precise details of each act of abuse. The bill will address these limitations in the current law by introducing a new way of charging repeated sexual abuse.[22]

At the time of release of the Criminal Justice Report in August 2017, 62 course of conduct charges against 34 accused had been approved in Victoria.[23]

See **Appendix B** for the Victorian course of conduct charge.

[18] *Criminal Procedure Act 2009* (Vic) sch 1, cl 4A.

[19] *Criminal Procedure Act 2009* (Vic) sch 1, cl 4A(1). Relevant offence includes all sexual offences.

[20] *Criminal Procedure Rules 2010* (UK) SI 2010/60 r 14.2.

[21] *Criminal Procedure Act 2011* (NZ) s 20.

[22] Victoria, *Parliamentary Debates*, Legislative Council, 18 September 2014, 3188 (Damian Drum).

[23] Victorian Director of Public Prosecutions, Submission No 81 to the Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Consultation Paper), September 2016, 5.

5.1.4 Differences between the Queensland 'maintaining a sexual relationship with a child' offence and the Victorian 'course of conduct' charge

Both the Queensland offence of 'maintaining a sexual relationship with a child', and the Victorian 'course of conduct' charge are ways of prosecuting sexual offences against children in circumstances where there has been multiple, repeated sexual acts committed over time, and the victim is unable to recall particulars of distinct occasions. Both attempt to overcome the issues with the 'persistent child sexual abuse' offences identified by the High Court in KBT. Both jurisdictions have described the approaches as attempts to capture the course of conduct of the accused.

The differences between the approaches are:

- The Queensland offence is a distinct offence within the *Criminal Code Act 1899* (Qld). The Victorian course of conduct charge is a mode of pleading a charge, rather than a distinct offence, and is legislated in the *Criminal Procedure Act 2009* (Vic).
- The unlawful sexual acts alleged under the Queensland offence do not need to be the same in nature. The Victorian charge can only be made if each incident constitutes an offence under the same provision.
- Victoria has introduced the course of conduct charge in addition to its 'persistent sexual abuse of child under the age of 16' offence, whereas Queensland has only one offence – 'maintaining a sexual relationship with a child'.

Criminal Justice Report, Recommendation 23

State and territory governments (other than Victoria) should consider introducing legislation to establish legislative authority for course of conduct charges in relation to child sexual abuse offences if legislative authority may assist in using course of conduct charges.

Recommendation 24

State and territory governments should consider providing for any of the two or more unlawful sexual acts that are particularised for the maintaining an unlawful sexual relationship offence to be particularised as courses of conduct.

5.2 Position in other jurisdictions

The Royal Commission recognised Queensland's offence of maintaining an unlawful sexual relationship with a child as being consistent with its proposed model provisions.

Victoria has not amended its persistent child sexual abuse offence, but has introduced an alternative method of prosecuting persistent child sexual abuse offences where distinguishing occasions of sexual abuse is difficult, through a 'course of conduct' charge.

From 2017 to 2018, ACT, NSW, and South Australia implemented the Royal Commission's recommendations 21 and 22, regarding 'maintaining an unlawful sexual relationship' with a child or young person.

The ACT, NSW, South Australia, and Tasmania, have all indicated that the Victorian course of conduct charge, recommended for consideration by the Royal Commission in recommendations 23 and 34, will not be implemented at this time. Responses to these recommendations by these jurisdictions ranged from needing to further consider the course of conduct charge, to finding the course of conduct charge 'unnecessary'.

See **Appendix C** for full details of persistent child sexual abuse offences in Australian jurisdictions, other than Victoria and Queensland.

5.3 Current law in Western Australia

Western Australia introduced the offence of '*sexual relationship with a child under 16'*, into the *Criminal Code Compilation Act 1913* (WA) (Criminal Code) in 1992.[24] Western Australia was the fourth Australian jurisdiction to introduce the offence, following Queensland, Victoria and the ACT.

In 2008,[25] the title of the offence was amended to replace the word 'relationship' with 'conduct', because it implied 'an element of mutuality or consent' which was 'considered inappropriate'.[26]

Persistent sexual conduct with a child under 16 years offence

The current 'Persistent sexual conduct with a child under 16' offence under section 321A of the Criminal Code, requires the following elements:

- A sexual act with a child on 3 or more occasions.
- A 'sexual act' is an act that would constitute a prescribed offence.
- A 'prescribed offence' is an offence under:
  - s320(2) (sexual penetration of a child under 13);
  - s320(4) (indecent dealing with a child under 13);
  - s321(2) (sexual penetration of a child between 13 and 16 years);
  - s321(4) (indecent dealing with a child between 13 and 16 years);

[24] *Acts Amendment (Sexual Offences) Act 1992* (WA).

[25] *Criminal Law and Evidence Amendment Act 2008* (WA) pt 2.

[26] Explanatory Memorandum, Criminal Law and Evidence Amendment Bill 2006 (WA) cl 10.

- s320(3) (procuring, inciting or encouraging child under 13 to engage in sexual behaviour); or
- s321(3) (procuring, inciting or encouraging a child aged 13 to 16 years to engage in sexual behaviour).

· Each occasion where a sexual act occurred must be on a different day.

Other parameters of the offence in section 321A are:

· The sexual acts need not all constitute the same prescribed offence.
· The sexual acts need not all have occurred in this State as long as at least one of them did.
· A charge need not specify dates, or in any way particularise circumstances, of the sexual acts.
· A charge must specify the period during which it is alleged that the sexual conduct occurred.
· A person charged with the offence can also be charged in the same or separate indictment with a prescribed offence that is alleged to be committed.
· An indictment containing a charge must be signed by the DPP.
· If there is evidence of sexual acts on 4 or more occasions, jury members need not be satisfied that the same sexual acts occurred, only that the accused person persistently engaged in sexual conduct in the specified period.
· If an accused is found not guilty to a charge of persistent sexual conduct with a child, he or she may be found guilty of one or more prescribed offences committed in the period specified if the offence or offences are established by the evidence.
· The maximum penalty for the offence is a term of imprisonment 20 years.

Defences to the charge for the offence are:

· That the accused believed on reasonable grounds that the child was of, or over the age of 16 years.
· That the accused was not more than 3 years older than the child.
· That the accused person was legally married to the child.

[**Note**, however, that the current Criminal Code Amendment (Child Marriage) Bill 2018 (WA), introduced into Parliament on 31 October 2018, proposes to remove this defence on the basis that the defence has no legal operation in Australia. Since August 1991, the *Marriage Act 1961* (Cth) has provided that the marriageable age is 18 years, or at least 16 years with the authorisation of a Judge or Magistrate].

Does Western Australia meet recommendations 21 – 24?

Recommendation 21: Introduce legislation to amend persistent sexual abuse offence:	
a) *Actus reus* is maintaining an unlawful sexual relationship	This is not met. The *actus reus* is a sexual act with a child on three or more occasions
b) Unlawful sexual relationship established by more than one unlawful act	This is not met. The *actus reus* is not an unlawful sexual relationship. The offence requires three or more sexual acts

c) Trier of fact must be satisfied that unlawful sexual relationship existed but, where it is a jury, jurors need not be satisfied of same unlawful sexual acts	This is partly met. The trier of fact is not looking to be satisfied that an 'unlawful sexual relationship' existed. However, jury members need not be satisfied that the same sexual acts occurred where there are four or more acts
d) Offence applies retrospectively to sexual acts that were unlawful at the time	The existing offence does not apply retrospectively
e) Regard is to be had to relevant lower statutory minimum penalties if the offence is charged retrospectively	The existing offence does not apply retrospectively
Recommendation 22: Draft model provision (see Appendix A)	
Not met	
Recommendation 23: Consider introducing legislation to establish legislative authority for course of conduct charges in relation to child sexual abuse offences if legislative authority may assist in using course of conduct charges.	
Not met. Western Australia does not have course of conduct charges in relation to child sexual abuse offences	
Recommendation 24: Consider providing for any of the two or more unlawful sexual acts that are particularised for the maintaining an unlawful sexual relationship offence to be particularised as courses of conduct.	
Not met. Western Australia does not have course of conduct charges in relation to child sexual abuse offences	

During the public hearing for Case Study 46,[27] Ms Amanda Forrester SC, the then Acting Director of Public Prosecutions (DPP) for Western Australia, told the Royal Commission that the section 321A offence is not used often because the judiciary tends not to favour use of the provision, and that it is used as a 'last resort' when, after attempts to particularise events, the complainant has not been able to particularise occasions of sexual conduct.

Ms Forrester expressed support for making the offence apply retrospectively, and agreed with Counsel Assisting the Royal Commission that if the provision was applied retrospectively, it should be subject to the statutory maximum penalty that applied at the time of the offending.[28]

Use of section 321A in Western Australia – adequacy of sentence

The current maximum sentence of 20 years for the section 321A offence may be inadequate, given that if the same person was convicted of one of the sexual acts the maximum sentence the person receives may be the same.

For example, if one of the alleged sexual acts constituting ongoing sexual abuse of a child is a penetrative act, the DPP may prefer to prosecute under section 320(2) of the Criminal Code. This is because it may be easier to convict a person for that offence than to establish the persistent sexual abuse of a child. The penalty for

[27] Transcript of A Forrester, Case Study 46, 1 December 2016, T24241:20-47.

[28] Transcript of A Forrester, Case Study 46, 1 December 2016, T24244:32-40.

sexual penetration of a child is the same as the penalty for persistently sexually abusing a child.

Current maximum sentencing for the prescribed sexual offences against children that constitute a 'sexual act' under the persistent sexual conduct offence are as follows:

s320(2) *sexual penetration of a child under 13*	20 years
s320(4) *indecent dealing with a child under 13*	10 years
s321(2) *sexual penetration of a child between 13 and 16 years*	14 years
s321(4) *indecent dealing with a child between 13 and 16 years*	7 years
s320(3) *procuring, inciting or encouraging child under 13 to engage in sexual behaviour*	20 years
s321(3) *procuring, inciting or encouraging a child aged 13 to 16 years to engage in sexual behaviour*	14 years

NSW recently increased the maximum sentence for its persistent child sexual offence to life imprisonment. However, it is intended that in individual cases, the sentencing court will consider the nature and seriousness of the acts in question when formulating a sentence within this maximum penalty.[29]

South Australia has also made its 'Persistent child sexual abuse' offence subject to life imprisonment. In the ACT, the maximum penalty is 25 years' imprisonment.

5.4 Proposals for reform in Western Australia

Western Australia does not meet most of the aspects of recommendations 21 to 24, however has responded that it accepts the recommendations in principle.

Issue 1 Proposal It is proposed to amend section 321A of the Criminal Code 'persistent sexual conduct with child under 16', as recommended by Royal Commission recommendations 21 and 22, including making the core element of the offence the maintenance of an unlawful sexual relationship (see below questions on appropriate alternative term), that is established by more than one unlawful sexual act. It is proposed that the offence would have retrospective application (to acts that were unlawful at the time committed). The offence provisions are proposed to be based on Recommendation 22 (see **Appendix A**). Additionally, the maximum

[29] New South Wales, *Parliamentary Debates*, Legislative Council, 20 June 2018 (Don Darwin, Minister for Resources, Energy and Utilities, and Arts) [9].

penalty for the offence would be increased to life imprisonment to reflect the seriousness of the offence.

5.5 Discussion questions

Issue 1	**Persistent child sexual abuse offence and course of conduct charges**
1.1	The term ‘relationship’ when describing the sexual exploitation of a child victim was found to be inappropriate by the Royal Commission because it implies a degree of participation in the offence by the victim. Western Australia removed the term ‘relationship’ from this offence in 2008. What would a preferable term be, that describes the core element of the offence, which still reflects the ongoing nature of the contact, without meaning ‘behaviour’ or ‘conduct’ that must be particularised?
1.2	What should the maximum penalty be for persistent sexual abuse of a child? Should the penalty be increased to reflect the seriousness of sexually abusing a child repeatedly over time?
1.3	Do you support establishing legislative authority for a rule of criminal procedure allowing course of conduct charges to be laid in respect of child sexual abuse offences, as an alternative to the above proposal, or in addition to the proposal? Would course of conduct charging be more effective in prosecuting persistent sexual abuse of a child than implementing the proposed amended ‘persistent sexual conduct with a child under 16’ offence?

6 Issue 2: Grooming offence

6.1 The issues of concern identified by the Royal Commission

The Royal Commission defines 'grooming' in its Criminal Justice Report as:

> …a preparatory stage of child sexual abuse, where an adult gains trust of a child (and, perhaps other people of influence in the child's life) in order to take sexual advantage of the child.[30]

Examples of grooming behaviours are: giving special attention to a child; buying gifts for a child; taking a child on outings; sharing secrets; physical games; and showing pornography to a child. Grooming also involves online behaviours such as misrepresenting true age, exploring sexual feelings, or discussing intimate feelings with a child, and trying to find out information about a child's situation or a child's family.

In terms of prosecuting grooming behaviour, the Royal Commission states:

> Grooming presents a challenge for the criminal law because…it is particularly difficult to identify if it does not lead to contact offending.[31]

And:

> What makes apparently innocent behaviour become grooming behaviour is the intention of the person engaging in the behaviour. The difficulty for the criminal law is identifying the person's unlawful intention in the context of apparently innocent behaviour.[32]

As the 'unlawful intention' element is difficult to prove, it is most often online grooming that is charged and prosecuted. Online grooming of a child offers a record of communication, whereas other behaviour may be more difficult to distinguish from normal adult to child interactions.

The Royal Commission recommended that even though grooming behaviours occurring face to face are difficult to identify and are not often charged, all jurisdictions should adopt a broad grooming offence that captures *any* grooming behaviour, rather than only having 'specific conduct' grooming offences, or online/electronic grooming offences.

The reason for this recommendation is:

> …a broader grooming offence could help to emphasise the wrongfulness of grooming behaviour, which should perform an educative function for institutions, their staff, parents, children and the broader community.[33]

The Royal Commission recommended that grooming offences be extended to include the grooming of persons other than the child. This was recommended after examining case studies where the perpetrator of child sexual abuse had also

[30] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 76. https://www.childabuseroyalcommission.gov.au/criminal-justice
[31] Ibid 76.
[32] Ibid 95.
[33] Ibid 96.

groomed the family of the victim in order to abuse the child. The 2013 *Betrayal of Trust* report,[34] arising out of the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations, also recommended that a criminal offence of grooming should recognise that parents and others can be victims of grooming.[35]

Examples of grooming the parents or family of a child are: befriending the family, becoming a trusted and reliable source of help to the family; and beginning an intimate relationship with a single parent in order to access a child.

In 2014, the Victorian Government introduced a grooming offence into the *Crimes Act 1958* (Vic) that recognises a broad range of grooming behaviours, and that a victim of grooming can also be a parent, carer or family member of a child.[36]

See **Appendix D** for Victoria's grooming offence provisions.

Within its *Criminal Justice Report*, the Royal Commission made the following two recommendations.

Criminal Justice Report, Recommendation 25
To the extent they do not already have a broad grooming offence, each state and territory government should introduce legislation to amend its criminal legislation to adopt a broad grooming offence that captures any communication or conduct with a child undertaken with the intention of grooming the child to be involved in a sexual offence.

Recommendation 26
Each state and territory government (other than Victoria) should introduce legislation to extend its broad grooming offence to the grooming of persons other than the child.

6.2 Position in other jurisdictions

See **Appendix E** for details about grooming offences in other Australian jurisdictions.

Recommendation 25: Adopt a broad grooming offence
The Commonwealth grooming offences are specific to grooming occurring via a 'carriage service', however, apply broadly to a number of online behaviours.

The ACT, Victoria and Queensland have implemented the broadest grooming offences that criminalise any communication or conduct.

South Australia and Tasmania have grooming offences that are fairly broad, but limit the grooming behaviour to 'communication', rather than including any conduct.

[34] Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, 2013.
[35] Ibid [22.1].
[36] *Crimes Amendment (Grooming) Act 2014* (Vic) s3.

New South Wales is extending its grooming offence to include 'providing a child with 'any financial or other material benefit', however this would exclude any other type of communication or conduct. The amendments are not yet in force.

Recommendation 26: Expand grooming offence to apply to other persons
The Commonwealth is currently considering a bill that would extend the application of grooming offences to other persons, but still only applying to using a carriage service.

The ACT, Victoria and NSW have provisions which extend grooming offences to persons other than the child.

The NSW provisions, when in force, will require that the accused has provided the person with a 'financial or material benefit', whereas the ACT and Victorian offences do not specify this conduct.

Tasmania has released a draft bill for consultation which includes expansion of the Tasmanian grooming offence to apply to third parties.

It is not clear whether South Australia has implemented Recommendation 26.

6.3 Current law in Western Australia

Western Australia is the only jurisdiction, apart from the Commonwealth, to have a grooming offence that applies only to online or other electronic communication. Western Australia does not have an offence that criminalises face to face (in person) communication or conduct engaged for the purpose of grooming a child.

The offence of 'Using electronic communication to procure, or expose to indecent matter, child under 16', was introduced in section 204B of the Criminal Code in 2006.[37] The offence was inserted into Chapter XXII of the Criminal Code, headed 'Offences against morality', rather than being placed in Chapter XXXI, 'Sexual offences', where grooming offences are placed in other jurisdictions.

The State Government introduced the section 204B offence in response to the increasing use of the internet by children and the emergence of online 'chat rooms'.[38] It reflected the thinking in 2006, demonstrated by the then member for Serpentine-Jarrahdale, in the Bill's second reading, that 'Many years ago a child molester would wander around the park with a bag of lollies, but now he has come in through the front door'.[39]

The focus of Western Australian criminal legislation on online and electronic grooming, was understandable in 2006, with growing online risk.

There is no doubt that the internet and other electronic means of communication present significant risks in being used by predators to groom children. However, children still attend many modern institutions, in-person, including schools, child-care

[37] *Criminal Code Amendment (Cyber Predators) Act 2006* (WA) s4, inserting s204B into the *Criminal Code* (WA).
[38] Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 November 2005 (A J Simpson).
[39] Ibid.

centres, hospitals, clubs, private classes, boarding houses, detention environments, mental health facilities, as well as out of home care environments (residential care and foster care), churches and other religious institutions. Despite the availability and prevalence of the internet, the majority of children's daily activities are still spent interacting personally with, or under the supervision of other adults.

6.4 Proposals for reform in Western Australia

Western Australia does not currently meet recommendations 25 and 26, however has accepted the recommendations in principle.

Issue 2 Proposal A: Move existing Criminal Code 'Using electronic communication to procure, or expose to indecent matter, child under 16' offence to Criminal Code Chapter XXXI, 'Sexual offences' to affirm its status as a sexual offence, and amend to include new provisions based on the Victorian 'Grooming for sexual conduct with a child under the age of 16*'* offence (see **Appendix D**). These amendments would serve to criminalise all grooming, conducted in-person and through electronic means, capturing *any* communication or conduct with a child undertaken *with the intention of grooming the child to be involved in a sexual offence*. It would also apply to the grooming of other persons, such as the child's family, with the intent of accessing the child.

In considering Proposal A, it is important to consider that face to face grooming behaviour, such as giving special attention to a person, buying gifts, playing physical games, is difficult to distinguish from genuine friendly, or perhaps 'mentoring' behaviour. Considerations may be:

- Whether a threat to being charged with grooming, will inhibit adults from taking genuine and innocent interest in a child or children's lives (for example, a family friend of a youth who is experiencing a difficult time offering to take the young person to a sporting match, or a coach spending extra time training a particular child in a skill)?
- Whether the WA Police Force would become overwhelmed by reports of alleged face to face grooming if 'any communication or conduct' is included?

A review of the literature on the grooming behaviour of perpetrators conducted in 2017, confirmed that the preparation towards sexually abusing a child occurs in identifiable stages of grooming.[40]

These stages have variously been identified as constituting:

- Friendship forming: targeting and gaining trust
- Relationship forming: filling the child's (or family's) needs
- Conducting risk assessment: gauging the level of threat
- Exclusivity: Isolating the child from others
- Sexual stage: Desensitising the child
- Conclusion stage: Controlling the child and situation

[40] Georgia M Winters and Elizabeth L Jeglic, 'Stages of Sexual Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters' (2017) 38 *Journal of Deviant Behaviour* 6.

Behaviours that tend to occur in the latter stages of grooming are behaviours such as:
discussing personal sexual feelings or topics with a child; using inappropriate inducements (significant money, gifts, special treats for no particular occasion) to develop an exclusive relationship with the child; initiating inappropriate physical contact with child (tickling, massages, games involving removal of clothing, bathing, getting child to sit on lap); making secret plans with the child; and seeking out time alone with the child.

These behaviours could be described as being more inappropriate as some of the behaviours that tend to occur in earlier stages of grooming, such as paying special attention to a child, or seeking to become part of a child's life.

Issue 2 Proposal B: Move existing Criminal Code 'Using electronic communication to procure, or expose to indecent matter, child under 16' offence to Criminal Code Chapter XXXI, 'Sexual offences', and amend to include new provisions that would broaden the existing grooming offence to include grooming that is executed in-person, however, it would specify the more culpable behaviours representing the advanced stages of grooming as constituting the behaviour, rather than behaviours that could otherwise be innocent. For example, the offence would criminalise behaviours such as, *but not limited to*:

- Discussing personal sexual feelings or topics with a child under 16, or about a child under 16 to another person having care of the child
- Using inappropriate inducements (significant money, gifts, special treats for no particular occasion) to develop an exclusive relationship with the child;
- Inappropriate physical contact with child (tickling, massages, games involving removal of clothing, bathing, getting child to sit on lap);
- Making secret plans with the child;
- Inducing the child away from parents where the offender is alone with the child.

And, the accused intends that the behaviours will facilitate the commission of a sexual offence.

It would also extend to grooming of other persons with the intent of accessing the child.

It is proposed, as an alternative to Proposal A, that rather than implement a broad grooming offence that includes any communication or conduct with a child undertaken with the intention of grooming the child to be involved in a sexual offence, that specific behaviours are listed that constitute the more obvious, and more culpable behaviours occurring in the latter stages of grooming. This would seek to limit excessive reporting to police of behaviours that may in fact be innocent, and would seek to limit negative social and community outcomes caused by suspicion of any interaction between adults outside the family and children.

6.5 Discussion Questions

Issue 2	**Grooming offence**
2.1	Should a grooming offence that applies to in-person (face to face) grooming, specify certain behaviours attributed to the latter stages of grooming (along with the intention of facilitating a sexual offence), or apply to any words or conduct intended to facilitate a sexual offence against a child?
2.2	Is the key element that the accused 'intends that the behaviours will facilitate the commission of a sexual offence', and not what particular behaviours are associated with that intent?
2.3	What defences should be available for a person charged with face to face grooming of a child or a child's significant others?

7 Issue 3: Position of authority offences

7.1 The issues of concern identified by the Royal Commission

The Royal Commission made three recommendations within the *Criminal Justice Report* relating to situations whereby the complainant is over the legal age of consent but not yet an adult (16 or 17 years old), and the accused is in a 'position of authority' to the minor.

The Royal Commission refers to 'positions of authority', as 'positions of trust or authority or persons having care, supervision or authority in relation to the victim'.[41]

These types of offences are common in institutional settings, according to the Royal Commission. Chapter 13 of the *Criminal Justice Report* details four legal cases; three involving school teachers, and one involving a cricket coach. However, these position of authority offences have the potential to occur in many settings, for example, foster care, residential care and religious institutions.

There are three major issues of concern for the Royal Commission in regards to position of authority sexual offences, outlined in the three recommendations made.

Essentially, **Recommendation 27** is that any position of authority sexual offences should only require that the perpetrator is in a position of authority and should not require that the position of authority is 'abused' or 'exercised'. The view of the Royal Commission is that it is already an abuse of position if the adult person of trust, authority, care or supervision in relation to the victim, engages in sexual activity with the victim. It should not require any additional element.

Western Australia already meets this recommendation (see below at 7.3), so this issue will not be discussed.

Criminal Justice Report, Recommendation 27
State and territory governments should review any position of authority offences applying in circumstances where the victim is 16 or 17 years of age and the offender is in a position of authority (however described) in relation to the victim.

If the offences require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), states and territories should introduce legislation to amend the offences so that the existence of the relationship is sufficient.

Recommendation 28 was directed at Queensland and Tasmania, neither of which have specific position of authority sexual offences. Rather, Queensland negates consent, in a trial for rape or sexual assault, where the accused is a person in authority, and higher penalties are prescribed in sentencing. This recommendation is not relevant to Western Australia (see 7.3) and will not be discussed.

[41] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-IV, 98. https://www.childabuseroyalcommission.gov.au/criminal-justice

Criminal Justice Report, Recommendation 28
State and territory governments should review any provisions allowing consent to be negatived in the event of sexual contact between a victim of 16 or 17 years of age and an offender who is in a position of authority (however described) in relation to the victim.

If the provisions require more than the existence of the relationship of authority (for example, that it be 'abused' or 'exercised'), state and territory governments should introduce legislation to amend the provisions so that the existence of the relationship is sufficient.

The Royal Commission received two submissions from NSW legal bodies, that there may be some circumstances where it is not appropriate that the criminal law deny persons over the age of consent to engage in sexual activity with certain persons in a position of care or responsibility, for example, where there is not inequality between the parties.

To demonstrate how broad categories of persons of 'authority' may criminalise behaviour that may be regarded by the community as more acceptable, two different hypothetical situations are:

A 40-year old religious leader has sexual intercourse with a 16 year old parishioner.

A 19-year old tennis coach has sexual intercourse with a 17 year old club player.

Under ACT, NSW, Northern Territory, South Australian and Victorian law, sports coaches are included as persons of authority. Only in the ACT is there an exception where the person in authority is aged less than two years older than the 16 or 17 year old person.

Rather than reduce categories of persons defined to be in a position of authority, the Royal Commission recommended, at **Recommendation 29**, jurisdictions consider what defences should be available to persons in these categories, such as a similar age defence.

As Recommendation 29 is the only 'position of authority' recommendation relevant to Western Australia, it will be the focus of this part of the Discussion Paper. Relevant also to this recommendation is that Western Australian legislation has not defined the relationship of 'care, supervision, or authority' in the relevant offence provisions, in contrast to other jurisdictions that have moved to clearly define which persons are in a position of authority in relation to a mature minor.

Criminal Justice Report, Recommendation 29
If there is a concern that one or more categories of persons in a position of authority (however described) may be too broad and may catch sexual contact which should not be criminalised when it is engaged in by such persons with children above the age of consent, state and territory governments could consider introducing legislation to establish defences such as a similar-age consent defence.

7.2 Position in other jurisdictions

Queensland and Tasmania have not amended their legislation as recommended by the Royal Commission to provide specific position of authority offences in regards to children aged 16 and 17 years. These states continue, instead, to negate consent given by the victim, and in the case of Queensland, higher penalties are handed down to offenders who were in positions of authority.

Between 2013 and 2018, the ACT, NSW, South Australia and Victoria have all introduced significant amendments to 'position of authority' offences, including new offences. The most significant changes have been made to the defining of, and broadening of, categories of persons having positions of authority in regards to children.

Victoria has the most comprehensive list of offences in this category, and the most defences available to position of authority charges involving a child aged 16 or 17, however, being of similar age to the child, is not one of them.

The ACT has two exceptions to position of authority related charges (victim 16 or 17 years), including being married to the child and being no more than 2 years older than the child. The ACT has one available defence: believing the child was aged 18 years or over.

New South Wales referred the 'Adequacy and scope of the special care offences' to the Standing Committee on Law and Justice on 13 February 2018. The Committee reported in November 2018, making a number of recommendations including expanding categories of persons in a position of care or authority to apply to employment relationships, relationships in youth residential care settings and homelessness services, adoptive parents, and de facto partners of adoptive parents. New South Wales has no defences available to charges involving positions of authority and only one exception of being married to the child.

See **Appendix F** for a full discussion of other Australian jurisdictions' implementation of position of authority offences.

7.3 Current law in Western Australia

Offences

It is an offence to have sexual dealings with a child aged 16 or 17 if a person has care, supervision or authority over the child.[42]

Western Australia introduced the section 322 offences, 'Sexual offences against a child of or over 16, by person in authority', in 1992.[43] Being convicted of the offence does not require that the authority of the person is 'abused' or 'exercised'; only that the person has either:

- sexually penetrated the child;
- procured, incited, or encouraged the child to engage in sexual behaviour;
- indecently dealt with the child;
- procured, incited, or encouraged the child to do an indecent act; or
- indecently recorded the child.

Meaning of 'person of authority'

Western Australia is the only jurisdiction not to define the term 'person of authority' in legislation and does not list categories of persons considered to be persons of authority.

A review of appeals against convictions and/or sentences under the section 322 offences demonstrate that the range of circumstances where an offender was identified to have 'care, supervision or authority', included where the offender was:

- a supervisor or manager at the victim's place of work;[44]
- the complainant's employer;[45]
- a teacher at the complainant's school;[46] and
- the complainant's sporting coach.[47]

However, there does not appear to have been specific consideration of the meaning of the term 'person with care, supervision and authority' in Western Australian courts.

Defences

Under section 322, there are two provisions that relate to the use of defences. Section 322(7) states that it is no defence to prove the accused believed on reasonable grounds that the child was of or over 18 years. Section 322(8) states that it is a defence to prove the accused person was lawfully married to the child.

Age disparity and whether a similar age defence should be available

There have been relatively few appeals concerning sentencing of persons for the section 322 offence to assist with an assessment of whether the court tends to

[42] *Criminal Code Compilation Act 1913* (WA) s322.

[43] *Acts Amendment (Sexual Offences) Act 1992* (WA).

[44] See e.g. *Ellis v The Queen* (unreported, Supreme Court of Western Australia Court of Criminal Appeal, 26 September 1997, Kennedy, Franklin and Steytler JJ, Lib No 970480).

[45] See e.g. *Church v State of Western Australia* [2007] WASCA 215; *Fletcher v The Queen* (unreported, Supreme Court of Western Australia Court of Criminal Appeal, 27 March 1997, Malcolm CJ, Wallwork and White JJ, Lib No 970125).

[46] See e.g. *D v State of Western Australia* [2009] WASCA 155.

[47] See e.g. *D v State of Western Australia* [2009] WASCA 155.

impose lesser sentences in cases where the age of the accused 'person of authority' is close to the complainant's age.[48]

A review of Western Australian case law in respect of sentences imposed for child sexual offences (generally and not limited to position of authority cases) demonstrates that the age of the offender in relation to the child is taken into account as one factor the court has regard to (especially when there is a large disparity in the age of the offender and the victim), however the offender's age is not determinative of the sentence imposed.[49] Sentencing has taken account of circumstances of aggravation and mitigation.

7.4 Proposals for reform in Western Australia

Western Australia already meets recommendations 27 and 28, and as such, proposals for reform to 'position of authority' offences where the victim is aged between 16 and 17 years, are limited to the consideration of Recommendation 29.

Whether persons having 'care, supervision or authority' in relation to children should be defined

A preliminary question arises as to whether Western Australia should follow the ACT, NSW, Northern Territory, South Australia and Victoria, in amending legislation to define who has 'care, supervision or authority', for purposes of the section 322 offences. Unlike other jurisdictions, Western Australia does not list categories of persons with 'care, supervision or authority' over children. Not defining these terms would leave interpretation of who may be in a position of authority in relation to a child up to the courts.

Which categories of persons to be defined

Should Western Australia move to define 'care, supervision or authority' under statute, consideration is needed as to which categories of persons should be included.

The Royal Commission recommends keeping the categories broad, but introducing appropriate defences that can be argued in cases where the accused asserts they should not be criminally liable.

The jurisdictions with the broadest categories of persons considered to be in positions of authority are the ACT, South Australia and Victoria. These jurisdictions include categories of persons in a familial relationship with the child, including parents, grandparents, and step-parents. The Criminal Code has existing offences under section 329, whereby sexual conduct by de facto parents and lineal relatives is criminalised, including where the child is aged over 16 years.[50]

[48] See e.g. *Church v State of Western Australia* [2007] WASCA 215; *D v State of Western Australia* [2009] WASCA 155; *Fletcher v The Queen* (unreported, Supreme Court of Western Australia Court of Criminal Appeal, 27 March 1997, Malcolm CJ, Wallwork and White JJ, Lib No 970125).

[49] *Cross v State of Western Australia* [2018] WASCA 86; *Deering v The State of Western Australia* [2007] WASCA 212; *Germain v The State of Western Australia* [2004] WASCA 293; *GJT v State of Western Australia* [2011] WASCA 263; *JAF v State of Western Australia* [2008] WASCA 231; *Marris v The Queen* [2003] WASCA 171; *Miles v The State of Western Australia* [2007] WASCA 258; *Poulton v The Queen v Avery* [2002] WASCA 136; *The State of Western Australia* [2008] WASCA 97; *The State of Western Australia v Lee* [2008] WASCA 150.

[50] *Criminal Code Compilation Act 1913* (WA) s329.

Outside of lineal relatives and de facto parents, the categories included in other jurisdictions' position of authority offences consist of:

Teachers (all)	Professional counsellors (ACT, VIC)
Persons with responsibility for students at school (ACT)	Health professionals (all)
Foster carers (all)	Medical practitioners (SA)
Out of home carers (VIC)	
Legal guardians (all)	Psychologists (SA)
Religious instructors (all)	Social workers (SA)
'other instructors' (NSW, NT, SA, VIC)	
Religious or spiritual guides, or leaders or officials (including lay members) of a church or religious body who provides care, advice or instruction (VIC)	Youth workers (VIC)
Employers (ACT, NT, SA, VIC)	Music instructors (NT, NSW, SA, VIC)
Supervisors in connection with employment or training (NT)	Police officers (VIC)
Sports coaches (all)	Corrections officers (NT, SA)
Custodial officers (ACT, NSW)	Persons responsible for care of child with cognitive impairment (SA)
Employees of remand centres (VIC)	Employed in, or providing services in, a remand centre, youth residential centre, youth justice centre or prison (Vic)

Defences to a charge under section 322

Whether or not the Criminal Code remains silent on the definition of persons having 'care, supervision or authority', the State Government has committed to considering whether appropriate defences should be introduced into legislation.

Section 322(7) states that:

a) it is **no** defence to prove the accused believed on reasonable grounds that the child was of or over 18 years, and

b) section 322(8) states that it **is** a defence to prove the accused person was lawfully married to the child.

It is noted that:

- All jurisdictions with specified position of authority offences have either an exception or a defence of being married to the young person, however some have recently added 'de facto relationship' or 'domestic relationship'.
- Both the ACT and Victoria have defences that the accused person reasonably believed the young person was aged 18 years or over.
- ACT has legislated for an exception to its position of authority offences where the person is aged not more than two years older than the young person.

See **Appendix G** for a comparison of other Australian jurisdictions' exceptions and defences available to position of authority charges.

Issue 3 Proposal A Introduce a definition of 'care, supervision or authority' into section 322 of the Criminal Code, by reference to list of broad categories of persons deemed to be in a position of authority in relation to a 16 or 17 year old; and introduce new defences that can be raised by defendants in cases where there may be an injustice caused, such as where there was no inequality between the parties or the conduct was not necessarily exploitative.

OR

Issue 3 Proposal B Make no amendments to define the meaning of 'care, supervision or authority' in section 322 of the Criminal Code, leaving the terms open to judicial interpretation; and introduce new defences that can be raised by defendants in cases where there may be an injustice caused, such as where there was no inequality between the parties or the conduct was not necessarily exploitative.

Proposal A or B, and

Issue 3 Proposal C Introduce a defence of 'similar age', based on the ACT defence,[51] and consistent with Criminal Code sexual offences against children under 16 years, 'persistent sexual conduct with a child under 16', whereby it is a defence to prove that the accused was not more than three years older than the young person.[52]

7.5 Discussion Questions

Issue 3	Position of authority offences
3.1	Should persons having 'care, supervision or authority' in relation to a child aged 16 or 17 years be defined by a list of categories of persons, or should the question of whether someone has a relationship of 'care, supervision or authority' in relation to a child be left to judicial discretion?
3.2	Are any additional defences required to be introduced for the offence of 'sexual offences against a child of or over 16, by a person of authority'?
3.3	Specifically, should a 'similar age' defence be introduced for this offence, whereby it is a defence that the accused is not more than two or three years older than the 16 or 17 year old?

[51] *Crimes Act 1900* (ACT) ss 55A(3) & 61A(3).
[52] *Criminal Code Compilation Act 1913* (WA) s 321A(9)(b).

8 Issue 4: Retrospective removal of criminal limitation periods

8.1 The issues of concern identified by the Royal Commission

The Royal Commission recommended, at Recommendation 30, that legislation should be introduced to give the repeal of the limitation periods on prosecuting child sexual offences, retrospective effect. This is in recognition that survivors of child sexual abuse often take years, if not decades, to disclose and report sexual abuse.

Whilst all Australian jurisdictions repealed limitation periods within which prosecutions must commence for most child sexual abuse offences in the 1980s and 90s, only some jurisdictions have subsequently removed any immunities that had arisen for perpetrators who had offended prior to the removal of limitation periods.

Criminal Justice Report, Recommendation 30
State and territory governments should introduce legislation to remove any remaining limitation periods, or any remaining immunities, that apply to child sexual abuse offences, including historical child sexual abuse offences, in a manner that does not revive any sexual offences that are no longer in keeping with community standards.

The Royal Commission stated that:

> Where a perpetrator has sexually abused a child, they should not retain the benefit of an immunity from prosecution for the offences which was granted at the time when the nature and impact of such offending was so poorly understood.[53]

8.2 Position in other jurisdictions

The ACT amended the *Crimes Act 1900* (ACT) in 2013, to retrospectively repeal the limitation period for particular sexual offences.[54] Section 441A of the *Crimes Act 1900* (ACT) provides that a small handful of sexual offences are not subject to the retrospective repeal of the limitation period, as prosecutions for those offences would 'no longer be in line with community standards'.[55]

Whilst NSW repealed limitation periods for some sexual offences in 1992, the repeal was not made retrospective. In 2018, NSW acted to make the repeal retrospective.[56]

South Australia repealed time limits on charging sexual offences in 1985. In 2003, South Australia legislated to abolish any immunity arising under previous limitation periods, with retrospective effect.[57]

[53] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III – VI. 129.
[54] *Crimes Act 1900* (ACT) s 441.
[55] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 124. https://www.childabuseroyalcommission.gov.au/criminal-justice
[56] *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) Schedule 1 [60].
[57] *Criminal Law Consolidation Act (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003* (SA).

Victoria abolished any immunity arising due to time limits imposed under past sexual offences in 2015.[58] The Victorian Government wrote a submission to the Royal Commission's *Criminal Justice Consultation Paper*, stating, 'the removal of historical time limits…does not revive sexual offences which no longer constitute an offence…and extends existing defences to historical offences.'[59]

8.3 Current law in Western Australia

Section 21(1) of the *Criminal Procedure Act 2004* (WA) provides that a prosecution for an indictable offence may be commenced at any time, unless another written law provides otherwise. Most child sexual offences within the Criminal Code are indictable offences and, consequently, no time limit is in place for being able to commence prosecution.[60]

In 1992, the *Amendment (Sexual Offences) Act 1992* (WA) repealed section 189 of the Criminal Code. Section 189(8) of the Criminal Code provided that a prosecution for the offence of unlawfully and indecently dealing with a child under the age of 16 years or a male under the age of 21 years, if the child is over the age of 13 years, be commenced within 3 months after the offence has been committed.

The removal of these limitation periods was prospective only. This means that charges cannot be laid in the case of a victim alleging they were sexually offended against prior to 1992 due to the expiry of the limitation period operating at the time.

8.4 Proposal for reform in Western Australia

Implementation would mean that a complainant who alleges he or she was unlawfully and indecently dealt with when aged over 13 years, but under the age of 16 (or a male under the age of 21), prior to 1992, would be in the same position as someone who is the complainant in relation to other child sexual abuse charges before or after 1992 in being able to commence prosecution without any time limit. Since it is no longer unlawful for an adult to engage in sexual activity with persons aged 16 years or older (with the exception of cases where the accused is a 'person of authority' in relation to a person aged 16 or 17 years or the accused is in a familial relationship with the complainant), implementation would exclude cases where the complainant is a male aged over 16 years.

Issue 4 Proposal Amend the Criminal Code to remove limitation periods for sexual offences against children (that were subject to a limitation period prior to 1992) and give retrospective effect dating back to 1913, when the Criminal Code was enacted, with the exception of males who were then aged over 16 when the offending occurred.

[58] *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic).

[59] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III – VI, 125. https://www.childabuseroyalcommission.gov.au/criminal-justice

[60] The *Amendment (Sexual Offences) Act 1992* (WA) repealed section 189 of the *Criminal Code*.

8.5 Discussion Questions

Issue 4	**Retrospective removal of criminal limitation periods**
4.1	Do you support the proposal to remove limitation periods for those sexual offences that were previously subject to a 3 month limitation period for prosecution?

9 Issue 5: Failure to report child sexual abuse criminal offence and the confession

9.1 The issues of concern identified by the Royal Commission

After hearing repeated cases involving the concealment and failure to act on the knowledge and suspicion of child sexual abuse, the Royal Commission released two key recommendations related to criminalising the failure to report child sexual abuse.

In many cases, survivors of child sexual abuse in institutional settings told the Royal Commission of having disclosed incidences of being sexually abused to adults at the institution, only to be not believed, or be punished for making a report. In many cases, children's claims were not followed up, reported to police, or investigated. In some cases that have now become well known, the only action taken by the institution was to move the perpetrator on to another location where other children became victims of sexual abuse.

The Royal Commission made clear findings of a positive duty to report and take action in response to the knowledge of child sexual abuse within an institutional setting, because:

- children do not know how to report to the police themselves, and need the assistance of adults to protect them and act on their behalf;
- failing to act exposes the child victim to further sexual abuse;
- failing to act exposes other children to being abused by the perpetrator; and
- the most effective deterrent for perpetrators of child sexual abuse is the risk of being detected. Increasing this risk would deter the offending.

The first key recommendation made in relation to legislating a criminal offence of failing to report child sexual abuse (recommendation 33) is that each state and territory should introduce a 'failure to report child sexual abuse' criminal offence aimed at those who conceal child sexual abuse.

The second key recommendation (recommendation 35) is that any information gained about sexual abuse of a child within religious confession, should not be exempt from the failure to report child sexual abuse offence.

The issues arising out of both of these recommendations are complex. Discussion of recommendation 33, will be dealt with first, followed by a separate discussion of recommendation 35. A third related consideration is recommendation 34(b), which is that in implementing a failure to report offence, appropriate defences should be included to avoid duplication of reporting under mandatory reporting obligations and under a reportable conduct scheme.

The State Government has accepted these recommendations in principle.

Criminal Justice Report, recommendation 33
Each state and territory government should introduce legislation to create a criminal offence of failure to report **targeted at child sexual abuse in an institutional context** as follows:

a. The failure to report offence should apply to any adult person who:
   i. is an owner, manager, staff member or volunteer of a relevant institution – this includes persons in religious ministry and other officers or personnel of religious institutions
   ii. otherwise requires a Working with Children Check clearance for the purposes of their role in the institution but it should not apply to individual foster carers or kinship carers.
b. The failure to report offence should apply if the person fails to report to police in circumstances where they know, suspect, or should have suspected (on the basis that a reasonable person in their circumstances would have suspected and it was criminally negligent for the person not to suspect), that an adult associated with the institution was sexually abusing or had sexually abused a child.
c. Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution. Foster and kinship care services should be included (but not individual foster carers or kinship carers). Facilities and services provided by religious institutions, and any services or functions performed by persons in religious ministry, should be included.
d. If the knowledge is gained or the suspicion is or should have been formed after the failure to report offence commences, the failure to report offence should apply if any of the following circumstances apply:
   i. iA child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years).
   ii. The person who is known to have abused a child or is or should have been suspected of abusing a child is either:
      · • still associated with the institution
      · • known or believed to be associated with another relevant institution.
   iii. The knowledge gained or the suspicion that is or should have been formed relates to abuse that may have occurred within the previous 10 years.
e. If the knowledge is gained or the suspicion is or should have been formed before the failure to report offence commences, the failure to report offence should apply if any of the following circumstances apply:
   i. A child to whom the knowledge relates or in relation to whom the suspicion is or should have been formed is still a child (that is, under the age of 18 years) and is still associated with the institution (that is, they are still in the care, supervision or control of the institution).
   ii. The person who is known to have abused a child or is or should have been suspected of abusing a child is either:
      · • still associated with the institution
      · • known or believed to be associated with another relevant institution.

Criminal Justice Report, recommendation 34(b)
Include appropriate defences in the failure to report offence to avoid duplication of reporting under mandatory reporting and any reportable conduct schemes.

Criminal Justice Report, recommendation 35

Each state and territory government should ensure that the legislation it introduces to create the criminal offence of failure to report recommended in recommendation 33 addresses religious confessions as follows:

a. The criminal offence of failure to report should apply in relation to knowledge gained or suspicions that are or should have been formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.
b. The legislation should exclude any existing excuse, protection or privilege in relation to religious confessions to the extent necessary to achieve this objective.
c. Religious confession should be defined to include a confession about the conduct of a person associated with the institution made by a person to a second person who is in religious ministry in that second person's professional capacity according to the ritual of the church or religious denomination concerned.

9.2 Failure to report child sexual abuse criminal offence

9.2.1 Discussion issues

Four other Australian jurisdictions have either introduced the offence, or have recently introduced legislation to introduce the offence. All four jurisdictions have, for various reasons, departed from implementing the offence in the exact manner recommended by the Royal Commission. This will be discussed in the following sub-sections.

Scope of the offence

a) Persons

The Royal Commission recommends that the offence should apply to:

- any adult person who,
- is an owner, manager, staff member or volunteer,
- of a relevant institution, and
- should include anyone who requires a Working with Children Check for the purposes of their role within the institution, but,
- should not apply to individual foster carers or kinship carers.[61]

A 'relevant institution' is defined as including:

> …institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution… Facilities and services provided by religious institutions, and any services or functions performed by persons in religious ministry, should be included.[62]

Prior to making these findings in the *Criminal Justice Report*, the Royal Commission canvassed three options as to scope of a criminal offence:

[61] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 33(a).
[62] Ibid recommendation 33(c).

- A broad offence of failing to report any serious (indictable) crime, requiring all adults to report to police.
- An offence of failing to report child sexual abuse, applying to all adults.
- A targeted offence of failing to report child sexual abuse applying to adults within institutions/organisations having responsibility or care for children.

The Royal Commission concluded that a criminal offence of failing to report child sexual abuse should be narrow and targeted toward institutional child sexual abuse.[63]

Despite this conclusion, the four Australian jurisdictions that have implemented, or have plans to implement an offence of failure to report child sexual abuse, have determined that the offence should have broad scope, applying to all adults.

Victoria
Victoria was the first jurisdiction to introduce this offence. It commenced in October 2014 as a response to the findings of the Victorian *Betrayal of Trust* report.[64] The offence of 'failure to disclose a sexual offence committed against a child under 16 years'[65] applies to all adults.

New South Wales
New South Wales' 'Concealing child abuse' offence applies to any adult.[66] Prior to August 2018 when the offence commenced, concealment of child sexual abuse was prosecuted under '*Concealing an indictable offence'*,[67] which also applied to all adults.

Tasmania
On 28 November 2018, the Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 (Tas) was introduced to the Tasmanian Parliament. The offence of 'failing to report the abuse of a child' is proposed to apply to all adult persons.[68]

Australian Capital Territory
On 19 March 2019, the ACT passed the *Royal Commission Criminal Justice Legislation Amendment Act 2019* (ACT). The offence of '*Failure to report child sexual offence*' will apply to all adults once the relevant provisions commence.[69]

b) Types of abuse

The Royal Commission's terms of reference were limited to examining child sexual abuse. Accordingly, recommendations related to reporting to authorities are about reporting child sexual abuse. Two jurisdictions have included other forms of child abuse in the scope of their failure to report offences.

[63] Ibid 209.
[64] Family and Community Development Committee, Parliament of Victoria, *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, 2013.
[65] *Crimes Act 1958* (Vic) s 327(2).
[66] *Crimes Act 1900* (NSW) s316A(1).
[67] *Crimes Act 1900* (NSW) s316.
[68] Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 (Tas) cl 7.
[69] *Royal Commission Criminal Justice Legislation Amendment Act 2019* (ACT) s 7.

- **New South Wales**: The 'concealing child abuse offence' criminalises the failure to report sexual abuse and serious physical abuse of a child.
- **Tasmania**: Proposes to criminalise failing to report sexual offences against a child and also serious physical abuse, failing to provide necessaries, and ill-treatment of children (which includes neglect and abandonment).[70]

State of mind required to trigger a report

The Royal Commission recommends that the state of mind, or threshold of knowledge, that should trigger a persons' reports to police is where they:

> know, suspect, or should have suspected, on the basis that a reasonable person in their circumstances would have suspected and it was criminally negligent for the person not to suspect).[71]

The Royal Commission's recommendation encompasses broad states of mind, from actual knowledge through to suspicion. It proposes liability for persons who not only *believe* or *know* that a child has been sexually abused, but who *suspect* or *should have suspected*. This is then qualified by the statement that it should apply where a 'reasonable person in their circumstances would have suspected and it was criminally negligent for the person not to suspect'. Criminal negligence has been found to equate with gross negligence, or more specifically, failure 'unjustifiably and to a gross degree to observe the standard of care which a reasonable person would have observed in the circumstances'.[72]

The Royal Commission included a threshold of 'suspicion' together with higher thresholds as a result of concerns that 'belief' or 'knowledge' only, would result in offences that are too difficult to successfully prosecute. In relation to the Victorian offence and the older New South Wales offence, both of which at that time had a threshold of 'belief' (or above) the Royal Commission stated:

> A significant difficulty with relying on the approaches adopted in section 316(1) of the Crimes Act 1900 (NSW) or section 327 of the Crimes Act 1958 (Vic) is that it must be proved that the accused had actual knowledge or in fact believed that the abuse occurred. If the accused did not witness the abuse and denies belief of any report or allegation made about it, it will be very difficult to prove the offence.[73]

The 6 December 2018 acquittal of former Archbishop Philip Wilson for concealing child sexual abuse when he was a Priest in Maitland, New South Wales, demonstrates this. Wilson was charged in 2015 under the former NSW applicable offence of concealing an indictable offence.[74] Under that offence, a person who fails

[70] Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 (Tas) cl 7.

[71] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Recommendation 33(b).

[72] See, *Bouch v The Queen* [2017] VSCA 86 [139].

[73] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, 209.

[74] *Crimes Act 1900* (NSW) s 316.

to report to police when they *know* or *believe* that a serious indictable offence has been committed, commits the offence.
Wilson was found guilty in the Newcastle Local Court on 22 May 2018, however appealed the conviction. Chief Judge Ellis of the District Court of New South Wales upheld Wilson's appeal, undergoing an in depth analysis as to why the prosecution had not proven beyond reasonable doubt that Wilson *knew* or had formed a *belief*, that fellow priest, James Fletcher, had sexually abused the complainant.[75] The complainant had claimed that he had disclosed the abuse by Fletcher in a conversation with Wilson in 1976.

Chief Judge Ellis examined the formation of a *belief*. He found that even if Wilson had recalled any conversation with the alleged victim, there was no evidence presented that Wilson had actually formed the requisite belief that the abuse had occurred, and acknowledged that the issue with subjective states of mind, such as knowledge or belief, is that the issue is 'not what the average person might think…it is what the …'belief' of the accused person is proved to be at the relevant time'.[76]

The Court held 'the reality is that people demonstrate a wide range of readiness or preparedness to form beliefs, from those who quickly form beliefs to those who are far more reticent to do so'.[77] Chief Justice Ellis stated, 'keeping an open mind on receiving allegations from a one sided perspective should not be seen as an unlikely or unusual approach for intelligent individuals with experience in conflict as between friends, work friends or indeed in this case parishioners'.[78]

The offence of 'concealing an indictable offence' had already been criticised by the Royal Commission prior to the Wilson appeal. The Royal Commission stated that it would be too hard to prove belief or knowledge due to the hidden nature of child sexual abuse.[79]

This led to NSW introducing the new 'Concealing child abuse' offence, which requires reporting to police when a person 'knows, believes or **reasonably ought to know**' that a child under 18 years has been abused. 'Reasonably ought to know' adds an objective test based on what would be reasonable to expect a person to know in the circumstances.

Relationship of state of mind to scope of offence

The Royal Commission recommended a lower threshold of knowledge, not only so that cases could be proven, but also because of the context of the offence.

The Royal Commission aimed to target persons working within institutions with children, after examining cases where reputation of the institution was prioritised over reporting to police. The Royal Commission stated that:

[75] *Wilson v R* [2018] NSWDC 487 [33].
[76] *Wilson v R* [2018] NSWDC 487 [94].
[77] *Wilson v R* [2018] NSWDC 487 [77].
[78] *Wilson v R* [2018] NSWDC 487 [78].
[79] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, 209.

> …a significant benefit of an offence that targets institutions might be that it would allow a lower standard of knowledge or belief than would be reasonable for offences that apply to the community at large.[80]

The four jurisdictions that have opted to apply the offence to all adult persons have accordingly ruled out applying a very low threshold of knowledge, such as 'suspect' or 'should have suspected'.

Victoria: requires that the person had a **reasonable belief** and did not report to police.

New South Wales: requires that the person **knows, believes, or reasonably ought to know**, and did not report to police.

Tasmania: proposes to require that a person has a **reasonable belief**, and did not report to police.

Australian Capital Territory: will require that a person had a **reasonable belief**, and did not report to police.

The Wilson case illustrates the need to set the threshold with an objective element in order to increase the likelihood of prosecution of those offenders who have clearly failed to report child sexual abuse to police. However, setting the threshold too low (by including 'suspicion') may cause:

- over-reporting to authorities, and 'defensive reporting';
- subjecting persons with no necessary experience or particular education to a greater liability than mandated reporters

Mandatory Reporting under the *Children And Community Services Act 2004* (WA)

Recommendation 33 of the *Criminal Justice Report* should be considered together with statutory mandatory reporting.

Mandatory reporting was introduced in Western Australia in 2008 under the *Children and Community Services Act 2004* (WA) (CCS Act). Currently, under this legislation, doctors, nurses, midwives, teachers, police officers and boarding house supervisors are mandated to report a 'belief' on 'reasonable grounds' to the CEO of the Department of Communities that a child has been or is being sexually abused.[81] On 23 May 2019, the State Government announced that the *Children and Community Services Act 2004* (WA) will be amended to require ministers of religion to report child sexual abuse, including where they have gained this knowledge through religious confession. This will apply to religious leaders, including priests, ministers, imams, rabbis and pastors. The amendments are expected to be introduced in the second half of 2019.

In addition, the *Family Court Act 1997* (WA) mandates court personnel, family counsellors, family dispute resolution practitioners and arbitrators, and children's

[80] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 179.

[81] See, *Children and Community Services Act 2004* (WA) s124B.

lawyers to report suspicions of child abuse (ill-treatment or psychological abuse) to the CEO of the Department of Communities.[82]

The penalty for non-compliance with mandatory reporting obligations under the CCS Act is a fine of $6,000.[83] There is no penalty under the *Family Court Act 1997* (WA).

Western Australia currently mandates the least categories of occupational groups of any Australian jurisdiction to report to the child protection authority.

If a new offence of failing to report child sexual abuse is introduced in Western Australia, whether it applies to all persons working or volunteering within child-related institutions, or to all adults, it could potentially significantly impact child protection resources as more people come forward to report to police to ensure they could not later be charged for concealing vital information. This is because police officers, as mandated reporters under the CCS Act, are required to send notification to the CEO in the event that they form a belief on reasonable grounds that a child has been or is being sexually abused.[84]

The different objectives of mandatory reporting and a failure to report child sexual abuse offence

There are key differences between the objectives of a 'failure to report' criminal offence and mandatory reporting obligations.

The Royal Commission's objective in recommending that a criminal offence is introduced, is to introduce strong community condemnation of concealing knowledge of child sexual abuse, and to strengthen the deterrence of child sexual abuse. It is focused on stopping, prosecuting and convicting perpetrators of child sexual abuse. It should be targeted at persons working within institutions dealing with children.

The recommendation was made after consideration of multiple cases where leaders of institutions had placed the reputation of the institution above child welfare. Recommendation 33 is about ensuring those people within institutions (often non-government or private institutions, but also government institutions), that may be tempted not to disclose information about child sexual abuse for fear of risking reputation and financial interests, do report child sexual abuse to police.

Examples of institutional child sexual abuse situations that the Department argues demonstrates the importance of having an offence, *in addition to* mandatory reporting requirements are:

- A senior dance school teacher sees another dance teacher push himself against a student and touch her breast. She does not report it for fear that the dance school will receive negative publicity and lose money.
- An 8-year-old child tells an adult in a cricket club that the volunteer coach showed him some pornographic images after training. The adult does nothing about it because the volunteer is his mate.

[82] *Family Court Act 1997* (WA) ss 5 & 160.
[83] *Children and Community Services Act 2004* (WA) s124B(1)(c).
[84] *Children and Community Services Act 2004* (WA) s124B(1)(a).

If a failure to report child sexual abuse offence is introduced to apply to all adults, an example of its application that has no interaction with mandatory reporting would be:

- A teenaged girl employed in a small business tells her employer that she has been sexually assaulted by her step-parent. The employer does not report the incident to police.

It should be noted that, should a 'failure to report child sexual abuse' offence be introduced to apply to all adults, it would also capture persons within a child's family and domestic environment who fail to report child sexual abuse (for example, adult family members, friends and associates). In Victoria and New South Wales, where any adult may be charged with these relevant offences, it is a defence that the person feared on reasonable grounds for the safety of any person. (Exceptions and defences are discussed further below).

Making it a crime to fail to report child sexual abuse would also achieve:

- Strong community condemnation of failing to act, or concealing knowledge of child sexual abuse
- Deterrence
- Punishment
- Stronger protection for children.

Mandatory reporting, on the other hand, is a legal obligation upon specified occupational groups who, through the course of their work with children, may be privy to disclosures by children and/or are able to observe the indicators of child sexual abuse, to report to the CEO. It is focused primarily on child protection, whereas a concealment offence would provide a clear criminal justice response to concealment. In examining the occupational groups mandated to report under mandatory reporting in Western Australia (teachers, doctors, nurses, midwives, police officers, and boarding house supervisors), these persons are external, 'public', trusted figures that a child may encounter outside of their family, who can objectively recognise the signs of sexual abuse, and to whom a child may have the opportunity to disclose abuse.

Parliament recognised the important role of these specific occupational groups to ensure that child sexual abuse is reported to authorities when mandatory reporting was introduced to Western Australia in 2007:

> The state government considers that children are more likely to disclose sexual abuse to doctors, nurses, midwives, teachers and police officers and that doctors, nurses and midwives are **in the best position to identify clinical signs of sexual abuse**… the bill now removes the discretion in relation to the reporting of child sexual abuse…[85] (emphasis added)

[85] Western Australian Parliament, *Parliamentary Debates*, Legislative Assembly, 28 November 2007, Children and Community Services Amendment (Reporting Sexual Abuse of Children) Bill 2007, 7901c-7902a, Jim McGinty.

Failing to report or intent to conceal?

The Royal Commission recommended that states and territories introduce an offence that criminalises failing to report child sexual abuse. At recommendation 33(b) it is stated that this should apply in circumstances that 'a reasonable person would have suspected and it was criminally negligent for the person not to suspect'.

Relevant considerations in introducing such an offence may be:

a) whether the elements of a new offence should capture 'inaction'; a pure failure to perform a positive duty to report to police; or

b) whether the elements of a new offence should capture more than inaction; an intention to conceal the occurrence of child sexual abuse, for example, an intention to remain silent or an intention to cover-up the abuse.

In the Victorian offence, and the proposed ACT and Tasmanian offences, the only mental element the prosecution must prove is the knowledge or belief that another person has sexually abused a child.

Under the NSW offence, however, the prosecution must prove **two** mental elements:

1) that the person 'knows, believes or reasonably ought to know that a child abuse offence has been committed'[86]

2) that the person 'knows, believes or reasonably ought to know that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence'[87].

This is followed by the physical element of the offence:

3) that the person 'fails without reasonable excuse to bring that information to the attention of a member of the NSW Police Force as soon as it is practicable to do so'[88].

The second mental element of the NSW offence, in combination with the physical element that follows (that the person fails to go to the police), may be considered to constitute 'concealment'. The mental and physical elements together imply a decision not to report.

Implementing these two mental elements would likely be more difficult to prove. An advantage may be, however, that needing to prove concealment would go further in distinguishing a new imprisonable offence from the existing offence of failing to report under mandatory reporting legislation.

Overlapping duties for some persons

Whether or not Western Australia implements a failure to report/concealment of child sexual abuse offence that applies to all adults, or to adults working in institutional settings, having two obligations introduces the possibility that one person would be required to report:

[86] *Crimes Act 1900* (NSW) s316A(1)(a).
[87] *Crimes Act 1900* (NSW) s316A(1)(b).
[88] *Crimes Act 1900* (NSW) s316A(1)(c).

a) to the CEO under mandatory reporting obligations; and

b) to Police, under the failure to report child sexual abuse offence provisions.

Additionally, the State Government has accepted in principle recommendations of the *Final Report* of the Royal Commission, about introducing a reportable conduct scheme, whereby heads of child-related organisations will be required to report any 'reportable conduct' of employees to an independent oversight body.[89]

Whilst multiple reporting would be required by some persons, unless appropriate defences to the offence are introduced (and policies under mandatory reporting and a reportable conduct scheme), it should be noted that the function of each reporting mechanism is fundamentally different in focus:

Existing mandatory reporting scheme: serves to notify authorities, and increase investigation of child sexual abuse reported by individuals who have a high degree of contact with children and therefore can recognise the signs that a child may be being sexually abused. It is focused on protecting children.

Proposed reportable conduct scheme: serves to ensure that reportable conduct (including sexual, physical, psychological abuse, or neglect) is identified and the institution handles the conduct, allegation or incident in the correct way. It is focused on institutional safety and best practice in complaint handling.

Proposed criminal offence: provides ability to charge and prosecute people who have been criminally negligent in not reporting to police their knowledge or belief that a child is being sexually abused, or has been sexually abused. It is ultimately focused on stopping, prosecuting and convicting the perpetrators of child sexual abuse, deterring offenders, and protecting children.

Defences and exceptions

Recommendation 33 does not contain any suggested defences or exceptions to the charge of failing to report child sexual abuse. Recommendation 34(b) of the *Criminal Justice Report* does direct governments to include appropriate defences in the failure to report offence to avoid duplication of reporting under mandatory reporting and any reportable conduct scheme. Implementing jurisdictions have legislated the following defences and exceptions:

[89] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (15 December 2017) Volume 7, Recommendation 7.9. https://www.childabuseroyalcommission.gov.au/final-report

Table of Excuses and Exceptions Legislated in other Jurisdictions 'Failure to Report' Offence

'Reasonable excuse' defence or exception	**VIC** Failure to disclose a sexual offence committed against a child under 16 years[90]	**NSW** Concealing child abuse[91]	**TAS** Failing to report the abuse of a child[92]	**ACT** Failure to report child sexual offence[93]
Fears on reasonable grounds for the safety of any person (other than the person reasonably believed to have committed the sexual offence)	ü	ü	ü	ü
Believes on reasonable grounds that the information has already been disclosed to police by another person	ü	ü	ü	ü
The person has reported the information in accordance with the statutory mandatory reporting requirements or believes on reasonable grounds that another person has done so	ü	ü		ü
The person has reported the information under the applicable reportable conduct scheme		ü		
The person believes on reasonable grounds that another person has already reported the information to a 'proper authority', or a proper authority already has the information			ü 'Proper authority' defined as a police officer, a correctional officer, or a Crown Law Officer.[94]	
The information forming the basis of the person's belief that a sexual offence has been committed came from the victim of the alleged offence whether directly or indirectly; and	ü (victim reached over 16 years)	ü (victim reached over 18 years)	ü (victim reached over 18 years)	ü (victim 'no longer a child')

[90] *Crimes Act 1958* (Vic) s 327(2).
[91] *Crimes Act 1900* (NSW) s316A.
[92] Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 (Tas) cl 7.
[93] *Royal Commission Criminal Justice Legislation Amendment Act 2019* (ACT) s7.
[94] *Criminal Code Act 1924* (Tas) s162A(1).

'Reasonable excuse' defence or exception	**VIC** Failure to disclose a sexual offence committed against a child under 16 years[90]	**NSW** Concealing child abuse[91]	**TAS** Failing to report the abuse of a child[92]	**ACT** Failure to report child sexual offence[93]
the victim was of or over age of [*] years at the time of providing the information to any person; and the victim requested that the information not be disclosed				
The person came into possession of the information when he or she was a child	ü	ü	ü	
The information referred to would be privileged	ü Under Part 3.10 of Evidence Act 2008 (Vic), includes legal privilege, journalistic privilege, religious confessions, self-incrimination. **Note:** the Andrew's Government has pledged to remove exemption for religious confession.		ü Includes privileges other than religious confession privilege	ü Includes privileges other than religious confession privilege
The person came into possession of the information solely through the public domain or forms the belief referred to in subsection solely from information in the public domain	ü		ü	ü
The person is a police officer acting in the course of his or her duty in respect of the victim of the alleged sexual offence	ü			
Grounds not limited on which it may be established that a person has a reasonable excuse for failing to bring information to police	ü	ü	ü	ü

Penalties
The Royal Commission did not make recommendations as to a suitable penalty under a failure to report offence.

The penalties prescribed under the existing Victorian and New South Wales offences are as follows:

Victoria: 3 years maximum imprisonment.

New South Wales: 5 years maximum imprisonment. The maximum sentence was two years imprisonment when introduced in August 2018. However, on 21 November 2018, after community pressure, the NSW Parliament passed legislation to amend the current sentence to a maximum five years imprisonment (where the offence concealed has a maximum penalty of five years imprisonment or more).[95]

Blind reporting
A 'blind report' is a report to authorities that omits the identity or other details of the victim of the offence. A person with an obligation to report to police under the proposed offence may not wish, for whatever reason, to report the details relating to the identity of the victim of the sexual abuse. In most circumstances this will be because the victim has requested not to be identified.

The Royal Commission did not address what specific details should be provided by a reporter to police.

The information that is required to be reported to police is not provided for in legislation in jurisdictions that have implemented this offence.

The question arises about what information needs to be reported to police about the sexual abuse of a child to discharge the obligation under a new offence. There are considerations about whether the law should provide that in the case of sexual abuse of a child, the name of the child victim must be disclosed, and whether it is enough to report only the institution (place), the circumstances, and the name of the perpetrator.

9.3 No exemption for religious confession for a failure to report offence

Recommendation 35 received a high level of media attention when the *Criminal Justice Report* was released in August 2017.

The arguments put forth by the Royal Commission, and other supporters of breaking the seal of confession to report child sexual abuse, include that:

- protecting children and ensuring children's best interests should be the paramount concern;[96]

[95] *Community Protection Legislation Amendment Act 2018* (NSW).

[96] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 217.

- child sexual abuse is a crime which causes serious long term harm to victims. Reporting child sexual abuse is the morally right thing to do, regardless of whether it is unlawful not to do so;[97]
- sexual offending against children is not a 'forgivable sin';[98] and
- putting religion ahead of children's welfare in the past is one practice that has led to vast numbers of children being abused within religious institutions.

The Catholic Church holds that the seal of the confession is of ultimate importance under the Code of Canon Law.[99]

The consequence of violating the sacramental seal is automatic excommunication. Several Priests who gave evidence to the Royal Commission during the Case 50 public hearing stated that they would never report child sexual abuse disclosed by a perpetrator in confession to authorities.[100]

Representatives of the Catholic Church made the following arguments as to why Recommendation 33 is not supported:

- child abuse perpetrators do not attend confession, and if they do, they do not report their abuse of children[101]
- child abuse perpetrators will not confess abusing a child if the law changes[102]
- priests often do not know who they are talking to due to partitions between them and the person attending confession[103]
- clergy will not abide by these criminal laws and would go to jail before breaking the seal of confession[104]
- abiding by the seal of confession is fundamental to the principle of religious freedom[105]
- disclosing contents of confession would interfere with a person's private communication with God[106]

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[97] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 208.

[98] Stephanie Anderson & Jessica Kidd, 'Child abuse royal commission: Bishops oppose forcing priests to report details heard in confession', *ABC News* (online) 14 August 2017.

[99] Australian Catholic Bishops Conference, 'Australian Catholic Bishops Conference and Catholic Religious Australia's Response to the Royal Commission into Institutional Responses to Child Sexual Abuse (August 2018) 40-42.

[100] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 222.

[101] Danny Tran & Karen Percy, 'Australian Catholics pass judgement on royal commission calls to break confessional seal' *ABC News* (online) 15 August 2017 https://www.abc.net.au/news/2017-08-15/catholics-pass-judgement-on-calls-for-confessional-broken/8809272 .

[102] Above n 105, 218.

[103] Stephanie Borys, 'States expected to push ahead with mandatory reporting laws despite Catholic opposition', *ABC News* (online) 1 Sept 2018 https://www.abc.net.au/news/2018-09-01/church-mandatory-reporting-laws-push-by-states/10190712 .

[104] Ibid.

[105] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, 218.

[106] Ibid.

- a reporting requirement is inconsistent with the religious confession privilege in the Uniform Evidence Act.[107]

In the *Criminal Justice Report*, the Royal Commission states 'We have carefully considered these arguments and have concluded that they are insufficient to outweigh the risk to children of granting an exemption from the failure to report offence'.[108]

The Western Australian Government has accepted recommendation 35 in principle and intends to legislate that information gained within religious confession is not exempted from being reported to police under a 'failure to report offence'.

In the *Final Report*, the Royal Commission recommended that mandatory reporting obligations be extended to people in religious ministry (rec 7.3(e)). Recommendation 7.4 is that persons in religious ministry should not be exempt from being required to report information gained in religious confession. Recommendation 7.4 is also accepted in principle.

9.3.1 Other jurisdictions' responses to recommendation 35

ACT
On 19 March 2019, the *Royal Commission Criminal Justice Legislation Amendment Act 2019* (ACT) was passed.

The Act implements recommendation 33 and 35 of the *Criminal Justice Report*, as well as recommendations 7.3 and 7.4 of the *Final Report*.[109]

This means that the ACT has introduced a failure to report child sexual abuse offence that will not exempt information gained during religious confession, however it has not yet commenced operation.

Mandatory reporting obligations are also extended to persons in religious ministry under the Act, and like the offence, there will be no exemption for information gained in the confessional.

The Act introduces the following definition of religious confession into the *Children and Young People Act 2008* (ACT) and the *Crimes Act 1900* (ACT):

> ***Religious confession*** means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the member's church or religious denomination.[110]

Section 7 of the Act (not yet commenced) introduces new section 66AA of the *Crimes Act 1900* (ACT) providing for a failure to report child sexual abuse offence. Subsection (3) states:

[107] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, 218.
[108] Ibid, 217.
[109] Explanatory Statement, Royal Commission Criminal Justice Legislation Amendment Bill 2019 (ACT) 3-4.
[110] *Royal Commission Criminal Justice Legislation Amendment Act 2019* (ACT) s6.

> A person who is or was a member of the clergy of a church religious denomination is not entitled to refuse to give information under subsection (1) because the information was communicated to the member during a religious confession.

New South Wales

The NSW 'Concealing child abuse' offence, does not contain any provision on exemptions for privileged information. However, when the NSW Government published its response to the Royal Commission's recommendations in June 2018, a 'further consideration' response to recommendation 35 was put forth, accompanied by the comment that:

> …where the information about an offence was gathered through religious confession is a complex issue that has been referred to the Council of Attorneys-General for national consideration.[111]

Despite this referral by NSW, the ACT, Tasmania and Victoria have already moved to meet the Royal Commission's recommendation.

Victoria

Victoria's offence of 'failure to disclose a sexual offence committed against a child under the age of 16 years'[112] commenced in October 2014.

On 14 August 2019, the Victorian Government introduced the Children Legislation Amendment Bill 2019 to Parliament. This bill proposes to remove the religious confessions exemption from the 'failure to disclose a sexual offence committed against a child under the age of 16 years' offence, which currently provides that a person does not contravene the offence if the information would be privileged under Part 3.10 of the *Evidence Act 2008* (Vic).

Additionally, the Children Legislation Amendment Bill 2019 proposes to amend section 182(1) of the *Children, Youth and Families Act 2005* (Vic) to include a person in religious ministry as a mandatory reporter, and provides that a person in religious ministry is not exempt from the requirement to make a mandatory report on the basis that the information was received in the context of religious confession.

Tasmania

The Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 (Tas) was introduced to the Tasmanian Parliament on 28 November 2018. The Bill introduces a 'failing to report the abuse of a child' offence, and inserts a 'member of the clergy of any church or religious denomination' as a prescribed person for mandatory reporting purposes.[113]

Under the proposed offence and mandatory reporting provisions, the Bill provides:

> Despite section 127 of the *Evidence Act 2001*, a member of the clergy of any church or religious denomination is not entitled to refuse to disclose information under

[111] New South Wales, *NSW Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (June 2018) https://static.nsw.gov.au/nsw-gov-au/1529890786/NSW-Government-response-to-the-Royal-Commission-into-Institutional-Responses-to-Child-Sexual-Abuse-June-2018.pdf.pdf .

[112] *Crimes Act 1958* (Vic) s327.

[113] Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 (Tas) cl 4.

> [subsection (2)] on the grounds that the information was communicated to that member of the clergy during a religious confession.[114]

The bill successfully passed through the Legislative Council on week of 12 August 2019 and is currently awaiting proclamation.

Remaining jurisdictions

The Northern Territory Government did not issue a response to the *Criminal Justice Report* recommendations, therefore it is not known whether the Government intends to implement recommendation 35. Whilst the Northern Territory has an offence of failing to report a belief on reasonable grounds that a child has been or is likely to be a victim of a sexual offence in its *Care and Protection of Children Act 2007* (NT), it is not an imprisonable offence.[115] The penalty for not reporting under the offence is 200 penalty units which, in the 2018-19 period, is equivalent of a fine of $31,000.

Under the Northern Territory's mandatory reporting laws, people in religious ministry are currently mandated to report *if* they are 'an operator of child-related services'[116]. The NT accepted in principle recommendation 7.4 regarding ensuring information gained in confession is reported under mandatory reporting obligations.

Queensland currently maintains a 'Further Consideration' response to introducing a criminal offence of failing to report child sexual abuse, and to the issue of information disclosed in confession.[117]

South Australia maintains a 'Further Consideration' response implementing a failure to report offence and an 'Accept in Principle' response to not exempting information gained in religious confession. South Australia was the first Australian jurisdiction to amend mandatory reporting laws to ensure that information gained in confession is not exempt from being reported to child protection authorities under the *Children and Young People (Safety) Act 2017* (SA).

9.4 Current position in Western Australia

The *Evidence Act 1906* (WA) does not protect communications with clergy and case law has not yet affirmed any common law privilege for religious communications in Western Australia.

Western Australia differs from uniform evidence law jurisdictions (the Commonwealth, Victoria, NSW, Tasmania, the ACT and the Northern Territory), where a statutory privilege for communications within religious confessions is provided.[118]

However, reporting criminal activity to police is different to being called as a witness to give evidence during criminal proceedings. The Royal Commission made this distinction in the *Criminal Justice Report*:

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[114] Criminal Code and Related Legislation Amendment (Child Abuse) Bill 2018 (Tas) cls 4 & 7.
[115] *Care and Protection Act 2007* (NT) s 30(1)(c).
[116] *Care and Protection Act 2007* (NT) s30(1)(a).
[117] Queensland Government, Queensland Government annual progress report - Royal Commission into Institutional Responses to Child Sexual Abuse (December 2018) 17.
[118] See *Evidence Act 1995* (Cth) s127.

> We are not persuaded that it is necessary to provide an exemption from a failure to report offence because of the existence of an evidentiary privilege. We note that reporting obligations in respect of child sexual offences seek to prevent future harm to children, whereas evidentiary privileges prescribe how matters are to be dealt with in court proceedings.[119]

Mandatory reporting for ministers of religion announced in May 2019

There are no current statutory provisions that require religious personnel to report child sexual abuse in Western Australia, however on 23 May 2019, the State Government announced that it will amend the *Children and Community Services Act 2004* (WA) to require ministers of religion to report child sexual abuse, including where they have gained this knowledge through religious confession. This will apply to religious leaders, including priests, ministers, imams, rabbis, pastors and Salvation Army officers. The amendments are expected to be introduced in the second half of 2019.

[119] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, Parts III-VI, 223.

9.5 Proposals

Issue 5 Proposal A
Implement a new offence of failure to report child sexual abuse that would apply to persons working within institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution.

Relevant institutions/organisations would include (confirmed during drafting):

- Schools
- Child care services
- Health services
- Mental health and drug and alcohol services
- Accommodation and residential care services
- Coaching or tuition services
- Clubs and associations that have a significant membership of children
- Disability services
- Justice and detention services
- Religious organisations, services, or activities of any kind
- Counselling and support services for children
- Sporting, arts and other recreation clubs

The state of mind/mental threshold required to report to police under the offence would be that the person either knows, believes, or reasonably ought to know that a child aged under 16 years has been sexually abused by an adult person.

The perpetrator of the sexual abuse is someone associated with the institution/organisation, as per recommendation 33.

If the state of mind is/was gained *before* the failure to report offence commences, the offence should still apply if the child is still a child and still associated with the institution, or, the perpetrator of sexual abuse is still associated with the institution or is associated with another institution.
Defences and exceptions would be in line with other jurisdictions' legislation.
Information gained within religious confession will not be exempted.

Rationale for Proposal A:
Persons deemed to have care, responsibility and/or control of children within an institutional/organisational setting, who know or believe (or reasonably ought to know) that a child is being or has been sexually abused by a person associated with that institution, but do not disclose information to police, should be held criminally responsible. These persons have a legal obligation to report knowledge or belief of child sexual abuse to police, in clear priority of protecting the reputation of the institution or the perpetrator.

- It would be easier to educate adults within relevant institutions of their obligations under the offence than educating entire adult population.

- The mental threshold of 'knows, believes, or reasonably ought to know' would prosecute actual knowledge or belief as well as circumstances where a reasonable person should have known. This latter objective threshold may make it easier for the prosecution to prove beyond reasonable doubt.

Issue 5 Proposal B
Implement a new offence of failure to report child sexual abuse that applies to all adult persons who know, believe or reasonably ought to know, that a child has been sexually abused.

Defences and exceptions would be in line with other jurisdictions' legislation. Information gained in religious confession will not be exempted.

Rationale for Proposal B:

Any adult who knows, believes (or reasonably ought to know) that a child is being or has been sexually abused but does not disclose information to police, should be held criminally responsible. All children should be assisted and protected in all circumstances, whether the person reporting is associated with an institution, or whether the knowledge or belief is gained through any other circumstance, including within families, social circumstances and other informal (non-institutional) environments. There is no justification (without reasonable excuse) for failing to act to report child sexual abuse by any adult person.

- This would go beyond the form recommended by Royal Commission, but would achieve consistency with Victoria and New South Wales (and Tasmania and ACT when legislation passes) in the offence applying to all adults.
- This option would ensure application of the offence to persons within families and domestic situations as well as those people working with children.

Issue 5 Proposal C
Implement a new offence of concealment of child sexual abuse.

Like the NSW 'concealing child abuse' offence, it would contain an additional mental element, that the person 'knows, believes or reasonably ought to know that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence' (but fails to report the information to police).

Defences and exceptions would be considered in line with other jurisdictions' legislation. Information gained in religious confession will not be exempted.

9.6 Discussion Questions

Rationale for Proposal C:
Whether or not this offence applies to all adults, or to persons involved within institutions, the offence should capture those cases where the person has intentionally evaded his or her duty to report information to police. Persons who know that a child has been sexually abused *and* know that this information would assist the police in investigating, charging and convicting a perpetrator of child sexual abuse, but fail to go to police, are culpable for concealing child sexual abuse.

Implementing the offence this way would make the distinction between the criminal offence and the offence under mandatory reporting legislation, in which the mandated reporter failed to report to child protection much clearer.

Issue 5	**Failure to report child sexual abuse/concealment offence**
5.1	Please comment on which policy rationale (A, B or C) is most compelling.
5.2	If you support Proposal A, should the obligation to report to police extend to all of the persons listed under recommendation 33(a), that is, to owners, managers, staff members and volunteers, and any person who requires a Working with Children Check clearance for purposes of their role in the institution? Or, would it be justified to restrict the obligation upon persons within the institution with the most authority, for example, owners and managers?
5.3	If you support Proposal B how can the risk of over-reporting and defensive reporting be managed?
5.4	If you support Proposal C should the offence apply to all adults or only to persons within institutions, as referred to in question 1?
5.5	Do you have any comments about which defences and exceptions should be included in a new failure to report offence? See for reference: 'Table of excuses and exceptions legislated by other jurisdictions for 'failure to report' offence' in Appendix G
5.6	Will the addition of an objective test of the accused's state of mind, such as 'reasonably ought to know', make it easier for the offence to be proven when prosecuted?
5.7	Should a person mandated to report under other statutory obligations, such as mandatory reporting or reporting under a proposed reportable conduct scheme, be required to report to all possible authorities? For example, should a teacher be required to report the same case of abuse to police and the CEO, or should one report suffice? Are information-sharing processes between the relevant authorities effective enough to ensure that if a report is made to one authority, it will be on-reported to the other?
5.8	Should a reporter who is required to report sexual abuse under these laws have to report the full details of the victim's identity to discharge their obligations under the offence? That is, would a person be exempt from being charged with failing to report child sexual abuse if they 'blind report' to police (reports details of the perpetrator and the offending, but not the victim's details)? Should the details of exactly what is required to be reported to police be provided in the offence provisions?

10 Issue 6: Failure to protect a child from sexual abuse criminal offence

10.1 The issues of concern identified by the Royal Commission

The Royal Commission heard multiple cases where perpetrators of sexual abuse against children continued to have access to children in institutions, even when concerns had been raised about their behaviour or their offending.

The Royal Commission states that:

> Unlike a duty to report, a duty to protect is primarily designed to prevent child sexual abuse rather than to bring abuse that has occurred to the attention of police. A failure to protect offence can apply to action taken or not taken *before* it is suspected that child sexual abuse is being or has been committed…In some circumstances it might be criminally negligent not to take other available steps [other than report to police], particularly if the risk is immediate and other steps are available that will allow an intervention to occur more quickly. It is not and should not be thought to be sufficient to wait until abuse occurs and then inform police.[120]

The Royal Commission was particularly focussed upon third parties within institutional settings having a duty to protect. Recommendation 36 of the *Criminal Justice Report* is:

Criminal Justice Report, recommendation 36

State and territory governments should introduce legislation to create a criminal offence of failure to protect a child within a relevant institution from a substantial risk of sexual abuse by an adult associated with the institution as follows:

a. The offence should apply where:
   i. an adult person knows that there is a substantial risk that another adult person associated with the institution will commit a sexual offence against:
      - a child under 16
      - a child of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child
   ii. the person has the power or responsibility to reduce or remove the risk
   iii. the person negligently fails to reduce or remove the risk.
b. The offence should not be able to be committed by individual foster carers or kinship carers.
c. Relevant institutions should be defined to include institutions that operate facilities or provide services to children in circumstances where the children are in the care, supervision or control of the institution. Foster care and kinship care services should be included, but individual foster carers and kinship carers should not be included. Facilities and services provided by religious institutions, and any service or functions performed by persons in religious ministry, should be included.
d. State and territory governments should consider the Victorian offence in section 49C of the Crimes Act 1958 (Vic) as a useful precedent, with an extension to include children of 16 or 17 years of age if the person associated with the institution is in a position of authority in relation to the child.

[120] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 246. https://www.childabuseroyalcommission.gov.au/criminal-justice

The Western Australian Government has 'Accepted in Principle' this recommendation.

10.2 Position in other jurisdictions

Only Victoria and NSW currently have an offence that applies to the failure to protect a child from sexual abuse, in criminal legislation.

The ACT plans to implement a failure to protect offence and is still completing consultation.

Tasmania, Queensland and South Australia will further consider introducing an offence.

It is not known whether the Northern Territory will introduce a failure to protect offence.

Differences between the NSW and Victorian offences
Scope: In Victoria, applies to the risk of sexual offences against children, whereas in NSW, applies to risk of 'child abuse' offences against children (sexual offences, serious physical abuse or serious neglect).

Liable person: In Victoria, the offence applies to a person within a relevant organisation, aged over 18 years, who has the power or responsibility to remove a risk, whereas the NSW offence applies to an adult who carries out work for an organisation, whether an employee, contractor, volunteer or otherwise.

Penalty: Commensurate with the level of authority and responsibility the person has within the organisation, the Victorian offence carries a maximum penalty of five years imprisonment. Under the NSW offence, which applies to any adult working within the organisation, the offence carries a two-year maximum prison sentence.

See **Appendix H** for a more detailed discussion of other Australian jurisdictions' position as to implementation of a 'failure to protect' offence.

10.3 Current law in Western Australia

The Criminal Code does not currently provide any similar offence to the offence recommended by the Royal Commission.

Under section 101 of the *Children and Community Services Act 2004* (WA) (**CCS Act**), Western Australia has an offence of 'Failing to protect a child from harm'. The offence was introduced at the time the Act commenced[121] and then amended in 2015.[122]

The key elements of the offence are as follows:

- Applies to a person who has 'care and control**'** of a child.

[121] Children and Community Development Bill 2003 (WA) cl 101.

[122] *Children and Community Services Legislation Amendment and Repeal Act 2015* (WA) s44.

- The person 'engages in conduct' (defined as doing an act, or omitting to do an act).
- The person knows that the conduct may result in a child suffering harm as a result of physical abuse, sexual abuse, emotional abuse, or neglect, or is reckless as to whether the conduct may have that result.
- If convicted, the maximum penalty is 10 years imprisonment.

There are several key differences between this offence, and the Royal Commission's recommended 'failure to protect a child within a relevant institution from a substantial risk of sexual abuse by an adult associated with the institution' offence.

These key differences are as follows:

Relationship to child, or 'role' of person who may be charged
The 'Failing to protect a child from harm' offence in the CCS Act applies to a person who has care and control of a child. A person with care and control of a child has a direct and crucial influence upon a child's survival, care and wellbeing, such as a primary caregiver or parent.

The Royal Commission's recommended offence applies to a person 'within a relevant institution', who has 'the power or responsibility to remove the risk'. For example, this may apply to a person within a modern day institution such as a school or a hospital who holds a role not necessarily involved with the 'care and control' of a child, but who has the power or responsibility within that institution to ensure that staff and volunteers are safe. Following the above examples, this could be a school principal or a manager within a health service.

Conduct
Under the 'Failing to protect a child from harm' offence in the CCS Act, the criminal behaviour is doing an act **or** omitting to do an act. The person who has care and control of a child may make a positive act, or fail to do something [that they know may result in harm]. For example, a parent may knowingly encourage and facilitate a child to spend time with a person with a history of sexual offending against children. This would be an act rather than an omission.

The conduct involved in the CCS Act 'failing to protect a child from harm offence', applies to the person's *own conduct*, and not the conduct of a third party.

The Royal Commission's recommended offence applies to someone with authority within an institution knowing that *someone else's conduct* presents a risk to a child.

Knowledge
The 'Failing to protect a child from harm' offence, includes *recklessness* as an alternative to *knowing* that conduct may result in harm to the child. Recklessness is a state of mind where a person is aware there is a possibility of harm, but engages in the conduct anyway.[123] Recklessness is not an element of the Royal Commission's recommended offence, which requires knowledge of a substantial risk.

[123] *Banditt v The Queen* [2005] HCA 80; *R v Coleman* (1990) 19 NSWLR 467 at 476C.

Harm
The harm to children focussed on in the Royal Commission's recommended offence is sexual abuse of children.

The 'Failure to protect a child from harm' offence in the CCS Act applies widely to physical abuse, sexual abuse, emotional abuse and neglect.

Context
The 'Failing to protect a child from harm' offence in the CCS Act and the Royal Commission's offence differs significantly in purpose and context.

The 'Failure to protect a child from harm' offence sits in the CCS Act and promotes the wellbeing of children and families, acknowledging the primary role of parents and families. It provides for the protection and care of children in circumstances where parents have not provided that protection and care. The Part 7 offence provisions, of which the 'Failing to protect a child from harm' offence is one, are offences intended for parents and direct caregivers.

The Royal Commission recommended a specific offence that should apply to third party persons of influence within child-related institutions, who are aware there is a risk presented by another person associated with the institution that they may perpetrate crimes of a sexual nature against children.

10.4 Proposals for reform in Western Australia

The offence recommended by the Royal Commission is intended to be a criminal offence specifically targeting persons of authority within institutions who fail to remove the risk presented by another person associated within that institution that they may sexually abuse a child or children within that institution.

The recommended offence differs significantly from the existing offence within the CCS Act, in the context, the intent, the role of whom it applies to, the nature of the harm, the directness of the risk, and the conduct.

It is therefore proposed that this offence is implemented as a separate and specific Criminal Code offence.

Issue 10 Proposal Enact new Criminal Code offence of 'Failing to protect a child from risk of sexual abuse'. The offence would apply to persons who have the authority and power within an **institutional setting**, who know there is a substantial risk that another adult person within the institution will sexually abuse a child or children; who have the power or responsibility to remove the risk; and who negligently fail to reduce or remove the risk. The offence would apply to the risk that children aged under 16 years would be sexually abused, but also include children aged 16 and 17 years in circumstances where the potential perpetrator is in a position of authority to the child.

10.5 Discussion questions

Issue 6	Failure to protect a child from child sexual abuse
6.1	The phrase 'power or responsibility to remove the risk', while clearly indicating that the offence applies to someone who has at least some authority within an

	organisation, may not be specific enough to enable persons within organisations/institutions to know if they are obligated under the offence. For example, in a sporting club, would the obligation apply to a coach, or is the obligation upon the club's governing board? In a school, does the obligation fall upon a teacher, or only on a school's principal? In a multi-tiered management structure within a larger organisation, who should have the obligation? Should the provisions specify who exactly within the institution has the obligation to remove the risk to a child? If so, should this be 'heads of institutions', or should it apply to other management roles within an institution? Should it apply to anyone within the institution who is capable of taking action to remove the risk? Should it state, as it is worded in Victoria's offence, that 'by reason of person's position, has the power or responsibility to reduce or remove that risk'?
6.2	Should there be any defences or exceptions to the offence of failing to protect a child from sexual abuse?

11 Issue 7: Sentencing reform in cases of child sexual abuse

11.1 The issues of concern identified by the Royal Commission

The Royal Commission delivered three recommendations regarding sentencing of persons convicted of child sexual abuse offences in the *Criminal Justice Report*. Two of these recommendations are not met in Western Australia and were allocated an 'Accept in Principle' response.

11.1.1 Exclusion of good character

The Royal Commission's research found that out of 283 persons sentenced for child sexual abuse offences in an institutional context:

- In over half of cases the offender had no prior criminal record;[124]
- 27 percent of offending occurred within a school or boys' home; and
- 23 percent of offending occurred within a church.

Previous good character and lack of previous convictions is currently taken into account in sentencing, however, the Royal Commission found that it is inappropriate in the case of child sexual abuse offending. This is because a lack of prior conviction is common, and offenders often use their position, good character or reputation to facilitate the grooming and sexual abuse of a child.

At the time of the release of the *Criminal Justice Report*, two jurisdictions had already introduced provisions that explicitly state that good character and lack of prior conviction is not to be taken into account in sentencing for child sexual abuse offences (see below). This was done to remedy the effect of the ruling in the High Court case of *Ryan v The Queen*,[125] on appeal from the NSW Court of Appeal, on the grounds that the District Court of NSW had not taken into account the good character of the Priest charged with numerous child sexual abuse offences. The

[124] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 277. https://www.childabuseroyalcommission.gov.au/criminal-justice
[125] *Ryan v The Queen* [2001] HCA 21.

High Court found that the Priest was entitled to some leniency on account of his otherwise good character.

The Royal Commission recommended:

> **Criminal Justice Report, recommendation 74**
> All state and territory governments (other than NSW and South Australia) should introduce legislation to provide that good character be excluded as a mitigating factor in sentencing for child sexual abuse offences where that good character facilitated the offending, similar to that applying in NSW and South Australia.

11.1.2 Sentencing based on current standards

The Royal Commission found that sentences attached to child sexual abuse crimes in the past reflected a poor understanding of the long term impact of sexual abuse on victims.[126]

Penalties have increased as knowledge of the profound impacts and the extent of the criminality has become known.

Despite this, the Royal Commission found that in the case of convictions for historical cases of child sexual abuse, courts were applying sentencing standards at the time of offending, rather than at the time of conviction.[127] This has resulted in shorter sentences, distress to victims, and inconsistency with sentencing for like offences in current cases.

The Royal Commission recommended that legislation should specify that sentencing for historical cases should be based on current standards, however, limited to the maximum penalty for the offence that existed at the time of offending.

> **Criminal Justice Report, recommendation 76**
> State and territory governments should introduce legislation to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing instead of at the time of the offending, but the sentence must be limited to the maximum sentence available for the offence at the date when the offence was committed.

11.2 Position in other jurisdictions

Character
The Northern Territory and Queensland are the only other jurisdictions, apart from Western Australia that have not implemented recommendation 74.
The ACT, NSW, South Australia, Tasmania and Victoria have all legislated to explicitly exclude good character and lack of prior convictions from being taken into account in sentencing for child sexual abuse.

[126] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 320. https://www.childabuseroyalcommission.gov.au/criminal-justice
[127] Ibid, 307-308.

Sentencing on current standards

Legislation to ensure that cases brought for historical child sexual abuse are sentenced based on current standards, rather than on the sentence stipulated at the time of offending, has been implemented by Victoria and NSW.

The ACT and Tasmania are currently preparing to introduce this measure.

Queensland and South Australia have submitted a further consideration response, and the Northern Territory did not submit a response.

See **Appendix I** for full discussion of other Australian jurisdictions' implementation of the sentencing reforms recommended by the Royal Commission in recommendations 74 and 76.

11.3 Current law in Western Australia

a) Exclusion of good character

The *Sentencing Act 1995* (WA) provides that in sentencing an offender, the court must take into account 'any mitigating factors'.[128] The only mitigating factors specified in statute are assisting law enforcement authorities[129] and entering a guilty plea.[130] An offender's character is not listed as a mitigating factor, however, the Act does not exclude good character in relation to child sexual abuse in the manner recommended by the Royal Commission.

b) Sentencing based on current standards

Section 10 of the *Sentencing Act* (WA), entitled 'Effect of change of statutory penalty', states:

> If the statutory penalty for an offence changes between the time when the offender committed it and the time when the offender is sentenced for it, the lesser statutory penalty applies for the purposes of sentencing the offender.

Beyond leaving the issue open, courts are currently statute bound to apply the lesser statutory penalty. In the case of historical child sex offending, the penalty at the time of offending is likely to be the lesser penalty.

11.4 Proposals for reform in Western Australia

a) Exclusion of good character

Recommendation 74 was 'Accepted in Principle' by the State Government.

Issue 7 Proposal Part A Introduce a new provision into the *Sentencing Act* (WA) that explicitly states that in determining the appropriate sentence for a sexual offence against a child, the good character or lack of previous convictions of the offender is not to be taken into account as a mitigating factor, if the offender's character or standing enabled, and was utilised by the offender to commit the offence/s.

[128] *Sentencing Act 1995* (WA) s6(2)(c).
[129] *Sentencing Act 1995* (WA) s8(5).
[130] *Sentencing Act 1995* (WA) s9AA(2).

a) Sentencing based on current standards

Recommendation 76 was 'Accepted in Principle' by the State Government.

Issue 7 Proposal Part B Section 10 of the *Sentencing Act 1995* (WA) is amended to state that in the case of sentencing for child sexual abuse offences, the court must have regard to current sentencing standards, and not to the standards at the time of the offending, however, the sentence must be limited to the maximum sentence available for the offence at the date that the offence occurred.

The Department of Justice proposes that both Proposal A and Proposal B are implemented.

11.5 Discussion Question

Issue 7	**Sentencing reform in cases of child sexual abuse**
7.1	Please provide any relevant feedback on Proposals Part A and Part B

12 Issue 8: Expanding interlocutory appeal rights

12.1 The issues of concern identified by the Royal Commission

Recommendation 79 of the *Criminal Justice Report* is for governments to introduce legislation to expand the Director of Public Prosecution's right to bring an interlocutory appeal in prosecutions involving child sexual abuse offences.

The full recommendation is as follows:

Criminal Justice Report, recommendation 79
State and territory governments should introduce legislation, where necessary, to expand the Director of Public Prosecution's right to bring an interlocutory appeal in prosecutions involving child sexual abuse offences so that the appeal right:

a. applies to pre-trial judgments or orders and decisions or rulings on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case
b. is not subject to a requirement for leave
c. extends to 'no case' rulings at trial.

Interlocutory decisions are decisions or orders made by the court prior to trial, such as a ruling on the admissibility of evidence, or a decision about whether a trial will be joint or severed.

An appeal against a pre-trial decision is an interlocutory appeal.

The advantages of conducting interlocutory appeals include:

- Reducing the number of re-trials
- Avoidance of trials through early resolution of issues, encouraging increased likelihood of guilty plea or withdrawal of charges
- Preventing unjust acquittals and convictions
- Increasing the efficiency of criminal justice system.[131]

However, the disadvantages of expansion of interlocutory appeal rights may be:

- Delays in getting to trial
- Fragmentation of the trial
- Increase in appeal court's workload.

Reducing the number of re-trials and encouraging early guilty pleas was seen by the Royal Commission as being particularly important for victims of child sexual abuse. The Royal Commission found interlocutory appeal rights for the prosecution need to be strengthened because interlocutory decisions can reduce or destroy the prosecution's prospects of success.[132]

The Royal Commission pointed out that broadening appeal rights in the manner recommended, may lead to an increase in appeals in the short-term. Victoria submitted that after reforms to interlocutory appeal rights were introduced, there was an initial spike in interlocutory appeals, followed by a decline.[133]
The Royal Commission considered that interlocutory appeal rights should not be subject to a requirement for leave of the court. Leave is a form of judicial approval or permission. The basic purpose of requiring leave of the court is to ensure unmeritorious cases do not consume the limited resources of the appellate court. The requirement of leave is the central mechanism by which appellate courts can control the quality and quantity of cases heard and determined on appeal.[134]

Recommendation 79 also recommends that in the case where the defendant has been successful in obtaining a ruling from the court that there is no case to answer in a child sexual abuse trial, the prosecution should be able to appeal that ruling. The Director of Public Prosecutions in Western Australia already has the power to appeal a judgment of acquittal entered that an accused has no case to enter on the charge,[135] and as such recommendation 79(c) will not be considered.

12.2 Position in other jurisdictions

Australian Capital Territory
The ACT has a general right of appeal by the prosecution for interlocutory decisions. Leave of the court is required.[136]

[131] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 340. https://www.childabuseroyalcommission.gov.au/criminal-justice
[132] Ibid, 341.
[133] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 340. https://www.childabuseroyalcommission.gov.au/criminal-justice
[134] Chris Corns, 'Leave to Appeal in Criminal Cases: The Victorian Model' (2017) 29(1) *Current Issues in Criminal Justice* 39, [6].
[135] *Criminal Appeals Act 2004* (WA) s24(2)(e)(i).
[136] *Supreme Court Act 1933* (ACT) s37E(4).

New South Wales
NSW has a general right of appeal against an interlocutory judgement or order under the *Criminal Appeal Act* 1912 (NSW) s5F, but, to appeal any decision or ruling on the admissibility of evidence, the Director of Public Prosecution must show that the ruling eliminates or substantially weakens the prosecution's case.

However, the *Criminal Appeal Act 1912* (NSW) does not define 'interlocutory judgment or order'. Whether or not a particular decision constitutes an interlocutory judgment or order on a case by case basis is determined by reference to the…:

> 'character and effect of what is decided. For a decision to constitute a judgment or order, there must be a measure of finality, which would require an appellate court to reverse it'.[137]

Leave of the court is required.[138]

Queensland
In Queensland, an interlocutory decision cannot be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence. However, the Attorney General may refer to the Court of Appeal a point of law that has arisen in relation to a direction or ruling as to the conduct of a trial or pre-trial hearing.

South Australia
The Director of Public Prosecutions may appeal an adverse pre-trial decision on any ground that involves a question of law alone or on any other ground with the permission of the Full Court of the Supreme Court. However, 'interlocutory appeals are limited to the question of whether proceedings should be stayed on the ground that they are an abuse of process.'[139] Leave of the court is required.

Tasmania
In Tasmania, the Attorney-General can only appeal a ruling prior to an acquittal where there has been an order arresting judgment or, with leave of the court, an order staying or quashing an indictment or upholding a demurrer. In practice, the Director of Public Prosecutions acts in matters on behalf of the Attorney-General.

Victoria
Interlocutory appeals in criminal trials became part of the Victorian law with the introduction of the *Criminal Procedure Act 2009* (Vic).[140] Interlocutory appeals in Victoria require leave and more stringent rules apply to making interlocutory appeals after a trial has commenced to try to encourage issues to be resolved as early as possible and avoid disrupting a trial.

In Victoria, an interlocutory decision is defined broadly to avoid technical arguments about what judgments or orders and other types of decisions are capable of being

[137] *R v Bozatsis* (1997) 97 A Crim R 296, 303.
[138] *Criminal Appeal Act 1912* (NSW) s5F(3)(a).
[139] *Criminal Law Consolidation Act 1935* (SA) s352(1) (b)-(c). See also NSW Law Reform Commission, NSW Government, Report 140, March 2014.
[140] Andrew Field, An efficient justice, 'Snapshot' 2 May 2016 <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/May-2016/An-efficient-justice>.

appealed.[141] At the end of the prosecution case, the defence may submit to the judge that there is no case for the accused to answer.[142]

12.3 Current law in Western Australia

In Western Australia, the right of interlocutory appeal in relation to severing an indictment is set out in section 26 of the *Criminal Appeals Act 2004* (WA). This provides that the prosecution and accused may appeal to the Court of Appeal against any order made by a judge of a superior court whether or not there be a separate trial of any of the charges. Other rights of appeal of the prosecutor in relation to decisions by a judge of a superior court relating to a charge of an indictable offence are contained in section 24(2). They include:

(a) a decision refusing to consent to the discontinuance of the prosecution of the charge

(b) a judgment entered under the Criminal Procedure Act 2004 section 128(2) or (3)

(c) a decision ordering a permanent stay of proceedings on the charge

(d) a decision ordering an adjournment of proceedings on the charge

(da) a judgment of acquittal (other than a judgment of acquittal on account of unsoundness of mind) entered after a jury's verdict of not guilty of a charge the statutory penalty for which is or includes imprisonment for 14 years or more or life, but only on the grounds that before or during the trial the judge made an error of fact or law in relation to the charge;

(e) a judgment of acquittal (other than a judgment of acquittal on account of unsoundness of mind) —

  (i) entered after a decision by the judge that the accused has no case to answer on the charge; or

  (ii) entered in a trial by the judge alone;

(f) any judgment entered as a result of any of the above decisions;

(g) any order made as a result of any of the above decisions or judgments.

Section 27 of the *Criminal Appeals Act 2004* (WA) states that leave of the Court of Appeal is required for each ground of appeal.

As such, the Director of Public Prosecution's right to bring an interlocutory appeal is very limited and only applies in specific circumstances. There is no general right for the prosecution to appeal an 'interlocutory decision'.

During a public hearing of Case Study 46, as part of the Royal Commission, Amanda Forrester (then Acting DPP) responded to a question regarding a prosecutor's right to an interlocutory appeal in Western Australia – to which she responded:

> I have the right of interlocutory appeal from a decision to sever an indictment, and an accused person has an equal right against a decision not to sever. Those applications are required to be brought and determined prior to the first day of trial. When they are brought in that way and the decision comes down, either party has seven days to appeal to the Court of Appeal, and the Court of Appeal makes every effort to determine that so that the trial does not need to be adjourned…

[141] http://www.judicialcollege.vic.edu.au/eManuals/VCPM/27884.htm

[142] *Criminal Procedure Act 2009* (Vic) s226.

> We had one that was completely dealt with in the space of a week. To be fair, that was a homicide, but it applies in every case where there is a severance application…[143]

12.4 Proposal for reform in Western Australia

Issue 8 Proposal

Expand the right of the Western Australian Director of Public Prosecutions, in prosecutions for child sexual abuse, to bring interlocutory appeals:

applying to pre-trial judgments or orders and decisions or rulings on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case;
that will not be subject to a requirement for leave.

12.5 Discussion Questions

Issue 8	Expanding interlocutory appeal rights
8.1	Can you provide comment on the proposal to expand the right of the Director of Public Prosecutions to bring interlocutory appeals in cases of child sexual abuse?
8.2	Should the DPP's right to appeal, applying to pre-trial judgments or orders and decisions or rulings on the admissibility of evidence, be subject to a requirement for leave?

13 Issue 9: Making presumption about males under 14 years retrospective

13.1 The issues of concern identified by the Royal Commission

Up until the 1980s and 90s, most criminal legislation around Australia contained the presumption, inherited from English common law, that a boy under the age of 14 years was physically incapable of being able to have sexual intercourse, and therefore could not be guilty of a sexual offence.

The presumption was abolished in all jurisdictions, with the exception of the Northern Territory (where the presumption was never adopted) and Tasmania (where there was a presumption that a male under 7 years is incapable of sexual intercourse).

In considering the length of time it can take for survivors of sexual abuse to disclose abuse, the Royal Commission considered that the immunities arising for male perpetrators aged under 14 years, who offended prior to the abolishment of the presumption, should be removed by making the abolishment retrospective.

[143] Transcript of Proceedings, Royal Commission into Institutional Responses to Child Sexual Abuse, *Hearing of Case Study 46* (Day 236) Justice Peter McClellan AM (1 December 2016) 24256-24257.

Criminal Justice Report, recommendation 83
State and territory governments (other than the Northern Territory) should give further consideration to whether the abolition of the presumption that a male under the age of 14 years is incapable of having sexual intercourse should be given retrospective effect and whether any immunity which has arisen as a result of the operation of the presumption should be abolished. State and territory governments (other than the Northern Territory) should introduce any legislation they consider necessary as a result of this consideration.

Recommendation 83 is as follows:
There has been a mixed response to this recommendation by states and territories that responded to the Royal Commission's recommendations in the *Criminal Justice Report*. Tasmania, for example, has already implemented the recommendation in full, whilst NSW issued caution about the recommendation, warning that retrospective repeal of the presumption would expose those defendants to lengthy terms of imprisonment.[144]

13.2 Position in other jurisdictions

Victoria, Queensland and South Australia have submitted that this recommendation would require 'Further Consideration'.

The ACT has accepted all aspects of the recommendation, however, notes that further analysis may be required.

NSW will not implement recommendation 83. The NSW Government stated, in the June 2018 response, that a defendant found guilty of a sexual offence who falls into this category, would potentially be exposed to a life sentence, since under NSW law, the offence of maintaining an unlawful sexual relationship with a child under 16 carries a penalty of life imprisonment.

Tasmania is the only jurisdiction at this point that has already implemented recommendation 83. The Criminal Code and Related Legislation Amendment Act 2018 (Tas), omitted section 18(3) of the Criminal Code Act 1924 (Tas). Section 7 of the amending legislation states that the omission of section 18(3) is to be taken to have effect from 4 April 1924.

13.3 Current law in Western Australia

Western Australia removed the presumption that males aged under 14 years are not capable of having sexual intercourse in 1985.[145] The relevant paragraph in section 29 of the Criminal Code was deleted, however the effect of the removal was prospective only.

Preliminary discussions with the Western Australian Police Force, Sex Crime Division, indicate that a small number of cases of historical sexual abuse alleged to

[144] NSW, *NSW Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (June 2018) 66. https://static.nsw.gov.au/nsw-gov-au/1529890786/NSW-Government-response-to-the-Royal-Commission-into-Institutional-Responses-to-Child-Sexual-Abuse-June-2018.pdf.pdf
[145] *Acts Amendment (Sexual Assaults) Act 1985* (WA) s4.

have been perpetrated by a male under the age of 14, prior to 1985, have not been charged due to the lack of retrospective application.

The paragraph of section 29 of the Criminal Code (repealed) was:

> 'A male person under the age of fourteen years is presumed to be incapable of having carnal knowledge'.

Although this repealed provision appears to be a 'rebuttable presumption', the Department has advice that this provision has been regarded as an example of an 'irrebuttable presumption'.[146]

The argument put forth by NSW in its response to recommendation 83, is that making the removal retrospective would lead to persons being sentenced to lengthy imprisonment. The Department notes, however, that males aged under 14 years charged with sexual offences since 1989, may be liable for lengthy sentences when prosecuted today.

Much of the Royal Commission's focus was upon its findings that survivors and victims of child sexual abuse take on average 29.3 years to disclose sexual abuse. Recommendation 83 is one of many recommendations made by the Royal Commission calling for the retrospective action of laws that have operated against victims and survivors finding justice at the time they are ready to take action.

13.4 Proposals for reform in Western Australia

In the June 2018 response to the Royal Commission's recommendations, the State Government responded to recommendation 83 with an 'Accept in Principle' response.

Issue 13 Proposal Introduce a provision into the Criminal Code stating that the 1985 omission of the presumption contained in section 29, has retrospective effect dating back to 1913, when the Criminal Code was enacted.

13.5 Discussion Questions

Issue 9	**Making removal of presumption that males under 14 years are incapable of having sexual intercourse retrospective**
9.1	Do you support the implementation of the proposal to introduce a provision into the Criminal Code to provide that the omission of section 29 in 1985 has retrospective effect dating back to 1913 when the Criminal Code was enacted?

Additional question
10.1 Is there anything else you would like to provide suggestion or feedback about in relation to the above issues, or in relation to child sexual abuse criminal laws in Western Australia?

End of paper

[146] See, e.g.: RF Carter, Carter's Criminal Law of Queensland (6th ed., 1982, Butterworths); *R v Moody* (1897) 8 QLJ 102; *Walters v Lunt* [1951] 2 All ER 645.

Appendix A

Persistent Sexual Abuse of Children Model Provisions – (Recommendation 22), *Criminal Justice Report*

1. Name of the Model Provisions

These Model Provision are the *Persistent Sexual Abuse of Children Model Provision*.

2. Definitions

(1) In these Model Provisions:

adult means a person over the age of 18 years.
child means:
(a) a person who is under the age of 16 years, or
(b) a person under the age of 18 years, if, during the period of the relationship that is the subject of the alleged unlawful sexual relationship offence, the person is under the special care of the adult in the relationship.

predecessor offence means the offence of persistent sexual abuse of a child.
sexual offence means:

(a) an offence that involves having sexual intercourse with another person, or
(b) an offence that involves an act of indecency on or in the presence of another person, or
(c) an offence that involves procuring a person for unlawful sexual activity, or
(d) an offence that involves compelling another person to engage in any sexual self-manipulation, or
(e) an offence involving the sexual servitude of another person, or
(f) an offence under a previous enactment that is substantially similar to an offence referred to in paragraph (a), (b), (c), (d) or (e), or
(g) an offence that involves an attempt to commit an offence of a kind referred to in paragraph (a), (b), (c), (d), (e) or (f).

unlawful sexual relationship offence means an offence against section 3 (1).

(2) For the purposes of these Model Provisions, a person under the age of 18 years *(the child)* is under the special care of an adult if:

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

Jurisdictional note.
The definition of sexual offence is a general description of the types of offences that should be covered by the offence. Each jurisdiction should insert a specific definition of the individual sexual offences that constitute the unlawful sexual relationship offence.

Jurisdictional note.
For the purposes of the offence, a child is a person under the age of 16 years. However, subsection (2) extends the definition of child to a person who is over 16 but under the age of 18 years, to cover sexual offences against younger persons committed by adults who are in a special relationship of trust or authority with the child. Each jurisdiction should tailor the wording of subsection (2) to suit the wording of the relevant offences in that jurisdiction.

Jurisdictional note.
A reference to the predecessor offence is only required in those jurisdictions that currently have an offence of persistent sexual abuse of a child. That offence should be repealed by the new offence. The definition of predecessor offence should refer to the section number of the offence that is repealed.

3. Offence of maintaining unlawful sexual relationship with child

(1) An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

(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) An unlawful sexual act is any act that constitutes, or would constitute (if particulars of the time and place at which the act took place were sufficiently particularised), a sexual offence.

(4) 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.

(5) 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.

(6) The prosecution is required to allege the particulars of the period of time over which the unlawful sexual relationship existed.

(7) This section extends to a relationship that existed wholly or partly before the commencement of this section and to unlawful sexual acts that occurred before the commencement of this section.

(8) A court that imposes a sentence for an unlawful sexual relationship offence constituted by an unlawful sexual relationship that is alleged to have existed wholly or partly before the commencement of this section must, when imposing sentence, take into account:

a) the maximum penalty for the predecessor offence, if the predecessor offence was in force during any part of the alleged period of the unlawful sexual relationship, and

b) the maximum penalty for the unlawful sexual acts that the unlawful sexual relationship is alleged to have involved, during the period of the unlawful sexual relationship, if the unlawful sexual relationship is alleged to have existed wholly or partly before the commencement of the predecessor offence.

Jurisdictional note.
For jurisdictions that require a fault element to be specified for each physical element of the offence, the intention is that the fault element for the offence is the fault element for each constituent unlawful sexual act.

4. Charging both unlawful sexual relationship offence and sexual offences

(1) A person may be charged on a single indictment with, and convicted of and punished for, both:

a) an offence of maintaining an unlawful sexual relationship with a child, and

b) one or more sexual offences committed by the person against the same child during the alleged period of the unlawful sexual relationship.

(2) Except as provided by subsection (1), a person who has been convicted or acquitted of a sexual offence in relation to a child cannot be convicted of an unlawful sexual relationship offence in relation to the same child if the sexual offence of which the person has been convicted or acquitted is one of the unlawful sexual acts that are alleged to constitute the unlawful sexual relationship.

(3) Except as provided by subsection (1), a person who has been convicted or acquitted of an unlawful sexual relationship offence in relation to a child cannot be convicted of a sexual offence in relation to the same child if the occasion on which the sexual offence is alleged to have occurred is during the period over which the person was alleged to have committed the unlawful sexual relationship offence.

(4) A person who has been convicted or acquitted of a predecessor offence in relation to a child cannot be convicted of an unlawful sexual relationship offence in relation to the same child if the period of the alleged unlawful sexual relationship includes any part of the period during which the person was alleged to have committed the predecessor offence.

(5) For the purposes of this section, a person ceases to be regarded as having been convicted for an offence if the conviction is quashed or set aside.

Appendix B

The Victorian course of conduct charge

Criminal Procedure Act 2009 (Vic) Schedule 1, Clauses 2 - 13

(2) More than one incident of the commission of the same relevant offence may be included in a single charge only if—

(a) each incident constitutes an offence under the same provision; and

(b) for a charge for a sexual offence, each incident relates to the same complainant; and

(c) the incidents take place on more than one occasion over a specified period; and

(d) the incidents taken together amount to a course of conduct having regard to their time, place or purpose of commission and any other relevant matter.

(3) More than one type of act may be alleged in the one charge to prove an element of the offence.

Example

A course of conduct charge for a sexual offence may allege acts of digital penetration as well as acts of penetration with an object.

(5) The charge must contain a statement that the charge is a course of conduct charge.

(6) To avoid doubt, a course of conduct charge is a charge of a single offence.

Note:
Because it is a single charge there is no scope for an order to be made under section 193 or 194 for a separate trial of any of the incidents.

(7) To avoid doubt, on a course of conduct charge the accused may rely on any exception, exemption, proviso, excuse or qualification that applies to the offence covered by the charge.

(8) he prosecution must prove beyond reasonable doubt that the incidents of an offence committed by the accused, taken together, amount to a course of conduct having regard to their time, place or purpose of commission and any other relevant matter.

(9) However, to prove a course of conduct offence it is not necessary to prove an incident of the offence with the same degree of specificity as to date, time, place, circumstances or occasion as would be required if the accused were charged with an offence constituted only by that incident.

(10) Without limiting subclause (9), it is not necessary to prove—

(a) any particular number of incidents of the offence or the dates, times, places, circumstances or occasions of the incidents; or

(b) that there were distinctive features differentiating any of the incidents; or

(c) the general circumstances of any particular incident.

(11) Without limiting clause 1(b), the particulars necessary to give reasonable information as to the nature of a course of conduct charge—

(a) must be determined having regard to—

(i) the fact that the charge is a course of conduct charge; and

(ii) the limitations contained in subclause (2); and

(iii) the fact that the various incidents of the offence are alleged to have occurred over a period of time; and

(b) need not include particulars of any specific incident of the offence, including its date, time, place, circumstances or occasion; and

(c) do not need to distinguish any specific incident of the offence from any other.

(12) A charge-sheet that contains a course of conduct charge for a sexual offence must not be filed or signed in accordance with section 6 without the consent of the Director of Public Prosecutions.

(13) This clause has effect despite any rule of law to the contrary.

Appendix C

Persistent child sexual abuse offences in Australian jurisdictions

Other than Queensland and Victoria (provided in body of paper), other Australian states' and territories' positions are as follows:

Australian Capital Territory

On 20 February 2018, the ACT Legislative Assembly passed the Crimes Legislation Amendment Act 2018 (ACT)[147] that implements a number of Royal Commission recommendations. The Act amends section 56 of the Crimes Act 1900 (ACT) relating to maintaining a sexual relationship with a young person, so that the unlawful sexual relationship, rather than individual sexual acts, constitutes the actus reus for the offence. This amendment gives effect, in the most part, to recommendations 21 and 22, of the Criminal Justice Report.

The section 56 offence provisions include:

- A person who is an adult and who maintains a sexual relationship with a young person or a person under the special care of the adult is guilty of an offence (section 56(1)).
- An adult maintains a sexual relationship with a young person or a person under the special care of the adult if on two or more occasions and over any period the adult engages in a sexual act with that person (section 56(2)).
- The period, or any part of the period, may be before the amendment day (section 56(3)(a)).
- There is no requirement for the prosecution to allege the particulars of a sexual act that would be necessary if the act were charged as a separate offence (section 56(5)(a)).
- There is no requirement for members of the jury to agree on which sexual acts constitute the sexual relationship (section 56(5)(c)).
- For an offence that occurred before the amendment day, when imposing a sentence a court must consider the maximum penalty before the amendment day for an offence against the section (section 56(7)).
- The maximum penalty for the offence is 25 years imprisonment (section 56(1)).

It is also noted that the ACT offence applies to an adult that maintains a sexual relationship with a 'young person or a person under the special care of the adult', rather than simply 'a child', as the Queensland offence does.

Under the ACT offence, a 'young person' is defined as 'a person who is under the age of 16 years', and 'special care' applies in the case where the complainant is 'not yet an adult', and, where the accused is classed under certain occupational groups (see discussion of Position of Authority Offences in 7.2).

In relation to recommendations 23 and 24, regarding introducing course of conduct charges, the ACT indicated in its response to the Royal Commission

[147] *Crimes Legislation Amendment Act 2018* [ACT].

recommendations, that it accepts these recommendations, however they require 'further analysis and consultation'.[148]

New South Wales

On 20 June 2018, the NSW Parliament passed the Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 (NSW). The legislation amends the Crimes Act 1900 (NSW) to introduce new section 66EA, that provides that it is an offence to maintain an unlawful sexual relationship with a child under 16 years of age.

The new penalty for the offence of persistent sexual abuse of a child is imprisonment for life.[149]

Excerpts of the Second Reading Speech provide the following details of the offence:[150]

A person will have maintained an unlawful sexual relationship if they have engaged in two or more unlawful sexual acts with a child.

- The prosecution will be required to specify over what period the unlawful sexual relationship is alleged to have occurred, but will not be required to specify the particulars of the unlawful sexual acts with the same degree of detail as they would if the acts were charged as separate offences.
- The jury will be required to unanimously agree beyond reasonable doubt that the unlawful sexual relationship took place, but will not be required to necessarily agree on the same unlawful acts that make up the relationship.
- The offence will only be able to be committed by an adult and will be punishable by a maximum penalty of life imprisonment. In individual cases, the sentencing court will consider the nature and seriousness of the acts in question when formulating a sentence within this maximum penalty.
- Prosecutions for this offence will require the approval of the Director of Public Prosecutions.
- The offence will apply retrospectively as long as the sexual acts that make up the unlawful sexual relationship were illegal at the time they were committed.

The NSW response to the Royal Commission's recommendations 23 and 24,[151] stated that in relation to the course of conduct charge, it is 'unnecessary' due to its strengthened persistent child sexual abuse offence.

Northern Territory

The Northern Territory issued a response only to the final set of recommendations made by the Royal Commission, and not to the three previous reports. It is not known whether the Northern Territory Government intends to amend its 'sexual

[148] Australian Capital Territory, *The ACT Government response (Part 2) to the Royal Commission into Institutional Responses to Child Sexual Abuse* (June 2018) 117. https://www.act.gov.au/__data/assets/pdf_file/0006/1210767/Response-Part-2.pdf

[149] *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) s20(1).

[150] NSW, *Parliamentary Debates*, Legislative Council, 20 June 2018 (Don Darwin, Minister for Resources, Energy and Utilities, and Arts).

[151] NSW, *NSW Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse* (June 2018) 54. https://static.nsw.gov.au/nsw-gov-au/1529890786/NSW-Government-response-to-the-Royal-Commission-into-Institutional-Responses-to-Child-Sexual-Abuse-June-2018.pdf.pdf

relationship with a child' offence,[152] in which it is necessary to prove at least three separate unlawful sexual acts.

South Australia

The Royal Commission noted that, like Queensland, South Australia responded to the High Court's decision in KBT, by amending its persistent child sexual abuse offence.[153] At that time, South Australia did not change the actus reus of the offence, but instead reduced the number of unlawful acts that the prosecution must prove, from three acts to two. Further, the offence required the jury to be unanimous on the same occasions of abuse.

Since the Criminal Justice Report was released, South Australia has amended its persistent child sexual abuse offence. On 19 October 2017, the South Australian Parliament passed the *Statutes Amendment (Attorney General's Portfolio) (No 2) Act 2017* (SA), replacing section 50 of the *Criminal Law Consolidation Act 1935* (SA), with a new provision that gives effect to the Royal Commission's recommendations 21 and 22.

These subsequent reforms adopt the model recommended by the Royal Commission, as well as addressing the impact of the High Court case of *Chiro v The Queen*,[154] a case of persistent child sexual abuse on appeal from the Supreme Court of South Australia.[155] The effect of the judgment in *Chiro,* is that where there is a course of behaviour that an individual is found guilty of, but where no special verdict on the particular aspects of the offending is taken from the jury in the sentencing, the most minor of the range of offending has to be taken into account and not the other, perhaps more serious, aspects of the case.[156] This ruling had the potential to lead to very serious offenders receiving a lesser punishment than they deserve, and that does not meet the expectations of the prosecution, the victim and the community.

Section 50 of the Criminal Law Consolidation Act 1935 (SA) now provides that:

- An adult who maintains an unlawful sexual relationship with a child is guilty of an offence (section 50(1)).
- 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 (section 50(2)).
- 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 (section 50(4)(a));
- 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 (section 50(4)(c)).

[152] *Criminal Code Act* (NT) s131A.

[153] *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) s7.

[154] *Chiro v The Queen* [2017] HCA 37.

[155] See *Statutes Amendment (Attorney-General's Porfolio) (No. 2) Act 2017* (SA) s9.

[156] *Chiro v The Queen* [2017] HCA 37; (2017) 260 CLR 425, 449-450 [49]-[50] (Kiefel CJ, Keane and Nettle JJ, 457-58 [71]-[74] (Bell J).

- The offence extends to a relationship that existed wholly or partly before the commencement of this section and to unlawful sexual acts that occurred before the commencement (section 50(6)).

Like the other jurisdictions above, two or more unlawful sexual acts are required to establish the relationship.

The penalty for the offence is life imprisonment.[157]

The section 50 offence defines child, as 'under 17 years of age'. The offence also applies where the complainant is aged between 17 and 18 years of age where the accused is in a position of authority to the complainant. Positions of authority listed under section 50(13), are broadly the same provided under the ACT offence (see above), with the addition of 'religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child'.[158]

Tasmania

Tasmania enacted the offence of 'maintaining a sexual relationship with a young person' in 1994.[159] Despite the name of the offence being similar to the Queensland offence, the actus reus of the offence requires the jury to be satisfied beyond reasonable doubt that at least three unlawful sexual acts occurred, and consequently, sufficient particulars of the occasions are required.

The Tasmanian Government introduced a bill into its House of Assembly in November 2018,[160] to implement a criminal justice response to the Royal Commission. The scope of reform related to Tasmania's 'maintaining a sexual relationship with a young person' offence, is limited to expanding the definition of 'unlawful sexual act' to include section 35(3) of the *Police Offences Act 1935* (Tas), which is 'assault with indecent intent', of a child under 17 years.

In regards to recommendations 23 and 24, about consideration of course of conduct charges, Tasmania's response to the Royal Commission indicated that the Tasmanian Government will monitor the operation of the Victorian charge.[161]

[157] *Criminal Law Consolidation Act 1935* (SA) s50(1).

[158] *Criminal Law Consolidation Act 1935* (SA) s50(13)(d).

[159] *Criminal Code Act 1924* (Tas) s125D; inserted by *Criminal Code Amendment (Sexual Offences) Act 1994* (Tas) s4.

[160] Criminal Code and Related Legislation Amendment Bill 2018 (Tas).

[161] Tasmania, Tasmanian Response – Royal Commission into Institutional Responses to Child Sexual Abuse (June 2018) 105.

Appendix D

'Grooming for sexual conduct with a child under the age of 16'
Section 49M of the *Crimes Act 1958* (Victoria)

(1) A person (**A**) commits an offence if—

(a) **A** is 18 years of age or more; and

(b) **A** communicates, by words or conduct (whether or not a response is made to the **communication**), with—

(i) another person (**B**) who is a child under the age of 16 years; or

(ii) another person (**C)** under whose care, supervision or authority **B** is; and

(c) **A** intends that the communication facilitate **B** engaging or being involved in the commission of a sexual offence by **A** or by another person who is 18 years of age or more.

(2) A person who commits an offence against subsection (1) is liable to level 5 imprisonment (10 years maximum).

(3) **A** does not intend to facilitate **B** engaging or being involved in the commission of a sexual offence by **A** or by another person who is 18 years of age or more if, were the conduct constituting the sexual offence to occur, A or the other person would satisfy an exception, or have a defence, to that sexual offence.

(4) **It** is immaterial that some or all of the conduct constituting an offence against subsection (1) occurred outside Victoria, so long as **B** or **C** was, or **B** and **C** were, in Victoria at the time at which that conduct occurred.

(5) It is immaterial that **B** or **C** was, or **B** and **C** were, outside Victoria at the time at which some or all of the conduct constituting an offence against subsection (1) occurred, so long as **A** was in Victoria at the time that conduct occurred.

(6) It is immaterial that **A, B** and **C** were all outside Victoria at the time at which some or all of the conduct constituting an offence against subsection (1) occurred, so long as **A** intended that the sexual offence would occur in Victoria.

(7) In this section —

'communication' includes an electronic communication within the meaning of the **Electronic Transactions (Victoria) Act 2000** ;

'sexual offence' means—

(a) an offence against a provision of Subdivision (8A), this Subdivision (other than section 49K(1) or this section), (8C), (8D), (8E), (8F) or (8FA); or

(b) an attempt to commit an offence covered by paragraph (a); or

(c) an assault with intent to commit an offence referred to in paragraph (a).

Appendix E

Grooming offences in other Australian jurisdictions

Commonwealth

Under section 51(v) of the *Australian Constitution*, the Commonwealth Government has the power to make laws with respect to postal, telegraphic, telephonic, and other like services. Using this power, the Commonwealth has enacted numerous laws in relation to 'carriage services', including telecommunications and the internet, since 2000.

There have been three main tranches in the introduction of Commonwealth grooming offences:

1. *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth)

This Act introduced two new offences into the *Criminal Code 1995* (Cth), as follows:

- Using a carriage service to procure persons under 16 (section **474.26**)
- Using a carriage service to 'groom' persons under 16 (section **474.27**)

2. *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth)

This Act expanded offences involving use of a carriage service, as follows:

- Using a postal service to procure persons under 16 (section **471.24**)
- Using a postal service to 'groom' persons under 16 (section **471.25**)

3. *Criminal Code Amendment (Protecting Minors Online) Act 2017* (Cth)

In 2017, the Commonwealth Government passed an additional offence of 'Using a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under 16' (section **474.25C** of the *Criminal Code 1995* (Cth)).

The Explanatory Memorandum of the Bill introducing the new offence, emphasised that this offence aims to criminalise the preparatory acts made by a predator in order to establish contact with a child. The examples given are the establishment of a false social media profile by an adult in order to establish an online relationship with a child, or using social media to lie about one's age.

Further, in response to the Royal Commission, the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 (Cth) was introduced into the Australian Parliament on 13 September 2017. The Bill includes a new offence of 'Using a postal or similar service to 'groom' another person to make it easier to procure persons under 16'. This would implement recommendation 26 regarding extending existing grooming provisions to the grooming of other persons. At the time of writing, the Bill lapsed at the end of the 45th Parliament.

Australian Capital Territory
The ACT first introduced a 'grooming'-type of offence in 2001 (*Crimes Act 1900* (ACT) s66). The offence of 'Using the internet etc to deprave young people', criminalised procuring a person under 16 years old to commit, or take part in, or watch a sexual act through electronic means.

In March 2018, the Legislative Assembly of the ACT passed the *Crimes Legislation Amendment Act* (ACT), that amended section 66 of the *Crimes Act 1900* (ACT), to apply to *any* communication or conduct with a child undertaken with the intention of grooming the child to be involved in a sexual offence. The amendments also extended the grooming offence to grooming people other than the child.

The ACT has, therefore, implemented recommendations 25 and 26 of the *Criminal Justice Report*.

New South Wales
In 2007, NSW introduced a new offence of 'Procuring or grooming a child under 16 for unlawful sexual activity into the *Crimes Act 1900* (NSW).[162] This offence required proof that the offender had either exposed a child to indecent material, or provided an illicit substance to a child with the intention of making it easier to procure sexual activity with a child.[163]

In its *Criminal Justice Report*, the Royal Commission noted that the NSW offence had 'limited application', because the types of grooming behaviour criminalised is specific and tends to occur towards the end of the grooming phase.[164]

Responding to the Royal Commission's recommendations, NSW has amended its grooming offence, adding providing a child with 'any financial or other material benefit', after the existing actions of exposing a child to indecent material or providing an illicit substance.[165]

NSW has also added a new section 66EC, that criminalises grooming an adult with the intention of making it easier to access a child in the adult's care. This offence requires the accused to have provided the adult with a 'financial or other material benefit'.[166]

In its formal response to the Royal Commission, the NSW Government explained that requiring proof of the accused providing the child, or the adult, with financial or material benefits, ensures that the prosecution can continue to use evidence of trust-building behaviours by the accused.

Northern Territory
The Northern Territory introduced an offence of 'Attempts at procuration of young person or mentally ill or handicapped females' in 1983. In 1994, the terminology of

[162] *Crimes Amendment (Sexual Procurement or Grooming of Children) Act 2007* (NSW).
[163] *Crimes Act 1900* (NSW) s 66EB(3), later amended by *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW).
[164] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 81. https://www.childabuseroyalcommission.gov.au/criminal-justice
[165] *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) s 22.
[166] *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) s 23.

'mentally ill or handicapped female', was replaced with 'mentally ill or handicapped person'.

The offence is now called 'Attempts to procure a child under 16 years', and criminalises 'attempts to procure'.[167] Unlike other jurisdictions' grooming offences, it does not use terms such as 'communication' or 'conduct'.

The Northern Territory Government's response to the recommendations of the Royal Commission did not expressly address whether it intends to amend its 'Attempts to procure a child under 16 years' offence, including whether the Northern Territory would expand the operation of the offence to apply to other persons.

Queensland

Queensland introduced a broad grooming offence in 2013.[168] Section 218B of the *Criminal Code Act 1899* (Qld) is 'Grooming children under 16', and provides that:

> Any adult who engages in any conduct in relation to a person under the age of 16 years, with intent to a) facilitate the procurement of the person to engage in a sexual act, either in Queensland or elsewhere; or b) expose, without legitimate reason, the person to an indecent matter, either in Queensland or elsewhere; commits a crime.

Ten years prior to introducing the broad grooming offence, the Queensland Government introduced the offence of 'Using the internet etc. to procure children under 16',[169] which criminalised the use of electronic communication to procure a person under 16 years, to engage in a sexual act, or expose a person under 16 years to any indecent matter.

In responding to the Royal Commission, Queensland stated that in having these two offences, recommendation 25 is met. In regards to recommendation 26, about extending grooming offences to include other persons, the Queensland Government stated that the recommendation 'involves a significant change to Queensland's grooming offence…It raises a number of issues that require further analysis and consultation with key stakeholders'.[170]

South Australia

In 2005, South Australia introduced a stalking offence that criminalised 'communication for a prurient purpose and with the intention of making a child under the prescribed age in relation to that person amenable to a sexual activity'.[171]

In its *Criminal Justice Report*, the Royal Commission regarded the South Australian offence as narrower in operation than the Victorian or Queensland offences, due to its limitation to 'communication'.[172]

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[167] *Criminal Code Act* (NT) s 131.

[168] *Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Act 2013* (Qld) pts 1 & 3.

[169] *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 17.

[170] Queensland, Queensland Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse (June 2018) 106.

[171] *Criminal Law Consolidation Act 1935* (SA) s 63B(3)(b).

[172] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, August 2017, 86. https://www.childabuseroyalcommission.gov.au/criminal-justice

In its response to the Royal Commission's recommendations, the South Australian Government stated that its existing offence already meets recommendation 25.[173] The only amendments made, on 19 October 2017, to the grooming offence have been in relation to introducing position of authority provisions (discussed at Chapter 7), and not to the breadth of the grooming offence, nor in relation to expanding the grooming offence to include grooming of others.[174]

Tasmania

Tasmania introduced the offence of 'Communications with intent to procure person under 17' in 2005.[175] The offence criminalises 'communications by any means with the intention of procuring a person under the age of 17 years, to engage in an unlawful sexual act'.[176] The Royal Commission regarded the Tasmanian offence as a broad offence because it captures 'communications by any means', although like the South Australian offence, it is not as broad as the Queensland and Victorian offences, which also include 'conduct'.

The Tasmanian Government introduced a new bill in November 2018,[177] which proposes to expand the operation of the 'grooming offence' to include communications with third parties for the purpose of procuring a child for unlawful sexual activity. Should the Tasmanian Government implement pass the bill, Tasmania will meet both recommendations 25 and 26 of the *Criminal Justice Report.*

Victoria

Prior to 2014, Victoria dealt with grooming behaviour by taking it into account as an aggravating factor in sentencing. The 2013 *Betrayal of Trust* report, found that this approach did not adequately address the criminality of the grooming conduct.

In response, the Victorian Government introduced a broad grooming offence: 'Grooming for sexual conduct with a child under the age of 16'.[178] The offence is broad, in that it criminalises 'communication, by words or conduct (whether or not a response is made to the communication)'.[179]

The offence applies to:

i) another person (B) who is a child under the age of 16 years; or
ii) another person (C) under whose care, supervision or authority B is.[180]

[173] South Australia, Recommendation update – December 2018 – Royal Commission into Institutional Responses to Child Sexual Abuse (December 2018). https://www.childprotection.sa.gov.au/sites/default/files/rcircsa-sa-recommendation-update-2018.pdf

[174] See *Statutes Amendment (Attorney General's Portfolio) (No 2) Act 2017.*

[175] *Criminal Code Amendment (Child Exploitation) Act 2005* (Tas) s 4, inserting s 125D into the *Criminal Code Act 1924* (Tas).

[176] *Criminal Code Act 1924* (Tas) s 125D(1).

[177] Criminal Code and Related Legislation Amendment Bill 2018 (Tas).

[178] *Crimes Act 1958* (Vic) s 49M.

[179] *Crimes Act 1958* (Vic) s 49M(1)(b).

[180] *Crimes Act 1958* (Vic) s 49M(1)(b)(i) & (ii).

Appendix F

Position of authority offences in other Australian jurisdictions

The following section outlines other Australian jurisdictions' legislation in relation to defining 'positions of authority' within position of authority sexual offences, and current defences to position of authority charges.

Australian Capital Territory

The ACT introduced two new offences criminalising sexual acts between an adult with a relationship of 'special care' to a person aged between 16 and 18 years in 2013.[181]

The two offences are 'Sexual intercourse with young person under special care'[182] and 'Act of indecency with young person under 16 years'.[183]

Under section 55A(2) and 61A(2) of the *Crimes Act 1900* (ACT), a young person is under a person's 'special care' if—

(a) the person is a teacher at a school, or a person with responsibility for students at a school, and the young person is a student at the school; or
(b) the person is a parent, grandparent, step-parent, foster carer or legal guardian of the young person; or
(c) the person provides religious instruction to the young person; or
(d) the person is the young person's employer; or
(e) the person is the young person's sports coach; or
(f) the person provides professional counselling to the young person; or
(g) the person is a health professional and the young person is the person's patient; or
(h) the person is a custodial officer and the young person is a young detainee in the officer's care, custody or control.

Both offences state that the offences will not apply if:

- the person was married to the young person at the time of the alleged offence;[184] and
- the person is not more than 2 years older than the young person.

For both offences, it is a defence that the defendant believed on reasonable grounds that the young person was at least 18 years old.[185]

Even though the ACT introduced these offences relatively recently and the categories of special care are clearly defined, with exceptions and defences applying, the ACT Government indicated in its response to the Royal Commission

[181] *Crimes Legislation Amendment Act 2013* (ACT) ss 9 and 10.
[182] *Crimes Act 1900* (ACT) s 55A.
[183] *Crimes Act 1900* (ACT) s 61A.
[184] *Crimes Act 1900* (ACT) ss 55A(3) & 61A(3).
[185] *Crimes Act 1900* (ACT) ss 55A(4) & 55A(4).

that it will consult the community regarding whether recommendation 29 is too broad and may catch sexual contact which should not be criminalised.[186]

New South Wales

The NSW *Crimes Act 1900*, also contains an offence of 'Sexual intercourse with a child between 16 and 18 and under special care'.[187] The 'special care' category applies if:

a) the offender is the step-parent, guardian or foster parent of the victim or the de facto partner of a parent, guardian or foster parent of the victim, or

b) the offender is a member of the teaching staff of the school at which the victim is a student, or

c) the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, or

d) the offender is a custodial officer of an institution of which the victim is an inmate, or

e) the offender is a health professional and the victim is a patient of the health professional.

Parents and grandparents are not included within the above NSW special care offence involving sexual intercourse because NSW has a separate incest offence used to prosecute biological child sexual abuse offences involving sexual intercourse.[188] The category of 'employer' is not included in the NSW special care offence.

In 2018, in response to the Royal Commission's recommendations, NSW passed changes to introduce an additional offence of 'Sexual touching – young person between 16 and 18 under special care'.[189] The same special care categories are included for the new offence as for the sexual intercourse offence, with the addition of parents and grandparents, because sexual touching is not captured under the existing incest offence.

The existing 'Sexual intercourse with a child between 16 and 18 and under special care' offence contains only one exception – that the person and the young person are married to each other.[190] There are no defences to this charge and none are proposed for the new 'Sexual touching' charge.

Northern Territory

The Northern Territory has one sexual offence relating to children aged between 16 and 17 years: 'Sexual intercourse and gross indecency involving child over 16 years under special care'.[191]

[186] Australian Capital Territory, *The ACT Government response (Part 2) to the Royal Commission into Institutional Responses to Child Sexual Abuse* (June 2018) 119.

[187] *Crimes Act 1900* (NSW) s 73.

[188] *Crimes Act 1900* (NSW) ss 78A & 78B.

[189] See, *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) s 34, amending *Crimes Act 1900* (NSW) s73A.

[190] *Crimes Act 1900* (NSW) s 73(5).

[191] *Criminal Code Act* (NT) s 128.

'Special care' categories are defined as: step-parent, guardian, foster carer, school teacher, officer at a correctional institution, health professional or other health provider, and someone who 'has an established personal relationship with the victim in connection with care, instruction (for example, religious, sporting or musical instruction) or supervision (for example, supervision in the course of employment or training)'.[192]

The only defence available is that the accused person was the husband, wife or de facto partner of the child.[193]

As the Northern Territory did not issue a response to the *Criminal Justice Report* recommendations, it is not known whether the Northern Territory Government intends upon reviewing offences and defences in relation to persons in positions of authority or reviewing the categories included under 'special care'.

Queensland

Queensland is one of the jurisdictions that the Royal Commission singled out as not having specified position of authority offences. Abusing a child under care exposes a person to higher penalties for most sexual offences in Queensland, but this appears only to apply where the victim is aged under 16 years.[194] Further, a 'person who has care of a child' includes only a 'parent, step-parent, foster-parent, guardian or other adult in charge of the child'. The *Criminal Code Act 1899* (Qld) also provides that consent for rape and sexual assault offences is negated in a range of circumstances, including by exercise of authority.

The Queensland Government responded to recommendations 27 – 29, that further consideration and consultation with stakeholders will be required.[195]

South Australia

Prior to 2008, South Australia's 'Unlawful sexual intercourse' offence made it an offence for a person who is a guardian, schoolmaster, schoolmistress or teacher of a person under 18 years to have sexual intercourse with that person.

In 2008, South Australia amended this offence, to provide that a person in a 'position of authority' commits an offence. The categories of persons considered to be in a position of authority were significantly expanded to include foster parents, step-parents, religious officials, medical practitioners, psychologists, social workers, corrective service workers, and employers.[196]

In 2017, in response to the *Criminal Justice Report*, the categories of those in a position of authority were expanded again. The *Statutes Amendment (Attorney General's Portfolio) (No 2) Act 2017* (SA) amended the offence to add:

- parents

[192] *Criminal Code Act* (NT) s 128(3).
[193] *Criminal Code Act* (NT) s 128(4).
[194] *Criminal Code 1899* (Qld) s 210(1).
[195] Queensland, Queensland Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse (June 2018) 106.
[196] *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) s 6.

- de facto partners or domestic partners of a parent, step-parent, guardian or foster parent
- persons providing sporting or musical or other instruction
- health professionals
- persons responsible for the care of the child and the child has a cognitive impairment.

These categories also apply to the South Australian 'Persistent sexual abuse of a child'[197] and the 'Procuring child to commit indecent act' offences.[198]

In response to recommendation 29 South Australia responded: 'Relevant defences exist…but are not consistent throughout the suite of offences. This recommendation will be further considered to determine whether some consolidation or clarification of existing defences ought to be recommended'.[199]

There is an exception applied if the person is legally married to the minor. There are no available defences for a person accused of sexual activity with a child, where the person was in a position of authority.

Tasmania
Tasmania does not have any specified sexual offences in relation to persons in a position of authority. Instead, Tasmanian legislation vitiates consent of the victim where they were 'overborne by the nature or position of another person'.[200]

In responding to the Royal Commission's recommendations, Tasmania 'noted' all three position of authority recommendations and commented that it will monitor the introduction of position of authority offences in other jurisdictions.[201]

Victoria
Victoria has arguably the most comprehensive provisions applying to cases of sexual activity with or involving children aged 16 or 17, by a person in position of care, supervision or authority. Victoria also has a number of defences available for these charges.

A suite of reforms to this category of offences was enacted by the *Crimes Amendment (Sexual Offences) Act* (Vic) in 2016. The Act introduced five separate offences committed against a child aged 16 or 17 years into the *Crimes Act 1958* (Vic):

- Sexual penetration of a child aged 16 or 17 under care, supervision or authority (section 49C)

[197] *Criminal Law Consolidation Act 1935* (SA) s 50(13).
[198] *Criminal Law Consolidation Act 1935* (SA) s 63B(6).
[199] South Australia, Government of South Australia's response to the Criminal Justice report (December 2017) 21. https://www.agd.sa.gov.au/sites/g/files/net2876/f/report_-_government_of_south_australias_resposne_to_the_criminal_justice_pdf_560kb.pdf
[200] *Criminal Code Act 1924* (Tas) s 2A(2)(e).
[201] Tasmania, Tasmanian Response – Royal Commission into Institutional Responses to Child Sexual Abuse (June 2018) 106.

- Sexual assault of a child aged 16 or 17 under care, supervision or authority (section 49E)
- Sexual activity in the presence of a child aged 16 or 17 under care, supervision or authority (section 49G)
- Causing a child aged 16 or 17 under care, supervision or authority to be present during sexual activity (section 49I)
- Encouraging a child aged 16 or 17 under care, supervision or authority to engage in, or be involved in, sexual activity (section 49L)

Persons in a 'position of authority' had previously been defined in the *Crimes Act 1958* (Vic) as including: teachers; foster parents; legal guardians; ministers of religion; employers; youth workers; sports coaches; counsellors; health professionals; police; and employees of remand and similar centres.[202]

The 2016 Act expanded categories of 'care, supervision or authority' to include: a parent or step-parent; a sports coach; a person who has parental responsibility (within the meaning of the *Children, Youth and Families Act 2005* (Vic)); an a police officer acting in the course of their duty; a religious or spiritual guide, or leader or official (including a lay member of a church or religious body who provides care, advice or instruction; an out of home carer; and a person employed in, or providing services to, a remand centre, youth residential centre, youth justice centre or prison.[203]

The defences available under the offences against children aged 16 or 17 years, are:

- A reasonable belief that the child was aged 18 years or more (section 49X)
- Being married to the person or in a domestic relationship (section 49Y) (note the inclusion of 'domestic relationship that was introduced to ensure discrimination against unmarried couples, including same-sex couples is avoided)[204]
- A reasonable belief of being married to the child, and that the accused is not more than 5 years older than the child (section 49Z)
- A reasonable belief that the child was not under the accused' care, supervision or authority (section 49ZA).

In response to recommendation 29, Victoria responded with a 'Further Consideration' response.[205] It is not yet known whether Victoria will make further amendments to ensure that sexual behaviour that should not be criminalised, is exempt from these laws.

[202] *Crimes (Sexual Offences) Act 2006* (Vic) ss 48(4), 49(4), 58(6).

[203] *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 5.

[204] Victoria, *Parliamentary Debates*, Legislative Assembly, 9 June 2016 (Martin Pakula, Attorney General).

[205] Victoria, Victorian Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse (June 2018). https://www.justice.vic.gov.au/safer-communities/protecting-children-and-families/victorian-government-response-to-the-royal-14

Appendix G

Position of authority offences – Exceptions and defences in all Australian jurisdictions

Australian Jurisdiction offence provisions	Exceptions	Defences
ACT *Crimes Act 1900* ss 55A and 61A Last amended: 2013	Person was married to the young person at time of the offence The person is not more than two years older than the young person	Defendant believed on reasonable grounds that the young person was aged at least 18 years
NSW *Crimes Act 1900* s 73 (current provisions) Last amended: 2018 (although new provisions not yet in force)	Person and young person are married to each other	
NT *Criminal Code Act* s 128		Accused person was the husband, wife or de facto partner of the child
SA *Criminal Law Consolidation Act* 1935 s 49 Last amended: 2017		Person was legally married to the young person
VIC *Crimes Act 1958* ss 49C; 49E; 49G; 49I; and 49L Last amended: 2016		Reasonable belief that the child was aged 18 years or more Being married to the person or in a domestic relationship Reasonable belief of being married to the child, and the accused is aged no more than 5 years older than the child Reasonable belief that the child was not under the accused' care, supervision or authority

WA Criminal Code 1913 s 322 Last amended: 2004		Person was lawfully married to the child

Appendix H

Failure to protect offences in other Australian jurisdictions

Australian Capital Territory

The ACT does not have a criminal offence of failing to protect a child from sexual abuse, however made an 'Accept in Principle' response to recommendation 36 in their June 2018 response to the Royal Commission's recommendations.[206]

New South Wales

On 20 June 2018, the Parliament passed the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW), which introduced the new offence of 'Failure to reduce or remove risk of child' into section 43B of the *Crimes Act 1900* (NSW).

The new offence is broader than that recommended by the Royal Commission, in that it applies where an adult knows there is a risk that another adult associated with the organisation will commit a serious physical abuse or serious neglect offence against a child, as well applying to knowledge of the risk of a sexual offence.

The maximum penalty for the offence is two years' imprisonment.

Northern Territory

The Northern Territory does not presently have a criminal offence of failing to protect a child from sexual abuse. It is not known whether the Northern Territory Government plans to implement recommendation 36, as a response to the *Criminal Justice Report* was not submitted.

Queensland

Queensland does not have a failure to protect a child from child sexual abuse offence. Recommendation 36 received a 'Further Consideration' response from the Queensland Government in June 2018.[207]

South Australia

South Australia does not have a criminal offence of failure to protect a child from sexual abuse. The response to this recommendation remains as 'Further Consideration.[208]

Tasmania

In June 2018, the Tasmanian Government 'Noted' recommendation 36, and stated that the State Government will monitor the introduction of failure to protect offences in other jurisdictions.[209]

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[206] Australian Capital Territory, *The ACT Government response (Part 2) to the Royal Commission into Institutional Responses to Child Sexual Abuse* (June 2018). https://www.act.gov.au/__data/assets/pdf_file/0006/1210767/Response-Part-2.pdf

[207] Queensland, Queensland Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse (June 2018).

[208] South Australia, Recommendation update – December 2018 – Royal Commission into Institutional Responses to Child Sexual Abuse (December 2018) 106. https://www.childprotection.sa.gov.au/sites/default/files/rcircsa-sa-recommendation-update-2018.pdf

[209] Tasmania, Tasmanian Response – Royal Commission into Institutional Responses to Child Sexual Abuse (June 2018) 105.

Victoria

At the time that the Royal Commission released the *Criminal Justice Report*, Victoria was the only jurisdiction to have implemented a failure to protect a child from sexual abuse criminal offence within criminal legislation. The Royal Commission's recommendation stated that the Victorian offence is a useful precedent to consider.

The Victorian Government introduced the offence of 'failing to protect a child from risk of sexual abuse' in 2015, under section 49C of the *Crimes Act* 1958 (Vic) in response to a recommendation of the *Betrayal of Trust* report.[210] The offence was moved to section 49O of the *Crimes Act 1958* (Vic) in 2016.[211]

The offence applies to a person in authority within a relevant institution, who knows there is a substantial risk that a person will commit a sexual offence against a child, and negligently fails to remove the risk.

The maximum penalty for the offence is 5 years' imprisonment.

https://www.justice.tas.gov.au/__data/assets/pdf_file/0010/418186/Tasmanian-Response-Child-Abuse-Royal-Commission.pdf

[210] Family and Community Development Committee, Parliament of Victoria, *Betrayal of trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, 2013.

[211] *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s16.

Appendix I

Sentencing reform in other Australian jurisdictions

Australian Capital Territory

a) Exclusion of good character

The ACT has implemented recommendation 74. The Crimes Legislation Amendment Bill 2017 (No 2), introduced new provisions into section 34(2)(d) of the *Crimes (Sentencing) Act 2005* (ACT), specifying that in the case of a sexual offence against a child, the court must not reduce the severity of the sentence it would otherwise impose, because of the offender's good character, to the extent that the offender's character enabled the offender to commit the offence.

The provision also includes, 'Examples: good character enabled offender to commit offence', and sets out the scenario where a person trusted in the community was given responsibility to supervise children on a camp because of that trust, and that person then abused children in the person's care.

b) Sentencing based on current standards

The ACT submitted an 'Accept in Principle' response to recommendation 76 in the June 2018 response, and indicated it intended to conduct consultation about how implementation could occur.[212] However, the ACT does already have a provision stating that courts must consider current sentencing practice.[213]

New South Wales

a) Exclusion of good character

NSW is one of the jurisdictions that had already legislated to make explicit that good character and lack of prior convictions is not to be taken into account in sentencing for child sexual abuse offences. Section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) was introduced in 2008, and provides 'special rules' for child sexual offences.

The provision is:

> In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.[214]

b) Sentencing based on current standards

The Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018 (NSW) will implement recommendation 76 of the Royal Commission, by inserting new section 25AA into the *Crimes (Sentencing Procedure) Act 1999* (NSW).

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[212] Australian Capital Territory, *The ACT Government response (Part 2) to the Royal Commission into Institutional Responses to Child Sexual Abuse* (June 2018) 132. https://www.act.gov.au/__data/assets/pdf_file/0006/1210767/Response-Part-2.pdf

[213] *Crimes (Sentencing) Act 2005* (ACT) s33(1)(za).

[214] *Crimes (Sentencing Procedure) Act 1999* (NSW) s21A(5A).

Northern Territory

a) Exclusion of good character

The Northern Territory has not legislated to exclude good character as a mitigating factor in child sexual offences at this point. It is not known whether the Northern Territory intends to implement recommendation 74.

b) Sentencing based on current standards

The Northern Territory has not legislated to ensure sentencing for child sexual offences is based on current standards. It is not known whether the Northern Territory intends to implement recommendation 74.

Queensland

a) Exclusion of good character

The *Penalties and Sentences Act 1992* (Qld) does not contain a provision as outlined in recommendation 74. The Queensland Government submitted that further consideration and consultation will be required to determine the impacts of the recommendation.[215]

b) Sentencing based on current standards

The Queensland Government responded that further consideration and consultation is required with stakeholders to determine whether recommendation 76 will be implemented.

South Australia

a) Exclusion of good character

South Australia is the other jurisdiction that had already implemented legislation stating that good character must not be taken into consideration at the time of the Royal Commission. South Australia enacted section 10(3)(ba) of the *Criminal Law (Sentencing) Act 1988* in 2014.

This Act was repealed on 30 April 2018, and replaced by the *Sentencing Act 2017* (SA). The provision prohibiting good character being taken into account is now in section 11(4)(c) of the *Sentencing Act* (SA), which provides:

> A court must determine the sentence for an offence without regard to—
> the good character or lack of previous convictions of the defendant if—
> (i) the offence is a class 1 or class 2 offence within the meaning of the *Child Sex Offenders Registration Act 2006* ; and
> (ii) the court is satisfied that the defendant's alleged good character or lack of previous convictions was of assistance to the defendant in the commission of the offence.

[215] Queensland, Queensland Government response to the Royal Commission into Institutional Responses to Child Sexual Abuse (June 2018) 119.

b) Sentencing based on current standards

South Australia has not introduced legislation to provide that sentences for child sexual abuse offences should be set in accordance with the sentencing standards at the time of sentencing. South Australia has retained a 'Further Consideration' response to recommendation 76 in its December 2018 update.[216]

Tasmania

a) Exclusion of good character

Tasmania implemented recommendation 74 in full in 2016. The Sentencing Amendment (Sexual Offences) Bill 2016 (Tas), inserts a new section 11A into the *Sentencing Act 1997* (Tas), which provides that in determining the appropriate sentence for an offender convicted of a sexual offence, the court is not to take into account the offender's good character or lack of previous convictions if the court is satisfied that the offender's alleged good character or lack of previous convictions was of assistance to the offender in the commission of the offence.

b) Sentencing based on current standards

The Tasmanian Government accepted recommendation 76 in full, and stated that it intends to introduce legislation to make suitable amendments imminently.[217]

Victoria

a) Exclusion of good character

Victoria implemented recommendation 74 in full in 2018. The *Justice Legislation Amendment (Victims) Act 2018* (Vic) introduced new section 5AA into the *Sentencing Act 1991* (Vic), and contains that the court must not have regard to previous good character or lack of previous findings of guilt or convictions in child sexual abuse cases.

b) Sentencing based on current standards

In 2014, Victoria introduced baseline standard sentences for sexual offences against children, including incest, sexual penetration of a child under 12, and persistent sexual abuse of a child under 16.[218] Section 5(2)(ab) of the *Sentencing Act 1991* (Vic) now provides that a court must have regard to the standard sentence for the offence; and current sentencing practices.

[216] South Australia, Recommendation update – December 2018 – Royal Commission into Institutional Responses to Child Sexual Abuse (December 2018) 131. https://www.childprotection.sa.gov.au/sites/default/files/rcircsa-sa-recommendation-update-2018.pdf
[217] Tasmania, Tasmanian Response – Royal Commission into Institutional Responses to Child Sexual Abuse (June 2018) 129.
[218] See *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic) ss12, 13, & 14.