know more

Submission to the Senate Committee for Community Affairs

The Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 and related Bill

2 February 2018

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Introduction

knowmore is a free legal service established to assist people who were engaging with or considering engaging with the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Royal Commission'). knowmore was established by the National Association of Community Legal Centres, with funding from the Australian Government, represented by the Attorney-General's Department.

knowmore uses a unique multidisciplinary model to provide trauma-informed, client-centred and culturally safe legal assistance to clients. Since the service commenced in July 2013, to 31 December 2017 knowmore has assisted 8,634 individual clients. The majority of those clients are survivors of institutional child sexual abuse. knowmore is Australia's first truly national community legal service with offices in Sydney, Melbourne and Brisbane and brings together lawyers, social workers, counsellors and Aboriginal and Torres Strait Islander engagement advisors to provide coordinated support to clients. 24% of our clients identify as Aboriginal and/or Torres Strait Islander peoples.[1]

As an independent legal service assisting clients from all around Australia who have experienced child sexual abuse and institutional responses in a diverse range of environments, knowmore is uniquely placed to provide insights into the legal, policy and procedural changes that are necessary to make a meaningful difference for survivors.

On 15th December 2017 the Royal Commission delivered its final report. After five years of excellent work the Commission is already being acknowledged internationally as a model of best practice. Its scale, complexity and quality is unprecedented and it heard, through its public hearings and through conducting over 8,000 private sessions with survivors, of their experiences of institutional child sexual abuse and importantly what those survivors now need governments and other institutions to do to address the impacts of that abuse and to ensure justice for them.

knowmore has worked closely alongside the Royal Commission, providing legal assistance and support to many of those survivors who engaged with the Commission through its hearings and private sessions. Our work has included providing clients with information and advice about possible redress options. In undertaking that work we have listened closely to survivors and in making this submission, knowmore relies on what we have learned through our work about the collective experience of our clients and their needs. We urge the Committee to listen to those voices in its consideration of the Bill.

[1] See knowmore, Service Snapshot (Infographic to 31 December 2017), Appendix 1 to this submission

General comments about redress and the Bill

knowmore supports the establishment of a national, independent redress scheme for survivors of institutional child sexual abuse, funded by relevant institutions and Commonwealth, State and Territory governments.[2] knowmore acknowledges and commends the Australian Government's leadership in establishing the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (the scheme) and in doing so implementing the Royal Commission's key redress recommendation; namely, that a single national redress scheme is the most effective structure for ensuring justice for survivors.[3]

knowmore's support for a national redress scheme recognises what has been a community-wide failure to protect children from institutional sexual abuse and as such, Australia's shared responsibility for the ongoing suffering experienced by survivors.

Implementation by the States and Territories of the Royal Commission's reforms for civil litigation systems will operate to assist more survivors in being able to pursue claims for damages through the courts. However, notwithstanding the implementation of those reforms (and recognising that to date most jurisdictions have only acted to implement some of those recommendations, and that South Australia has not yet implemented any of the recommended reforms), considerable evidentiary and other barriers still exist for many survivors in bringing common law/civil claims, particularly in cases of historical abuse. It is therefore vital that survivors have an alternate way to access compensation and support in recognition of each individual's experiences. We also note the fundamental importance of ensuring that survivors are afforded meaningful opportunities to access justice and most importantly, choice in how to pursue justice outcomes that are appropriate and important to them.

Our work with clients reflects that survivors wish to access a redress process, as an alternative to litigation, for many reasons. Some wish to use a redress process to obtain some element of financial recompense for the abuse they occurred, but many also wish to seek non-financial and/or therapeutic outcomes including counselling support; an acknowledgement of the abuse perpetrated against them, and an apology. Importantly, to be effective a redress process must also ensure institutional accountability for that abuse and its impacts upon the survivor. The scheme will be able to provide those outcomes by:

- providing a monetary payment to survivors as a tangible means of recognising the wrong they have suffered; and
- providing access to counselling and psychological services to survivors; and
- facilitating a direct personal response to survivors from the participating, responsible institutions.[4]

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[2] knowmore, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper 6, *Redress Schemes* and knowmore, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, Consultation Paper, *Redress Schemes and Civil Litigation*. knowmore's publicly available submissions can be viewed at http://knowmore.org.au/resources/

[3] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015). Recommendation 26

[4] *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017,* (hereafter referred to as 'Bill') , Clause 3(2) – Objects of the Act

knowmore submits that the design of the scheme, in relation to key issues such as eligibility and processes, should follow the recommendations of the Royal Commission without significant departure. The design of the scheme must also be guided by the principles of fairness, equality and justice. Many of the clients we have assisted have engaged with existing institutional redress schemes or previous State based schemes that are no longer available. Comparatively few of those clients have reported receiving satisfactory outcomes. We have outlined in a previous submission to the Royal Commission the problems with such past and present redress mechanisms.[5] Many of those problems fall into a general category of inconsistency, of both access to redress and the outcomes obtained. The design of the scheme should strive to avoid such problems and the consequent unfairness to survivors.

In summary, knowmore supports the *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017* (the Bill) and recommends that it should be passed, subject to some important amendments and accompanying policy changes, as described in the following sections of our submission.

We would be pleased to provide further information on any issue raised in our submission if the Committee wishes. We have no concern about the publication of this submission.

[5] knowmore, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper 6, *Redress Schemes*, pp.8-10

Summary of recommended reforms

knowmore supports the *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017* (the Bill) and recommends that it should be passed, subject to some important amendments and accompanying policy changes, as noted below and described in more detail in our submission.

Exclusion of certain classes of survivors

We understand from public commentary that it is intended to exclude from access to the redress scheme survivors who have convictions for sexual offences and/or have been sentenced to a term of imprisonment of five years or more. The Bill does not contain any provisions to this effect. We recommend:

- The scheme should not exclude these survivors. To do so will result in considerable unfairness and inconsistency in how survivors are treated. Such an approach will produce unintended consequences, such as barring access to the scheme to survivors who have historical convictions arising from past policing practices now recognised as inappropriate; such as those survivors who have convictions for historical offences involving homosexuality, and those who as children were charged with sexual offences arising directly from the circumstances of their abuse by an adult, in order to facilitate the prosecution of the adult offender.

- If the proposed exclusions are persisted with, they should be contained in this Bill rather than in any accompanying rules.

- While knowmore's primary view is that survivors in the proposed categories of exclusion should be eligible for all elements of redress in the same way as other survivors, steps could be taken to hold redress payments in trust for those serving lengthy sentences of imprisonment, while allowing those survivors to have access to the other elements of redress (counselling and support, and a direct personal response from the relevant institutions).

Citizenship/Permanent residency requirements

- The Bill should be amended to ensure it aligns with the Royal Commission's recommendations around the need for the redress scheme to provide justice to all survivors, including those who are sexually abused as children while in immigration detention settings, and that the eligibility requirements of Australian citizenship or permanent residency be revisited.

- If the legislative exclusions about citizenship and permanent residency remain, the Bill should expressly provide for the eligibility of former child migrants who are neither Australian citizens nor permanent residents.

Clause 18 – redress payments

- The Bill should be amended to provide for redress payments up to a maximum of $200,000 for the most severe cases, consistent with the Royal Commission's recommendation.

- The Bill should include some mechanism for the review and indexation of the maximum redress payment during the life of the scheme, to reflect cost of living increases and so as not to penalise survivors who are unable to disclose their abuse for the purpose of making a claim during the initial years of the scheme.

Clause 29 – Application for redress

- The requirement for information in an application to be verified by statutory declaration should be removed.

Clause 34 – the assessment matrix

- That transparency and certainty, for all participants in the scheme, would best be achieved through the inclusion in the Bill of the assessment matrix for determining redress payments.

Clause 37 – Offers of Redress

- Clause 37 should be amended to expressly require reasons for redress decisions to be provided in the offer of redress made to an applicant.

Clause 38 – acceptance period for offers

- The acceptance period in the Bill should be extended to at least twelve months, to align with that recommended by the Royal Commission and to reduce the re-traumatisation of participating survivors.

Part 2-6 – Counselling and psychological services

- Clause 49 of the Bill be amended to include reference to the general principle that counselling and psychological services should be available throughout a survivor's life.

- The Bill, or alternatively the rules, make transparent provision for how determinations around the provision of such services will be made.

Part 3-2 – Funders of last resort

- The Bill be amended to meet the recommendations of the Royal Commission that the Commonwealth and self-governing Territory Governments and eventually

participating State governments agree to be funders of last resort, in instances where:

- the institution no longer exists;
- there is no successor institution; or
- where the institution still exists but has no assets from which to fund redress

and that the concept of 'shared responsibility' not be applied.

Chapter 4 – Administrative matters

- The Bill should be amended to ensure applicants and their agents who provide the scheme with relevant and helpful information in support of their redress claims (whether under compulsion or voluntarily), such as material relating to prosecution proceedings, are not unfairly exposed to unintended legal consequences.

- Part 4-4 of the Bill should be amended to expressly provide for the power of a principal to revoke or suspend a nominee appointment.

- Clause 128 be amended to expressly provide for the review of the redress scheme to involve consultation and to draw on the knowledge of persons with expertise and experience around the operation of the scheme and the ongoing needs of survivors.

We have no concern about the publication of this submission.

Framework of this legislation

knowmore notes that many of the key provisions of this bill are to be the subject of rules made by the Minister. While clause 117(2) of this Bill sets out where the rules may prescribe matters, there are references in the Bill to rules which have not been referred to in that section. These are:

- eligibility for redress - clause 16(3)
- acceptance of offers - clause 41(1)(d), declining of offers - clause 42(1)(e)
- matters relating to redress payments - clause 44(2)
- direct personal response - clause 50
- scheme administration costs - clause 58(2)
- entitlement to redress payment on the death of the applicant– clause 115(5)

The Office of Parliamentary Counsel must generally deliver a legislative instrument (which these rules are), for laying before each House of the Parliament within six sitting days of that House after the instrument is registered, with the instrument's registered explanatory statement, if applicable.[6] A legislative instrument may be disallowed by either House within a certain time after the instrument is tabled.[7] A legislative instrument is taken to be repealed if it is disallowed. Some legislative instruments are required to be tabled in Parliament, but are not subject to disallowance.[8]

knowmore is concerned that many key provisions of this Bill will be reliant on rules which are not going to be subjected to close consideration and debate in Parliament, as is generally the case for primary legislation. Nor will the opportunity arise for Parliament to amend such subordinate legislation, as it may with primary legislation.

Our concerns in this regard particularly relate to the current drafting which allows for provisions about eligibility for redress to be covered in the rules. The eligibility of a survivor to access the redress scheme is a fundamental issue; especially so in the context where as a matter of policy, some survivors may be classed as ineligible, notwithstanding their experience of childhood sexual abuse in Australian institutions. In our submission, such a fundamental issue as a survivor's entitlement to access the redress scheme should be addressed in the primary Act, particularly where that Act already contains other specific provisions around the issue of eligibility.[9] Parliament should have direct control over the form of any provisions about eligibility and be accountable for any policy decisions that exclude survivors from access to the scheme.

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[6] Section 38 *Legislation Act 2003* (Cth)

[7] Section 42 *Legislation Act 2003* (Cth)

[8] Section 44 *Legislation Act 2003* (Cth)

[9] Bill, Part 2.2

Proposed exclusion of certain survivors/offenders from the redress scheme

There are currently no legislative provisions in the Bill, beyond those dealing with citizenship/permanent residency,[10] that stipulate that certain 'classes' of survivors will be ineligible to apply for redress under the proposed scheme. However in an interview with the ABC on 26 October 2017, Social Services Minister the Hon. Christian Porter MP advised that the redress scheme will exclude anyone *"convicted of sex offences or sentenced to prison terms of five years or more for crimes such as serious drug, homicide or fraud offences."*[11] This position was confirmed by the Prime Minister in an interview with radio station 3AW on 15 December 2017, where Mr Turnbull stated *"many people would be uncomfortable with and opposed to people who have committed serious offences then being provided compensation by government.'* [12]

General discussion[13]

knowmore's submission is that there should be no exclusion of any category of survivors from the redress scheme. Excluding categories of survivors from access to the scheme fails to acknowledge the impact on individuals of childhood abuse and its causal relationship with criminal behaviour. Children who were sexually abused in institutions have experienced serious harm and have been failed by those institutions. A critical part of being accountable and responding to this harm is through an informed approach about the consequences of abuse and how this causes complex trauma which may in turn manifest in drug or alcohol abuse and/or criminal activity. knowmore's submission is based on the extensive work done by both the Royal Commission and knowmore in all of the prisons across Australia through the Royal Commission's Inmate Engagement Strategy.

Excluding the proposed categories of survivors from access to redress is also inconsistent with the recommendations and findings of the Royal Commission. The Royal Commission recommended that redress be provided to all survivors of child sexual abuse, emphasising the importance of the principle of equality. It did not distinguish on grounds such as whether survivors were offenders or not. The Royal Commission's first recommendation was that *'[a] process for redress must provide equal access and equal treatment for survivors'*.[14] Moreover, the Royal Commission stated that, '*[i]ndividual experiences of*

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[10] Bill, Clause 16

[11] ABC News, 'Child Sex Abuse Redress Scheme to Cap Payments at $150,000 and Exclude Some Criminals', *ABC News* (online), 26 October 2017 http://www.abc.net.au/news/2017-10-26/sex-offenders-to-be-excluded-from-child-abuse-redress-scheme/9087256\

[12] 3AW, 'Prime Minister Malcolm Turnbull in his final appearance with Neil Mitchell', *Neil Mitchell*, 15 December 2017 (Malcolm Turnbull) https://pm.gov.au/media/radio-interview-neil-mitchell-3aw-13

[13] Some of the issues highlighted in this section will impact on survivors to a much greater degree when States opt-in to the Scheme. While we appreciate that the current drafting of the Bill addresses participating Commonwealth and Territory institutions, we have throughout this submission and particularly in this part considered the position were States to opt-in, in light of Minister Porter's statement in the ABC story above (Note # 12) that the position to exclude certain survivors from access to the scheme followed "deep consultation" with Attorneys-General from other jurisdictions

[14] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), p. 4

inadequate or unobtainable redress should be placed in the broader context of a social failure to protect children'.[15]

In its Final Report the Royal Commission summarised the data gained from prisoners and provided insightful comments on the circumstances at the time of their abuse and on the wellbeing of prisoners.

Circumstances at the time of abuse

"The majority of survivors in prison described entrenched disadvantage when they were growing up. From a young age, they were often subjected to multiple types of sexual and other abuse. Some were abandoned at a young age and spent much of their childhood being passed from one extended family member to the next. As they grew older, they spent less time at home to avoid family dysfunction. They said they had to look after themselves, but often did not know how to do this in safe ways. Sometimes their involvement in petty crime or substance use brought them to the attention of police and welfare authorities. Some survivors saw links between their home environments and their vulnerability to child sexual abuse in institutional settings.

Survivors in prison commonly described a childhood moving frequently in and out-of-home care placements, sometimes experiencing homelessness, time in youth detention and then prison.

Some experienced abuse and assault in all of these institutions. Some felt vulnerable to abuse in and out of out-of-home care because the foster family knew they had been in multiple placements, and that they probably had no supportive parents or friends. Many described youth detention centres as violent places where physical abuse perpetrated by staff towards children was tolerated as a means of enforcing rules." [16]

Wellbeing

"For many survivors, child sexual abuse in an institution was only one in a series of multiple childhood traumas. Most reported symptoms of mental illness, including self-harm, suicide attempts, addiction, sleeping problems, flashbacks and triggers. Many spoke about anger, and sometimes criminal offences that were related to violence. Most survivors said that they had been involved with the criminal justice system for some time, usually for crimes linked to substance use. Some said that after spending so much of their life in youth detention and prison they had become institutionalised and struggled to readjust to life outside prison after being released. Some survivors said they had found strength from accessing education, counselling and other therapeutic services in prison. Others said they felt that mental health services in prisons were focused on preventing suicide and managing medications

[15] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), p. 5

[16] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 5*, at p. 24

> *rather than providing the kind of long-term care some survivors felt they needed to deal with the consequences of child sexual abuse and other trauma."* [17]

When dealing in its Final Report with the impacts of child sexual abuse, the Royal Commission noted the following in relation to prisoners:

> "*How a victim's criminal behaviour can impact on others was another issue highlighted in private sessions. Prisoners in particular spoke about the anger and violence they have inflicted on other people, and how the sexual abuse had led them to a hard, emotionless and numbing insensitivity to the feelings of others. We heard how feelings of rage and anger contributed to crimes of violence. A number of survivors told us about their violent offences, some in domestic situations, and often linked to alcohol and other drug use. 'Keith Michael' told us he was constantly fearful of others and used violence to protect himself. It was a strategy that quickly slipped from his control. He said drugs and alcohol inflamed his temper and he often flew into uncontrollable rages, Violence landed him in gaol and he ended up spending much of his life there."* [18]

In summary, there is nothing in any of the Royal Commission's relevant reports that supports the position of excluding any class of offenders from access to the scheme.

Minister Porter acknowledged at the time of announcing the intention to exclude these offenders from the scheme that the decision was an "agonising" one, reportedly stating that *"[N]o one disputes what the Royal Commission said, which is that many times people who were the victims and survivors of abuse as a child can often go on, because of those terrible circumstances, to themselves commit wrongs … but a view was taken and it was not an easy decision to make."*[19]

Prime Minister Malcolm Turnbull indicated on 14 December 2017 that the Government may be open to expanding access to the redress scheme to convicted criminals, acknowledging that he too understands the argument many had become incarcerated as a result of the abuse they had suffered.[20]

knowmore is highly supportive of this position being reconsidered. The scheme must be accessible to all survivors. Apart from the unfairness of creating and then excluding a particular 'class' of survivors from access to the scheme, on the policy basis that they are undeserving of redress, the current position is likely to operate to exclude survivors not contemplated as relevant offenders for the purpose of that policy. It will also raise many inconsistencies in its application and will have other unintended policy consequences. It will be viewed by those survivors who are excluded as yet another institutional failure in responding to their experiences of childhood sexual abuse.

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[17] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 5*, at p. 26

[18] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report, Volume 3* at p. 145

[19] Reported in *The Age,* 26 October 2017

[20] https://www.sbs.com.au/news/pm-may-be-open-to-expanding-redress-access

During the Royal Commission's Inmate Engagement Strategy knowmore worked closely with hundreds of current and former prisoners around Australia. Child sexual abuse survivors are over-represented in the prison population and make up 20% of knowmore's client base. Of these prisoners:

- 41% report being sexually abused in detention or youth detention
- 21% report being sexually abused in out of home care and orphanages
- 6% report being sexually abused in school, and
- 5% report being sexually abused in a religious institution.

The balance report being sexually abused in a range of other institutions including government and community organisations.

Around one third of our prisoner clients identify as Aboriginal or Torres Strait Islander peoples, reflecting the over-representation of Indigenous people in Australia's prisons, and more generally in institutions.

Consistent with the findings of the Royal Commission noted above, knowmore's work with prisoners highlighted a common trajectory for many adult prisoners; from childhood sexual and physical abuse to drug and alcohol use, to offending behaviours (as a juvenile and later as an adult) leading to detention and eventually imprisonment. This trajectory was often partnered with other factors of disadvantage including homelessness, lack of employment and poor standards of education. The proposed exclusion of these survivors from the redress scheme will only further entrench the disadvantage they already experience. It is likely, in many cases, to have a devastating impact on the well-being of these men and women and damage their prospects of rehabilitation and reintegration.

Reports about the decision to exclude these survivors indicate that the decision was made to *"give integrity and public confidence to the scheme."* [21] While the exclusion of prisoners may satisfy some elements of the public and be thought to reduce the costs of the redress scheme to be borne by participating institutions (which is likely in any event to be a false economy, see below), knowmore submits that the operation of the scheme must be considered through the lens of the survivor, rather than the public.

Separating survivors into those who are 'deserving' and 'undeserving' on the basis of perceptions around public opinion is inappropriate in our submission. Survivors in prison have already been convicted and sentenced for their offending behaviour and it is not appropriate to impose additional punishment on them through the denial of access to redress for sexual abuse perpetrated against them when they were vulnerable children, often in an institutional setting for which a State or Territory Government was responsible.

In an earlier submission made to the Royal Commission about statutory victims' of crime schemes knowmore said the following:

[21] *The Age,* 26 October 2017, quoting Minister Porter

Relevant character evidence

Most schemes provide for the court to take into account the criminal history of the applicant, either before or after the crime for which an award is sought. In the context of institutionalised child sexual abuse, this concept of relevant character evidence[22] is problematic. Survivors commonly present with complex trauma, psychiatric and substance abuse issues. It is well established that people who have suffered these outcomes as a result of child sexual abuse interact with the criminal justice system more frequently than those who have not; for example, research indicates that the incidence of women in Australian prisons who have suffered child sexual abuse varies from 57% to 90%.[23]

It is unfair to preclude or reduce financial awards because of other conduct which in many cases has its origins, to a significant degree, in the offending perpetrated against the claimant.

From our extensive work with prisoners we have also seen first-hand the life-changing consequences for many men and women who, for the first time in their lives, have been afforded opportunities to disclose with safety their experiences of childhood sexual abuse; to receive therapeutic support through counselling to enable them to understand and begin to deal with their trauma; and to pursue justice-seeking opportunities such as making criminal complaints about their perpetrator and seeking redress or damages. We would expect from our work that providing offenders with access to redress, and particularly access to ongoing counselling and support, is likely to have a positive impact in many instances, ultimately leading to a reduction in recidivism rates and other improved outcomes for these offenders and, more broadly, for society.

[22] Usually prior convictions; see for example, *Victims of Crime Assistance Act* 1996 (Vic) s.54(a)

[23] *Addressing women's victimisation histories in custodial settings*, Mary Stathopolous, Australian Centre for the Study of Sexual Assault, p 3. Viewed at http://www.aifs.gov.au/acssa/pubs/issue/i13/

Below are some examples of feedback provided to knowmore by prisoner clients assisted during the Royal Commission's Inmate Engagement Strategy:

"It means a great deal to me that you guys have believed my story of abuse when no one else has taken the time to listen. It has not been about compensation it has been more about clearing the air for me and to help me overcome a lot of demons within myself and hopefully stops other poor kids from going through what a lot of us went through back then ... thank you for leading me in the right direction to proceed with these matters and getting the right support with the counsellors to help me move forward and make me stronger in my life."

"The counselling I received through [a funded service] *arranged by knowmore has changed my life. I can't believe that I didn't connect the dots and now realise why I have spent 24 years in prison. My counselling is going well and I couldn't have told my story but for the kind person on the end of the phone who I first spoke to at knowmore."*

An Aboriginal prisoner assisted by knowmore explained that he was grateful to the Royal Commission for raising awareness about child sexual abuse. He said that he and other prisoners were now talking more freely about their own experiences of abuse and that as older men in the prison he and others had formed their own "self-help" group to support younger Aboriginal prisoners.

Another prisoner assisted by knowmore in 2016 contacted our service in late 2017 to update us on his progress. The client explained that following our advice he had made a formal complaint to the police about the perpetrator who sexually abused him in an institutional setting when the client was a child. The client had recently been advised by the investigating police that the alleged offender had been arrested and charged with multiple child sexual offences. The client went on to explain that he was now out of prison; that he was seeing a psychologist regularly; that he had formed a new relationship and that he and his partner were planning a family; and that he had instructed a private law firm that knowmore had referred him to for the pursuit of redress.

The following case studies are all examples of prisoner clients of our service who would be excluded from accessing any form of redress available under the CRS, if the proposed categories of survivors are made ineligible.

Case Study 1

A female prisoner assisted by knowmore recounted details of a very dysfunctional life, starting from the time of her birth. The client's mother was addicted to drugs and was not in a position to provide proper care for her baby.

When the client was quite young (four years old) she was charged with being a neglected child, was made a ward of the state until she was 16, and was sent to a children's home where she was sexually abused. The client was later returned to her mother, living at times in refuges. The client experienced further sexual abuse while living in one such refuge; commenting to us that at that time of her life she thought sexual abuse was 'normal' behaviour, such was the frequency of her experiencing it.

Before the client reached her teens, she started using drugs and was prostituting herself. All through this time, she remained a ward of the state and under the supposed care of the relevant government department. Ultimately as an adult the client committed a very serious offence and received a sentence of many years imprisonment.

At the time of our service providing assistance to this client, she was using her time in prison to receive trauma counselling, to deal with her substance addiction and to finish her schooling.

Case Study 2

An Aboriginal client advised that as a young boy he had been placed in the care of a State Department of Children's Services until he was 18. He spent time in boys' homes but at one point was placed in the care of a family member, where he experienced sexual abuse perpetrated by another adult. In disclosing these experiences for the first time to knowmore, over 30 years later, the client advised that he had spent most of his adult life in prison and was serving a sentence of more than five years.

As he discussed what his life had been, the client stated simply that he could now see why he had led the life he had. He was adamant that on his release from prison he wanted to change the direction of his life. He expressed keen interest in obtaining counselling and support to help him understand the impact of his abuse, which he in turn believed would help him to be a good father to his own children.

Case Study 3

A male prisoner sought advice from knowmore. This client was approaching 50 years of age, and advised that he had spent more than half of his life in custody, and that some of the sentences imposed by him exceeded five years imprisonment.

The client advised that he had grown up in rural Australia and had had a happy childhood, up until he was sexually abused by a sporting coach. When the client told his parents of the abuse he was not believed.

Following the abuse, the client advised his life deteriorated rapidly. He started drinking heavily and smoking marijuana. By the time he reached his early teens, the client had been charged with offences and incarcerated in a youth detention centre.

The client was sexually and physically abused at that institution by staff and older boys and suffered serious injuries as a result of that abuse. By the time the client was in his mid-teens he was using hard drugs. He self-harmed and attempted to take his life on several occasions. The client stated to knowmore that he was "full of rage and pain."

The client stated that he wanted to engage with the Royal Commission and knowmore because he did not want what happened to him to happen to other children. Counselling was arranged and the client reported that this was helping him to make the link between his early traumatic experiences and the life he had spent in custody. The client explained that he was really hoping that on release from prison, his future will be different.

The above client feedback and case studies illustrate the critical needs survivors in prisons have for appropriate psychological services and counselling. Additionally, through our work with prisoners we have identified a number of systemic issues impacting adversely on survivors. For example, prisoners who are survivors of sexual assaults can be triggered by the fear of being stripped naked in the presence of correctional officers during strip searches. Prisoners have also reported that they have experienced difficulty in complying with directions to provide urine samples in the presence of a correctional officer, due to their experiences of childhood sexual abuse. Moreover, many sexual abuse survivors recount feeling physically and psychologically unsafe in prison. A common instance is where survivors are incarcerated alongside prisoners who are serving sentences for child sexual offences.

Many prisoners who are survivors have commented to us that prison would present an opportunity to work on their trauma, if appropriate and long-term support services existed and were made available to assist them. We anticipate that allowing access to redress counselling services would in time be likely to contribute to lower rates of prisoner aggression and non-compliance within the prison environment and ultimately better outcomes post-prison, including around recidivism rates.

Unintended Consequences

Convictions for sexual offences

The currently advised exclusion of all persons with *"convictions for sexual offences"* will be hugely problematic in practice, as it will cast a very wide net and unfairly exclude survivors whose circumstances appear not to have been contemplated in the formulation of the current position. Unfortunately the exact ambit of that policy position is unclear, as the exclusions are not contained in the Bill and as the accompanying rules (which is presumably how this position will be implemented) have not yet been made available. For example, does the term 'convicted' mean only those offenders against whom a formal conviction is recorded in the sentencing process, or will it carry a similar meaning to, for instance, the definition contained in the *Penalties and Sentences Act 1992* (Queensland), which provides:

> ***conviction*** *means a finding of guilt, or the acceptance of a plea of guilty, by a court.* [24]

If the latter, the outcome will mean that some offenders who are charged and plead guilty to a comparatively minor offence of a sexual nature, and who receive a sentence that does not involve a formal conviction and which may be in the form of a non-custodial penalty such as a good behaviour recognisance, will be excluded absolutely from eligibility to make a claim under the scheme for any institutional child sexual abuse they have ever suffered. One such situation which readily comes to mind would be a person who is a survivor but who has been prosecuted as a young person at some time for an offence involving conduct commonly referred to as 'sexting' (which may technically involve an offence relating to possessing or transmitting to another young person an image which may be child exploitation material). Not insignificant numbers of young people are prosecuted for such offences each year.[25]

A similar group would be young people who were dealt with for offences of unlawful carnal knowledge and who again received good behaviour bonds. It was not uncommon in years past for these prosecutions to arise in circumstances where a complaint was made by one child's parent, or where a teenage pregnancy resulted, with a prosecution ensuing notwithstanding that the young couple were in a relationship, both consenting, and that there was only a relatively small age gap.

A particularly disturbing impact of the proposed policy is illustrated by instances we have seen in our work of historical police practices where the child victim of very serious sexual offending by an adult was also charged with a criminal offence of a sexual nature, the facts of which were directly based on their abuse.

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[24] Section 4

[25] See for example, the *Sentencing Spotlight of Child Exploitation Material Offences,* published by the Queensland Sentencing Advisory Council, 2017 , viewed at http://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0010/519535/Sentencing-Spotlight-on-child-exploitation-offences-July-2017.pdf

Case Study

knowmore assisted a survivor who as a child was sexually abused by an adult while in foster care. Upon a complaint being made to police the adult was charged with several counts of sexual offences, convicted and imprisoned. The client, then aged in his early teen years, was also charged with an offence of indecent assault and had to appear in court.

Records relating to the client contain the following entry in a Departmental report (dated 1957):

> "Detective X phoned. After discussing this case with a Detective Inspector it was thought the nature of the offences committed is such that both parties must be charged or an indemnity obtained for [the child victim]. Detective X has decided that the best course of action will be to charge [the child victim], and arrangements will be made for him to appear at the Children's Court tomorrow."

We do not know the outcome of the prosecution of the client, beyond that the charge was adjourned at the initial appearance date.

Irrespective of the validity or not of the view held by the investigating police about the need to charge the child victim with a sexual offence, this actually happened. If a conviction resulted from such circumstances this survivor would be ineligible to claim redress under the scheme. Such an outcome is preposterous.

The federal nature of Australia's criminal justice system will also mean that significant inconsistencies will inevitably arise in who is excluded from access to the scheme, particularly when States opt-in to the scheme. One area of inevitable inconsistency arises around 'spent convictions'. Will *'a conviction for a sexual offence'* include convictions which are legally to be regarded as 'spent' under a relevant State or Territory law? If so, there are differences as to how the various jurisdictions approach convictions for sexual offences.[26] Victoria does not even have a spent convictions scheme. Unfairness will arise with survivors having similar criminal histories either included or excluded from access merely because of the location of where they were charged.

There will be a grossly unfair impact upon survivors who may have had a conviction recorded for a historical homosexual offence. There have been steps taken recently in some jurisdictions to recognise the injustice surrounding these convictions,[27] and to expunge past convictions for offences which essentially involved consensual sexual acts between adults. However, not every State and Territory has yet moved to implement such reforms. Even where such reform has happened, a survivor's eligibility may turn on how *'a conviction for a*

[26] See for example the approaches taken in *Spent Convictions Act 2009* (SA) and the *Criminal Records Act 1991* (NSW)

[27] See, for example, the *Criminal Law (Historical Homosexual Convictions Expungement Bill) 2017 (Qld)* and the *Historical Homosexual Convictions Expungement Bill 2017 (WA)*

sexual offence' is defined under the rules (or the Bill) and whether spent or expunged convictions are caught.

For present purposes, we note that the Northern Territory currently has no such laws. We understand the matter is 'under review', although the position is reportedly thought to be complicated by the fact that the Territory did not become self-governing until 1978.[28] So a survivor who had as an adult sustained a historical conviction in the Territory (or another jurisdiction which has not expunged such convictions), for an offence involving a consensual homosexual act with another adult would be ineligible to apply for redress in respect of child sexual abuse suffered in a participating institution.

Unfairness arising from sentencing inconsistencies

More unfairness will arise for survivors because sentencing outcomes for similar offences will differ across jurisdictions, particularly where mandatory sentencing provisions operate. Similar criminal offending may mean that one person receives a sentence excluding them from the scheme and another receives a sentence that does not.

Also, the exclusion threshold of a sentence of a *"prison term of five years or more"* may operate to exclude some survivors who have not received a head sentence of that length, but who are serving two (or more) terms of imprisonment. Some such situations may be where an offender is sentenced:

- for multiple offences and some sentences of imprisonment are imposed as cumulative rather than concurrent, with each relevant sentence being less than five years in length, but the effective term of imprisonment being more than five years; and
- to a term of imprisonment of less than five years, in circumstances involving the activation of an operative period of a prior sentence, such as a partially or wholly suspended sentence of imprisonment, resulting in an effective term of five years or more (albeit for multiple offences).

In both cases, the survivor/offender may be serving a period of imprisonment[29] of five years or more, despite not being sentenced for any single offence attracting a sentence of that length.

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[28] See the ABC report at http://www.abc.net.au/triplej/programs/hack/calls-for-nt-to-wipe-historical-gay-sex-convictions/8294308

[29] Note for example, that this term is defined in the *Penalties and Sentences Act 1992* (Qld), s.4, as follows:

> ***period of imprisonment*** means the unbroken duration of imprisonment that an offender is to serve for 2 or more terms of imprisonment, whether—
>
> (a) ordered to be served concurrently or cumulatively; or
>
> (b)imposed at the same time or different times;
>
> and includes a term of imprisonment.

Cost implications for institutions

Another clear consequence of excluding the nominated classes of survivors from being eligible to seek redress under the scheme will be to drive those men and women towards other justice options, particularly the pursuit of common law or civil claims for damages for personal injuries. In many instances prospective plaintiffs, faced with the likelihood that their abusers may no longer be alive and/or may not have insufficient assets to satisfy any judgment, will look to hold the responsible institution accountable. From reported experience of our clients in prison and noting the statistics reported above, that will most often be a State or Territory Government institution, particularly a youth detention setting.

Accordingly, while excluding these survivors from access to the scheme may result in responsible State and Territory governments and other institutions avoiding responsibility for any monetary redress component under that scheme, it may in time mean that a greater level of financial exposure results through increased civil litigation claims.

A similar outcome may also occur where survivors excluded from the scheme are able to pursue claims under statutory victims of crime schemes. Where that happens, and claims are established in circumstances where there is no effective means of recovery from the actual offender, the end result may be that the relevant State or Territory Government bears the cost of meeting an award of victim's compensation, which might otherwise have been borne by the relevant institution had the survivor been able to bring a redress claim under the scheme. For example, a survivor who is now in one of the categories of offender excluded under the scheme may have experienced institutional child sexual abuse in a religious setting by a clergy official who is now deceased or impecunious. If the relevant Church in time determined to participate in the scheme (following the participation and referral of powers by the relevant State), had the survivor been eligible to apply to the scheme, the scheme would have looked to that Church, as a participating responsible institution, to provide redress. However, due to the survivor not being eligible to make a claim to the scheme, one justice option that might be pursued would be bring a victim's compensation claim which, if successful, would be met from the public purse.

Wider policy implications

Furthermore, it is still far from clear at this time that all State Governments, and in turn the non-Government institutions in those States, will opt-in to the scheme. For example, the current State Government in South Australia has made a number of public statements indicating that it will not participate in the scheme unless the Commonwealth funds that participation (which of course is not what the Royal Commission recommended, nor how the Commonwealth has designed the scheme). In those situations, if the Commonwealth's position about excluding certain offenders is maintained, it can reasonably be anticipated that any other State or institutional redress schemes operated by non-participating institutions, outside the framework of the scheme, will follow the Commonwealth's policy lead and mirror those exclusions, thus effectively closing the door on redress as a justice-seeking option for any offender in the abovementioned categories.

Submissions for reform – excluded survivors

Our primary submission is that the scheme should not exclude survivors who have been convicted of certain offences or who have received lengthy sentences of imprisonment. There is nothing arising from all of the work of the Royal Commission to support such exclusions. They will operate harshly and unfairly to create different 'classes' of survivors with some being judged as undeserving, in the eyes of society, of receiving redress for the harm done to them as vulnerable children, often at a time when they were supposedly in the care of a State or Territory Government.

Secondly, if the proposed exclusions are persisted with, they should be enshrined in the legislation (that is, this Bill) rather than in any accompanying rules. That approach would help to ensure an appropriate level of scrutiny of the relevant provisions and the underlying policy rationale, and is also necessary to ensure that proper regard is had to some of the interpretation issues that might otherwise arise and operate to unfairly exclude some survivors in circumstances which appear not have been contemplated to date.

Thirdly, redress under the scheme comprises the three elements noted above (monetary payment, counselling and direct personal response), as outlined in clause 18(1) of the Bill. At present, the scheme for redress payments is structured in such a way that those payments are generally protected.[30] While our primary view is that survivors in the nominated categories should be eligible for all elements of redress in the same way as other survivors, steps could be taken to hold redress payments in trust for those serving lengthy sentences of imprisonment, while allowing those survivors to have access to the other elements of redress (counselling and support, and a direct personal response from the relevant institutions).

[30] See Part 2-6, Division 2 of the Bill

SECTION 16 –Australian citizen or permanent resident eligibility requirement

The current legislative provisions

Under the current legislative provisions, only persons who are Australian citizens or permanent residents as defined by the *Australian Citizenship Act 2007,*[31] at the time the person applies for redress, will be eligible for redress under the scheme. As noted earlier in this submission, the current drafting of the Bill also leaves open for the accompanying rules to prescribe that a person is eligible or not eligible for redress under the scheme.[32]

The Explanatory Memorandum to the Bill states that the eligibility requirement in clause 16(1) is included to mitigate the risk of fraudulent claims and that *"[I]t would be very difficult to verify the identity of those who are not citizens, permanent residents or within the other classes who may be specified in the Rules."*[33]

Discussion

We cannot see that the current provision excluding those who are not Australian citizens or permanent residents from seeking redress is supported by any findings or recommendations of the Royal Commission.

knowmore has identified two groups of survivors who, being neither Australian citizens nor permanent residents, will be adversely impacted by clause 16(1) (c). The first group is children who have been sexually abused in immigration detention centres. The second group is survivors who pursuant to section 501 of the *Migration Act (1958*) Cth have had their permanent residency visas cancelled.

The current drafting may also exclude former child migrants who came to Australia as children under the Child Migration scheme, were placed in Australian institutions and suffered sexual abuse in such settings, and who may have returned to their country of origin without ever obtaining Australian citizenship or residency. For example, knowmore assisted one former child migrant who after experiencing terrible physical and sexual abuse in Australian institutions was 'repatriated' by the relevant Australian authorities to the United Kingdom as a child, where the client has lived ever since.

We understand that it is not the intention of the Government to exclude former child migrants from the scheme.[34] As such, we will not further address their position in this submission, other than to note that if the above legislative exclusions about citizenship and

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[31] Bill, clause 16(1)(c)

[32] Bill, clauses 16(2) and (3)

[33] Explanatory Memorandum, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Cth)*, at p.13

[34] Press Conference given by Minister Porter on 4 November 2016, see: https://formerministers.dss.gov.au/17436/press-conference-national-redress-scheme/

permanent residency remain, the Bill should expressly provide for the eligibility of former child migrants who are neither Australian citizens nor permanent residents.

Children sexually abused in immigration detention centres

In the course of its work the Royal Commission examined institutional responses (including of the Department of Immigration and Border Protection), to child sexual abuse occurring in immigration detention settings, and made a number of specific recommendations. [35] In its Final Report the Royal Commission stated:

> *Our commissioned research identified immigration detention as a specific institutional context with an elevated risk of child sexual abuse …*
>
> *Vulnerability to child sexual abuse is likely to be accentuated for many children in immigration detention."* [36]

Under the relevant provisions of the Bill it would appear that immigration detention settings would be Commonwealth institutions,[37] and that the occurrence of child sexual abuse in those settings would usually involve circumstances where those participating institutions would be considered to be responsible for that abuse.[38] This accords with the view of the Roya Commission:

> *"The Australian Government and its contracted service providers are responsible, directly or indirectly, for the safety and wellbeing of children in immigration detention who have been detained, sometimes for prolonged periods. This includes children in community detention. The department is responsible for maintaining adequate supervision of its contractors, to ensure proper care is provided."*[39]

The Royal Commission in its Final Report also made the following comments about the impact of child sexual abuse on children held in immigration detention:-

> *"The impacts of child sexual abuse in immigration detention are often similar to those experienced by victims in other institutional contexts. Still, we heard about specific impacts, including vulnerability of victims to cumulative harm, difficult recovering from sexual abuse while in held detention and fears about disclosing abuse. We heard that these impacts may be exacerbated by the extent of detainee's dependency on the department and its service providers, and the perceived effect that disclosure may have on placement and immigration-status decisions. A further challenge for victims of child sexual abuse in immigration detention can be adapting to a new country in the aftermath of abuse.*[40]

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[35] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 15*

[36] Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report, *Preface and Executive Summary,* p.92

[37] Bill, Clauses 9 and 22

[38] Bill, Clause 21

[39] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 15* p.172

[40] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 15* pp.12-13

The Royal Commission made clear in its Redress and Civil Litigation Report that redress must provide equal access and equal treatment for survivors, if it is to be regarded by survivors as being capable of delivering justice.[41] We also cannot see how the stated difficulties in identifying survivors for the purposes of the scheme would arise in the case of children sexually abused in an immigration detention setting, or for those survivors who previously held permanent resident status.

Survivors who have had their permanent residency visas cancelled

knowmore has taken instructions from several prisoners who had received letters from the DIBP advising them that their permanent residency visas had been cancelled. The cancellations were made pursuant to section 501 of the *Migration Act (1958)* Cth.

As with many other survivors sexually abused as children, these clients reported that the impact of their abuse led frequently to a history of drug and alcohol use, offending and then imprisonment.

These survivors face the possibility of being excluded from the redress scheme on two grounds; first because of their criminal offending, and secondly because they are no longer permanent residents.

Case Study

A client arrived in Australia from overseas aged two. He was later abused by a priest while attending a religious school. Complaints made by him at the time resulted in no action other than him being physically punished.

As a child the client stole a car and was apprehended interstate. He was sentenced to detention, spending the first period in a juvenile justice centre where he was physically and sexually assaulted by staff and older inmates. He was then extradited to his home state and served the remainder of his sentence in an adult prison, although he was aged only 17 at that time. He was again sexually and physically assaulted while in prison.

The client is now middle-aged and has spent much of his life in and out of prison. The client is currently in prison and has now received a letter from the Department of Immigration and Border Protection advising him that his visa has been cancelled.

Under the provisions of the legislation the client will not be eligible to claim redress for the numerous occasions he was sexually abused as a child as his permanent residency has been cancelled, and also as one of his prison terms exceeded five years.

[41] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015) p.4

Submissions for reform of clause 16(1) of the bill

knowmore submits that:

- The Bill should be amended to ensure it aligns with the Royal Commission's recommendations around the need for the redress scheme to provide justice to all survivors, and that the eligibility requirements of Australian citizenship or permanent residency be revisited.

- If the above legislative exclusions about citizenship and permanent residency remain, the Bill should expressly provide for the eligibility of former child migrants who are neither Australian citizens nor permanent residents.

CLAUSE 18 – What redress is provided - maximum redress payments

The current legislative provision

Under clause 18(1) (a) of the Bill, the redress payment under the scheme can be up to $150,000. This is obviously a reduction on the $200,000 maximum payment recommended by the Royal Commission.[42]

Discussion

We understand that current costings for the scheme and also discussions with the States and non-government organisations considering participating in the scheme will have proceeded on the basis of the current 'cap' of $150,000. However, knowmore submits that a cap of $200,000 would help to ensure just outcomes in the most severe cases, having regard to the Royal Commission's view that:

> *We consider that the higher maximum payment is appropriate to allow recognition of the most severe cases, taking account of both the severity of the abuse and the severity of the impact of the abuse.*[43]

We draw the Committee's attention to the information contained in the Royal Commission's Redress Consultation Paper about past State-based redress schemes.[44] That material reflects how claims under those past schemes were assessed against differing payment tiers. For example, under the Queensland redress scheme that operated following the Forde Inquiry, only a comparatively small number of claimants were assessed as being within the 'very extreme' category for more serious cases of harm, which in turn led to receipt of the highest redress payment available under the scheme. The actual numbers would appear to be only 167 survivors out of a total of 7,453 deemed eligible for some level of redress under the scheme (that is, 2.24% of claims). [45]

While knowmore's work with clients who participated in those State schemes has highlighted many inadequacies around the operation of those schemes, the abovementioned excerpts indicate that it is reasonable to expect that the maximum redress payment under the scheme could be confined to a limited number of the most severe cases only.

If it is determined to keep the maximum redress payment amount at $150,000, knowmore notes that the scheme is intended to operate for ten years. In those circumstances, claimants who come forward to the scheme in its later years of operation will receive a lesser sum by way of their redress payment in real terms, considering the likely cost-of-living

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[42] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report,* 2015. Recommendation 19

[43] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report,* 2015, at p.22

[44] Royal Commission into Institutional Responses to Child Sexual Abuse, Consultation Paper, *Redress and Civil Litigation,* January 2015, at pp. 135-140

[45] Royal Commission into Institutional Responses to Child Sexual Abuse, Consultation Paper, *Redress and Civil Litigation,* January 2015. See Table 15 at p.138

raises that will occur over such a period. The average length of time taken by survivors to disclose their abuse is now well understood. Survivors who are unable to disclose their abuse until the later years of the scheme's operation should not be penalised for that. We suggest that the Bill include some mechanism for the review and indexation of the maximum redress payment during the life of the scheme, perhaps at least by the midpoint of the ten-year period.

Submission for reform of clause 18

knowmore submits that:

- redress payments should be up to a maximum of $200,000 for the most severe cases, consistent with the Royal Commission's recommendation; and

- that the Bill should include some mechanism for the review and indexation of the maximum redress payment during the life of the scheme, to reflect cost of living increases and so as not to penalise survivors who are unable to disclose their abuse for the purpose of making a claim during the initial years of the scheme.

PART 2-4 – HOW TO OBTAIN REDRESS

1. Clause 29 – Application for redress

Current provision

Clause 29(2) (c) requires the information contained in an application for redress to be verified by statutory declaration.

Discussion

From our work with survivors over recent years we are acutely aware of the considerable difficulties so many survivors have experienced in getting to the point where they can make a disclosure about their experience of child sexual abuse. It is not at all uncommon for us to work with survivors who, prior to contacting our service, have never made a disclosure about their experiences and who are now, with appropriate support, coming forward to speak of what happened to them several decades ago.

It must be clearly understood by all involved in the operation of the scheme that notwithstanding all efforts that might properly be made to minimise re-traumatisation during the redress process, the exercise of seeking redress will be inherently traumatising for survivors, and will cause many to experience considerable distress.

The requirement for the application to be made in the form of a statutory declaration will exacerbate these impacts. Obviously that requirement means that a survivor must source an appropriate person to witness their declaration. We are particularly concerned for the position of survivors who live in rural and remote areas and who may have limited options as to who they can approach to lawfully witness their declaration, without compromising their privacy. We anticipate that some survivors will simply be unwilling to approach anyone in their local community to witness their declaration, meaning they will not apply under the scheme.

Apart from being a barrier for some survivors, the requirement for information to be verified by statutory declaration is unnecessary. It may facilitate the prosecution of someone who provides false information in an application for the specific offence of making a false declaration under the *Statutory Declarations Act 1959* (Cth). However, such factual circumstances could readily be prosecuted also under the *Criminal Code* offences of 'False or misleading information or documents' (s.137), or an offence of fraudulent conduct (under Part 7.3). A prosecution under those provisions would not require the false information to have been provided in the form of a statutory declaration.

Submission for reform

knowmore submits that the requirement for information in an application to be verified by statutory declaration should be removed.

2. Clause 34 – The assessment matrix

Current legislative provisions

Clause 34 of the Bill provides that the Minister may declare, in writing, a method, or matters to take into account, for the purposes of working out the amount of redress payment for a person. This declaration is to be the 'assessment matrix' and while it is to be a legislative instrument, clause 34(3) specifically provides that section 42 of the *Legislation Act 2003* (Cth)[46] does not apply to it.

Discussion

knowmore has already in this submission noted the problems with many past and current institutional redress schemes around inconsistency of processes and outcomes. Transparency of the scheme's assessment processes will be a critical factor in survivors both developing the trust and confidence necessary to commit to bringing a redress application, and then in accepting the outcome of the determination of that claim. Not dissimilar considerations apply to institutions participating in the scheme and importantly those considering whether or not they will in time opt-in to the scheme.

The method by which redress payments are determined is a fundamental component of the redress scheme. The transparency of that method is integral in whether the operation of the scheme in practice can meet the objects set out in Clause 3(1) of the Act.

The Royal Commission recommended that a matrix should be used to determine ranges of monetary payments and that such a process was the best way to resolve the tension between the need for fairness, equality and transparency for survivors and institutions and an individualised approach to assessment.[47] The Royal Commission also proceeded to make a number of specific recommendations around how monetary redress payments should be assessed.[48]

Recommendation 16 was that monetary payments should be assessed and determined using the following assessment matrix:

Factor	**Value**
Severity of abuse	1–40
Impact of abuse	1–40
Additional elements	1–20

Recommendation 17 was to the effect that the 'additional elements' factor should recognise whether the applicant was in state care at the time; whether the applicant experienced other forms of abuse in conjunction with the sexual abuse; whether the applicant was in a

[46] Which provides for disallowance, as noted earlier in this submission

[47] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report,* 2015, at p.21

[48] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report,* 2015, pp.230-245 and Recommendations 16-18

closed institution or without family support at the time of the abuse; and whether the applicant was particularly vulnerable because of his or her disability.

Recommendation 18 was that those establishing a redress scheme should commission further work to develop this matrix and the detailed assessment procedures and guidelines required to implement it.

knowmore's primary concerns around clause 34 and the process it outlines for the Minister declaring the assessment matrix relate to:

- the need for transparency in the process of developing the matrix; and
- that the final matrix is consistent with the above recommendations of the Royal Commission and, particularly, in a form that can be readily understood by survivors.

In our submission, the most preferable approach would be for the assessment matrix to be included in the Bill. The Explanatory Memorandum for the Bill notes, in relation to clause 34(3), that it is necessary to make the Ministerial declaration/matrix a legislative instrument but to exempt it from disallowance *"… so that the method or matters to be taken into account for the purpose of working out the amount of redress payment for a person are certain for applicants to the Scheme and decision-makers."* Such certainty would be best achieved by including the matrix in the primary, rather than in subordinate, legislation.

If the matrix is to remain in a subordinate instrument, we note section 17 of the *Legislation Act 2003* (Cth) which specifically refers to the desirability of the relevant rule-maker (here, the Minister) consulting about the proposed content of any legislative instrument[49] with persons of appropriate expertise and also those likely to be affected by the instrument.[50] That section also provides guidance as to how the consultation referred to in section 17(1) might occur.[51] If the current approach set out in the Bill is maintained, such consultation must occur and full details should be published in order to promote confidence in the matrix.

Submissions for reform – publishing matrix details in the Bill

knowmore submits that transparency and certainty, for all participants in the scheme, would best be achieved through the inclusion in the primary legislation of the assessment matrix for determining redress payments.

[49] Subsection (1) of section 17, *Legislation Act 2003* (Cth)

[50] Subsection (2) of section 17, *Legislation Act 2003* (Cth)

[51] Subsection (3) of section 17, *Legislation Act 2003* (Cth)

PART 2-5 – Offers and acceptance of redress

1. Clause 37 – Offers of redress

Current legislative provision

Clause 37 of the Bill sets out the matters that must be addressed in the written offer of redress made to a person whose application for redress has been approved. Reference is made in clause 37 to many specific issues which must be covered in the written offer, including the amount of the redress payment,[52] but the current drafting does not include the requirement to provide reasons for the decision on the amount of that redress payment.

Discussion

In its final *Redress and Civil Litigation* report, the Royal Commission made reference to its earlier Consultation Paper and said the following:

> *We suggested that it seemed appropriate that, once a decision has been made that an applicant is eligible for redress and the size of any monetary payment to be offered has been determined, the applicant should be provided with a statement of decision. The statement of decision should contain sufficient information for the applicant to understand the determination of eligibility and the amount of any monetary payment while minimising the risk of re-traumatisation.*[53]

The Royal Commission stated that the applicant should also receive some specific information; being written notice of the amount of any monetary payment; advice about other redress elements and how they can be obtained; and advice about next steps.[54] While these aspects all seem to be addressed in the drafting of Clause 37,[55] the use of the adverb 'also' by the Royal Commission makes it clear that information about these issues was to be provided in addition to the 'statement of decision' that enables the claimant to understand the Operator's determinations as to their eligibility and the amount of their redress payment.

The Royal Commission also commented that:

> *The importance of a written decision is perhaps most clearly seen when certain harms are not compensable under a redress scheme – while a smaller monetary payment would make it clear to an applicant that not all the harms were recognised, the capacity and scope for a written decision to recognise a harm but also explain*

[52] Bill, clause 37(1)(b)

[53] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report,* 2015, at p.378

[54] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report,* 2015, at p.378

[55] Bill, clause 37, subsections (b), (a) and (f), (g), (i), (l) and (m)

> *why it is not compensable under the terms of a particular scheme would appear to be respectful and informative to applicants.*[56]

In summary, the Royal Commission's *Redress and Civil Litigation Report* emphasises the importance of the provision to claimants of sufficient information about how the amount of their redress payment was determined to enable them to understand what the payment they are offered is meant to represent, and to assess whether or not they should accept any payment.

It follows, in knowmore's submission, that there should be a statutory obligation to provide reasons for a redress payment decision. The process needs to be transparent and decision makers should be accountable. Expanding clause 34 of the Bill to include the assessment matrix (as suggested above), together with a requirement to provide reasons for the redress payment decision, will help to both create consistency in the assessment process and allow survivors to see what how the matrix has been applied. We expect that this will reducing the level of discomfort and uncertainty for survivors and greatly assist their decision-making about exercising their rights of review under Part 4-3 of the Bill.

In this context, we note that there are many survivors who are in regular contact with other survivors who also experienced abuse in the same institution, and often also with specific support groups. Members of these groups will talk to each other and compare among themselves the different offers they receive. There will be similar impacts in families where a number of siblings were put in care and sexually abused. The comparison of offers among survivors and support groups, without an understanding of how payments were determined, will increase the level of anxiety and distrust in the system.

Further, we note that the absence of any requirement to provide reasons for the determination of a claimant's redress payment is inconsistent with the Department of Social Services' Service Charter which, among other things, provides the following commitment:

> *When administering programs, we will provide:*
>
> - *An explanation of our decision.*[57]

Submissions for reform

Clause 37 should be amended to expressly require reasons for redress decisions to be provided in the offer of redress made to an applicant.

[56] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report,* 2015, at p.379

[57] Department of Social Services Service Charter. Viewed at https://www.dss.gov.au/about-the-department/publications-articles/corporate-publications/dss-service-charter

2. Clause 38 – Acceptance period for offers of redress

The current legislative provisions

Under subclause 38(1) of the Bill, survivors who are offered redress will be given at least 90 days to accept the offer. If they fail to respond to the offer within that acceptance period they are taken to have rejected the offer and are unable to reapply for redress under the scheme.

Discussion

knowmore submits that the minimum three month acceptance period for a survivor to accept an offer of redress should be extended to at least 12 months. This amendment would align the Bill with Recommendation 59 of the Royal Commission's *Redress and Civil Litigation Report;*[58] that an offer of redress should remain open for acceptance for a period of one year. The Commission considered that such a time limit struck the right balance *"… between providing applicants with sufficient time to consider an offer and providing the redress scheme and institutions with certainty as to the outcome of the application."*[59]

Having worked closely with survivors, knowmore considers a three month acceptance period will increase the trauma for many clients around their decision as to whether they should accept their offer or not. We are concerned that if an offer is not accepted or an extension of time is not sought within the three month period, it will be taken that the offer has been rejected,[60] and once rejected the survivor cannot make a new application for redress. Clause 30 of the Bill provides that a person may only make one application for redress under this scheme.

knowmore submits a three month acceptance period may impact adversely for many survivors. Our experience reflects that:

- Many of our clients live in rural, regional and remote areas of Australia. A not insignificant number of survivors may be homeless or experiencing homelessness at some stage in the application process. Many survivors are hard to reach as they are living with complex trauma and the impact of mental and physical ill-health; there are simply times when some of our client group will 'drop off the radar' from time to time, particularly due to their fluctuating mental health which may impact on their willingness and capacity to make such important decisions as to whether they accept, reject or seek a review of an offer. For many clients three months will not be enough time to access supports, fully comprehend their options and make informed decisions.

[58] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report,* 2015, at p.380

[59] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report,* 2015, at p.380

[60] Bill, clause 42(2)

- On receiving an offer, we anticipate that many survivors will require both psychological and legal support to process the content and to reach an informed decision. Accessing support is a process that can take some time, especially where the survivor has difficulty with literacy, is incarcerated or may live in a regional or remote area where support service options – and particularly culturally safe services for Aboriginal and Torres Strait Islander survivors - are limited. In assisting clients engaging with the Royal Commission, knowmore frequently referred clients needing ongoing counselling support to the specific support services funded by the Department of Social Services. However, often there were delays for survivors in accessing support from these services. It is anticipated that similar delays could again occur when survivors need support around their engagement with the redress scheme and could result in them being forced to make decisions about an offer of redress without having in place appropriate support for their well-being.

- knowmore is acutely aware that the process of applying for redress and receiving an offer may be a difficult and/or a triggering experience for survivors. Many survivors suffer from post-traumatic stress disorder and other debilitating mental health issues. The impact of the complex trauma resulting from childhood sexual abuse, in the specific context when a survivor will receive a letter which effectively sets a dollar value on the abuse they experienced, has not been adequately recognised in deciding upon a three month acceptance period.

- Many survivors of abuse and trauma live in circumstances of disadvantage and when given a monetary offer, are vulnerable to accepting the offer without full consideration, due to immediate financial pressures. It is important that they be given time to access appropriate legal support in relation to considering their options and particularly to understand that accepting the offer will both terminate their civil legal rights against the participating institutions and also finalises their interaction with the redress scheme. The latter issue is very significant as many of our clients experienced abuse in multiple institutions and across different jurisdictions. It is logical to anticipate that in those cases not all institutions responsible for incidents of sexual abuse will be participating institutions at the time a survivor first considers making a claim to the scheme. As the commentary in the Explanatory Memorandum around clause 30 of the Bill makes clear,[61] proceeding to the acceptance of an offer of redress for a claim made against one or more participating institutions, in circumstances where abuse occurred also in other non-participating institutions, will mean that a survivor

[61] *Explanatory Memorandum*, at p.21

cannot make any further application to the scheme if in time those other institutions join the scheme.

While it could be argued that a short acceptance period assists in minimising trauma to survivors by requiring them to promptly conclude their application for redress, the Royal Commission, after receiving many submissions, clearly found 12 months to be preferable. It is the view of knowmore that anything less than 12 months is insufficient and will unfairly disadvantage many survivors, causing more trauma.

Obviously if survivors want to finalise their claim within 90 days, or even earlier, they will be able to do so under an extended acceptance period.

Case study

A client approached knowmore some years ago for assistance in engaging with the Royal Commission and for advice about options for compensation. The client was highly educated and had been successful in their chosen career. However, following their participation in a redress scheme in the 2000's, the client experienced a rapid and ongoing deterioration in their mental health. This deterioration has continued with the client being diagnosed with a range of complex mental health issues. The client was struggling with many issues including drug and alcohol use and homelessness, all of which made regular contact difficult.

The client was very clear with knowmore that they are often not well enough to participate in any process which brings up the past and which in turn has a serious impact on their mental health. This has impacted on the client's capacity to provide instructions and to receive advice.

The lawyers and counsellors working with this client have moved carefully in and out of engagement with the client, working at the client's pace.

Such a client would be extremely vulnerable to missing key dates such as the proposed acceptance period.

This client's presentation is not unique amongst the clients making contact with knowmore.

Submissions for reform – extension of time to accept offer

knowmore submits that the acceptance period in the Bill should be extended to at least twelve months, to align with that recommended by the Royal Commission and to reduce the re-traumatisation of participating survivors.

Part 2-6 – Provision of Redress: Counselling and psychological services

The current legislative provisions

Part 2-6 Division 3 of the Bill outlines the counselling and psychological services available to survivors that form an element of redress under the scheme. Clause 47 requires that the Operator must enable access to counselling and psychological services if a person accepts an offer of redress under clause 39. Clause 48 enables the Minister to make rules that may prescribe matters about the counselling and psychological services under the scheme, having regard to the principles set out in clause 49, which provides:

> *49 General principles guiding counselling and psychological services*
>
> *(1) Survivors should be empowered to make decisions about their own need for counselling or psychological services.*
>
> *(2) Survivors should be supported to maintain existing therapeutic relationships to ensure continuity of care.*
>
> *(3) Counselling and psychological services provided through redress should supplement, and not compete with, existing services.*

Discussion

knowmore supports these principles and is pleased to see their inclusion in the Bill. The principles are consistent with the objective of survivors achieving access to counselling or psychological services to assist them with the impacts of child sexual abuse. The principles will help to ensure that services are survivor focused and foster trusting relationships between survivors and service providers.

knowmore emphasises that survivors of child sexual abuse encounter distinct lived experiences resulting in diverse needs. It is imperative that survivors retain control over their access to services that are flexible, meet their needs and accord with clinical best practice. Survivors must remain the ultimate decision makers in their journey towards healing; choice and flexibility are crucial in ensuring survivors are able to access services that are culturally appropriate and best suited to their particular needs.

Consistent with the findings and recommendations of the Royal Commission,[62] knowmore submits that access to counselling and psychological services should be available throughout a survivor's life. The relationship between child sexual abuse and psychological and mental health issues later in life is well documented. Survivors experience a range of effects and may require long term and ongoing counselling support and psychological care. Factors such as delays in reporting of child sexual abuse and the emergence of symptoms and trauma triggers later in life affirm the need for support services throughout a survivor's lifetime.

[62] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), at pp.14-15

Accordingly, it is our submission that the Bill should make clear that the counselling and psychological services will be provided to survivors throughout their lives (as needed)[63] and not only for the life of the Scheme.[64] This is consistent with the Commission's view and also the Minister for Social Services' statement in the second reading speech for the Bill, that 'the scheme will provide survivors with three elements of redress, comprising… access to counselling or psychological services of their choice *throughout their lives*.'[65]

knowmore also submits that any allowance for the provision of counselling or psychological services should reflect the *impact* of the abuse and individual needs of the survivor, and not be determined solely by reference to the severity of the abuse or the amount of any redress payment offered. As we have noted elsewhere in this submission, the process of applying for redress will be inherently traumatising for many survivors. This impact requires acknowledgement in how counselling and psychological services are made available to best support the well-being and recovery of applicants.

Consistent with what we have said above, knowmore sees benefits in the Bill (or at least the rules) including information as to how determinations will be made about how counselling and psychological services will be provided to survivors. Uncertainty in relation to the calculation of funding for counselling or psychological services removes control from child sexual abuse survivors and may perpetuate the further triggering of trauma. In this respect, we note the Royal Commission made a number of specific recommendations around the administration of funding for counselling and psychological care paid under the redress scheme.[66]

Submissions for reform

knowmore submits that:

- clause 49 of the Bill be amended to include reference to the general principle that counselling and psychological services should be available throughout a survivor's life; and

- the Bill, or alternatively the rules, make transparent provision for how determinations around the provision of such services will be made.

[63] It is noted the Royal Commission specifically commented that services should be available on an episodic basis - Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), at p.14

[64] *Explanatory Memorandum*, at p.31

[65] Commonwealth, *Parliamentary Debates,* House of Representatives, 26 October 2017, 12129 (The Hon. Christian Porter MP).

[66] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), Recommendations 40-42

PART 3-2 - Funders of last resort

The current legislative provisions

Sections 66 and 67 of the Bill set out the provisions as to when the Commonwealth and a self-governing Territory will be the funders of last resort for participating non-government institutions.

The Explanatory Memorandum details how the funder of last resort will operate under the scheme, and states:

> "*In some circumstances there may be no responsible participating institution for a particular instance of abuse because the relevant institution no longer exists or cannot opt into the Scheme because it does not have sufficient assets or resources. Where there is an appropriate level of shared responsibility, it will be open to the Commonwealth or a self-governing Territory to step in to meet the cost of providing redress for survivors of that abuse."*[67]

Discussion

The concept of 'shared responsibility' is a new concept which was not referred to in the *Redress and Civil Litigation Report* of the Royal Commission. It is our submission that if this approach is maintained some survivors, contrary to the recommendations of the Royal Commission, will continue to be deprived of access to redress.

The Royal Commission recommended:

> "*The Australian Government and state and territory governments should provide 'funder of last resort' funding for the redress scheme or schemes so that the governments will meet any shortfall in funding for the scheme or schemes."* [68]

The Royal Commission emphasised that the purpose of setting up a funder of last resort arrangement was to ensure 'justice for victims.'[69]

> *"There will be cases where institutions in which abuse has occurred no longer exist and they were not part of a larger group of institutions or there is no successor institution. There will also be cases where institutions that still exist have no assets from which to fund redress.*
>
> *Funding for redress for survivors of abuse in these institutions will need to come from elsewhere. Leaving these survivors without access to the redress that is available to*

[67] Explanatory Memorandum, p.38

[68] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), Recommendation 36

[69] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), pp.338-339

> *others would fall short of the requirement in our Terms of Reference of 'ensuring justice of victims.'"*[70]

The Royal Commission estimated the overall cost of the scheme at $4.01 billion and further estimated that the cost to government of being funder of last resort would be $613 million or 15.3% of the total cost of funding redress. The Royal Commission concluded on this point

> *"We consider that an additional share of total costs of this sort of magnitude is a fair and reasonable amount to expect governments to pay given their social, regulatory and guardianship responsibilities discussed above."* [71]

Given the scope of services provided by our service, knowmore has not kept detailed statistics around institutions reported by our clients which would fall into the three categories of institutions the Royal Commission noted in proposing its funder of last resort recommendations. However, we would not think that among those clients who have contacted our service that the number who may be facing a 'funder of last resort' outcome would be as high as that suggested by the Commission.

Nevertheless, there are a significant number of survivors who will be affected by the current drafting of the Bill. The following case studies below detail circumstances where clients will not be able to claim redress under the scheme (assuming participation by the relevant States) despite having been sexually abused as children within institutions. It should be noted also that the survivors in these cases would appear to have little prospect of recovering damages through any civil claim.

Case study 1

The client was placed in several homes by his father after the death of his mother. The client was never made a ward of the state. In some of those homes the client experienced sexual abuse.

One home in which the client experienced sexual abuse was a home set up by a retired official from a religious organisation. The home was funded out of the pension received by the retired official and from community donations. The home received no assistance from the religious organisation, nor was that organisation involved in the establishment of the home nor in the day to day running of it. The home no longer exists. The religious organisation is not accepting any claims in relation to abuse which occurred in this home.

Under the current legislation this survivor would not have a redress claim which can be met as the home no longer exists and the current funder of last resort provisions will not apply as it would appear difficult to attribute any 'shared' responsibility on the part of the relevant government (assuming its eventual participation in the scheme)

[70] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), pp. 337-338

[71] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), pp.340-341

Case study 2

A client advised that they had been sexually abused at a local sporting club in the early 1980's. The club did not become part of the relevant State Federation until years later. The club itself now no longer exists.

Under the current legislation the client will not have a redress claim which can be met as the sporting club no longer exists and the funder of last resort provisions will not apply.

Case study 3

knowmore provided advice to a client who was sexually abused as a teenage by a youth worker at a refuge. The refuge is no longer in existence and there is no record of any government funding of the refuge.

Under the current legislation the client will not have any access to redress because the institution no longer exists and cannot opt in to the scheme and the funder of last resort provisions will not apply, as it is not possible to prove any government connection with the refuge.

Submissions for reform – Broadening the concept of funder of last resort

knowmore submits that Part 3-2 of the Bill be amended to meet the recommendations of the Royal Commission be accepted that the Commonwealth and self-governing Territory Governments and eventually participating State governments agree to be funders of last resort, in instances where:

- the institution no longer exists;
- there is no successor institution; or
- where the institution still exists but has no assets from which to fund redress

and that the concept of 'shared responsibility' not be applied.

CHAPTER 4 – Administrative Matters

1. PART 4-1: Information provision by claimants

Current legislative provisions

The Bill gives the Operator the power to request information from applicants (who will obviously provide some level of supporting information with their redress application). Division 3 of Chapter 4 deals with the interaction between the provisions in this Chapter of the Bill and other laws. Clause 71 provides certain protections for a person giving information, including that the information given is not admissible in any criminal proceedings, save for the specific offence of providing false or misleading documents under section 137 of the *Criminal Code.* The protection extends to providing derivative use immunity,[72] but does not refer to civil liability.

Clause 72 provides that the obligation to give information etc. to the Operator is not affected by a law of a State or self-governing Territory.

Discussion

We are concerned that the current drafting of the Bill may not operate to afford all necessary legal protections to claimants who, outside of being compelled to furnish information or documents under clause 69, quite properly provide the scheme with information to support their application, in circumstances which may give rise to unforeseen legal consequences. Two scenarios illustrate these concerns.

First, as the Bill contemplates, many survivors will make claims under the scheme in circumstances where they have previously received 'relevant payments' from participating institutions. Often those payments will have resulted from a civil action or an earlier redress claim that also saw the parties enter into a deed of settlement and release. We have often heard that such deeds contained confidentiality clauses. The Bill should make it patently clear that the provision of information about such payments by a survivor, or an institution, at any stage of the application process, cannot amount to a breach of the obligations in any such deed.

Secondly, some survivors will have made complaints to police about their perpetrators. In order to provide sufficient information to the scheme about their experience of abuse, while at the same time minimising the trauma and impact of re-telling their story, we anticipate that many in this group might wish to provide the scheme with copies of relevant documents such as police statements or transcripts of their evidence, rather than having to once again recount details of their abuse in making their application. This may occur at times when those relevant proceedings remain on foot.

In such circumstances, a risk may arise that the provision of such material to the scheme may inadvertently breach statutory provisions and/or court orders about the non-

[72] Bill, Clause 71(4)(c)

identification of complainants and accused persons in criminal matters. For example, we refer to Part 3 of the *Criminal Law (Sexual Offences) Act 1978* (Qld), which contains prohibitions as to the publication of details about a complainant's identifying details and also prohibitions about the premature identification of a defendant. Exemptions for certain reports and for other authorised purposes are contained in that Act, but it would seem far from clear that provision to the scheme of identifying material relating to a criminal proceeding for a sexual offence would not be in breach of the Act.

Submissions for reform

knowmore submits that in order to ensure applicants and their agents who provide the scheme with relevant and helpful information in support of their redress claims (whether under compulsion or voluntarily) are not unfairly exposed to unintended legal consequences, the Bill should include a specific provision addressing these issues. Perhaps that provision could be to the effect that:

- No obligation to maintain secrecy or other restriction on the disclosure of information obtained by or furnished to a person, whether imposed by any Act or by a rule of law, applies to the disclosure of information to the Operator or for the purposes of the scheme.

- An applicant to the scheme who so discloses information does not, only because of the disclosure—
    - contravene a provision of an Act requiring the person to maintain confidentiality in relation to the disclosure of information; or
    - incur any civil liability, including liability for defamation; or
    - become liable to disciplinary action.[73]

[73] This wording comes from s.343 of the *Crime and Corruption Act 2001* (Qld)

2. PART 4–4 – Appointment of nominees

The current legislative provisions

Part 4-4 of the Bill allows for the appointment of nominees (correspondence and payment nominees) where there is written consent from the person to be appointed and after taking into account the wishes (if any) of the claimant/principal regarding the making of such an appointment.

Clause 95 then sets out the circumstances when the suspension and cancellation of nominee appointments can take place. Following clauses deal with the duties, functions and responsibilities of nominees and the payment of redress payments to payment nominees.

Discussion

knowmore understands the need for the Bill to provide for the appointment of nominees, and notes the use of nominees in other situations involving a person's interaction with Commonwealth Government programs, such as Centrelink.

We are concerned however about the particular vulnerabilities of many in this client group, and the accompanying likelihood that some vulnerable survivors who may be entitled to receive a redress payment may be very susceptible to exploitation by family members and/or other persons seeking personal financial gain.

In delivering services to survivors we have heard of multiple instances where survivors have received redress payments under other schemes and have seen those monies quickly dissipated through the involvement of family members or others wanting access to the funds and who saw an opportunity to gain financial advantage, or who perhaps felt that they were entitled to share in the redress payment because of how they had been impacted by their family member's trauma. The experience of knowmore is that a significant number of our clients are extremely vulnerable to agreeing to allow others to make decisions on their behalf. Often those clients, when speaking with knowmore, have sought advice about how to disengage from their current advocate or nominee.

Given that many survivors likely to claim under the scheme are now elderly, the possibility of elder abuse is significant. Some elderly clients may also have put in place arrangements such as the appointment of an enduring power of attorney to operate should they lose or lack capacity. We note that current nominee provisions in the Bill do not specifically refer to the interaction between a nominee appointment and such an attorney.

> **Case study**
>
> An elderly client who had been sexually abused as a child in an institutional setting approached knowmore for assistance in relation to a referral to a law firm to make a compensation claim. The client had capacity to understand what was happening but the possibility of that capacity diminishing was clear. The lawyer acting for the client came to the conclusion that while the client had capacity to provide instructions at that time he did not feel confident that the client's capacity would be maintained through-out the period of time it would take to negotiate a settlement. Steps were taken while the client had capacity for the client to complete the appointment of an enduring power of attorney.

The Royal Commission did not make any recommendations about the appointment of nominees. Where there are capacity issues, it will be imperative that formal steps are taken to appoint a financial manager or enduring power of attorney to deal with the redress payment.

The current wording in the Bill gives significant power and control to a nominee. However, the Bill does not appear to expressly address the issue of how a claimant/principal (as opposed to the nominee themselves or the Operator) may suspend or cancel the nominee appointment, or compel the Operator to suspend or cancel that appointment. While there may be an implied power on the part of the Operator to revoke in cases where the wishes of a principal regarding the complainant change, it would be preferable for the primary legislation to make express provision for this.

We also submit that it is very important that all information surrounding the appointment, functions and responsibilities of nominees make it very clear to claimants considering appointing a nominee that:

1. Appointing someone else to be a nominee will equip them with significant powers.
2. The person the survivor/principal nominates must be someone they can trust to make the good decisions for them and potentially, if appointed as a payment nominee, to receive and deal with their redress payment.
3. The written consent of the principal for the appointment of a nominee must be required.
4. The principal should be able to decide that the nomination be suspended or cancelled (see below).
5. It would be appropriate and helpful to receive legal advice before proceeding to appoint a nominee.
6. Where the capacity of the survivor is in issue, that formal steps should be taken for the appointment of a financial manager.

We do not suggest that this type of explanatory information is included in the Bill; it would be better conveyed through more accessible materials such as in brochures and other guidance material relating to the scheme.

Submissions for reform

knowmore submits that Part 4-4 of the Bill should be amended to expressly provide for the power of a principal to revoke or suspend a nominee appointment.

CLAUSE 128 – Review of the scheme

Current legislative provision

Clause 128 requires the Minister to cause a review of the operation of the scheme as soon as possible after the eighth anniversary of the scheme's start day or earlier, but not within the first two years of the scheme.

Discussion

A key question for the review to examine and report upon will be whether the scheme should be extended to enable ongoing access to justice for relevant survivors. The Royal Commission recommended that the redress scheme should not have a fixed closing date, but if applications reduced to the level where it would be reasonable to consider closing the scheme, the closing date should be at least 12 months into the future and given widespread publicity.[74]

It will therefore be critical for the review to consider the position of survivors who may be impacted by the closure (or non-continuation) of the scheme. There are likely to be some complex issues arising; for example, around the delivery of ongoing counselling and psychological services to survivors (as referred to above, survivors will have life-long needs for such services). For the review to be effective wide and effective consultation will need to occur with survivors and with the various services delivering support to that client group.

Submissions for reform

knowmore suggests that it would be appropriate for clause 128 to be amended to expressly provide for the review to involve such consultation and to draw on the knowledge of persons with expertise and experience around the operation of the redress scheme and the ongoing needs of survivors.

[74] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015), Recommendation 48

Appendix 1

knowmore
Service snapshot

knowmore is an independent service giving free legal advice to people who are considering telling their story or providing information to the Royal Commission into Institutional Responses to Child Sexual Abuse.

knowmore is a unique, national legal service, providing trauma-informed and holistic services to survivors and other people considering engaging with the Royal Commission.

Callers can access legal help, social worker/counsellor support and Aboriginal and Torres Strait Islander engagement advisors to talk to if they wish.

We have offices in Brisbane, Melbourne and Sydney.

Free call: 1800 605 762
info@knowmore.org.au
www.knowmore.org.au

knowmore began providing services to the public on 8 July 2013 – as of 31st December 2017, we've helped:

8634 unique clients

92166 client activities

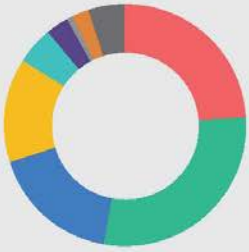
Our current client-facing team includes:

17 lawyers

5 social workers/counsellors

3 Aboriginal and Torres Strait Islander engagement advisors

Calls came from



NSW	24%
QLD	29%
VIC	17%
WA	14%
SA	5%
TAS	3%
ACT	1%
NT	2%
Unspecified/Overseas	5%

Community outreach and liaison

Face to face legal services were provided to **1182 clients**

knowmore has conducted or participated in **1821** community outreach and liaison events

91 Royal Commission private sessions that **knowmore** staff have accompanied clients to as their support person

As at 31st December 2017

knowmore
Service snapshot

Counselling/ social work

All clients have access to social work/counselling assistance in addition to legal assistance

5133 clients received social work/counselling support either directly or through case consultation

6164 clients have been referred to other support services from **knowmore**

Specialist staff for Aboriginal and Torres Strait Islander clients

knowmore has a strong commitment to providing culturally appropriate services to Aboriginal and Torres Strait Islander clients

24% of our clients identify as being of Aboriginal and Torres Strait Islander descent

We employ 3 experienced male and female Aboriginal engagement advisors.

We also work closely with interpreters and Aboriginal and Torres Strait Islander community organisations to ensure that we are engaging respectfully and appropriately with people

Our clients

61% were aged 45 and over

38% identified as females

62% identified as males

18% required more than one advice session

Feedback

From a client...

"...my life changed the day I called **knowmore**. I've carried the burden of abuse for 30 years and it controlled every aspect of my life without me even realising it until we spoke. How a person can even begin to express what it felt like to break free from that burden is impossible... now it feels like I have hope in my life once more! I feel like I have a long way to go, however now I know where to start and I've just touched the surface of that journey which is exciting."

From a service provider...

"I would like to take this opportunity to say thank you to everyone (at **knowmore**) for all their support provided to myself and especially for my clients over the last 3 ½ years. You guys were so amazingly deadly at what you do, and have made the process for my clients in understanding their next step into the legal side of things a smooth, clear understanding of their rights."

knowmore has been established by the National Association of Community Legal Centres with funding from the Australian Government represented by the Attorney-General's Department.

knowmore
Free legal help to navigate the Royal Commission