

Submission to the Royal Commission into Institutional
Responses to Child Sexual Abuse

Issues Paper 8: Experiences of police and prosecution
responses

Submission of knowmore legal service

knowmore

Free legal help to navigate
the Royal Commission

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Introduction

knowmore is a free legal service established to assist people engaging with the Royal Commission. Advice is provided through a national telephone service and at face to face meetings, including at outreach locations. **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, and has offices in Sydney, Brisbane, Melbourne and Perth.

Our service was launched in July 2013 and since that time we have assisted over 3,000 clients with legal advice or information relating to childhood sexual abuse within an institutional context. Many of the clients that we have assisted have either engaged, or have been seeking advice or information about engaging, with police and prosecution agencies.

Of the clients **knowmore** has assisted up to 31 March 2015:

- 82% were aged 45 and over
- 44% identified as females
- 56% identified as males
- 18% identify as being of Aboriginal or Torres Strait Islander descent.

knowmore's submission

knowmore's submission will address the topics raised in the Commission's Issues Paper through the illustration of our client's experiences, and discussion.

knowmore's clients have shared with us a large number of their experiences with police and prosecution responses. Many clients have already provided the detail of these experiences to the Royal Commission either in giving evidence at public hearings; in private sessions; or through the provision of statements.

We have drawn on these reports to address our clients' experiences in relation to the matters set out in questions 1 – 7 of Issues Paper Number 8. These experiences of our clients are set out in Appendices A and B, dealing respectively with police and prosecution responses (attached). Obviously, these appendices are not an exhaustive compilation of our clients' experiences and observations. Rather, a number of cases have been selected as being representative of commonly reported experiences (although some are exceptional), and to illustrate experiences that have in turn led to the recommendations set out below. These de-identified case studies illustrate the sometimes devastating effect that a poor or inappropriate police or prosecution response(s) can have for a survivor seeking to report childhood sexual abuse within an institutional context. We have also provided case studies which demonstrate the many benefits that our clients have gained from good responses by police and prosecution services.

knowmore's primary recommendation is that police and prosecution agencies adopt trauma informed practices in dealing with survivors of childhood institutional sexual abuse. The adoption of trauma informed practices will be of benefit to both survivors and to police and prosecution agencies. It will improve the response to survivors of childhood sexual offences by maximising their well-being during a complex and stressful process of interacting with police and prosecution agencies. It will also enhance the ability of the criminal justice system to make offenders accountable for their criminal conduct.

This submission will confine itself to police and prosecution responses. These are the interactions between survivors and police and prosecution agencies up to the commencement of a trial or hearing of charges by a court, during the trial and after proceedings have concluded. However, in this submission, **knowmore** has not addressed some related matters such as issues of law relating to the trial processes for child sex offences, including confidential counselling communications and privilege; joinder of charges; the admissibility of 'similar fact' evidence; pre-recording of complainants' evidence; the proper limits of cross-examination of complainants; judge's directions relating to the effect of delay on reporting; sentencing issues; and so forth. These are complex topics and **knowmore** suggests that they be addressed in future, separate Issues Papers of the Commission.

knowmore also notes that statutory compensation schemes for victims of crime were dealt with by the Royal Commission in Issues Paper 7. Similarly, those issues will not be dealt with in this submission. This submission will therefore deal primarily with issues of practice and policy, and not issues of law.

knowmore acknowledges that there has been – and continues to be – substantial reform in the area of police and prosecution responses, which is having significant positive benefits for survivors.¹ However, we would urge police and prosecution agencies to take responsibility not only for the continual improvement of current responses, but also to address the legacy of past responses that have been inappropriate.

¹ As the Royal Commission is aware, there have been numerous reform efforts in the area of the investigation and prosecution of sexual assault including child sexual assault over the past few decades. All state and territory law reform commissions, for example, have reported multiple times on this area of law and practice. **knowmore** is aware that several police services are currently reviewing or are trialling improvements to their sexual assault reporting process.

List of Recommendations

[Note: some of these recommendations are derived (partially or wholly) from the reports of earlier inquiries into the investigation and prosecution of sexual assault. The sources of such recommendations are described in the later sections of our submission].

Police and Prosecution Agencies

1. The adoption of trauma informed practices by police and prosecution agencies.
2. Police and prosecution responses to all reports should include access to information and high quality counselling and support services (with the element of survivor choice).

Police Agencies

3. Improved coordination of complaints when information is shared between police services.
4. Use of anonymous reporting and sharing of information between police, child welfare services and working with children agencies
5. That criminal records are expunged and compensation is granted to those who were as children charged and convicted of offences relating to their own experience of childhood sexual abuse, when they reported that abuse.
6. Training and resources to improve the quality of the process by police of taking a survivor's statement, including training about the nature and dynamics of sexual assault; and training on the social, psychological and cultural factors that may affect the behaviour of people who have been sexually assaulted and may result in them delaying in reporting an assault.
7. The above training be delivered to those policing rural and remote areas
8. Increase of numbers of police in specialist sexual assault units
9. A consistent approach to the handling of reports of sexual assault, including coordination with sexual assault centres.
10. Providing written reasons when a decision is made not to charge an offender or to take no further action in respect of a report.
11. Determining the appropriate time frame for the investigation of sexual offences and ensuring increased supervision regarding investigation time frames and appropriate contact and follow up.

Prosecution Agencies

12. Review of Directors' Guidelines to ensure that there is full consultation with survivors during the charge negotiation process and that written reasons are given to survivors well in advance of trial as to the reasons for the acceptance of a plea agreement or a decision not to proceed with charges.
13. A transparent process for the right of review of such decisions where prosecutorial discretion has been exercised.

14. Each Office of the Director of Public Prosecutions (ODPP) should continue to offer a regular training program for solicitors and prosecutors involved in committals and trials in sexual offence cases. As well as dealing with legal issues the objectives of the program should include:

- increasing prosecutors' understanding of the emotional, psychological and social impact of sexual assault on complainants in sexual offence cases, and how this may affect complainants in giving their evidence;
- providing information on the social context in which sexual offences typically occur;
- ensuring that prosecutors are aware of the advantages of meeting with complainants before the hearing and advising them about what will happen when they give their evidence;
- familiarising prosecutors with the use of all alternative arrangements available to assist witnesses in giving evidence, and of the advantages to complainants in giving their evidence in this way;
- liaising with witness support services to ensure that complainants receive support and information which prepares them for what will happen in court; and
- encouraging prosecutors to take appropriate steps to protect complainants from offensive, unfair or irrelevant cross-examination.

Witness Assistance Services

15. A separate service for child witnesses

16. Adequate funding should be committed to ODPP based Witness Assistance Services, to enable them to provide adequate support to all adult prosecution witnesses in sexual offences cases, both in [metropolitan] and in rural and regional areas. The funding should be sufficient to enable the service to:

- meet the needs of witnesses from non-English speaking background communities;
- meet the needs of Indigenous witnesses;
- meet the needs of witnesses with differing physical and intellectual requirements;
- respond to all appropriate requests for assistance in a timely manner;
- assess the needs of witnesses for support through the criminal justice process and develop a clear plan as to how this should be done;
- either directly provide or negotiate the provision, nature and level of assistance required to ensure that the witnesses' participation in the criminal justice system is as positive as possible and that the integrity of the judicial process is upheld; and
- ensure witnesses are made aware of, and where necessary assisted to access, any assistance required for longer term support arising from either the experience of surviving an offence or any negative effects from giving evidence at court.

Aboriginal and Torres Strait Islander Survivors

17. Clear protocols explaining confidentiality issues and the circumstances under which information provided in the making of complaints may be shared with other government authorities;
18. Proactive and positive community engagement in communities to build and enhance respect and confidence, to overturn past attitudes;
19. An Indigenous liaison service within each police service that could be a first point of contact for Indigenous survivors to facilitate reporting;
20. Indigenous specific liaison through the legal process, starting at the time of the initial report and following until the finalisation of proceedings;
21. Indigenous specific services providing culturally safe and appropriate counselling and emotional support to Indigenous survivors; and
22. Specific recruitment drives for Indigenous people to become police officers.

Other survivors

23. Specific and appropriate support services (with tailored resources) be established (or maintained) for necessary communities, including CALD, LGBTI and deaf communities.

The Structure of Police and Prosecution Services in Australia

Each state and territory within Australia maintains an independent police service tasked with the primary responsibility for detecting, investigating and laying charges in respect to child sexual offences, as well as with other breaches of the criminal law. Each state and territory also maintains an independent prosecution agency, usually known as an Office of the Director for Public Prosecutions (ODPP).

All states also maintain a police prosecution unit which conducts the prosecution of offences in courts of summary jurisdiction. Both territories have now included the prosecution of offences in courts of summary jurisdiction within their ODPP.

The Commonwealth maintains an independent police service and an independent ODPP as well as separate agencies for the investigation and prosecution of offences under military law.

From time to time various authorities within the Commonwealth, States and Territories have established *ad hoc* investigative responses (including commissions of inquiry) specific to institutional child sexual abuse, or which have considered child sexual abuse in an institutional context within a wider ambit. Examples include the DLA Piper Report² and the subsequent Defence Abuse Response Taskforce; numerous NSW police task forces in the Newcastle area³ and a Special Commission of Inquiry into certain of those police investigations;⁴ the South Australian Mullighan Inquiry;⁵ the Queensland Forde Inquiry;⁶ and the Victorian Parliament's *Betrayal of Trust* Report,⁷ among many others. A number of state police services have established or have adapted existing police taskforces to complement the work of this Royal Commission.⁸

Despite this multiplicity of police services and prosecution agencies, there is (with the exception of the area of military law) a great number of similarities amongst all Australian

Like many Australians, **knowmore's** clients have often moved interstate to follow family, job opportunities or sometimes simply to move away from a state which held so many terrible childhood memories for them. As a result, when such a survivor begins the process of making a report about their childhood sexual abuse they must either travel to their former state to make the report to police in that state, or report the abuse to police in their current state of residence for that state's police to relay their statement to the appropriate officer in the other state. This will usually be to a police officer and station located closest to the place where the offence took place. This transfer process often leaves clients without a primary contact in the other state, and many clients have complained about the lengthy delays and frustrating attempts to obtain information that then follow.

² Report of the Review of allegations of sexual and other abuse in Defence, October 2011

³ Including Strike forces Lantle, Georgiana and Arinya-2

⁴ Special Commission of Inquiry into matters relating to the police investigation of certain child sexual allegations in the Catholic Diocese of Maitland-Newcastle, 4 volumes, 20 May 2014, Margaret Cunneen SC

⁵ Children in State care Commission of Inquiry Allegations of sexual abuse and Death from criminal conduct, 31 March 2008

⁶ Commission of Inquiry into Abuse of Children in Queensland Institutions, 1998-1999

⁷ Parliament of Victoria, Family And Community Development Committee, Inquiry Into The Handling Of Child Abuse By Religious And Other Non-Government Organisations, November 2013

⁸ Such as Taskforce SANO in Victoria

police services and prosecution agencies. This makes them amenable to comparison, both in relation to current practice and past practice.

The decision to report to a police service

The decision by a survivor to report an act of sexual abuse against them while they are, or were, a child, is a very significant personal step. For a number of reasons, including the death or incapacity of the offender; the circumstances of the offending (which will often not involve other witnesses); or the operation of the presumption of innocence in cases where there has been a lengthy delay before disclosure, the most likely result of such a report will not be the prosecution and conviction of the offender.⁹

Despite this, many survivors of childhood sexual abuse will choose to report to police. Some will do so immediately, but more will only do so after a substantial period of time.¹⁰ Many of **knowmore's** clients are only now reporting offences which were committed against them very many years ago.

⁹ “Although implementation of our recommendations will improve the situation for complainants in sexual offence cases, many people who are sexually assaulted will decide not to report the crime or not to give evidence against the alleged abuser. Even if a person decides to report an alleged offence, the presumption of innocence which is the fundamental tenet of our criminal justice system will mean that some people who have actually committed offences will not be convicted of them. **Where the assault occurred many years previously the alleged perpetrator will rarely be found criminally liable.** It is important that people harmed by sexual assault should not see the criminal justice system as the only way of assisting them to recover from the wrong done to them, or of acknowledging the effect of sexual assault on their lives.” Victorian Law Reform Commission, Sexual Offences Final Report, July 2004, p. 100 (emphasis added).

¹⁰ The Royal Commission in its interim report indicated that for a snapshot of people who had attended for a private session between 17 January 2013 and 30 April 2014, the average length of time between offence and disclosure (not police report) is 22 years, Interim Report, Chapter 5, p.158

Some survivors will never report to police because they do not understand that what they had experienced was a sexual offence. Some survivors wish to report anonymously, as they do not want their families or their communities to know that they are a survivor of childhood sexual abuse.

A number of survivors are reluctant to report offending due to previous negative interactions with the police. Survivors who have criminal convictions for offences they have committed as a child or an adult can be distrustful of the police and the authority they command. Regrettably, this distrust of authority and progression into criminal activity can be a result of the sexual abuse they suffered as a child.

Some survivors are concerned that they do not possess the resilience to proceed with what they are told will be a lengthy and often difficult and stressful process, possibly further traumatising them.

However, these survivors have told us that they often want to make someone aware of the identity of a perpetrator, as this might then save another child from sexual abuse in the future. While there are limits on the use that can be made of anonymous reports, some police services, as well as other government agencies such as child protection agencies and non-governmental agencies, will accept, register and in some cases pass on anonymous reports.¹¹ Such reports can alert agencies as to children in need of immediate protection, or identify a person as a risk to children in certain types of employment.

Low reporting rates of childhood sexual abuse,¹² for whatever reason, are of concern as they are likely to result in offenders escaping identification and conviction, and in some cases, maintaining contact with children and persisting in their offending. A poorly conducted police investigation can also result in an offender escaping conviction and so expose other children to the risk of sexual abuse by a serial offender.

Some **knowmore** clients from residential children's homes have questioned whether they fall within the Royal Commission's terms of reference as they have not viewed themselves as having experienced sexual abuse, as they were not subject to acts of sexual penetration. However, when disclosing their experiences they have related obvious acts of sexual abuse such as routine and gratuitous inspections of their genitalia at shower time; being encouraged in acts of mutual masturbation with staff on the basis that this was a form of sex education; being made to undergo gynaecological inspections to determine virginity by unqualified staff; and being masturbated to erection to allow the fitting of electronic devices (on the pretext that this was a way of dealing with bed wetting). In some cases, such as during the Redress WA scheme, this failure to identify and present acts of sexual abuse has resulted in those survivors receiving a lesser payment than they would have been entitled to had they related that aspect of their abuse.

¹¹ See, for example, Victoria Police Taskforce Sano and the NSW police web site on Sexual Assault Reporting Options (SARO):

http://www.police.nsw.gov.au/data/assets/pdf_file/0013/224014/SARO_Form_200213.pdf

The document on reporting options makes clear that an anonymous report will not result in an investigation of the offence alleged in the report but that it will assist police to gather intelligence. See also Bravehearts Sexual Assault Disclosure Scheme (SADS): <http://www.bravehearts.org.au/pages/sads.php>

¹² Adults Surviving Child Abuse, 'The Last Frontier: Practice Guidelines For Treatment of Complex Trauma and Trauma Informed Care and Service Delivery', Kezelman C. and Stravropoulos P., Fact Sheet For Workers in Diverse Service Settings

Most Australian jurisdictions have introduced some form of mandatory reporting for particular categories of people who may become aware of the suspected sexual abuse of a child. However, where there is a considerable delay by survivors in reporting childhood sexual abuse, so that most are adults when they disclose, these disclosures may fall outside of the mandatory reporting provisions in Australian states and territories.

knowmore has been told by several male clients that when they reported to police as children in the period up to the 1970's that they were being sexually abused that they were themselves charged with offences of consenting homosexuality, such as 'permitting buggery', on the basis that their statement to police alleging the offence against them was an admission by them of a criminal act.

'Decision points' in reporting systems

The general progress through the criminal justice process of a reported act of childhood sexual abuse within an institutional context is common to all states and territories.¹³ **knowmore** has structured this submission on the chronological progression of a survivor through the police and prosecution systems. This progression can be described in many ways. **knowmore** has chosen to adopt a progression based on 'decision points' within the police and prosecution response, an approach which has previously been used in the context of analysing police and prosecution responses in relation to sexual offences against women.¹⁴ (See Figure 1 below, at page 11)

At each stage provision of an appropriate level of support to a survivor will reduce the occurrence of additional trauma and will maximise the prospects that they will move to the next 'decision point' in the criminal justice process. A poor or inappropriate level of support will reduce the prospect that they will move to the next 'decision point' in the process. At each 'decision point' there will be considerable attrition, with reports failing to progress to the next decision point, with the result that only a very small proportion of childhood sexual assaults within an institutional context will result in a conviction following a trial or hearing.¹⁵

Survivors will present in a variety of ways but many will have experience of unresolved trauma; *'[U]nresolved trauma has pervasive effects and impairs a wide range of functioning. Trauma radically restricts the capacity to respond flexibly to daily stress and life challenges'*.¹⁶ An experience of child sexual abuse is strongly associated with a subsequent diagnosis of mental illness (e.g. depression and anxiety), and in particular, borderline

¹³ While there are many differences in law (including in substantive criminal law, criminal procedure and evidence, for example) between the states and territories the general structure of the prosecution of a criminal offence is the same in all these jurisdictions. The largest single difference is in Western Australia, which has abolished committal proceedings.

¹⁴ From the Australian Law Reform Commission Report Family Violence – A National Legal Response Final Report, V 1, pp. 1184-1186, extracted from the 2004 report *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* by Dr Denise Lievore.

¹⁵ *Ibid*

¹⁶ Adults Surviving Child Abuse, 'The Last Frontier: Practice Guidelines For Treatment of Complex Trauma and Trauma Informed Care and Service Delivery', Kezelman C. and Stravropoulos P., Fact Sheet For Workers in Diverse Service Settings

personality disorder in adulthood.¹⁷ As a consequence, adults reporting ‘historical’ child sexual abuse may struggle to present their story in a clear fashion. They may be disorganised or even highly chaotic in their presentation. This may undermine their credibility with police when lodging a complaint and giving a statement, particularly when dealing with police who have a poor understanding of the impacts of childhood sexual abuse.

Where these complaints are referred to public prosecutors, that style of presentation will further be considered in an assessment of what would be the complainant’s future performance as a witness. This will be taken into account when considering the prospect of conviction, a key decision making point.

Hence, the most damaged of individuals, those who have suffered the most grievous forms of abuse and suffered the greatest mental health consequences, may be the least likely to have their childhood sexual abuse addressed by the criminal justice system.

knowmore recommends that a ‘trauma informed’ approach should be embedded at all levels of service delivery. To achieve such an approach requires that police officers and prosecution staff recognise that the most worthy of cases – those where the greatest harm has been done – require a level of support to victims in reporting such crimes and being a party to a subsequent prosecution, that is not currently provided. A trauma informed approach would see such people offered a patient and more considered approach during these key decision making points at the ‘front-end’ of the criminal justice system. Training about a trauma informed approach should include information explaining why many survivors take many years to report and an understanding of the grooming behaviours of perpetrators.

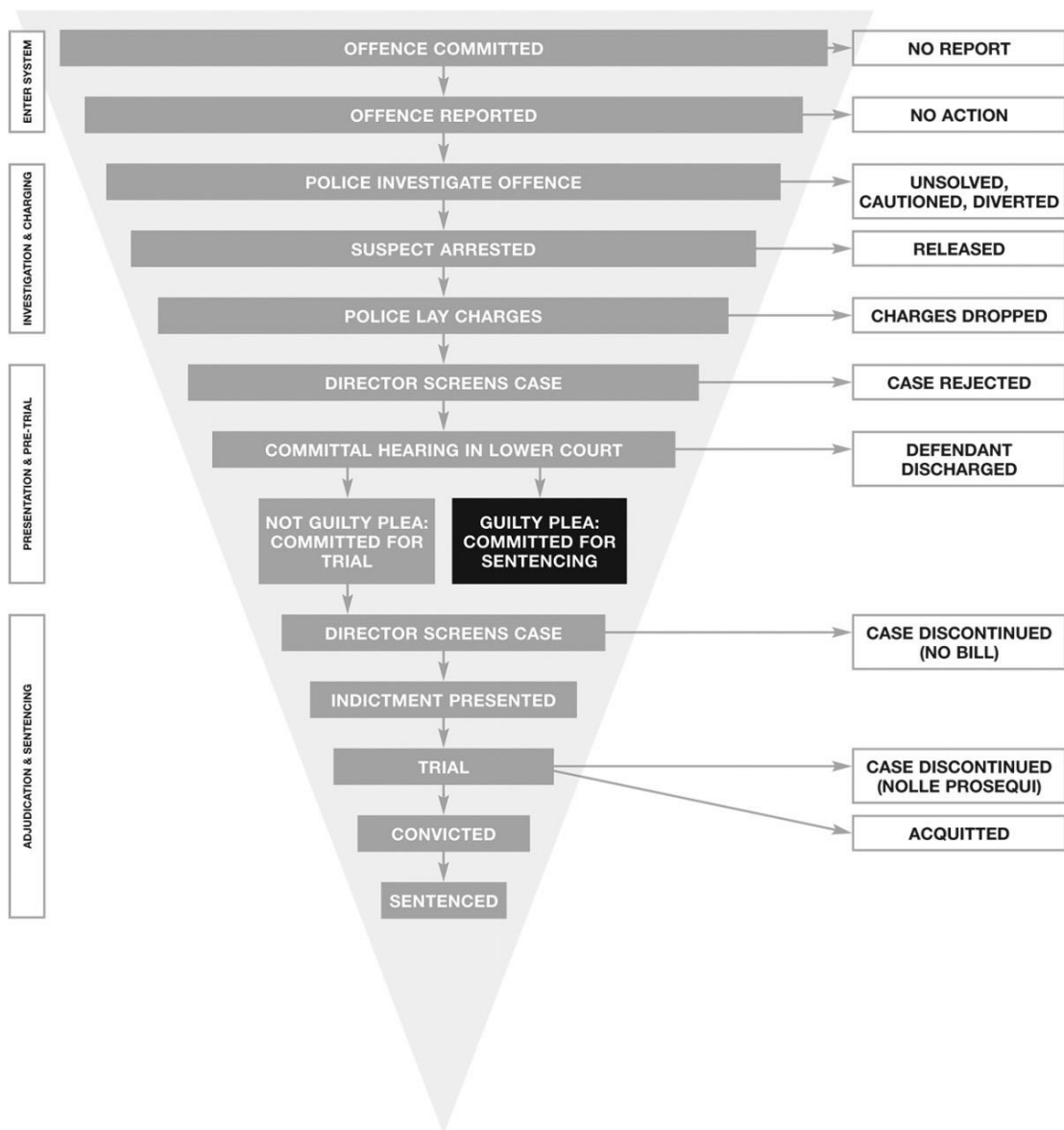
knowmore concurs with the Victorian Law Reform Commission’s recommendation that an effective governmental response should include access to information and the provision of counselling and support services, as well as police and prosecution responses of the highest quality.¹⁸ There should also be the provision of an adequate scheme of financial redress.¹⁹

¹⁷ Adults Surviving Child Abuse, ‘The Last Frontier: Practice Guidelines For Treatment of Complex Trauma and Trauma Informed Care and Service Delivery’, Kezelman C. and Stravropoulos P., Foreword by Professor Warwick Middleton

¹⁸ *Op cit*

¹⁹ **knowmore**’s submission in respect to Issues Paper number 6: Redress Schemes, 20 June 2014

Figure 1: Decision Points for Indictable Sexual Offences



The Police Response (excluding Police Prosecution Units):

Outside of the very infrequently used option of laying a private prosecution, a charge alleging child sexual abuse will only be presented to a criminal court in an Australian jurisdiction if it is made on the complaint of a police officer and then usually only after a review and authorisation by a senior police officer, applying internal policies. Police services are therefore the absolute ‘gatekeepers’ in respect of childhood sexual offences in the criminal justice process in Australia. Therefore, to engage with the criminal justice process, a survivor must first make the step of engaging with a police service, which in practice will be contact with a police officer to make a complaint.

... the initial response of the criminal justice system is vital, not only to ensuring that subsequent stages function effectively, but also to minimise the trauma of the process for complainants. Consequently, where sexual assault is reported, the response of the police is vital to the complainant's decision to continue to pursue their complaint. As the VLRC observed: how the police are perceived by people who report an assault and the quality and consistency of their investigative and decision-making practices will have a major impact on reporting and prosecution patterns.

Australian Law Reform Commission Report 114: Family Violence – A National Legal Response, October 2010, V 1 p. 1192

As the above diagram (Figure 1) indicates, the police response to a complaint of sexual abuse (which will include sexual abuse within an institutional context), can be broken down into four general stages:

1. Offence reported
2. Police investigate offence
3. Suspect arrested
4. Police lay charges

Not every reported offence will move through these four stages. Indeed, it is clear from our clients' reported experiences that some reports to police will be given cursory attention and are dismissed immediately without any formal action taken. However, the most usual response encountered to the making of a report will be the process of a formal complaint and the compilation of a written statement, describing details of the alleged offence(s). This document will then guide much of the following police and prosecution response and it is often a critical document on which many of the following decision points are based. A poorly taken police statement may prejudice all the following stages, and later attempts to deal with the defects of a poor statement, by compiling a second or addendum statement(s), can attract allegations of recent fabrication designed to shore up an unmeritorious prosecution, or may otherwise be used by the defence in efforts to undermine the statement-maker's reliability.

Many of **knowmore's** clients who were brought up in large residential institutions during the 1950's and 1960's have disclosed that when they ran away as children from these institutions they were returned to these institutions by the police who apprehended them. Some have told **knowmore** that they directly told police about abuse within the institutions, but these complaints were dismissed as lies. Many then did not consider later reporting the offences against them as they had lost trust in the police. Graphic evidence about this was given to the Royal Commission by survivor Gordon Hill at the public hearing into Catholic Church authorities in Ballarat in May 2015 (Case Study 28).

The process of a police investigation will usually require the investigating officers to interview witnesses and any identified suspects. **knowmore's** clients, especially those who live in small communities, have expressed concern that this will lead to them being identified as a survivor of sexual abuse to family members and friends or to others in their community, such as fellow members of a Church congregation. This is a factor that most of **knowmore's** clients accept is an inevitable result of an investigation, but the knowledge that this will happen will prevent some survivors from making a report to police. This is a difficult decision for many survivors, particularly if they are aware that an offender still remains in a position where he has continuing contact with children, as they also wish to act to prevent any future abuse of children.

The impact of a police investigation into childhood sexual abuse where it informs an otherwise unaware family member can be significant and extremely traumatising. **knowmore** has been informed by a client that she discovered that her son was likely to have been sexually abused by a priest within her church many years after her son had committed suicide. Police spoke to her when they were investigating the priest for the sexual assault of another child. During the investigation police had seized and examined the priest's diary which listed her son's name, and the names of other boys, as well as the boy who had raised the complaint with them. It appeared that priest had listed the names of boys that he had abused. Her distress at this news was amplified as the priest had supported her and her family during the months that her son was in a coma and on life support, and even officiated at his funeral. As a result of this knowledge the client is extremely traumatised.

Some clients who hold these concerns have decided, where the facility exists, to make an anonymous report, or a report without instigating a formal investigation, in order to raise their concern about an offender with the authorities.

knowmore's clients who have reported to police have experienced widely varying responses from police during the reporting process. Factors identified by our clients as contributing to a positive experience include:

- feeling believed by police;
- being provided by police with information about the offender which contributes to the feeling of being believed (such as that he is known to police);
- time taken to build a relationship with the police officers involved, especially where the survivor has a feeling of distrust towards police;
- being permitted to give a statement in stages with frequent breaks;
- dealing with experienced officers from a specialist sexual assault unit;
- being treated seriously even when it is unlikely that an offender will be charged, such as it being known he is deceased or cannot be easily identified;
- being referred to a support service;
- being kept informed about the progress of an investigation; and
- being given information such as the response by an offender during interview, or about a decision such as that an offender will not be charged, in a way that is supportive and does not indicate doubt about the credibility of the survivor, or otherwise invalidate their experience.

Factors which our clients have identified as contributing to a negative experience include:

- feeling disbelieved, or that the seriousness of their experience is not understood; for example, being told that there is no point in giving a statement as the offender is likely never to be charged - particularly because the offences are too 'old', or that the offender is now themselves 'too old' to be charged;
- giving a statement in a single lengthy session, dealing with inexperienced officers, not being provided with information or finding it very difficult to speak to the relevant officer for lengthy periods of time; and
- feeling that the investigation is a formality and is not being conducted seriously, and being told things such as that because the offender during interview denied the offence there is insufficient evidence to charge him.

There can be marked differences in how the prosecution process is experienced between states in Australia. The Victorian Law Reform Commission Sexual Offences Final Report, July 2004 has stated:

5.61 Eastwood and Patton's study of the experiences of child complainants in Western Australia, New South Wales and Queensland also provides evidence that child complainants in Western Australia find the criminal justice process less stressful than complainants in New South Wales and Queensland where pre-recording was not used. Nearly two-thirds of child complainants in Western Australia said that if they were sexually abused again they would report sexual abuse again. By contrast, only 44% of Queensland children and 33% of New South Wales children said they would report again.

5.62 These differences were also evident in the responses of lawyers and judges. Forty-six percent of Western Australian lawyers and judges surveyed said they would want their child in the justice system if the child was a victim of serious sexual assault, compared with 18% in Queensland and 33% in New South Wales.

While it is noted that legislative changes enacted since the above study may now significantly alter some of the negative perceptions arising in certain jurisdictions, this research still stands as a striking example of how processes can impact upon the experiences of a survivor reporting abuse.

knowmore concurs with the recommendations of the Victorian Law Reform Commission²⁰ that police codes of conduct include:

- increased training to all police officers in the nature and dynamics of sexual assault, including the provision of that training in rural and remote areas;
- provide training on the social, psychological and cultural factors that may affect the behaviour of people who have been sexually assaulted and may result in them delaying in reporting an assault;
- increase numbers of police in specialist sexual assault units;
- provide a consistent approach to the handling of reports of sexual assault including coordination with sexual assault centres;
- use processes that minimise trauma during the investigative process:

²⁰ Sexual Offences Final Report, July 2004

- provide written reasons when a decision is made not to charge an offender or to take no further action in respect of a report; and
- determining appropriate time frames for the investigation of sexual offences and ensuring increased supervision regarding investigation time frames and appropriate contact and follow up.

The Prosecution Response (Police Prosecution Units and ODPPs)

The Office of the Director of Public Prosecution will usually take over the carriage of the prosecution of allegations of serious child sexual offences, at least by the point at which a Magistrates court sets down the charges for a committal hearing or equivalent process. While a public prosecutor may amend, add or withdraw a charge or charges they will usually do this only in relation to a charge or charges that have been initially laid by a police officer. However, at this point in the criminal justice process the charges will be closely examined to determine whether there is a reasonable prospect of a conviction and whether it is in the public interest to continue with a prosecution initiated by police. This is a higher test than that initially applied by the charging police officer. This is a point at which there is further and considerable attrition on charges:

Commonwealth, state and territory DPPs exercise considerable discretion in deciding whether to prosecute alleged offenders and how any such prosecution should proceed. This discretion is subject to prosecution policies or guidelines in each jurisdiction. DPPs are regularly subject to criticism about the exercise of their discretion in sexual assault matters and the exercise of prosecutorial discretion has been characterised as 'one of the most important but least understood aspects of the administration of criminal justice'.

Australian Law Reform Commission Report 114: Family Violence – A National Legal Response, October 2010, V 1 p. 1197

As set out in Figure 1 above, the eight major stages of the prosecution part of the criminal justice process are:

- | | |
|---|------------------------|
| 1. Director screens case | |
| 2. Committal hearing in lower court ²¹ | |
| 3. Not guilty plea: | Guilty plea: |
| Committal for trial | Committed for sentence |
| 4. Director screens case | |
| 5. Indictment presented | |
| 6. Trial | |
| 7. Convicted | |
| 8. Sentenced | |

The prosecutorial discretion which prosecutors will use during these stages is set out in guidelines issued by the various Directors of Public Prosecutions in accordance with their establishing Acts.²²

²¹ With the exception of Western Australia, which has abolished this step.

²² See for example, the Statement of Prosecution Policy and Guidelines 2005 (WA) and Statement of Prosecution Policy and Guidelines (SA)

There is often negotiation between the defence and prosecution, whereby the number and seriousness of charges may be reduced in return for the offender pleading guilty to an amended set of charges. All ODPPs have published guidelines²³ which set out the circumstances in which the prosecutorial discretion to conclude such negotiations is defined. This will usually involve a number of matters, including taking into account the views of victims of the offending on the proposed charge resolution.

For example, the Guidelines of the Director of Public Prosecutions for the Northern Territory sets out in detail the steps that a prosecutor must follow when engaging in charge 'bargaining' including a decision to alter a statement of facts or to discontinue or amend a charge. Additional steps are required when the offence in question is a sexual offence and this will usually include consultation with the victim with the assistance of the NTDP's witness assistance service.²⁴

However, as was demonstrated in the Royal Commission's Case Study 17 when examining the prosecution of an offender for alleged historical child sexual offences within the Retta Dixon Home, prosecution guidelines have in some cases not been followed.²⁵

In all Australian jurisdictions ODPPs are statutorily independent entities whose decisions on individual cases are not subject to a review process, and an aggrieved survivor will usually not be able to complain about the exercise of discretion except to the very agency which made the decision.

This issue was raised in Case Study 17 and it is understood that the Royal Commission will consider the issue of whether it is advisable for ODPPs to be subject to an independent review such as is the case in England.²⁶ **knowmore** supports the establishment of transparent, timely and effective review processes, which allow for participation by the victim, of decisions not to proceed with prosecutions.

knowmore was informed by a client that an offender was to go to trial in NSW in relation to a number of offences against him. The offender had pleaded not guilty to all charges. After a committal process a trial date was set and the survivor was required to attend court on the first day of the trial as a witness in the matter. The survivor suffered considerable stress at the prospect of being cross examined during the trial, however he was determined to give evidence in the matter to ensure that the offender was brought to justice. The survivor attended court on the first day of the trial in the expectation that he would give evidence and be cross examined, but when he arrived he was told by the prosecutor that a plea deal had been agreed with the defence and the offender would plead guilty to a lesser number of less serious offences. The survivor was not consulted about this agreement which he believed severely diminished the seriousness given to the criminal conduct of the offender and failed to hold the offender responsible for his actual offending. Following a plea of guilty on the plea arrangement the offender received a sentence of that the survivor thought was inadequate.

²³ *Ibid*

²⁴ Office of the Director of Public Prosecutions Guidelines Northern Territory, see:

<http://www.dpp.nt.gov.au/legal-resources/documents/dppguidelines.pdf>

²⁵ See for example paragraphs 101 -102 of the submissions on behalf of the Northern Territory responding to submissions dated 27 October 2014

²⁶ The English Crown Prosecution Service introduced a Victims Right to Review (VRR) policy in 2013. In launching the policy the CPS said: "*The introduction of VRR scheme follows the judgment of the Court of Appeal in R v Killick (2011), in which the court stated "as a decision not to prosecute is in reality a final decision for a victim, there must be a right to seek a review of such a decision." The court also ruled that reversing a decision could be compatible with a suspect's rights.*"

http://www.cps.gov.uk/news/latest_news/victims_right_to_review/

Police prosecution units perform similar functions in relation to less serious offences within the criminal justice system in all states, but not in the two territories.

In the some states, police prosecution units manage the prosecution of offences up to the time when they are transferred to ODPPs, which is usually at the point at which they are set down for a committal hearing or equivalent procedure. During this time police prosecutors are responsible for the management of such issues as the amendment and review of bail conditions and orders for the preparation of a committal brief. The poor quality management of a prosecution at this stage can have considerable negative consequences for the onward progression of that prosecution.

knowmore supports Recommendation 37 of the Victorian Law Reform Commission,²⁷ that:

knowmore was informed by a client that she was one of several children who complained to police about sexual abuse by a member of her church in a country town. The offender held both Australian citizenship and citizenship of another country. The offender was charged with a large number of serious child sexual offences. After a number of court appearances with failures by police to present evidence to court the charges were dismissed for 'want of prosecution'. The offender then left Australia and travelled to the country of his other citizenship. After a period of ten years he was sighted in the Australian country town. He was again charged and police refused bail. He was granted bail by a court but was either not required to surrender his passports or the order to do so was not enforced and he fled Australia to his country of other citizenship. Four years later the offender was sentenced to a lengthy prison term in his country of origin for child sexual offences he had committed against multiple children after he had fled Australia. He had again met these children through his membership of a church. Although police had known that he had fled to his country of other citizenship no attempt had been made to extradite him to Australia in that four year period as the police wrongly believed that Australia did not have an extradition treaty with that other country.

The Office of Public Prosecutions (OPP) should continue to offer a regular training program for solicitors and prosecutors involved in committals and trials in sexual offence cases. As well as dealing with legal issues the objectives of the program should include:

- *increasing prosecutors' understanding of the emotional, psychological and social impact of sexual assault on complainants in sexual offence cases, and how this may affect complainants in giving their evidence;*
- *providing information on the social context in which sexual offences typically occur;*
- *ensuring that prosecutors are aware of the advantages of meeting with complainants before the hearing and advising them about what will happen when they give their evidence;*
- *familiarising prosecutors with the use of all alternative arrangements available to assist witnesses in giving evidence, and of the advantages to complainants in giving their evidence in this way;*
- *liaising with witness support services to ensure that complainants receive support and information which prepares them for what will happen in court; and*
- *encouraging prosecutors to take appropriate steps to protect complainants from offensive, unfair or irrelevant cross-examination.*

Witness Assistance Services are usually attached to Offices of the Director of Public Prosecutions and support survivors to engage with prosecutors, as well as providing

²⁷ Sexual Offences Final Report, July 2004

additional support such as assistance to access financial support, counselling services and so forth. A review of the Victorian witness assistance service by the Victorian Law Reform Commission²⁸ called for:

A dedicated funding stream should be committed to the OPP based Witness Assistance Service to enable it to provide adequate support to all adult prosecution witnesses in sexual offences cases, both in Melbourne and in rural and regional areas.

The funding should be sufficient to enable the service to:

- *meet the needs of witnesses from non-English speaking background communities;*
- *meet the needs of Indigenous witnesses;*
- *meet the needs of witnesses with differing physical and intellectual requirements;*
- *respond to all appropriate requests for assistance in a timely manner;*
- *assess the needs of witnesses for support through the criminal justice process and develop a clear plan as to how this should be done;*
- *either directly provide or negotiate the provision, nature and level of assistance required to ensure that the witnesses' participation in the criminal justice system is as positive as possible and that the integrity of the judicial process is upheld; and*
- *ensure witnesses are made aware of, and where necessary assisted to access, any assistance required for longer term support arising from either the experience of surviving an offence or any negative effects from giving evidence at court.*

knowmore supports those recommendations.

Aboriginal and Torres Strait Islander survivors of child sexual abuse

Beyond the factors noted above, there are many specific factors impacting why Aboriginal and Torres Strait Islander survivors of child sexual abuse may not report their abuse; such as the impacts of previous government policies effecting the multi-generational removal of children; and the consequent distrust of police and other relevant authorities. There may also be language issues, meaning that interpreters may need to be used. Even with appropriate interpreters, police and court processes can be foreign and not culturally appropriate for Indigenous survivors.

Our Indigenous clients have also reported that cultural issues may impact upon reporting, including skin relationships between the survivor and the perpetrator, and other relationships between witnesses, such as seniority of the perpetrator within their community, and gender and age differences between the survivor and police interviewers.

Confidentiality for Aboriginal and Torres Strait Islander witnesses is paramount in order to minimise the pressure that can be put upon such witnesses. For example, in small and remote

²⁸ Sexual Offences Final Report, July 2004 p. 257

communities, the need for the police and the prosecution to ‘sequester’ complainants while they are going through the process becomes crucial to a matter reaching trial and its success. Often perpetrators, victims and their respective families continue to live within the same small community, even after the abuse has occurred. It is also noted there is often a lack of support for a survivor and their respective family who are residing in the same community as the perpetrator and their family members. The ALRC Report stated:²⁹

“Stakeholders noted the importance of Aboriginal and Torres Strait Islander- specific liaison and support positions throughout the legal system, including within the police, courts and service providers, such as witness assistance services.³⁰ The Aboriginal Family Violence and Prevention Legal Service Victoria referred to the need to delineate between victim and defendant support and advice services. The submission emphasised that such a distinction is necessary to ensure ‘confidentiality and to avoid perceived conflicts of interest.’

A survivor may have little or no option to leave their community. As a result that person may choose not to report to police as they have nowhere else to live and do not want to leave their community or their country.

As noted, often negative past experiences with police and other authorities deters Indigenous survivors from reporting crimes, including child sexual abuse, to the police.

The police or other government authorities may have been responsible for, or involved in, the removal of a survivor from their family to an institution where abuse subsequently occurred. In those circumstances it is understandable that a survivor would not be comfortable approaching police to report abuse. Indigenous children today remain over represented in the numbers of children removed from their natural families. For survivors who now have their own children, there is often a natural reticence to draw themselves to the attention of authorities in fear that their own children may be removed; there may also be a fear that the effects of their trauma as a survivor would be seen as making them unsuitable to raise their own children.

Working effectively with Aboriginal and Torres Strait Islander people is enhanced through an increased awareness and appreciation of cultural diversities, including where survivors come from; and the ‘interconnections’ between people through familial and ‘tribal’ links.

In the Australia Law Reform Commission’s 2010 Report on Family Violence, the following submission was made by a Community Legal Centre, established to deliver services to Indigenous women:³¹

“Aboriginal and Torres Strait Islander individuals and organisations emphasised that in engaging with Aboriginal and Torres Strait Islander women there needs to be regular, ongoing and culturally appropriate support throughout the whole process from the beginning of the investigation phase to the end of the prosecution phase. There is enormous pressure placed on Aboriginal women who report

²⁹ ALRC Report on *Family Violence* (2010), at paragraph 26.95, p. 1210.

³⁰ *Ibid.* Submission of Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; H McGlade, *Submission FV 84*, 2 June 2010.

³¹ ALRC Report on *Family Violence* (2010), at paragraph 26.93, p. 1209. Submission of Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

family violence by her partner/ex-partner, his family and sometimes their community. In cases of sexual violence, where the legal stakes and consequences can be even higher, that pressure can be unbearable.”

To assist in supporting the reporting by Aboriginal and Torres Strait Islander survivors, and to ensure that they receive culturally safe and appropriate support while engaging with police and prosecution processes, **knowmore** recommends that there should be:

- clear protocols explaining confidentiality issues and the circumstances under which information provided in the making of complaints may be shared with other government authorities;
- proactive and positive community engagement in communities to build and enhance respect and confidence, to overturn past attitudes;
- an Indigenous liaison service within each police service that could be a first point of contact for Indigenous survivors to facilitate reporting;
- Indigenous specific liaison through the legal process, starting at the time of the initial report and following until the finalisation of proceedings;
- Indigenous specific services providing culturally safe and appropriate counselling and emotional support to Indigenous survivors; and
- specific recruitment drives for Indigenous people to become police officers.

It is acknowledged that many state and territory police services have implemented at least some of the above supports. However, the reported experiences of our Aboriginal and Torres Strait Islander clients underline the need for commitment by all services to systems of culturally appropriate support and continuous improvement in the operation of those supports in practice.

Supports for other survivors

In respect of other marginalised communities, like survivors with disabilities; culturally and linguistically diverse ('CALD') survivors; as well as those who are members of LGBTI communities, there is also a need for specific and appropriate support services to be available to survivors when they are engaged in the police and prosecution phases.

CALD survivors will need to have trained, professional interpreters available to assist investigators and prosecutors in communicating with them. This needs to be supported through the making of relevant information available in appropriate languages and in formats accessible to, and readily understood by, different language or cultural groups.

Similarly, for example, for deaf survivors, AUSLAN interpreters may need to be available to assist in all phases of the process, as well as the appropriate support services to support the individual survivor/witness.

It is notable that several **knowmore** clients have reported negative interactions with police, when seeking to report child sexual offending against them, which they attribute (at least in part), to negative perceptions or discrimination by the police on the basis of the complainant's

sexuality. In contrast, other clients have reported much more positive experiences when engaging with nominated LGBTI liaison officers.