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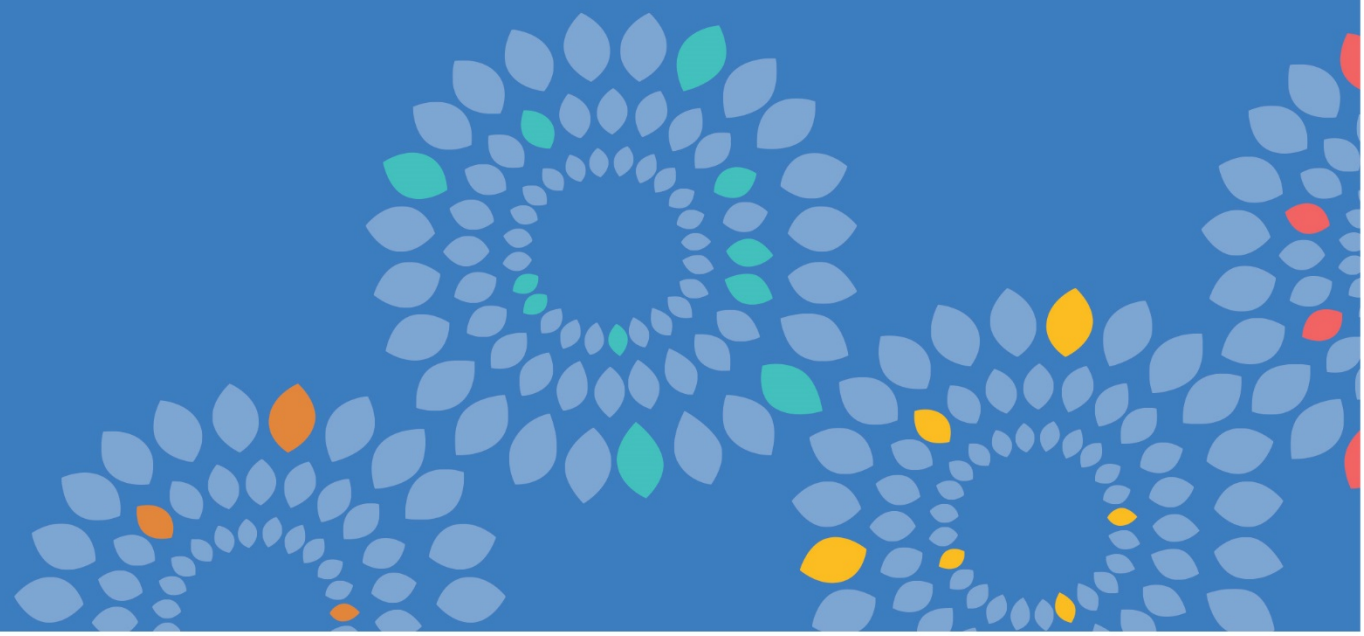
Submission to the Legal Affairs and Community Safety Committee

Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016 and the Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016

16 September 2016



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1 Introduction

knowmore is a free, national legal service providing legal advice and assistance, information and referral services via a free advice line and face-to-face services in key locations, for people considering telling their story or providing information to the Royal Commission into Institutional Responses to Child Sexual Abuse (the 'Royal Commission'). Our service is multidisciplinary, staffed by solicitors, counsellors, social workers and Aboriginal and Torres Strait Islander Engagement Advisors, and is conducted from offices in Brisbane, Sydney, Melbourne and Perth.

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.

Our service was launched in July 2013 and, since that time, we have now provided services to over 5,000 individual clients. The majority of those clients are survivors of institutional child sexual abuse. 24% of those clients live in Queensland. Around 20% of our clients identify as Aboriginal and/or Torres Strait Islanders.[1]

Many of the clients that we have assisted have been seeking legal advice about their options, if any, to obtain financial and other redress in relation to sexual and other abuse they suffered as children in institutions. Some of these clients have had direct experience with the civil litigation system; usually as a potential litigant seeking advice about a possible claim and the effect and operation of limitation periods, both upon their capacity to commence proceedings, and in resolving any claim. Very few have ever actually commenced civil proceedings; in many cases, this has been primarily due to the barrier presented by existing laws about limitation periods.

As noted below in our submission, the Royal Commission has highlighted research findings that the average time for a victim to disclose sexual abuse is 22 years. As a result of this common delay in disclosing child sexual abuse, at the present time **knowmore** lawyers regularly have to advise clients that any civil claim the client may have against the perpetrator of abuse, or the institution responsible for the client at the time of abuse, is out of time. **knowmore** does not represent clients in ongoing cases relating to actions for compensation, such as civil claims for damages or claims for redress made to an institution. We therefore do not advise clients upon issues such as the prospects of success of potential options; for example, whether their claim may be covered by one of the existing exceptions that might result in a court extending a limitation period. We do provide referral services, and in such circumstances we would advise clients about referral options to seek advice, about whether their claim may fall within one of the existing exemptions, from an experienced personal injury lawyer familiar with the issues arising in cases of claims for institutional abuse. For that purpose, we have established a national panel of experienced private lawyers, who meet

[1] See **knowmore**, *Service Snapshot* (Infographic, as at 30 June 2016). A copy is attached as Appendix 1 to this submission.

specific criteria that reflects their experience with and understanding of the needs of this client group, to whom we refer clients for such representation.

In responding to this Issues Paper, we have drawn on what we have learned, through our work, about the collective experience of our clients and their needs. It should be noted that much of the information provided by our clients, and also by the lawyers on our abovementioned panel, reflects recent and/or contemporaneous experiences (particularly in regard to institutional responses), rather than historical events.

knowmore believes that any reform should be guided by principles of fairness, equality and justice. Potential claimants should not be disadvantaged by the period in which they experienced abuse, nor the setting in which that abuse occurred.

We note the fundamental importance of ensuring that child abuse survivors/claimants are afforded meaningful opportunities to access justice and, most importantly, choice in how to pursue outcomes that are appropriate and important for them. In our experience,[2] and as found both by the Royal Commission[3] and by the Victorian Family and Community Development Parliamentary Committee (as set out in the Committee's report, *Betrayal of Trust*),[4] many survivors of child abuse will never be in a position to successfully pursue civil claims through the courts, as these particular claimants face additional legal and evidentiary barriers in accessing compensation through the civil litigation system. These barriers cannot be overcome by taking the single step of exempting child abuse claimants from the application of limitation periods.

In particular, absent the effecting of significant reform to the current law regarding vicarious liability in this context,[5] and other reforms as recommended by the Royal Commission around the identification of a proper defendant, it will remain challenging for survivors to establish claims against institutions and their officials (save for those who are direct perpetrators – who then often lack the means to satisfy any judgment).

We therefore reiterate our view, as set out in detail in our submissions to the Royal Commission, that it is both necessary and desirable to establish, and for all Queensland Parliamentarians to support, a national redress scheme for child abuse survivors. Without such a scheme, it is our view that many survivors will never be able to receive just outcomes that are truly meaningful for them.

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[2] **knowmore**, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper 5, Civil Litigation, pp.3 – 4. See www.knowmore.org.au/resources/issues-papers/

[3] Royal Commission Report, *Redress and Civil Litigation,* September 2015, see pp. 431 - 433

[4] Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust* (2014) Chapters 25 and 26

[5] As may occur through either the enactment of legislation as recommended by the Royal Commission (recommendations 89 – 93 of the *Redress and Civil Litigation* report), or through the evolution of the common law in Australia – see *Prince Alfred College v ADC* [2015] SASFC 161 - High Court appeal heard 21 July 2016, decision pending

2 The context for reform

i. General comments

This submission addresses the provisions of the Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016 ('the Government Bill') and the Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016 ('Mr Pyne's Bill'), which are directed towards reform of the existing limitation period laws, and related laws, that apply to claims for damages brought where that claim is founded on the personal injury of the claimant, resulting from childhood sexual abuse.

knowmore is fully supportive of law reform in this area which will enhance access to justice for survivors. We have supported such reform in previous submissions we have made to the Royal Commission[6] and in relation to the reforms occurring in Victoria and New South Wales,[7] and we partnered with Micah Projects in May this year to host a forum at Parliament House to address these issues.

It is well established that many survivors of child sexual abuse are unable to make a disclosure about their experiences until many years after their abuse. The Royal Commission has found that the average time for a survivor of such abuse, in an institutional context, to make a disclosure is 22 years, with men taking longer than women to disclose.[8] The current law in Queensland provides that actions for personal injuries must generally be brought within three years of when the cause of action arose, with extensions of time possible in only some narrow circumstances, including where the plaintiff was under a disability or was unaware of a material fact of a decisive character relating to their action. As such, the majority of survivors of institutional child sexual abuse occurring in Queensland have not to date been able to commence any claim because of the operation of existing limitation periods.

> "*It is a peculiarity of civil limitation laws, where applicable to historical child abuse cases, that the adult survivor is often faced with the Scylla of a constraining 'limitation window' for initiating civil law redress and the Charybdis of psychological incapacity (diagnostically attributable to the abuse) which may prevent the taking of such action until many years after the applicable limitation period has expired. Initiating a timely civil law action risks reviving traumatic memories of abuse – not least in terms of the minute scrutiny to which the allegations of abuse will be subjected in a court setting – at a time when the victim may not be mentally*

[6] See **knowmore**, Submission (Issues Paper 5 – Civil Litigation); Submission (Issues Paper 6 - Redress Schemes); Submission (Issues Paper 7 - Statutory victims of crime compensation schemes); and Submission (Consultation Paper 1 – Redress and Civil Litigation), to the Royal Commission into Institutional Responses to Child Sexual Abuse. All of these submissions can be viewed at our website: www.knowmore.org.au/resources/issues-papers

[7] See **knowmore**, Submission to the NSW Department of Justice, Discussion paper – *Limitation periods in civil claims for child sexual abuse;* and Submission to the Victorian Department of Justice, Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014, Exposure draft. These submissions can be viewed at our website: www.knowmore.org.au/resources/other-submissions/

[8] Royal Commission into Institutional Responses to Child Sexual Abuse; *Interim Report,* June 2014, at p.6

prepared for this; while delaying such action until the process of recovery from trauma is more advanced risks the loss of rights through the operation of civil limitation laws […] The civil wrongs capable of being classified under the rubric of 'child abuse' in a sense contain the seeds of their own 'forensic destruction' because, arguably, woven into the fabric of such wrongs (particularly child sexual abuse) is the resultant incapacity of an adult survivor to pursue timely legal redress against the abuser."[9]

The need for reform is clear, and our client group has been heartened to see that this need has been recognised through the introduction of the current Bills, and the broad bipartisan support for reform. Accordingly, our submission will not dwell upon why reform is needed.

Rather, the issue now is in relation to the details of the amending legislation needed to both give proper effect to the recommendations of the Royal Commission, and to afford improved access to justice to survivors.

ii. Recommendations of the Royal Commission

While the six Commissioners inquiring into institutional responses to child sexual abuse have been appointed by the Governor-General of the Commonwealth, all Australian States have issued Letters Patent (or their equivalent), to appoint the same six Commissioners to conduct an inquiry into institutional responses to child sexual abuse under their laws. The Commissioners were formally appointed under Queensland law[10] on 24 January 2013.

The Royal Commission's report on *Redress and Civil Litigation,* produced following extensive public hearings and lengthy consultation with stakeholders (including institutions and their insurers), and the receipt of public submissions, persuasively makes the case for why limitation periods should be removed for claims for damages arising from child sexual abuse. The Royal Commission's recommendations about the reform of our civil litigation system, including those for the removal of limitation periods, were also made in the context of all of the information and evidence provided to the Royal Commission by thousands of survivors in private sessions and at public hearings, and in recognition of the manifest inadequacies of the other existing avenues presently available to survivors seeking justice, including through institutional redress schemes and statutory victims of crime schemes. In the Executive Summary of its final report on *Redress and Civil Litigation*, released in September 2015, the Royal Commission made the following remarks:

Limitation periods are a significant, sometimes insurmountable, barrier to survivors pursuing civil litigation.

We are satisfied that current limitation periods are inappropriate given the length of time that many survivors of child sexual abuse take to disclose their abuse.

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[9] Hamish Ross, 'Adults as grown-up children – a perspective on children's rights' (2013) 27 *Australian Journal of Family Law* 235, 245

[10] *Commissions of Inquiry Act 1950* (Qld)

We recognise that there are benefits to all parties if civil proceedings are determined as close as possible to the time the injury is alleged to have occurred. However, we are satisfied that the limitation period for commencing civil litigation for personal injury related to child sexual abuse should be removed and that the removal should be retrospective in operation.

It seems to us that the objective should be to allow claims for damages that arise from allegations of institutional child sexual abuse to be determined on their merits. It is also desirable that national consistency be sought in this area.

We acknowledge that institutions may face additional claims as a result of the removal of limitation periods with retrospective effect. However, we are satisfied that limitation periods have worked great injustices against survivors for some time. We consider that institutions' interests are adequately protected by the need for a claimant to prove his or her case on admissible evidence and by the court's power to stay proceedings in the event that a fair trial is not possible. Institutions can also take steps to limit expensive and time-consuming litigation by offering effective redress and by moving quickly and fairly to investigate, accept and settle meritorious claims.

Removing limitation periods may create a risk that courts will interpret the removal as an indication that they should exercise their powers to stay proceedings in a more limited fashion. We consider that it should be made clear that the removal of limitation periods does not affect the courts' existing powers.

We consider that state and territory governments should implement our recommendations to remove limitation periods as soon as possible.[11]

Those findings, and the Royal Commission's corresponding recommendations, are the starting points for consideration of the two Bills currently before the Committee.

Another important principle to be borne in mind in enacting reform is that of consistency across Australia. There should not be arbitrary inconsistencies across the range of rights afforded to survivors of child abuse merely because of the jurisdiction(s) where they were abused. Indeed, this is one of the major failings of past and existing institutional redress schemes, where gross inconsistencies in access to justice exist across State and Territory boundaries and across different institutions. This injustice should not be replicated in any reform efforts.

We would also note that many survivors of institutional abuse have waited decades for justice. 62% of our clients are aged 45 years or older. Many of the issues uncovered by the Royal Commission around institutional failings and the lack of access to justice for survivors have been addressed in past inquiries impacting upon Queensland, including the Forde Inquiry into Abuse of Children in Queensland Institutions; and at the Commonwealth level the Senate Inquiry into Children in Institutional Care, culminating in the publishing of the

[11] Royal Commission *Redress and Civil Litigation Report,* at p.52, and see Recommendations 85 – 89

Forgotten Australians report in 2004, and an apology to survivors being delivered in the Federal Parliament in November 2009.

The passing of legislation by the Queensland Parliament which removes limitation periods will help to remove a significant barrier that survivors face in seeking justice, while also helping to ensure that institutions are held accountable for the acts and omissions that occurred and which resulted in harm to so many children.

iii. Developments in other jurisdictions

Victoria,[12] New South Wales and the Australian Capital Territory have already acted to implement the Royal Commission's recommendations upon the removal of limitation periods, allowing survivors to claim damages arising from personal injury suffered through child abuse.

In Victoria, the *Limitation of Actions Amendment (Child Abuse) Act 2015* resulted in the removal of limitation periods that previously applied to actions in respect of causes of action relating to death or personal injury resulting from child abuse. A similar outcome was achieved in New South Wales with the passing earlier this year of the *Limitation Amendment (Child Abuse) Act 2016,* and in the Australian Capital Territory the *Justice and Community Safety Legislation Amendment Act 2016 (No. 2)* was passed last month.

In Western Australia, the *Limitation Amendment (Child Sexual Abuse Actions) Bill 2015* has been introduced as a private member's Bill by a Liberal Party member (reportedly now supported by the Government).[13] We understand it will be debated by that State Parliament later this year.

There are important differences between the above amending Acts, and the two Bills currently the subject of this Committee's inquiry. We will address those issues below.

3 Comments on the Bills

i. Scope of the amendments

Two primary issues of 'scope' arise for consideration; namely –

- the forms of abuse relevant to claims to be exempted from limitation periods (i.e. only sexual abuse, or should other forms of abuse be included?) and
- the setting in which such abuse occurred (i.e. only in 'institutional' contexts, or abuse occurring in any context?)

[12] In Victoria, there was also bipartisan commitment to implementation of the recommendations made in *Betrayal of Trust,* the report of the Family and Community Development Committee's Inquiry into the Handling of Child Abuse by Religious and other Non-Governmental Organisations, tabled on 13 November 2013; see particularly Recommendation 26.3

[13] See "Lift limit in abuse claims, urges MP*", The Sunday Times,* Perth, 10 April 2016, at p.2

The Government Bill seeks to remove limitation periods for actions for damages relating to the personal injury of a person *"… resulting from the sexual abuse of the person in an institutional context."* [14]

Mr Pyne's Bill seeks to make actions relating to personal injury *"resulting from child abuse"* not subject to a limitation period.[15] This Bill, for the purposes of limitation period reform, also does not limit *'child abuse'* to institutional contexts. Under clause 7 of Mr Pyne's Bill, child abuse is defined in identical terms to the legislation now in place in New South Wales; as including sexual abuse, serious physical abuse, and any other abuse perpetrated in connection with the sexual abuse or serious physical abuse (as explained further below).

a. Forms of abuse covered

It must be clearly understood that the Royal Commission's recommendations were necessarily limited by the Letters Patent issued to it, which for present purposes, restricted it to the context of considering child sexual abuse occurring in institutional settings.[16] However, as the Letters Patent specifically acknowledged, child sexual abuse *"may be accompanied by other unlawful or improper treatment of children, including physical assault, exploitation, deprivation and neglect."*

Indeed, this is the reported experience of the majority of our survivor clients. The evidence in so many of the Royal Commission's public hearings to date establishes both the prevailing brutality and the frequency of multiple forms of abuse in many Australian institutions entrusted with the care of children. This reality needs to be recognised in the steps now being taken to enhance survivors' access to justice by removing limitation periods.

In our initial submission to the Royal Commission about redress, we made the following observations about the scope of a recommended national redress scheme, which are apposite in the present context of the scope of claims in respect of which the limitation period should be removed:

> *"… the sexual abuse of children in many institutions, especially residential homes, rarely occurred in isolation of physical and emotional abuse, and that at times, the boundaries between different forms of abuse often overlapped. Some of our clients have spoken of institutional cultures where extreme physical abuse and degradation of children created a culture which in turn facilitated the occurrence of sexual abuse…*
>
> *We have also spoken to clients who suffered extreme physical and emotional abuse in residential homes and other institutional settings, but who did not experience sexual abuse within the Royal Commission's Terms of Reference. The overwhelming majority of clients who have reported surviving sexual abuse also report enduring physical and emotional abuse; in many institutions, particularly residential home settings, it seems rare for sexual abuse to have occurred in isolation of other mistreatment.*

[14] Clause 4 of the Government Bill (emphasis added)
[15] Clause 9 (emphasis added)
[16] See generally the discussion at pp. 99-102 of the Royal Commission's report, *Redress and Civil Litigation*

While the reasons for the limitations of the current Royal Commission's scope are understood, in terms of the magnitude of the Commission's existing task and the need to make timely reports and recommendations, it is perhaps difficult to maintain why any national redress scheme, if one is established, should be so restricted and exclude those who suffered abuse in institutional contexts as children, which did not involve sexual abuse. Further, the limitation of any such scheme simply to childhood sexual abuse would mean that many claimants would be forced to undertake more than one process to seek redress (which in itself will be re-traumatising) and may, for the reasons set out herein, have no recourse to redress for the non-sexual aspects of their institutional abuse."

The Victorian and New South Wales' positions present wider, and slightly differing models for reform. Both of those States have removed limitation periods for claims relating to 'child abuse'. The ACT took a limited approach, consistent with the strict scope of the Royal Commission's recommendations and the current Queensland Government Bill.

The Victorian 2015 amending legislation removed limitation periods so that they do not apply to actions founded on death or personal injury resulting from acts of physical or sexual abuse of a child, and psychological abuse that arises out of physical and sexual abuse.[17] The Victorian *Limitation of Actions Act 1958* does not define physical or sexual abuse and courts are able to interpret these terms by reference to their ordinary meaning, informed by the inquiry work undertaken by the Victorian Parliamentary Committee inquiry and the Royal Commission.

Similarly, in New South Wales an action for damages that relates to the death of or personal injury to a person resulting from an act or omission that constitutes 'child abuse' of the person may be brought at any time and is not subject to any limitation period under the *Limitation Act 1969* (NSW).[18] The New South Wales laws cover sexual abuse, serious physical abuse, or other abuse perpetrated in connection with sexual or serious physical abuse against a child. 'Connected abuse' is any abuse linked to the sexual or serious physical abuse, whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse.

The New South Wales' position on this issue is reflected in Mr Pyne's Bill, and differs from the Victorian position in that:

- there is included a 'threshold' for physical abuse; i.e. that it must be 'serious'; and
- it extends to 'connected abuse' linked to sexual or serious physical abuse, compared to 'psychological abuse' only, arising out of the act or omission that is sexual or physical abuse.

We are of the view that Parliament should pass legislation that removes limitation periods not just for claims arising from child sexual abuse, but also for claims of serious physical

[17] See *Limitation of Actions Act 1958* (Vic) Part IIA, Division 5 of that Act
[18] *Limitation Act 1969* (NSW) s.6A

abuse and, once either of those thresholds is met, any connected abuse. Accordingly, we favour the New South Wales' provisions.

Given the rationale for removing limitation periods for claims arising from child abuse, it is reasonable, in our view, to import a threshold of 'serious' for claims involving a component of physical abuse, particularly absent a claim of sexual abuse.

The concept of 'connected abuse' will also allow a court to consider all forms of abuse associated with a survivor's experience of childhood sexual or serious physical abuse. It will also prevent definitional arguments arising round the point of whether a particular form of mistreatment amounts to 'psychological abuse' or not.

These terms should not be defined in legislation, and should bear their ordinary meaning, and be informed by the work of the Royal Commission and other inquiries; for example, in recognising that the harm caused to an individual by a particular form of abuse may vary considerably across survivors.

Importantly, an approach providing for child abuse to include sexual, serious physical and connected abuse would allow a court to consider all of a survivor's experiences of abuse when determining a claim. It will also hold perpetrators and institutions properly accountable for all of their acts and omissions, and not just for some of them. It is illogical, and will be highly re-traumatising, to expect survivors to separate aspects of their experience into those involving only sexual abuse, which may be pursued in the courts with no limitation issue, and other aspects of serious abuse, for which a limitation period barrier will continue to exist, and for which they must pursue other avenues in an attempt to seek justice. From our experience in working with survivor clients, it is beyond doubt that survivors will regard such an outcome as traumatising and invalidating of their experiences in general.

b. Context of the abuse

We can see no sound policy reason for not extending the reforming legislation to cover claims arising from child abuse in all contexts, and not just institutional settings.

One objective of law reform in this area should be to ensure that the cost of child abuse is fairly borne by those who were responsible for that harm. Under the current laws, the considerable cost of child sexual abuse is disproportionately borne by survivors and the Australian community, rather than individual perpetrators and institutions where the abuse took place. The cost of unresolved childhood trauma in Australia caused by sexual, emotional and physical abuse has recently been calculated as $6.8 billion annually.[19] Perpetrators and institutions are able to take advantage of the current law to avoid bearing a fair proportion of this cost, at least in part, because of the current laws that apply to limitation periods for civil claims (and other liability issues, such as vicarious liability).

Parliament should not pass legislation that creates different classes of survivors of child abuse. Perpetrators of such abuse, in any setting,[20] should be held liable civilly for their acts

[19] ASCA, *The cost of unresolved childhood trauma and abuse in adults in Australia,* January 2015, 41.
[20] Including those who bear vicarious responsibility

and omissions, irrespective of the context. While many offenders will ultimately lack the financial means to satisfy a judgment, some offenders will inevitably have assets and it is just that they should pay compensation.

It must also be understood here that for many survivors, the wish to take action against those responsible for their abuse is not motivated exclusively, or even predominantly, by a desire to obtain financial assistance. Our clients have spoken of multiple objectives in wanting to take civil legal action, or to pursue other redress, for the harm they have experienced as a result of child abuse. In **knowmore's** submission responding to the Royal Commission's Issues Paper on *Civil Litigation,*[21] we made the following observations about why survivors of institutional child sexual might wish to take civil action; these remarks apply equally to survivors of child abuse that occurred in other contexts:

> *In our experience, survivors wish to use the civil litigation system for a number of reasons. Aside from the obvious motive of seeking an appropriate award of financial compensation, many clients wish to utilise a process to obtain various non-financial and/or therapeutic outcomes. These include:*
>
> - *public affirmation that they were wronged;*
> - *to seek a sense of justice, especially where an offender's death means that the criminal justice system is not an option;*
> - *to obtain a sense of closure;*
> - *to secure an apology and a sense that the institution has been brought to account;*
> - *to ensure that the specific institution implements policy and procedural reforms;*
> - *for the purposes of specific and general deterrence (to reduce the future incidence of child sexual abuse in institutional contexts, and more generally);* [22] *and*
> - *to obtain personal retribution against their abuser(s) and the institution.*
>
> *These are all goals pursued in search of social responses to injustice, rather than ones focused on financial redress, and should be borne in mind in considering what governments and institutions should do to address or alleviate the impact of past and future child sexual abuse in institutional contexts.*

Importantly, such an approach would also make the law in Queensland consistent with that in Victoria and New South Wales. Survivors of child abuse that occurred in Queensland should not have lesser rights than survivors who were abused in other Australian States.

Additionally, extending the reforms to cover all settings will mean that cases will not be able to be contested on definitional points around whether, for example, the abuse occurred in an 'institutional context', and/or the perpetrator was an 'official of an institution'. [23] The wider approach will promote the determination of claims on their merits and reduce the

[21] **knowmore**, Submission (Issues Paper 5 – Civil Litigation), at pp.1 - 2

[22] We have heard many survivors explain that one of their primary motivations in coming forward to disclose their experience of child sexual abuse is so that *"what happened to me doesn't happen to other children in future"*

[23] Clause 4, inserting a new s.11A, which defines these terms, and also the term 'institution'

costs for survivors in pursuing claims (and also the costs for our Courts), and the time involved in any proceedings.

The point is not an abstract one. In assisting thousands of clients to date, our service has encountered a number of cases where a live question has arisen, in the context of advising a client about whether the Royal Commission will accept that survivor as being "within terms" for the purposes of engaging, as to whether the sexual abuse suffered by the client occurred in an institutional context. Some such examples include:

- where the sexual abuse was perpetrated by a religious figure, who also had a familial or other relationship with the child victim and his or her family, outside of the structure of the relevant church (e.g. a religious Minister assaulting a child who was his nephew, and with whom he had contact in both Church and family circles);
- children who were legally adopted and then sexually abused by an adoptive parent (a context regarded as 'outside terms' by the Royal Commission); and
- contexts where children were abused while their parents were members of groups which might be described as 'cults' or 'sects'. In such cases, for the purposes of the Royal Commission's jurisdiction, it has been necessary to closely examine the circumstances of the abuse in order to seek to establish whether the group and the setting had indicia of being an 'institution' or an 'institutional context'.

These definitional issues simply do not arise if the wider approach is adopted.

ii. Preservation of courts' powers

Clause 4 of the Government Bill, through the insertion of a new section 11A(5), expressly preserves the existing jurisdiction and powers of the court (such as the power to stay proceedings for an abuse of process or where a fair trial is not possible due, for example, to prejudice arising from the passage of time). This provision gives effect to the Royal Commission's recommendation No. 87.

A different approach is taken in Mr Pyne's Bill, through Clause 5 and the insertion of a new s.22A in the *Civil Proceedings Act 2011*. That provision impacts upon the power of a court to stay or dismiss a proceeding for personal injury resulting from child abuse, where specified factors are present – such as where the defendant is an institution and seeks to stay proceedings due to the passage of time, and where the institution was the cause of the passage of time.

Clause 5 of Mr Pyne's Bill is clearly well-intentioned. However, we would question whether its enactment may have unintended consequences, which might operate to the detriment of survivor claimants.

On balance, our view is that the discretion of the court to determine any application for a stay of proceedings is best left unfettered. This is for the following reasons:

- It is well established in our law that a stay of proceedings is an exceptional remedy.[24]

[24] See *Walton v Gardiner* (1993) 177 CLR 378 and related authorities

- Many of the factors listed in Mr Pyne's Bill are ones which, under the current law, would be taken into consideration by a court in determining a stay application (should one be made), and which would strongly mitigate against granting a stay. For example, it is difficult to conceive of how an application for a stay or dismissal of a claim on the grounds of prejudice through the passage of time, or abuse of process, could seriously be advanced by a defendant, or contemplated by a court, where the defendant has previously made an admission about liability for the child abuse founding the action.[25]

- The approach of expressly providing for certain circumstances which prevent a court from staying or dismissing a proceeding may in fact encourage the making of applications for stays or dismissals by defendant institutions in cases based on historical abuse, where none of those factors exist. There are also other factors or circumstances, not listed in the Bill, which would weigh against granting any stay application; such as where acts or omissions of the defendant may not have contributed to delay in the start of proceedings, but may make the granting of a stay unjust in all the circumstances.

- The inclusion of the current subsections (iii) and (iv) of the proposed new s.22A(1) must inevitably lead to a chilling of institutions' preparedness, in responding to a complaint or report of child abuse, to offer any apology or other form of acknowledgement to the survivor, particularly at an early stage.

  There are many reasons why survivors of child abuse seek justice, including to receive an apology or other acknowledgement from the perpetrator and institution responsible. The importance of these outcomes to survivors has been a consistent feature or our engagement with our clients, and has been addressed at length in the work of the Royal Commission; see for example Chapter 5 of the Commission's report on *Redress and Civil Litigation* (Direct personal responses). The critical importance of responding to claims in a consistent, compassionate way that minimizes re-traumatisation for survivors also underpins the recently released *Whole-of-Government Guidelines for responding to civil litigation involving child sexual abuse.*

  In short, we apprehend that the inclusion of these provisions is likely to lead to the entrenching of a more adversarial response when a claim is notified, either as a precursor to a civil claim for damages for personal injury, or under some institutional or other redress process. In particular, for institutions which have any relevant insurance coverage, the provisions will drive the defendant to make no admissions or responses which may later attract an argument around the potential availability of an application to stay or dismiss any consequent civil proceeding, and whether the defendant has complied with its obligations under the contract of insurance.

[25] Clause 5, draft s. 22A(1)(v)

Such consequences will embed a strong reluctance on the part of defendants to make any admissions about the circumstances of the reported abuse, and will in turn impact upon preparedness to contemplate any early resolution of a claim.

The provision relating to apologies also would appear to conflict with the current provisions in the *Civil Liability Act 2003* regarding the effect on liability and inadmissibility into evidence of expressions of regret and apologies.[26]

iii. Past settlements

Mr Pyne's Bill contains provisions which would allow for past settlements of claims involving child abuse to be revisited. The Explanatory Note accompanying Mr Pyne's Bill indicates that:

> "*… the re-actioning of past settlements has been specifically restricted to cases which are unjust on the basis of time limits. Cases which have been heard on their merits or cases that have been heard within time are not able to be revisited.*
>
> *Appropriate consideration is given to past settlements in that a future fairer settlement is to be reduced by the amount of any previous settlement already paid."*

We have noted above some of the major legal difficulties that survivors have faced when approaching institutions for any redress related outcome, including through possible civil action claiming damages. The cumulative effect of all of these barriers, of which limitation periods is perhaps the foremost, has meant that when entering settlement discussions, either during actual civil litigation or more commonly while participating in institutional redress schemes, these difficulties were ever present in the context of settlement negotiations, informing the positions of defendant institutions and in effect putting the survivor at the institution's 'mercy'.

We have dealt with many clients who have told us that they felt that they were effectively coerced into settling their claims, on the basis that if they did not accept the amount of monetary compensation offered by the institution (which they perceived as inadequate), their only other option was to take the matter to court, in circumstances where they were in receipt of advice that any such action would in all likelihood be doomed to failure, due to the limitation barrier alone. In those circumstances, the majority of our clients in such positions understandably resolved their claims by accepting the financial settlements offered, where, on any objective assessment, that settlement was manifestly inadequate and arbitrary in nature, bearing no similarity at all to the quantum of damages they would have received had they been able to litigate their matter before a court. We have seen many clients who have told us of their experience of suffering prolonged sexual and other abuse as children while in institutions, with consequential and debilitating complex trauma and its associated life-long adverse effects, who reluctantly resolved their claim against the institution for financial amounts of often less than $20,000, inclusive of their costs. For these survivors, the power imbalance present at the time of their abuse is replicated, with

[26] See sections 68 - 72D of that Act

further trauma, by the inequality inherent in the respective positions of survivor and institution.

It is our clients' collective experience that nearly all settlements with an institution, including claims made under the Queensland Redress Scheme established following the Forde Inquiry, involved execution of a deed of settlement upon resolution of the claim. Typically, those deeds expressly excluded any admission of liability and required a claimant to release the relevant institution, and often the State (in circumstances where they may have been a Ward of the State, for example) from any and all liability for any claim relating to the claimant's mistreatment by the institution or the government or any official or person associated with either entity. In short, nearly all of the clients we have assisted who have faced these circumstances were required to execute a binding and comprehensive deed of settlement that saw them forego any future rights of action. Absent the institution now waiving its rights under any such deed, the prospects of a survivor having such a deed overturned, under the current law, are remote.

Additionally, we have assisted many clients who resolved past claims on the basis of only making limited disclosures about their abuse; for example, it is common for survivors to have only disclosed physical and not sexual abuse; or to have only disclosed information about some perpetrators, and not others. The reasons for such limited disclosure are based in the clients' experience of complex trauma, and reflect the general reasons underlying why disclosure may take decades for many survivors. In executing wide-ranging deeds of release relating to all claims, these survivors have effectively foregone any future rights to seeking justice for their undisclosed abuse.

The above circumstances have impacted, very adversely, upon many Queenslanders who are survivors of child abuse. Accordingly we support the position that if a right of action relating to child abuse was previously settled, in circumstances where the expiration of a limitation period was a factor, that settlement should not now prevent that survivor accessing justice.

Further, we note that the work of the Royal Commission since 2013 has exposed shocking, systemic and gross failures to properly care for children and to respond to notifications about child sexual abuse across a broad range of Australian institutions, including Churches, schools and residential facilities. Despite this reality, and the accompanying apologies and admissions made by multiple senior officials at public hearing after public hearing of the Royal Commission, very few of those institutions have shown any inclination to actively revisit past and settled claims (or if so, to offer increased and adequate compensation, in light of the exposure of gross institutional culpability and unfair practices in resolving past claims). There have been some instances, such as the approach taken by the Christian Brothers in Western Australia to revisit and increase many previous settlements, and the agreement by the Anglican Diocese of Southern Queensland to refund school fees of students sexually abused at its schools, but they are rare. This reluctance is unlikely to change in any way for the better once the spotlight of the Royal Commission is removed at the end of 2017. Accordingly, in the absence of institutional willingness to do what is clearly right and fair, legislative action should be taken to afford survivors access to justice.

While defendants who have had the benefit of such deeds or release may complain about 'infringement' of finalised rights and obligations, there will only be an adverse impact on those defendants where it can be demonstrated that a past settlement has been inadequate and unfair to a survivor. Defendants who paid just compensation have little to fear from such reform.

It is only fair in such circumstances that regard be had to the quantum of any prior, relevant settlement.

iv. Right to trial by jury

Mr Pyne's Bill (Clause 3) seeks to reintroduce the right to trial by jury for civil actions for personal injury resulting from child abuse.

We neither support nor oppose this proposal. We understand that some survivors may wish to have their matter determined by a jury, and that wish must be respected.

However, we make two observations on this proposal. First, not all survivors contemplating civil proceedings would wish to have their matter determined by a jury, given the very personal nature of their experience of abuse and the difficulties many encounter in any context where they are required to disclose their story. This concern is likely to be magnified in regional areas where potential juror pools are drawn from the local population. If restored, the right to trial by jury in a case of child abuse should not be exercisable at the election of a defendant alone.

Secondly, the option of a jury trial will add to the cost and length of any trial, for the parties, but more so for our courts.

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, Perth 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 30th June 2016, we've helped:

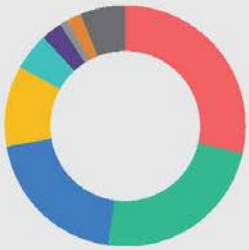
4910 unique clients

35910 client activities

Our current client-facing team includes:

- 19 lawyers
- 7 social workers/counsellors
- 6 Aboriginal and Torres Strait Islander engagement advisors

Calls came from



NSW	29%
QLD	24%
VIC	20%
WA	11%
SA	5%
TAS	3%
ACT	1%
NT	2%
Unspecified/Overseas	6%

Community outreach and liaison

Face to face legal services were provided to **417 clients**

knowmore has conducted or participated in **1234** community outreach and liaison events

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

As at 30th June 2016

knowmore
Service snapshot

Counselling/ social work

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

2808 clients received social work/counselling support either directly or through case consultation

2302 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

20% of our clients identify as being of Aboriginal and Torres Strait Islander descent

We employ 6 experienced male and female Aboriginal engagement advisors and an Aboriginal lawyer

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

62% were aged 45 and over

42% identified as females

58% identified as males

23% required more than one advice session

Feedback

From a client...

"Thank you so much for the great work and words and deeds in support and understanding you have been putting into my case with me and for me, resulting greatly in the way I am feeling about myself today."

From a client after a private session with the Royal Commission...

"I can't thank you enough for your help, I couldn't have got through today without [*knowmore's*] support and I do know that."

From a client...

"I'm doing what [*knowmore counsellor*] suggested and writing things down so I can hopefully get a completed story for that part of my life, then I may settle somewhat. Thank you so very much, you have not just provided me with support, but comfort and incentive, it that's the right word."

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