Free advice line 1800 605 762
Website knowmore.org.au

knowmore
Free legal help to navigate the Royal Commission

Our Ref: KB: WGS
Please reply to: Melbourne office

1 December 2014

Limitations Exposure Draft
C/- Department of Justice
GPO Box 4356
MELBOURNE VIC 3000

By email: limitation.submissions@justice.vic.gov.au

Dear Colleagues,

RE: LIMITATIONS OF ACTIONS AMENDMENT (CRIMINAL CHILD ABUSE) BILL 2014 - EXPOSURE DRAFT

We enclose **knowmore**'s submission in response to the *Exposure Draft - Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014 Discussion Paper*.

Thank you for the invitation to comment on the draft Bill, and for considering our submission and its accompanying recommendations. We have no concerns about this submission being published.

Should you wish to discuss our submission further, please contact me on (02) 8267 7400.

Yours Sincerely

WARREN STRANGE
Acting Executive Officer

ENCL. *Submission to the Victorian Department of Justice*

Submission to the Victorian Department of Justice

Exposure Draft - Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014

1. INTRODUCTION

knowmore is a free, national service providing legal advice and assistance, information and referral 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 staffed by solicitors, counsellors, social workers and Aboriginal and Torres Strait Islander Cultural Liaison Officers and is conducted from offices in Sydney, Melbourne, Brisbane and Perth.

knowmore has been established by the National Association of Community Legal Centres Inc., 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 provided 4,778 client advices to over 1,800 clients. The types of assistance we provide include:

- information about the Royal Commission, its legal powers and procedures, the roles of the Commissioners and others involved, rights of representation before it and the Commission's guidelines and statements about how it intends to proceed;
- legal advice for people considering providing information to the Royal Commission about their options and what they may mean;
- legal advice on a range of legal issues including witness and informant protections, the availability of compensation or other forms of action or redress, and the effect of confidentiality agreements in past proceedings;
- linking people with specialist counselling and support services and victims' support groups; and
- preparation of statements and assistance with preparing submissions about needed reforms.

Many of the clients we assist are seeking legal advice about their options, if any, to obtain financial and other redress in relation to child abuse they suffered in institutional contexts. Many of our clients have had direct experiences with civil litigation, redress and victims compensation systems, including the operation and effect of limitation periods in the commencement and resolution of civil proceedings for personal injuries related to child abuse, and in related settlement negotiations.

The experiences of **knowmore**'s clients, as well as the Royal Commission's work more generally,[1] confirms evidence that the Victorian Family and Community Development Parliamentary Committee ("the Committee") has heard about child sexual abuse and supports many if not all of the recommendations set out in the Committee's report, *Betrayal of Trust*. Implementing recommendation 26.3 is an important step in ensuring that child abuse survivors/claimants are given meaningful opportunities to access justice. However, in our experience,[2] and as found by the Committee,[3] 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 exempting child abuse claimants from the application of limitation periods.

We therefore confirm our view, as set out in detail in our submissions to the Royal Commission,[4] that it is both necessary and desirable to establish, and for the Victorian Government to support, a national redress scheme for child abuse claimants. Without such a scheme, it is our view that, for the majority of claimants, the recommendations in *Betrayal of Trust* cannot be truly and meaningfully realised in a way that delivers justice for those survivors.

2. DISCUSSION QUESTIONS

1. Whether the Bill's definition of "criminal child abuse" appropriately covers all cases of child abuse that should be encompassed within the reforms.

We agree with the approach of including 'physical' abuse in the definition. The reported experience of our clients is that very often sexual abuse in an institutional context was accompanied by other forms of abuse, including physical and emotional abuse and neglect.

We also agree with the imposition of the requirement that the relevant abuse 'could' constitute a criminal offence; however, we submit that the Bill's definition of "criminal child abuse" should be broadened to include acts or omissions constituting a criminal offence under the law existing at the time the claim is actioned, rather than only at the law at the time the abuse occurred. This is so for several reasons.

First, sexual offence laws in Victoria have undergone significant reform from the 1960s to date. Some acts, which are now sexual offences, were not in the past; or are now categorised as more serious offences. For example, until the introduction of the *Crimes Sexual Offences Act 1980*, oral rape of a male child was then classified as the relatively minor offence of indecent assault[5], which had a maximum penalty of 10 years

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[1] Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (2014) 180-185; Case Studies 3, 4, 5, 7, 9, 11, 12, 13, 16, 17 and 19

[2] **knowmore**, Submission No 17 to the Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper 5, Civil Litigation, pp.3-4

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

[4] **knowmore**, Submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse; Issues Paper 5 - Civil Litigation; Issues Paper 6 – Redress Schemes; and Issues Paper 7 – Statutory victims of crime compensation schemes. Viewed at http://www.childabuseroyalcommission.gov.au/research/issues-papers-submissions

[5] At common law, an indecent assault was an assault accompanied by circumstances of indecency: *R v Nesbitt* [1953] VLR 298. The issue of whether an assault occurred in "indecent circumstances" is an objective one, to be assessed according to community

imprisonment.[6] This conduct now constitutes the offence of rape, which carries a maximum penalty of 25 years imprisonment.

These changes notwithstanding, it is difficult to think of an act of physical or sexual abuse involving physical contact that would not have amounted to a criminal offence under state law, at any reasonably relevant point of time. However, it must be recognised that there are now a number of offences which have developed because of societal change, particularly changing technology which has created new methods of offending against children. These offences may or may not involve an element of contact or assault; for example:

a. grooming offences, as enacted earlier this year in Victoria;[7]

b. Commonwealth sexual offences involving the use of transit services[8] – there may be a short time period where this behaviour occurred before it was criminalised. If the offending occurred in two jurisdictions (as it often does), then it would not amount to a Victorian offence because the actions of the accused did not occur in Victoria. This means that some children who are preyed upon, electronically, would not have the benefit of this Bill if the offence occurred before the Commonwealth offences were enacted even if the offending involved, say, procuring the child to perform a sexual act on web cam. The Commonwealth Act remedies this problem;

c. Intentionally transmitting a very serious disease[9]- as this offence was not known to Victorian law until 1993, the same problem outlined above may arise if the act does not amount to another offence known to the law at the time. Again this conduct is likely to be accompanied by an act constituting a contact offence which would ordinarily amount to an offence of violence, such as conduct endangering persons;[10]

d. State child pornography offences[11] and sexual servitude offences[12] (where these offences involve a contact offence, they will engage the provisions of the Bill).

In many cases potential claimants of historical child sexual abuse will not be covered by these relatively new offence provisions, and will therefore not be covered under the proposed definition of 'criminal child abuse' for the purposes of the proposed legislation. Equally, potential claimants will not be covered by offences that are introduced in future. It is worth noting here that 92.4 per cent of participants before the Committee reported abuse occurring between the 1930s and 1980s.[13] Similarly, 71.4 per cent of people attending private

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standards. "Indecent" conduct is conduct which would be considered indecent by "right minded people", or which is *"so offensive to contemporary standards of modesty or decency as to be indecent"* (*R v Court* [1989] AC 28; *Curtis v R* [2011] VSCA 102).

[6] Pursuant to s 68(3) of the *Crimes Act 1958* (No. 6231/1958)

[7] Pursuant to s 49B *Crimes Act 1958* (Vic.)

[8] Pursuant to s 474.19 *Criminal Code Act 1995* (Cth)

[9] Pursuant to s 19A *Crimes Act 1958* (Vic.)

[10] Pursuant to s 23 *Crimes Act 1958* (Vic.)

[11] Pursuant to s 68 *Crimes Act 1958* (Vic.)

[12] Pursuant to s 60AB *Crimes Act 1958* (Vic.)

[13] Family and Community Development Committee, Ibid Volume 1, 51

sessions at the Royal Commission, so far, reported abuse occurring prior to 1980.[14] 78 per cent of **knowmore**'s clients are also over the age of 45 years.

Secondly, the Bill's definition is at odds with that used by the Committee[15] as well as the contemporaneous definition of "act of violence" in s.3 of the *Victims of Crime Assistance Act 1996* (Vic).

Thirdly, we reject any suggestion that, by broadening the definition, the 'floodgates' for claims will be opened unreasonably. We have already noted that there are significant and, in some cases, insurmountable legal and evidentiary barriers inherent in pursuing civil litigation claims for child abuse. Broadening the definition would simply ensure that claimants with meritorious claims, notwithstanding the non-criminality of their abuse at the time, are entitled to put their case to proof. There are also strong public policy grounds in support of allowing child abuse claims to be litigated, such as ensuring that the jurisprudence in this area, which we have previously submitted is lacking, can be further and meaningfully developed.

Recommendation 1: That the Bill's definition of "criminal child abuse" be broadened to include acts or omissions constituting a criminal offence according to the criminal law existing at the time the claim is actioned.

2. Whether the Bill's reliance on the inherent powers of courts is sufficient to protect the proper administration of justice, including in cases where a fair hearing of a matter may not be possible on the available evidence

We support the inclusion of this proposed section which, in our submission, should be sufficient to protect the parties' interests where a defendant seeks to argue that the passage of time has resulted in irreparable prejudice to their prospects of receiving a fair trial.

In this respect, guidance can be drawn from the criminal law jurisprudence relating to the prosecution of historical sexual offences and applications seeking a permanent stay of proceedings, on the grounds of unacceptable unfairness arising in the form of prejudice to the defendant (where long delay may often be cited as a contributing factor).[16] In such contexts, trial courts routinely and effectively balance the competing public policy considerations and the accused person's interests, and the capacity of the court to ensure that a fair trial ensues. It can be noted from the decided criminal cases that a long delay between the date of the allegedly offending conduct and the bringing of the accused to trial will not, in itself, justify the granting of a stay, in the absence of an extreme case where there is clear evidence of prejudice to the accused that can not be remedied in the conduct of the trial.

3. Any other relevant matters

We have no further submissions to make.

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[14] Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (2014) Volume 1, 286-287

[15] Family and Community Development Committee, Ibid Volume 1, xix

[16] See for example *Jago v District Court (NSW)* 1989 168 CLR 23; and *The Queen v Edwards* (2009) 255 ALR 399