

# Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse Response to Consultation Paper - Redress and Civil Litigation

## 1 INTRODUCTION

**knowmore** is a free, national legal 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 multidisciplinary, staffed by solicitors, counsellors, social workers and Aboriginal and Torres Strait Islander Engagement Advisors, and is conducted from offices in Sydney, Melbourne, Brisbane 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 provided over 6,739 client advices to over 2,243 clients.<sup>1</sup> 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.

In making this submission, we rely primarily on what we have learned, through our work, about the collective experience of our clients and their needs. We also note our previous submissions on relevant topics to the Royal Commission.<sup>2</sup>

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<sup>1</sup> **knowmore**, *Service Snapshot* (Infographic, as at 31 December 2014). A copy is attached as Appendix 1 to this submission.

<sup>2</sup> See **knowmore**, Submission No 17 (Issues Paper 5 – Civil Litigation); Submission No 74 (Issues Paper 6 - Redress Schemes); and Submission No 42 (Issues Paper 7 - Statutory victims of crime compensation schemes) to the Royal Commission into Institutional Responses to Child Sexual Abuse <<http://www.childabuseroyalcommission.gov.au/research/issues-papers-submissions>>

## 2 LIST OF RECOMMENDATIONS

**Recommendation 1:** That preference be given to establishing a single, national redress scheme led by the Australian Government.

**Recommendation 2:** That the Royal Commission include 'future institutional child sexual abuse' in the scope of its redress recommendations.

**Recommendation 3:** That the principles proposed by the Royal Commission for effective direct personal responses be adopted, and consideration be given to the adoption of a uniform definition of 'apology' in Australian civil liability legislation.

**Recommendation 4:** That past monetary payments previously received by claimants relating to the same injuries and abuse now claimed for under the new redress scheme should be taken into account in calculating redress awards.

**Recommendation 5:** That consideration be given to the provision of government funding to establish an independent, multidisciplinary and trauma-informed legal service to support survivors to access and make decisions around engaging in the redress process and in making claims under the redress scheme.

Alternatively, capacity within the Australian Community Legal Centre sector be built to deliver this support.

**Recommendation 6:** That the definition of 'institution', as provided for in the Royal Commission's Letters Patent, be adopted for the purposes of the redress scheme.

**Recommendation 7:** That the Royal Commission's approach to the connection required between the institution and abuse be adopted for the purposes of the redress scheme.

**Recommendation 8:** That the redress scheme cover the sexual and/or physical abuse of a child.

**Recommendation 9:** In the event that 'sexual abuse' should be defined for the purposes of the redress scheme, that the following definition be adopted (without reference to the criminal law existing at the time the abuse occurred): any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material)'.

**Recommendation 10:** That the 'reasonably likely' standard of proof be applied to all claims under the redress scheme.

**Recommendation 11:** That the standard of proof explicitly take into consideration the possible destruction of records and the record-keeping practices of the time or as applied to certain groups of people, such as the Stolen Generations.

**Recommendation 12:** That claimants not be required to enter deeds of release under the redress scheme.

**Recommendation 13:** That all Australian jurisdictions adopt legislation removing time limitation periods applying to causes of action founded on personal injury resulting from 'child abuse', noting that:

- (a) actions for intentional and unintentional torts, including any new legislative duty of care, should be explicitly covered
- (b) 'child abuse' should be defined as an act or omission in relation to a person when the person is a minor that is sexual abuse or serious physical abuse.

**Recommendation 14:** That such amendments operate retrospectively.

**Recommendation 15:** That all Australian jurisdictions adopt legislation:

- a) imposing a clear duty of care holding institutions liable for child sexual abuse committed by their employees or agents unless the institution proves that it took reasonable precautions to prevent the abuse; and
- b) conferring on a survivor a private cause of action to recover damages from an institution that breaches that duty.

We support consideration being given to whether absolute liability should be imposed on specific institutions whose settings, according to evidence-based research or their history, pose a high-level risk to children being sexually abused.

**Recommendation 16:** That all Australian Governments require faith-based institutions to be incorporated and adequately insured in order to access government funding or tax exemptions and/or other entitlements.

**Recommendation 17:** That Australian Governments work together to require faith-based institutions that engage with children to adopt incorporated legal structures.

**Recommendation 18:** That Australian Governments should only consider legislating with respect to Nominal Defendants for faith-based institutions as an interim option or as an option of last resort.

**Recommendation 19:** That all Australian Governments require non-government institutions to be incorporated and adequately insured in order to access government funding or tax exemptions and/or other entitlements.

**Recommendation 20:** That Australian Governments work together to require non-government institutions that engage with children to adopt incorporated legal structures.

**Recommendation 21:** That all Australian Governments and all other institutions subject to a statutory duty of care to children adopt principles for how they will handle civil litigation in relation to child sexual abuse claims.

### 3 DISCUSSION

#### 3.1 CHAPTER 2 - Structural issues

##### General comments

We generally support the Royal Commission's approach to the redress scheme's structure, principles and values and reinforce **knowmore's** recommendation that an independent statutory body be established to administer a single, national redress scheme.<sup>3</sup>

1. **We seek the views of the Australian Government and state and territory governments on whether they favour a single, national redress scheme led by the Australian Government or an alternate approach**

**Recommendation 1:** That preference be given to establishing a single, national redress scheme led by the Australian Government.

We refer to our previous submission supporting a single, national redress scheme.<sup>4</sup>

2. **We welcome submissions on whether we should recommend redress processes and outcomes for future institutional child sexual abuse**

**Recommendation 2:** That the Royal Commission include 'future institutional child sexual abuse' in the scope of its redress recommendations.

As previously submitted,<sup>5</sup> reforming the civil litigation system is likely to remove many legal difficulties specific to claims arising from institutional child sexual abuse; however, these reforms will not necessarily render that system more accessible to many survivors, from an access to justice perspective. Numerous individual and systemic barriers to accessing legal assistance and engaging in the civil litigation system remain.<sup>6</sup>

In **knowmore's** experience, these barriers disproportionately affect survivors of child sexual abuse, and it is likely that people experiencing institutional child sexual abuse in future will face similar barriers. A redress scheme is likely to be more accessible to past and future survivors than the civil litigation system. Moreover, a redress scheme can adopt and deliver restorative justice and therapeutic jurisprudence approaches that the civil litigation system cannot.

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<sup>3</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, Recommendation 1.

<sup>4</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, Recommendation 1 and 30-31.

<sup>5</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 22-27; see also:

<sup>6</sup> See also: M Karras, E McCarron, A Gray and S Ardasinski, 'On the edge of justice: the legal needs of people with mental illness in NSW' (May 2006), Law and Justice Foundation of NSW, 93-149; L Schetzer and J Henderson, 'Access to Justice and Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW' (August 2003) (Consultation paper), Law and Justice Foundation of NSW, 29-87, 135-173.

## 3.2 CHAPTER 4 - Direct personal response

### 1. Principles for an effective direct personal response and the interaction between a redress scheme and direct personal response

**Recommendation 3:** That the principles proposed by the Royal Commission for effective direct personal responses be adopted, and consideration be given to the adoption of a uniform definition of ‘apology’ in Australian civil liability legislation.

We broadly support the principles advanced in the consultation paper for an effective direct personal response.

#### **Re-engagement between a survivor and institution**

We support the principle that re-engagement, including the opportunity to provide a direct personal response, should be survivor oriented and should only be survivor-led.

We have previously submitted that any national or state-based redress schemes should co-exist with existing, and in some circumstances, expanded capacity to pursue civil claims against institutions.<sup>7</sup> Best practice principles for direct personal responses should contemplate and accommodate the choice of survivors to pursue alternate pathways to redress. Importantly, the provision of an apology or other direct personal response should not be contingent on a survivor's choice to approach an organisation in person, or by means of a proposed redress scheme, rather than by bringing a civil claim against the responding institution.

#### **Apologies**

We support the principle that an apology is a key component of a minimum standard of direct personal response.

The existing legislative framework for the effect of apologies on civil liability in each state and territory<sup>8</sup> does not generally present any immediate barrier to the provision of apologies,<sup>9</sup> although there may be some exemptions arising in respect of civil liability of a person for an unlawful sexual assault or other unlawful sexual misconduct committed by the person. There is a lack of consistency regarding the definition of an apology or expression of regret in the respective state and territory provisions, which may affect the quality of the direct personal response offered by institutions that take a conservative approach to their possible liability for a survivor's injury. We submit that this concern might be addressed by a recommendation for states and territories to adopt a uniform definition of ‘apology’, in line with the current definition in the New South Wales *Civil Liabilities Act 2002*, which enables an institution to admit or imply an admission of fault.

#### **Other forms of direct personal response**

We support the continued provision of needs-based financial assistance, access to records, memorials, family-tracing services, reunions and support groups and pastoral care by institutions.

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<sup>7</sup> **knowmore** Submission No 74 (Redress Schemes) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 2014, pp.34-35.

<sup>8</sup> *Civil Liability Act 2002* (NSW), s.69; *Civil Liability Act 2002* (WA), s.54H; *Civil Liability Act 2003* (Qld), s.72D; *Civil Liability Act 2002* (Tas) s.7; *Personal Injury (Liabilities and Damages) Act 2011* (NT) s.13; *Wrongs Act 1958* (Vic), s.14J; *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA), s.75

<sup>9</sup> For further discussion, see NSW Ombudsman, *Apologies: A Practical Guide* (2<sup>nd</sup> Edition, 2009) 25-26.

As previously submitted, many of these responses are key components of justice for survivors. Survivors' choices should be honoured and facilitated by making such forms of personal response equally accessible, by means of a redress scheme, for those survivors who do not choose to re-engage with an institution.

### **Training for people delivering a direct personal response**

We support the principle that a direct personal response to survivors should be delivered by people who have received training about the nature and impact of child sexual abuse and the needs of survivors, including the need for cultural safety in delivering responses and services.

We further submit that it may be beneficial to provide training or forums for discussing and developing a range of best practice personal responses for board members, trustees, executive level staff and other parties with responsibility for the governance of smaller institutions, in particular clubs, associations and non-government organisations, which continue to provide services for children. Such training might address the effect of apologies on civil liability discussed above and other issues which may adversely affect the quality of direct personal responses afforded to survivors, such as formulating a complaints process for survivors raising concerns about the personal response of the institution.

### **Interaction between a redress scheme and direct personal response**

We support the principle that an independent redress scheme should not be involved in the direct provision of appropriate personal responses to survivors by institutions.

It is our view that the issues raised in the consultation paper about re-traumatisation and the consistency and reliability of institutional responses underscore the need for survivors to have access to independent support and advocacy, as well as the importance of trauma-informed approaches by institutions.

## 3.2 CHAPTER 5 - Counselling and psychological care

### 1. We seek the views of the Australian Government and state and territory governments on options for expanding the public provision of counselling and psychological care for survivors

We make no submissions here.

### 2. We welcome submissions on the relative effectiveness and efficiency of the options in meeting survivors' needs.

The needs of survivors of institutional child sexual abuse are diverse in relation to the access of appropriate counselling and psychological care. All providers of psycho-social care should develop capabilities in relation to being trauma-informed and aware of the potential needs of adult survivors of child sexual abuse.

The consultation paper covers all aspects of a counselling system that will address the needs of these vulnerable individuals; however, in our experience, there are specific possible issues in service delivery that should also be addressed. These are discussed below.

#### **Gender**

The predominance of male survivors means that traditional counselling models may need to be reviewed to address gender issues. Where the counselling is located (i.e. what organisation and type of counselling is available for men), is an important issue. There is a particular need for specialist services for men to address trauma-informed principles of both safety and choice.

#### **Modality**

The constantly developing knowledge-base, in terms of trauma and recovery, is greatly informed by work in the area of neuroplasticity.

#### **Ageing population**

The nature of our ageing population and the impact of institutional child sexual abuse needs further consideration. This client group, who are needing to engage more and more with health care and aged care services, often have significant fear about 'returning to institutional care'. As such, medical and care services could make counselling options available for this client group outside institutional settings. There is a need for organisational and staff training to underpin service provision to fully address the needs of this client group. Older survivors have reported an increase in grief and loss issues related to their childhood experience. Their needs may not fit well into the medical model of psychological care offered by Medicare, or specialised sexual assault counselling. Some older clients of **knowmore** have reported benefiting from psychological support by counsellors who have a good understanding of the social dimensions related to surviving child sexual abuse and who can attend also to issues related to social isolation and grief and loss.

#### **Getting to counselling as opposed to getting counselling**

We note that a significant issue for our clients is, having accessed appropriate counselling, the heavy burden of the costs of getting to and from a counselling service. This is particularly true for those clients who live in rural and remote areas and who cannot access public transport. Most of our clients are on a limited and fixed income and cannot stretch resources any further to accommodate extra financial burden. The proposed schemes should address this by paying for clients' transport costs, or by paying support services for the delivery of services in more marginalised areas.

## **Intergenerational impact of abuse**

Our clients consistently tell us of the ripple effect of what has happened to them. They speak of the fracturing of relationships with partners, children, grandchildren and great grandchildren. The proposed counselling scheme needs to be broad enough to encompass these important aspects of a survivor's recovery.

## **Source of funding**

The source of funding for counselling and psychological care is important to our clients. For some clients, they want nothing to do with the institution responsible for the abuse they experienced, so many survivors may reject counselling offered via funding from these institutions. However, for others, it is important that the institutions themselves are seen to contribute as a form of acknowledgement of responsibility.

## **Aboriginal and Torres Strait Islander needs**

The Royal Commission acknowledges that the Western model of care does not address or may not be appropriate to meet the psychological, counselling and cultural needs of Aboriginal and Torres Strait Islander people. It is recommended that further attention be given to cultural models of healing; such as healing circles, family work, community focused healing and connection to culture, that might currently not receive attention due to limits in the current evidence base and funding

It would also be beneficial if mainstream services employed Aboriginal and Torres Strait Islander staff and that all staff are culturally aware and culturally sensitive in their service provision. Attention also needs to be directed toward developing the capacity of Aboriginal and Torres Strait Islander workers and organisations and ensuring that their particular support needs are addressed, when responding to community members who are survivors of institutional child sexual abuse.

## **Disabled clients**

We have noted a lack of appropriate counselling services for this large and diverse client group. On the whole, mainstream services are providing case management for these clients in lieu of the counselling our clients are seeking. Often, the only referral pathway is to existing organisations, such as Partners in Recovery or People with Disabilities. While this is a good first step in partnering people, it may not result in the provision of the counselling or psychological care that is needed by a survivor. Expanding access to therapeutic counselling for survivors with disabilities is an essential factor of any model adopted, particularly given the over-representation of people with disability as victims of sexual abuse as children.

## **Clients in prisons**

The current focus of psychological interventions in correctional settings is on offending behaviour. However, our experience with this client group, and clients in the community with criminal histories, has indicated that their experience of institutional child sexual abuse has often been indirectly related to their offending behaviour. Factors such as poor emotional regulation, interpersonal difficulties, poor education, mental health difficulties, anti-social attitudes and substance abuse, which have been reported by our clients as related to their experience of institutional child sexual abuse, are also risk factors in offending behaviour.

Male clients in prison state that they have difficulties in accessing counselling and psychological support in relation to their childhood sexual abuse. Our clients have told us that they would have benefited from psychological support and believe that addressing ongoing trauma, interpersonal difficulties and anger related to what happened to them, would have reduced or would in turn reduce the likelihood of their offending.



It is recommended that in addressing the counselling and psychological care needs of survivors that consideration is given to ensuring that staff in correctional settings receive training in trauma-informed care. The expansion of offence-related interventions, focused on attending the psychological and well-being needs of adult survivors of child sexual abuse who are incarcerated, should be recommended.

### **Trust fund**

A trust fund, to fill existing service gaps, may be of benefit in relation to survivors who already have counselling support in place but face constraints in relation to current funding arrangements. As noted by the Royal Commission, the administration of a trust fund could provide a case-management function for those clients who require care coordination in relation to their counselling and psychological needs; with additional functions of overseeing a referral database and monitoring of treatment efficacy. A trust model would provide a degree of survivor choice in relation to where they receive support and by whom.

### 3.3 CHAPTER 6 - Monetary payments

#### 1. The assessment of monetary payments, including possible tables or matrices, factors and values

We refer to our previous submissions on these issues<sup>10</sup> and generally support Table 26 as a possible model, noting that:

- Consideration should be given to whether loss of culture, identity and language, especially for Aboriginal and Torres Strait Islander survivors, could be explicitly included under the ‘severity of impact’ or ‘distinctive institutional factors’ heads of loss or as an entirely separate head of loss.
- Assessing and quantifying the ‘severity of impact’ is more complex in historic claims of child sexual abuse, as causation is often unclear, intergenerational trauma exists and many survivors may have experienced subsequent re-victimisation.<sup>11</sup>
- Consideration be given to whether the institution’s responses could be considered when assessing the ‘severity of impact’.
- Consideration be given to adopting the impacts of sexual offences used by section 27(1)(f) of the *Victims of Crime Assistance Act 2009* (Qld).<sup>12</sup>
- Competent legal assistance is likely to greatly assist the applicant in voicing the impact of the abuse and to assist the decision-maker in forming an accurate assessment.

#### 2. The average and maximum monetary payments that should be available through redress

In this context, we simply note that:

- There are compelling public policy reasons to ensure that survivors receive adequate redress payments. The most compelling argument is that in the absence of significant monetary redress payments, the Australian community significantly bears the costs associated with addressing unresolved childhood trauma; rather than the culpable individuals and institutions. Addressing unresolved childhood trauma, for example, has recently been calculated to cost the Australian community an *average* annual budget cost of \$6.8 billion.<sup>13</sup> The redress scheme should operate as much as possible to shift this financial cost back onto the institutions that are responsible.
- We agree with the Royal Commission’s view that amounts paid under the redress scheme should be higher than those currently available under statutory victims of crime compensation schemes due to the responsibility or culpability of institutions, including Governments, in this context.

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<sup>10</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 36-40.

<sup>11</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 20-21.

<sup>12</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 21.

<sup>13</sup> Includes child sexual, emotional and physical abuse: Dr C Kezelman, N Hossack, Dr P Stavropoulos and P Burley, *The cost of unresolved childhood trauma and abuse in adults in Australia* (January 2015), Report for Adults Surviving Child Abuse, 41.

- As previously submitted, **knowmore** reinforces that the affordability of institutions should not be a barrier to survivors accessing meaningful redress payments.<sup>14</sup> Otherwise, ultimately the Australian community will be required to bear the costs of any shortfall.

**3. Whether an option for payments by instalments would be taken up by many survivors and whether it should be offered by a redress scheme**

We make no submission here other than that the principle of survivor choice should underlie the redress scheme.

**4. The treatment of past monetary payments under a new redress scheme**

**Recommendation 4:** That past monetary payments previously received by claimants relating to the same injuries and abuse now claimed for under the new redress scheme should be taken into account in calculating redress awards.

We refer to our previous submission on this issue.<sup>15</sup>

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<sup>14</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 26, 40.

<sup>15</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, Recommendations 26 and 46.

### 3.4 CHAPTER 7 - Redress scheme processes

#### Legal assistance with accessing redress

**Recommendation 5:** That consideration be given to the provision of government funding to establish an independent, multidisciplinary and trauma-informed legal service to support survivors to access and make decisions around engaging in the redress process and in making claims under the redress scheme.

Alternatively, capacity within the Australian Community Legal Centre sector be built to deliver this support.

As previously submitted,<sup>16</sup> **knowmore** is of the firm view, following the work we have undertaken with many hundreds of survivors, that it is fundamental that applicants have access to competent and independent legal assistance as part of, throughout and upon conclusion of any redress process. Competent and independent legal assistance is fundamental because:

- the redress scheme will be the only viable option for many survivors to access any form of redress; their opportunity should therefore be maximised
- legal assistance is likely to significantly assist decision-makers and survivors satisfactorily engaging in the redress scheme process
- legal assistance is likely to add another layer of consistency, transparency and accountability to the redress process (which is by nature a process conducted by another ‘institution’), including the exercise of review and appeal rights
- a centralised legal service has the added benefits of improving consistency in the redress scheme process and addressing systemic issues arising in its processes
- survivors may have multiple legal issues that require addressing
- support services assisting survivors may need to collaborate or consult with a legal service
- in **knowmore**’s experience, even relatively ‘simple’ legal processes, such as engaging with the Royal Commission, or making a claim under statutory victims of crime compensation schemes can:
  - overwhelm and confuse survivors
  - present significant barriers to survivors effectively engaging in these processes
  - make wrong decisions
- of the need to respond to emerging and unforeseen legal issues that the process itself creates

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<sup>16</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 24-25; **knowmore**, Submission No 47 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 45-46.

- of the need for a co-ordinated and consistent approach to ensuring survivors who are entitled to bring redress claims can in reality access the redress process. In this regard, we note that many survivors live in regional and remote communities, or otherwise in circumstances where they are not connected with support services. Our experience in assisting considerable numbers of clients who missed the opportunity to engage with now finalised State redress schemes<sup>17</sup> underlines the need for there to be concerted efforts made through both general and targeted community legal education programs to enable eligible survivors to access the redress scheme.

**knowmore's** work with survivors to date demonstrates the need that survivors accessing the redress scheme will have for an independent and trauma-informed legal assistance. While our services are free, it is clear that the overwhelming majority of our clients lack the financial means to privately fund any legal action.

For the reasons set out above, we remain of the view that the provision of government funding for the establishment of an independent, multidisciplinary and trauma informed legal service, delivering free legal services to survivors, is the most efficient means to assist survivors in making decisions around engaging in a redress process, and in pursuing claims under that scheme. That service would operate without regard to restrictive commercial interests, would be able to address systemic and cross-jurisdictional issues through a truly national approach and could significantly contribute to the inevitable need to continuously improve processes and arrangements under the redress scheme once it commences operation, through the submission of feedback and recommended reforms. A co-ordinated multi-disciplinary approach would also assist in building relationships (or developing existing relationships), that would serve to connect clients with other necessary support services, such as ongoing counselling and support needs. It would also best serve the needs of clients with claims arising across multiple jurisdictions and multiple institutions (a common circumstance).

A purpose specific service would also facilitate the appropriate handling of cases that may otherwise present a conflict of interest for another publicly funded legal service (e.g. it is likely that many perpetrators of sexual offences who have faced prosecution will have received funding or defence services through State and Territory Legal Aid Commissions and Aboriginal and Torres Strait Islander Legal Services).

Alternatively, funding could be injected into the Australian Community Legal Centre (CLC) sector to build the resource capacity that would be required for these services to undertake the work. CLCs are experienced in working with disadvantaged clients and, for many centres, in providing legal assistance with claims under statutory victims of crime compensation schemes. These services are also well networked and coordinated at national and state levels, are embedded in their local communities, are linked to local support services and provide significant community legal education across communities. As noted above, once a redress scheme is established it will be very important that the scheme's availability is promoted to potential claimants.

Given the figures contained in the Commission's consultation paper indicating that the total number of eligible survivors who will make a claim for payment under a redress scheme is estimated to be 65,000, there would obviously be a huge impact on the existing CLC sector if this body of work became its responsibility.

One difficulty that will arise in the context of this work falling to a number of CLCs rather than a single purpose-specific service, will be in managing the workload and particularly the inevitable impacts on staff of undertaking a significant caseload of survivors' redress claims.<sup>18</sup> The establishment of a single service provides, in our view, the

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<sup>17</sup> Such as those in Queensland and Western Australia.

<sup>18</sup> For an explanation of the risks of vicarious trauma for workers in this context, see, for example, Morrison Z, *'Feeling Heavy': Vicarious trauma and the other issues facing those who work in the sexual assault field*, ACSSA Wrap No. 4 September 2007. Viewed at <http://www.aifs.gov.au/acssa/pubs/wrap/w4.html>

better framework and structure for addressing the inevitable impacts of vicarious trauma on lawyers and other staff acting for survivors, and in supporting those staff to undertake this challenging work on a sustained basis. Such a service can ensure flexibility, learning and a consistency of approaches to work that may not be able to be replicated within individual CLCs or across the broader CLC sector, given other service delivery priorities.

Finally, we also support the Royal Commission recommending that disbursements necessarily incurred by claimants or their legal representatives during the making of a redress claim be reimbursed under the final offer/award, such as those expenses incurred in obtaining supporting documentation.

**1. Eligibility for redress, including the connection required between the institution and the abuse and the types of abuse that should be included**

**Recommendation 6:** That the definition of ‘institution’, as provided for in the Royal Commission’s Letters Patent, be adopted for the purposes of the redress scheme.

**Recommendation 7:** That the Royal Commission’s approach to the connection required between the institution and abuse be adopted for the purposes of the redress scheme.

**Recommendation 8:** That the redress scheme cover the sexual and/or physical abuse of a child.

**Recommendation 9:** In the event that ‘sexual abuse’ should be defined for the purposes of the redress scheme, that the following definition be adopted (without reference to the criminal law existing at the time the abuse occurred): any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material).

We refer to our previous submission on these specific issues as well as those on the broader features that are necessary in the redress scheme process.<sup>19</sup>

For the same reasons submitted in relation to the issues addressed in Chapter 10 and our responses, ‘sexual abuse’ should be left undefined. However, should a definition be adopted for the purposes of the redress scheme, we strongly support the ‘reportable conduct’ definition in section 25A(1) of the *Ombudsman Act 1974* (NSW). That definition is ‘any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material)’. We note that this definition does not explicitly restrict the offences to those existing under the law at the time the conduct occurred and that ‘sexual misconduct’ and ‘serious physical assault’ is usefully defined further in the NSW Ombudsman’s *Practice Update 2013/1: Defining Reportable Conduct*.<sup>20</sup>

**2. The appropriate standard of proof**

**Recommendation 10:** That the ‘reasonably likely’ standard of proof be applied to all claims under the redress scheme.

**Recommendation 11:** That the standard of proof explicitly take into consideration the possible destruction of records and the record-keeping practices of the time or as applied to certain groups of people, such as the Stolen Generations.

<sup>19</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 12-24.

<sup>20</sup> [http://www.ombo.nsw.gov.au/data/assets/pdf\\_file/0013/5620/PU\\_CP\\_02\\_11\\_Reportable\\_Conduct\\_v3.pdf](http://www.ombo.nsw.gov.au/data/assets/pdf_file/0013/5620/PU_CP_02_11_Reportable_Conduct_v3.pdf)

We refer to our previous submission on this issue,<sup>21</sup> including our submissions on the frequent non-existence of relevant records.<sup>22</sup>

We also reiterate that record keeping-practices and record destruction (with or without authority),<sup>23</sup> particularly with respect to members of the Stolen Generation, will place particular survivors at significant disadvantage when attempting to marshal documentary evidence proving the requisite connection to an institutional context. We therefore support the Royal Commission recommending that the standard of proof explicitly take into consideration the possible destruction of records or the record-keeping practices of the time, or as applied to certain groups of people, such as the Stolen Generations.

### 3. Whether or not deeds of release should be required.

**Recommendation 12:** That claimants not be required to enter deeds of release under the redress scheme.

We refer to our previous submissions on this issue.<sup>24</sup> However, in the alternative, if the Royal Commission recommends that claimants enter deeds of release under the scheme, we submit that the deed of release should clearly provide that:

- (i) the deed is to be set aside in certain circumstances, such as where new evidence emerges about abuse or liability (the circumstances that should be included will vary depending on what is taken into account during the assessment stages);
- (ii) the deed does not preclude the survivor from claiming future counseling expenses; and
- (iii) the deed releases the relevant parties only in relation to the abuse specifically claimed for under the scheme

and claimants should be required to obtain competent legal advice, at the redress scheme's reasonable expense, prior to entering the deed of release.

Any deed of release should not seek to bind the claimant to confidentiality.

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<sup>21</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 41-42.

<sup>22</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 17-19.

<sup>23</sup> Commonwealth of Australia, Senate Standing Committees on Community Affairs, *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children* (August 2004), 262-268.

<sup>24</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 34-35.

### **3.5 CHAPTER 8 - Funding redress**

- 1. Modelling of required funding and the possible approaches to funding redress**
- 2. Appropriate funding arrangements, appropriate funder of last resort arrangements and the level of flexibility that should be allowed in implementing redress schemes and funding arrangements**

We refer to our previous submissions on these issues.<sup>25</sup>

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<sup>25</sup> **knowmore**, Submission No 74 (Issues Paper 6) to the Royal Commission into Institutional Responses to Child Sexual Abuse, Recommendation 22, 31-33.



## 3.6 CHAPTER 9 - Interim arrangements

### 1. Additional principles for interim arrangements and possible structures;

We support the Royal Commission's views on interim arrangements and reinforce that steps must be taken as soon as possible to allow survivors to mitigate their injuries and to ensure that elderly survivors are given some form of access to justice.

### 2. Whether there are other issues on which direction or guidance might be required for interim arrangements.

We make no submissions here, other than to note our view that on the basis of our experience working with clients, we strongly agree with the observation made in the consultation paper<sup>26</sup> that options for non-government institutions to adopt effective and co-operative approaches to redress, in the absence of government leadership and participation, appear limited. In this context, we would note that despite the proceedings of the Royal Commission over the last two years, **knowmore** continues to see significant inconsistencies within branches of the same institution (such as across dioceses, orders or territories) as to how redress issues are approached.

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<sup>26</sup> At 195.

### 3.7 CHAPTER 10 - Civil litigation

#### 1. The options for reforming limitation periods and whether any changes should apply retrospectively;

**Recommendation 13:** That all Australian jurisdictions adopt legislation removing time limitation periods applying to causes of action founded on personal injury resulting from ‘child abuse’, noting that:

- (a) actions for intentional and unintentional torts, including any new legislative duty of care, should be explicitly covered
- (b) ‘child abuse’ should be defined as an act or omission in relation to a person when the person is a minor that is sexual abuse or serious physical abuse.

**Recommendation 14:** That such amendments operate retrospectively.

#### Claims that should fall under the amendments

We support all Australian jurisdictions adopting broad legislation amending the time limitation periods governing causes of action founded on personal injury resulting from ‘child abuse’. The amendments should explicitly cover actions for intentional or unintentional torts (covering the conduct of perpetrators and institutions), and actions that may in future be founded on any new legislative duty of care institutions owe to children.

There are compelling public policy arguments for applying the amendments to a broad class of conduct perpetrated against children. The most compelling argument is that breadth will provide the deterrence and loss spreading functions of tort law<sup>27</sup> with opportunity to operate in the area of child abuse, an area where the financial costs of the harm are at present significantly borne by the Australian community and not the culpable individuals and institutions. As noted, addressing unresolved childhood trauma, for example, has recently been calculated to cost the Australian community an *average* annual budget cost of \$6.8 billion.<sup>28</sup>

To ensure these functions can operate effectively, ‘child abuse’ should be broadly defined as ‘an act or omission in relation to a person when the person is a minor that is sexual abuse or serious physical abuse’. The terms ‘sexual abuse’ and ‘serious physical abuse’ should be left undefined. However, should a definition be recommended, we support the definition used by section 25A(1) of the *Ombudsman Act 1974* (NSW). That definition is ‘*any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material)*’. We note that this definition does not explicitly restrict the offences to those existing under the law at the time the conduct occurred and that ‘sexual misconduct’ and ‘serious physical assault’ is usefully defined further in the NSW Ombudsman’s *Practice Update 2013/1: Defining Reportable Conduct*.<sup>29</sup>

In any case, the criminal law from the period in which the abuse occurs should *not* be used as a definitional aid or the threshold level of conduct. We hold this view firmly, for several reasons.

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<sup>27</sup> *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 375 [123] (Gummow J).

<sup>28</sup> Includes child sexual, emotional and physical abuse: Dr C Kezelman, N Hossack, Dr P Stavropoulos and P Burley, *The cost of unresolved childhood trauma and abuse in adults in Australia* (January 2015), Report for Adults Surviving Child Abuse, 41.

<sup>29</sup> [http://www.ombo.nsw.gov.au/data/assets/pdf\\_file/0013/5620/PU\\_CP\\_02\\_11\\_Reportable\\_Conduct\\_v3.pdf](http://www.ombo.nsw.gov.au/data/assets/pdf_file/0013/5620/PU_CP_02_11_Reportable_Conduct_v3.pdf)

First, child sexual abuse was not 'seen' as a widespread social problem by Australian parliaments until the 1970s and 1980.<sup>30</sup> Many forms of behaviour, especially with respect to non-penetrative forms of abuse and male victimhood, while sexually abusive by any standard, might not have been identified and criminalised at the relevant time. Several issues arise as a result:

- (i) Criminal laws did not fully identify sexually abusive behaviour toward children until at least the mid-1980s.<sup>31</sup> The range of conduct not criminalised but still occurring at the time includes: sexual activity between children under the age of criminal responsibility; 'internal' examination of a child's genitals; inciting a child to sexual activity; procuring a child for sexual activity; kidnapping a male for sexual activity; acts of indecency or indecent assaults by female perpetrators towards or on males; carnal knowledge of a female aged 16-18 who is under the perpetrator's care; voyeurism or prying; grooming; transit and postal service offences; involving a child in exploitation materials; sexual servitude; and persistent sexual abuse of a child.

The cohort of plaintiffs affected by this socio-legal reality is significant: we note that 71.4% of private session attendees reported abuse occurring prior to 1980 and approximately 28.5 per cent of attendees described non-contact related sexual abuse. Similarly, 78% of **knowmore's** clients are over the age of 45 years and 92.4% of participants before the Victorian Parliament's Family and Community Development Committee (the "Victorian Committee") reported abuse occurring between the 1930s and 1980s.<sup>32</sup>

- (ii) While broad child abuse offences exist in historical child protection legislation,<sup>33</sup> courts are likely to narrowly interpret the terms 'ill-treatment' and 'expose' often used in those provisions by reference to parliaments' intention - an intention constrained by the poor knowledge of the prevalence and nature of child sexual abuse and the few criminal offences existing at the relevant time. Some offences also only apply to children in state care.
- (iii) Plaintiffs experiencing similar forms of abuse, but in different time periods, will have different rights to commence civil action, with historical cases being disproportionately affected. This offends principles of equality, fairness and justice which, in our submission, should be the key objectives of reform and legislative amendment.

Secondly, it is more appropriate to apply historical standards when determining the relevant standard of care, at least in negligence cases, rather than in determining time limitation issues. Tort law also generally focuses on harm that is foreseeable, despite whether the act or omission causing the harm is criminal or not.

Thirdly, there are factors other than criminality relevant to determining what sexually abusive behaviour is and who should be able to put their case to proof. Other relevant factors include the relationship between the perpetrator and the victim, the age of the perpetrator and victim, the mental capacity and social circumstances of the victim and the presence of coercion and violence.

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<sup>30</sup> Kathleen Daly, 'Conceptualising Responses to Institutional Abuse of Children' (2014) 26:1 *Current Issues in Criminal Justice* 5, 8.

<sup>31</sup> See, for example, *Crimes (Child Assault) Amendment Act 1985* (NSW); Hayley Boxall, Adam Tomison, Shann Hulme, 'Historical review of sexual offence and child sexual abuse legislation in Australia 1788-2013' (Special Report, Australian Institute of Criminology, 2014), 9.

<sup>32</sup> Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (June 2014), Volume 1, Appendix C, Table 9, 292; 286-287; **knowmore**, *Our Clients* (Infographic, December 2014); Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Volume 1, 51.

<sup>33</sup> See, for example, s.149(1) of the *Child Welfare Act 1939* (NSW) and s.227 of the *Children and Young Persons (care and Protection) Act 1998* (NSW); s.47 of the *State Children Act 1911* (QLD) (specific to state wards); s.71(1) of the *Children's Welfare Act 1958* (Vic); s.62 of the *Child Welfare Act 1947* (WA); s.69 of the *State Children Act 1895* (SA) (specific to foster-parents); s.66 of the *Child Welfare Act 1960* (Tas); ss.70(1) and (2) of the *Child Welfare Ordinance 1958-1960* (NT); ss.98 and 99 of the *Child Welfare Ordinance 1957* (ACT).

Finally, we reject any suggestion that, in avoiding a criminality threshold, the ‘floodgates’ for claims will open unreasonably. As we submitted in our response to Issues Paper 5,<sup>34</sup> apart from issues surrounding the expiry and extension of time limitation periods, there are other significant and, in many cases, insurmountable legal, evidentiary and financial barriers to pursuing personal injury claims for child abuse. For example, in February 2015 a survivor’s claim in the case of *A, DC v Prince Alfred College Incorporated*<sup>35</sup> was held to be unsuccessful on all five grounds pleaded, namely: vicarious liability, breach of a general duty of care, breach of a non-delegable duty of care, time limitation period and extension of time limitation period. Broadening the definition would therefore simply provide claimants who have meritorious claims, notwithstanding the non-criminality of their abuse at the time, opportunity 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 enabling the jurisprudence in this area, which is lacking, to be further and meaningfully developed to benefit the public interest.

### **No time limitation should apply**

As we submitted in response to Issues Paper 5,<sup>36</sup> no time limitation period should apply to the causes of action noted above. We view the courts’ inherent and statutory power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible, as being sufficient to safeguard the defendant’s rights (as is the case in criminal prosecutions).

### **Exception to pre-action procedures**

As we submitted in response to Issues Paper 5,<sup>37</sup> the law in Queensland, the Australian Capital Territory and the Northern Territory (yet to commence) imposes mandatory pre-action procedures on personal injury proceedings, which, particularly in Queensland, are insurmountable in historical cases. These procedures can nullify a claim prior to consideration of relevant time limitation period issues. Amendments to time limitation periods in these jurisdictions should therefore be coupled with corresponding amendments to their pre-action procedures.

### **Amendments should operate retrospectively**

While we acknowledge inherent difficulties and unfairness can sometimes arise when passing amendments with retrospective operation, reforming limitation laws, in most cases,<sup>38</sup> will simply remove a defence and not necessarily impose new liability on the defendant. In any case, there are strong policy reasons favouring retrospectivity. Without retrospectivity, for example, the Australian community will continue to bear the significant costs associated with addressing unresolved childhood trauma, the fact of significant delay between abuse and disclosure means that a significant cohort of plaintiffs will not be able to access justice or pursue their claims (see the time period statistics from the Royal Commission, **knowmore** and Victorian Committee noted above) and, as previously submitted,<sup>39</sup> and as demonstrated by Case Study 27,<sup>40</sup> a significant cohort of survivors in Western Australia are absolutely barred from bringing a claim.

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<sup>34</sup> **knowmore**, Submission No 17 to the Royal Commission into Institutional Responses to Child Sexual Abuse, 14-15.

<sup>35</sup> [2015] SASC 12.

<sup>36</sup> **knowmore**, *ibid*, 24-25.

<sup>37</sup> **knowmore**, Submission No 17 to the Royal Commission into Institutional Responses to Child Sexual Abuse, 14.

<sup>38</sup> We note that limitation law is deemed part of the substantive law in New South Wales, Queensland and South Australia: *Limitation Act 1969* (NSW), s.78(2); *Limitation of Actions Act 1974* (QLD), s43A; *Limitation of Actions Act 1936* (SA), s38A(1).

<sup>39</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 16.

<sup>40</sup> Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 11* (December 2014), 46.

We reject any suggestions that the ‘floodgates’ for claims will open unreasonably in retrospectively removing time limitation periods. No such ‘flood’ seems to have occurred in England following the House of Lords’ decision in *A v Hoare*<sup>41</sup>. Moreover, specific to child sexual abuse claims, retrospectivity will not necessarily put a potential plaintiff in a better position now given the proper defendant, liability and evidentiary issues the majority of claims will face. Rather, retrospectivity would simply provide plaintiffs with meritorious claims the opportunity to put their case to proof.

We therefore support amendments removing time limitation periods for claims where the cause of action accrues before, on or after the amendments commence; for claims defeated by or under limitation laws at an interlocutory stage on or before the amendments commence; and for claims currently before but not finally determined by the courts.

## **2. The options for reforming the duty of institutions and whether any changes should apply retrospectively**

**Recommendation 15:** That all Australian jurisdictions adopt legislation:

- a) imposing a clear duty of care holding institutions liable for child sexual abuse committed by their employees or agents unless the institution proves that it took reasonable precautions to prevent the abuse; and
- b) conferring on a survivor a private cause of action to recover damages from an institution that breaches the duty.

We support consideration being given to whether absolute liability should be imposed on specific institutions whose settings, according to evidence-based research or their history, pose a high-level risk to children being sexually abused.

As submitted previously,<sup>42</sup> we firmly support all Australian jurisdictions adopting legislation imposing a clear duty of care on institutions to prevent child sexual abuse and conferring on a survivor a private cause of action to recover damages from an institution that breaches the duty. The duty should strive to:

- promote and safeguard the rights and best interests of children;
- strike a balance between the interests of children, parents, plaintiffs, institutions, insurers and the Australian community;
- encourage institutions to be, and continually improve to be, child-safe organisations; and
- achieve a just, fair and effective response to the care and protection of children in institutional settings.

In our view, the duty of care in Option 2<sup>43</sup> achieves the most appropriate balance and response. However, we also see scope for absolute liability, as proposed by Option 3,<sup>44</sup> being imposed on particular institutions facing high-level risks.

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<sup>41</sup> *A v Iorworth Hoare; C v Middlesrough Council; X & Anor v Wandsworth LBC; H v Suffolk County Council; Young v Catholic Care (Diocese of Leeds)* [2008] UKHL 6.

<sup>42</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 14., Recommendation 3(c), 8-12.

<sup>43</sup> That is, an institution is liable for child sexual abuse committed by their employees or agents unless the institution proves that it took reasonable precautions to prevent the abuse: Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Redress and civil litigation* (January, 2015), 219.

<sup>44</sup> That is, an institution is liable for child sexual abuse committed by their employees or agents: *ibid.*

## Discussion

**knowmore's** clients often hold a very firm conviction that institutions, *in no matter what period of time in Australian history*, owe them a very clear moral and legal duty of care to prevent employees, agents and other children committing sexual abuse against them within institutional contexts. Some assert that this duty should be absolute in nature.

Absolute liability will mean an institution is legally responsible for the criminal conduct of its employees or agents regardless of, and no matter how effective, the steps the institution took to prevent the conduct and even if there was no way for the institution to foresee the conduct occurring. This form of liability will no doubt significantly assist parties to determine liability and approaches to litigation; claims would be actionable upon proof of the conduct and damage, especially where the perpetrator has been convicted; claims are more likely to be settled through alternative dispute resolution processes; exemplary, punitive and aggravated damages could be awarded;<sup>45</sup> the legal and factual issues considered by a Court will be few, static and simple, possibly reducing time and legal fees for all parties as well as the necessity for legal expertise; and duty, breach and causation issues, which are often fatal for plaintiffs under the current law, will not be at issue.<sup>46</sup>

At the same time, however, imposing a duty that has no content (such as to take reasonable measures or to see that such measures are implemented), while simplifying the process for parties, prevents courts from examining the reasonableness of the preventative measures adopted by institutions. As a result, courts are unable to pronounce, or contribute to the development of, child-safety principles and norms, which could direct best practice for other institutions in Australia to eliminate risks and prevent future abuse. The fact that there seems to be minimal guidance to assist institutions to assess and mitigate risks specific to child sexual abuse in Australia gives credence to the important role courts can play in this area.<sup>47</sup>

Absolute liability sends a zero-tolerance message to institutions and should encourage institutions to adopt highly proactive, risk-averse and robust preventative measures.<sup>48</sup> However, several issues also arise here. First, while risk-averse behavioural changes are highly desirable in most instances, there may be some unintended consequences. For example, institutions might further under-report abuse or even actively deter children from disclosing abuse (there being more at stake); institutions might stop employing men in child-related employment or avoid providing crucial services or activities to children or specific groups of vulnerable children, such as children with a disability, that give rise to unmanageable risks; or governments might take legislative steps to sever their responsibility over (and liability for) children in need of care and protection.<sup>49</sup>

Secondly, institutions might not be able to obtain, at reasonable rates, insurance cover for absolute liability, unless proactive, risk-averse and robust preventative measures can be demonstrated to insurers. Thirdly, despite the threat of absolute liability and benevolent motivations, some institutions will simply lack the financial and staffing capacity to adopt highly proactive, risk-averse and robust preventative measures, thereby enabling them to obtain insurance; or guidance on such measures might be lacking, as found by the Victorian Committee.<sup>50</sup> Without complimentary

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<sup>45</sup> See, for example, *Civil Liability Act 2002* (NSW), s.21.

<sup>46</sup> These three issues also tend to occupy the High Court of Australia in most negligence cases: Pam Stewart and Anita Stuhmcke, 'High Court Negligence Cases 2000-10' (2014) *Sydney Law Review* 36:585, 598.

<sup>47</sup> Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Volume 1, Finding 11.2, 257.

<sup>48</sup> For such measures, see Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Volume 1, Table 6.2, 275.

<sup>49</sup> See, for example, the new 'permanent placement principles' in section 10A(3)(b) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), inserted by the *Child Protection Legislation Amendment Act 2014* (NSW), Sch 1 [7], which, for various reasons, prioritises adoption of a child by carers over placing the child under the parental responsibility of the Minister.

<sup>50</sup> Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Volume 1, Finding 11.2, 257.

capacity-building strategies, absolute liability will be punitive for these institutions.<sup>51</sup> In some cases, this may be appropriate, as perhaps some of these institutions should simply not provide services to children.

Finally, some ‘types’ of perpetrators actively create opportunities and manipulate situations to offend (‘serial, predatory perpetrators’).<sup>52</sup> Institutions, no matter what safeguards are adopted, might experience great difficulty in deterring these perpetrators and preventing their abuse.

For these reasons, we would only support imposing absolute liability on institutions that:

- a) receive government funding (e.g. public authorities, public and private schools);
- b) provide services or conduct activities that, according to evidence-based research, are accepted to pose high-level risk of children being sexually abused (e.g. out-of-home care, especially residential care and foster care, boarding schools, immigration detention, juvenile justice centres);<sup>53</sup>
- c) cater to or care for vulnerable groups of children, according to evidence-based research (e.g. children in care, children with disability and Aboriginal and Torres Strait Islander children); and
- d) have demonstrated systemic, cultural failure (e.g. some religious organisations).<sup>54</sup>

For all other institutions, it is appropriate to impose the duty proposed in Option 2.

## Definitions

Legislation imposing the proposed duty of care should adopt the same or a similar framework as that used in legislation directed toward assessing the risk a person poses to the safety of children in their employment (or legislation empowering agencies to oversee the prevention and handling of ‘reportable conduct’), as the proposed duty is also aimed at minimalising or eliminating the same risk, albeit in a much more comprehensive manner.<sup>55</sup>

We support the following definitions being adopted:

- **Institution**

It is desirable to define the class of institutions owing the relevant duty by reference to the work they undertake with children. We support a broad definition of the class similar to that used to define ‘child-related work’ in section 6 of the *Child Protection (Working With Children) Act 2012* (NSW).

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<sup>51</sup> Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Volume 1, Recommendation 13.1, 296.

<sup>52</sup> Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Volume 1, Table 6.2, 135; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (June 2014), 121.

<sup>53</sup> Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Volume 1, 132, 138-151; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (June 2014), 112-115; Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Redress and civil litigation* (2015), Table 11, 77-79, 112-115; *New South Wales v Lepore*; *Samin v Queensland*; *Rich v Queensland* (2003) 195 ALR 412, 445 [123]-[126] (Gaudron J).

<sup>54</sup> Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Volume 1, Finding 7.3, 194-195.

<sup>55</sup> See, for example, the *Child Protection (Working With Children) Act 2012* (NSW) and Part 3A of the *Ombudsman Act 1974* (NSW).

- **Child sexual abuse**

The definition we propose on page 17 should be adopted for the purposes of the duty of care.

- **Employees or agents**

We support the definition of ‘person associated with an organisation’ adopted by section 3 of the *Crimes Amendment (Protection of Children) Act 2014* (Vic), to be used in the new section 49C offence, and the explicit inclusion of ‘minister, priest, rabbi, mufti or other religious leader or spiritual officer of a religion or other member of a religious organisation’ in the section 5 definition of ‘worker’ in the *Child Protection (Working With Children) Act 2012* (NSW).

We also support consideration as to whether the duty could be extended to sexual abuse committed by peers.

- **Reasonable measures**

It is important that the legislation give content to the duty by including a non-exhaustive list of the preventive measures institutions should take; or alternatively mandate minimum measures, derived from evidence-based research, including the work of the Royal Commission and the Victorian Committee.<sup>56</sup> Providing content through legislation will make the content of the duty publicly accessible, and will assist institutions to comply with their duty of care and also assist courts in applying the law and legal practitioners in providing advice.

The measures could fall within the categories of effective selection of suitable personnel, managing situational and environmental risks and creating child-safe cultures. Examples could include compliance with pre-employment screening laws; mandatory reporting laws; criminal laws (such as new sections 49C and 327 of the *Crimes Amendment (Protection of Children) Act 2014* (Vic)); implementing annual reviews of child-safety policies to identify and reduce or eliminate new risks and predatory abusers; and compliance with guidelines provided by a peak body or government agency, such as an Ombudsman or Office of the Children’s Guardian.

As with the non-delegable duty of care owed by schools to pupils, the measures should also explicitly provide there is a duty to see that the measures are carried out diligently and effectively.<sup>57</sup>

## **Retrospectivity**

While we again acknowledge that inherent difficulties and unfairness that can sometimes arise when passing amendments with retrospective operation, we support the retrospective imposition of liability on institutions in this instance, for the following reasons:

- The legal liability of institutions for child sexual abuse by employees or agents is and has always been somewhat uncertain in Australia. This negates to some extent any argument by institutions to the effect that they have relied upon the ‘law’ to their detriment, should retrospective liability be imposed.

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<sup>56</sup> See, for example, Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (June 2014), Chapter 4; Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Volume 1, Part D.

<sup>57</sup> *Commonwealth v Introvigne* (1982) 150 CLR 258, 274–5 (Murphy J).



- Irrespective of an institution’s reliance on the law existing at the relevant time and the level of legal ‘risk’ arising, there was always a moral obligation on institutions to take care with respect to the protection of children. There is therefore a strong argument that the public interest in seeing such institutions being called to justice outweighs the need of society to protect institutions from liability on the basis that legal liability did not exist at the time of their conduct.
- The alternative to retrospectively applying new liability is that the court should maintain and apply unjust and inefficient laws. As Lord Lane CJ stated in the English Court of Criminal Appeal with respect to removal by the court of the common law defence to rape within marriage: *‘This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive.’*<sup>58</sup> Many survivors feel that the absence of liability on institutions for past abuse is equally anachronistic and offensive.
- Finally, retrospectively imposing new liability will, specific to institutional child sexual abuse, clarify for parties what the law with respect to liability actual is.

### **3. How to address difficulties in identifying a proper defendant in faith-based institutions with statutory property trusts**

**Recommendation 16:** That all Australian Governments require faith-based institutions to be incorporated and adequately insured in order to access government funding or tax exemptions and/or other entitlements.

**Recommendation 17:** That Australian Governments work together to require faith-based institutions that engage with children to adopt incorporated legal structures.

**Recommendation 18:** That Australian Governments should only consider legislating with respect to Nominal Defendants for faith-based institutions as an interim option or as an option of last resort.

#### **The issues arising**

Unlike most other non-government institutions, faith-based institutions in Australia tend to operate through complex ‘systems’ of incorporated and unincorporated organisations, most of which interact with children. These systems inevitably result in unclear and fractured hierarchal structures and lines of responsibility and authority.<sup>59</sup> As we submitted in response to Issues Paper 5,<sup>60</sup> several judicial decisions highlight the three difficulties plaintiffs face when trying to identify:

- (i) who in these systems could be liable for torts committed by employees or agents;
- (ii) whether that person or body is amendable to legal proceedings; and
- (iii) who could satisfy a potential judgment.<sup>61</sup>

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<sup>58</sup> *R v R* [1991] 2 All ER 257, 256-266.

<sup>59</sup> Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Volume 1, 7.3.3.

<sup>60</sup> **knowmore**, Submission No 17 (Issues Paper 5) to the Royal Commission into Institutional Responses to Child Sexual Abuse, 5-8.

<sup>61</sup> See, for example, *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117; *Roman Catholic Archbishop of Perth v AA to JC inclusive* (1995) 18 ACSR 333; *PAO v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWSC 1216.

By way of illustration, the Catholic Archdiocese of Sydney, for example, is a voluntary, unincorporated association whose members reside within Sydney and are led by a bishop. The association's system, as relevant to children, is made up of:

- individual parishes and churches, such as St Mary's Cathedral Sydney, which are usually unincorporated entities who might run a range of services, such as pastoral, pre-school and day-care services, and whose personnel might supervise religious education and influence the administration of local schools;
- individual religious orders, which are usually unincorporated associations with a body corporate holding real property on trust<sup>62</sup> and who might also run their own subsystem of other unincorporated associations, such as schools;<sup>63</sup>
- the Trustees of the Roman Catholic Church for the Archdiocese of Sydney, a body corporate holding real property on trust for the Archdiocese of Sydney who might itself run a service;<sup>64</sup>
- the Sydney Catholic Education Office, which is an unincorporated association;
- Catholic Care, which is an unincorporated association; and
- Catholic schools, which are usually unincorporated associations.

When child sexual abuse occurs within such a system, the following difficulties with civil liability arise, especially in historical cases:

1. The relationship between personnel and 'members' of a voluntary association as a whole is too slender and diffuse to establish vicarious liability on the part of members.
2. The institution with direct responsibility (and who might be directly or vicariously liable), for managing the services provided to children might be an unincorporated association, not amenable to legal proceedings.
3. The person or body within the unincorporated association who might have direct responsibility for appointing, managing and removing personnel might not be amenable to legal proceedings because:
  - a. in the case of an officeholder, such as an Archbishop, diocesan Bishop, Territorial Commander or Provincial:
    - i. they are now deceased
    - ii. they do not exist as a legal person with successor responsibility, such as a corporation sole, or
    - iii. they exist as a corporation sole but only for limited purposes, such as dealing with church property
  - b. in the case of an oversight body, such as an Archdiocesan Council or Catholic Education Office:
    - i. it does not exist as a legal entity
  - c. in either case, judgment may not be satisfied because:
    - i. the individual is 'judgment-proof' or

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<sup>62</sup> *Roman Catholic Church Communities' Lands Act 1942* (NSW), Schedule 2.

<sup>63</sup> In *PAO v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWSC 1216, for example, the Court noted from the evidence at [21]-[23] that: '*...Catholic primary and second schools in Sydney were situate on land owned by the Archdiocese Trustees and the Archbishop would ask or invite a religious order to run a secondary school...Teachers and principals at Catholic primary and second schools who were members of a religious order were appointed to their position by the Provincial of the religious order. The Provincial also determined whether the appointment of such a teacher or principal should cease to exist....Upon a religious order being invited to run a particular school, there was, and continued to be, little and usually no direct communication between the Archbishop and the school.*'

<sup>64</sup> See, for example, Preamble and ss.4(3), 9 and 9A of the *Roman Catholic Church Trust Property Act 1936* (NSW).

- ii. the corporate entity, such as a corporation sole, may not hold or have access to the institution's property
4. The legal entity associated with the unincorporated association, although owning the premises or land, might not be involved in operating, managing and controlling:
  - the services provided to children; or
  - the unincorporated association with direct responsibility for providing the services.

The legal entity is usually a body corporate established by legislation to hold property on trust for the benefit or use of the faith-based institution.<sup>65</sup> Although legislation may authorise the entity to run a service, the entity may choose not to operate the service as a strategy to avoid or reduce liability.<sup>66</sup> Of note:

- a. the body corporate will usually be, or assume the position of, the employer of personnel in a given service<sup>67</sup>
- b. whether religious clergy or members of a religious order are 'employees' is unsettled in Australian law
- c. the relevant legislation usually:
  - i. binds the body corporate to hold property on trust for ecclesiastical, charitable and educational purposes
  - ii. confines the corporation's role and powers to holding property, rather than appointing, managing and removing personnel
  - iii. does not render the body corporate the 'universal nominal defendant' liable for all legal claims against the greater unincorporated association or its personnel that are unrelated to holding property.

## The options for reform

We firmly support the Royal Commission recommending reforms in this area that are proactive and preventative in nature. In our view, this means the reforms should aim to compel faith-based institutions to adopt structures that enhance the institutional leadership, governance and culture<sup>68</sup> essential to being a child-safe organisation and the ability to comply with any future statutory duty of care, and also aim to ensure access to justice for survivors by addressing the civil liability difficulties noted above.

The Victorian Committee's recommendations on this issue are proactive, preventive and could achieve these aims. For this reason, we support the Royal Commission adopting those recommendations for all Australian jurisdictions. The Victorian Committee recommended:

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<sup>65</sup> Anglican Church, Roman Catholic Church, Presbyterian Church, Uniting Church, Baptist Church, The Salvation Army, Churches of Christ, Lutheran churches, Congregational Churches, some members of the Jewish faith and certain orthodox churches and small religious groups: see *Halsbury's Laws of Australia*, Religion.

<sup>66</sup> See, for example, Case Study 8 exhibits DUG.051.038.0034, DUG.051.038.0044 and DUG.051.038.0010.

<sup>67</sup> For example, Teachers (Archdiocese of Sydney and Dioceses of Broken Bay and Parramatta) Enterprise Agreement 2013, Cl 2.1; *Connor v Trustees of the Roman Catholic Church of the Archdiocese of Sydney* [2006] NSWCCPD 124; *Trustees of the Sydney Grammar School v Winch* [2013] NSWCA 37.

<sup>68</sup> Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report* (June 2014), 140-144.

- that the [Victorian] Government consider requiring non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlements; and
- that the [Victorian] Government work with the Australian Government to require religious and other non-government organisations that engage with children to adopt incorporated legal structures.<sup>69</sup>

The Victorian Committee also relevantly found that ‘[A]mending specific statutes that establish trustee corporations for some organisations is unlikely to resolve the issue of establishing the legal identity of unincorporated associations and ensuring appropriate governance structures to address civil claims for criminal child abuse’.<sup>70</sup> We agree with this finding.

In our view, based upon the reported experiences of our clients and the evidence revealed in the Royal Commission’s public hearings to date, the structure and related culture of many faith-based institutions has significantly contributed to the perpetration and concealment of child sexual abuse within these institutions and undermined the capacity of these institutions to prevent and respond to its occurrence. Passing remedial legislation such as the Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW), or such other legislation establishing Nominal Defendants, will not proactively address these structural and cultural issues and thereby protect children in future. Nor would such steps adequately position these institutions within the broader legal, social and regulatory context in which they operate. More significantly, without incorporation and proper governance structures, these institutions have discretion in whether to implement and comply with a statutory duty of care, as this duty cannot be enforced against an institution, or an organisation within its system, that does not exist at law. The existence of discretion within an institution whose members and personnel are personally united and bonded by a common faith is dangerous.<sup>71</sup>

Alternatively, if the Nominal Defendant device were to be adopted by all Australian jurisdictions, we would only support such a recommendation as an interim measure or as an option of last resort. Reforms giving effect to this device should be modelled on the Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW). In addition, the reforms should include:

- The Nominal Defendant should be a corporate entity established under the legislation creating the faith-based institution’s property trust.<sup>72</sup>
- A new Part, which could be modelled on the Bill and motor accidents compensation legislation,<sup>73</sup> should be inserted into the property trust legislation. That Part should include the following:
  - a) Any action or proceedings by or against the Nominal Defendant should be taken in the name of the ‘Nominal Defendant for [insert name of faith-based religious institution]’. For example, ‘Nominal Defendant for the Roman Catholic Church for the Archdiocese of Sydney’. Including the name of the faith-based institution in the title of proceedings is symbolically significant.

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<sup>69</sup> Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Recommendations 26.1 and 26.2, Volume 1, 536.

<sup>70</sup> Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Finding 26.3, Volume 1, 536.

<sup>71</sup> Parliament of Victoria, Family and Community Development Committee, *Betrayal of Trust* (2014), Recommendations 26.1 and 26.2, Volume 1, 166-167.

<sup>72</sup> For example, the *Roman Catholic Church Trust Property Act 1936* (NSW), the *Roman Catholic Church Communities’ Lands Act 1942* (NSW), the *Salvation Army (New South Wales) Property Trust Act 1929* (NSW) or *Anglican Church of Australia Trust Property Act 1917* (NSW).

<sup>73</sup> See, for example, the *Motor Accidents Compensation Act 1999* (NSW), Part 2.4 and *Crown Proceedings Act 1988* (NSW), ss.3, 5(1) and 7.

- b) The Nominal Defendant should apply in ‘civil proceedings’ (as similarly defined in section 3 of the *Crown Proceedings Act 1988* (NSW) to cover discovery), in respect of causes of action against the faith-based institution founded on personal injury resulting from ‘child abuse’ (as defined above).
- c) The Nominal Defendant is liable as if it were the ‘person responsible’ for the appointment, management or removal, for the majority of the time, of the individual who committed the ‘child abuse’. The ‘person responsible’ should be defined to include the head of the faith-based institution, from time to time, or their delegate, as determined by the rules and regulations of the relevant institution.<sup>74</sup> Clarifying through legislation who the responsible person is should assist that person to take proper steps to implement and ensure compliance with any statutory duty of care owed to children.
- d) The Part does not operate to exclude or limit vicarious liability.
- e) The Amendment applies to causes of action arising before, on and after the commencement of the Act.

**4. Whether the difficulties in identifying a proper defendant arise in respect of institutions other than faith-based institutions and how these difficulties should be addressed**

**Recommendation 19:** That all Australian Governments require non-government institutions to be incorporated and adequately insured in order to access government funding or tax exemptions and/or other entitlements.

**Recommendation 20:** That Australian Governments work together to require non-government institutions that engage with children to adopt incorporated legal structures.

We submit that the above difficulties can also arise in respect to other non-government institutions; however, these other non-government institutions are unlikely to adopt the complex systems that faith-based institutions tend to adopt, possibly because these institutions tend to deliver a narrower suite of services or programs to children or lack the financial capacity or other resources necessary to adopt and maintain such systems. The Victorian Committee’s recommendations therefore equally apply to these institutions.

**5. Whether governments and non-government institutions should adopt principles for how they will handle civil litigation in relation to child sexual abuse claims**

**Recommendation 21:** That all Australian Governments and all other institutions subject to a statutory duty of care to children adopt principles for how they will handle civil litigation in relation to child sexual abuse claims.

We support all institutions, especially all Australian Governments, who are subject to a statutory duty of care to children, adopting specific principles or guidelines (beyond the more general ‘model litigant’ obligations), for how they will handle civil litigation in relation to child sexual abuse claims. Such principles or guidelines should be informed by the principles underpinning trauma-informed practice models. There should be some mechanism for monitoring and enforcing compliance by governments and their lawyers with such obligations.

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<sup>74</sup> The Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW), Sch 1, Cl 17 provides workable definitions.

**6. Whether any changes may have adverse effects on insurance availability or coverage for institutions, including specific details of the adverse effects and the reasons for them.**

We have made some observations above relevant to these issues, and make no additional submission here, other than to note that it is accepted that some of the fundamental changes under consideration, such as the retrospective operation of certain legislative amendments relevant to institutional liability, will impact significantly on institutions and insurers, and the availability and expense of their future insurance coverage.

However, it is far preferable that these consequences, and any related adverse financial effects, fall upon the institutions and their insurers, rather than upon those who suffered sexual abuse as children while in the supposed 'care' of institutions and who have borne such burdens since.

**ATTACHMENTS**

**Appendix 1 – knowmore Service Snapshot ('Infographic') to 31 December 2014.**

# 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 31<sup>st</sup> December 2014, we've helped:**

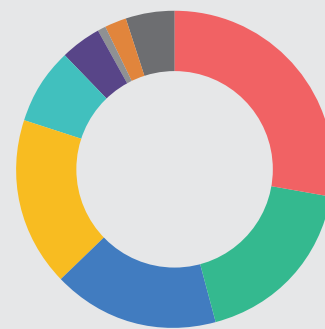


**2243**  
unique clients



**6739**  
advices provided

### Calls came from




NSW	28%
QLD	18%
VIC	17%
WA	17%
SA	8%
TAS	4%
ACT	1%
NT	2%
Unspecified/Overseas	5%

### Our current client-facing team includes:

 19 lawyers

 8 social workers/counsellors

 5 Aboriginal and Torres Strait Islander Engagement Advisors

### Community outreach and liaison



Face to face services were provided to **781 clients**



**knowmore** has conducted or participated in **503** community outreach and liaison events



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

# knowmore

## Service snapshot



### Counselling/ social work

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

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



**419 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



**22% of our clients** identify as being of Aboriginal and Torres Strait Islander descent



We employ 5 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



**79%**

79% of clients were aged 45 and over



**43%**

43% identified as females



**56%**

56% identified as males



**29%**

29% of clients required more than one advice session

### Client feedback

"Thank you very much for your assistance with dealing with this issue. I have found my communications with **knowmore** to be very efficient and I feel that you have handled my case in a very safe and sensitive manner, which I appreciate"

"You set me on the right track, I give you my heartfelt thanks for organising my contact with... (compensation lawyer)"

"Each time I open up I feel that one more brick is taken out of the wall of silence, it's a good thing that you and your colleagues are doing"

"I was so appreciative of your concern yesterday for my welfare, I've found this part of the process encouraging with a great amount of empathy"

"I have seen quite a few counsellors but I have never really had anyone show the humanness that you did"