

Our Ref: MR: WGS  
Please reply to: Brisbane office

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Department of Justice  
Office of Strategic Legislation and Policy  
GPO Box 825  
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Dear Colleagues,

**RE: DRAFT LIMITATION AMENDMENT BILL 2017**

We thank the Department of Justice for the opportunity to comment on the draft *Limitation Amendment Bill 2017* ("the draft Bill").

The need for reform of the limitation period laws that apply to claims for damages founded on the personal injury of a claimant resulting from childhood abuse is clear from the work of the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Commission').<sup>1</sup>

**knowmore** welcomes the Tasmanian government's commitment to implementing the Commission's recommendations concerning removal of limitation periods<sup>2</sup> as a necessary step towards enhancing access to justice for child abuse survivors. We have supported such reform in previous submissions made to the Commission<sup>3</sup> and in relation to recent legislative reforms that have been occurring in Victoria, New South Wales and Queensland.<sup>4</sup>

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<sup>1</sup> See Royal Commission into Institutional Responses to Child Sexual Abuse, *Report on Redress and Civil Litigation* (2015), pp 434-459

<sup>2</sup> See Royal Commission into Institutional Responses to Child Sexual Abuse, *Report on Redress and Civil Litigation* (2015), p 459, recommendations 85-88

<sup>3</sup> See **knowmore**, Submission (Issues Paper 5 – Civil Litigation); Submission (Issues Paper 6 - Redress Schemes); Submission (Issues Paper 7 - Statutory victims of crime compensation schemes); and Submission (Consultation Paper 1 – Redress and Civil Litigation), to the Royal Commission into Institutional Responses to Child Sexual Abuse. All of these submissions can be viewed at our website: [www.knowmore.org.au/resources/issues-papers](http://www.knowmore.org.au/resources/issues-papers)

<sup>4</sup> See **knowmore**, Submission to the NSW Department of Justice, Discussion paper – *Limitation periods in civil claims for child sexual abuse*; and Submission to the Victorian Department of Justice, *Limitation of Actions Amendment (Criminal Child Abuse) Bill 2014*, Exposure draft; and Submission to the QLD Legal Affairs and Community Safety Committee, *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016* and the *Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings)*

## A. INTRODUCTION

**knowmore** is a free, national legal service providing legal advice and assistance, information and referral services via a free advice line and face-to-face services in key locations, for people considering telling their story or providing information to the Commission. **knowmore** is a multidisciplinary and trauma-informed service, staffed by solicitors, counsellors, social workers and Aboriginal and Torres Strait Islander Engagement Advisors, and is conducted from offices in Brisbane, Sydney and Melbourne. Client outreach clinics are held on a regular basis in other States and Territories, including Tasmania, where we often work closely with local services supporting survivors.

**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. The service was launched in July 2013 and, since that time, we have provided services to over 7,300 individual clients. The majority of our clients are survivors of institutional child sexual abuse. 3% of those clients live in Tasmania. 23% of our clients identify as Aboriginal and/or Torres Strait Islanders.<sup>5</sup>

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

## B. RESPONSE TO THE DRAFT BILL

**knowmore** supports the proposed removal of limitation periods for all civil claims for child sexual abuse, physical abuse and neglect in both institutional and non-institutional contexts.

We have had the advantage of reading the submission of Professor Ben Mathews of the Faculty of Law, Queensland University of Technology, dated 25 September 2017 (Professor Mathews' submission')<sup>6</sup>. Professor Mathews has written extensively on the need for reform of Australia's limitation laws relating to actions founded on child abuse. We generally endorse Professor Mathews' submission regarding the draft Bill and make the following comments in relation to the suggestions made by Professor Mathews.

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*Amendment Bill 2016* These submissions can be viewed at our website:

[www.knowmore.org.au/resources/other-submissions/](http://www.knowmore.org.au/resources/other-submissions/)

<sup>5</sup> See **knowmore** Service Snapshot (Infographic as at 30 June 2017). A copy is attached as Appendix 1 to this submission

<sup>6</sup> See Professor Ben Mathews, Submission to the Tasmanian Department of Justice, *Draft Limitation Amendment Bill 2017*

1. That the wording 'sexual assault' in the new s 5B(1)(a) of the draft Bill be amended to read 'sexual abuse'.

We agree with Professor Mathews' concern that the provision as currently drafted would exclude non-contact sexual offences. Advances in technology have created new methods of offending against children which may or may not involve an element of contact or assault. Examples of these types of offences which may not fall within the scope of the bill as currently drafted include: grooming or procurement offences<sup>7</sup>; Commonwealth sexual offences involving the use of transit services<sup>8</sup>; and child pornography offences<sup>9</sup>.

We will deal below with the issue of 'psychological abuse'.

2. That the new s 5B(1)(a) of the draft Bill be modified to confine the term 'physical abuse' to 'serious physical abuse'.

This amendment would assist in promoting consistency across jurisdictions. However, in practice we expect that the cost and time involved in instigating civil proceedings would filter out claims based on 'less serious' physical abuse.

3. That the new s 5B(1)(a) of the draft Bill be modified to confine the term 'neglect' to 'serious neglect'.

We welcome the inclusion of child neglect in the draft Bill.

4. That the new s38A(2) of the draft Bill be amended to apply the reform to actions previously brought and defeated on the basis the limitation period had expired and other similar situations, in line with the reforms in Queensland, New South Wales and the Northern Territory.

We support a variation to the new s 38A(2) so that it applies to any claim that has not been determined on its merits; that is, the change to the law should apply to claims that have already commenced where an extension to the limitation period has not yet been determined, as well as claims where the limitation period was judicially determined at an interlocutory stage. The reforms implemented by the Queensland government in ss 48(2)-(5) of the *Limitation of Actions Act 1974* are an appropriate model.

5. That a new section be included in the draft Bill that duplicates the provisions in the *Limitation of Actions Act 1974* (Qld) to enable reopening of previously settled claims in cases where the court considers that to be 'just and reasonable.'<sup>10</sup>

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<sup>7</sup> Pursuant to ss 125C-125D *Criminal Code Act 1924* (Tas)

<sup>8</sup> Pursuant to s 474.19 *Criminal Code Act 1995* (Cth)

<sup>9</sup> Pursuant to s 130 *Criminal Code Act 1924* (Tas)

<sup>10</sup> See *Limitation of Actions Act 1974* (Qld) s 48(5A)-(5C)

In our previous submission concerning changes to the limitation period laws in Queensland,<sup>11</sup> we outlined the basis of our support for re-opening previously settled claims in circumstances where the expiration of a limitation period was a factor. The concerns we raised in that submission have also adversely impacted on many Tasmanian survivors of institutional child abuse, including those who made claims under the Tasmanian Claims of Abuse in State Care Program, and who were required to execute a Deed of Waiver foregoing any future rights of legal action.

**knowmore** has heard from Tasmanian survivors who felt they were effectively coerced into settling their claims on the basis that if they did not accept the amount offered, which in some instances was less than \$5,000, their only other option was to take the matter to court. In most cases, such action would in all likelihood have been doomed to failure, due to the limitation barrier alone.

6. That the new s 5B(2) of the draft Bill be modified to elaborate on the nature and sources of the Court's inherent powers (such as those enabling the permanent stay of a proceeding), as done in other jurisdictions.

**knowmore** supports the wording contained within the New South Wales, Queensland, and Northern Territory legislation.<sup>12</sup>

### Connected abuse

**knowmore** further recommends that the scope of s 5B(1)(a) of the draft Bill be extended to cover not only claims arising from child sexual abuse, serious physical abuse and serious neglect, but also once any of those thresholds is met, any connected abuse.

The concept of 'connected abuse' was included in the New South Wales' laws. Specifically, the NSW laws cover sexual abuse, serious physical abuse and *any other abuse perpetrated in connection with sexual or serious physical abuse (whether or not the connected abuse was perpetrated by the person who perpetrated the sexual abuse or serious physical abuse)*.<sup>13</sup>

**knowmore** favours the NSW approach over the provisions adopted in the Victorian legislation which include 'psychological abuse that arises out of physical and sexual abuse'.<sup>14</sup> Importantly, an approach providing for 'connected abuse' would allow a court to consider all forms of abuse associated with a survivor's experience of childhood sexual abuse, serious physical abuse or serious neglect when determining a claim. Many of **knowmore's** clients, for example, have disclosed being subjected to emotional abuse, and in the case of some of

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<sup>11</sup> See **knowmore**, Submission to the QLD Legal Affairs and Community Safety Committee, *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016* and the *Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016*, at pp.13-15

<sup>12</sup> See *Limitation Act 1969* (NSW) s6A(6), *Limitation of Actions Act 1974* (Qld) s 11A(5) and *Limitation Act 1981* (NT) s 5A(5)

<sup>13</sup> *Limitation Act 1969* (NSW) s 6A

<sup>14</sup> *Limitation of Actions Act 1958* (Vic) Part 11A, Division 5 of that Act

our Aboriginal and Torres Strait Islander clients, cultural abuse, in connection with the institutional child sexual abuse they experienced.<sup>15</sup>

Indeed, the majority of **knowmore's** clients report having experienced multiple forms of abuse as children, as noted in our submission to the Commission concerning redress:

*"...the sexual abuse of children in many institutions, especially residential homes, rarely occurred in isolation of physical and emotional abuse, and that at times, the boundaries between different forms of abuse often overlapped. Some of our clients have spoken of institutional cultures where extreme physical abuse and degradation of children created a culture which in turn facilitated the occurrence of sexual abuse...."*

*We have also spoken to clients who suffered extreme physical and emotional abuse in residential homes and other institutional settings, but who did not experience sexual abuse within the Royal Commission's Terms of Reference. The overwhelming majority of clients who have reported surviving sexual abuse also report enduring physical and emotional abuse; in many institutions, particularly residential home settings, it seems rare for sexual abuse to have occurred in isolation of other mistreatment."<sup>16</sup>*

The inclusion of provision for 'connected abuse' would also prevent definitional arguments concerning whether a particular form of mistreatment amounts to 'psychological abuse' or not. It would furthermore hold perpetrators and institutions properly accountable for all of their acts and omissions, and not just for some of them.

### C. THE NEED FOR FURTHER REFORM

**knowmore** notes the fundamental importance of ensuring that survivors of institutional child abuse are afforded meaningful opportunities to access justice and, most importantly, choice in how to pursue outcomes that are appropriate and important to them. In our experience<sup>17</sup> and as found by the Commission,<sup>18</sup> many survivors of institutional child abuse will never be in a position to successfully pursue civil claims through the courts, as they face considerable evidentiary and other barriers in accessing compensation through the civil litigation system. These barriers cannot be overcome solely by exempting child abuse claimants from the application of limitation periods.

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<sup>15</sup> In relation to the issue of cultural abuse, see **knowmore** Submission No 42 (Issues Paper 7 - Statutory victims of crime compensation schemes) to the Royal Commission into Institutional Responses to Child Sexual Abuse, at p.16

<sup>16</sup> **knowmore** Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper 6, *Redress Schemes*, pp 19-20. See [www.knowmore.org.au/resources/issues-papers/](http://www.knowmore.org.au/resources/issues-papers/)

<sup>17</sup> **knowmore** Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, Issues Paper 5, *Civil Litigation*, pp 3 – 4. See [www.knowmore.org.au/resources/issues-papers/](http://www.knowmore.org.au/resources/issues-papers/)

<sup>18</sup> Royal Commission, *Redress and Civil Litigation Report (2015)* pp.431 -433

In particular, absent implementation of other civil litigation reforms as recommended by the Commission regarding the liability of institutions and the identification of a proper defendant,<sup>19</sup> it will remain challenging for survivors to establish claims against institutions and their officials.

We therefore confirm our view that it is both necessary and desirable for the Tasmanian Government to opt in to the Commonwealth Redress Scheme being established by the Commonwealth Government.<sup>20</sup> Without the participation of State Governments and non-government institutions in the Commonwealth Redress Scheme, it is our view that many survivors will never be able to receive just outcomes that are truly meaningful for them.

Thank you for considering our submission and its accompanying recommendations. We have no concerns about this submission being published.

Should you wish to discuss our submission further, please contact me on (07) 3218 4500.

Yours sincerely,



**WARREN STRANGE**  
Executive Officer

**Encl.**

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<sup>19</sup> See Royal Commission into Institutional Responses to Child Sexual Abuse, *Report on Redress and Civil Litigation* (2015) pp77-78, Recommendations 89-99

<sup>20</sup> For knowmore's previously expressed views about the need for a national redress scheme, see **knowmore**, Submissions to the Royal Commission into Institutional Responses to Child Sexual Abuse; Issues Paper 5 - Civil Litigation; Issues Paper 6 – Redress Schemes; and Issues Paper 7 – Statutory victims of crime compensation schemes. Viewed at [www.knowmore.org.au/resources/issues-papers/](http://www.knowmore.org.au/resources/issues-papers/)