knowmore
free legal help for survivors

Submission to the Northern Territory Government's consultation in relation to

'Options for the implementation in the Northern Territory of the civil litigation reforms recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse'

November 2018

Table of Contents

1. Introduction

knowmore is a free legal service that was initially established in 2013 to assist people who were engaging with or considering engaging with the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Royal Commission'). knowmore was established by and operates as a program of the National Association of Community Legal Centres (NACLC), with funding from the Australian Government, represented by the Attorney-General's Department.

From 1 July 2018 NACLC has been funded to operate knowmore to deliver legal support services to assist survivors of institutional child sexual abuse to access redress under the National Redress Scheme ('the NRS'). knowmore assists survivors by providing information and advice about the options available to them, including claims under the NRS, access to compensation through other schemes or common law rights and claims. Advice is also provided on key steps in the redress application process, including:

a) prior to application so survivors understand eligibility requirements and the application process of the Scheme and their legal options;

b) during completion of a survivor's application;

c) after a survivor has received an offer of redress or refusal and elects to seek an internal review; and

d) on the effect of signing a deed of release, including its impact on the prospect of future litigation.

knowmore operates as a national community legal centre, using a multidisciplinary model to provide trauma-informed, client-centred and culturally safe legal assistance to clients. knowmore has offices in Sydney, Melbourne and Brisbane and brings together lawyers, social workers, counsellors and Aboriginal and Torres Strait Islander engagement advisors to provide coordinated support to clients.

In its Royal Commission related work, from July 2013 to 31 March 2018 knowmore assisted 8,954 individual clients. The majority of those clients were survivors of institutional child sexual abuse. 24% of the clients assisted during our Royal Commission work identified as Aboriginal and/or Torres Strait Islander peoples.

In undertaking this work, knowmore travelled regularly to the Northern Territory to support clients residing there and to work with local legal and support services. We assisted 126 clients living in the Northern Territory. 61% of those clients identified as Aboriginal and/or Torres Strait Islander peoples.[1]

[1] See knowmore, Service Snapshot (Infographic to 31 March 2018), attached to this submission, for further information about our clients residing in the Northern Territory.

In its work relating to the NRS, from 1 July to 31 October 2018 knowmore has completed intake processes and has assisted or is currently assisting 2,703 clients. 56% of these clients are people who have previously engaged with knowmore, and 44% are new clients. Further, 12% of the clients assisted to date have been identified as priority matters; clients are allocated priority where they are of advanced age and/or have identified immediate and serious health concerns such as a diagnosis of a terminal or life-threatening illness.[2]

Many of the clients knowmore has assisted have been seeking legal advice about their options, if any, to obtain financial and other redress in relation to sexual and other abuse they suffered as children in institutions. Some of these clients have had direct experience with the civil litigation system; usually as a potential litigant seeking advice about a possible claim. Very few have ever actually commenced civil proceedings; in many cases, this has been primarily due to the barriers presented by the previous laws about limitation periods, and the existing laws relating to the duty of institutions, and the identification of a proper defendant (and who may have means to satisfy any judgment), to sue.

knowmore does not represent clients in common law or civil claims relating to actions for compensation. We do provide referral services, and in circumstances where clients may have a viable civil claim and wish to investigate or pursue such a cause of action we advise clients about referral options to seek advice from an experienced personal injury lawyer familiar with the issues arising in cases of claims for institutional abuse. For that purpose, we have established a national panel of experienced private lawyers, who meet specific criteria that reflect their experience with and understanding of the needs of this client group.

In responding to the Options Paper, we have drawn on what we have learned, through our work, about the collective experience of our clients and their needs. We welcome the opportunity to participate in the Territory's consultation process to consider how justice can be provided to victims of institutional child abuse. The effecting of reform to the current law regarding the duty of institutions and other reforms as recommended by the Royal Commission around the identification of a proper defendant, will significantly assist survivors who are seeking to establish claims against institutions and their officials, and will facilitate the disposition of those claims on their merits.

We note the fundamental importance of ensuring that survivors/claimants 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. As the Territory nears full participation in the NRS, it is important that these reforms be implemented soon. Given that the acceptance of an offer of monetary redress under the NRS requires a survivor to relinquish their rights in relation to any civil claim against a participating institution, it is important that survivors are provided with the best

[2] See knowmore, Service Snapshot (Infographic 1 July to 31 October 2018), attached to this submission, for further information about our NRS related service delivery

information and advice possible about their legal rights before determining to pursue a claim under the NRS and to accept an offer of redress.

2. General comments on actions against institutions and the recommendations of the Royal Commission

i. Actions against institutions

The Civil Litigation component of the Royal Commission's *Redress and Civil Litigation Report* outlines the options available to survivors of institutional child abuse to seek to recover damages through bringing civil claims. However, survivors bringing civil actions for institutional child abuse face many significant difficulties under the current law.

Obviously the most straightforward option is to sue the perpetrator(s) of the abuse, for the tort of battery. However the reality facing survivors is that in many cases their perpetrator has no significant assets from which to satisfy a judgment. The frequent elapsing of considerable time between the occurrence of the abuse and the survivor being able to make an effective report and/or take action to seek justice for their experience,[3] also means that often the perpetrator is deceased by the time civil action is contemplated, leaving no significant estate.

Accordingly, to recover compensation survivors often need to look to the relevant institution. There are three primary approaches to establishing institutional liability in these cases, namely:

- bringing an action in negligence;
- bringing an action relying on the vicarious liability of the institution for the abuse committed by the perpetrator; and
- bringing an action for the breach of the institution's non-delegable duty to ensure third parties take reasonable care to prevent harm.

The Royal Commission identified and the Options Paper sets out some of the difficulties currently faced by child abuse plaintiffs in seeking to establish organisational/institutional liability. These may include:

- For actions in negligence – the plaintiff must prove they were owed a duty of care by the institution; that duty was breached through a failure to exercise reasonable care; and that breach caused the harm alleged. On the current state of the law, there may be difficulties in establishing that an organisation had a

[3] The Royal Commission has found that the average time for a survivor of sexual abuse in an institutional context to make a disclosure is 22 years, with men taking longer than women to disclose. Royal Commission, *Interim Report,* June 2014, at p.6

duty of care to prevent abuse from occurring through the criminal conduct of others:

> *The unpredictability of criminal behaviour is one of the reasons why, as a general rule, and in the absence of some special relationship, the law does not impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk of such harm is foreseeable.* [4]

- For actions founded on vicarious liability, legal responsibility is imposed on the institution for misconduct by another party, even if the institution is not itself at fault. However, under Australian law plaintiffs have found it difficult to establish vicarious liability outside the existence of a clear employer-employee relationship. This presents particular difficulties for survivors wishing to establish institutional/vicarious liability where their perpetrator was not an employee of the relevant institution (such as a volunteer or a minister of a religion). Additionally, a plaintiff must establish that the wrongful conduct occurred within the scope or course of the relevant employment (we will address these issues in further detail below).

- Non-delegable duties have traditionally been imposed in certain categories of relationship, requiring one party to take care for another's safety. For actions for breach of a non-delegable duty to prevent harm, Australian courts have shown a reluctance to include intentional criminal conduct within the scope of non-delegable duties. In the 2003 decision of *Lepore* (a case involving the sexual abuse of a student by a teacher), a majority of the High Court held that a school's non-delegable duty of care with respect to a pupil did not extend to the intentional criminal conduct of a teacher, in the nature of sexual abuse.[5] The High Court determined not to revisit this aspect of *Lepore* in the recent decision in *Prince Alfred College Incorporated v ADC* [2016] HCA 37.[6]

Beyond the difficulties attaching to the above specific causes of action, there are the more general barriers facing institutional child abuse plaintiffs, as the Options Paper acknowledges, namely:

- identifying a defendant to sue can also be difficult because the way an institution is structured may mean that there is no legal entity who is capable of being sued;
- even if an institution has 'legal personality', it may not have legal responsibility for the actions of the perpetrator of the abuse; and

[4] *Modbury Triangle Shopping Centre Pty Ltd v Anzi*l (2000) 205 CLR 254, per Gleeson CJ at [29]

[5] *New South Wales v Lepore* (2003) 212 CLR 511 at 534-535 [36]-[39], 598-601 [254]-[263], 609-610 [292]-[295], 624 [340]

[6] At [36]-[37]

- even if an institution is found to be liable, it may not have sufficient assets or insurance cover which extends to abuse.

ii. The recommendations of the Royal Commission

The Royal Commission in its Report made seven recommendations (89 – 95) about enhancing the legal responsibility of institutions for child sexual abuse, ensuring there is someone to sue, and requiring relevant institutions to have insurance.

knowmore recommends that all of these recommendations should be implemented by the Northern Territory Government.

In considering implementation of the Royal Commission's recommendations, two important matters must be noted.

First, the Commission released its final report on *Redress and Civil Litigation* in September 2015. This was an interim report, but it contained the Commission's final recommendations on redress and civil litigation. The report addressed that part of the Letters Patent, which required the Commission to inquire into:

> *What institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims …*

The report made recommendations about the provision of effective redress to survivors through the establishment, funding and operation of a single national redress scheme. It also contained recommendations for reforms to civil litigation systems *"to make civil litigation a more effective means of providing justice for survivors."*

The Commission's final recommendations on civil litigation reform have been comprehensively informed by a huge amount of work and information. This body of work included:

- Numerous public hearings involving cases where survivors had sought to pursue claims for damages under existing arrangements and laws, including a case study involving institutions in the Northern Territory.
- Thousands of private sessions where survivors have explained their experiences of abuse and what they need for justice.
- The gathering of submissions following the release of four Issues papers - on the *Towards Healing* process of the Catholic Church; civil litigation; redress; and statutory victims of crime compensation schemes. These four papers resulted in the lodging of over 190 public submissions, representing a diverse range of interests and views.[7] Submissions were lodged by survivors; Governments; support services; institutions; lawyers; academics; industry groups and others.
- Holding roundtables to consult: *"[F]rom September to November 2014 a series of private roundtables were held with invited participants to discuss redress and civil*

[7] See http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/redress

litigation. Participants included representatives from survivor advocacy and support groups, government representatives, lawyers and insurers, legal academics, faith based organisations and community service organisations." [8]

- On 30 January 2015 a very detailed Consultation Paper was released, inviting further input from the community into the issues raised in the paper.
- In March 2015 a public hearing was held *"to enable invited persons and institutions to speak to their written submissions to the Royal Commission's consultation paper and particular issues relevant to the Royal Commission's work on redress and civil litigation."* [9]

The above reflects the Commission's efforts to obtain information from all relevant sources, across Australia, to inform its final report on redress and civil litigation reforms. All points of view were sought and represented in those processes. In our experience, the level of consultation and community engagement leading to the Commission's final recommendations exceeds that undertaken by any previous Commission of Inquiry.

The Commission's final recommendations are balanced and sound and have clearly been arrived at after prolonged and very careful consideration as to all of the impacts, upon all relevant stakeholders. In our submission, it follows that in considering and implementing reform in the Northern Territory, there should be no significant derogation from the recommendations of the Commission.

Secondly, the Options Paper raises the potential impacts of reform upon the provision of services by institutions to children[10]. That is, the proposed reforms may be seen by institutions as increasing the risks related to providing services, which in turn might lead to a reduction in services in order to limit that risk. We make two comments about this concern.

First, the Royal Commission's recommendations are designed to provide an appropriate balance between the competing public policy interests of child protection and accessible service provision. This is particularly reflected in the crafting of recommendations 89 -91 inclusive, which relate to the imposition of non-delegable duties upon institutions, with only certain categories of institutions (as per recommendation 90), being the subject of the strict liability imposed by recommendation 89. The Royal Commission's report addressed in some detail the reasons why this new statutory duty should not apply to other categories of institutions, specifically noting community-based and not-for-profit organisations, which are to be the subject of the reverse onus reform set out in recommendation 91. In considering the impact of these reforms on institutions, it must also be noted that the Royal Commission has recommended that these reforms operate with prospective, rather than retrospective, effect.

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[8] See http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/redress

[9]Case Study 25: see http://www.childabuseroyalcommission.gov.au/case-study/93e59a38-c3df-4528-b479-f0e83d4ff19a/case-study-25,-march-2015,-sydney

[10] Options Paper, at p.10

Secondly, the extensive work of the Royal Commission over the past five years has exposed what can only be described as a national, catastrophic and completely unacceptable failure by Australian institutions to adequately protect vulnerable children from sexual abuse. It is fair to say that Australians aware of the Royal Commission's work have been appalled by its revelations and particularly the repeated exposure of conduct on the part of previously respected institutions and their officials that fell so far short of the community's expectations about the standards of care and protection that should be provided to children. Every day our legal service endeavours to provide assistance to the victims of this national failure, who carry with them a life-long legacy of complex trauma arising from their victimisation and which almost inevitably impacts adversely on multiple aspects of their lives, including their relationships, mental and physical health, financial status and employment.

Implementation of the Royal Commission's civil litigation reforms will obviously impose higher standards on institutions providing services to children. As such, resourcing demands around the adoption of improved practices and accountability, and possibly higher insurance premiums, will follow.

However, as the Royal Commission noted, *"legal duties are important for prescribing the standard that the community requires of institutions."*[11] If the implementation of enhanced duties and higher standards forces some institutions out of delivering services to children, because they unwilling to now invest the time and resources in meeting the standards the community expects to protect our children, we suggest that is no bad thing.

[11] Royal Commission, Redress and Civil Litigation Report (2015), at p. 56

3. Duties and liability of institutions

General comments

Tracing the liability of the institution in child abuse matters is one of the many hurdles faced by survivors. As the law currently stands in Australia it is unclear and needs a legislative framework to clarify and ensure stronger protections for children to afford survivors justice, and to properly hold institutions accountable for the harm that arises from abuse connected to them.

The Options Paper notes the decisions of the High Court in the cases of *Lepore*[12] and *Prince Alfred College*[13]. In considering whether the Northern Territory should adopt the Royal Commission's recommendations for a new non-delegable duty (recommendations 89 and 90), it is useful to consider the current state of the common law in light of the High Court's decision in *Prince Alfred College* and the implications of that decision for actions brought by institutional child abuse plaintiffs.

While the appeal in *Prince Alfred College* was determined on the limitations/extension of time issue,[14] the plurality (French CJ, Kiefel, Bell, Keane and Nettle JJ) considered that it was appropriate to consider the issue of the institution's vicarious liability because it was both relevant to the extension of time issue, and as the existing state of the law was impacted by the differing judgments in *Lepore*. The plurality reviewed the relevant authorities and suggested that the 'relevant approach' was as follows:[15]

> *In cases of the kind here in question, the fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. As* Lloyd v Grace, Smith & Co *shows, it is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion. Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability. As* Deatons Pty Ltd v Flew *demonstrates, depending on the circumstances, a wrongful act for which employment provides an opportunity may yet be entirely unconnected with the employment. Even so, as Gleeson CJ identified in* New South Wales v Lepore *and the Canadian cases show, the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that*

[12] *New South Wales v. Lepore* (2003) 212 CLR 511

[13] *Prince Alfred College Incorporated v. ADC* (2016)HCA 37

[14] The High Court holding that there was no basis to allow an extension of the limitation period

[15] At [80] – [81]

act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.

Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.

Turning to the facts of the particular case, the plurality said:[16]

In the present case, the appropriate enquiry is whether Bain's role as housemaster placed him in a position of power and intimacy vis-à-vis the respondent, such that Bain's apparent performance of his role as housemaster gave the occasion for the wrongful acts, and that because he misused or took advantage of his position, the wrongful acts could be regarded as having been committed in the course or scope of his employment. The relevant approach requires a careful examination of the role that the PAC actually assigned to housemasters and the position in which Bain was thereby placed vis-à-vis the respondent and the other children.

In a separate judgment Gageler and Gordon JJ also allowed the appeal, on the basis that an extension of time should not have been granted. Their joint judgment also addressed how the plurality's 'relevant approach' will be applied in future cases:[17]

We accept that the approach described in the other reasons as the "relevant approach" will now be applied in Australia. That general approach does not adopt or endorse the generally applicable "tests" for vicarious liability for intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.

The "relevant approach" described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer is liable or where there is no liability must and will develop in accordance with ordinary common law methods.

[16] At [84]

[17] At [130]-[131]

> *The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case.*

As such, while the High Court has now provided some guidance about the 'relevant approach' to be followed in future cases, particularly where survivors of institutional child sexual abuse seek to hold an institution vicariously liable for the criminal acts of an employee, it is clear that no absolute rule has been prescribed and that the issue of vicarious liability will be determined on the facts and evidence of each case. As Gageler and Gordon JJ noted:[18]

> *The course of decisions in this Court[19] and the courts of final appeal in the United Kingdom and in Canada reveals that decisions concerning vicarious responsibility for intentional wrongdoing are particularly fact specific. Decisions in the United Kingdom[20] and Canada[21] recognise that resolution of each case will turn on its own particular facts and that existing cases provide guidance in the resolution of contestable and contested questions. The overseas decisions also expose a difficulty in undertaking any analysis by reference to generalised "kinds" of case. Why? Because the "[s]exual abuse of children may be facilitated in a number of different circumstances."[22]*

Also, in the *Prince Alfred College* case the appellant school, in resisting the respondent plaintiff's application for an extension of time, argued that because of the length of the delay in commencing proceedings and consequential deficiencies in the evidence it could not properly defend the claim against it. The plurality decided, following its identification of the 'relevant approach' to the issue of the appellant's vicarious liability, that a determination as to liability could not be made in the case, for those reasons.

Their judgment makes it very clear that in future historical cases, even after the limitation barrier has been removed, that in applying the High Court's 'relevant approach' to determining issues of liability courts will need to be highly cognisant of any forensic disadvantage arising for the defendant due to the passage of time and loss of evidence.

In looking at the implications of the High Court's decision for survivors, it is anticipated that despite the guidance provided by the High Court as to the relevant approach in these cases,

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[18] At [128]

[19] See *Deatons Pty Ltd v. Flew* (1949) CLR at 381 – 382;[1949]HCA 60

[20] *Dubai Aluminum Co Ltd v. Salaam*[2003] 2AC at 378 [26] cited in *Mohamud v. Wm Morrison Supermarkets plc* [2016] AC 677 at 692

[21] *Bazely v. Curry* [1999]2SCR 534 at 545[15] cited in *Jocabi v. Griffiths* [1999] 2SCR570 at 590[31], *John Doe v. Bennett* [2002] 1SCR436 at 445[20] and *EB v. Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3SCR 45 at 69[38].

[22] *Various Claimants v. Catholic Child Welfare Society* [2013] 2AC1 at 26[85]

survivor plaintiffs will continue to face difficulties in establishing vicarious liability on the part of institutions for a number of reasons, including:

- in cases outside a strict employer-employee relationship;[23]
- uncertainty around whether the facts of their case fall within those where a court may hold the institution vicariously liable; and
- in historical cases where it might be expected that defendant institutions will readily be able to identify forensic disadvantage in assembling evidence in their defence such as evidence about the nature of the role assigned to the employee, the nature of the relationship between the employee and the victim, and the features of that relationship, particularly the ability of the employee to achieve intimacy with the victim.

On the first point, many knowmore clients have reported being abused by persons associated with institutions, but who were not formally employed by the institution. For example, priests and other church personnel are often not employed by their church. Volunteers and contractors such as cleaners or support workers as well as other participants or residents of the institution are not employees. These categories of persons who are associated with institutions have been consistently identified by knowmore's clients as perpetrators of abuse. This constitutes an insurmountable hurdle in the ability of survivors to hold institutions liable for injuries arising from child abuse by such perpetrators.

While the reforms currently under consideration are to operate prospectively and will therefore not at this time assist for claims based on historical circumstances, the above reasons support the need for legislation to be enacted. In recommending the creation of this new form of statutory strict liability for institutions, the Royal Commission in its report very aptly noted the priorities applied in property law:

> *"The principle in relation to property was recognised centuries ago when, in* Hern v Nichols, *Sir John Holt said* 'somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger'.[24] *In our opinion, it is time the same principle applied to the care of children."*[25]

[23] In the United Kingdom and in Canada courts have expanded institutional liability beyond employees to others who have relationships which are 'sufficiently analogous' or 'akin' to employment: *Woodland v. Essex County Council* [2013]UKSC 66

[24] *Hern v Nichols* (undated c.1700) 1 Salk 289

[25] Royal Commission, *Redress and Civil Litigation Report* (2015), at p.491

Discussion questions

Proposed reform

1. **What are your views on adopting a statutory duty of care that incorporates a non-delegable element and a reverse onus provision as opposed to the two distinct duties recommended by the Royal Commission?**

We note the Options Paper indicates the Department's preference at this time to approach reform in a manner consistent with the Victorian legislation. It follows from the above discussion that we support the full implementation of the Royal Commission's recommendations (89 & 90) for the prospective imposition of a non-delegable duty of care/strict liability on the categories of institutions identified by the Royal Commission.

However, we acknowledge that this aspect of the Commission's recommendations has not been adopted in other jurisdictions to date. Instead, as Question 1 indicates, the approach taken has been to implement a single statutory duty of care provision applying to all relevant institutions, incorporating a non-delegable duty and a reverse onus provision that provides a defence where the institution can prove it took reasonable steps to prevent the abuse.

While we support full implementation of the Commission's recommendations, including the imposition on a non-delegable duty and strict liability upon those institutions considered to be of 'high risk', if that approach is not taken by the Territory we would support an approach consistent with the other jurisdictions.

2. **What are your views on the proposal to extend the proposed duty to related physical and psychological abuse?**

We support the position foreshadowed in the Options Paper that the proposed duty should extend to related physical and psychological abuse. The recommendations of the Royal Commission were necessarily limited by the Letters Patent issued to it, which for present purposes, restricted it to the context of considering child sexual abuse occurring in institutional settings.[26]

However, as the Letters Patent specifically acknowledged, child sexual abuse *"may be accompanied by other unlawful or improper treatment of children, including physical assault, exploitation, deprivation and neglect."* Further to this, the Royal Commission has since recognised that*"…in particular instances, other unlawful or improper treatment, such as physical abuse or neglect, or emotion or cultural abuse, may have accompanied the sexual abuse."*[27] Indeed, the evidence in so many of the Royal Commission's public

[26] See generally the discussion at pp. 99-102 of the Royal Commission's *Redress and Civil Litigation Report* (2015)

[27] Royal Commission *Redress and Civil Litigation Report* (2015), at p.5

hearings[28] has established both the prevailing brutality and the frequency of multiple forms of abuse in many Australian institutions entrusted with the care of children.

This is the reported experience of the majority of our survivor clients. Our work reflects that 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.

However, the 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.

This reality needs to be recognised in the steps now being taken to enhance survivors' access to justice, by being inclusive of all of the forms of abuse they suffered. Other appropriate aims of law reform in this context should be to ensure consistency in the relevant laws applying to institutional child abuse claims, and to promote the disposition of claims by allowing plaintiffs to pursue all aspects of their experience of abuse in the one action. It is somewhat trite to note that forcing potential plaintiffs to pursue separate remedies or actions for differing forms of abuse will be inherently and highly re-traumatising, and lead to the likely litigation of challenging issues around causation and assessment of loss and damages.

Accordingly, we submit that reform should encompass all forms of child abuse – including sexual, physical, psychological/emotional and cultural abuse – and that civil litigation reforms should adopt a broad definition of child abuse – at a minimum consistent with the approach taken by the Territory in the *Limitation Amendment (Child Abuse) Act 2017.*

3. What financial or associated impacts would the Proposed Duty have on Territory institutions, such as the cost and availability of insurance and the ability to provide services to children?

There will of course be impacts for institutions if reforms are implemented. However, the Commission in its report noted the following, in relation to limiting the application of the recommended new non-delegable duty and strict liability:

> *"We consider it undesirable to impose the liability on non-for-profit institutions that are not providing particularly high-risk services because the risk of liability, or the*

[28] Such as Case Study 7 involving the Parramatta Training School for Girls and the Institution for Girls in Hay, as noted at p.13 of the Discussion Paper

cost of insuring against it, may force them to cease providing services and activities for children. Many community-based not-for-profit or volunteer institutions offer opportunities for children to engage in cultural, social and sporting activities."[29]

That passage, and others in the Commission's *Redress and Civil Litigation* report, illustrates the consideration given by it to the financial and associated impacts upon institutions currently providing services to children. The Commission's recommendations were crafted in a way that balanced those impacts with the need for reform to better protect children and to afford justice to those who were abused as children.

A possible outcome of introducing legislation impacting upon the liability of institutions, including imposing a reverse onus of proof, is that for institutions offering services to children, insurance premiums may be increased. Obviously insurance availability in this area will depend on typical factors such as the risks arising and claims histories; that is, institutions that adopt effective child safety practices should be rewarded with less expensive insurance coverage. As the Royal Commission in its report noted:

The significant financial consequences that may flow if the standard is not met create powerful incentives for institutions and their insurers to take steps to ensure that abuse is prevented. Changes to the duties of institutions do more than provide an additional or more certain avenue for victims of abuse to seek compensation after institutional child sexual abuse has occurred. Changes to the duties of institutions are critical measures for preventing institutional child sexual abuse occurring in the first place.[30]

The proposed reforms may mean that some smaller institutions will no longer be able to offer services and this may well impact the community. However, as we have outlined above, the public interest is in ensuring that all organisations delivering services to children do so safely.

4. Are there any organisations to which the Proposed Duty should not apply? If so, why?

Recommendation 91 of the Royal Commission states:

Irrespective of whether state and territory parliaments legislate to impose a non-delegable duty upon institutions, state and territory governments should introduce legislation to make institutions liable for institutional child sexual abuse by persons associated with the institution unless the institution proves it took reasonable steps to prevent the abuse. The 'reverse onus' should be imposed on all institutions including those institutions in respect of which we do not recommend a non-delegable duty be imposed.

[29] Royal Commission *Redress and Civil Litigation Report* (2015) at p.491

[30] Royal Commission, *Redress and Civil Litigation report* (2015), at p.494

We are of the view that the Royal Commission's recommendation should be adopted. No organisation providing services to children should be exempted. Application of the duty to all such institutions will help to drive heightened awareness of the need to protect children from all forms of abuse, and also the implementation of processes and procedures to ensure that reasonable steps have been taken to prevent child abuse.

Institutional associates

5. Should there be any limitation on who may be considered an associate of an institution?

The Royal Commission's Recommendation 92 stated:

> *For the purposes of both the non-delegable duty and the imposition of liability with a reverse onus of proof, the persons associated with the institution should include the institution's officers, office holders, employees, agents, volunteers and contractors. For religious organisations, persons associated with the institution also include religious leaders, officers and personnel of the religious organisation.*[31]

knowmore supports the Royal Commission's recommendation. We recognise the special position of trust a perpetrator may attain through their association with an institution. For many of our clients, the perpetrators of their abuse were not direct employees of an institution, but were associated with the institution in other capacities, such as those captured by recommendation 92. It has been our experience that often perpetrators gain trust and credibility as a result of their relationship with an organisation, which they in turn use to facilitate opportunities to offend.

Organisations represent those associated with them as trustworthy individuals.[32] In some cases, parents only entrust their children to a non-government organisation because of this special relationship of trust.[33]

We agree with the Royal Commission's observation that "*child sexual abuse can occur within any institution where there are children and a motivated perpetrator. Some perpetrators will actively try to manipulate institutional conditions to create an opportunity to sexually abuse. Institutions can take certain actions to reduce risk factors and enhance protective factors. These involve considering the role of an institution's policies, climate, culture and norms*."[34]

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[31] Royal Commission, *Redress and Civil Litigation Report* (2015), at p.77

[32] Parliament of Victoria, Betrayal of Trust, Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations, November 2013, p.544

[33] Parliament of Victoria, Betrayal of Trust, Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations, November 2013, p.544

[34] Royal Commission into Institutional Responses to Child Sexual Abuse, Literature Review, Risk Profiles for Institutional Child Sexual Abuse, October 2016, p.9

Extending liability to all persons associated is necessary to strengthen such protective measures.

Adopting recommendation 92 would acknowledge the institution's responsibility in creating relationships of trust not confined to direct employment, and clarify a legal duty to take appropriate safeguards to minimise the risk of abuse that arises because of this.[35] We submit that the non-delegable duty and the reverse onus of proof reform should extend to all persons associated with an institution, as defined above. This is crucial to recognise the institution's responsibility and to create a 'deterrent' effect. Increasing responsibility of institutions in this manner would:

- Clarify the liability of institutions for all parties.[36]
- Provide clearer compensation options for those who have suffered abuse.
- Create cultural change in institutions through a motivation to adopt stronger preventative measures, due to the financial incentive to meet requirements of insurance and the more stringent duty to show reasonable precautions were taken (the reverse onus of proof).
- Shift the financial burden from communities and survivors to the institutions responsible.[37]

We noted in an earlier submission that an objective of law reform in this context should be *"… to ensure the cost of child abuse is fairly borne by those who were responsible for that harm."*[38]

We also note the expansive approach taken in the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)* in determining the relevant circumstances for when an institution should be considered primarily or equally responsible for an abuser having contact with a child – see section 15(4) of that Act, which provides:

> ***Relevant circumstances for determining responsibility***
>
> *(4) Without limiting the circumstances that might be relevant for determining under subsection (2) or (3) whether an institution is primarily responsible or equally responsible for the abuser having contact with the person, the following circumstances are relevant:*
>
> *(a) whether the institution was responsible for the day-to-day care or custody of the person when the abuse occurred;*
>
> *(b) whether the institution was the legal guardian of the person when the abuse occurred;*
>
> *(c) whether the institution was responsible for placing the person into the institution in which the abuse occurred;*

[35] Law Council of Australia, submission to the Royal Commission on Issue Paper 5, Civil Litigation, 25 March 2014, p.16

[36] knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p. 25

[37] knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p.18

[38] knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p.4

(d) whether the abuser was an official of the institution when the abuse occurred;

(e) whether the abuse occurred:

(i) on the premises of the institution; or

(ii) where activities of the institution took place; or

(iii) in connection with the activities of the institution;

(f) any other circumstances that are prescribed by the rules.

Note: When determining the question whether an institution is responsible for abuse of a person, the circumstances listed in this subsection are relevant to that question, but none of them on its own is determinative of that question.

6. Should liability extend to acts of abuse committed by children under the care, control or supervision of institutions? Why or why not?

In our view, yes, for the reasons noted above. Institutions should bear the onus of providing a safe environment for children over whom they are exercising care, supervision or authority.

In Volume 2 of its Final Report the Royal Commission said the following about institutional settings where children sexually harmed other children:

> *Most of the children with harmful sexual behaviours we heard about in private sessions harmed other children in institutions where they had the opportunity to be with other children unsupervised. For example:*
>
> - *Sixty-three per cent of survivors indicated they were the target of another child's harmful sexual behaviour in historical residential and foster care or contemporary out-of-home care*
> - *Eighteen per cent of survivors indicated that they were targeted in a school*
> - *Twelve per cent of survivors told us they were sexually abused by another child in a youth detention setting.*
>
> *Research we commissioned also indicates that most children with harmful sexual behaviours knew their victims.*[39]

In Volume 11 of its Final Report the Commission noted:

> *'Among those who indicated the approximate age of the person or persons who abused them (62.3 per cent), more than two-thirds (71.9 per cent) said they were*

[39] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report, Volume 2 – Nature and Cause,* at p.106

abused by adults and two in five (41.1 per cent) said they were abused by other children.' [40]

Given these findings about prevalence, we submit the liability should extend to acts of abuse committed by children under the care, control or supervision of institutions upon other children.

We note that if the indicated approach of adopting a statutory duty of care provision which incorporates a non-delegable duty and a reverse onus is implemented, it will be a question of fact in child abuse cases as to whether the institution took reasonable steps to prevent the child abuse alleged. Those reasonable steps (as explained below) will vary depending on the institution and the 'associate' involved and their relationship to the child victim.

7. How closely associated should an institution and a perpetrator need to be to result in potential liability? For example, should an institution be liable for abuse committed by an employee or volunteer in their own home, against a child met through the institution?

The term 'associated with' should be non-exhaustively defined in legislation. We suggest that the definition of 'associated with' should be defined broadly for the following reasons:

- In our experience the scope of institutions and scenarios where an organisation is responsible for a perpetrator having contact with a child is broad.[41]
- Claims should not be excluded due to a novel or unexpected category of relationship.[42]
- So that institutions cannot avoid liability through delegation of the care, supervision or authority of a child to third parties.[43]
- So that the financial burden of child abuse is not unfairly borne by the victim and the community.[44]

We can unfortunately point to many cases disclosed by our clients which would fall within the example noted in this question. It is common for offenders to use their connection and status within an institution to groom and otherwise manipulate children and to in turn facilitate offending in a variety of settings, such as outside the institution.

Despite a legislated definition, it will be possible for an institution to dispute responsibility in any specific case where it is considered that the facts of the institution's relationship with the alleged abuser and the circumstances of the abuse should not found institutional

[40] Royal Commission, *Final Report, Volume 11 Historical residential institutions*, at p.78

[41] knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p.17

[42] Explanatory Memorandum, Wrongs Amendment (Organisational Child Abuse) Bill 2016 (Vic), p.4

[43] Explanatory Memorandum, Wrongs Amendment (Organisational Child Abuse) Bill 2016 (Vic), p.4

[44] knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p.18

responsibility. These types of cases are likely to turn on their own facts, and do not therefore in any event lend themselves to ready definitional resolution.[45]

We note that the amending Victorian legislation included the qualification that the reverse onus liability does not apply to abuse committed in circumstances "wholly unrelated" to the perpetrator's association with an institution – see s.91(6) of the *Wrongs Act 1958 (Vic).*

Again, in seeking to discharge the reverse onus, the inquiry into what are 'reasonable steps' on the part of the institution may also assist in resolving cases where there is less proximity.

Reasonable steps

8. What would be the benefit and/or implications of defining the term 'reasonable steps' in legislation?

9. If the recommendation is adopted, would it be useful to develop guidelines or industry standards about what is considered to be reasonable?

10. Would it be appropriate for a definition of reasonable steps to be graduated according to the type of service provided? If so, on what basis?

The Royal Commission advised that *"the steps that are reasonable for an institution will vary depending upon the nature of the institution and the role of the perpetrator in the institution. For example, more might be expected of a commercial institution than a community-based voluntary institution. Similarly, more might be expected of institutions in relation to employees than contractors."* [46]

In *Prince Alfred College*, Gageler and Gordon JJ referred to the difficulties in generalising, given how the sexual abuse of children may be facilitated in numerous and different circumstances:

> *"Decisions in the United Kingdom and Canada recognise that resolution of each case will turn on its own particular facts and that existing cases provide guidance in the resolution of contestable and contested questions."* [47]

Also, as noted above, depending on the nature of the relationship between the relevant organisation and the perpetrator, the burden of proving reasonable precautions may be different.

Victoria and New South Wales have both taken the approach of providing a non-exhaustive list of factors that may be taken into account by the court in determining if reasonable steps were taken by an institution to prevent the abuse. We favour this approach. It provides guidance without limiting the capacity of a court to consider appropriate factors in the

[45] knowmore, Submission to the Victorian Government on the Creation of a Redress Scheme for Institutional Child Abuse, 2015, p. 17 See: http://knowmore.org.au/resources/other-submissions/

[46] Royal Commission, *Redress and Civil Litigation Report* (2015), at p.56

[47] *Prince Alfred College Incorporated v. ADC* [2016] HCA 37 [128]

specific case. We do not support defining the term 'reasonable steps' in legislation. Such an approach is unlikely to be helpful, given that the proposed reform will apply to all institutions (and therefore a wide variety of circumstances).

This approach has also been adopted in the Private Members Bill introduced into the Queensland Parliament by Greens MP Michael Berkman on 31 October 2018.[48]

What amounts to 'reasonable steps' will be informed by the existing law of negligence in the context of the circumstances of the particular case. Guidance can be drawn from existing case law about negligence, including decided cases of institutional child abuse. For example, in *Lepore*, McHugh J suggested the following as reasonable steps:

- implementing systems to provide early warning of possible offences;
- random and unannounced inspections to deter misconduct;
- prohibiting adults from being alone with a child; and
- encouraging children and adults to notify authorities or parents about any signs of aberrant or unusual behaviour.[49]

There are precedents in other legislation for the approach of providing a non-exhaustive list of factors as guidance, in the context of determining whether reasonable steps were taken by an entity such as might avoid vicarious liability. See for example the *Racial Discrimination Act 1975 (Commonwealth);*[50] the *Disability Discrimination Act 1992 (Commonwealth);* [51]and the *Sex Discrimination Act 1984 (Commonwealth).*[52]

11. How could it be ensured that 'reasonable steps' were actually effective to improve the safety of children?

The Commission has already published a significant body of material [53] which will be useful to guide institutions about the implementation of effective child safety practices. The Royal Commission's work should continue to inform the development of both practice and the law in these cases. Entities such as the National Office of Child Safety and the National Centre for Excellence will be able to play significant roles in guiding best practice and in monitoring and reporting on the safety of children.

[48] Civil Liability (Institutional Child Abuse) Amendment Bill 2018 (Queensland), clause 49D(4)

[49] *NSW v Lepore* [2003]HCA 4 at [164]

[50] See sections 18A and 18E

[51] See section 123

[52] See section 7B

[53] See, for example, the report *Key Elements of Child Safe Organisations: Research Study*, published by the Commission in July 2016; and the various pieces of work referred to on its website: http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/making-institutions-child-safe.aspx

4. Identifying a proper defendant

General comments

The existing problems confronting many survivors in both identifying the proper defendant to sue, and/or having an institution make assets available to meet an award of damages in a civil action, have been addressed at length in the Royal Commission's report.

Consistent with what we have said already in this submission, and in relation to the forms of abuse to be covered, we strongly support reforming legislation being drafted in terms that do not arbitrarily or unjustly exclude some survivors from being able to effectively bring claims against relevant institutions. Such a situation would be unjust in also holding only some institutions with responsibilities relating to children, and not some others, to the new duties recommended by the Royal Commission.

Accordingly, legislation enacting the Commission's recommendations must be drafted in such a way that that it enables survivors to bring a civil action against all institutions that will bear the onus of the new duties that are proposed, and for those bodies to be required to put forward a proper defendant with the capacity to meet any judgment.

From our work with clients who have sought redress from a very wide range of institutions, including in recent years, we would be concerned with any proposals that may leave the assumption of legal liability by an institution, when facing an abuse claim, dependent upon a voluntary choice by the institution to put forward a proper defendant or to choose whether or not to assist the plaintiff to identify the correct defendant. If this is the case, we predict that the outcome will be, in some cases, an unwillingness by some institutions to volunteer or identify a legal person to be the defendant, and who in turn has assets to meet any eventual judgment.

We have already seen some instances of institutions (including religious bodies) continuing, notwithstanding public exposure through the Royal Commission's hearings, to exhibit reluctance to deal with and accept claims from survivors. This includes actions that could only be described as obfuscation, in responding to potential plaintiffs' efforts to have the correct defendant identified or confirmed.

Nor should the reforming legislation stop at simply providing for the nomination by the institution of an associated legal person who is capable of being sued, for the purposes of any claim and any liability incurred. This would seem to leave open the possibility of a natural person nominating as the proper defendant, but who may lack the means to satisfy a judgment. It does not compel, as explained below, the provision of assets held by another arm of the relevant organisation (such as the property trust associated with a religious body), to be made available to meet the organisation's liability.

Simply put, we expect that if liability is left to a matter of voluntary assumption, some institutions will ultimately do what they can to avoid liability – either to protect assets, or to compel claims to be resolved (to its perceived advantage), outside the framework of a formal claim for damages.

In summary, the ability of a survivor to bring a claim should not be dependent upon the institution's co-operation in providing a defendant. Nor should the victim/plaintiff be put through the expense, delay and trauma of having to investigate to identify the correct defendant. Fairness requires the onus to identify and provide a defendant be upon the institution. The amending legislation should not replicate past power imbalances to the detriment of survivors. This position is also consistent with the Commission's recommendation 98, regarding the development of model guidelines by both government and non-government institutions expecting to receive civil claims for institutional child sexual abuse.

Discussion questions

Proposed reform

12. Should the Royal Commissions 'proper defendant' recommendation be adopted?

The Royal Commission's relevant recommendation (# 94) was as follows:

> *State and territory governments should introduce legislation to provide that, where a survivor wishes to commence proceedings for damages in respect of institutional child sexual abuse where the institution is alleged to be an institution with which a property trust is associated, then unless the institution nominates a proper defendant to sue that has sufficient assets to meet any liability arising from the proceedings:*
>
> > *a. The property trust is a proper defendant to the litigation*
> > *b. Any liability of the institution with which the property trust is associated that arises from the proceedings can be met from the assets of the trust.*

This recommendation should be adopted. The outcome of this reform will be that survivors are able to sue a readily identifiable entity that has the financial capacity to meet a claim arising from institutional child sexual abuse. Given the current state of the law,[54] legislative reform is needed to effect change. The Law Council of Australia in its submission to the Royal Commission's Issues Paper 5 noted that faith based associations often behave as a legal entity, and their associated bodies will often have significant assets in property trusts and enjoy the benefit of succession, whereas individual perpetrators within the organisation typically have few assets of their own so that a civil claim against them would be unlikely to produce meaningful compensation for a survivor of child sexual abuse.[55]

13. How would the proposed reforms impact your organisation?

(Not applicable)

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[54] *Trustees of the Roman Catholic Church v Ellis and Anor* [2007] NSWCA 117

[55] Law Council of Australia, Submission Number 29 to the Royal Commission into Institutional Responses to Child Sexual Abuse, Civil Litigation: Issues Paper 5, 21 March 2014

14. Should a different model/approach be adopted? If so, what should it look like?

As noted in the Options Paper, Western Australia has taken the approach in its *Civil Liability Legislation Amendment (Child Sexual Abuse Actions)* Act 2018 (WA) to specifically address the continuity of organisations, in order to link historical institutions to current entities. The Explanatory Memorandum to that Bill noted:[56]

> *The operation of the provisions under sections 15F and 15G links an institution that existed at the time of the accrual of the cause of action with an institution as it is currently to provide continuity in law in the absence of perpetual succession.*

This is a particularly relevant issue for survivors in Western Australia, given the number of missions and institutions run by interdenominational religious organisations. For example, Sister Kate's Children's Cottage Home, which operated from 1934 to 1980, was run by non-denominational management committees, then the Presbyterian Church, and later the Methodist Church while being funded by the Aborigines Department.[57]

The factual situation relating to the transition of institutions from the control of one entity to another can be challenging for survivors and provides uncertainty for our client group, particularly Aboriginal clients, in identifying a proper defendant. knowmore has assisted many Aboriginal clients who were forcibly removed from their families and country and placed in missions, which over time were run by multiple unincorporated care providers and organisations that changed their name over time, such as the Australian Aborigines Mission, an organisation that then changed to the United Aborigines Mission. The United Aborigines Mission and Aborigines Inland Mission also operated missions in the Northern Territory. We suspect continuity of institutions in identifying a proper defendant will become an important issue in the Northern Territory where historically significant numbers of children were removed. Accordingly, we recommend that the Territory considers the value in adopting similar continuity provisions to those contained in the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions)* Act 2018 (WA).

We also note that a Bill just introduced by the Queensland Government (on 15 November 2018) contains similar continuity provisions – see Clause 33O of the Civil Liability and Other Legislation Amendment Bill 2018 (Queensland).

It must be borne in mind too that under the relevant provisions of the legislation establishing the National Redress Scheme, it may not be possible for a survivor to obtain any redress for abuse suffered in a 'defunct' institution that does not have a current representative institution which is participating in the NRS. A 'defunct' institution (which is a government or non-government institution which no longer exists), can only participate in the NRS if it has a representative, who must have agreed to the defunct institution participating and agreed to be its representative.[58] It is therefore possible for a survivor, who experienced abuse in a non-government institution that is now defunct, to not be able

[56] At p.8

[57] See the detail provided on the Find and Connect website - https://www.findandconnect.gov.au/guide/wa/WE00684

[58] See Part 5-1 of the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)

to sustain a redress claim. The 'funder of last resort' provisions in the legislation will not assist that survivor, in the sense of making the relevant government the funder of redress, unless the survivor can identify factual circumstances which point to that government having equal responsibility with the defunct institution for that abuse.[59]

We would hope that any current institution with links to a historical institution would become a representative of that past institution for the purposes of participating in the NRS. However, this requires first that the current institution itself is participating in the NRS (and this is voluntary for NGOs) and secondly that it agrees to such representation. In these circumstances, it may be important to provide in the legislation relating to civil claims for child abuse the means to establish continuity of institutions so that at least the survivor may pursue a civil claim, where there may be no access to the NRS.

Controls

15. Should the consent of the nominee be required before it can be named a proper defendant?

This is appropriate, in our view. The Victorian and New South Wales' Acts provide for the appointment of an entity, with consent, as a proper defendant for an organisation.

16. Should nomination be limited by the nature of the association between the institution and the nominee?

In our submission the provisions around nomination should not be overly prescriptive. The Royal Commission has framed its recommendations in a way that allows institutions choice around how they provide a proper defendant. The requirement for a property trust to be the deemed or default proper defendant should be sufficient to incentivise institutions to consider who the proper defendant to an action should be (and to so identify that defendant).

17. How can victims obtain access to justice where consent of a nominee is not provided to name an alternative proper defendant?

The reforming legislation should provide, as recommended by the Royal Commission, that if no suitable proper defendant is identified and appointed by an organisation within a reasonable period[60] after notice of a claim is served on the relevant organisation, then the trustees of an associated trust may be appointed as the proper defendant for the organisation.

18. Are there any other controls that you think are necessary?

The New South Wales and Victorian Acts contain provisions to ensure that trustees of an associated trust, when appointed as the proper defendant, have:

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[59] See Part 6-2 of the National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)

[60] For example, `120 days as specified in the New South Wales Act – s. 6N of the Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)

- an indemnity for costs;
- a limit on liability to no more than the value of the trust; and
- an immunity from suit for breach of trust (for acting in accordance with their obligations as the proper defendant).[61]

Both Acts also contain a declaration as to Corporations legislation displacement provisions.[62]

We would also favour the inclusion of an anti-avoidance provision of the type set out in the New South Wales legislation, to address the situation where an organisation seeks to restructure an associated trust in a way to avoid the trust property being applied to satisfy liability in a child abuse claim.[63]

All institutions?

19. Should recommendation 94 apply to all property trusts (including private trusts), or to statutory trusts only?

In our submission, yes. The implementation of this recommendation should be extended to all trusts connected with the organisation. There is little point in compelling organisations to provide a proper defendant if there will be no assets available to satisfy any judgment and a restricted approach will simply encourage organisations to take steps to evade liability and safeguard trust assets through alternate, non-accessible structures.

The term 'associated trust' should be defined broadly in the legislation, as is the case in the New South Wales and Victorian Acts, to address all situations where an institution may directly or indirectly control or influence the property, distribution, management and affairs of a trust.

20. Do the difficulties in identifying a proper defendant arise in respect of non-religious organisations?

Yes, the issue may arise with unincorporated associations, regardless of whether the association is a religious organisation or not. For reasons of confidentiality we will not herein set out details of such institutions, but we are happy to elaborate in future consultations.

21. Should the recommendation apply only to religious organisations?

No. There is no reason to exempt non-religious organisations. If the Royal Commission's recommendations about the liability of institutions are adopted it follows that Parliament should also ensure that those reforms have practical effect and that no institution can avoid liability (in appropriate cases where liability is established).

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[61] See, for example, section 6P of the Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)

[62] See, for example, section 6P(5) of the Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)

[63] Section 6N(2)(b) of the Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)

The proposed reform will help drive compliance with expected standards of care and protection on the part of such organisations in their delivery of services to children. It will ensure that the deterrent function of the reforms can be fulfilled and that all institutions are encouraged to be proactive and preventative in their approach to managing the risks around delivering services to children.

Extent of association

22. What limits, if any, should there be on association between an institution and an associated trust?

See our answer to question 19 above.

Incorporation

23. Would it be reasonable to require every institution working with children to incorporate, or to have an incorporated 'proper defendant'? What would the impacts of this be?

We note the observations made by the Royal Commission around not being satisfied that it was appropriate to recommend that any particular institutions should be incorporated and insured,[64] given the potential impacts for smaller community based and non-commercial organisations.

In response to Issues Paper 5 the Law Council of Australia submitted that associations receiving government funding should be required to incorporate (so as to provide a proper defendant), as a requirement for receiving that funding. We agree with this submission.[65] It is not unduly onerous to create an eligibility requirement for government funding that the association be incorporated. While this may exclude some organisations from the ability to compete for funding we do not believe this to be unduly onerous given the gravity of the harm sought to be addressed by these reforms.

One relevant consideration is that if every institution working with children were required to incorporate then the impact on small, non-commercial, community groups may effectively inhibit their operation, thereby significantly reducing the amount of activities and opportunities available to children at a community level. Another related impact would be the privatisation of these community groups as this important community function is driven to corporations with sufficient funds; i.e. out of the hands of community. Privatisation of these kinds of groups would reduce their accessibility (e.g. they may price-out community members reliant on free or cheaper services) and impede their ability to respond to the specific and nuanced needs of their community.

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[64] Royal Commission *Redress and Civil Litigation Report* (2015), at p.511

[65] Law Council of Australia, Submission Number 29 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Civil Litigation: Issues Paper 5* (21 March 2014), at p.16

We submit it is not necessary to require incorporation of all relevant organisations. If there are appropriate requirements around the availability of a proper defendant and the existence of a deemed defendant, then there is sufficient incentive for an association to incorporate to provide a proper defendant, or otherwise make one available. The requirement is that there be an available legal entity to answer a claim; incorporation is merely one way to achieve this. As noted, institutions should retain discretion around this point, especially since incorporation has traditionally been a means of limiting liability. This would allow the law to be coercive and regulatory without being prescriptive and inflexible.

However, we support the Royal Commission's recommendation 95, that the Northern Territory Government should consider whether there are any unincorporated bodies that it funds directly or indirectly to provide children's services, and whether they should be required to maintain insurance that covers their liability in respect of institutional child abuse claims. This should be a mandatory consideration for Government in advancing funding to any organisation.

In our view, recommendation 95 is founded on sound policy principles. In funding bodies to provide services for children, Government should rightly be concerned that such bodies have a capacity to meet any liability incurred through those activities. The child victim should not be the party to bear any default arising from how the body is structured and whether it is insured or not.

In this context, we also note Recommendation 26.1 of the *Betrayal of Trust* report of the Victorian Parliament,[66] which was as follows:

> *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.*

Recommendation 26.2 of that report was

> *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.*

If an institution is not prepared to take steps in relation to its structure and insurance coverage that would enable it to meet any liability for child abuse arising from its provision of services to children, it should not in any way be engaged or supported by Government.

There are a multitude of examples in society where Government prescribes certain prerequisites, through legislation, for the delivery of services to members of the public. The underlying policy rationale is principally to ensure the protection of the public. One such example is the legal profession; legal services can only be provided by qualified and accredited persons, who submit to compliance obligations, who practice in one form of a

[66] Family and Community Development Committee, Parliament of Victoria Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations (2013)

limited number of structures set out in the legal profession legislation, and who hold compulsory insurance to cover claims of professional negligence. Surely no lesser standards should be imposed on those bodies seeking Government funding or exemptions to provide services to children?

In this context, we would urge that the Northern Territory Government also takes steps to ensure that any NGO funded by it to engage with children is a participating institution for the purposes of the NRS.

24. Should legislation similar to that proposed by Western Australia be adopted in the Territory? If so, what modifications, if any would you suggest and why?

Yes – see our answer to question 14 above.

knowmore

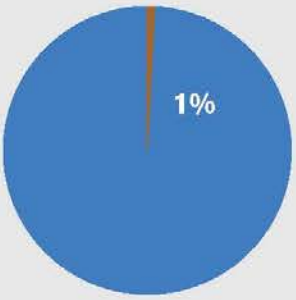
Data Snapshot – Northern Territory

as at 31 March 2018

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.

This snapshot provides data about our clients living in the Northern Territory

Our clients

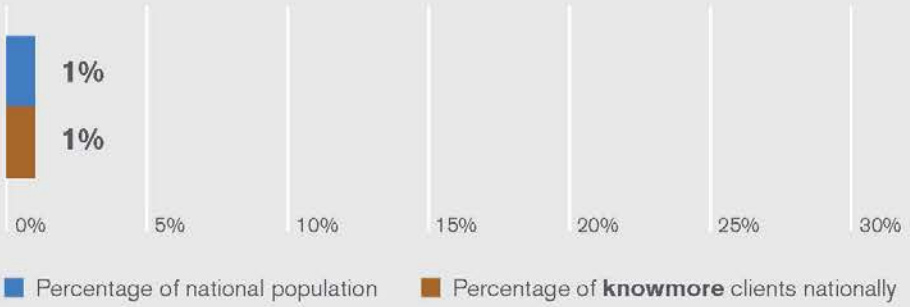


knowmore began providing services to the public on 8 July 2013 – as at 31 March 2018, we've helped:

126
knowmore Northern Territory clients

8954
Total number of **knowmore** clients

State representation



Percentage of national population living in NT

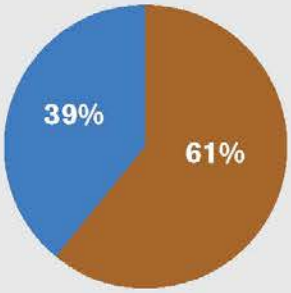
Against

Percentage of **knowmore** clients living in NT

48%
Identified as female

52%
Identified as male

Aboriginal and Torres Strait Islander clients



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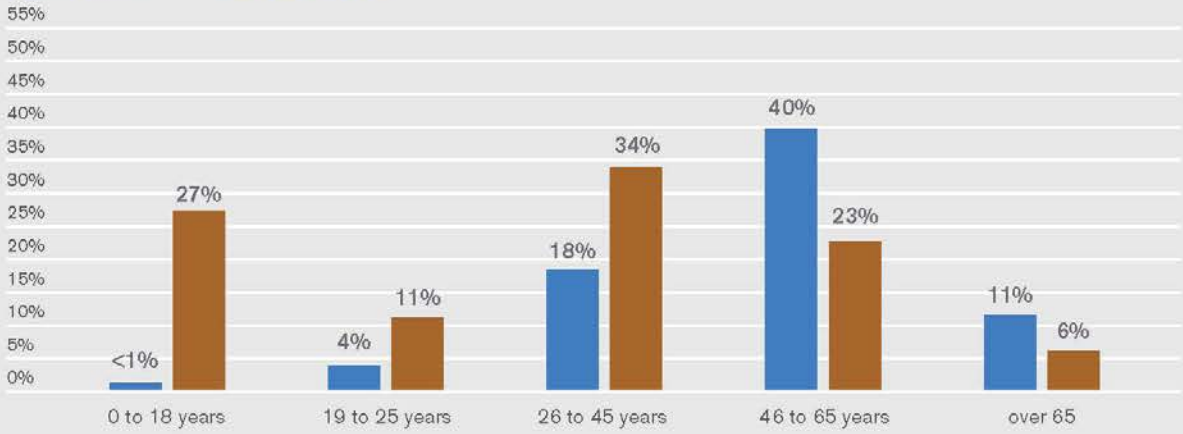
Data Snapshot – Northern Territory

as at 31 March 2018

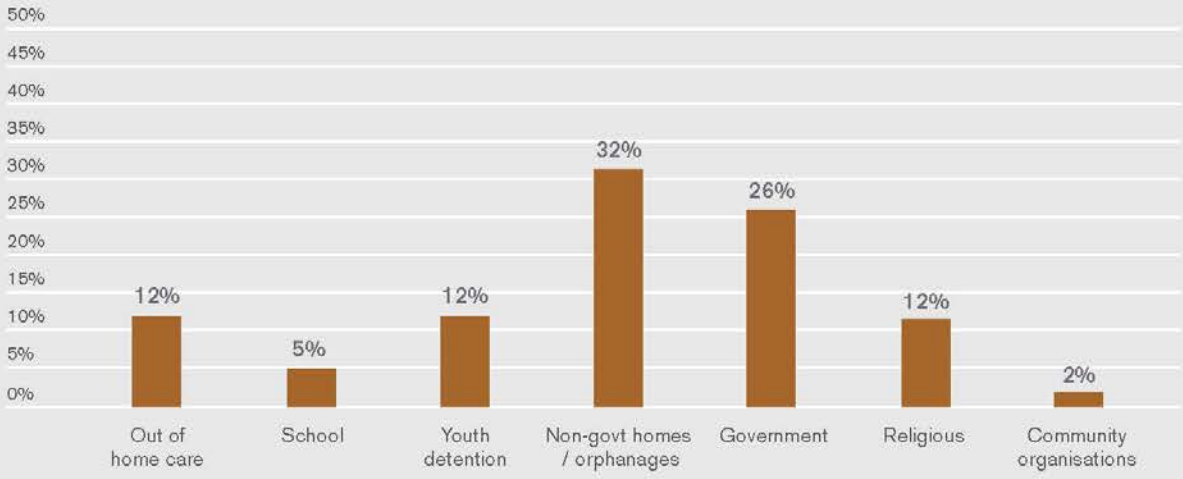
Our clients – Age groups



Percentage of Northern Territory based **knowmore** clients per age group

Against percentage of Northern Territory population per age group

Institutions in the Northern Territory where our clients report experiencing childhood sexual abuse



Out of home care: care provided to children who could not be cared for by their parents, including foster care

School: State and private primary and secondary schools

Youth detention: facilities run by the state government for people under 18yrs

Non-govt homes/orphanages: homes run mainly by religious organisations

Government: Government departments and agencies

Religious: Religious settings including churches and church run activities such as camps

Community Organisations: Organisations providing recreational activities to children

knowmore has been established by the National Association of Community Legal Centres with funding from the Australian Government represented by the Attorney-General's Department.

knowmore
Free legal help to navigate the Royal Commission

knowmore National Redress Scheme

1 July 2018 – 31 October 2018

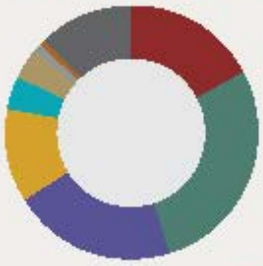
Total calls and clients

7843
Total 1800 calls nationally (637 in first two days)

2703
clients (intake completed)

44%
new clients

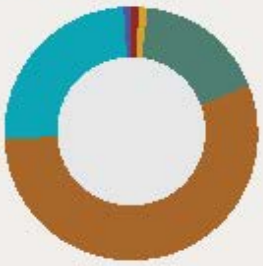
Calls came from



NSW	17%
QLD	28%
VIC	21%
WA	12%
SA	5%
TAS	3%
ACT	1%
NT	1%
International/Other	12%

Age

As at 16 October 2018



0-18	<1%
19-25	1%
26-45	17%
46-65	56%
66-85	25%
86+	<1%

Our clients

12%
priority clients

23%
identify as Aboriginal and/or Torres Strait Islander

32%
identified as female

68%
identified as male

knowmore free legal help for survivors

1800 605 762 | knowmore.org.au

* Notes re Priority Clients

Clients are allocated priority where they are of advanced age, and/or have identified immediate and serious health concerns such as a diagnosis of terminal cancer or other life-threatening illnesses.

knowmore National Redress Scheme

1 July 2018 – 31 October 2018

Service delivery

Brisbane

Level 20, 144 Edward Street

Brisbane QLD 4000

PO Box 2151

Brisbane QLD 4001

Sydney

Level 7, 36 College Street

Sydney NSW 2000

PO Box 267, Darlinghurst

Sydney NSW 1200

Melbourne

Level 15, 607 Bourke Street

Melbourne VIC 3000

PO Box 504, Collins Street West

Melbourne VIC 8007

e: info@knowmore.org.au

www.facebook.com/knowmorecomms

@knowmorecomms

knowmore free legal help for survivors

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knowmore is a program of National Association of Community Legal Centres ABN 67 757 001 303 ACN 163 101 737.

NACLC acknowledges the traditional owners of the lands across Australia upon which we live and work. We pay deep respect to Elders past and present.

Image inspired by original artwork by Dean Bell depicting knowmore's connection to the towns, cities, missions and settlements within Australia.