knowmore
free legal help for survivors

Submission to the Government of Western Australia, Department of Justice, Discussion Paper

'Royal Commission into Institutional Responses to Child Sexual Abuse – Duty of Institutions – recommendations 89-93'

March 2019

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1. Introduction

i. Our service

knowmore is a national and independent community legal centre providing free legal information, advice, representation and referrals, education and systemic advocacy for victims and survivors of child abuse. Our vision is a community that is accountable to survivors and free of child abuse. Our mission is to facilitate access to justice for victims and survivors of child abuse, and to work with them and their supporters to stop child abuse.

Our service 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 now also receives some funding from the Financial Counselling Foundation to provide financial counselling to people receiving monetary payments under 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 uses 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 is re-establishing its office in Perth, which we anticipate opening in April 2019. Our service model brings together lawyers, social workers, counsellors, Aboriginal and Torres Strait Islander engagement advisors and financial counsellors to provide co-ordinated and holistic support to clients.

In our 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, we assisted 1,278 clients living in Western Australia (representing 14% of all knowmore clients). 45% of our Western Australian clients identified as Aboriginal peoples.[1]

In our work relating to the NRS, from 1 July 2018 to 28 February 2019 knowmore has received 13,488 calls to its 1800 telephone line and has completed intake processes for and has assisted or is currently assisting 3,748 clients. 44% of these clients are people who have previously engaged with knowmore and 56% are new clients. 482, or 13%, of these clients live in Western Australia, and over half of those clients (53%) identify as Aboriginal peoples. [2]

20% of clients assisted to date have been identified as priority clients. Clients are allocated priority on the basis of advanced age and/or have identified immediate and serious health concerns such as a diagnosis of a terminal or life-threatening illness.

Many of the clients knowmore has assisted have sought legal advice about their options, if any, to obtain financial and other redress in relation to sexual and other abuse they experienced 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 identification of a proper defendant to sue (and who may have means to satisfy any judgment), and the existing laws relating to the duty of institutions.

knowmore does not represent clients in common law or civil claims relating to actions for compensation. In circumstances where clients may have a viable civil claim and wish to investigate or pursue such a cause of action, knowmore advises 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.

ii. Our submission

In responding to this Discussion Paper, we have drawn on what we have learned, through our work, about the collective experience of our clients and their needs. From our work with survivors of institutional child sexual abuse, we understand how important it is that survivors are given meaningful opportunities to access justice and, most importantly, have choice in how to pursue outcomes that are appropriate and important to them.

We acknowledge the significant progress made to date by the Western Australian Government in implementing relevant recommendations made by the Royal Commission relating to civil litigation reform, which include the lifting of limitation periods for claims arising from child sexual abuse and reforms relating to the identification of a proper defendant, and the making available of assets to

[1] See knowmore Service Snapshot (infographic to 31 March 2018) attached to this submission for further information about our Royal Commission related work with clients residing in Western Australia

[2] See knowmore, Service Snapshot (Infographic 1 July – 28 February 2019) attached to this submission, for further information about our NRS related service delivery

discharge a liability arising from a child sexual abuse action.[3] We note that the amending legislation also gave the courts power to set aside judgments and settlement agreements in cases where it is satisfied that it is just and reasonable to do so.[4]

We welcome the opportunity to respond now to the current Discussion Paper, addressing recommendations 89-93 of the Royal Commission, relating to the introduction of new duties on institutions.

The effecting of reform to the current law regarding the duty of institutions 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. The proposed reform by its deterrent effects will also help to ensure abuse does not happen again. The Royal Commission, in its *Redress and Civil Litigation Report,* noted that these proposed reforms would not only benefit survivors of institutional child sexual abuse, but their implementation would benefit society as a whole.

> *"We recognise that introducing a new duty and reversing the onus of proof may lead to increased insurance premiums for institutions. However, legal duties are important for prescribing the standard that the community requires of institutions. 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 crucial measures for preventing institutional child sexual abuse occurring in the first place."* [5]

knowmore's primary position is to support the full implementation of the recommendations of the Royal Commission.

[3] Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018 (WA)
[4] Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018 (WA) s.92 (3)
[5] Royal Commission, *Redress and Civil Litigation* Report, (2015), at p. 494

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

i. Actions against institutions

The Royal Commission noted in its *Redress and Civil Litigation* Report that:

> *"In considering possible reforms to civil litigation systems, we have focused on the issues that appear to be particularly difficult for survivors. In focusing on issues of particular significance for survivors, it may be possible to improve the capacity of the civil litigation systems to provide justice to survivors and in a manner at least comparable to that of other injured persons."*[6]

The civil litigation component of the report outlined the options available to survivors of institutional child abuse to seek to recover damages through bringing civil claims, noting that survivors bringing such actions 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. Often considerable time has elapsed between the abuse occurring and the survivor being able to make an effective report and/or take action to seek justice for their experience.[7] This 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. As noted in the Discussion Paper there are three primary approaches to establishing institutional liability in these cases namely:

- Bringing an action in negligence – where an institution has breached a duty to exercise reasonable care and in doing so has caused harm to the person to whom the duty of care was owed. That is, the institution must have been at fault.
- Bringing an action relying on the vicarious liability of the institution for the actions of employees and agents who have caused harm to the person.
- 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 Discussion 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 the 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 duty of care to prevent abuse from occurring through the criminal conduct of others:

[6] Royal Commission, *Redress and Civil Litigation Report* (2015), at p.51

[7] 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

> *"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."*[8]

- 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 religion). Additionally, a plaintiff must establish that the wrongful conduct occurred within the scope or course of the relevant employment.

- 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 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.[9] The High Court determined not to revisit this aspect of *Lepore* in the decision in *Prince Alfred College Incorporated v. ADC* [2016] HCA 37.[10]

ii. The recommendations of the Royal Commission

The Royal Commission made fourteen recommendations (85 – 99) for the reform of the civil litigation system. It is noted that the focus of this Discussion Paper is recommendations 89-93, regarding the introduction of new statutory duties of care on institutions.

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

First, the Commission released its final report on *Redress and Civil Litigation* in September 2015. While this was an interim report it did contain 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…."*[11]

[8] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, per Gleeson CJ at [29]
[9] *New South Wales v Lepore* (2003) 212 CLR 511 at 534-535 [36]-[39], 598 – 601 [254]-[263], 609 – 610 [292]-[295], 624 [340]
[10] At [36]-[37]
[11] Royal Commission, *Redress and Civil Litigation Report* (2015), at p.3

The Commission's recommendations on civil litigation have been comprehensively informed by a large 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 into the Christian Brothers institutions in Western Australia.
- 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.[12] 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 litigation. Participants included representatives from survivor advocacy and support groups, government representatives, lawyers and insurers, legal academics, faith based organisations and community service organisations."*[13]
- 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."*[14]

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 these 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 careful consideration as to all of the impacts upon all relevant stakeholders. In our submission, there should be no significant derogation from the recommendations of the Commission.

Secondly, the questions posed in the Discussion Paper raise the potential impacts of reform upon the provision of services by institutions to children.[15] That is, the proposed reforms may be seen by institutions as increasing the risks and costs related to providing services, which in turn might lead to a reduction in services 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 wording of recommendations 89-91 inclusive, which relate to the imposition of non-delegable duties upon institutions, with only certain categories of institutions (as

[12] See http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/redress
[13] See http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/redress
[14] Case Study 25: see http://www.childabuseroyalcommission.gov.au/case-study/93e59a38-c3df-4528-b479-f0e83d4ff19a/case-study-25,-march-2015,-sydney
[15] Discussion Paper at p.15

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.

Secondly, the extensive work of the Royal Commission 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 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."*[16] If the implementation of enhanced duties and higher standards forces some institutions out of delivering services to children, because they are 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.

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

3. Duties and liabilities of institutions

Tracing the liability of the institution in child abuse matters is one of the many hurdles faced by survivors. The law as it currently stands in Australia 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 Discussion Paper refers to the decisions of the High Court in the cases of *Lepore*[17] and *Prince Alfred College.*[18] In considering whether or not the Western Australian government should adopt the recommendations of the Royal Commission in relation to statutory duties of care for institutions, 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.

In the *Prince Alfred College* case, the High Court dealt with, among other issues, the liability of an institution for the deliberate criminal acts (child sexual offences) committed by an employee.

Key facts of the case relevant to the vicarious liability point were as follows:

- The case involved a boarding school context. The plaintiff was a 12-year-old boarder when the boarding housemaster, Bain, sexually abused him. This happened on repeated occasions over some months during 1962, at the school and elsewhere. Bain was convicted of criminal offences against the plaintiff and other boys (in 2007).
- Bain lived in the boarding house in his own room. He was present in the boys' dormitory and supervised them in the evenings, during their bedtime preparations, which included nightly showers.
- Bain told the boys stories after 'lights out' and sat on the plaintiff's bed to do so. In that context he began to abuse the plaintiff. Bain also abused the plaintiff in Bain's own private room.

The plaintiff argued (among other claims) that the school should be held vicariously liable for the abuse committed by Bain, arguing there was a sufficiently close relationship between what he was employed to do and the abuse he committed.

The plaintiff was unsuccessful at trial[19] but that decision was overturned on appeal,[20] the South Australian Court of Appeal finding that the abuse occurred during Bain's role of employment, which included being in the dormitory, and that the abuse occurred in the 'ostensible' pursuit of this role. The College appealed to the High Court.

While the appeal in *Prince Alfred College* was determined on the limitations/extension of time issue,[21] the plurality (French CJ, Kiefel, Bell, Keane and Nettle JJ) considered that it was appropriate to consider the issue for 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

[17] *New South Wales v. Lepore* (2003) 212 CLR 511
[18] *Prince Alfred College Incorporated v. ADC* (2016) HCA 37
[19] *ADC v. Prince Alfred College Incorporated* [2015] SASC 12
[20] *ADC v. Prince Alfred College Incorporated* [2015] SASCFC 161
[21] The High Court holding that there was no basis to allow an extension of the limitation period.

in *Lepore.* The plurality reviewed the relevant authorities and suggested that the 'relevant approach' was as follows:

> "*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 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 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 features 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."* [22]

Turning to the facts of the particular case, the plurality said:

> "*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 of scope of his employment. The relevant approach requires a careful examination of the role that the PAC actually assigned to the housemasters and the position in which Bain was thereby placed vis-à-vis the respondent and the other children."* [23]

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:

> "*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*

[22] At [80]-[81]
[23] At [84]

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. The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case." [24]

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. The ordinary processes of common law will cause at least some retrospective application. As Gageler and Gordon JJ noted:

"*The course of decisions in this Court[25] 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[26] and Canada[27] 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."[28]*

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

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[24] At [130]-[131]

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

[26] *Dubai Aluminium Co Ltd v. Salaam* [2003] 2 AC at 378 [26] cited in *Mohamud v. Wm Morrison Supermarkets plc* [2016] AC677 at 692

[27] *Bazely v. Curry* [1999] 2 SCR 534 at 545[15] cited in *Jocabi v. Griffiths* [1999] 2 SCR 570 at 590[31], *John Doe v. Bennett* [2002] 1 SCR 436 at 445[20] and *EB v. Order of the Oblates of Mary Immaculate in the Province of British Columbia* [2005] 3 SCR 45 at 69[38]

[28] *Various Claimants v. Catholic Child Welfare Society* [2013] 2 AC 1 at 26[85]

- in cases outside a strict employer-employee relationship;[29]
- uncertainty round whether the facts of their case fall within those where a court may hold the institution vicariously liable;[30] 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 a significant 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 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 employs and puts a trust and confidence in the deceiver should be a lose than a stranger.[31] *In our opinion, it is time the same principle applied to the care of children."*[32]

[29] 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 Council* [2013] UK SC 66
[30] In this context, we note that most survivors investigating potential claims will engage with private lawyer on a 'no win, no fee' basis, with this uncertainty likely to influence the lawyers' opinion as to whether claims are viable or not
[31] *Hern v Nichols* (undated c.1700) 1 Salk 289
[32] Royal Commission, *Redress and Civil Litigation Report* (2015), at p.491

4. Scope of the abuse to be covered

We submit that the proposed duty, in addition to applying to actions based on child sexual abuse, should extend to connected physical and psychological abuse - to ensure proper access to justice; and to promote consistency with reform in other jurisdictions.[33] In this respect, we support the approach taken by New South Wales to define child abuse in the following terms:

> *child abuse, of a child, means sexual abuse or physical abuse of the child but does not include an act that is lawful at the time it takes place.*[34]

We also fully support corresponding amendment of the *Limitation Act 2005* (WA).

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.[35] 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."*[36] Indeed, the evidence in so many of the Royal Commission's public hearings[37] 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.

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

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[33] New South Wales, Victoria and the Australian Capital Territory have all enacted statutory reform around the duty of institutions that extends beyond institutional sexual abuse alone. The majority of Australian jurisdictions in implementing limitation period reform have also included other forms of child abuse, beyond sexual abuse in an institutional context

[34] *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2019* (NSW), s.6H(4)

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

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

[37] Such as Case Study 7 involving the Parramatta Training School for Girls and the Institution for Girls in Hay

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 the proposed civil litigation reforms should adopt a broad definition of child abuse.

5. Key issues for consideration

i. Imposition of non-delegable duty of care

Question 1. Should a 'strict' non-delegable duty of care be imposed by the enactment of Western Australian legislation and why?

It follows from the discussion above, that knowmore supports the full implementation of the Royal Commission recommendations (89 & 90) for the prospective imposition of a non-delegable duty of care and strict liability on the categories of institutions identified by the Royal Commission. As we have noted, the law as it stands currently in Australia is unclear and needs a legislative framework to clarify and ensure stronger protections for children, to afford justice and to properly hold institutions to account for the harm that arises from abuse connected to them.

The non-delegable duty refers responsibility back to institutions to ensure they cannot deny liability where child sexual abuse is facilitated by an institutional context. A non-delegable duty should arise when an institution undertakes a responsibility for a vulnerable person, such as a child. The institution must ensure the safety and care of children under its care, supervision or authority. Their non-delegable duty of care cannot be delegated to an individual employee.

Implementing recommendation 89 by introducing a non-delegable duty would improve the situation for prospective plaintiffs where institutions currently deny liability on the basis of the criminal conduct of the perpetrator. Recommendation 89 enacts a conceptual shift, whereby responsibility becomes located with the institution; this is warranted because the context of the institution aids the perpetration of the abuse. This context includes the power and authority institutions have over children.

While knowmore supports the full implementation of the Commission's recommendations, including the imposition of a non-delegable duty and strict liability upon those institutions considered to be of 'high risk', if that approach is not adopted by the Western Australian Government, we would support an approach being adopted that is consistent with the other jurisdictions (i.e. the 'reverse onus' duty).

Question 2. If so, should the duty apply to institutions other than those recommended by the Royal Commission? If so, why?

In supporting its recommendation that the non-delegable duty apply to a class of institutions rather than to institutions generally, the Royal Commission noted

> "*We do not believe that liability should be extended to not-for-profit or volunteer institutions generally – that is, beyond the specific categories of institutions identified. To do*

so may discourage members of the community from coming together to provide or create facilities that offer opportunities for children to engage in valuable cultural, social and sporting activities."[38]

A review of institutions named by clients of knowmore as institutions where perpetrators offended indicates that the majority of such institutions would fall within one of the six categories listed in the Commission's recommendation 90.

However, it has also been the experience of our clients, that there are some larger not-for-profit institutions that have provided a significant level of services to children which in turn generates a significant level of risk. We understand that these institutions are insured and/or should otherwise have the means to meet any judgment against them arising from an action for institutional child abuse. These 'larger' not-for-profit institutions include those such as Scouts Australia, the YMCA, State Police Citizen Youth Clubs and sporting bodies such as Surf Life Saving Australia, Tennis Australia and Swimming Australia. Given the findings of the Royal Commission to date, and the level of risk attaching to the services delivered by such institutions to children, in our submission it would not be appropriate to exempt all non-for-profit organisations from the proposed non-delegable duty. Larger not-for-profit institutions should be subject to the new duty.

The issue then arises as to how the boundaries for inclusion/exclusion of such institutions might best be fixed. knowmore submits that the list set out in Recommendation 90 is appropriate, but could be expanded so as to include some larger not-for-profit organisations providing services to children, such as those noted above. One way to do that, which knowmore submits for consideration, is that the test for inclusion of not-for-profit institutions in the list for which the non-delegable duty applies, be based on the organisation's annual turnover. We suggest a threshold above $3 million annually. We note that the benchmark of $3 million turnover is used for compliance by entities with the amendments to the Commonwealth *Privacy Act 1988.*

Question 3. Which institutions should be excluded from the duty? Why?

Following on from the answer and reasons provided to question 2, we would submit that that institutions to be excluded from this duty should be:

(a) those institutions not falling within the list in recommendation 90; and

(b) those not-for-profit organisations providing services to children which have an annual turnover of less than $3 million.

Question 4. Should the duty apply to organisations that work with adults as well as children? For example, should GP medical practices be considered a health service for the purpose of a non-delegable duty? It so, why?

It is our submission that the new non-delegable duty should apply to institutions that work with children as well as adults. The wording of recommendation 90 does not limit the application of the non-delegable duty to institutions working solely with children. The recommendation states in its introduction,

[38] Royal Commission, *Redress and Civil Litigation* Report (2015), at p.54

"The non-delegable duty should apply to institutions that operate the following facilities or provide the following services and be owed to children who are in the care, supervision or control of the institution in relation to the relevant facility or service:"[39]

This duty should not just apply to organisations that work solely with children. It would be our submission that a GP medical practice should be considered a health service for the purpose of a non-delegable duty. In support of this submission we note that many of the Royal Commission's hearings dealt with institutions that provided services to children and to adults. Case Study 27 is a case in point, where the Royal Commission examined the sexual abuse of children in the context of a private medical practice as well as in the context of public hospitals. In both the private medical practice and the public hospital the services provided by the institution were to children as well as to adults.

Other examples include the Defence forces and sporting organisations; both types of organisations provide extensive services to teenagers, some of who will be aged under 18 years and some over. Many knowmore clients have cited perpetrators who were working in institutions such as sporting bodies that provided services to both adults and children.

In our submission, providing services exclusively to children should not be a limiting factor. Instead the nexus should be that a component of the services offered by that institution includes providing services to children.

Question 5. What financial or other impacts would the duty have on organisations? In what ways would this improve or hinder their ability to provide services to children? Would this differ depending on the size or type of organisation?

The introduction of the proposed reforms may be seen by institutions as increasing the financial costs and the risks related to providing services, which in turn might lead to a reduction in service in order to limit that risk.

There will be impacts for institutions if these reforms are implemented. The financial impacts are likely to include:

- higher start-up costs;
- fees (statutory, legal etc.) for child-safety compliance;
- increased insurance premiums;
- uninsured liability risk; and
- ongoing costs of child safety programs for training.

However, 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. This is particularly reflected in the crafting of recommendations 89-91, 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

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

must be noted that the Royal Commission has recommended that these reforms operate with prospective, rather than retrospective, effect.

As noted above, one possible outcome of introducing legislation impacting upon the liability of institutions, including imposing a non-delegable duty of care, 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 from occurring in the first place."*[40]

As noted earlier, the extensive work of the Royal Commission over the five years 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.

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.

Question 6. Would the duty motivate institutions to improve child safety? How might the possible deterrent effect of the Royal Commission's recommendations for a non-delegable duty of care be optimised?

As noted in our answer to question 5, we believe there will be considerable financial motivation for institutions supplying services to children, to improve child safety within their institutions. At the very least, there will be requirements to be met by institutions to obtain insurance cover. These requirements will be negotiated between the insurance provider and the institution, meaning that the practical steps required to be taken to obtain insurance cover will be unique to each institution. However, it is anticipated that there will be certain basic requirements to be reached by all institutions requiring cover.

It is our submission that the additional requirements to obtain insurance cover will align with optimising the possible deterrent effect of a non-delegable duty. Where a non-delegable duty exists, institutions will need to ensure that they have in place all appropriate measures to provide a child-safe environment, including training for staff (including boards of management); a high standard of record keeping; effective reporting and response mechanisms; and that all staff are aware of the policies and procedures of the institution.

In particular, knowmore can comment on the importance of setting in place good response mechanisms. So many of our clients have reported that when they went to report what had happened to them to authority figures such as teachers, leaders, police and welfare workers (as well as many others), they were not believed. Children need to feel safe to report abuse.

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

Question 7. Should statutory provisions similar to those in New South Wales also be included to provide a test for vicarious liability and extend the liability to person 'akin to employees'?

Liability for breach of a non-delegable duty is a primary non-derivative liability of the employer/institution, whereas vicarious liability is a secondary or derivative liability, in the sense that it is based on the liability of the negligent worker. The scope of vicarious liability at common law in Australia remains unclear and ideally this uncertainty must be avoided to optimise the effects of the proposed reforms.

The decision in the *Prince Alfred College*[41] case is binding authority in all States and Territories unless it is displaced by statute. 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, 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.

On this point many, as we have noted above, many knowmore clients have reported being abused by persons associated with institutions, but who were not formally employed by the institution. The New South Wales Act, as noted on page 11 of the Discussion Paper, has codified a strict vicarious liability extending this to individuals that are 'akin to employees'.[42] We would support the Western Australian Government adopting the same provisions. A statutory test of 'akin to employment' provides greater certainty for plaintiffs at the litigation stage and for institutions at the reasonable precautions/preventative stage. Apart from the certainty such a test would provide, the test would cover the situation where an institution is not of a class described in recommendation 90 and therefore not the subject of the proposed statutory non-delegable duty discussed in Question 1.

ii. Reverse onus – Discussion Paper questions 8 to 15

Question 8. Should a reverse onus be imposed under Western Australian legislation and why? If so, should the reverse onus be legislated together with a non-delegable duty of care (or should only one or the other be imposed under legislation) and why?

As noted above knowmore supports the implementation of all of the recommendations of the Royal Commission. The Royal Commission recommended (recommendation 91) that if the non-delegable duty were not accepted, then the 'reverse onus' should be imposed on all institutions, including those institutions in respect of which they did not recommend a non-delegable duty be imposed.

Both Victoria and New South Wales have legislated in relation to the duty of care and reverse onus of proof in the context of institutional child abuse.

Victoria did not legislate for both the non-delegable duty and the reverse onus. The Discussion Paper refers to the situation in Victoria *"which was the first jurisdiction to legislate to introduce a specific duty of care in respect of institutional child abuse by way of reversing the onus of proof in negligence*

[41] *Prince Alfred College Incorporated v. ADC* [2016] HCA 3
[42] *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018 (NSW)* [s.6G]

claims against liable institutions."[43] The Discussion Paper notes that aspects of a non-delegable duty have been incorporated in the legislation.[44]

The Discussion Paper notes that New South Wales introduced a new non-delegable statutory duty of care that imposes a reverse onus of proof, going further to codify a strict vicarious liability for child abuse, extending this to individuals that are 'akin to employees.'[45]

We submit that the reverse onus should be introduced in amending legislation, together with a non-delegable duty of care for relevant institutions, as recommended by the Royal Commission:

> "*It is true that, even if the institution adopts best practice in every respect in relation to abuse, under strict liability it will still be liable for any abuse that does in fact occur."*[46]

The Royal Commission recommended the non-delegable duty would only be imposed on particularly high-risk institutions and institutions that operated for profit (and in our submission on larger not-for-profit institutions), and that the reverse onus would be applied to all institutions regardless of their size. This combination would offer children going forward the best protection and the best access to justice should abuse occur.

By legislating for these changes, many injustices can be avoided. As noted by the Royal Commission

> "*If the change is made by statue, the injustices that may arise if the change is left to the common law can be avoided. In particular, the burden that retrospective change would impose on insurers or institutions that will not have insured against this liability can be avoided."* [47]

Question 9. Should the reverse onus apply to all institutions or are there any that should be excluded? Why?

The Royal Commission recommended (Recommendation 91) that 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."*

As the Royal Commission noted in its report

> "*We are satisfied that institutions should be in a good position to prove the steps they took to prevent abuse. The institution generally should have better access to records and witnesses capable of giving evidence about the institution's behaviour than plaintiffs are likely to have. Reversing the onus of proof has the potential to encourage higher standards of governance and risk mitigation in institutions, both through their own efforts and through their compliance with the requirements of insurers."*[48]

knowmore supports the application of the reverse onus to all institutions, agreeing that no organisation providing services to children should be exempted. Application of the duty to all such

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[43] *Wrongs Amendment Act (Organisational Child Abuse) Act 2017* (Vic)

[44] *Wrongs Act 1958* (Vic) [s.90(1)(c)] An 'individual associated with a relevant organisation', upon whom the statutory duty of care is imposed, will also include an individual who is associated with another organisation who has had functions and services delegated to it by the relevant organisation

[45] *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2019* (NSW) ss.6F(5) and 6H(4)

[46] Royal Commission *Redress and Civil Litigation* Report (2015), at p.55

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

[48] Royal Commission *Redress and Civil Litigation* Report (2015, at p.494

institutions will help to drive heightened awareness of the need to protect children from all forms of abuse, and will guide the implementation of processes and procedures to ensure that reasonable steps have been taken to prevent child abuse.

The reverse onus has been enacted in legislation in Victoria in the *Wrongs Act 1958* (Vic) [49]and in New South Wales in the *Civil Liability Amendment (Organisational Child Abuse Liability) Act* 2018 (NSW).[50]

Question 10. If a reverse onus is imposed, should legislation define what would be considered 'reasonable steps' (or reasonable precautions)? If so, how would this be defined for a broad range of different institutions?

It is our submission that it is not necessary to define exhaustively 'reasonable steps' or 'reasonable care' in legislation. What is going to be 'reasonable' works on a sliding scale; where there is a relatively low risk to children the reasonable steps will not be overly burdensome, where there is a high risk to children the reasonable steps will be appropriately more demanding. 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."* [51]

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."* [52]

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 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).

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*

[49] See s.91
[50] See s.6F(3)
[51] Royal Commission, *Redress and Civil Litigation* Report (2015), at p.56
[52] *Prince Alfred College Incorporated v. ADC* [2016] HCA 37 [128]

(Commonwealth);[53] the *Disability Discrimination Act 1992 (Commonwealth);* [54] and the *Sex Discrimination Act 1984 (Commonwealth).*[55]

Question 11. In the absence of a statutory definition, how would courts determine whether an institution had taken 'reasonable steps' to prevent abuse from occurring (even if it did not prevent the specific abuse from occurring)? Should legislation provide any particular guiding principles for the reverse onus such as in Victoria and New South Wales?

As above, it is our submission that it is not necessary to define 'reasonable steps' or 'reasonable care' in legislation. What amounts to 'reasonable steps' will be informed by existing law.

In the absence of statutory definition, guidance can be drawn from existing case law from common law torts, their statutory counterparts and related areas, including decided cases of institutional child abuse. McHugh J in *Lepore* 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 behaviour or unusual behaviour.[56]

In the High Court decision 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."*[57]

The Royal Commission has already published a significant body of material [58] 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.

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[53] See sections 18A and 18E
[54] See section 123
[55] See section 7B
[56] *NSW v. Lepore* [2003] HCA 4 at [164]
[57] *Prince Alfred College Incorporated v. ADC* [2016] HCA 37[128]
[58] 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

Question 12. In what ways should an obligation on institutions to take reasonable steps differ and why? For example, would obligations on commercial institutions be greater than for a community-based voluntary institution (and if so, why)? How might an institution's obligation differ depending on the nature of the association between the organisation and the perpetrator of the abuse?

We refer to our answers above and note that test of 'reasonableness' has proportionality built in. That is, what is reasonable for a large commercial organisation may well not be reasonable for an unincorporated organisation, simply due to the lack of resources. The guiding principles and notes set out in the New South Wales and Victorian legislation referred to above, would allow such flexibility.

When considering the scope of risk management to be expected of institutions providing services to children, the size and social utility of the institution could be measured against the risk that the institution bears. In most circumstances the risk will rise concomitantly and proportionately with the size of the organisation. Therefore, the obligations on the institution will be mandated by the size of the risk it bears which should be related to its size and the amount of its resources.

On the question of whether or not an institution's obligation will differ depending on the nature of the association between the organisation and the perpetrator of the abuse, we make the following comments. knowmore recognises 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 referred to in 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 trusted individuals.[59] This being the case, it is our submission that taking reasonable steps/precautions must extend to all persons associated with the institution. This would strengthen these protective measures.

Question 13. Would it be useful for guidelines or industry standards to be developed regarding what may be considered reasonable? How would this take into account the differences referred to above? Would this be useful for the purposes of better preventing institutional child abuse and from an insurance perspective?

Certainly industry standards would set a benchmark for all institutions to achieve to be regarded as a child safe institution. Even when such standards are aspirational only, they would still create a clear mechanism to show where an institution had fallen short.

We believe that practice standards will inevitably emerge from the reforms taking place across Australia.

In relation to the prevention of institutional child abuse and the issue of insurance, we refer to our answers to questions 10 to 12 above.

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

Question 14. What financial or other impacts would a reverse onus have on organisations? In what ways would this improve or hinder their ability to provide services to children? Would this differ depending on the size or type of organisation?

A possible outcome of introducing legislation impacting 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 noted in its report:

> *"We recognise that introducing the new duty and reversing the onus of proof may lead to increased insurance premiums for institutions. However, legal duties are important for prescribing the standard that the community requires of institutions. 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 abuse has occurred. Changes to the duties of institutions are critical measures for preventing institutional child abuse from occurring in the first place."*[60]

The proposed reforms may well 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.

Question 15. Would the proposed changes motivate institutions to improve child safety? How might the possible deterrent effect of the Royal Commission's recommendations for a reverse onus be optimised?

The Royal Commission was of the view that reversing the onus of proof would improve child safety and we agree with the comments made:

> "*We are satisfied that institutions should be in a good position to prove the steps they took to prevent abuse. The institution generally should have better access to records and witnesses capable of giving evidence about the institution's behaviour than plaintiffs are likely to have. Reversing the onus of proof has the potential to encourage higher standards of governance and risk mitigation in institutions, both through their own efforts and through their compliance with the requirements of their insurers."* [61]

One example of 'higher standards of governance' may well see working with children checks introduced to cover a broader class of work environments and employees.

Certainly for larger commercial organisations, meeting the likely additional requirements imposed by insurers for cover will optimise the deterrent effect of the reverse onus. In relation to smaller community and not-for-profit organisations many will receive government grants to supply services. Consideration could be given to stipulating what 'reasonable steps/precautions' need to be in place

[60] Royal Commission, *Redress and Civil Litigation* Report (2015), at p.494
[61] Royal Commission, *Redress and Civil Litigation* Report (2015), at p.494

in relation to child safety (appropriate record keeping, responding and reporting regimes etc.) before government funding is made available to such organisations.

iii. Persons associated with the institution

Question 16. Should there be any limitations regarding who may be considered a person 'associated with' an institution? What factors my need to be taken into account?

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.*" [62]

knowmore supports the implementation of this recommendation. As noted above, we recognise the special position of trust a perpetrator may attain through their association with an institution.

We agree with the Royal Commission's observation that:

> "*Child sexual abuse can occur with 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 and norms.*" [63]

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.[64] Increasing responsibility of institutions in this manner would:

- clarify the liability of institutions for all parties;[65]
- 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); and
- shift the financial burden from communities and survivors to the institutions responsible.[66]

It is our submission that the term 'associated with' should be defined broadly in legislation, and in a non-exhaustive way. This is 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.[67]

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[62] Royal Commission, *Redress and Civil Litigation* Report (2015), at p.77
[63] Royal Commission into Institutional Responses to Child Sexual Abuse, Literature Review, *Risk Profiles for Institutional Child Sexual Abuse*, October 2016, at p.9
[64] Law Council of Australia, submission to the Royal Commission on Issues Paper 5, *Civil Litigation*, 25 March 2014, at p.16
[65] knowmore, Response to Consultation Paper, Issues Paper 5, *Redress and Civil Litigation*, 17 March 2014, at p.25
[66] knowmore, Response to Consultation Paper, Issues Paper 5, *Redress and Civil Litigation*, 17 March 2014, at p.18
[67] knowmore, Response to Consultation Paper, Issues Paper 5, *Redress and Civil Litigation*, 17 March 2014, at p.17

- Claims should not be excluded due to a novel or unexpected category of relationship.[68]
- So that institutions cannot avoid liability through delegation of the care, supervision or authority of a child to third parties[69]
- So that the financial burden of child abuse is not unfairly borne by the victim and the community.[70]

We can unfortunately point to many circumstances disclosed by our clients where perpetrators have abused children met at an institution, within their (perpetrator's or child's) own home. The question whether that abuse occurred when the perpetrator was 'associated with' an institution is vexed. It is common for perpetrators to use their connection and status within an institution to groom and otherwise manipulate children, facilitating offending in a variety of settings, such as outside the institution.

Both Victoria and New South Wales have passed legislation implementing recommendation 92.[71] The New South Wales Act includes the power to prescribe, in regulations, the circumstances in which an individual will be akin to an employee (or not). This will enable Parliament to deal with novel situations and to reflect industry standards as they change over time which, in our submission, is a sensible drafting approach. A similar approach has been adopted in the Government Bill currently before the Queensland Parliament.[72]

Question 17. Should 'associated' persons differ depending on the type of duty that may be imposed under legislation?

The Royal Commission in recommendation 92 stated that the concept of 'associated with an institution' was to apply to both the non-delegable duty and the imposition of liability with a reverse onus of proof. knowmore supports that position. As noted by the Royal Commission:

> "*We do not consider that including volunteers will unreasonably discourage people from volunteering. The liability is imposed on the institution and not on the volunteer. We consider it appropriate that institutions that operate facilities or services we have identified be liable for abuse committed while a child is under the care, supervision or control of the institution, regardless of whether it is committed by a volunteer or by a person with a different association with the institution. Institutions should take all necessary steps to prevent abuse that might arise from the involvement of volunteers in the institution's care, supervision or control, just as they should take those steps in relation to employees and others."*

If the reverse onus duty is implemented, it will be a question of fact in child abuse cases as to whether the institution took reasonable steps to prevent the abuse alleged. Those steps will vary depending on the institution (as explained above) but also depending on the 'associate' involved and their relationship to the child victim.

[68] Explanatory Memorandum, Wrongs Amendment (Organisational Child Abuse) Bill 2016 (Vic) at p.4
[69] Explanatory Memorandum, Wrongs Amendment (Organisational Child Abuse) Bill 2016 (Vic) at p.4
[70] knowmore, Response to Consultation Paper, Issues Paper 5, *Redress and Civil Litigation*, 17 March 2014, at p.18
[71] The *Wrongs Act 1958* (Vic) s.90 and *Civil Liability Amendment (Organisational Child Abuse Liability) Act 2018* (NSW) s.6E
[72] Civil Liability and Other Legislation Amendment Bill 2018 (Qld), s.33C

Question 18. Should persons associated with an institution include children under the care, control or supervision of the institution? For example, should a school be liable for abuse committed by one or more students against another of its students?

In our submission, liability on the part of institutions for sexual abuse should extend to acts of abuse committed by children under the care, control or supervision of institutions and, for clarity the definition of "w*hen is a person associated with an institution"* should specifically provide for this.

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."* [73]

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 abused by adults and two in five (41.1 per cent) said they were abused by other children.'*[74]

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

Question 19. Should legislation define who is associated with an institution or should this be decided on a case-by-case basis?

As we have said above in answering Question 16, the term 'associated with' should be non-exhaustively defined in legislation.

knowmore made the following statement in our submission to the Victorian Government on the Creation of a Redress Scheme for Institutional Child Abuse:

> "*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 should not found institutional responsibility. These types of cases are*

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

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

likely to turn on their own facts, and do not therefore in any event lend themselves to ready definitional resolution." [75]

Question 20. What limits (if any) should there be to exclude acts of abuse committed by a person associated with an institution, which occur in circumstances not connected with the activities of the institution (e.g. in the associated person's home)?

It is our submission that there must be the potential for the institution to be liable where the institution is responsible for and/or has facilitated the abuser having contact with the applicant.[76] As referred to in our answer to question 16, we have heard of many instances where offenders have used 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.

However, scope should also exist for an institution to be able to dispute responsibility depending on the facts of the institution's relationship with the perpetrator and the circumstances of the case.[77]

It should be noted 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:

> *"(6) Subsection (2) does not apply to abuse of a child committed by an individual associated with a relevant organisation in circumstances wholly unrelated to that individual's association with the relevant organisation."*[78]

This test seems appropriate. Such a provision would allow for the institution to argue that the perpetrator's association with the institution had nothing at all to do with the abuse committed.

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.

knowmore has previously submitted that a narrow interpretation of 'institutional child sexual abuse' should not be adopted:

> "*In particular, the Parliamentary Inquiry and the Royal Commission will have been informed of many examples, as knowmore has, of children being abused in circumstances falling within sub-paragraph(iv) of the definition of 'institutional context' in the Royal Commission's Letter Patent; that is, where perpetrators have misused their position and association with an institution, and the consequent relationship of trust with the child victim, to commit sexual offences. It is important that this reality be recognised in the eligibility criteria and that a narrow approach not be adopted, that limits eligibility to only abuse that occurred within institutions themselves. Such an approach would unfairly exclude thousands of survivors of what is quite properly and currently recognised under the Royal Commission's Letters Patent as "institutional child sexual abuse." We do not anticipate*

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

[76] knowmore, *Submission to the Victorian Government on the Creation of a Redress Scheme for Institutional Child Abuse*, 2015, at p.17

[77] knowmore, *Submission to the Victorian Government on the Creation of a Redress Scheme for Institutional Child Abuse*, 2015, at p.17

[78] *Wrongs Act 1958* (Vic) s.91(6)

major difficulties, in the practical application of a redress scheme, arising from the inclusion of a 'catch-all' style provision such as paragraph (v) of the definition of 'institutional context' in the Royal Commission's Letters Patent; that is, abuse is taken to have occurred in an 'institutional context' if it happens in any other circumstances where the institution is, or should be treated as being, responsible for the adult abuser having contact with the applicant.".[79]

knowmore continues to support this position. 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;

(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.

Adopting a narrow interpretation of abuse occurring within an institutional context or abuse associated with an institution, will ignore the reality of how and where abuse occurs and will deny victims justice.

[79] knowmore legal service, *Submission to the Victorian Government on the Creation of a Redress Scheme for Institutional Child Abuse,* 2015, at p.17

iv. New duties to apply prospectively

Question 21. If new statutory duties to deter and compensate for institutional child abuse are imposed by Western Australian legislation, should the duties apply prospectively only? Why or why not?

The Royal Commission in its report stated that the proposed reforms to duties should apply prospectively. The Royal Commission noted, that it was likely given the development of the common law, these changes would ultimately be made by the court. [80] Given that as a likely outcome, the Commission went on to state:

> "*If the liability was left to the development of the common law and applied retrospectively, in combination with the removal of limitation periods we recommend, relevant institutions would face potentially large and effectively new liability for abuse that has already occurred, potentially over many previous decades. If it were even possible to obtain insurance for retrospective liability on such a scale, the insurance would be likely to be unaffordable for many institutions. No institution could now improve its practices or take steps to prevent abuse that has already occurred."*[81]

Recommendation 93 states:

> *"State and territory governments should ensure that the non-delegable duty and the imposition of liability with a reverse onus of proof apply prospectively and not retrospectively."*

Obviously retrospective application of the duties would be most advantageous for survivors now wishing to bring actions based on their experience of abuse and, given the power imbalance and the barriers that survivors have faced until now in pursuing civil claims, there is an arguable basis for retrospective application. However, we acknowledge the Royal Commission's specific recommendations.

5. Conclusion

Since its commencement in 2013, knowmore has witnessed the incredible tragedy of the impact of institutional child sexual abuse on thousands of people. As we have explained in this submission, there are often predictive or precipitating factors to child sexual abuse, as well as risk factors specific to institutions, that justify the imposition of new statutory duties on institutions. The work of the Royal Commission has illuminated the range of institutional settings where child abuse has occurred across Australia, and the circumstances and situational factors within institutions that promoted its occurrence and hindered its detection. Institutions should be aware of the risks when they commence operations and at all times in their delivery of services for children.

We support the Government of Western Australia implementing these reforms. They will improve survivors' access to justice and help to ensure that relevant claims are determined on their merits.

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[80] Royal Commission, *Redress and Civil Litigation* Report (2015) at p. 54
[81] Royal Commission, *Redress and Civil Litigation* Report (2015) at p.55

Importantly, the reforms will also help to ensure that institutions responsible for child abuse bear the cost of that harm.

We would urge the Government to progress quickly with these reforms. We note the fundamental importance of ensuring that survivors of 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 that context, Western Australia has now joined the National Redress Scheme. As explained below, our service is seeing large numbers of survivors of institutional child abuse[82] who are living in Western Australia now coming forward to seek advice and information about their rights to compensation or redress. Those survivors are currently in the difficult position of having to make decisions about their best option for justice without a clear picture as to their common law and civil rights and their prospects of success in establishing liability on the part of an institution. 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/common law claim against a participating institution,[83] it is important that survivors are provided with the best information and advice possible about their legal rights before determining to pursue a claim under the NRS and to accept an offer of redress.

Civil litigation reform to remove the barriers addressed in the Discussion Paper has already been implemented in Victoria, New South Wales and the Australian Capital Territory; and there are Bills before the parliament of Queensland. We would hope that Western Australia will now move urgently on these issues.

We thank the Government for the opportunity to make this submission. We have no concerns about its publication.

[82] Who have also often experienced child abuse in other settings

[83] See s.43 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)*

knowmore

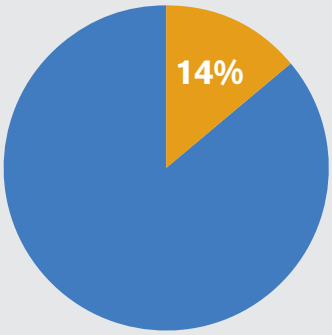
Data Snapshot – Western Australia

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 Western Australia

Our clients

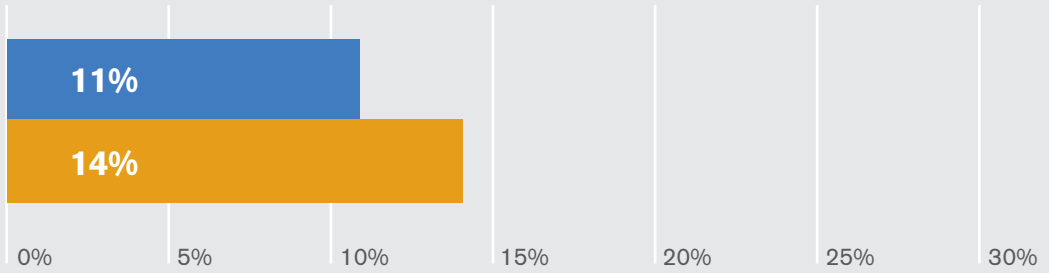


knowmore began providing services to the public on 8 July 2013 – as at 31 March 2018, we've helped:

1278
knowmore Western Australia clients

8954
Total number of **knowmore** clients

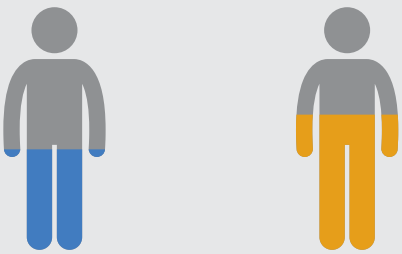
State representation



Percentage of national population living in WA

Against

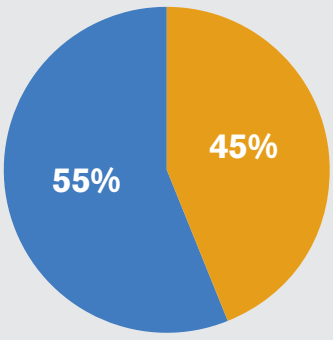
Percentage of **knowmore** clients living in WA



45%
Identified as female

55%
Identified as male

Aboriginal and Torres Strait Islander clients



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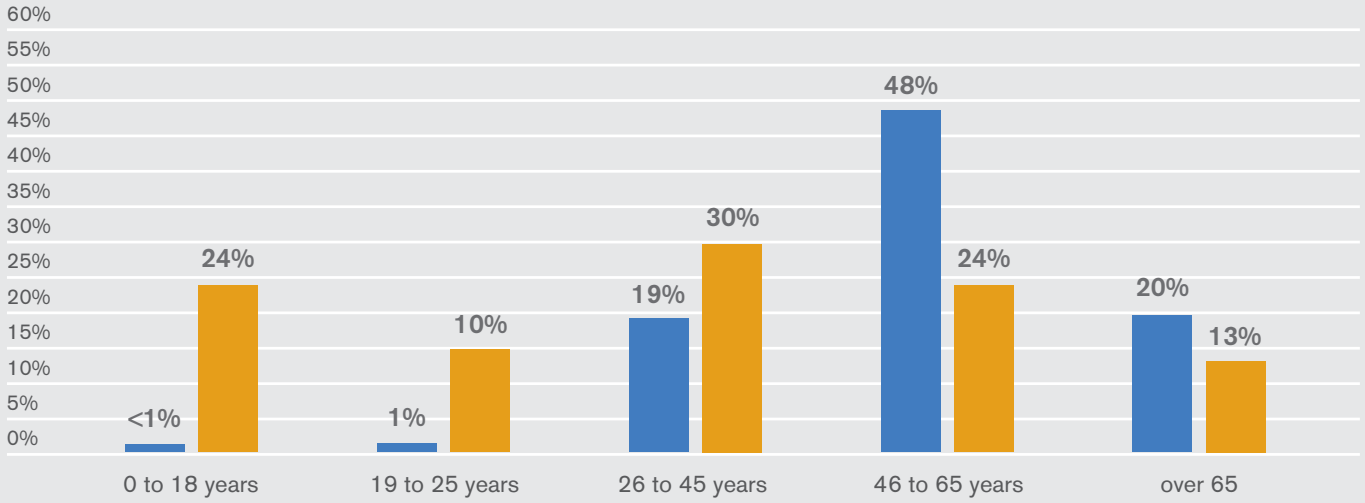
knowmore

Data Snapshot – Western Australia

as at 31 March 2018

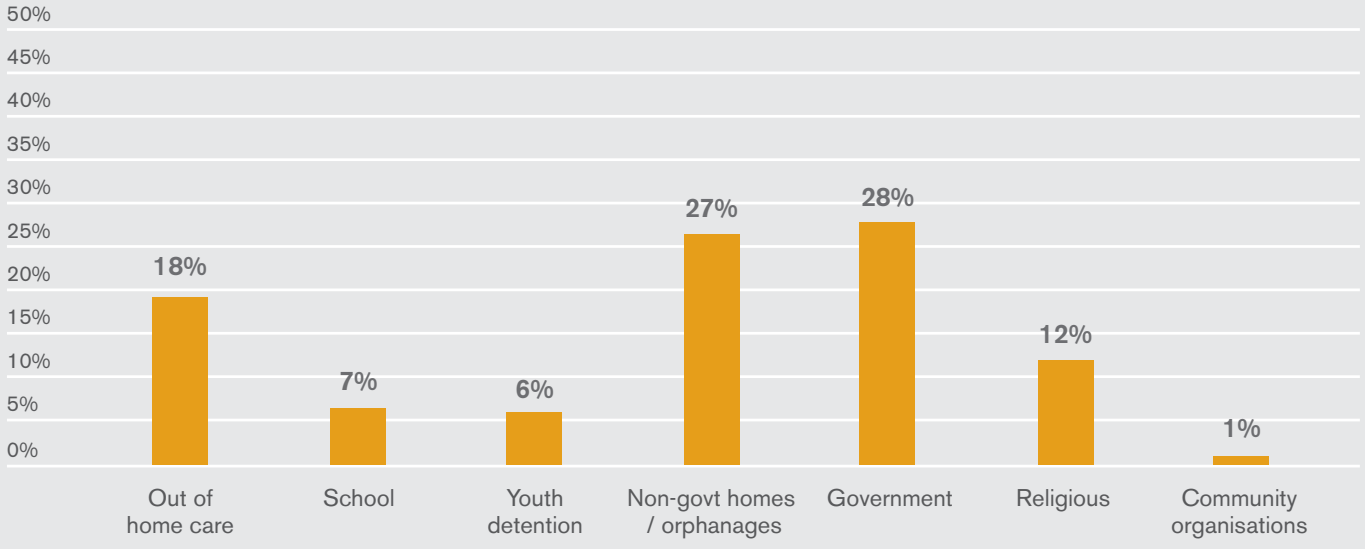
Our clients – Age groups



Percentage of Western Australia based knowmore clients per age group

Against percentage of Western Australia population per age group

Institutions in Western Australia 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 – 28 February 2019

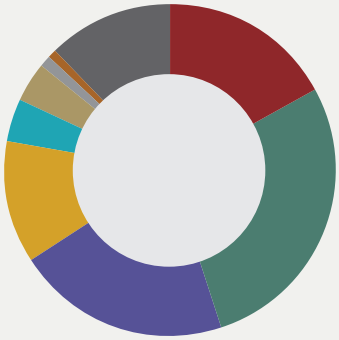
Total calls and clients

13,488
Total 1800 calls nationally

3,748
clients (intake completed)

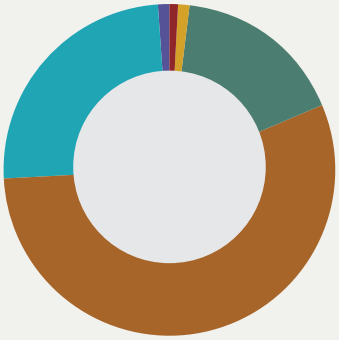
56%
new clients

Calls came from



NSW	18%
QLD	28%
VIC	20%
WA	13%
SA	5%
TAS	4%
ACT	1%
NT	1%
International/Other	10%

Age



0-18	<1%
19-25	1%
26-45	16%
46-65	57%
66-85	25%
86+	<1%

Our clients

20% priority clients

24% identify as Aboriginal and/or Torres Strait Islander

38% identified as female

62% identified as male

knowmore free legal help for survivors

1800 605 762 | knowmore.org.au

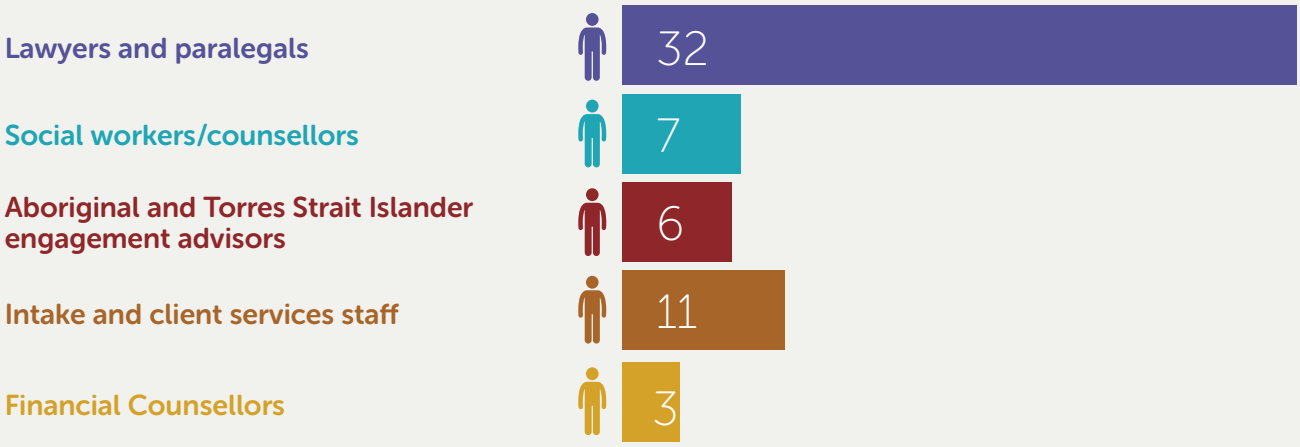
* **Notes re Priority Clients**

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 – 28 February 2019

Service delivery



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knowmore free legal help for survivors

1800 605 762 | knowmore.org.au

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.