

Evidence Amendment Bill 2020

Submission to the Tasmanian
Department of Justice

10 February 2020

Contents

About knowmore	2
Our service	2
Our clients	2
knowmore's submission	3
knowmore's overall position on the Bill	3
Recommended changes to the Bill	4
Practical supports for victims and survivors	6
Conclusion	7

About knowmore

Our service

knowmore legal service (knowmore) is a nation-wide, free and independent community legal centre providing 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 survivors and their supporters to stop child abuse.

Our service was 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 Community Legal Centres Australia, with funding from the Australian Government, represented by the Attorney-General's Department. knowmore also receives some funding from the Financial Counselling Foundation.

From 1 July 2018, Community Legal Centres Australia has been funded to operate knowmore to deliver legal support services to assist survivors of institutional child sexual abuse to access their redress options, including under the National Redress Scheme.

knowmore uses a multidisciplinary model to provide trauma-informed, client-centred and culturally safe legal assistance to clients. Our service model brings together lawyers, social workers and counsellors, Aboriginal and Torres Strait Islander engagement advisors and financial counsellors to provide coordinated support to clients.

knowmore has offices in Sydney, Melbourne, Brisbane and Perth and provides services in the other states and territories, including through regular outreach. Due to the very high numbers of clients coming through intake at knowmore in the NRS's first year of operation, together with the staggered timing of governments' and other institutions' participation in the scheme, our outreach activities in the initial period of the NRS's operation have largely been focussed on meeting the needs of individual clients, and on building our relationships with local services, community organisations and other stakeholder services on the ground through the provision of training and information about the NRS, eligibility and knowmore's services.

Our outreach work has begun to gather momentum this financial year, with the initial priority on those jurisdictions where we do not have an office. knowmore is currently visiting Redress Support Services in Tasmania every six to eight weeks to assist clients.

Our clients

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

Since the commencement of the National Redress Scheme for survivors of institutional child sexual abuse on 1 July 2018 to 31 December 2019, knowmore has received 26,245 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 5,561 clients. This includes 257 clients (approximately 5%) who reside in Tasmania. Of knowmore's clients residing in Tasmania, 22% identify as Aboriginal and/or Torres Strait Islander peoples, and a quarter (25%) are classified as priority clients due to advanced age and/or immediate and serious health concerns including terminal cancer or other life-limiting illness.

knowmore's submission

This section outlines knowmore's overall position on laws that protect the anonymity of complainants in sexual offence proceedings and specifically, on the Evidence Amendment Bill 2020 (the Bill). It also details recommended changes to the Bill, and discusses knowmore's views on non-legislative supports that are essential to ensuring the new provisions operate effectively in practice.

knowmore's overall position on the Bill

knowmore strongly supports the Bill. While we support laws that protect the anonymity of complainants in sexual offence proceedings by generally prohibiting the publication of identifying information, our experience is that it is essential for victims and survivors to have the right to be identified and tell their stories publicly if they choose to do so. For some survivors, telling their story and being heard is an integral part of the healing process.

As an example of this, knowmore helped many clients to share their stories with the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). Whether this was by giving evidence in public hearings or private sessions or by providing written statements, survivors of child sexual abuse were given the opportunity to be heard and believed. For some clients, the Royal Commission's work helped to lift, at least to some extent, the stigma they had experienced as a result of their sexual abuse. This has inspired some survivors to want to continue to share their stories, not only to heal themselves, but also to raise awareness, influence reform and prevent the future abuse of children.

Similarly, we are aware of some clients in other jurisdictions who have been permitted to tell their story after participating in the criminal justice process. These survivors have expressed that being able to exercise their right to be named was transformative to their recovery, especially after the gruelling experience of criminal proceedings. Conversely, some survivors who have not been able to publicly discuss their abuse because of suppression orders have described that experience as re-traumatising. Having been silenced as children,¹ which often led to them being silent about their abuse for decades out of shame, embarrassment and the fear of not being believed,² they feel they have again been silenced by the criminal justice system.³

knowmore supports reforms that recognise and uphold the agency of victims and survivors of sexual abuse. We concur with the view of Women's Legal Service Tasmania in their submission to the Department of Justice in May 2019, that:

'[i]t is in the public interest for the experience of survivors to be in the public domain and for the survivors of that abuse to maintain control of their own stories and experiences if survivors wish to speak of their experiences.'⁴

1 See Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 4, Identifying and Disclosing Child Sexual Abuse*, 2017, for a detailed discussion of why victims of child sexual abuse often do not disclose their abuse.

2 The Royal Commission found that survivors take 23.9 years on average to disclose childhood sexual abuse (Royal Commission, *Final report: Volume 4*, p. 30).

3 A previous submission on section 194K of the Tasmanian *Evidence Act 2001* by End Rape On Campus Australia and Marque Lawyers includes detailed accounts from 14 survivors describing similar experiences, either in not being able to tell their story publicly, or in being able to speak out about the abuse they experienced (see <www.marquelawyers.com.au/assets/eroc-marque-submission-may.pdf>, pp. 25–58).

4 Women's Legal Service Tasmania, 'Discussion Paper Submission — s194K of *Evidence Act 2001*', May 2019, p. 7.

In light of the above, we support new section 194K which will continue to prohibit the publication of a complainant's identifying information, but will give adult survivors the right to consent to being identified in certain circumstances. This will bring Tasmania into line with all other states and territories.⁵ We think it is particularly important that publication of a complainant's identity only occurs where that complainant has the capacity to give informed consent, and does not identify any other complainant who has not consented to having their identity disclosed. The provisions in the Bill address both of these matters. However, we make a number of recommendations below, aimed at ensuring that the provisions operate effectively and that survivors are supported in reaching a decision to provide their informed consent.

We also support the strengthening of section 194K, through the introduction of clear criminal sanctions and penalty structures for breaches of section 194K, including custodial sentences for individuals. As stated in our previous submission to the Department of Justice on section 194K,⁶ such sanctions offer greater protection to survivors who are contemplating engaging in the criminal justice process and also recognise the severity of publishing a survivor's personal information without their consent.

Recommended changes to the Bill

Although we strongly support the Bill overall, we submit that there are a number of ways in which the Bill could be improved to better promote and protect the rights of victims and survivors of sexual abuse.

Ensuring that a complainant's identifying information can only be published with their consent

We note that the Bill provides two defences to an offence against section 194K(1): that the complainant has provided their written consent to the publication of their identifying information, or that the publication of the identifying information is in accordance with a court order.

We are concerned that in the latter scenario, a court may make an order permitting a complainant's identifying information to be published against their wishes and without their consent. While section 194K(5)(a) provides that in making the order the court must be satisfied that the complainant has been consulted and understands that they may be identified if the order is made and their information is published, it falls short of requiring that the complainant has provided their consent.

As stated in our previous submission on section 194K,⁷ knowmore strongly opposes the publication of a complainant's identifying information without their written and informed consent. This is due not only to the risks to the survivor and their family members, but also the risk that it may further discourage other survivors of sexual abuse from coming forward and reporting their abuse.

We support the approach taken in Victoria, which specifically prohibits the lifting of a suppression order without the adult victim's consent.⁸ We therefore submit that the proposed provision should be amended to specifically require the complainant's written and informed consent before a court can make an order pursuant to section 194K(5) to permit the publication of the person's identifying information. In addition, we suggest that further consideration be given to ensuring that the court must make a publication order under section 194K(5) where an adult survivor provides their written and informed consent, and the disclosure of their identity would not lead to the identification of other survivors who have not consented.

5 See s. 74, *Evidence (Miscellaneous Provisions) Act 1991* (ACT); s. 578A, *Crimes Act 1900* (NSW); s. 10, *Criminal Law (Sexual Offences) Act 1978* (Qld); s. 71A(4), *Evidence Act 1929* (SA); s. 4, *Judicial Proceedings Reports Act 1958* (Vic); s. 36C, *Evidence Act 1906* (WA). Like Tasmania, the Northern Territory is also progressing reforms in this area — see Part 2 of the Sexual Offences (Evidence and Procedure) Amendment Bill 2019, available at: <https://legislation.nt.gov.au/en/LegislationPortal/Bills/~link.aspx?id=F0B5308B1F87411F96D242E816C6B4A7&z=z>.

6 knowmore, 'Submission to the Tasmanian Department of Justice — Discussion Paper: Section 194K of the *Evidence Act 2001*', May 2019.

7 Ibid.

8 See the *Open Courts Act 2013* (Vic), as amended by the *Open Courts and Other Acts Amendment Act 2019*.

Strengthening the provisions relating to the complainant's informed consent

While we strongly support adult complainants having the right to consent to being publicly identified, we emphasise the need to ensure that their consent is properly informed. This is especially important for particularly vulnerable complainants — such as complainants with disability, Aboriginal and/or Torres Strait Islander complainants, and complainants from culturally and linguistically diverse backgrounds — whose circumstances may mean they do not fully understand the potential ramifications of being publicly identified as a victim or survivor of sexual abuse. There is also the risk of third parties such as media organisations harassing or exploiting complainants to obtain their consent, including in exchange for financial compensation, at a time when they are most vulnerable.

We note section 194K(4) of the Bill, which outlines the legal test for establishing that the survivor has consented to the publication of their identifying information. Although we broadly support this provision, we submit that several amendments are required to ensure that a survivor's consent is truly free and informed.

Firstly, we note that paragraph (a) provides that the person must have attained the age of 18 years at the time their identifying information is published. We are concerned that this provision incorrectly focuses on the person's age at the time of publication, rather than the person's age at the time of exercising their legal capacity to provide consent. As currently drafted, the legislation appears to permit a minor to consent to the publication of their identifying information, so long as the publication does not occur until they have attained the age of 18 years. This is inconsistent with the recommendations of the Tasmanian Law Reform Institute⁹ as well as the approach in other jurisdictions,¹⁰ and does not appear to be in the best interests of survivors who are minors. We are concerned that minors may be particularly vulnerable when engaging in the criminal justice process and should be protected from the risk of undue influence by third parties seeking to publish their stories. knowmore submits that the provision should be amended to ensure that only adult survivors can consent to the publication of their identifying information under new section 194K.

Secondly, we are concerned that paragraph (c) adopts a narrow approach to capacity. As currently drafted, the provision only requires that the person understood at the time of providing consent that they may be identified as a result of the publication. In knowmore's view, the person should also be able to understand the likely risks and consequences resulting from their identity being revealed. We submit that further consideration be given to the Queensland approach to capacity. In Queensland, capacity is defined to mean that the person is capable of understanding the nature and effect of decisions, and can freely and voluntarily make decisions and communicate these in some way, as per the *Guardianship and Administration Act 2000* (Qld).¹¹ We submit that this approach will provide greater assistance to courts in determining whether a person has capacity to consent.

Thirdly, we note that paragraph (d) outlines circumstances in which a person's consent cannot be taken to have been given freely. Specifically, it provides that the person will not be taken to have provided their consent under section 194K(3) if they were coerced into consenting. In knowmore's view, the provision takes an overly limited view of the nature of consent. We anticipate that there may be circumstances where a third party seeking to publish the person's identifying information may not have obtained the person's consent in good faith, but their actions may fall short of coercion. For example, in circumstances involving undue inducement, undue pressure, and other forms of intimidation or manipulation. We submit

9 Tasmanian Law Reform Institute, 'Protecting the Anonymity of Victims of Sexual Crimes: Final Report No 19', November 2013, Recommendation 4.

10 See for example, s. 15(1B) of the *Open Courts Act 2013* (Vic); and proposed s. 6(2) of the Northern Territory's *Sexual Offences (Evidence and Procedure) Act 1983*, as per clause 4 of the Sexual Offences (Evidence and Procedure) Amendment Bill 2019.

11 Section 10(3), *Criminal Law (Sexual Offences) Act 1978* (Qld) and Schedule 4, definition of capacity, *Guardianship and Administration Act 2000* (Qld).

that further consideration should be given to broadening this provision to include other improper conduct that may affect the person's ability to provide free and informed consent.¹²

We submit that these recommended amendments will ensure that the Bill strikes the appropriate balance between respecting a survivor's agency in consenting to the publication of their identifying information, and ensuring that their consent is truly free and informed.

Allowing complainants to consent to publication at any time

We note section 194K(3)(b)(v) which provides that a complainant's written consent is only a defence to an offence against section 194K(1) if the complainant's identifying information is published after the relevant court proceedings have been finally determined or otherwise completed. In effect, this means that a complainant only has the right to be identified and tell their story once all proceedings, including any appeal or re-trial, are finalised. We consider this unduly limiting, and submit that subparagraph (v) should be omitted.

With the exception of Victoria,¹³ no jurisdiction currently imposes restrictions on complainants in terms of when they can consent to having their identity disclosed. Although under section 194K(5) survivors may apply for a court order to be identified and tell their story while criminal proceedings are pending, this process can be difficult and re-traumatising for survivors, and as noted above, there is currently no obligation on the court to grant the order.

Consistent with our comments above, we support empowering survivors who want to share their story as much as possible given the healing effects this can have. While we acknowledge the importance of ensuring a fair trial, we consider that any risk to this posed by the disclosure of a complainant's identity would be minimal. Furthermore, we note that the principal purpose of section 194K is to protect victims and survivors from having their identities revealed without their consent, not to silence those who want to tell their story. Section 194K(3)(b) should therefore be amended to omit paragraph (v), consistent with comparable provisions elsewhere in Australia.

Practical supports for victims and survivors

We consider that, in addition to legislative protections, it is essential for complainants to have access to independent, free, culturally appropriate and trauma-informed support and legal advice when considering whether to consent to having their identity published. For example, counsellors can talk complainants through the potential mental health and well-being implications of telling their story, while lawyers can help complainants to understand the potential legal implications. Tailored assistance can also be provided to ensure that particularly vulnerable complainants are supported to exercise their decision-making authority and make informed choices.

Community legal centres that assist victims and survivors of sexual offences, such as knowmore and specialist legal services in Tasmania, are well placed to provide complainants with independent and client-centred legal assistance and other support to empower them to make informed decisions about these issues. However, additional resourcing would be required to support such service delivery in order to not impact upon current services.

¹² We note the approach recommended by the Tasmanian Law Reform Institute, above note 9, Recommendation 4.

¹³ Section 4(1B), *Judicial Proceedings Reports Act 1958* (Vic). We note that the proposed provisions in the Northern Territory contain a similar restriction [proposed s. 6(2)(a) of the Sexual Offences (Evidence and Procedure)

Amendment Bill 2019, available at:

<http://legislation.nt.gov.au/en/LegislationPortal/Bills/~link.aspx?id=F0B5308B1F87411F96D242E816C6B4A7&z=1>.

Conclusion

As stated above, knowmore supports the right of victims and survivors of sexual abuse to be publicly identified and to tell their own stories, should they choose to do so. We recognise that providing survivors with the opportunity to be heard is important not only for the person's healing, but also for raising community awareness of sexual abuse, and helping to prevent it.

knowmore strongly supports the Bill, which will bring Tasmania into line with other states and territories. To further promote the rights of victims and survivors, knowmore recommends that the Bill be amended to: ensure that a complainant's identifying information can only be published with their consent; strengthen the provisions relating to the complainant's informed consent; and allow complainants to consent to publication at any time.

Finally, we urge the Tasmanian Government to consider the practical support that victims and survivors of sexual abuse will require when deciding whether to consent to having their identity published. In our view, complainants must have access to independent, free, culturally appropriate and trauma-informed support and legal advice to empower them to make informed decisions.

We have no objection to the publication of this submission.

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