knowmore
free legal help for survivors

Justice Legislation (Organisational Liability for Child Abuse) Amendment Bill 2019

Submission to the Department of Justice

August 2019

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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 the National Association of Community Legal Centres (NACLC), 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, NACLC 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. knowmore has offices in Sydney, Melbourne, Brisbane and Perth. 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.

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 30 June 2019, knowmore has received 18,420 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 4,509 clients. A quarter (25%) of knowmore's clients identify as Aboriginal and/or Torres Strait Islander peoples. Just over a fifth (22%) of clients are classified as priority clients due to advanced age and/or immediate and serious health concerns including terminal cancer or other life-limiting illness.

Our clients in Tasmania

knowmore has a significant client base in Tasmania — 4% per cent of our current clients reside in the state. We therefore have a strong interest in Tasmanian law reform that will enable and enhance access to justice for survivors.

knowmore's submission

This section outlines knowmore's overall position on the Justice Legislation (Organisational Liability for Child Abuse) Amendment Bill 2019, and details knowmore's specific comments on aspects of the Bill relevant to institutional child sexual abuse and the experiences of our clients.

In considering the amendments in the Bill, knowmore has reflected on both the findings of the Royal Commission into Institutional Child Sexual Abuse (the Royal Commission) and its own work with survivors of child sexual abuse, particularly survivors who have experience with the current civil litigation system.

knowmore's overall position

knowmore welcomes the Tasmanian government's commitment to implementing the civil litigation recommendations made by the Royal Commission in its *Redress and civil litigation report* (2015), as well as proposed reforms that enable previously settled causes of action relating to child abuse to be reviewed.

We note the fundamental importance of ensuring that survivors of child abuse are afforded meaningful opportunities to access justice, and most importantly, to make an informed choice in how to pursue outcomes that are appropriate and important to them.

Amendments to the *Limitation Act 1974*

knowmore advocates for nationally consistent approaches to laws which impact the rights and interests of survivors of child sexual abuse. While knowmore generally supports the proposed reforms to the *Limitation Act 1974,* knowmore suggests the Tasmanian Government consider an amendment to section 5C(2) of the proposed Bill, to bring the reforming provisions in line with the approach adopted in other Australian jurisdictions.

Past settlements

The Royal Commission recognised that survivors of institutional child sexual abuse take, on average, approximately 24 years to disclose the abuse they experienced.[1] However, until recently, limitation periods operated arbitrarily to prevent survivors from commencing civil litigation for damages where the prescribed limitation period had expired. In many cases, limitation periods proved an insurmountable barrier and left survivors with no option but to accept out of court settlements which were often woefully inadequate and unjust. In addition, nearly all settlement agreements were conditional on the survivor signing a 'deed of release', therefore requiring the survivor to forfeit their future rights to make any further claims against the institution.

The Royal Commission recognised the significant barriers faced by survivors during these settlement proceedings, stating:

> '[w]e recognise the difficulties many survivors have faced in dealing directly with representatives of the institution in which they were abused, being presented with deeds of release under time pressure and in some cases without the opportunity to obtain independent advice, and with little or no knowledge of what others in comparable positions had been offered or paid.'[2]

[1] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 4, Identifying and Disclosing Child Sexual Abuse* (December 2017) at 9.
[2] Royal Commission into Institutional Responses to Child Sexual Abuse, Redress and civil litigation report, September

Many of knowmore's clients have reported facing similar barriers during settlement proceedings with institutions. In a previous submission concerning changes to the limitation period laws in Queensland,[3] knowmore detailed these experiences:

> '[w]e have dealt with many clients who have told us that they felt that they were effectively coerced into settling their claims, on the basis that if they did not accept the amount of monetary compensation offered by the institution (which they perceived as inadequate), their only other option was to take the matter to court, in circumstances where they were in receipt of advice that any such action would in all likelihood be doomed to failure, due to the limitation barrier alone. In those circumstances, the majority of our clients in such positions understandably resolved their claims by accepting the financial settlements offered, where, on any objective assessment, that settlement was manifestly inadequate and arbitrary in nature, bearing no similarity at all to the quantum of damages they would have received had they been able to litigate their matter before a court. We have seen many clients who have told us of their experience of suffering prolonged sexual and other abuse as children while in institutions, with consequential and debilitating complex trauma and its associated life-long adverse effects, who reluctantly resolved their claim against the institution for financial amounts of often less than $20,000, inclusive of their costs. For these survivors, the power imbalance present at the time of their abuse is replicated, with further trauma, by the inequality inherent in the respective positions of survivor and institution.'[4]

As stated in our submission to the Tasmanian Department of Justice on the *Draft Limitation Amendment Bill 2017*, the concerns we raised in the context of Queensland law reform have also adversely impacted on many Tasmanian survivors of institutional child abuse, including those who made claims under the Tasmanian Claims of Abuse in State Care Program, and who were required to execute a Deed of Waiver foregoing any future rights of legal action:

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

As a result of the unfair and unjust circumstances in which many past settlement agreements were signed, knowmore supports the implementation of nationally consistent legislative reforms which provide courts with the discretion to review and set aside past settlements where "it is just and reasonable to do so."

Comparable legal arrangements in other Australian jurisdictions

Legislative reforms to allow the setting aside of past settlements in child sexual abuse cases were first introduced in Queensland in 2016. The *Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016* inserted section 48(5A) into the *Limitation of Actions Act 1971 (QLD)*:

> (5A) An action may be brought on a previously settled right of action if a court, by order on application, sets aside the agreement effecting the settlement on the grounds it is just and

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2015, pp.42-43, available at: https://www.childabuseroyalcommission.gov.au/redress-and-civil-litigation.

[3] See knowmore, Submission to the QLD Legal Affairs and Community Safety Committee, *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill* 2016 and the *Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill* 2016, at pp.13-15, available at: https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/22-LimitationActions

[4] Ibid.

[5] knowmore, submission on the *Draft Limitation Amendment Bill 2017 (Tas)*, 4 October 2017,

reasonable to do so.[6]

As a result of the operation of section 48(6), actions under section 48(5A) can only be brought in cases involving child sexual abuse that were settled after the expiration of a limitation period and before the commencement of the reforms.[7]

Importantly, in order for the judiciary to exercise its discretion to set aside a past settlement, it must be satisfied that the threshold of "just and reasonable" is met. The Supreme Court of Queensland recently provided guidance on which factors are and are not relevant for consideration in the exercise of this discretion in *TRG v The Board of Trustees of the Brisbane Grammar School* [2019] QSC 157.[8] In determining the application Davis J took into account a number of key factors, including: the conduct of the respondent throughout the settlement process; that both parties were appropriately represented; the incurring of settlement costs by the respondent; the settlement figure of $47,000 which Davis J considered to amount to a fair settlement based on the proper assessment of the parties' respective cases at that time; and that '[t]he discount of the applicant's claim was not materially contributed to by any consideration of limitation defences.'[9] After considering these factors and the legislative intent, Davis J concluded that it was not just and reasonable for the past settlement to be set aside.

This case demonstrates that not all past settlements of child sexual abuse claims involving the expiration of a limitation period will be set aside under these reforms. Rather, in considering whether it is "just and reasonable" to set aside a past settlement, the court will consider and balance the interests of both parties.[10] Therefore, defendants are only likely to be adversely impacted by such reforms where past settlements resulted in inadequate or unjust compensation, or involved unfair or unreasonable conduct on the part of the defendant.

Reforms mirroring those in Queensland have been introduced in both Western Australia and the Northern Territory. In Western Australia the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* inserted section 92 into the *Limitation Act 2005 (WA)*,[11] allowing a court to set aside a past settlement agreement involving a "child sexual abuse cause of action"[12] where the court is satisfied that "it is just and reasonable to do so." Similarly, in the Northern Territory the *Limitation Amendment (Child Abuse) Act 2017* inserted section 54 into the *Limitation Act 1981 (NT),*[13] allowing a court to set aside pre-existing judgments, including settlement agreements, relating to causes of action arising from child abuse, if "it is just and reasonable to do so".[14]

The Western Australian reforms have been considered in the decision of Sleight CJDC in *JAS v The Trustees of the Christian Brothers* [2018] WADC 169. In considering whether the circumstances of that case were such that granting leave to set aside the past settlement agreement would be "just and reasonable",

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[6] *Limitation of Actions Act 1971 (Qld)*, section 48(5A), available at: https://www.legislation.qld.gov.au/view/html/inforce/current/act-1974-075.

[7] See *Limitation of Actions Act 1971 (Qld)* section 48(6) and section 11A.

[8] We note the applicant has filed an appeal against the decision.

[9] *TRG v The Board of Trustees of the Brisbane Grammar School* [2019] QSC 157, Davis J at 272-279, available at: https://www.queenslandjudgments.com.au/case/id/328743.

[10] Ibid, Davis J at 96.

[11] *Limitation Act 2005 (WA)*, section 92, in particular subsection 92(3), available at: https://www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_542_homepage.html.

[12] A "child sex abuse cause of action is defined in section 6A(1) as '…a cause of action that relates, directly or indirectly, to a personal injury of the person to whom the cause of action accrues, where the injury results from child sexual abuse of the person.' The reforms apply to a child sexual abuse cause of action that was settled after it was statute barred as a result of the expiration of a limitation period.

[13] See *Limitation Act 1981 (NT),* Part V Division 2, available at: https://legislation.nt.gov.au/en/Legislation/LIMITATION-ACT-1981.

[14] Ibid, section 54.

Sleight CJDC noted that " …the focus more appropriately is on the circumstances of the parties at the time the settlement agreement was entered into",[15] and also noted the " … remedial principles which are obviously intended by the amendments to the Act."[16]

Progress to allow the setting aside of past settlement agreements has also been made in other Australian jurisdictions. For example, in South Australia the *Limitation of Actions (Actions for Child Abuse) Amendment Bill 2019*, if passed, will insert new section 3B into the *Limitation of Actions Act 1936 (SA)*, to enable a court to set aside an agreement on a previously settled cause of action on the grounds it is "just and reasonable to do so."[17] In Victoria, Attorney-General Jill Hennessy confirmed the Government's intention to amend the *Limitation of Actions Act 1958 (Vic)* to give discretion to a court to set aside a past deed of release or court judgement if it is "just and reasonable to do so."[18] The proposed reforms in both South Australia and Victoria will cover sexual abuse as well as other forms of child abuse.[19]

The proposed amendments

knowmore generally supports the proposed amendments to the *Limitation Act 1974 (Tas)* in Part 3 of the Bill, which allow previously settled causes of action relating to child abuse to be reviewed and set aside. These reforms are an essential step in ensuring that survivors have access to justice, and can receive fair and appropriate compensation for the harm they suffered.

knowmore supports the broad definition of child abuse contained in 5C(1), which in addition to sexual abuse, includes serious physical abuse and associated psychological abuse. This broad definition will recognise the realities of survivors' experiences of abuse and ensure that the amendments enhance access to justice for all survivors of child abuse that have been adversely impacted by past settlement agreements. In our previous submission to the Queensland Parliament about limitation law reform (noted above) we made the following comments, which are relevant to the current context:

> "Importantly, an approach providing for child abuse to include sexual, serious physical and connected abuse would allow a court to consider all of a survivor's experiences of abuse when determining a claim. It will also hold perpetrators and institutions properly accountable for all of their acts and omissions, and not just for some of them. It is illogical, and will be highly re-traumatising, to expect survivors to separate aspects of their experience into those involving only sexual abuse, which may be pursued in the courts with no limitation issue, and other aspects of serious abuse, for which a limitation period barrier will continue to exist, and for which they must pursue other avenues in an attempt to seek justice. From our experience in working with survivor clients, it is beyond doubt that survivors will regard such an outcome as traumatising and invalidating of their experiences in general."[20]

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[15] *JAS v The Trustees of the Christian Brothers* [2018] WADC 169 at [21], available at: http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WADC/2018/169.html?context=1;query=christian;mask_path=au/cases/wa/WADC

[16] Ibid. See [21] – [27]

[17] This is a private Member's Bill - *Limitation of Actions (Actions for Child Abuse) Amendment Bill 2019*, introduced in the Legislative Council by the Hon Connie Bonaros MLC on 19 June 2019, available at: https://www.legislation.sa.gov.au/LZ/B/CURRENT/LIMITATION%20OF%20ACTIONS%20(ACTIONS%20FOR%20CHILD%20ABUSE)%20AMENDMENT%20BILL%202019_HON%20CONNIE%20BONAROS%20MLC.aspx. In particular, see Part 2 – Amendment of Limitation of Actions Act 1936.

[18] Victorian Attorney-General Jill Hennessy, 'Landmark Reforms to Better Support Abuse Victims', 14 June 2019, available at: https://www.premier.vic.gov.au/landmark-reforms-to-better-support-abuse-victims/.

[19] See *Limitation of Actions Act 1936 (SA)*, section 3A(5), available at: https://www.legislation.sa.gov.au/LZ/C/A/LIMITATION%20OF%20ACTIONS%20ACT%201936.aspx; and Victorian Attorney-General Jill Hennessy, 'Landmark Reforms to Better Support Abuse Victims', at above note 3.

[20] See knowmore, Submission to the QLD Legal Affairs and Community Safety Committee, *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill* 2016 and the *Limitation of Actions and Other*

Section 5C(2) allows a court to set aside a past settlement agreement on the grounds that "it is in the interest of justice to do so." Although knowmore supports the legislative intention of section 5C(2), it is noted that the relevant test for the exercise of judicial discretion differs to the approach taken in all other Australian jurisdictions to date. As detailed above, the test adopted in those jurisdictions is "just and reasonable". It is unclear why the drafting in the Tasmanian Bill differs from the approach adopted in other jurisdictions.

knowmore is of the view that laws which impact the rights and interests of survivors of child sexual abuse should be nationally consistent, so as to ensure that survivors are not disadvantaged, in seeking justice, merely because of where they live. This position is consistent with the views and recommendations of the Royal Commission.

In practical terms, it may be that little turns on the different wording of the proposed test in the Tasmanian Bill. However, we anticipate that the various State and Territory provisions will be the subject of a growing body of case law, as those laws are applied to differing factual scenarios. To prevent any issues arising through the application of different tests or approaches in the various jurisdictions, we favour national consistency in the wording of reforming legislation. Accordingly, we suggest that amendment of section 5C(2) be considered, to bring the provision into line with the approach adopted in other Australian jurisdictions.

Finally, knowmore is supportive of the inclusion of a non-exhaustive list of factors that may be relevant to the exercise of judicial discretion to set aside a past settlement. Many of the factors listed in section 5C(3) are consistent with those outlined by the Supreme Court of Queensland in *TRG v The Board of Trustees of the Brisbane Grammar School* [2019] QSC 157.

Amendments to the *Civil Liability Act 2002*

Survivors face many systematic barriers in bringing civil actions under current civil law systems. knowmore is generally supportive of the proposed amendments to the *Civil Liability Act 2002*, which seek to give effect to the civil litigation recommendations of the Royal Commission, specifically the recommendations in its *Redress and civil litigation report* (2015) relating to the duty of institutions (recommendations 89-93) and identifying a proper defendant (recommendations 94-95).

We have addressed the need for law reform implementing these recommendations in previous submissions. We attach a copy of our most recent submission, dated December 2018, being to the Legal Affairs and Community Safety Committee of the Queensland parliament, relating to its inquiry into the Civil Liability and Other Legislation Amendment Bill 2018 (Qld).[21] While acknowledging the drafting differences between the Queensland Bill and the current draft Bill, much of the commentary in that submission is relevant to the current Tasmanian draft Bill.

In particular, knowmore supports legislative reform which take a broad approach to determining when an organisation is taken to be responsible for a child, and when an individual perpetrator is taken to be associated with the organisation. Similarly, knowmore supports the proposed reforms which seek to clarify the vicarious liability of organisations for the perpetration of child abuse, and extend this liability to employees and individuals who are "akin to employees".[22]

Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016, at p.9, available at: https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/22-LimitationActions

[21] Our submission can also be viewed at: https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/CivilLiabilityandOtherLegislation2018

[22] Draft Bill, sections 49I, 49J.

Conclusion

knowmore reiterates the fundamental importance of ensuring that survivors of child abuse are afforded meaningful opportunities to access justice, and most importantly, to make an informed choice in how to pursue outcomes that are appropriate and important to them.

knowmore welcomes the Tasmanian government's commitment to implementing the civil litigation recommendations made by the Royal Commission in its *Redress and civil litigation report* (2015), specifically reforms which clarify and enhance the duty of care and vicarious liability of institutions.

While knowmore generally supports the proposed reforms to the *Limitation Act 1974* that enable previously settled causes of action relating to child abuse to be reviewed, we suggest that consideration be given to amending section 5C(2) of the proposed reforms to bring the provision in line with the approach adopted in other Australian jurisdictions.

Finally, knowmore supports and endorses the submission made by Community Legal Centres Tasmania.

We have no concerns about this submission being published.

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

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

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Submission to the Legal Affairs and Community Safety Committee's Inquiry into the Civil Liability and Other Legislation Amendment Bill 2018

12 December 2018

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1. Introduction

knowmore legal service supports the enactment of legislative reform in Queensland to implement the civil litigation recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse in its 2015 *Redress and Civil Litigation Report.*

We commend the introduction into Parliament of the two Bills directed towards implementing these recommendations, being the Civil Liability and Other Legislation Amendment Bill 2018 ('the Government Bill') and the Private Member's Bill introduced by Mr Michael Berkman MP, being the Civil Liability (Institutional Child Abuse) Amendment Bill 2018 ('Mr Berkman's Bill').

The progression of these reforms in Queensland is overdue. They address longstanding barriers that have impacted adversely on the ability of survivors of child abuse to access justice and to have their claims decided on their merits by our courts.

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, Queensland joined the National Redress Scheme (the NRS) on 19 November 2018. As explained below, our service is seeing large numbers of survivors of institutional child abuse[1] who are living in Queensland 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 both establishing liability on the part of an institution and in ultimately being able to recover any award of damages. 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,[2] 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 two Bills has already been implemented in Victoria, New South Wales and the Australian Capital Territory; and to an extent in Western Australia. Queensland needs to move urgently on these issues.

2. Our 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

[1] Who have also often experienced child abuse in other settings
[2] See s.43 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)*

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 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 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 brings together lawyers, social workers and counsellors, Aboriginal and Torres Strait Islander engagement advisors and financial counsellors to provide coordinated 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 2,571 clients living in Queensland. 29% of those clients identified as Aboriginal and/or Torres Strait Islander peoples.[3]

In our work relating to the NRS, from 1 July to 30 November 2018 knowmore has received 9,506 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 3,050 clients. 56% of these clients are people who have previously engaged with knowmore during our Royal Commission work, and 44% are new

[3] 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 Queensland

clients. We receive more calls from survivors living in Queensland than from any other Australian state. 27% of the 9,506 calls received in the abovementioned period have come from Queenslanders.

16% of the clients assisted to date have been identified as priority matters; clients are allocated priority where they are of advanced age and/or have identified immediate and serious health concerns such as a diagnosis of a terminal or life-threatening illness.[4]

Many of the clients knowmore has assisted since 2013 have been seeking legal advice about their options, if any, to obtain financial and other redress in relation to sexual and other abuse they suffered as children in institutions. Some of these clients have had direct experience with the civil litigation system; usually as a potential litigant seeking advice about a possible claim. Very few have ever actually commenced civil proceedings; in many cases, this has been primarily due to the barriers presented by the previous laws about limitation periods, and the existing laws relating to the duty of institutions, and the identification of a proper defendant (and who may have means to satisfy any judgment), to sue.

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

The effecting of reform to the current law regarding the duty of institutions and other reforms as recommended by the Royal Commission around the identification of a proper defendant, will significantly assist survivors who are seeking to establish claims against institutions and their officials, and will facilitate the disposition of those claims on their merits.

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

Actions against institutions

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

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

Obviously the most straightforward option is to sue the perpetrator(s) of the abuse, for the tort of battery. However the reality facing survivors is that in many cases their perpetrator has no significant assets from which to satisfy a judgment. The frequent elapsing of considerable time between the occurrence of the abuse and the survivor being able to make an effective report and/or take action to seek justice for their experience,[5] also means that often the perpetrator is deceased by the time civil action is contemplated, leaving no significant estate.

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

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

The Royal Commission identified the difficulties currently faced by child abuse plaintiffs in seeking to establish organisational/institutional liability. These may include:

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

  > *The unpredictability of criminal behaviour is one of the reasons why, as a general rule, and in the absence of some special relationship, the law does not impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk of such harm is foreseeable.* [6]

- For actions founded on vicarious liability, legal responsibility is imposed on the institution for misconduct by another party, even if the institution is not itself at fault. However, under Australian law plaintiffs have found it difficult to establish vicarious liability outside the existence of a clear employer-employee relationship. This presents particular difficulties for survivors wishing to establish institutional/vicarious liability where their perpetrator was not an employee of the relevant institution (such as a volunteer or a minister of a religion).

[5] 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
[6] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, per Gleeson CJ at [29]

Additionally, a plaintiff must establish that the wrongful conduct occurred within the scope or course of the relevant employment (we will address these issues in further detail below).

- Non-delegable duties have traditionally been imposed in certain categories of relationship, requiring one party to take care for another's safety. For actions for breach of a non-delegable duty to prevent harm, Australian courts have shown a reluctance to include intentional criminal conduct within the scope of non-delegable duties. In the 2003 decision of *Lepore* (a case involving the sexual abuse of a student by a teacher), a majority of the High Court held that a school's non-delegable duty of care with respect to a pupil did not extend to the intentional criminal conduct of a teacher, in the nature of sexual abuse.[7] The High Court determined not to revisit this aspect of *Lepore* in the more recent decision in *Prince Alfred College Incorporated v ADC* [2016] HCA 37.[8]

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

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

The recommendations of the Royal Commission

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

knowmore recommends that all of these recommendations should be implemented.

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

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

[7] *New South Wales v Lepore* (2003) 212 CLR 511 at 534-535 [36]-[39], 598-601 [254]-[263], 609-610 [292]-[295], 624 [340]
[8] At [36]-[37]

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

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

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

- Numerous public hearings involving cases where survivors had sought to pursue claims for damages under existing arrangements and laws, including case studies involving institutions in Queensland.
- 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.[9] 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."* [10]
- 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."* [11]

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

[9] See http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/redress
[10] See http://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/redress
[11] Case Study 25: see http://www.childabuseroyalcommission.gov.au/case-study/93e59a38-c3df-4528-b479-f0e83d4ff19a/case-study-25,-march-2015,-sydney

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

Secondly, we expect that some submissions to the Committee will raise concerns about the potential impacts of reform upon the provision of services by institutions to children. That is, the proposed reforms may be seen by institutions as increasing the risks related to providing services, which in turn might lead to a reduction in services in order to limit that risk. We make the following comments about these concerns.

There will of course be impacts for institutions if reforms are implemented. 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 inclusive, which relate to the imposition of non-delegable duties upon institutions, with only certain categories of institutions (as per recommendation 90), being the subject of the strict liability imposed by recommendation 89. The Royal Commission's report addressed in some detail the reasons why this new statutory duty should not apply to other categories of institutions, specifically noting community-based and not-for-profit organisations, which are to be the subject of the reverse onus reform set out in recommendation 91. In considering the impact of these reforms on institutions, it must also be noted that the Royal Commission has recommended that these reforms operate with prospective, rather than retrospective, effect.

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

> *The significant financial consequences that may flow if the standard is not met create powerful incentives for institutions and their insurers to take steps to ensure that abuse is prevented. Changes to the duties of institutions do more than provide an additional or more certain avenue for victims of abuse to seek compensation after institutional child sexual abuse has occurred. Changes to the duties of institutions are critical measures for preventing institutional child sexual abuse occurring in the first place.*[12]

The extensive work of the Royal Commission over the past five years has exposed what can only be described as a national, catastrophic and completely unacceptable failure by

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

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

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.

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. As the Royal Commission noted, *"legal duties are important for prescribing the standard that the community requires of institutions."*[13] If the implementation of enhanced duties and higher standards forces some institutions out of delivering services to children, because they unwilling to now invest the time and resources in meeting the standards the community expects to protect our children, we suggest that is no bad thing.

4. Duties and liability of institutions

General comments

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

The leading High Court decisions are the cases of *Lepore*[14] and *Prince Alfred College*[15]. In considering whether Queensland should adopt the Royal Commission's recommendations for a new non-delegable duty and a reverse onus provision (recommendations 89, 90 and 91), 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.

[13] Royal Commission, *Redress and Civil Litigation Report* (2015), at p. 56
[14] *New South Wales v. Lepore* (2003) 212 CLR 511
[15] *Prince Alfred College Incorporated v. ADC* (2016) HCA 37

While the appeal in *Prince Alfred College* was determined on the limitations/extension of time issue,[16] the plurality (French CJ, Kiefel, Bell, Keane and Nettle JJ) considered that it was appropriate to consider the issue of the institution's vicarious liability because it was both relevant to the extension of time issue, and as the existing state of the law was impacted by the differing judgments in *Lepore*. The plurality reviewed the relevant authorities and suggested that the 'relevant approach' was as follows:[17]

> *In cases of the kind here in question, the fact that a wrongful act is a criminal offence does not preclude the possibility of vicarious liability. As* Lloyd v Grace, Smith & Co *shows, it is possible for a criminal offence to be an act for which the apparent performance of employment provides the occasion. Conversely, the fact that employment affords an opportunity for the commission of a wrongful act is not of itself a sufficient reason to attract vicarious liability. As* Deatons Pty Ltd v Flew *demonstrates, depending on the circumstances, a wrongful act for which employment provides an opportunity may yet be entirely unconnected with the employment. Even so, as Gleeson CJ identified in* New South Wales v Lepore *and the Canadian cases show, the role given to the employee and the nature of the employee's responsibilities may justify the conclusion that the employment not only provided an opportunity but also was the occasion for the commission of the wrongful act. By way of example, it may be sufficient to hold an employer vicariously liable for a criminal act committed by an employee where, in the commission of that act, the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim.*
>
> *Consequently, in cases of this kind, the relevant approach is to consider any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim. In determining whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act, particular features may be taken into account. They include authority, power, trust, control and the ability to achieve intimacy with the victim. The latter feature may be especially important. Where, in such circumstances, the employee takes advantage of his or her position with respect to the victim, that may suffice to determine that the wrongful act should be regarded as committed in the course or scope of employment and as such render the employer vicariously liable.*

Turning to the facts of the particular case, the plurality said:[18]

> *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*

[16] The High Court holding that there was no basis to allow an extension of the limitation period
[17] At [80] – [81]
[18] At [84]

> *wrongful acts could be regarded as having been committed in the course or scope of his employment. The relevant approach requires a careful examination of the role that the PAC actually assigned to housemasters and the position in which Bain was thereby placed vis-à-vis the respondent and the other children.*

In a separate judgment Gageler and Gordon JJ also allowed the appeal, on the basis that an extension of time should not have been granted. Their joint judgment also addressed how the plurality's 'relevant approach' will be applied in future cases:[19]

> *We accept that the approach described in the other reasons as the "relevant approach" will now be applied in Australia. That general approach does not adopt or endorse the generally applicable "tests" for vicarious liability for intentional wrongdoing developed in the United Kingdom or Canada (or the policy underlying those tests), although it does draw heavily on various factors identified in cases involving child sexual abuse in those jurisdictions.*
>
> *The "relevant approach" described in the other reasons is necessarily general. It does not and cannot prescribe an absolute rule. Applications of the approach must and will develop case by case. Some plaintiffs will win. Some plaintiffs will lose. The criteria that will mark those cases in which an employer is liable or where there is no liability must and will develop in accordance with ordinary common law methods. The Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case.*

As such, while the High Court has now provided some guidance about the 'relevant approach' to be followed in future cases, particularly where survivors of institutional child sexual abuse seek to hold an institution vicariously liable for the criminal acts of an employee, it is clear that no absolute rule has been prescribed and that the issue of vicarious liability will be determined on the facts and evidence of each case. As Gageler and Gordon JJ noted:[20]

> *The course of decisions in this Court[21] 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[22] and Canada[23] 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*

[19] At [130] - [131]
[20] At [128]
[21] See *Deatons Pty Ltd v. Flew* (1949) CLR at 381 – 382; [1949] HCA 60
[22] *Dubai Aluminum Co Ltd v. Salaam* [2003] 2 AC at 378 [26] cited in *Mohamud v. Wm Morrison Supermarkets plc* [2016] AC 677 at 692
[23] *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]

> *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."*[24]

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:

- in cases outside a strict employer-employee relationship;[25]
- uncertainty around whether the facts of their case fall within those where a court may hold the institution vicariously liable; and
- in historical cases where it might be expected that defendant institutions will readily be able to identify forensic disadvantage in assembling evidence in their defence such as evidence about the nature of the role assigned to the employee, the nature of the relationship between the employee and the victim, and the features of that relationship, particularly the ability of the employee to achieve intimacy with the victim.

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

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

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

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

> *"The principle in relation to property was recognised centuries ago when, in* Hern v Nichols, *Sir John Holt said* 'somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger'.[26] *In our opinion, it is time the same principle applied to the care of children."*[27]

Comments on the Bills

Imposition of a new duty and reverse onus

It follows from the above discussion that we support the full implementation of the Royal Commission's recommendations (89 & 90) for the prospective imposition of a non-delegable duty of care/strict liability on the categories of institutions identified by the Royal Commission. The practical effect of those recommendations would be to impose a strict form of liability, if child abuse occurs, on the 'sub-set' of institutions named in Recommendation 90, being:

> *a. residential facilities for children, including residential out-of-home care facilities and juvenile detention centres but not including foster care or kinship care*
>
> *b. day and boarding schools and early childhood education and care services, including long day care, family day care, outside school hours services and preschool programs*
>
> *c. disability services for children*
>
> *d. health services for children*
>
> *e. any other facility operated for profit which provides services for children that involve the facility having the care, supervision or control of children for a period of time but not including foster care or kinship care*
>
> *f. any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care.*

While there are drafting differences, both the Government and Mr Berkman's Bills do not implement recommendations 89 and 90. Both follow the approach of imposing a broad

[26] *Hern v Nichols* (undated c.1700) 1 Salk 289
[27] Royal Commission, *Redress and Civil Litigation Report* (2015), at p.491

form of liability on institutions, accompanied by a reverse onus which affords the institution the opportunity to avoid liability if it can prove that it took reasonable steps to prevent the sexual abuse of the relevant child. As such, unlike the law of vicarious liability, the approach taken to imposing liability in the Bills is a fault-based one.

We acknowledge that this aspect of the Commission's recommendations has not been adopted in other jurisdictions to date. While we support full implementation of the Commission's recommendations, including the imposition on a non-delegable duty and strict liability upon those institutions considered to be of 'high risk', if that approach is not taken by Queensland we would support an approach consistent with the other jurisdictions and which addresses the uncertainty that currently exists in the common law.

We note that the approach taken to institutional liability in both Bills is similar to that adopted in Victoria and New South Wales.

Scope of the abuse to be covered

The proposed duty should extend to related physical and psychological abuse, in order to recognise the experiences of survivors; to ensure proper access to justice; and to promote consistency with reform in other jurisdictions.[28] In this respect, we fully support the approach take in Mr Berkman's Bill to defining the scope of 'child abuse'.[29] We also fully support corresponding amendment of the *Limitation of Actions Act 1974* and the *Personal Injuries Proceedings Act 2002,* as we have advocated for in previous submissions.[30]

We recommend amendments be made to the Government Bill to broaden the definition of 'abuse claim',[31] and to effect corresponding amendments to the two Acts mentioned above.

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.[32]

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*

[28] 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

[29] Civil Liability (Institutional Child Abuse) Amendment Bill 2018, clause 49C

[30] See knowmore's submission to the Committee's Inquiry into the Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016 and the Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016, viewed at https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/22-LimitationActions

[31] Civil liability and Other Legislation Amendment Bill 2018, clause 33A

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

sexual abuse."[33] Indeed, the evidence in so many of the Royal Commission's public hearings[34] 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 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.

Institutional associates

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.*[35]

[33] Royal Commission *Redress and Civil Litigation Report* (2015), at p.5
[34] Such as Case Study 7 involving the Parramatta Training School for Girls and the Institution for Girls in Hay
[35] Royal Commission, *Redress and Civil Litigation Report* (2015), at p.77

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

Organisations represent those associated with them as trustworthy individuals.[36] In some cases, parents only entrust their children to a non-government organisation because of this special relationship of trust.[37]

We agree with the Royal Commission's observation that "*child sexual abuse can occur within any institution where there are children and a motivated perpetrator. Some perpetrators will actively try to manipulate institutional conditions to create an opportunity to sexually abuse. Institutions can take certain actions to reduce risk factors and enhance protective factors. These involve considering the role of an institution's policies, climate, culture and norms*."[38]

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

Adopting recommendation 92 acknowledges the institution's responsibility in creating relationships of trust not confined to direct employment, and clarifies a legal duty to take appropriate safeguards to minimise the risk of abuse that arises because of this.[39] We submit that the reform should extend to all persons associated with an institution, as defined above. This is crucial to recognise the institution's responsibility and to create a 'deterrent' effect. Increasing responsibility of institutions in this manner would:

- Clarify the liability of institutions for all parties.[40]
- Provide clearer compensation options for those who have suffered abuse.
- Create cultural change in institutions through a motivation to adopt stronger preventative measures, due to the financial incentive to meet requirements of insurance and the more stringent duty to show reasonable precautions were taken (the reverse onus of proof).
- Shift the financial burden from communities and survivors to the institutions responsible.[41]

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

[36] Parliament of Victoria, Betrayal of Trust, Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations, November 2013, p.544
[37] Parliament of Victoria, Betrayal of Trust, Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations, November 2013, p.544
[38] Royal Commission into Institutional Responses to Child Sexual Abuse, Literature Review, Risk Profiles for Institutional Child Sexual Abuse, October 2016, p.9
[39] Law Council of Australia, submission to the Royal Commission on Issue Paper 5, Civil Litigation, 25 March 2014, p.16
[40] knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p. 25
[41] knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p.18

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.*

For these reasons, we support the drafting of the relevant definitional section in terms that are non-exhaustive. The concept of *"When is a person associated with an institution"* should be defined broadly for the following reasons:

- In our experience the scope of institutions and scenarios where an organisation is responsible for a perpetrator having contact with a child is broad.[42]
- Claims should not be excluded due to a novel or unexpected category of relationship.[43]
- So that institutions cannot avoid liability through delegation of the care, supervision or authority of a child to third parties.[44]
- So that the financial burden of child abuse is not unfairly borne by the victim and the community.[45]

[42] knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p.17
[43] Explanatory Memorandum, Wrongs Amendment (Organisational Child Abuse) Bill 2016 (Vic), p.4
[44] Explanatory Memorandum, Wrongs Amendment (Organisational Child Abuse) Bill 2016 (Vic), p.4
[45] knowmore, Response to Consultation Paper, Issues Paper 5, Redress and Civil Litigation, 17 March 2014, p.18

We also support the mechanism in clause 33C (1)(d) of the Government Bill, of allowing a person to be prescribed by regulation to be a person associated with an institution, to cover for unforeseen situations.

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

Despite a legislated definition, it will be possible for an institution to dispute responsibility in any specific case where it is considered that the facts of the institution's relationship with the alleged abuser and the circumstances of the abuse should not found institutional responsibility. These types of cases are likely to turn on their own facts, and do not therefore in any event lend themselves to ready definitional resolution.[46]

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.

Abuse committed by children

In our submission, liability on the part of institutions for sexual abuse under the proposed duty should extend to acts of abuse committed by children under the care, control or supervision of institutions and, for clarity, the definition of *"When 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.*

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

> *Research we commissioned also indicates that most children with harmful sexual behaviours knew their victims.*[47]

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.'* [48]

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

Reasonable steps

We note that clause 33E(3) of the Government Bill provides some guidance as to the matters a court may consider to be relevant in deciding whether the institution took all reasonable steps to prevent the abuse.

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."* [49]

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."* [50]

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, which has been adopted in clause 33E (3) of the Government Bill. 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

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[47] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report, Volume 2 – Nature and Cause,* at p.106
[48] Royal Commission, Final Report, Volume 11 Historical residential institutions, at p.78
[49] Royal Commission, *Redress and Civil Litigation Report* (2015), at p.56
[50] *Prince Alfred College Incorporated v. ADC* [2016] HCA 37 [128]

be helpful, given that the proposed reform will apply to all institutions (and therefore a wide variety of circumstances).

This approach has also been adopted in Mr Berkman's Bill.[51]

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

- implementing systems to provide early warning of possible offences;
- random and unannounced inspections to deter misconduct;
- prohibiting adults from being alone with a child; and
- encouraging children and adults to notify authorities or parents about any signs of aberrant or unusual behaviour.[52]

There are precedents in other legislation for the approach of providing a non-exhaustive list of factors as guidance, in the context of determining whether reasonable steps were taken by an entity such as might avoid vicarious liability. See for example the *Racial Discrimination Act 1975 (Commonwealth);*[53] the *Disability Discrimination Act 1992 (Commonwealth);* [54]and the *Sex Discrimination Act 1984 (Commonwealth).*[55]

[51] Civil Liability (Institutional Child Abuse) Amendment Bill 2018 (Queensland), clause 49D (4)
[52] *NSW v Lepore* [2003] HCA 4 at [164]
[53] See sections 18A and 18E
[54] See section 123
[55] See section 7B

5. Identifying a proper defendant

General comments

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

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

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

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

We have already seen some instances of institutions (including religious bodies) continuing, notwithstanding public exposure through the Royal Commission's hearings, to exhibit reluctance to deal with and accept claims from survivors.

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

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

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

Proposed reform

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

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

This recommendation should be adopted. The outcome of this reform will be that survivors are able to sue a readily identifiable entity that has the financial capacity to meet a claim arising from institutional child sexual abuse. Given the current state of the law,[56] legislative reform is needed to effect change. The Law Council of Australia in its submission to the Royal Commission's Issues Paper 5 noted that faith based associations often behave as a legal entity, and their associated bodies will often have significant assets in property trusts and enjoy the benefit of succession, whereas individual perpetrators within the organisation typically have few assets of their own so that a civil claim against them would be unlikely to produce meaningful compensation for a survivor of child sexual abuse.[57]

The Government Bill removes the legal barriers that currently prevent the imposition of liability upon trustees, including those under the general law relating to trusts and under the *Corporations Act 2001* (Cth). It will allow, in appropriate cases, for the authority to satisfy a judgment from trust assets.

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

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

The amendments apply retrospectively and prospectively, as recommended by the Royal Commission, to enable survivors to bring actions against unincorporated bodies and to recover damages from associated trusts, irrespective of when their abuse occurred.

We make the following comments on the drafting of the Government Bill.

Appointment of a nominee as the proper defendant

It is appropriate, in our view, to require the nominee's consent to appointment [as per clause 33H (4)]. The Victorian and New South Wales' Acts provide for the appointment of an entity, with consent, as a proper defendant for an organisation.

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

The Government Bill contains appropriate protections for a nominee, which are consistent with those adopted in Victoria and New South Wales.

Meaning of associated trust

We support a broad definition for the term 'associated trust'. The term 'associated trust' should be defined broadly in the legislation, as is the case in the New South Wales and Victorian Acts, to address all situations where an institution may directly or indirectly control or influence the property, distribution, management and affairs of a trust. We are concerned that a narrow approach will provide the opportunity for institutions to seek to avoid making trust assets available to meet damages claims through the adoption of structures that seek to immunize those assets.

We would also favour the inclusion of an anti-avoidance provision of the type set out in the New South Wales legislation, to address the situation where an organisation seeks to restructure an existing associated trust in a way to avoid the trust property being applied to satisfy liability in a child abuse claim.[58]

Legislative reform allowing satisfaction of liability arising in child abuse cases from associated trusts will help drive compliance with expected standards of care and protection on the part of such organisations in their delivery of services to children. It will ensure that the deterrent function of the reforms can be fulfilled and that all institutions are encouraged to be proactive and preventative in their approach to managing the risks around delivering services to children.

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

Continuity provisions

We note the Government Bill has followed the approach taken by Western Australia in its *Civil Liability Legislation Amendment (Child Sexual Abuse Actions)* Act 2018 (WA) to specifically address the continuity of organisations and offices, in order to link historical institutions to current entities. The Explanatory Memorandum to the Western Australian Bill noted:[59]

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

This was a particularly relevant issue for survivors in Western Australia, given the number of missions and institutions run by interdenominational religious organisations. For example, Sister Kate's Children's Cottage Home, which operated from 1934 to 1980, was run by non-denominational management committees, then the Presbyterian Church, and later the Methodist Church while being funded by the Aborigines Department.[60]

The factual situation relating to the transition of institutions from the control of one entity to another can be challenging for survivors and provides uncertainty for our client group, particularly Aboriginal clients, in identifying a proper defendant. knowmore has assisted many Aboriginal clients who were forcibly removed from their families and country and placed in missions, which over time were run by multiple unincorporated care providers and organisations that changed their name over time, such as the Australian Aborigines Mission, an organisation that then changed to the United Aborigines Mission. We understand these missions also operated in Queensland. We suspect continuity of institutions in identifying a proper defendant will become an important issue in Queensland where historically significant numbers of children were removed.

Accordingly, we support the amending legislation including these continuity provisions.

It must be borne in mind too that under the relevant provisions of the legislation establishing the National Redress Scheme, it may not be possible for a survivor to obtain any redress for abuse suffered in a 'defunct' institution that does not have a current representative institution which is participating in the NRS. A 'defunct' institution (which is a government or non-government institution which no longer exists), can only participate in the NRS if it has a representative, who must have agreed to the defunct institution participating and agreed to be its representative.[61] It is therefore possible for a survivor, who experienced abuse in a non-government institution that is now defunct, to not be able to sustain a redress claim. The 'funder of last resort' provisions in the legislation will not assist that survivor, in the sense of making the relevant government the funder of redress, unless the survivor can identify factual circumstances which point to that government having equal responsibility with the defunct institution for that abuse.[62]

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[59] At p.8
[60] See the detail provided on the Find and Connect website - https://www.findandconnect.gov.au/guide/wa/WE00684
[61] See Part 5-1 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)*
[62] See Part 6-2 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Cth)*

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

We thank the Committee for the opportunity to make this submission. We have no concerns about publication of our submission.

If you have any queries, please contact me.

Yours faithfully

WARREN STRANGE
Executive Officer

ENCL.

knowmore

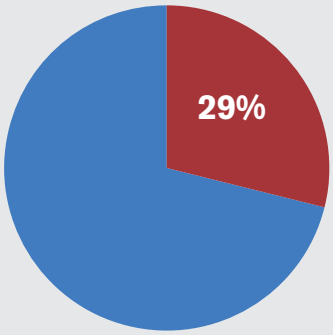
Data Snapshot – Queensland

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 Queensland

Our clients

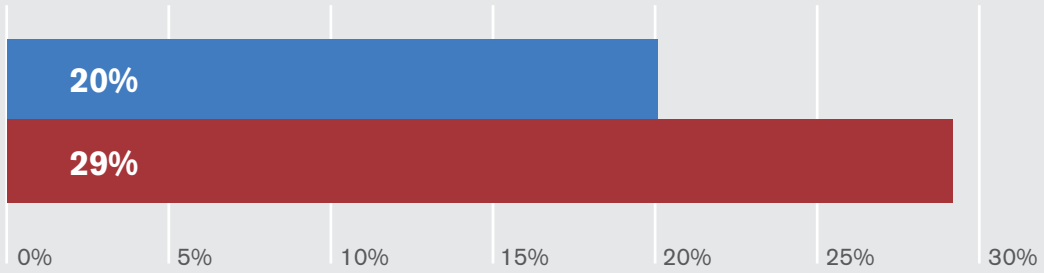


knowmore began providing services to the public on 8 July 2013 – as at 31 March 2018, we've helped:

2571
knowmore Queensland clients

8954
Total number of **knowmore** clients

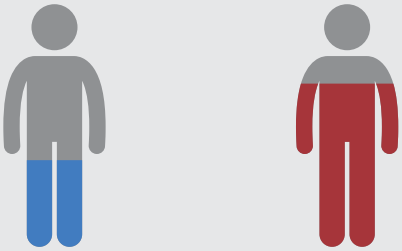
State representation



Percentage of national population living in QLD

Against

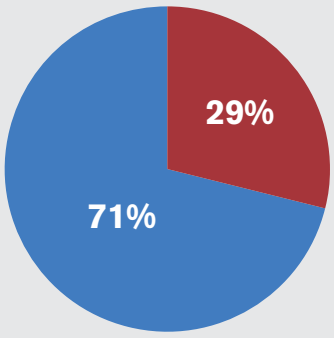
Percentage of **knowmore** clients living in QLD



30%
Identified as female

70%
Identified as male

Aboriginal and Torres Strait Islander clients



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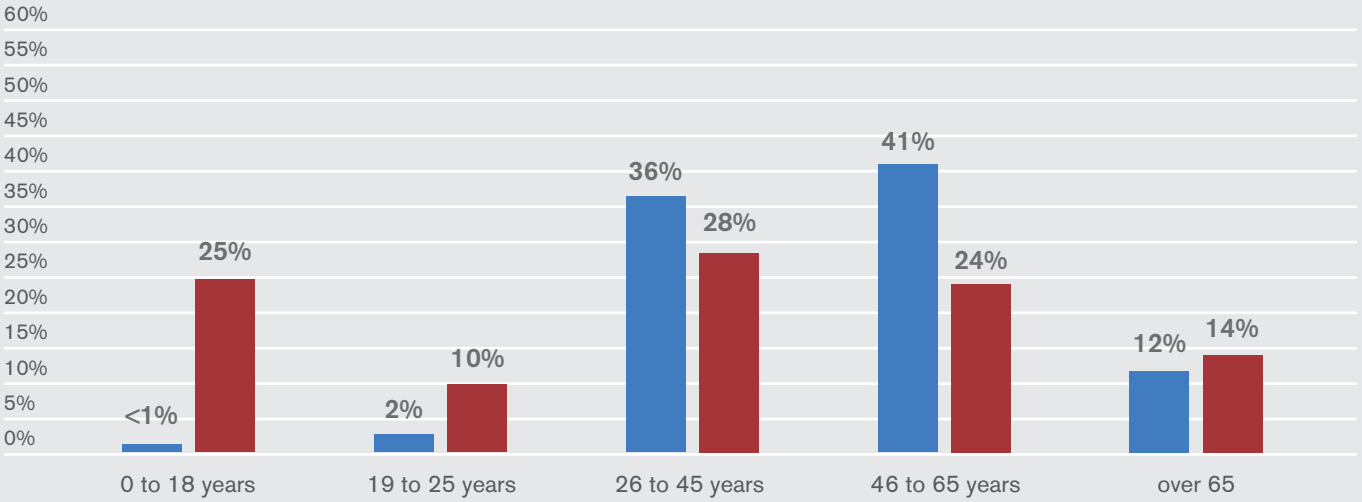
knowmore

Data Snapshot – Queensland

as at 31 March 2018

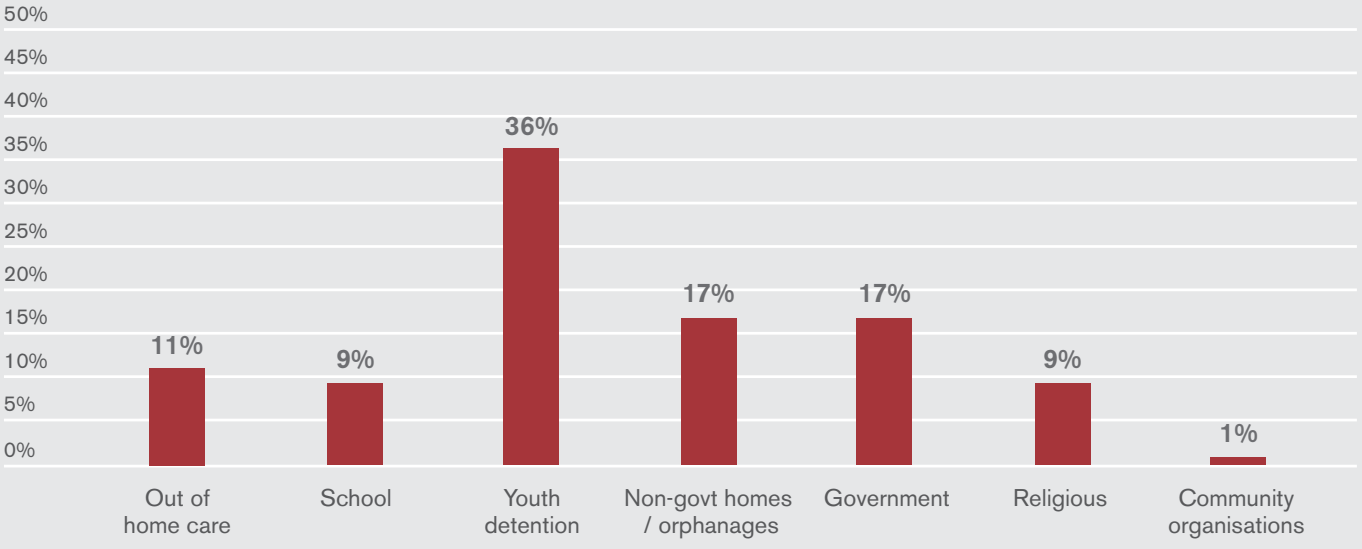
Our clients – Age groups



Percentage of Queensland based knowmore clients per age group

Against percentage of Queensland population per age group

Institutions in Queensland 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 – 30 November 2018

Total calls and clients

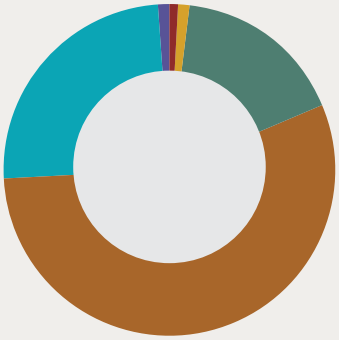
9506
Total 1800 calls nationally (637 in first two days)

3050
clients (intake completed)

44%
new clients

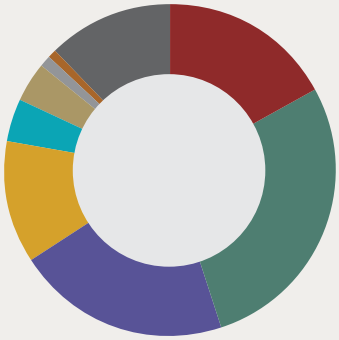
Age

As at 16 October 2018



0-18	<1%
19-25	1%
26-45	16%
46-65	59%
66-85	24%
86+	<1%

Calls came from



NSW	16%
QLD	27%
VIC	20%
WA	12%
SA	4%
TAS	4%
ACT	1%
NT	1%
International/Other	15%

Our clients

16% priority clients

22% identify as Aboriginal and/or Torres Strait Islander

31% identified as female

69% identified as male

knowmore free legal help for survivors

1800 605 762 | knowmore.org.au

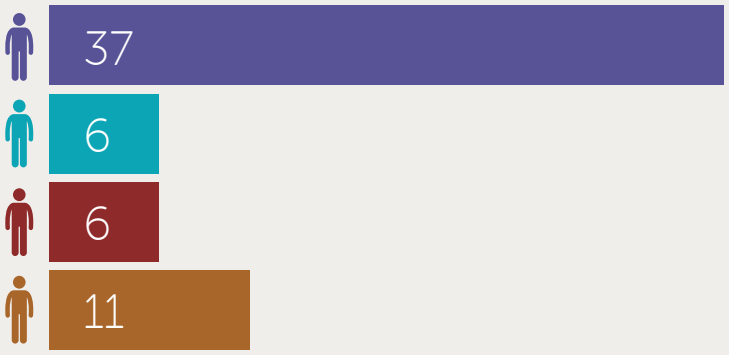
* Notes re Priority Clients

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 – 30 November 2018

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.