

Proposal Paper: Renaming sexual offences

Submission to the Tasmanian
Department of Justice

12 February 2020

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

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

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

knowmore has offices in Sydney, Melbourne, Brisbane and Perth and provides services in the other states and territories, including through regular outreach. knowmore is currently visiting Redress Support Services in Tasmania every six to eight weeks to assist clients.

Our clients

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

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

knowmore's submission

This section outlines knowmore's overall position on the Tasmanian Government's Proposal Paper – 'Renaming sexual offences: Removing outdated language in Chapter XIV of the *Criminal Code Act 1924*'. It also outlines knowmore's specific comments on the proposed renaming of Chapter XIV and relevant offences involving child sexual abuse.

knowmore's overall position on the Proposal Paper

knowmore welcomes the Tasmanian Government's review of the language in Chapter XIV of the *Criminal Code Act 1924* (the *Criminal Code*), which governs offences involving child sexual abuse and other forms of sexual violence. As a specialist legal service providing support to victims and survivors of child sexual abuse, we recognise the importance of the appropriate use of language to describe child sexual abuse and the people impacted by it.

The way in which child sexual abuse is represented and framed through language can have significant implications for how society understands, approaches and responds to child sexual abuse. The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) also emphasised that the use of language can have significant implications for victims and survivors, stating:

[t]he inappropriate use of words to describe child sexual abuse and the people who experience the abuse or perpetrate it can have silencing, stigmatising and other harmful effects. Conversely, the appropriate use of words can empower and educate.¹

knowmore commends the efforts of victims and survivors of child sexual abuse in Tasmania and their supporters to reframe the language in Chapter XIV of the *Criminal Code* to better reflect the experiences of survivors and contemporary understanding of the nature of sexual violence.

The Royal Commission found that many myths and misconceptions about child sexual abuse continue to affect the criminal justice system's response to child sexual abuse prosecutions, including the attitudes of jury members.² Language is a powerful tool to challenge these myths and misconceptions. In knowmore's view, the language used to describe child sexual abuse in the *Criminal Code* should properly reflect the serious and violent nature of the abuse, while also respecting the dignity of victims and survivors and recognising the impact of the abuse on their lives.

Comments on the proposed renaming of Chapter XIV – Crimes Against Morality

knowmore supports the proposal to rename Chapter XIV – Crimes Against Morality of the *Criminal Code* to better reflect changing community understanding of the nature and impact of sexual violence. In our view, the name of Chapter XIV should clearly and accurately reflect the offences that it contains, and should not include language that is in any way ambiguous, emotive, or otherwise laden with assumptions and stigma relating to sexual violence.

Regarding the proposed alternative names, knowmore strongly supports the adoption of consistent terminology and approaches to child sexual abuse offences within Australian jurisdictions, and notes that 'sexual offences' is the more commonly used term within the criminal legislation of different states and

1 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 2, Nature and Cause*, 2017, p. 24.

2 Royal Commission, *Criminal Justice Report: Executive Summary and Parts I and II*, 2017, p. 11.

territories. knowmore also notes that the Royal Commission adopted the term ‘offences’ in its Criminal Justice report. For these reasons, knowmore recommends that the Tasmanian Government rename Chapter XIV to ‘Sexual Offences’.

Proposal to relocate section 139 – Misconduct in respect of human remains

knowmore notes the proposal to relocate section 139 from Chapter XIV of the *Criminal Code*. Given that the relevant offence includes conduct other than sexual offending, it would be unfitting for it to remain in Chapter XIV following the renaming of the Chapter.

Comments on the proposed renaming of sexual offences involving child sexual abuse

In this section we outline our comments on the specific proposals to rename offences in Chapter XIV of the *Criminal Code* involving child sexual abuse. As we do not practice in criminal law, our comments focus on how child sexual abuse can be appropriately framed through legislation, rather than on the potential practical impacts of the proposals on the effective prosecution of the relevant offences.

Section 124 – Sexual intercourse with young person

knowmore supports the proposal to rename section 124 of the *Criminal Code* to accurately reflect the serious and coercive nature of the offence, and to challenge community misconceptions about the nature of sexual abuse against children.

knowmore understands that the purpose of section 124 is to criminalise sexual intercourse with a child who is under the age of 17 years, except in exceptional circumstances outlined in subsection (3). According to the definition of sexual intercourse in section 2B of the *Criminal Code*, sexual intercourse is limited to acts involving the penetration of a person.

While knowmore generally supports the use of the terms ‘child sexual abuse’ and ‘sexual abuse’, we note that these terms encompass unlawful sexual acts other than penetration, including other forms of contact or exposure abuse. For example, the Royal Commission defined ‘child sexual abuse’ to include:

[a]ny act which exposes a child to, or involves a child in, sexual processes beyond his or her understanding or contrary to accepted community standards. Sexually abusive behaviours can include the fondling of genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or any other object, fondling of breasts, voyeurism, exhibitionism, and exposing the child to or involving the child in pornography. It includes child grooming, which refers to actions deliberately undertaken with the aim of befriending and establishing an emotional connection with a child, to lower the child’s inhibitions in preparation for sexual activity with the child.³

knowmore recommends that the Tasmanian Government have regard to the specific elements of the offence, and the implications that the proposed renaming may have for other offences in Chapter XIV that can also rightly be described as ‘child sexual abuse’. In knowmore’s view, the name of section 124 should accurately and clearly reflect the nature of the offence, while also respecting the dignity of survivors.

While there is a lack of consistency in the terminology used to describe comparable offences within Australian jurisdictions, we note that ‘sexual penetration’ is also used in Victoria and Western Australia. We therefore recommend that consideration be given to the name ‘sexual penetration of a child’.⁴

3 Royal Commission, above note 1, p. 30.

4 In knowmore’s view, the term ‘child’ is preferable to ‘child or young person’, given that the offence criminalises penetration of a person under the age of 17 years, and under both international and Tasmanian law a child includes all people under the age of 18 years. See Article 1 of the *Convention on the Rights of the Child 1989* and section 3 of the *Age of Majority Act 1973* (Tas).

Section 125 – Person permitting unlawful sexual intercourse with young person on premises

We refer the Tasmanian Government to our comments above on section 124. Given the close correlation between sections 124 and 125, we are of the view that the approach adopted for section 125 should be consistent with the approach adopted for section 124.

Section 125A – Maintaining a sexual relationship with a young person

knowmore supports the proposal to rename section 125A of the *Criminal Code* to ‘persistent child sexual abuse’, following significant criticism from victims and survivors of child sexual abuse in Tasmania and their supporters. knowmore echoes the concerns of these survivors and their supporters that the current name of the offence normalises the sexual abuse of children and wrongly suggests that the child was a “willing participant in an equal relationship”.⁵ knowmore acknowledges that the current name has caused distress and psychological harm to some survivors in Tasmania who have sought a criminal justice response.⁶

The Royal Commission also expressed concern with the current name of the offence, noting that it was “uncomfortable with the language of ‘relationship’”, but ultimately concluded that it was “content to adopt it in the interests of achieving the most effective form of [the] offence”.⁷ The Royal Commission’s view was that the current name may help to emphasise the actus reus of the offence. knowmore highlights this perspective for the Tasmanian Government’s further consideration.

In knowmore’s view, the current name of the offence obscures the serious, coercive and abusive nature of the offending and perpetuates misconceptions and stigma associated with child sexual abuse, including that survivors contribute to their abuse. Provided that the proposed renaming does not compromise the effective prosecution of the offence, knowmore supports the adoption of the name ‘persistent child sexual abuse’, which more appropriately reflects the nature of the offence and the experiences of survivors.

Further concerns regarding section 125A

While we note that the elements of the offence are outside the scope of the current review, we are concerned that the Tasmanian Government has not fully implemented the Royal Commission’s recommendations relating to persistent child sexual abuse offences.⁸ Specifically, we are concerned that section 125A continues to require complainants to establish that an unlawful sexual act took place on three or more occasions, despite the Royal Commission’s recommendation that the legislation should be amended so that the offence is “...established by more than one unlawful sexual act.”⁹

In the initial response to the Royal Commission’s recommendations, the Tasmanian Government noted the relevant recommendation (Recommendation 21b) and stated that it would “...monitor the operation of the crime and the adoption of this part of the recommendation in other Australian jurisdictions.”¹⁰ Although legislative amendments have since been introduced to section 125A, there has been no progress to implement Recommendation 21b. We also note that in the *Annual Progress Report and Action Plan 2020*, the Tasmanian Government reported that the implementation of Recommendation 21 is now complete, with the recommendation having only been “[a]ccepted in part”.¹¹ We have been unable to locate any

5 E Bevin, “Overhaul of sex abuse laws needed to remedy community confusion, advocates say”, *ABC News*, 15 August 2019, <<https://www.abc.net.au/news/2019-08-15/call-for-sexual-assault-laws-overhaul-in-tasmania/11414982>>.

6 We refer to the comments of Survivor and Beyond Abuse founder Mr Steve Fisher in E Jarvie, “Rewording sexual abuse offence ‘not as straightforward as it looks’: Tasmanian Law Reform Institute”, *The Examiner*, 19 August 2019, <<https://www.examiner.com.au/story/6335139/caution-urged-when-renaming-child-sex-offence/>>

7 Royal Commission, *Criminal Justice Report: Parts III–VI*, 2017, p. 71.

8 Ibid, Recommendations 21–24.

9 Ibid, Recommendation 21b.

10 Tasmanian Government, *Tasmanian Response: Royal Commission into Institutional Responses to Child Sexual Abuse*, June 2018, p. 104.

11 Tasmanian Government, *Annual Progress Report and Action Plan 2020: Appendix A – Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse*, December 2019, pp. 107–108.

further information regarding the outcome of the Tasmanian Government's monitoring efforts, or reasons for not accepting this recommendation.

knowmore has monitored the implementation of Recommendation 21b in other Australian jurisdictions, and notes that the majority of states and territories have successfully implemented this recommendation.¹² Tasmania is one of only three jurisdictions, along with Western Australia and the Northern Territory, that continues to require complainants to establish that an unlawful sexual act took place on three or more occasions.

knowmore reiterates the Royal Commission's findings that in cases involving repeated sexual abuse:

...it is often difficult for victims or survivors to give adequate details of the offending against them because:

- *young children may not have a good understanding of dates, times and locations or an ability to describe how different events relate to each other across time*
- *delay in reporting may cause memories to fade or events to be (wrongly) attributed to a particular time or location when they in fact occurred earlier or later, or at another location*
- *the abuse may have occurred repeatedly and in similar circumstances, so the victim or survivor is unable to describe specific or distinct occasions of abuse.*¹³

In knowmore's view, the full implementation of Recommendation 21 is essential to ensuring that cases of persistent child sexual abuse are effectively prosecuted and that the law appropriately reflects current understanding of the impact of trauma on a survivor's memory. knowmore therefore urges the Tasmanian Government to reconsider its position on this important recommendation.

Section 125B – Indecent act with young person

knowmore generally supports the renaming of section 125B of the *Criminal Code* consistent with our overall position outlined above and the approach of other states and territories. However, knowmore emphasises the importance of ensuring that the names of offences accurately describe the specific offence and can be clearly distinguished from other offences in Chapter XIV. Further, knowmore reiterates the importance of ensuring that the proposed name does not adversely impact the effective prosecution of the offence or other offences in Chapter XIV.

Section 125C – Procuring unlawful sexual intercourse with person under 17 years

knowmore generally supports the renaming of section 125C to ensure internal consistency in the *Criminal Code*. Given the close correlation between section 125C and sections 124 and 125D, knowmore refers the Tasmanian Government to our comments on those provisions.

Section 125D – Communications with intent to procure person under 17 years

knowmore understands that the purpose of section 125D is to criminalise any communications or conduct¹⁴ with a child or any other persons undertaken with the intention of procuring a child to be involved in an 'unlawful sexual act'. An 'unlawful sexual act' is defined to cover a number of offences involving child sexual abuse in Chapter XIV, as well as the offence of rape in Chapter XX.

12 See s. 56(2), *Crimes Act 1900* (ACT); s. 47A(2), *Crimes Act 1958* (Vic); s. 66EA(2), *Crimes Act 1900* (NSW); s. 229B(2), *Criminal Code Act 1899* (Qld); s. 50(2), *Criminal Law Consolidation Act 1935* (SA).

13 Royal Commission, *Criminal Justice Report: Parts III-VI*, p. 10. The Royal Commission reported that survivors who participated in private sessions took, on average, 23.9 years to disclose the abuse to someone (*Final Report: Volume 4, Identifying and Disclosing Child Sexual Abuse*, 2017, p. 9).

14 We note that in a submission to the Royal Commission, the Tasmanian Director of Public Prosecutions stated that 'communication' is defined broadly and would also include conduct. See Royal Commission, above note 7, p. 86.

As noted in the Proposal Paper, the Royal Commission referred to offences of this nature as broad grooming offences.¹⁵ knowmore supports the renaming of section 125D to incorporate the term 'grooming', consistent with the approach of the Royal Commission and that of other states and territories, including the Australian Capital Territory, New South Wales and Queensland. In knowmore's view, the proposed name 'Grooming for child sexual abuse' more accurately describes the broad nature of the communications and conduct criminalised by section 125D.

¹⁵ See Royal Commission, above note 2, pp. 41–43. We note that the Royal Commission used the term 'grooming' to generally describe any conduct undertaken to facilitate and/or prepare a child for child sexual abuse.

Conclusion

knowmore welcomes the Tasmanian Government's review into the language used in Chapter XIV of the *Criminal Code*, in response to concerns raised by victims and survivors of child sexual abuse and their supporters. knowmore recommends that the language in Chapter XIV of the *Criminal Code* be amended to ensure that it appropriately reflects the serious and violent nature of child sexual abuse and respects the dignity and experiences of victims and survivors. Where feasible, knowmore also supports the adoption of consistent terminology and approaches to child sexual abuse offences within Australian jurisdictions.

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knowmore is a program of Community Legal Centres Australia
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Community Legal Centres Australia 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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free legal help for survivors