knowmore
free legal help for survivors

Sexual Offences (Evidence and Procedure) Amendment Bill 2019

Submission to the Legislation Scrutiny Committee

29 January 2020

Contents

About knowmore 2

1. Our service 2
2. Our clients 2

knowmore's submission 3

3. knowmore's overall position on the Bill 3
4. Recommended changes to the Bill 4
5. Practical supports for victims and survivors 6

Conclusion 8

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 (formerly the National Association of Community Legal Centres), 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 (the NRS).

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

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

Our outreach work has begun to gather momentum this financial year, with the initial priority on those jurisdictions where we do not have an office. knowmore is currently visiting Redress Support Services in the Northern Territory 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. Of these, 126 clients (1%) lived in the Northern Territory. The majority of those clients were survivors of institutional child sexual abuse, and 61 per cent 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 November 2019, knowmore has received 25,330 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 5,508 clients. This includes 67 clients (1%) who reside in the Northern Territory.

knowmore's submission

This section outlines knowmore's overall position on the Sexual Offences (Evidence and Procedure) Amendment Bill 2019 (the Bill). It also details recommended changes to two aspects of the Bill, and discusses knowmore's views on non-legislative supports that are essential to ensuring the new provisions operative effectively in practice.

knowmore's overall position on the Bill

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

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

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

In light of the above, we support new section 6 of the *Sexual Offences (Evidence and Procedure) Act 1983* (the Act), which will continue to prohibit the publication of a complainant's identity generally, but will give adult survivors the right to provide their written consent to being identified in certain circumstances. This

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

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

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

will bring the Northern Territory into line with all of the other states and territories.[4] We think it is particularly important that publication of a complainant's identity only occurs where that complainant has the capacity to give informed consent, and does not identify any other complainant who has not consented to having their identity disclosed. The provisions in the Bill, as per new section 6(2)(b), address both of these matters appropriately. However, we do suggest with regards to the definition of capacity in new section 6(4) that further consideration be given to the Queensland approach. In Queensland, capacity is defined to mean that the person is capable of understanding the nature and effect of decisions, and can freely and voluntarily make decisions and communicate these in some way, as per the *Guardianship and Administration Act 2000* (Qld).[5] A similar approach in the Northern Territory, such as one based on the meaning of decision-making capacity in the *Guardianship of Adults Act 2016* (NT), may provide greater assistance to the court in determining whether a person has capacity to consent, particularly in circumstances of mental impairment.

We also support new section 9(2) of the Act, which will require the court to consider a complainant's wishes when making an order relating to the disclosure of their identifying information. Consistent with the aim of new section 6(2), we would expect a court to authorise disclosure in any situation in which an adult survivor gives informed consent to being identified (and provided that the disclosure will not identify any other complainant who has not consented). It is nevertheless essential for a survivor's consent to be truly informed, and we consider that a variety of non-legislative supports must be in place to ensure the new provisions operate effectively in practice. This is discussed further on pages 6 and 7.

Recommended changes to the Bill

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

Allowing complainants to consent to publication at any time

We note section 6(2), paragraph (a), which provides that a complainant's consent is only a defence to an offence against section 6(1) if there is no proceeding in relation to the alleged sexual offence pending in a court when the complainant's identity is disclosed. In effect, this means that a complainant only has the right to be identified and tell their story once all proceedings, including any appeal or re-trial, are finalised. We consider this unduly limiting, and submit that paragraph (a) of section 6(2) should be omitted.

With the exception of Victoria,[6] no jurisdiction currently imposes restrictions on complainants in terms of when they can consent to having their identity disclosed.[7] Consistent with our comments above, we support empowering survivors who want to share their story as much as possible given the healing effects this can have. While we acknowledge the importance of ensuring a fair trial, we consider that any risk to this posed by the disclosure of a complainant's identity is adequately addressed by new section 7(1), which makes it an offence to disclose a defendant's identity prior to them being committed for trial or sentence (consistent with current sections 7 and 11B). Provided that the publication of a complainant's identity does

4 See s. 74, *Evidence (Miscellaneous Provisions) Act 1991* (ACT); s. 578A, *Crimes Act 1900* (NSW); s. 10, *Criminal Law (Sexual Offences) Act 1978* (Qld); s. 71A(4), *Evidence Act 1929* (SA); s. 4, *Judicial Proceedings Reports Act 1958* (Vic); s. 36C, *Evidence Act 1906* (WA). Like the Northern Territory, Tasmania is currently progressing its reforms — see proposed s. 194K, *Evidence Act 2001* (Tas), as per cl. 4 of the 10 December 2019 consultation draft version of the Evidence Amendment Bill 2020 (Tas) available at <www.justice.tas.gov.au/__data/assets/pdf_file/0005/554774/EABill-v4consultation.pdf>.

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

6 Section 4(1B), *Judicial Proceedings Reports Act 1958* (Vic). We note that the proposed provisions in Tasmania contain a similar restriction [proposed s. 194K(3)(v), *Evidence Act 2001* (Tas), as per cl. 4 of the 10 December 2019 consultation draft version of the Evidence Amendment Bill 2020 (Tas)].

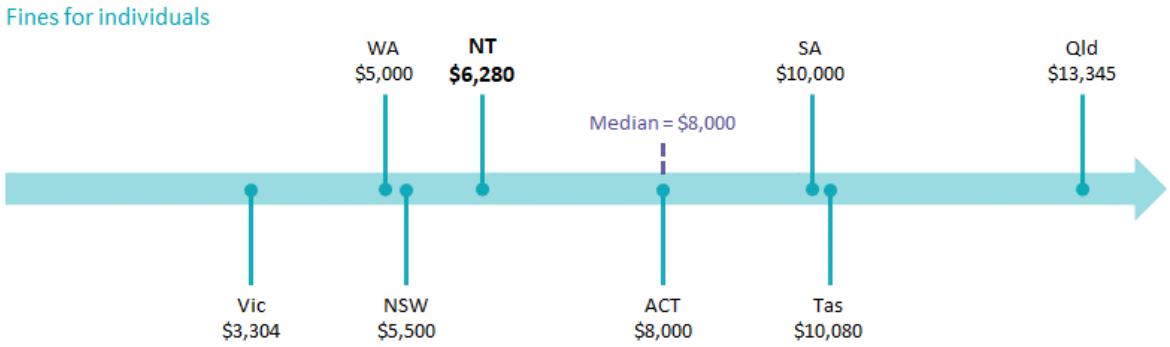
7 Refer to footnote 4.

not disclose the defendant's identity in breach of section 7(1), we see no need to prevent a complainant from telling their story until after all proceedings have been finalised. Section 6(2) of the Bill should therefore be amended to omit paragraph (a), consistent with the comparable provisions elsewhere in Australia.

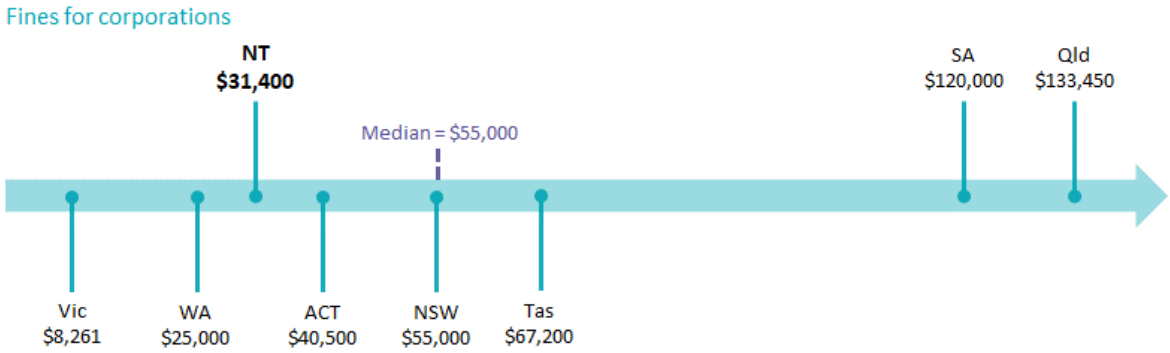
Increasing the maximum penalty

In preparing this submission, we have noted that the maximum penalty for an offence under new section 6(1) is relatively low when compared with the penalties for comparable offences in other states and territories.[8] Specifically:

- The maximum fine for individuals in the Northern Territory — 40 penalty units, or $6,280[9] — is lower than those in the ACT, South Australia, Tasmania and Queensland, which range from $8,000 to $13,345 (see diagram below). The median fine for all jurisdictions outside the Northern Territory is $8,000.



- The maximum fine for body corporates in the Northern Territory — 200 penalty units,[10] or $31,400 — is lower than those in the ACT, New South Wales, Tasmania, South Australia and Queensland, which range from $40,500 to $133,450 (see diagram below). The median fine for all jurisdictions outside the Northern Territory is $55,000.[11]



8 See s. 74(1), *Evidence (Miscellaneous Provisions) Act 1991* (ACT) and s. 133(2), *Legislation Act 2001* (ACT); s. 578A(2), *Crimes Act 1900* (NSW) and s. 17, *Crimes (Sentencing Procedure) Act 1999* (NSW); s. 10(1), *Criminal Law (Sexual Offences) Act 1978* (Qld) and reg. 3, Penalties and Sentences Regulation 2015 (Qld); s. 71A(4), *Evidence Act 1929* (SA); proposed s. 194K(1), *Evidence Act 2001* (Tas), as per cl. 4 of the 10 December 2019 consultation draft version of the Evidence Amendment Bill 2020 (Tas), and s. 4A, *Penalty Units and Other Penalties Act 1987* (Tas); s. 4(2), *Judicial Proceedings Reports Act 1958* (Vic) and s. 5(3), *Monetary Units Act 2004* (Vic); s. 36C(2), *Evidence Act 1906* (WA).

9 As per reg. 2 of the Penalty Units Regulations 2010 (NT), the current value of a penalty unit is $157.

10 As per section 29 of the *Sentencing Act 1995* (NT), where the maximum fine for a body corporate is not expressly stated, the court may impose a maximum fine equal to five times the fine specified for an individual.

11 Refer to footnote 8.

- The maximum term of imprisonment in the Northern Territory — six months — is shorter than those in Tasmania (12 months) and Queensland (2 years). The median term of imprisonment for all jurisdictions outside the Northern Territory is six months.[12]

We understand that the maximum penalty included in new section 6(1) reflects the existing provisions and that the Bill is not intended to make any changes in this regard. However, given the higher penalties in other jurisdictions, especially for offences committed by corporations, we suggest that it would be timely for the Legislation Scrutiny Committee (the Committee) and the Legislative Assembly to consider the appropriateness of the penalties in the Northern Territory.

In knowmore's view, it is essential that the penalties adequately reflect the gravity of publishing a complainant's personal information without their consent. Such conduct not only has serious adverse impacts on the individual complainant, but it can also deter other victims and survivors of sexual abuse from reporting their abuse and/or engaging in criminal proceedings. This is clearly not in the interests of justice. The legislation must also recognise the potential for "deliberate, flagrant or repetitive breaches" and provide for significant punishments in such circumstances.[13] We consider that the maximum penalties currently proposed in Tasmania — 12 months' imprisonment and/or a $10,080 fine for individuals, and a $67,200 fine for corporations — are appropriate in this regard, and we support similar penalties applying in the Northern Territory.

Practical supports for victims and survivors

We acknowledge that the Committee's current inquiry is limited to consideration of the Bill and not broader issues that are matters for the Northern Territory Government. Nevertheless, the new provisions will not operate most effectively without appropriate non-legislative supports for victims and survivors of sexual abuse. We therefore raise the following issues for further consideration by the Northern Territory Government.

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

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

Access to this kind of support is also important in the context of the new requirement for the court to consider the complainant's wishes when making an order in relation to a statement or representation likely to lead to the complainant's identification. Without it, there is a risk of complainants communicating views to the court that do not reflect an informed understanding of the consequences of being identified. We

12 Refer to footnote 8.

13 Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes: Final Report No. 19*, TLRI, Hobart, 2013, p. 46.

therefore recommend that mental health, legal and cultural safety checks be included in this process where appropriate.

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

Conclusion

knowmore strongly supports the Bill, which will bring the Northern Territory into line with the other states and territories. Most importantly, the new provisions will give victims and survivors of sexual abuse, including child sexual abuse, the opportunity to tell their stories and to be heard. This is important not only for healing individuals, but also for raising community awareness of sexual abuse, and helping to prevent it.

To further promote the rights of victims and survivors, we recommend that the Bill be amended so that there are no time restrictions on when an adult complainant can consent to having their identity published. We also consider that now is an opportune time for the relevant penalties in the Northern Territory to be reviewed, given the substantially more severe penalties that apply in some other Australian jurisdictions.

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

Brisbane
Level 20, 144 Edward St
Brisbane QLD 4000
t 07 3218 4500

Melbourne
Level 15, 607 Bourke St
Melbourne VIC 3000
t 03 8663 7400

Perth
Level 5, 5 Mill St
Perth WA 6000
t 08 6117 7244

Sydney
Level 7, 26 College St
Sydney NSW 2000
t 02 8267 7400

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

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.

knowmore
free legal help for survivors