

Open Justice: Court
and Tribunal
Information: Access,
Disclosure and
Publication

Submission to the NSW
Law Reform Commission

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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). From 1 July 2018, knowmore has been funded 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 is funded by the Commonwealth Government, represented by the Attorney-General's Department and the Department of Social Services, and receives additional funding from the Financial Counselling Foundation.

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 31 January 2021, knowmore has received 41,741 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 8,034 clients. Twenty-nine per cent 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 New South Wales

knowmore has a significant client base in New South Wales — 19 per cent of our current clients reside in the state. We therefore have a strong interest in New South Wales law reform relevant to victims and survivors of child sexual abuse.

knowmore's submission

knowmore's preliminary submission to the NSW Law Reform Commission dated June 2019 included comments relevant to a number of the issues raised in the December 2020 Consultation Paper. We reiterate some of the key points from that submission here and provide further comments in response to key questions in the Consultation Paper.

Statutory prohibitions on publishing the identities of sexual offence complainants

Question 3.1:

As a matter of principle, should there ever be automatic statutory prohibitions on publishing or disclosing certain information? Why or why not?

Question 9.1:

- (1) Is the prohibition on publishing the identities of complainants in sexual offence proceedings and the exceptions to the prohibition appropriate? Why or why not?
- (2) What changes, if any, should be made?

As indicated in our preliminary submission to the review,¹ we strongly support section 578A of the *Crimes Act 1900* (NSW), which automatically prohibits publication of the identities of complainants in certain sexual offence proceedings. This appropriately protects complainants' privacy without burdening them with the need to apply for a suppression or non-publication order. We also endorse other arguments in favour of the automatic prohibition noted in the Consultation Paper, including that complainants in sexual offence proceedings "highly value it".²

Publication with the complainant's consent

We noted in our preliminary submission that "there are circumstances where a survivor should be able to provide informed consent to allow publication of their identifying details".³ We therefore strongly support the exception in paragraph (b) of section 578A(4), which permits publication with the consent of the complainant (if they are 14 years of age or older at the time of publication).

1 knowmore, *Preliminary Submission PCI35*, June 2019, p. 2, <www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Court%20information/PCI35.pdf>.

2 Paragraph 9.17.

3 knowmore, *Preliminary Submission PCI35*, p. 3.

In noting our support for this exception, we reiterate the points we made in our previous submission about the need for mechanisms to be in place to ensure that a complainant's consent to publication is truly informed from a mental health, cultural safety and legal perspective.⁴ We consider this particularly important in New South Wales given that the option for a survivor to consent to the publication of their identity is available to survivors as young as 14 years.

Publication after the complainant's death

Consistent with the comments in our preliminary submission regarding non-publication orders continuing to apply after a complainant's death,⁵ we submit that the current exception in paragraph (f) of section 578A(4), which permits the publication of a complainant's identity after their death, should be removed. This would be consistent with the current provisions in Victoria,^{6,7} and with previous findings and recommendations from the Tasmania Law Reform Institute (TLRI).⁸

We support anonymity persisting beyond the death of the complainant, with interested parties able to apply to the court for an order authorising publication of the complainant's identity. The Victorian legislation provides a suitable model for this, including in requiring the court to take into account the views of deceased complainants (where known) and any relevant family members.⁹ In our view, this approach appropriately recognises that "there may be cogent reasons why a family would wish to preserve the victim's anonymity",¹⁰ including the effects of identification on the victim's surviving relatives and community. This is particularly important in cases involving Aboriginal and/or Torres Strait Islander survivors, as we noted in our preliminary submission.¹¹

4 knowmore, *Preliminary Submission PCI35*, pp. 4–5.

5 knowmore, *Preliminary Submission PCI35*, pp. 6–7.

6 Section 4, *Judicial Proceedings Reports Act 1958* (Vic).

7 We note that the Victorian Law Reform Commission (VLRC) has recently recommended that this provision be amended to clarify that the prohibition on publication ceases to apply where a victim has died (*Contempt of Court*, Recommendation 100, p. 190). In our view, the VLRC's conclusion that "there is no compelling reason why a victim should not be able to be identified after death" (paragraph 12.77) fails to recognise the significant impact child and other sexual offences can have on the victim's relatives and community and the consequent ongoing privacy interests of the deceased and others. We consider that it particularly fails to recognise the importance of privacy for Aboriginal and/or Torres Strait Islander people and cultural considerations that do not simply end with a person's death.

8 Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes: Final Report No. 19*, TLRI, Hobart, 2013, <www.utas.edu.au/data/assets/pdf_file/0005/461768/S194k_Final_05_A4.pdf>.

9 Paragraph (b), section 4(1BF), *Judicial Proceedings Reports Act 1958* (Vic).

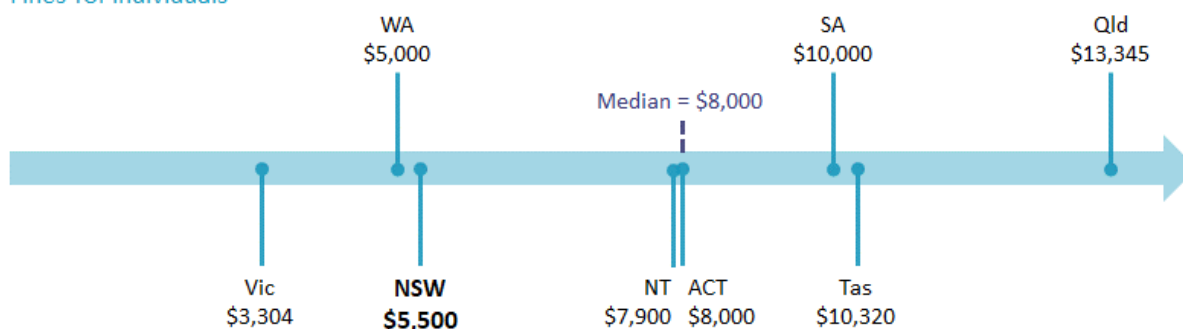
10 Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, p. 43.

11 knowmore, *Preliminary Submission PCI35*, pp. 6–7.

Offence provisions

We note that the current penalty for an offence against section 578A(2) of the Crimes Act is 50 penalty units (\$5,500) and/or six months imprisonment for individuals, and 500 penalty units (\$55,000) for corporations. While the maximum fine for corporations is about average when compared with the fines for comparable offences in other states and territories,¹² the maximum fine for individuals in New South Wales is among the lowest of all jurisdictions, as illustrated below.¹³ It is also significantly lower than the \$110,000 maximum fine (1000 penalty units) for individuals who contravene suppression or non-publication orders,¹⁴ despite both offences involving conduct of a similar nature.

Fines for individuals



We note that maximum penalties are being examined as part of the current review, and we strongly support consideration being given to increasing the penalties for individuals in section 578A(2) of the Crimes Act. Maximum penalties reflect the view of the Parliament and, by extension, the community, about the comparative seriousness of an offence. In our view, it is essential that the penalties adequately reflect the gravity of publishing a complainant's identity without their consent (and where no other exception applies). 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.¹⁵ We suggest that the penalties

12 The maximum fine for corporations in New South Wales is higher than those in Victoria (\$8,261), Western Australia (\$25,000), the Northern Territory (\$39,500) and the ACT (\$40,500), but lower than those in Tasmania (\$68,800), South Australia (\$120,000) and Queensland (\$133,450). The median fine for all jurisdictions outside of New South Wales is \$40,500.

13 Section 74(1), *Evidence (Miscellaneous Provisions) Act 1991* (ACT) and section 133(2), *Legislation Act 2001* (ACT); section 6(1), *Sexual Offences (Evidence and Procedure) Act 1983* (NT) and regulation 2, *Penalty Units Regulations 2010* (NT); section 10(1), *Criminal Law (Sexual Offences) Act 1978* (Qld) and regulation 3, *Penalties and Sentences Regulation 2015* (Qld); section 71A(4), *Evidence Act 1929* (SA); section 194K(1), *Evidence Act 2001* (Tas) and section 4A, *Penalty Units and Other Penalties Act 1987* (Tas); section 4(2), *Judicial Proceedings Reports Act 1958* (Vic) and section 5(3), *Monetary Units Act 2004* (Vic); section 36C(2), *Evidence Act 1906* (WA).

14 Section 16(1), *Court Suppression and Non-publication Orders Act 2010* (NSW).

15 Tasmania Law Reform Institute, *Protecting the Anonymity of Victims of Sexual Crimes*, p. 46.

for comparable offences in other jurisdictions should serve as a useful guide in determining appropriate penalties in New South Wales.

Prohibitions on disclosing and publishing sensitive evidence

Question 3.3:

What further information, if any, should be protected by automatic statutory prohibitions on publication or disclosure?

We note the suggestion flagged in the Consultation Paper that there should be an automatic prohibition on disclosing and publishing “sensitive evidence” in sexual offence proceedings.¹⁶

On this issue, we agree with the recent findings and recommendations of the Victorian Law Reform Commission (VLRC).¹⁷ We particularly note the VLRC’s conclusions that:

- It would be difficult to practically define the scope of such a prohibition, including in terms of the types of sensitive evidence that would be automatically suppressed.
- A prohibition of this kind is “contrary to the trend of law reform, which recognises the value of raising awareness about the nature and prevalence of sexual offending..., and in countering the stigma attached to victims”.
- Suppressing sensitive information about sexual offences as a matter of course “risks reinforcing harmful myths that certain types of offending are shameful for victims and should not be openly discussed”.¹⁸

As the Consultation Paper notes, the VLRC ultimately concluded that the best model for addressing concerns about victims’ privacy in these circumstances was to ensure that they were appropriately supported to apply for suppression orders at an early stage. The VLRC recommended that this model would involve:

- A legislative requirement for the court to inquire into the victim’s position on suppression orders at the first mention of a matter.¹⁹

16 Rape and Domestic Violence Services Australia cited in paragraph 3.51.

17 Victorian Law Reform Commission, *Contempt of Court*, VLRC, Melbourne, February 2020, pp. 196–200, <lawreform.vic.gov.au/sites/default/files/VLRC_Contempt_of_Court_report_forWeb.pdf>.

18 Victorian Law Reform Commission, *Contempt of Court*, paragraphs 12.147–12.149.

19 Victorian Law Reform Commission, *Contempt of Court*, Recommendation 106, p. 200.

- Police providing victims with a) initial information about the automatic prohibitions on publication and b) referrals to appropriate services to help victims with suppression orders and media engagements.²⁰
- A funded service to provide legal advice and assistance to victims during criminal proceedings, modelled on the Sexual Assault Communications Privilege Service at Legal Aid NSW.²¹

We support a similar approach being considered in New South Wales.

Discretionary court orders

Question 4.3:

What provision, if any, should be made about making an order where a person consents to the publication of information that would reveal their identity?

Question 4.9:

- (1) Are the grounds for making suppression and non-publication orders under the *Court Suppression and Non-publication Orders Act 2010* (NSW) and other NSW statutes appropriate? Why or why not?
- (2) What changes, if any, should be made to them?

Consistent with the preceding discussion and the comments we made in our preliminary submission,²² we support courts having the discretion, as per sections 7 and 8 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) (the CSNPO Act), to make suppression and non-publication orders to protect complainants in sexual offence proceedings from undue distress or embarrassment. To ensure that proper regard is had to complainants' wishes in the making of such orders, we support suggestions from other stakeholders, as noted in the Consultation Paper, that the CSNPO Act be amended to:

- Expressly require a court to consult the complainant and consider their wishes when making (or reviewing) an order relating to the disclosure or publication of their information²³
- Prevent a court from making an order/require a court to revoke an order if the complainant gives informed consent for their information to be disclosed or

20 Victorian Law Reform Commission, *Contempt of Court*, Recommendation 107, p. 200.

21 Victorian Law Reform Commission, *Contempt of Court*, Recommendation 108, p. 200. See also *The Role of Victims of Crime in the Criminal Trial Process*, VLRC, Melbourne, August 2016, Recommendation 23, p. 126, <www.lawreform.vic.gov.au/sites/default/files/VLRC_Victims%20Of%20Crime-Report-W_0.pdf>.

22 knowmore, *Preliminary Submission PCI35*, p. 3.

23 Public Defenders cited in paragraph 4.84.

published (provided that this would not adversely impact another victim who had not consented).²⁴

We note that such an approach would be more consistent with that taken in relation to section 578A of the Crimes Act.

Other privacy protections for victims and witnesses in sexual offence proceedings

Closing courts during sexual offence proceedings

Question 9.2:

- (1) Are the situations in which courts may be closed during sexual offence proceedings appropriate? Why or why not?
- (2) What changes, if any, should be made?

knowmore strongly supports the existing provisions in New South Wales that seek to protect complainants in sexual offence matters by closing the court during certain parts of proceedings. We specifically support:

- The requirement for courts to be closed while a complainant gives evidence (including if they give evidence via CCTV) or reads their victim impact statement, unless the court directs otherwise.²⁵
- Courts having the discretion to close other parts of sexual offence proceedings, having regard to, among other things, the complainant's need to have any person excluded from or present in the proceedings.²⁶
- Complainants having the option to give evidence or read their victim impact statement in open court if they choose.²⁷

As the Consultation Paper notes, these provisions are important for:

- Protecting the complainant's privacy
- Protecting the complainant from stress and embarrassment

24 Women's Domestic Violence Court Advocacy Service NSW and No to Violence cited in paragraph 4.17. See also our comments on page 6 of our preliminary submission regarding our support for similar provisions in Victoria's *Open Courts Act 2013*.

25 Section 291, *Criminal Procedure Act 1986* (NSW); section 30I, *Crimes (Sentencing Procedure) Act 1999* (NSW).

26 Section 291A, *Criminal Procedure Act 1986* (NSW).

27 Section 291, *Criminal Procedure Act 1986* (NSW); section 30I, *Crimes (Sentencing Procedure) Act 1999* (NSW).

- Helping the complainant to give their best evidence.

The provisions are also consistent with similar protections in other jurisdictions,²⁸ and we do not consider that any changes should be made.

Other privacy protections

Question 8.2:

- (1) Are the privacy protections for specific types of victims and witnesses in NSW appropriate? Why or why not?
- (2) What changes, if any, should be made?

We note the mention in the Consultation Paper of the Child Sexual Offence Evidence Pilot, a key component of which is the use of pre-recorded evidence for child witnesses. Consistent with the findings and recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission), we submit that all complainants in proceedings for child sexual offences should be given the option of pre-recording the entirety of their evidence.²⁹ The Royal Commission further recommended that pre-recording be made available to a) other witnesses who are vulnerable adults and b) other prosecution witnesses that the prosecution considers necessary, and we also support this. We note that these recommendations were accepted in principle by the NSW Government in 2018.³⁰

Similarly, we note that the Royal Commission recommended a range of other privacy protections for complainants and witnesses in child sexual offence proceedings. These included:

- Giving evidence via CCTV or audiovisual link
- Allowing the witness to be supported when giving evidence, for example, by having a support person present
- Using screens, partitions or one-way glass so that the witness cannot see the accused while giving evidence in the courtroom.³¹

28 For example, section 5, *Criminal Law (Sexual Offences) Act 1978* (Qld); section 21A, *Evidence Act 1939* (NT).

29 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts VII to X and Appendices*, Recommendations 52 to 54, p. 92, <www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_parts_vii_to_x_and_appendices.pdf>.

30 NSW Government, *Response to the Royal Commission into Institutional Responses to Child Sexual Abuse*, June 2018, p. 60, <www.nsw.gov.au/sites/default/files/2020-10/NSW-Government-response-to-the-Royal-Commission-into-Institutional-Responses-to-Child-Sexual-Abuse-June-2018_0.pdf>.

31 Royal Commission, *Criminal Justice Report: Parts VII to X and Appendices*, Recommendation 61, p. 101.

While we note that these measures are already available in New South Wales to complainants and tendency witnesses in sexual offence proceedings³² and to child witnesses and witnesses with a cognitive impairment generally,³³ we support these measures also being made available to other vulnerable witnesses and prosecution witnesses as recommended by the Royal Commission.

Access to court information

While our above comments have been focused on the interests of complainants, the following comments relate to circumstances where we assist clients who have themselves been convicted of criminal offences.

Under the National Redress Scheme, survivors of institutional child sexual abuse who have been sentenced to imprisonment for five years or longer for any offence are not automatically entitled to redress.³⁴ Rather, the Operator of the Scheme must first make a determination that providing redress to the person would not bring the Scheme into disrepute, or adversely affect public confidence in, or support for, the Scheme.³⁵ In making this determination, the Operator must consider matters such as the nature of the offence, the length of the sentence and any rehabilitation of the person.³⁶

To make submissions in support of our clients being entitled to redress in these circumstances, knowmore will typically seek to obtain further information about the circumstances of the client's conviction and sentence through locating and accessing relevant records, including sentencing remarks. Unfortunately, we have often encountered problems accessing sentencing remarks from New South Wales courts. Our experience is that the process is overly difficult, particularly given the different procedures across different courts. It can also be expensive if the sentencing remarks need to be transcribed before they can be provided to us.

Given our experiences, we would strongly support any changes that would make sentencing remarks more readily accessible in these types of circumstances where access is sought by the person sentenced. We suggest that a single consolidated regime for accessing court information, as identified in the Consultation Paper, would be particularly beneficial.

32 Sections 294B, 294C and 294D, *Criminal Procedure Act 1986* (NSW).

33 Part 6, Division 4 and section 306ZK, *Criminal Procedure Act 1986* (NSW).

34 Sections 63(1) and 63(2), *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth).

35 Section 63(5), *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth).

36 Section 63(6), *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth).

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Image inspired by original artwork by Dean Bell depicting knowmore's connection to the towns, cities, missions and settlements within Australia.

knowmore acknowledges the Traditional Owners of the lands across Australia upon which we live and work. We pay our deep respects to Elders past, present and emerging.