

Green Bill to establish a reportable conduct scheme

Submission to the
Ombudsman Western
Australia

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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 Perth, Brisbane, Melbourne and Sydney. 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 December 2020, knowmore has received 40,674 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 7,847 clients. Thirty 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 Western Australia

knowmore has a significant client base in Western Australia — 14 per cent of our current clients reside in the state. We therefore have a strong interest in reforms that will ensure organisations engaged in child-related work in Western Australia are subject to independent oversight.

knowmore's submission

This section outlines knowmore's strong support for the proposed reportable conduct scheme and key provisions in the Green Bill [the Parliamentary Commissioner Amendment (Reportable Conduct) Bill 2020]. It also raises a small number of matters for the Ombudsman's further consideration.

Overall support for a reportable conduct scheme

knowmore strongly supports a reportable conduct scheme being established in Western Australia, consistent with Recommendation 7.9 in the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).¹ As the Royal Commission noted, independent oversight of this kind:

- Increases institutions' competency, transparency and accountability in handling complaints of institutional child sexual abuse and other harmful conduct towards or involving children.
- Ensures more consistency in how complaints are dealt with across different institutions and sectors.
- Ensures the risk of institutional child sexual abuse is adequately addressed, including by ensuring that allegations come to the attention of regulatory authorities and the criminal justice system where appropriate.²

We consider these are important outcomes, given failures by institutions in the past to respond appropriately to allegations of child sexual abuse. Many of our clients have told us that they complained to institutional staff about sexual abuse at the time that it was occurring, but their complaints were never followed up or referred to the appropriate authorities. Many of our clients have expressed the view that those within institutions were more concerned about upholding the institution's reputation than protecting children from abuse. We therefore support the Green Bill as a means of ensuring institutions engaged in child-related work in Western Australia are subject to external scrutiny and that the children under their care and supervision are better protected from abuse and other misconduct.

Support for key provisions

knowmore supports key provisions in the Green Bill that will ensure Western Australia's reportable conduct scheme implements all elements of Recommendations 7.10 to 7.12 from

1 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 7, Improving Institutional Responding and Reporting*, 2017, p. 283, <www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_7_improving_institutional_responding_and_reporting.pdf>.

2 Royal Commission, *Final Report: Volume 7*, p. 247.

the Royal Commission³ and is consistent with existing schemes in New South Wales, Victoria and the ACT.⁴ The Royal Commission emphasised the importance of reportable conduct schemes across Australia being consistent in a number of key ways,⁵ and we are pleased that the Green Bill reflects this.

We particularly support:

- The full range of high risk institutions identified by the Royal Commission in Recommendation 7.12 being included within the scope of the scheme, either upon commencement [as per proposed Schedule 2 in clause 25] or after 12 months [as per the proposed amendments to Schedule 2 in clause 27]. On this point, we note our support for Western Australia's reportable conduct scheme being implemented in a phased approach. We agree with the Royal Commission that such an approach is appropriate and desirable given the administrative and cost implications the scheme will have for the government and institutions.⁶
- Reportable conduct being defined to include:
 - Sexual offences and sexual misconduct committed against, with or in the presence of a child [as per proposed sections 19C and 19F in clause 7], consistent with part c of Recommendation 7.10 and relevant provisions in New South Wales, Victoria and the ACT.⁷
 - Significant neglect of a child and any behaviour that causes significant emotional or psychological harm to a child [as per the proposed amendments to section 19F in clause 26], consistent with relevant provisions in New South Wales, Victoria and the ACT.⁸
 - Conduct that occurred before the commencement of the scheme [as per proposed section 19F in clause 7], consistent with part d of Recommendation 7.10 and similar provisions in New South Wales and the ACT.⁹
 - Conduct that occurs outside the course of an employee's employment [as per

3 Royal Commission, *Final Report: Volume 7*, pp. 283 and 294.

4 Part 4, *Children's Guardian Act 2019* (NSW); Part 5A, *Child Wellbeing and Safety Act 2005* (Vic); Part 2, Division 2.2A, *Ombudsman Act 1989* (ACT).

5 Royal Commission, *Final Report: Volume 7*, p. 282.

6 Royal Commission, *Final Report: Volume 7*, p. 296.

7 Sections 20 to 22, *Children's Guardian Act 2019* (NSW); section 3, *Child Wellbeing and Safety Act 2005* (Vic); section 17E, *Ombudsman Act 1989* (ACT).

8 See note 7.

9 Sections 18 and 19, *Children's Guardian Act 2019* (NSW); section 17D, *Ombudsman Act 1989* (ACT).

proposed section 19E in clause 7], consistent with the approach taken in Victoria and the ACT.¹⁰

- Employees being defined to include paid employees as well as volunteers and contractors who provide services to children [as per proposed section 19C in clause 7], consistent with part e of Recommendation 7.10 and relevant provisions in New South Wales, Victoria and the ACT.¹¹
- People who provide information about reportable conduct to the Ombudsman being comprehensively protected from liability and reprisals [as per proposed section 30AA in clause 21 and the proposed amendments to section 30B in clause 22], consistent with part f of Recommendation 7.10 and protections available in New South Wales.¹²
- The Ombudsman having a range of specific powers and functions under the scheme [as per proposed sections 19K to 19N, 19P and 19W in clause 7 and proposed section 28 in clause 18], consistent with part g of Recommendation 7.10 and the functions of the relevant oversight bodies in New South Wales, Victoria and the ACT.¹³
- The Minister being required to review and report on the operation and effectiveness of the scheme after its fifth anniversary [as per proposed section 19ZE in clause 7], consistent with Recommendation 7.11 and similar review provisions in New South Wales and Victoria.¹⁴

We also support:

- A key principle of the scheme being that the protection and best interests of children are paramount considerations [as per proposed section 19I(2) in clause 7], consistent with similar principles in New South Wales and Victoria.¹⁵ While not a specific recommendation, we note that the Royal Commission expressed its support for

10 Section 3, *Child Wellbeing and Safety Act 2005* (Vic); section 17E, *Ombudsman Act 1989* (ACT). New South Wales's scheme also covers conduct that occurs outside of the course of the employee's employment, but not for employees in public authorities who are not required to hold a working with children check clearance for the purpose of their employment [sections 18 and 19, *Children's Guardian Act 2019* (NSW)].

11 Section 16, *Children's Guardian Act 2019* (NSW); section 3, *Child Wellbeing and Safety Act 2005* (Vic); section 17EAC, *Ombudsman Act 1989* (ACT).

12 Sections 64 and 68, *Children's Guardian Act 2019* (NSW). We also note provisions in Victoria [section 16Y, *Child Wellbeing and Safety Act 2005* (Vic)] and the ACT [section 17O, *Ombudsman Act 1989* (ACT)] that protect people who disclose information in good faith from liability, but these jurisdictions do not go as far as protecting people from reprisals in relation to the reportable conduct scheme.

13 Sections 9, 30, 43, 46, 55, 138 and 139, *Children's Guardian Act 2019* (NSW); sections 16G, 16I, 16J, 16K(3), 16O and 16ZL, *Child Wellbeing and Safety Act 2005* (Vic); section 17F, 17G(3), 17I, 17K and 21, *Ombudsman Act 1989* (ACT).

14 Section 183, *Children's Guardian Act 2019* (NSW); section 16ZN, *Child Wellbeing and Safety Act 2005* (Vic).

15 Section 7, *Children's Guardian Act 2019* (NSW); section 16B(1)(a), *Child Wellbeing and Safety Act 2005* (Vic).

Victoria's paramountcy principle being reflected in other jurisdictions' reportable conduct schemes.¹⁶

- Employees of institutions being able to report matters directly to the Ombudsman [as per proposed section 19Q in clause 7]. This too was a further suggestion of the Royal Commission,¹⁷ which noted the importance of employees being able to report information in circumstances where they do not feel comfortable using their institution's internal processes. It is also consistent with the existing schemes in other jurisdictions.¹⁸

Overall, we consider that the provisions in the Green Bill comprehensively address the relevant findings and recommendations of the Royal Commission and are appropriate to deliver a minimum standard of national consistency.

Matters for further consideration

While we would strongly support the Green Bill being implemented in its current form, we raise the following matters for further consideration.

Additional provisions to strengthen the reportable conduct scheme

In reviewing both the Royal Commission's commentary on reportable conduct schemes and relevant legislation in other jurisdictions, we have identified three areas where we consider Western Australia's proposed scheme could be strengthened, and also further aligned with the schemes in other jurisdictions.

First, we note the scope of the reportable conduct scheme in both New South Wales and the ACT not only includes authorised carers, but also people who reside with authorised carers.¹⁹ This is appropriate, in our view, given the heightened risk of abuse in out-of-home care. It also aligns well with existing practices in Western Australia, such as carers needing to be able to provide a safe living environment for a child,²⁰ as well as key recommendations from the Royal Commission in relation to out-of-home care (for example, Recommendation 12.6 requiring community services checks of adult household members of home-based

16 Royal Commission, *Final Report: Volume 7*, p. 300.

17 Royal Commission, *Final Report: Volume 7*, p. 266.

18 Sections 27 and 28, *Children's Guardian Act 2019* (NSW); section 16L, *Child Wellbeing and Safety Act 2005* (Vic); section 17H, *Ombudsman Act 1989* (ACT).

19 In New South Wales, an adult who is required to hold a working with children check clearance because they reside on the same property as an authorised carer for three weeks or more is included as a relevant entity [sections 12 and 13, *Children's Guardian Act 2019* (NSW)]. In the ACT, the definition of employee, for a designated entity that authorises an out-of-home carer to exercise daily or long-term care responsibility for a child, includes an adult who stays for at least 21 days at premises provided by the authorised carer for the child to live [section 17EAC(1)(b), *Ombudsman Act 1989* (ACT)].

20 Regulation 4(1)(a)(ii), *Children and Community Services Regulations 2006* (WA).

carers,²¹ and Recommendation 8.19 requiring carers registers to include information about household members of home-based carers).²²

Second, we note Victoria's reportable conduct scheme includes additional legislative protections for people who make notifications of reportable conduct by generally prohibiting the publication of their identifying information.²³ The Royal Commission suggested that other governments give consideration to including such a provision in their schemes,²⁴ and we agree this has merit. During our Royal Commission work, some of our clients who worked at institutions expressed reluctance to disclose institutional child sexual abuse because of their fear of dismissal or reprisals in the workplace. We therefore support legislative protections for reporters being as comprehensive as possible, to encourage employees to provide information about reportable conduct and ensure the effective operation of the scheme.

Finally, we note the Royal Commission identified the non-binding nature of the New South Wales Ombudsman's recommendations under that state's reportable conduct scheme as a potential problem.²⁵ Although the Royal Commission heard that the New South Wales Ombudsman was "rarely faced with protracted agency inaction or non-compliance" as a result of the strong relationships it had developed with relevant institutions,²⁶ the Royal Commission remained of the view that:

*The non-binding nature of an oversight body's recommendations may present a potential impediment to the effective functioning of a reportable conduct scheme. Non-binding recommendations may limit the capacity of an oversight body to ensure change within institutions that are reluctant or unwilling to change and where child sexual abuse is being actively covered up. Further, the oversight body's amicable relationship with an institution does not guarantee that its recommendations are always implemented by the institution, or, if implemented, that it is done in the intended way.*²⁷

The Royal Commission therefore suggested that governments consider "whether the recommendations of oversight bodies should be binding for agencies in exceptional circumstances — for example, where it is in the public interest".²⁸ While we acknowledge that none of the jurisdictions with reportable conduct schemes has yet taken such an

21 Royal Commission, *Final Report: Volume 12, Contemporary Out-of-Home Care*, 2017, p. 269, <www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_12_contemporary_out-of-home_care.pdf>.

22 Royal Commission, *Final Report: Volume 8, Recordkeeping and Information Sharing*, 2017, p. 343, <www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_8_recordkeeping_and_information_sharing.pdf>.

23 Section 16ZE, *Child Wellbeing and Safety Act 2005* (Vic).

24 Royal Commission, *Final Report: Volume 7*, p. 271.

25 Royal Commission, *Final Report: Volume 7*, p. 261.

26 Royal Commission, *Final Report: Volume 7*, p. 272.

27 Royal Commission, *Final Report: Volume 7*, p. 273.

28 Royal Commission, *Final Report: Volume 7*, p. 273.

approach, we agree that it may be useful to give further consideration to the potential benefits of this, if not now, in future reviews of the scheme's operation and effectiveness.

Choice of oversight body

We understand that the Green Bill forms part of the Western Australian Government's response to recommendations made by the Joint Standing Committee on the Commissioner for Children and Young People (the Joint Standing Committee),²⁹ and has been developed following consultation with key stakeholders.³⁰ We therefore recognise that the decision to have Western Australia's reportable conduct scheme operated by the Ombudsman has been a considered one, and we do not expect it to change now. We nevertheless make the following comments about the choice of oversight body given its importance to the effective operation of the scheme and the differing approaches taken in other states to date.

The Royal Commission was of the view that the oversight body for a jurisdiction's reportable conduct scheme should also be responsible for monitoring and enforcing institutions' compliance with its recommended Child Safe Standards (now reflected in the National Principles for Child Safe Organisations). It stated that this would ensure child-related institutions "are given consistent advice and guidance on complaint handling policies and procedures", regardless of whether they are within the scope of the reportable conduct scheme.³¹ We note that the current approach in Victoria and the proposed approach in New South Wales are both consistent with this view.³² In contrast, the preferred approach in Western Australia would see the Ombudsman providing oversight of the reportable conduct scheme, and the Commissioner for Children and Young People providing oversight in relation to the Child Safe Standards.³³

In relation to oversight of the reportable conduct scheme, we acknowledge the findings of the Joint Standing Committee that:

29 Joint Standing Committee on the Commissioner for Children and Young People, *From Words to Action: Fulfilling the Obligation to be Child Safe*, Parliament of Western Australia, Perth, August 2020, <[www.parliament.wa.gov.au/Parliament/commit.nsf/\(ReportsAndEvidence\)/81BA06A67EF9CB26482585C1001300A5?opendocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(ReportsAndEvidence)/81BA06A67EF9CB26482585C1001300A5?opendocument)>.

30 Western Australian Legislative Assembly (Hon. SF McGurk), *Parliamentary Debates (Hansard)* — *Fortieth Parliament First Session 2020*, 'Joint Standing Committee on the Commissioner for Children and Young People', 12 November 2020, p. 7898, <[www.parliament.wa.gov.au/Hansard/hansard.nsf/0/F464D17B9D59E06148258623002DB43B/\\$File/A40%20S1%2020201112%20All.pdf](http://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/F464D17B9D59E06148258623002DB43B/$File/A40%20S1%2020201112%20All.pdf)>.

31 Royal Commission, *Final Report: Volume 7*, p. 301.

32 Under the Exposure Draft of the Children's Guardian Amendment (Child Safe Scheme) Bill 2020 (NSW), the New South Wales Office of the Children's Guardian would provide independent oversight in relation to the Child Safe Standards, in addition to its current role operating the state's reportable conduct scheme (among other functions; see <www.nsw.gov.au/sites/default/files/2020-12/child-safe-scheme-bill-consultation-draft.pdf>).

33 Joint Standing Committee on the Commissioner for Children and Young People, *From Words to Action*.

- “the Ombudsman’s office already has the specialist skills for investigating and resolving complaints” and
- “the expertise of the Ombudsman’s office aligns well with the investigatory nature of the reportable conduct scheme”.³⁴

We agree. We further consider that it is important for the oversight body to also have specialist expertise in relation to child abuse, particularly child sexual abuse. As the Victorian Commissioner for Children and Young People has explained:

*Allegations of sexual abuse are very challenging to investigate given their nature and the heightened sensitivity for all those involved. There is a need for specialist expertise in understanding not only child development and the nature of sexual abuse, both the behaviour of offenders and the impacts on the victim, but also forensic investigation techniques. The handling of allegations... therefore requires a range of skills and careful assurance that the voice of the child is privileged over the interests of the organisation and its staff...*³⁵

Of course, there is no reason the Ombudsman cannot develop this additional expertise, and ultimately we are of the view that there are factors supporting both options when it comes to choosing between the Ombudsman and the Commissioner for Children and Young People as the oversight body for Western Australia’s reportable conduct scheme.

We do note, however, that oversight of New South Wales’s reportable conduct scheme has been the responsibility of both the Ombudsman and the Office of the Children’s Guardian at different times.³⁶ This is a unique situation among those jurisdictions with existing schemes.³⁷ The Children’s Guardian has now had responsibility for the reportable conduct scheme for over 10 months. We therefore raise for consideration whether there are any initial learnings from the New South Wales experience — some of which may not have been available to the Joint Standing Committee at the time of its *From Words to Action* report — that may further affirm the Ombudsman as the most appropriate choice of oversight body or otherwise inform Western Australia’s approach.

34 Joint Standing Committee on the Commissioner for Children and Young People, *From Words to Action*, pp. 83 and 112.

35 Commission for Children and Young People, *Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse — Issues Paper 4: Preventing Sexual Abuse of Children in Out of Home Care*, CCYP, Melbourne, November 2013, p. 24, www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Issues%20Paper%204%20-%20Submission%20-%2054%20Victorian%20Commissioner%20for%20Children%20and%20Young%20People.pdf.

36 The reportable conduct scheme was operated by the Ombudsman from the scheme’s commencement in May 1999 to February 2020. It has been operated by the Office of the Children’s Guardian since 1 March 2020.

37 In Victoria, the Commission for Children and Young People has provided oversight of the reportable conduct scheme since the scheme commenced in July 2017. In the ACT, the ACT Ombudsman has provided oversight of the reportable conduct scheme since the scheme commenced in July 2017.

Conclusion

knowmore strongly supports the Green Bill to establish a reportable conduct scheme in Western Australia. The proposed provisions comprehensively address the relevant findings and recommendations of the Royal Commission and will ensure Western Australia's scheme is highly consistent with existing schemes in other jurisdictions. Most importantly, the Green Bill will ensure institutions engaged in child-related work in Western Australia are subject to external scrutiny and that the children under their care and supervision are better protected from abuse and other misconduct.

The quality of the Green Bill undoubtedly reflects the significant amount of work undertaken in developing it. We expect, therefore, that the Ombudsman has already considered the matters we have raised in relation to additional provisions to strengthen the reportable conduct scheme and the choice of oversight body. We have nevertheless included some comments on these matters in the event they can help to inform further development of the scheme.

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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.