knowmore
free legal help for survivors

Justice Miscellaneous (Royal Commission Amendments) Bill 2022 — Consultation Draft

Submission to the Department of Justice

7 October 2022

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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 (NRS). knowmore also receives funding to deliver financial counselling services to people participating in the NRS, and to work with other services in the NRS support network to support and build their capability. From 1 January 2022, our services were expanded to assist survivors who experienced child sexual abuse in non-institutional settings. From 1 March 2022, we have also been funded to provide legal and financial counselling support to people engaging with the Territories Stolen Generations Redress Scheme (Territories 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, Perth, Adelaide and Darwin. 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 is funded by the Commonwealth Government, represented by the Departments of Attorney-General and Social Services and the National Indigenous Australians Agency.

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 August 2022, knowmore has received 72,554 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 12,469 clients. Just over a third (34%) of knowmore's clients identify as Aboriginal and/or Torres Strait Islander peoples. About a fifth (19%) 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 notable client base in Tasmania — 4 per cent of our current clients reside in the state. We therefore have a strong interest in reforms to the Tasmanian criminal justice system that will better protect children from sexual abuse and provide enhanced access to justice for victims and survivors.

knowmore's submission

knowmore strongly supports the primary focus of the draft Justice Miscellaneous (Royal Commission Amendments) Bill 2022 (the draft Bill) in proposing legislative amendments to implement a number of recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) in its 2017 Criminal Justice Report. Five years of work by the Royal Commission produced a significant body of evidence demonstrating the need for these reforms, and knowmore is committed to supporting the implementation of the Royal Commission's recommendations. The work of the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (the Commission of Inquiry) has served to highlight that the need for these reforms remains ongoing.

We note that a number of amendments proposed in the draft Bill will also help to increase legislative consistency between Tasmania and other states and territories in some important areas. We strongly support this, given that increased consistency is essential to ensuring that children in Tasmania are afforded the same level of protection as children elsewhere in Australia, and that victims and survivors of child sexual abuse in Tasmania are no less able to have satisfactory experiences with the criminal justice system because of where they live.

Our comments on a number of specific provisions in the draft Bill are set out below. We note that we have provided more limited comments than we otherwise might have provided, given the absence of explanatory materials to the draft Bill.

Introducing a new crime of 'failing to protect' a child from a substantial risk of sexual abuse

knowmore strongly supports the provisions in proposed section 125E of the *Criminal Code Act 1924*, as per clause 7(a), which will make it an offence for a person who occupies a position within or in relation to a relevant organisation to fail to reduce or remove a substantial risk of institutional child sexual abuse if they have the power or responsibility to do so. This is consistent with Recommendation 36 from the Royal Commission,[1] and will bring Tasmania into line with the majority of other Australian jurisdictions.[2] We particularly support:

1 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III–VI*, 2017, p. 249, <www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_parts_iii_to_vi.pdf>.

2 Section 66A, *Crimes Act 1900* (ACT); section 43B, *Crimes Act 1900* (NSW); section 229BB, *Criminal Code Act 1899* (Qld); section 65, *Criminal Law Consolidation Act 1935* (SA); section 49O, *Crimes Act 1958* (Vic); section 273B.4, *Criminal Code Act 1995* (Cth).

- The reference to a "substantial" risk [as per proposed subsection 1(b)], consistent with the Royal Commission's recommendation and comparable provisions in the ACT, South Australia, Victoria and the Commonwealth.[3]
- The offence applying in relation to risks to all children, including children aged 16 and 17 years old, who are or may come under the care, supervision or authority of the organisation [as per the definition of 'relevant child' in proposed subsection (6)], consistent with the Royal Commission's recommendation and comparable provisions in the ACT, NSW, South Australia and the Commonwealth.[4]
- The explicit clarification that it is not necessary in a prosecution for the failure to protect offence to prove that a sexual offence has been committed [as per proposed subsection (2)], consistent with comparable provisions in the ACT, NSW, South Australia and Victoria.[5]
- The offence explicitly capturing circumstances occurring outside Tasmania, provided that the child was in Tasmania at any time while the risk existed or that the sexual offence was at risk of occurring in Tasmania [as per proposed subsections (3) and (4)], consistent with comparable provisions in the ACT and Victoria (noting that the Victorian offence formed the basis of the Royal Commission's recommendation).[6]

Overall, we believe that the failure to protect offence will encourage organisations to implement effective systems for preventing and responding to institutional child sexual abuse. It will also place increased responsibility on staff with leadership roles to foster effective organisational cultures in this area. These are clearly important outcomes, particularly in light of the findings of the Royal Commission[7] and evidence heard by the Commission of Inquiry about systemic failures to protect children across government institutions.[8]

To ensure these outcomes are achieved in practice, it will be essential for the government to engage with institutions to deliver information and education about the new offence. All

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3 Section 66A(1)(b), *Crimes Act 1900* (ACT); section 65(1)(a), *Criminal Law Consolidation Act 1935* (SA); section 49O(1)(b), *Crimes Act 1958* (Vic); section 273B.4(1)(c), *Criminal Code Act 1995* (Cth).

4 Sections 66A(1)(b)(ii) and 66A(5), definition of a young person, *Crimes Act 1900* (ACT); sections 43B(1)(c) and 43B(3), definition of a child, *Crimes Act 1900* (NSW); sections 65(1)(a)(ii) and 65(3), *Criminal Law Consolidation Act 1935* (SA); section 273B.4(1)(b), *Criminal Code Act 1995* (Cth).

5 Section 66A(2)(c), *Crimes Act 1900* (ACT); section 43B(2), *Crimes Act 1900* (NSW); section 65(2), *Criminal Law Consolidation Act 1935* (SA); section 49O(4), *Crimes Act 1958* (Vic).

6 Section 66A(2)(a), *Crimes Act 1900* (ACT); sections 49O(5) and (6), *Crimes Act 1958* (Vic).

7 See, for example, Royal Commission, *Criminal Justice Report: Parts III–VI*, sections 15.1 and 15.2, pp. 133–148.

8 For overviews, see, for example, A Holmes, 'Commission of Inquiry: Tasmanian children put back in abusive homes due to referral service failures, worker claims', *The Examiner*, 9 May 2022, <www.examiner.com.au/story/7730165/tasmanian-children-put-back-in-abusive-homes-due-to-failures/>; L Lohberger, 'Tasmania's commission of inquiry exposes systemic failings that allowed child sex abuse to happen', *ABC News*, 16 May 2022, <www.abc.net.au/news/2022-05-16/tasmania-inquiry-exposes-failings-allowing-child-sex-abuse/101066358>.

staff within all relevant organisations need to understand how the offence applies to them, and what they can do to protect children from sexual abuse. We suggest that the government consider the experiences of other states and territories in developing effective strategies to ensure awareness and understanding of the offence within institutions, and to improve how people within institutions respond to risks of child sexual abuse. We note, for example, the fact sheet produced by the Victorian Government to accompany the introduction of the failure to protect offence in Victoria.[9]

Removing remaining limitation periods that apply to child sexual abuse offences

knowmore supports the intent of the proposed amendments to section 79 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995*, as per clause 4, which will ensure that proceedings for offences against section 72A (Offence to make or reproduce child exploitation material) and section 73 (Offence to procure child to be involved in making child exploitation material) can be commenced at any time. This is consistent with Recommendation 30 from the Royal Commission,[10] and appropriately recognises that child sexual abuse offences arising in the production of child exploitation material should be treated in the same manner as other child sexual abuse offences.

We specifically note our support for the retrospective application of these amendments, as per the transitional provisions in proposed section 88E (clause 5). This is consistent with the Royal Commission's commentary in relation to Recommendation 30:

> *There are two aspects to the effective repeal of limitation periods:*
>
> - *First, the limitation period itself must be repealed so that there is no longer any limitation period within which a prosecution for the offence must be brought.*
> - *Secondly, any immunity which has already arisen for a perpetrator as a result of the operation of the limitation period up until the time it was repealed must be abolished. This effectively allows the repeal of the limitation period to operate retrospectively. Otherwise, merely removing the limitation period will not 'revive' the opportunity to prosecute for offences where the limitation period had already expired. This second step must be taken to enable those previously protected by a limitation period to be prosecuted.*[11]

Despite our above comments, we suggest that it would be timely for the Tasmanian Government to consider more substantial reforms in relation to the state's child

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9 Victorian Government, *Betrayal of Trust: Fact Sheet — Failure to Protect: A New Criminal Offence to Protect Children from Sexual Abuse*, Victorian Government, Melbourne, 2017, <files.justice.vic.gov.au/2021-06/failure_to_protect_betrayal_of_trust_factsheet_2017.pdf>.

10 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 129.

11 Royal Commission, *Criminal Justice Report: Parts III–VI*, pp. 121–122.

exploitation material offences. Specifically, we note that the offences in sections 72A, 73, 73A and 74A of the Classification (Publications, Films and Computer Games) Enforcement Act are similar to those in sections 130A, 130, 130B and 130C of the Criminal Code, but carry a substantially lower maximum penalty. In our view, including all child exploitation material offences in the Criminal Code would more appropriately reflect the gravity of these offences and the significant harm they cause to children.

Facilitating greater admissibility of tendency and coincidence evidence in child sexual abuse trials

The Royal Commission found that tendency and coincidence evidence is critically important for securing convictions in many child sexual abuse cases. It highlighted a number of instances where significant injustices had resulted from these types of evidence being excluded from criminal proceedings, preventing juries from getting a true picture of the perpetrator's alleged offending.[12] Clearly, such outcomes are not only deeply disappointing and distressing for victims and survivors, but they can also result in perpetrators continuing to pose a threat to the safety of children. As the Royal Commission concluded, the laws relating to the admissibility of tendency and coincidence evidence have become "unfairly protective of the accused", to the detriment of complainants and the community.[13]

In light of these problems, knowmore strongly supports the amendments to Part 5 of the *Evidence Act 2001*, as per clauses 10 to 14, which will implement the Uniform Evidence Law (Tendency and Coincidence) Model Provisions 2019 (the Model Provisions) in Tasmania.[14] The Model Provisions were developed in response to Recommendations 44 to 51 from the Royal Commission to facilitate the increased admissibility of tendency and coincidence evidence in proceedings for child sexual offences,[15] and we have previously noted our strong support for reforms of this nature.[16] We note that all Uniform Evidence Law jurisdictions agreed to implement the Model Provisions at the Council of Attorneys-General

12 Royal Commission, *Criminal Justice Report: Parts III–VI*, Chapters 27 and 28.

13 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 591.

14 Available at <pcc.gov.au/uniform/2019/29%20November%202019%20amendments.pdf>.

15 See Council of Attorneys-General Working Group, 'Proposal paper: Proposed reform to facilitate greater admissibility of tendency and coincidence evidence in criminal proceedings', 2019.

16 See, for example, knowmore, *Submission on Improving the Response of the Justice System to Sexual Offences*, 23 December 2020, <knowmore.org.au/wp-content/uploads/2021/04/submission-improving-the-response-of-the-justice-system-to-sexual-offenc....pdf>.

meeting on 29 November 2019,[17] and we are pleased to see Tasmania joining New South Wales, the ACT and the Northern Territory in introducing these important reforms.[18]

Enabling parties to bring interlocutory appeals in child sexual abuse offence matters

knowmore generally supports the provisions in proposed Chapter XLVIA of the *Criminal Code Act 1924*, as per clause 7(d), to the extent that they will enable parties in child sexual offence proceedings (and criminal proceedings generally) to appeal to the Court of Criminal Appeal against interlocutory decisions, if given leave to appeal by the Court. This responds to Recommendation 79 from the Royal Commission,[19] which concluded that:

> *Given the significant role that interlocutory appeals have in correcting errors of law before trial, it is important that the DPP [Director of Public Prosecutions] in each jurisdiction has adequate rights of interlocutory appeal to reduce the possibility of error in the trial.*[20]

We note that the proposed provisions are largely consistent with those in Victoria,[21] which the Royal Commission found were working well.[22]

We further note, however, that the proposed provisions, like those in Victoria, do include a requirement for leave. Despite its overall view of the Victorian provisions, the Royal Commission ultimately recommended that the Director of Public Prosecutions (DPP) should have an expanded right to bring interlocutory appeals that was not subject to a requirement for leave (part b of Recommendation 79).

In the interests of ensuring Tasmania's provisions fully implement the Royal Commission's recommendation, knowmore would like to see the proposed provisions amended to enable the DPP to bring interlocutory appeals without having to obtain leave from the Court. We suggest that an appropriate model for this is provided by the relevant provisions in New

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17 Council of Attorneys-General, *Communiqué*, 29 November 2019, <www.ag.gov.au/sites/default/files/2020-03/Council-of-Attorneys-General-communique-November-2019.pdf>.

18 See *Evidence Amendment (Tendency and Coincidence) Act 2020* (NSW); *Royal Commission Criminal Justice Legislation Amendment Act 2020* (ACT); *Evidence (National Uniform Legislation) Amendment Act 2021* (NT).

19 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, 2017, p. 342, <www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_parts_vii_to_x_and_appendices.pdf>.

20 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 341.

21 Part 6.3, Division 4, *Criminal Procedure Act 2009* (Vic).

22 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 341.

South Wales,[23] which the Royal Commission concluded were also working well,[24] and which the Tasmanian DPP expressed his support for in his submission to the Royal Commission.[25]

Finally, we note the potential for increased rights of appeal to prolong court proceedings. We know that the length of time taken for matters to be resolved and the experience of delays is a significant source of stress and trauma for victims and survivors of child sexual abuse in the criminal justice system.[26] It is essential, therefore, that the Tasmanian Government also implements Recommendation 80 from the Royal Commission and ensure that there are sufficient resources in place to support these legislative amendments and ensure the timely resolution of interlocutory appeals.[27]

Extending the classes of vulnerable witnesses eligible to have their police interviews used as their evidence in chief

knowmore supports proposed section 5A of the *Evidence (Children and Special Witnesses) Act 2001*, as per clause 16, which will enable child witnesses (other than defendants), alleged victims of sexual and family violence offences and special witnesses[28] to have an audiovisual recording of their interview with a police officer or other investigating official to be used as their evidence in chief. This is consistent with Recommendations 52 (part a) and 53 from the Royal Commission,[29] and is an important measure for helping victims and survivors to avoid the trauma of repeatedly recounting their abuse, and giving evidence in court.

In giving practical effect to these provisions, we suggest that consideration also be given to Recommendation 55 insofar as it relates to "[improving] the equipment used and staff training in… replaying prerecorded… evidence".[30]

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23 Section 5F(2), *Criminal Appeal Act 1912* (NSW).

24 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 341.

25 Director of Public Prosecutions Tasmania, *Response to Consultation Paper into Criminal Justice*, 11 October 2016, p. 14, <www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Consultation%20Paper%20-%20Criminal%20Justice%20-%20Submission%20-%2069%20Tasmanian%20DPP.pdf>.

26 See, for example, our comments in knowmore, *Submission on Victoria's Committal System*, 15 August 2019, p. 4, <knowmore.org.au/wp-content/uploads/2020/11/submission-review-of-the-committal-system-vic.pdf>.

27 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 342.

28 As per section 8, *Evidence (Children and Special Witnesses) Act 2001* (Tas).

29 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 92.

30 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 92.

Other amendments — witness intermediaries

knowmore notes the proposed amendment to section 7I of the *Evidence (Children and Special Witnesses) Act 2001*, as per clause 18(a), that will remove the existing provision in subsection 3(b), which obliges a judge to not make an order for an assessment report to be prepared by a witness intermediary if the judge is satisfied that the witness does not wish the order to be made. This existing provision reflects feedback knowmore previously provided on the consultation draft of the Evidence (Children and Special Witnesses) Amendment Bill 2020, where we:

- Noted that comparable provisions in other jurisdictions specifically enable eligible witnesses to give evidence without a witness intermediary if they prefer and are able to do so.
- Recommended that similar provisions be inserted into section 7I to empower complainants and ensure that they retain the right to choose how they give evidence in court where appropriate.[31]

In the absence of explanatory materials to the draft Bill, we assume that this proposed amendment reflects early experiences under the Witness Intermediary Scheme pilot. While we acknowledge that we do not have insights into the practical operation of the scheme or this provision since the pilot commenced on 1 March 2021, we reiterate the importance of victims and survivors having choice and control throughout their interactions with the criminal justice system, including in relation to how they give evidence in court. We remain of the view that eligible witnesses should be able to give evidence without a witness intermediary if they prefer and are able to do so, and do not support the removal of section 7I(3)(b). If there are practical problems with the operation of this provision, we would urge the Department of Justice to explore other solutions that do not ultimately disempower victims and survivors.

31 knowmore, *Submission on Tasmania's Evidence (Children and Special Witnesses) Amendment Bill 2020*, 16 April 2020, p. 3, <knowmore.org.au/wp-content/uploads/2020/11/submission-evidence-children-and-special-witnesses-amendment-bill-2020-consultation-draft-tas.pdf>.

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

knowmore acknowledges the Traditional Owners of the lands and waters across Australia upon which we live and work. We pay our deep respects to Elders past and present for their ongoing leadership and advocacy.

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