knowmore
free legal help for survivors

Criminal Justice Legislation Amendment (Sexual Offences) Bill 2023 — Exposure Draft

Submission to the Department of the Attorney-General and Justice

14 February 2023

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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 aim 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 January 2023, knowmore has received 83,188 calls to its 1800 telephone line and has completed intake processes for, and has assisted or is currently assisting, 13,877 clients. Over a third (35%) of knowmore's clients identify as Aboriginal and/or Torres Strait Islander peoples. Just under a fifth (18%) 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 the Northern Territory

knowmore has a notable client base in the Northern Territory, with 2 per cent of our clients residing there. We therefore have a strong interest in sexual offence reforms in the Northern Territory, particularly those that respond to the findings and recommendations of the Royal Commission.

knowmore's submission

knowmore is pleased to see the Department of the Attorney-General and Justice working to reform sexual offences in the Northern Territory Criminal Code and we welcome the Exposure Draft of the Criminal Justice Legislation Amendment (Sexual Offences) Bill 2023 (the Exposure Draft Bill).

As a community legal centre supporting victims and survivors of child sexual abuse, we are particularly pleased to see that sexual offences against children will no longer be contained under the heading 'Offences against morality'. Using 'morality' to describe any sexual offence, especially sexual offences against children, does not reflect current community standards and is not appropriate in a modern criminal justice system. We strongly support the amendments in the Exposure Draft Bill that will include these offences in the new Part VIA — Sexual offences.

We also welcome amendments in the Exposure Draft Bill that will address several 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. We note that many of these amendments will also help to increase legislative consistency between the Northern Territory and other states and territories. We strongly support this, given that increased consistency is essential to ensuring that children in the Northern Territory are afforded the same level of protection as children elsewhere in Australia.

Although we strongly support these reforms overall, there are aspects of the draft provisions where we submit that amendments should be considered to better achieve the outcomes sought by the Royal Commission. Our specific comments on these provisions are detailed below.

New and amended offences in the Criminal Code

Repeated sexual abuse of a child

knowmore supports the amendments in Clause 13 that will insert new section 208JI (Repeated sexual abuse of child) into the Criminal Code, as a replacement for the offence currently in section 131A. We particularly support:

- The name of the offence being changed from 'Sexual relationship with child' to 'Repeated sexual abuse of child'. As victims and survivors have noted, the current name normalises the sexual abuse of children and wrongly suggests that the child

was 'a willing participant in an equal relationship'.[1] The new name, in contrast, appropriately reflects the gravity and nature of the offence. It is also more consistent with the names of comparable offences in other jurisdictions, which generally refer to 'persistent sexual abuse'.[2]

- The relevant number of occasions of sexual abuse being reduced from 3 or more to more than 1. This is consistent with the Royal Commission's recommendations (see Recommendation 21, part b)[3] and brings the Northern Territory's offence into line with the comparable offences in most other jurisdictions.[4]
- The provisions in subsection (4) that explicitly clarify, among other things, that all members of the jury are not required be satisfied about the same sexual acts [paragraph (d)]. This is consistent with the Royal Commission's recommendations (see Recommendation 21, part c)[5] and brings the Northern Territory's offence into line with the comparable offences in most other jurisdictions.[6]
- The increase in the maximum penalty to life imprisonment. This appropriately reflects that the offence describes the most serious type of repeated sexual offending against children. It is also consistent with the maximum penalty in New South Wales, Queensland and South Australia.[7]

We do note, however, that the proposed provisions are not entirely consistent with Recommendations 21 and 22 from the Royal Commission. In particular:

- The offence does not capture repeated sexual abuse of a child aged 16 or 17 years by a person in a position of authority in relation to the child. This is contrary to the Royal Commission's Model Provisions, which defined a child to include a person

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1 See, for example, E Bevin, 'Overhaul of sex abuse laws needed to remedy community confusion, advocates say', *ABC News*, 15 August 2019, <www.abc.net.au/news/2019-08-15/call-for-sexual-assault-laws-overhaul-in-tasmania/11414982>; End Rape on Campus Australia, *Submission to the Tasmanian Government — Renaming Sexual Offences: Removing Outdated Language in Chapter XIV of the Criminal Code Act 1924*, 7 February 2020, <www.justice.tas.gov.au/__data/assets/pdf_file/0003/561162/Submission-EROC-Renaming-sexual-offences.PDF>.

2 Section 56, *Crimes Act 1900* (ACT); section 66EA, *Crimes Act 1900* (NSW); section 125A, *Criminal Code Act 1924* (Tas); section 49J, *Crimes Act 1958* (Vic).

3 Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Parts III–VI*, 2017, p. 74, <www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_parts_iii_to_vi.pdf>.

4 Section 56(1)(b), *Crimes Act 1900* (ACT); section 66EA(2), *Crimes Act 1900* (NSW); section 229B(2), *Criminal Code Act 1899* (Qld); section 50(2), *Criminal Law Consolidation Act 1935* (SA).

5 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 74.

6 Section 56(4)(c), *Crimes Act 1900* (ACT); section 66EA(5)(c), *Crimes Act 1900* (NSW); section 229B(4)(c), *Criminal Code Act 1899* (Qld); section 50(4)(c), *Criminal Law Consolidation Act 1935* (SA); section 125A(4)(c), *Criminal Code Act 1924* (Tas); section 321A(11), *Criminal Code Act Compilation Act 1913* (WA).

7 Section 66EA(1), *Crimes Act 1900* (NSW); section 229B(1), *Criminal Code Act 1899* (Qld); section 50(1), *Criminal Law Consolidation Act 1935* (SA).

under the age of 18 years under the 'special care' of the offender[8] (where the definition of 'special care' was similar to the proposed definition of 'position of authority' in new section 208GC;[9] see further comments on this below). We note that the ACT and South Australia have both enacted legislative changes to implement this recommendation of the Royal Commission.[10]

- The offence will not operate with full retrospectivity — as per the new section 473 in Clause 15, a person may be charged with an offence against 208JI in relation to sexual acts that occurred before the commencement of the provisions, but only if there has also been at least one relevant sexual act after the commencement. This is contrary to part d of Recommendation 21[11] and the Royal Commission's Model Provisions, which provided that the offence extended to 'a relationship [repeated sexual abuse] that *existed wholly* or partly *before the commencement of this section*…' [emphasis added].[12] This is also inconsistent with the comparable provisions in the majority of other jurisdictions (namely the ACT, New South Wales, Queensland, South Australia and Tasmania).[13]

We also note that:

- The new offence will be able to be prosecuted against children (with the consent of the Director of Public Prosecutions), whereas the Royal Commission's Model Provisions (and the provisions in most other jurisdictions) are explicit in only applying to adults.[14, 15]
- The actus reus of the offence will remain multiple occasions of sexual offending, contrary to the Royal Commission's recommendations[16] and in contrast to the

8 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, 2017, Appendix H (Persistent Sexual Abuse of Children Model Provisions), p. 551, section 2(1), definition of 'child', <www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_parts_vii_to_x_and_appendices.pdf>.

9 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, Appendix H (Persistent Sexual Abuse of Children Model Provisions), p. 551, section 2(2).

10 See sections 56(1)(b) and (12), *Crimes Act 1900* (ACT) and sections 50(12)–(13), *Criminal Law Consolidation Act 1935* (SA).

11 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 74.

12 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, Appendix H (Persistent Sexual Abuse of Children Model Provisions), p. 552, section 3(7).

13 Section 56(6), *Crimes Act 1900* (ACT); section 66EA(7), *Crimes Act 1900* (NSW); sections 746–747, *Criminal Code Act 1899* (Qld); section 50(6), *Criminal Law Consolidation Act 1935* (SA); section 125A(1), *Criminal Code Act 1924* (Tas).

14 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, Appendix H (Persistent Sexual Abuse of Children Model Provisions), p. 552, section 3(1).

15 Section 56(1), *Crimes Act 1900* (ACT); section 66EA(1), *Crimes Act 1900* (NSW); section 229B(1), *Criminal Code Act 1899* (Qld); section 50(1), *Criminal Law Consolidation Act 1935* (SA).

16 See Recommendation 21, part a and Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, Appendix H (Persistent Sexual Abuse of Children Model Provisions).

amended offence put forward by the Northern Territory Government during stakeholder consultations in 2014.[17, 18]

knowmore recommends that the Exposure Draft Bill be amended to address these issues and ensure the Northern Territory's new offence better implements Recommendations 21 and 22. We consider it particularly important to ensure the offence captures the repeated sexual abuse of children aged 16 or 17 years by people in positions of authority. The power imbalance in such situations means that they are inherently exploitative and can cause significant long-term harm to victims. We also foresee practical difficulties in prosecuting relevant criminal conduct where it will be an offence for a person in a position of authority to commit one sexual act against a child aged 16 or 17 years, as per the offences in new Division 4, without an accompanying offence to do so repeatedly.

Grooming child to engage in sexual activity

knowmore supports the amendment in Clause 13 that will make it an offence for a person to engage in conduct with the intention of making it easier for a person to engage in sexual activity with a child under the age of 16 years (new section 208JH Grooming child to engage in sexual activity), whether that conduct is directed at the child [subsection (1)] or the child's carer [subsection (2)]. This amendment addresses Recommendations 25 and 26 from the Royal Commission,[19] which heard many examples of institutional child sexual abuse offenders grooming children, parents and other adults to facilitate their offending against child victims.[20] The new provisions will also bring the Northern Territory into line with most other jurisdictions, which have already enacted broad grooming offences.[21]

We note that 'carer' is defined broadly in subsection (6) to mean 'a person who, from time to time, has the child under the person's care, supervision or authority'. We support this broad definition, noting that the Royal Commission expressed its particular support for Victoria's provisions,[22] which also capture conduct directed at any person 'under whose

17 Proposed new section 208JD as per clause 9 in the Consultation Draft of the Criminal Code Amendment (Sexual Offences) Bill 2014, available at <justice.nt.gov.au/__data/assets/pdf_file/0014/171230/consultation-draft-criminal-code-amendment-sexual-offences-bill-2014.pdf>.

18 The offence put forward in the 2014 consultations proposed to criminalise persistent sexual conduct involving a child. We note that this more closely aligns with the view of Dallaston and Mathews that persistent sexual abuse of a child is the optimal definition of the actus reus because it achieves the Royal Commission's policy objectives in recommending an acts reus of maintaining an unlawful sexual relationship, while avoiding 'the significant legal and normative shortcomings of "relationship" terminology'. See E Dallaston and B Mathews, 'Reforming Australian criminal laws against persistent child sexual abuse', *Sydney Law Review*, 2022, vol. 44, no. 1, pp. 77–109, <eprints.qut.edu.au/232485/8/77_SLRv44n1Mar2022DallastonMatthews FINAL.pdf>.

19 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 97.

20 See discussion in Royal Commission, *Criminal Justice Report: Parts III–VI*, Chapter 12.

21 Section 66, *Crimes Act 1900* (ACT); section 66EB(3) and 66EC, *Crimes Act 1900* (NSW); section 218B, *Criminal Code Act 1899* (Qld); section 63B(3), *Criminal Law Consolidation Act 1935* (SA); section 125D, *Criminal Code Act 1924* (Tas); section 49M, *Crimes Act 1958* (Vic).

22 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 97

care, supervision or authority the child is'.[23] This specifically includes, for example, teachers, employers, counsellors and health professionals.[24] We suggest it would be useful to include some of these as further examples for the definition of carer in subsection (6), to make clear that 'carers' are also found outside of domestic settings. This would better reflect the nature of grooming in the context of institutional child sexual abuse[25] and would also be consistent with the proposed definition of 'position of authority' in new section 208GC.

Given subsection (2) relates to the grooming of a person other than a child, we also suggest that the new section would be more appropriately named 'Grooming person to engage child in sexual activity' or 'Grooming to engage child in sexual activity.'

Sexual acts committed against young persons by persons in positions of authority

knowmore supports the amendment in Clause 13 that will make it an offence for a person to commit various sexual acts against a child aged 16 or 17 years where they are in a position of authority in relation to the child [new sections 208K to 208KC in new Division 4]. We note that these offences effectively replace and expand upon the existing offence in section 128 (Sexual intercourse or gross indecency involving child over 16 years under special care), and are consistent with the recommendations of the Royal Commission in seeking to protect older children from sexual abuse by people in positions of authority.[26]

For the proposed definition of 'position of authority' in new section 208GC, we note the comments on page 4 of the Explanatory Document that:

> *This provision is proposed to replace the current provision at section 128(3), which provides for when a person is considered to be under the 'special care' of another person.*
>
> *The proposed new provision is broader and includes specific circumstances of authority such as any teacher at a school at which the young person is enrolled as a student, and also a broad catch-all provision where 'the person has authority over the young person because of the circumstances of the person's relationship with the young person, regardless of whether the authority is exercised lawfully'.*

23 Section 49M(1)(b)(ii), *Crimes Act 1958* (Vic).

24 Section 37(1), *Crimes Act 1958* (Vic).

25 People with Disability Australia, for example, has noted that perpetrators in disability services will groom people within the institution to gain access to their victims. Perpetrators in schools have likewise been identified as likely to groom other employees to gain unsupervised access to students. See People with Disability Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse: Submission Regarding Criminal Justice*, 2016, <pwd.org.au/wp-content/uploads/2018/11/PWDA_Criminal-Justice_RC_311016.doc> and Parliament of Victoria Family and Community Development Committee, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations — Volume 2 of 2*, Parliament of Victoria, Melbourne, 2013.

26 Royal Commission, *Criminal Justice Report: Parts III–VI*, Recommendations 27 and 29, p. 120.

This broader definition is to implement [Royal Commission] recommendation 27.

While we agree that some aspects of the new definition are broader than the current definition of special care (in relation to teachers, for example), we are concerned that the definition is in fact narrower with respect to perpetrators of child sexual abuse in institutional settings such as sporting clubs. Specifically, the current definition of special care includes where an offender:

> *has established a personal relationship with the victim in connection with the care, instruction (for example, religious, sporting or musical instruction) or supervision (for example, supervision in the course of employment or training) of the victim…*[27]

While elements of this are captured in paragraphs (c) and (d) of new section 208GC, training and sporting and musical instruction are not specifically addressed. While we note the intention for paragraph (h) to be a 'broad catch-all provision', we consider that the requirement for a person to have 'authority' over the young person is unlikely to capture the same breadth of personal relationships as paragraph (c) in the current definition of special care.

The omission of a specific reference to sporting and musical instruction is a particular concern to us given that 1 in 20 survivors the Royal Commission heard from in private sessions had been sexually abused as children in sporting and recreational clubs.[28] Consistent with this, the Royal Commission gave particular consideration to position of authority offences in these types of contexts and came to the conclusion that:

> *…it is clearly the case that relationships formed through these types of instruction can provide opportunities for the instructor to gain access to children and to abuse them. Our public hearings have examined many circumstances involving religious instruction, and we have also examined circumstances involving sporting and musical instruction.*
>
> *We do not consider that this category of relationships of 'special care' should be narrowed or removed.*[29]

Comparable provisions in other jurisdictions reflect the Royal Commission's position in making specific reference to circumstances where the person provided 'sporting, musical or other instruction' to the child.[30] We recommend that the proposed definition of position of authority in section 208GC be amended to include the same.

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27 Section 128(3)(c), *Criminal Code Act 1983* (NT).

28 Specifically, 408 survivors, or 5.9% of all survivors in private sessions, told the Royal Commission that their sexual abuse occurred in 'recreation, sports and clubs'. See Royal Commission, *Final Report: Volume 5, Private Sessions*, 2017, Table 5.2, p. 62, <www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_5_private_sessions.pdf>.

29 Royal Commission, *Criminal Justice Report: Parts III–VI*, p. 119.

30 Section 55A(2)(d), *Crimes Act 1900* (ACT); section 73(3)(c) and 73A(3)(c), *Crimes Act 1900* (NSW); section 49(9)(c), *Criminal Law Consolidation Act 1935* (SA). See also section 37(1)(e), *Crimes Act 1958* (Vic).

Changes to the *Sentencing Act 1995*

Excluding good character as a mitigating factor in sentencing

knowmore supports the amendment in Clause 19 that will require the court to disregard an offender's 'good character' when sentencing them for a sexual offence against a child if the court is satisfied that the offender's alleged good character was of assistance to them in the commission of the offence [new section 5(3A), *Sentencing Act 1995*]. This amendment is generally consistent with Recommendation 74 from the Royal Commission.[31] In making its recommendation, the Royal Commission highlighted that:

> *In many of the cases of institutional child sexual abuse that we have considered, it is clear that the perpetrator's good character and reputation facilitated the offending. In some cases, it enabled them to continue to offend despite complaints or allegations being made.*[32]

The experience of many knowmore clients reflects this, and we consider it entirely inappropriate in these circumstances for an offender's good character to be considered as a mitigating factor in sentencing. While the Royal Commission found that sentencing courts generally appear to give only slight consideration to good character in child sexual abuse cases,[33] we consider it important for the legislation to specifically exclude its consideration where it facilitated the person's offending. This will also ensure the Northern Territory is in line with other jurisdictions, namely New South Wales, South Australia and Tasmania, which have had similar provisions since 2009, 2014 and 2016 respectively,[34] and the ACT, Victoria and Queensland, which have more recently passed amendments to implement the Royal Commission's recommendation.[35]

We note that the comparable provision in the ACT has been drafted with a view to ensuring it applies in somewhat broader circumstances than the proposed NT provision (and the provisions in the other jurisdictions). Specifically, it refers to circumstances where the offender's good character *enabled* them to commit the offence and includes two examples:

1. *The offender's good character was one reason the offender was selected to supervise children on a camp. The offender began to establish a relationship with children at the camp to obtain their compliance in acts of a sexual nature.*
2. *A child's parents trusted the offender to care for the child because of the offender's authority in their community. The offender held authority in the*

31 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 299.

32 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 299.

33 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 299.

34 Section 21A(5A), *Crimes (Sentencing Procedure) Act 1999* (NSW); section 11(4)(c), *Sentencing Act 2017* (SA); section 11A(2)(b), *Sentencing Act 1997* (Tas).

35 Section 34A(b), *Crimes (Sentencing) Act 2005* (ACT); section 5AA, *Sentencing Act 1991* (Vic); section 9(6A), *Penalties and Sentences Act 1992* (Qld).

> *community in part because of the offender's good character. The offender sexually abused the child including while the child was in the offender's care.*

We suggest the ACT's approach is more consistent with the Royal Commission's recommendation, which refers to circumstances where a person's good character 'facilitated' their offending. It is intended to address concerns raised by the Royal Commission that 'the requirement that the good character in question specifically *aid* the offence [as in the proposed NT provision and the NSW provision] may limit the application of the provision, both in some institutional offending and in offending that is not in an institutional context' [emphasis in original].[36] As noted in the Explanatory Statement to the ACT amending Bill:

> *Case law in NSW has affirmed that 'assistance' is a high threshold…*
>
> *In LB, an unreported decision of the NSW District Court (9 February 2012), a rugby coach who sexually abused a junior player on his team was found to be of good character, and further this good character did not assist him in committing the offences. Although Bennett DCJ held, 'in the broader context that his exposure to the victim was by reason of his role in junior rugby league, which he could only have had because of good character and lack of prior convictions'; however, this was merely 'coincidental with the commission of these offences'. The offender could rely on evidence of good character in mitigation of sentence, including evidence of 'the contribution he has made to the community... to the junior rugby league'.*[37]

Given the experiences of our clients and the findings of the Royal Commission, knowmore agrees with the ACT Government's position that:

> *The artificial separation of good character and commission of sexual offences does not reflect the realities of child sexual abuse, and the fact that it is often committed by trusted persons in positions of authority and who are well-regarded by the community, particularly in institutional contexts.*[38]

knowmore therefore suggests that Clause 19 be amended to reflect the broader scope of the ACT provision (that is, by referring to good character that 'enabled' the offender to commit the offence).

36 Royal Commission, *Criminal Justice Report: Parts VII–X and Appendices*, p. 293. See page 23 of the Explanatory Statement to the Crimes Legislation Amendment Bill (No 2) 2017 (ACT).

37 Explanatory Statement to the Crimes Legislation Amendment Bill (No 2) 2017 (ACT), p. 23.

38 Explanatory Statement to the Crimes Legislation Amendment Bill (No 2) 2017 (ACT), p. 23.

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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.

knowmore Legal Service Limited | ABN 34 639 490 912 | ACN 639 490 912. knowmore is funded by the Commonwealth Government, represented by the Departments of Attorney-General and Social Services and the National Indigenous Australians Agency.

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